REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS, Registrar of the Court.

Vol. 7.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.
1884.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

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

" " SAMUEL HENRY STRONG, J.

" " TÉLÉSPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZÉAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable SIR ALEXANDER CAMPBELL, K.C.M.G., Q.C.

ERRATA.

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

Page 147—in line 17 from top, instead of "were" read "was."

" 436—in line 11 from top, instead of "now" read "mere."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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J. M. COTÉ *et al*.....APPELLANTS; 1881

AND *Feb'y.24,25.
*June 10.

JAMES MORGAN *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

Writ of prohibition to municipal corporation—Assessment roll, amendment of—Arts. 716 *&* 746 *a, municipal code, P. Q.*

The municipal corporation of the county of *H.*, in the province of *Quebec*, made an assessment roll according to law in 1872. In 1875 a triennial assessment roll was made, and the property subject to assessment was assessed at $1,745,588.58. In 1876, without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at $3,138,550. Among the properties that contributed towards this augmentation were those of appellants, who, by their petition, or *requête libellée*, addressed to the Superior Court, *P. Q.*, alleged that the Secretary-Treasurer of the county of *H.* was about selling their real estate for taxes under the provisions of the municipal code for the province of *Quebec*, 34 *Vic.*, c. 68, sec. 998 *et seq.*, and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void.

Held, per *Henry, Taschereau* and *Gwynne*, JJ., affirming the judgment of the Court of Queen's Bench, that the roll of 1876 not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to

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

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an order from the Superior Court as prayed for to restrain the municipal corporation from selling their property, and the writ which issued, whether correctly styled "writ of prohibition" or not, was properly issued, and should be maintained.

Per *Ritchie*, C.J., *Strong* and *Fournier*, JJ., that a writ of prohibition issued under art. 1031, as was the writ issued in this case, will only lie to an inferior tribunal, and not to a municipal officer.

[The court being equally divided, the judgment appealed from was confirmed, but without costs.]

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side), maintaining a writ of prohibition addressed to appellants forbidding them from proceeding to the sale of the lands of the respondents for taxes.

By the declaration or *requête libellée* of the respondents, they alleged that the appellant *Joseph Michael Côté*, as secretary-treasurer of the county of *Hochelaga*, was about selling their real estate by forced sale for taxes, under the provisions of the municipal code for the province of *Quebec*; that in the year 1876 the corporation of the village of *Hochelaga*, while there was a valid subsisting assessment roll for the municipality made in 1875, which by law was, and continued to be, in force for three years, and under the false pretence that there was no such roll, nor any made since 1873, proceeded to make a new assessment roll, which by law could only be made every three years; that the school commissioners of the school municipality of the village had taken for the base of their roll the said illegal assessment roll; that these taxes, which were claimed by the municipality of the village of *Hochelaga* and by the catholic school commissioners of the same municipality, were utterly illegal. In consequence, they prayed that a writ of prohibition should issue, that the two corporations who claimed the taxes, and the county of *Hochelaga* and their secretary treasurer, by whom the sale was to be made, should be enjoined

and forbidden from selling the real estate in question. And further, that a certain valuation roll for 1876 of the municipality of the village of *Hochelaga*, upon which the legality of the contested taxes turns, should be declared illegal, null and void.

This *requête libellée* was sworn to, and the following order was made by *Torrance*, J.S.C., "Let the writ issue as prayed for. 1st March, 1878."

(Signed) "F. W. *Torrance*, J."

On the same day, under 35 *Vic.* c. 6, sec. 21, *Quebec*, the appellants sued out of the Superior Court of the district of *Montreal*, an ordinary writ of summons, whereby the respondents were summoned to appear in the said court in the city of *Montreal* on the fourteenth day of March, to answer the demand which should be made against them for the causes mentioned in the *requête libellée* thereunto annexed.

This writ, to which was annexed the *requête libellée* or declaration, was served upon all the defendants. The defendants appeared and severed in their defence. They filed an exception to the form, and they also, by demurrer, objected that no writ of prohibition lies in such a cause; they pleaded also to the merits, denying the truth of the allegations in the declaration, thereby raising an issue as to the validity of the assessment roll. The learned judge of the superior court maintained the action to be well founded, and pronounced judgment for the plaintiffs on the demurrers, but in favor of the defendants upon the issue as to the validity of the roll, thereby holding the roll of 1876 to be valid as an amendment of the roll of 1875, which was admitted to have been duly made. From this judgment upon the merits the plaintiffs appealed to the Court of Queen's Bench (appeal side), the majority of which court reversed the judgment of the superior court, holding the assessment roll impugned not to be an amend-

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ment of the roll of 1875, but to be a wholly new roll and absolutely null and void. From this judgment the present appeal was taken.

Mr. *Archambault*, Q.C., for appellants:

The first ground we rely upon is that no writ of prohibition lies against an officer of a municipal corporation. Writs of prohibition can only issue here as in *England*, to prevent an inferior tribunal from exceeding its jurisdiction. Art. 1031 C. C. P. Writs of prohibition, mandamus, &c., are granted only in default of any other remedy.

Our municipal code articles 734, 735, 736, 737 and 738 provide the necessary means to have a roll reformed; it is a cheap and rapid remedy to which the respondents would not resort. Then, again, they had an appeal by art. 927, but respondents not only did not resort to these remedies, but in their petition, or *requête libellée*, they do not mention that they used those remedies, and they do not complain that the appellants prevented them, either by fraud or otherwise, from employing those remedies. They only said you had no right to make a new roll for 1876. We answer, the roll of 1876 was only an amendment for local and school purposes. All the formalities in making the amended roll of 1876, required by art. 746 *a*, arts. 736, 737 and 738 have been observed, and, after the homologation of the roll, the appellants, or a number of them, appealed to the county council, as they had a right to do, and as held by the Superior Court this roll is valid, regular and legal.

Mr. *Mousseau*, Q.C., followed on behalf of appellants:

The appellant (*Côté*) should not have been condemned to pay costs. He had nothing whatever to do with the confection of the roll. He had no discretional power, and he was bound to obey the law. Arts. 371, 373, 998,

999 and 1,000 M. C., *P.Q.* Neither could the corporation of the county council of *Hochelaga* be made a party and made liable for costs, and although the court of first instance dismissed the exceptions to the form and the demurrers of the defendant, the appellants are entitled before this court, to urge in support of the final judgment of the superior court, all the grounds taken by them before the Superior Court.

Now, with reference to the writ of prohibition, as was contended by my learned colleague, I submit that no such writ lies in the present case under art. 1031 C. C. P. In my opponent's factum it is very ingeniously tried to confuse the writ of injunction with the writ of prohibition. This cannot avail the respondent's case, for 41 *Vic.*, c. 14, was passed after the issue of the writ in this case, and before then, no such writ as a writ of injunction was known in our procedure. The writ which was issued in this case could not be addressed to a municipal corporation (1).

There was nothing in the evidence to show that the roll of 1876 was a new roll. Art. 746*a*, under which this roll was made, virtually gives the power to the council to make a new roll every year. Here there was no injustice; all respondents complain of is that, instead of making alterations on the roll itself, the secretary-treasurer recopied the whole roll; and the reason was that, as at that period property increased very much in value every year, and there were so many changes, it was found better to copy the whole roll. Under such circumstances this court ought to uphold the judgment of the Superior Court, and declare the roll valid and regular. See *Cooley* on Taxation (2).

Mr. *Barnard*, Q.C., and Mr. *Creighton*, with him, for respondents:

(1) See High on Extraordinary Legal Remedies, s. 782.

(2) P. 536.

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Two questions arise on this appeal: 1st. Whether the taxes sought to be collected were or were not perfectly illegal, null and void? 2nd. Whether the petitioners had a remedy, and whether by a writ of prohibition. With regard to the first question the judge who rendered the judgment in the court of first instance, and all the judges in the Court of Queen's Bench, seem to have admitted that this roll of 1876, in so far as it was an original triennial roll, was an absolute nullity. The minority in appeal and the judge of the court of first instance however held that the council has, under article 746*a*, the power, every year, of revising, for local purposes, the triennial roll, and as the roll of 1876 has been revised by the council they consider it as if it were the revised edition of the roll of 1875. They think that it is practically the same thing whether the result arrived at finally by the council is reached by way of a revised roll or by way of a new roll.

Now, we submit there can be no doubt that this was not an amended roll of the original triennial roll of 1875.

Art. 746*a* says: The revision must be made in accordance with art. 736 among others. Now, under article 736 the council, before proceeding to the revision of the valuation roll of 1875, were bound to give notice of the day and hour when such revision should take place. The notice given in this case, so far from being a notice that the roll of 1875 would be revised, expressly refers to the revision of the new roll made by valuators for the year 1876.

In the second place, art. 737 says that the council, sitting as a revising board, must take into consideration the complaints made, and hear the interested parties in presence of the valuators. Surely the valuators referred to are the valuators who made the roll to be revised. In this case the roll of 1875 therefore could not be

revised, if the valuators present were those who made the roll of 1876.

The importance of article 738, which says that the amendments made must be entered on the amended roll, or on a document annexed thereto, lies in the fact that it practically recognizes that no revision can take place of a roll unless that roll is before the revising tribunal. The incongruity attaching to the appellants' pretention on this point is so manifest that it is deemed unnecessary to pursue the matter further. Here the council, sitting as a court, are called to revise the judgment of *A.* and the argument on the other side is that this is done if by some new law of equivalents the court revise the judgment of *B.*

It will possibly be argued that in *Lower Canada* the council, sitting as a revising board, has power to alter the roll *proprio motu* in the absence of any petition or complaint. No doubt such is the case under the article 734 when the council examines the triennial roll. It is an anomaly however which it is impossible to account for. But even supposing the council, in the case of a roll actually in force, to have the same right to make alterations of its own accord, the fact would still remain that the roll to be revised was that of 1875, and it could not be revised when it was not before the council at all.

As to the pretention of the school commissioners that they could render a roll valid which is an absolute nullity by simply adopting it as their own, it was entertained neither by the judge of the court of first instance nor by any one of the judges of the Court of Queen's Bench, and it seems to require no special notice, at least at present.

With regard to the second point, whether the remedy we employed was a proper remedy.

Although the writ in this case has been called a writ of prohibition, the prayer of the petition was that the

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defendants should be enjoined and forbidden from selling. There can be no doubt that in *Lower Canada* it is sufficient that the facts and conclusions be distinctly and fairly stated without any particular form being necessary, and if the respondents' proceeding was valid as an injunction, it was not invalid because called a prohibition. In fact, to speak of writs of prohibition is not correct, although the code uses the term, for the writ is an ordinary writ of summons as held by the judicial committee in the case of *Brown* v. *Curé &c. de Montreal* (1) and the real character of the remedy depends on the conclusions of the *requête libellée*, which is allowed by the preliminary order of the judge.

If, however, it were necessary to show that prohibition strictly so called did lie in this case, the respondents contend that the English precedents and authorities fairly applied to the altered circumstances existing in this country are conclusive in their favor, and such seem to have been hitherto the view not only of the majority of the Court of Queen's Bench for *Lower Canada*, but of the Chief Justice of that court also. See report of *Armstrong* and *Sorel* in *Taschereau's* Code of Procedure (2), and the report of the same case (3), and also *Bourgouin* and the *Montreal Northern Colonization Railway Company* (4); *Carter* v. *Breaky* (5); *McDougall* and *Corporation* of *St Ephrem Upton* (6). In all those cases, according to our own jurisprudence, the name is nothing.

The further objection, that the respondents had a remedy of another kind under the municipal law, will be found to be without any foundation. The respondents opposed the valuation roll of 1876 before the village council, but their opposition was not even taken

(1) L. R. 6 P. C. 193.
(2) Art. 1031.
(3) 20 L. C. Jur. 171.
(4) 19 L. C. Jur. 57.
(5) 2 Q. L. R. 232.
(6) 5 L. C. Jur. 229.

into consideration. They then had the choice of an appeal to the county council or to the circuit court. They chose the county council, who took the opinion of counsel, and were told that the valuation roll was a nullity. A decision of the county council in favor of the respondents, unfortunately, was prevented by the fact that the opinion of counsel came too late and the appeal stood dismissed by the mere lapse of time.

The last point we urge is, that this court cannot entertain the objection raised to the form of the writ. There is no cross appeal, and as the judgments of Mr. Justice *Torrance* and Mr. Justice *Rainville*, dismissing the appellant's preliminary pleas, have not been printed in the record, this court will hold that they have acquiesced in these judgments.

The learned counsel also referred to the following cases :

Kane v. *Montreal Tel. Co.* (1) ; *Guyot* Répertoire (2) ; *Guyot* Répertoire (3) ; *Bouteiller* Somme Rurale (4) ; *Savard* v. *Moisan* (5) ; *Mayor, etc., of Montreal* v. *Harrison Stephens* (6) ; *Molson* v. *City of Montreal* (7) ; *Mayor et al,* v. *Benny et al* (8) ; *Mayor of Iberville* v. *Jones* (9) ; *Atty. Gen.* v. *Litchfield* (10).

Mr. *Mousseau*, Q. C., in reply.

RITCHIE, C.J. :—

The question in this case arises under a decision of the Court of Appeal of the province of *Quebec*. Proceedings were initiated by petition—*requête libellée*—by which the parties sought to stop the sale of certain property which was about being sold under an assess-

(1) 20 L. C. Jur. 120.
(2) IV. Vo. Complainte, 206.
(3) I. Vo. Arrêt de Défense.
(4) Tit. 21 demande sur nouvelleté et trouble.
(5) 1 Rev. de Leg. 378.
(6) 3 App. Cases 605.
(7) 3 Legal News 382.
(8) 16 L. C. Jur. 1.
(9) 3 Legal News 277.
(10) 11 Beav. 120.

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ment which was made in the county of *Hochelaga*. There are a number of parties to the suit, but it is not necessary to refer to them. The Court of Queen's Bench held that the assessment was unjustifiable, and that the order prayed for, the prohibition, should issue to prevent them going on with the sale. The decision of the court was that the valuation roll was null and illegal, and that the sale ought to be stopped, and granted the prayer of the petition. The Honorable the Chief Justice and Mr. Justice *Tessier* dissented from this decision.

I think that the whole case turns, as far as my view of it goes, on the question, not whether the assessment was null and void or not, but whether, in the proceedings which were taken by the parties, they were entitled to a writ of prohibition, or to a writ in the nature of a writ of prohibition, under the circumstances which were proved in this case. The code, art. 1031, provides that in writs of prohibition which are to be addressed to courts of inferior jurisdiction wherever they exceed their jurisdiction, they are to be applied for and obtained in the same manner as writs of *mandamus*, with the same formalities. Now, it is obvious that this power of issuing writs of prohibition in the province of *Quebec*, under the code of civil procedure, art. 1031, is substantially the same as the power to issue writs of prohibition under the English jurisprudence, and these writs of prohibition can only go to the courts to prevent their acting without jurisdiction, or to prevent their exceeding their jurisdiction, and it is abundantly clear that the prerogative writ of prohibition under the English law does not go for the purpose of stopping or preventing the proceedings of commissioners under assessments, or of those persons who are to carry out the assessment laws, they not being judicial tribunals to which the prohibi-

tion will go. It is true that in the *United States* there are to be found some cases, in some of the states where writs of prohibition, similar to the writ of prohibition under English jurisprudence, have been used for such a purpose, but it is to be remarked that in the majority of the states the writ of prohibition has not been used for any such purpose, and it is further to be remarked that in those states where the writ of prohibition has been so used, and in those courts out of which those writs have issued, the judges, I think, in all the cases that I have looked up, have stated that the writ of prohibition was justified by the practice of those courts, but could not be justified by English principles or by English practice, and that while used in the *United States* in these individual states, it was in opposition to the usage in *England*. Therefore, this writ of prohibition which is prayed for could not, if it was the prerogative writ in *England*, avail in this case, and the writ under article 1,031 of the civil code of procedure, if the writ is the same (as I think is very clear from the wording of the code) as the English prerogative writ of prohibition, would not be applicable to a case of this kind; and this seems to have been admitted by the learned judge who delivered the judgment of the majority of the court in this case, but he gets rid of the difficulty by saying that the jurisprudence of *Quebec* does not regard the name of the writ, but that by whatever name it may be called, the writ may issue in a case of this kind, and it is not a writ of prohibition as understood under the English law, or as under article 1031 of the code, but that it may be treated in the nature of an injunction. Now, it is well known that the writ of injunction under the English law and the writ of prohibition are writs of an entirely separate and distinct character. *High*, on

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Extraordinary Legal Remedies (1), points out that while some points of similarity may be noticed between the extraordinary remedial process of prohibition and the extraordinary remedy of courts of equity by injunction against proceedings at law, says :

> There is this vital difference to be observed between them, that an injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the courts, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim, and injunction usually recognizes the jurisdiction of the court in which the proceedings are pending and proceeds on the ground of equities affecting only the parties litigant, while the prohibition strikes at once at the very jurisdiction of the court. The former remedy affects only the parties, the latter is directed against the forum itself.

The difficulty that strikes my mind (and I put it forward with a great deal of hesitancy, still, it is the best judgment at which I have been able to arrive in this matter) is this: that the conclusion at which the minority of the Court of Queen's Bench arrived was the correct decision, if I may be permitted to say so. I think that when Mr. Justice *Ramsay* pointed out that according to the jurisprudence of *Quebec* it mattered not by what name you called the writ, if the party was entitled to the remedy, he overlooked the fact that when the parties in this case were seeking to restrain municipal officers they were doing it by a proceeding which, according to what I understand of the practice in the province of *Quebec*, was applicable to the writ of prohibition, and was not open to the parties as it would be if they had taken proceedings to set aside this assessment and to get the remedy which they were entitled to, if the assessment was null and void, by a regular proceeding. In fact, that they did not adopt that course, but that they adopted this summary proceeding which would be open to them if they

(1) P. 550.

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were merely seeking to get a writ of prohibition under this act, and, therefore, in my opinion, the remedy as sought for in this case was misconceived, and therefore they ought not to be allowed to use the writ of prohibition to give them that relief which, under the procedure in the province of *Quebec*, could only be obtained by a regular suit in which the proceedings are of an entirely different character.

I must confess myself much impressed with the reasoning of the learned Chief Justice *Meredith* and the very exhaustive judgment he has given in the case of *Carter* v. *Breaky* (1), in which he has put forward, with much force, that there was no writ of injuction applicable under the system of procedure then in force in the province of *Quebec*. He points out that the want of a writ of injunction was considered by the courts, by judges and by counsel, as a *casus omissus* in the law of *Quebec*, and he expresses his regret and the regret of others that it was not provided for by the code, and we find that the legislature very lately has given, by statutory enactment, the writ of injunction.

Reference is made to that in Chief Justice *Dorion's* judgment, in which he points out that by the Act 41 *Vic.*, ch. 14, security is necessary to be given in such proceedings, and says to allow a writ of prohibition to issue in a case where a writ of injunction is the proper remedy, would deprive a defendant of the substantial right of obtaining security; but, I think that is answered by this fact: that at the time these proceedings were taken that statute had not come in force; and therefore, if the writ of injunction did not exist, I am very much inclined to think in accordance with the view of Chief Justice *Meredith*, in *Quebec*, no matter what proceedings they had taken, they could not have got a writ of injunction, as we term it in the English

(1) 3 Q. L. R. 315.

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law. But, however that may be, hereafter no questions will arise as to whether the writ of injunction can be issued in the province of *Quebec* or not, because the legislature has made provision for it, but of course the provisions which have been made for the issuing of it by the legislature must be acted on. As Chief Justice *Meredith* pointed out in the case to which I have referred, that authority must be found for the proceedings and we must know under what law the power is derived to do what has been done, so just in the present case, we must know what authority the court had; and I must confess that for the issuing of this prohibition, injunction or restraining writ, by whatsoever name it may be called, I have sought in vain to find in the jurisprudence of *Quebec* any authority for issuing such an order, if order it is, or such a writ, if writ it is, in the proceeding which has been taken in this case, and, altogether, I think that the judgment cannot be sustained, but that the appeal in this case should be allowed with costs.

STRONG, J.:—

Art. 1031 of the Code of Procedure of the province of *Quebec*, is as follows:—"Writs of prohibition are addressed to courts of inferior jurisdiction." Without entering upon any discussion as to the analogy or distinction between writs of prohibition as known to the common law of *England* and those authorized by this article of the *Quebec* code, it is manifest that such a writ as that defined by the article quoted, is a remedy entirely inapplicable and inappropriate in the present case. The defendants, who were proceeding to execute a ministerial office, did not constitute a court of inferior jurisdiction, nor were they threatening any excess of jurisdiction in assuming to exercise any judicial authority whatever. The proceeding appealed against cannot therefore be sustained as a writ of prohibition.

It has, however, been suggested that the writ may be considered as a writ of injunction, and the judgment of the Court of Queen's Bench supported on that ground. The plain and conclusive answer to this, however, is that the writ of injunction was unknown to the procedure of the courts of the Province of *Quebec*, until the stat. of *Quebec* 41 *Vic.*, cap. 14 made provision for such writs, and the proceedings in the present case were taken before that act came into operation.

Then it has been contended that although a technical writ of injunction could not have been obtained before the statute, it was still the right of the plaintiff, if the assessement was null, to have it so pronounced judicially, and the defendants prohibited from enforcing payment of the illegal tax, on an ordinary action at common law. Granting that this was so, the respondents are met by the objection that they have not made use of the procedure prescribed by the code for an ordinary action, but have instead adopted the special and exceptional mode of proceeding prescribed for writs of prohibition, which differs essentially from those which the law authorizes in common actions, the delays being different, and the proceeding being originated by petition (*requête libellée*) instead of by service of a writ of summons and a declaration. It has been urged, it is true, that these proceedings are notwithstanding the same, and for that reason we should ignore formal distinctions, but to this argument I cannot accede. The law has directed a different mode of proceeding in each case, and I do not think we are at liberty to disregard the plain distinctions of the code and to recognise one form of action as an equivalent for another; were we to do so we should be virtually subverting and repealing the code of procedure.

I am, therefore, obliged to come to the conclusion that the appellants are entitled to prevail. I have come to this

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determination reluctantly, I admit, for I am of opinion that the assessment was illegal, and the merits altogether with the respondents, but the technical difficulties I have mentioned appear to me to be insurmountable.

My conclusion is, therefore, that the appeal should be allowed, the judgment of the Court of Queen's Bench reversed, and the action dismissed, with costs to the appellants in this court and both the courts below.

FOURNIER, J. :

La requête libellée des Intimés demandant un bref de prohibition avait pour objet d'empêcher la vente de leurs propriétés, situées dans le village d'*Hochelaga*, annoncées en vente par le secrétaire-trésorier du comté d'*Hochelaga*, pour arrérages de taxes.

Le principal moyen invoqué au soutien de cette requête est la nullité du rôle d'évaluation de 1876 d'après lequel s'est faite la répartition des taxes demandées. Cette nullité, résultant de ce que, d'après la loi, un rôle d'évaluation ne pouvant être fait que tous les trois ans, celui fait en 1875 était encore en force et qu'une révision seulement de ce dernier rôle pouvait avoir lieu en 1876, en observant toutefois les formalités voulues à cet effet.

La requête ne contient pas d'allégation de fraude, ni d'évaluation injuste ou excessive. Il n'y a pas d'offre de payer les taxes dues suivant le rôle de 1875. C'est la forme seulement des procédés suivis dans la confection du rôle que les Intimés ont attaquée par leur requête.

Quoique les Appelants aient séparé leurs défenses, pour invoquer des moyens particuliers à chacun d'eux, tous ont cependant plaidé par exception à la forme, et par défense au fonds en droit, les moyens suivants : que les Appelants ayant des intérêts différents ne pouvaient

s'unir dans la même procédure pour obtenir une conclusion uniforme; que le bref est irrégulier et nul ne contenant aucun ordre, si ce n'est le commandement de comparaître; que les Appelants n'étant pas juges d'un tribunal inférieur, un bref de prohibition ne pouvait pas leur être adressé.

Quant aux autres plaidoyers, réponses spéciales, etc., je crois devoir me dispenser d'en donner ici une analyse, car, au point de vue que j'ai adopté, leur considération n'est pas nécessaire pour la décision de cette cause.

Cet appel soulève deux questions : la première est de savoir si un bref de prohibition peut être adressé à une corporation municipale ou scolaire et à leurs officiers pour les empêcher de faire la collection des taxes qu'elles ont imposées; la deuxième : si le rôle attaqué est nul parce que les changements ou amendements faits l'ont été de la même manière que s'il s'était agi d'un nouveau rôle au lieu d'un amendement.

Sur la première question de savoir si le bref de prohibition est admis dans le système judiciaire de la province de *Québec* pour empêcher la collection d'une taxe illégale, la Cour du Banc de la Reine a été divisée d'opinions, mais la majorité de la cour a soutenu l'affirmative. On voit, par une note de sir *A. A. Dorion*, que le même jour cette cour a rendu un jugement semblable dans la cause de *Jones* contre le maire d'*Hébertville*. C'est la première fois que ce principe a reçu la sanction de la Cour d'Appel. A venir jusqu'à ces deux décisions le contraire avait été maintenu, conformément à l'art. 1031 C.P.C. qui déclare que les brefs de prohibition sont adressés aux tribunaux de juridiction inférieure lorsqu'ils excèdent leur juridiction. En cela le code est conforme à la loi anglaise.

Dans la cause de *Blain vs. La corporation de Granby*, la Cour Supérieure, siégeant en révision pour le district de *Montréal* avait décidé qu'un bref de prohibition ne

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pouvait être adressé qu'à une cour et non pas à une corporation municipale. Le même principe a été énoncé dans la cause de *Beaudry vs. The Recorder of the City of Montreal* (1). Dans la cause du *Maire de Sorel vs. Armstrong* (2), la Cour de Révision a infirmé la décision de la Cour Inférieure ordonnant l'émission d'un bref de prohibition, et déclaré qu'il n'y a pas lieu à l'émission de ce bref. La même cour a décidé le 20 septembre 1876 qu'il n'y avait pas lieu au bref de prohibition pour empêcher une corporation de faire d'une partie de son territoire une municipalité séparée.

On voit par ces citations que les décisions de la Cour du Banc de la Reine ont d'abord refusé d'admettre qu'il y avait lieu au bref de prohibition en matières municipales. Ces décisions étaient plus conformes au Code de procédure et aux autorités anglaises que les deux derniers jugements qui ont décidé le contraire et dont l'un, celui rendu en cette cause, forme le sujet du présent appel.

High, on Extraordinary legal Remedies, § 782 states from American and English Authorities the rule on this subject as follows :

> The legitimate scope and purpose of the remedy being, as we have already seen, to keep inferior Courts within the limits of their own jurisdiction and to prevent them from encroaching upon other tribunals, it cannot properly be extended to officers or tribunals whose functions are not strictly judicial. And while there are cases where the writ has been granted against ministerial officers intrusted with the collection of taxes, yet the better doctrine, both upon principle and authority, undoubtedly is, that it will not lie as against municipal officers, such as collectors of taxes, or as against municipal boards of quasi judicial functions, entrusted with taxing powers, to restrain them from levying or collecting taxes.

En effet l'article 1031 du Code de procédure déclare que les brefs de prohibition sont adressés aux tribunaux de juridiction inférieure lorsqu'ils excèdent leur juri-

(1) 5 Rév. Leg. 223. (2) 20 L. C. Jur. 171.

diction. Ce texte précis devrait dispenser de citer aucune autre autorité. Il doit régler la question.

L'article 1031, comme on le voit par l'autorité citée par les codificateurs indiquant son origine, nous vient du droit anglais. Le code n'a sous ce rapport aucunement modifié la loi anglaise au sujet du bref de prohibition, il n'a fait qu'en régler la procédure; mais il n'a pas admis le recours à ce bref en d'autres cas que dans ceux où il était admis dans le droit anglais. Rien n'est plus certain que ce bref, d'après le droit anglais, ne peut être employé contre les corporations municipales. J'ai en vain cherché dans les auteurs anglais des traces de son application dans ces matières; je puis dire avec assurance qu'on n'en trouve aucune. L'assertion de *High* à ce sujet est certainement exacte: "The exercise of the jurisdiction for this purpose (in municipal matters) is conceded to be without the sanction of English precedent."

Pour ces raisons je suis d'avis qu'il n'y avait pas lieu à l'émission d'un bref de prohibition et que les Appelants doivent avoir le bénéfice de l'objection qu'ils ont prise à ce sujet. Mais le jugement de la majorité de la cour procède moins sur l'existence du bref de prohibition en pareil cas, que sur le fait que, dans la présente cause, les conclusions prises dans la demande de ce bref ne sont pas différentes de celles que les Intimés auraient pu prendre par un bref d'injonction. Il est vrai que d'après le Code de procédure, les actions et autres procédés judiciaires n'ont pas besoin d'être désignés par un nom particulier, et qu'une erreur à ce sujet n'emporterait aucune conséquence. Il aurait été parfaitement correct de dire, que le bref en question quoique appelé "prohibition" devrait être considéré comme un bref d'injonction, si à l'époque où il a été émis le bref d'injonction eût été admis dans notre système de procédure, mais il ne l'était pas encore. Le bref dont il

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s'agit est daté du 1er mars 1878, et la loi introduisant le bref d'injonction dans le Code de procédure de P. de Q. n'a été sanctionnné que le 9 mars, quelques jours après. Ainsi la procédure des Intimés doit être réglée par la loi en force le 1er mars 1878. Si le bref d'injonction avait été en existence le 1er mars, je n'hésiterais nullement à me joindre à l'opinion que le bref de prohibition en cette cause doit être pris comme l'équivalent d'un bref d'injonction ; mais avant d'en arriver là il faudrait démontrer l'existence de ce dernier bref à cette époque. Le bref de prohibition existait pour les fins de l'art. 1031, comme bref de prérogative introduit avant le code comme faisant partie du droit public anglais. Mais il n'en était pas de même du bref d'injonction qui, comme appartenant au droit civil anglais, n'a jamais fait partie du droit de la province de *Québec*. Cette importante question a été traitée d'une manière si complète et si savante par l'honorable juge-en-chef *Meredith*, qu'après avoir lu et étudié son admirable jugement sur cette question dans la cause de *Carter vs. Breaky* (1), je n'ai pu faire autrement que d'en venir comme lui à la conclusion qu'avant la 41ème *Vict.*, ch. 14, le bref d'injonction n'existait pas dans la loi de la province de *Québec*.

Il est vrai que la dernière clause de cet acte, en exceptant de son effet les causes pendantes, laissa la question ouverte ; mais dans mon humble opinion elle ne peut recevoir une autre solution que celle donnée par l'honorable juge en chef. Dans le cas actuel on ne pouvait donc employer ni l'un ni l'autre de ces deux brefs,—le bref de prohibition ne pouvant l'être pour contrôler les corps municipaux, et le bref d'injonction n'existant pas encore.

Faudrait-il conclure de là que la loi de la province de *Québec* n'offrait aucun remède aux Intimés pour se protéger contre l'imposition d'une taxe illégale et qu'il

(1) Q. L. R. 113.

devenait en conséquence nécessaire d'étendre l'application du bref de prohibition ? Ce serait une grande erreur que de croire à une telle lacune dans notre droit. Non-seulement le code municipal mais le droit commun offrait aussi aux Intimés des moyens suffisants de protection. Ils avaient d'abord contre la décision du conseil local, l'appel au conseil de comté, droit qu'ils ont exercé. Ils avaient aussi l'appel à la Cour de Circuit, puis, d'après le droit commun, le recours à l'action négatoire pour empêcher la vente de leur propriété (1),—il était aussi facile d'adopter le mode de l'action négatoire reconnu par les lois de la province de *Québec* que de recourir au bref de prohibition ;—et enfin l'action en dommages après la vente pour la faire annuler. Ce n'est certainement pas une raison de nécessité qui devait faire admettre, outre tous ces différents recours, celui du bref de prohibition que la loi n'a pas accordé en pareil cas. Les moyens d'obtenir justice étaient assez nombreux sans cela. Pour ces raisons je suis d'avis qu'il n'y avait pas lieu au bref de prohibition.

Adoptant cette manière de voir sur la première question, il devient inutile que je me prononce sur la seconde, car je considère qu'elle n'est pas devant la Cour.

HENRY, J. :—

After a good deal of consideration, in fact all I have been able to give to this subject, I have arrived at the conclusion that I should sustain the finding of the court below in reference to the question of the power of a judge of the Superior Court to issue such an order. On looking at the jurisprudence in *France* I find that there the courts are authorized to issue an *ordre provisionel*—a provisional order—and it is necessary to the proper

(1) *McDougall vs. Corporation of the parish of St. Ephrem d'Upton*, 35 L. C. Jur. 229.

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administration of justice, not only in *Quebec*, but in every part of the world, that a superior court of a country should exercise a summary jurisdiction to prevent immense wrong and injury being done by one party to another. If there were not such an inherent power in the court, or if the legislature did not think it necessary to enact it, one party might seize upon a valuable gold mine or other valuable property of another, and before the right and title to it could be tested the party would be left without any redress whatever except by an action to recover damages, and that, possibly, from a party who is not worth the cost of the suit. I take it, then, that *Quebec* always had in its jurisprudence the power, through one of its judges, of issuing some kind of process in the shape of an order to restrain the party from doing an irreparable injury to his neighbor's property. I have ascertained that such a recourse always existed in *France*, and that being the case I am free to say that the practice and the law applicable to such cases in *France* would be sufficient, I think, to give to the Superior Court of *Quebec* the right to issue a provisional order. We are told, however, that an action could be brought—I believe it is called an *action negatoire*—but, as I understand it, that would be no stay of proceedings. It would not stop the party so going on with a trespass that might be disastrous in its consequences, and he might ruin a large amount of the property of his neighbor. As I have said, before a decision could be had the property would be gone and no redress would be left. I think, under the circumstances, therefore, such a power was inherent in the court, independent of the legislature.

I am free to say that I agree with my brother judges who expressed the opinion that the process in regard to what is called specially a writ of prohibition, does not apply to this case. At the time this process was commenced,

there was no judicial action about to be taken, and therefore there is nothing to which the writ could apply. I need not consider whether the case was one in which a remedy could be given by a writ such as is issued in *England*. I do not think that the parties there could adopt the English practice in regard to the matter of injunction, but it is no matter. I agree to that extent with Judge *Ramsay* when saying that it is no matter, if the court had the power to restrain a party it makes very little difference what you call it—provided it is sufficient to enable the other party to obtain redress in the case, so far as protecting property until the question as to the right to it is determined. Chief Justice *Meredith*, in his judgment in the case referred to, says this is a case that has been often mooted, and the want of such a power has been often felt. If I am right in the conclusion at which I have arrived, the judges were wrong in not putting it in force years and years before. I consider the jurisprudence of the country was defective without it, but I find in a number of cases such a proceeding has been had. I find that on this point there is a difference of opinion among the judges of the province of *Quebec*.

Looking at the whole case, then, I am inclined to sustain the judgment of the court below, and I am the more inclined to do it because I am of the opinion that the assessment is altogether wrong. The law authorized the parties to amend the assessment roll, but not to make a new roll two years in succession. Having, then, not amended the roll, but having taken the proceedings that were adopted of providing a new assessment roll altogether, they have clearly shown they did not amend the roll, but made a new roll, which they were not justified in doing. I am, therefore, of opinion that the judgment of the court below should be confirmed.

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TASCHEREAU, J. :—

I am of opinion to dismiss this appeal. On the merits of the case, that is to say, on the point submitted, whether the valuation roll in question was legally made or not, I really see nothing but a question of fact. On the question of law connected therewith at the argument, whether a new valuation roll could be made in 1876, there cannot be two opinions. The council in 1876 could amend the existing roll, but clearly could not then make a new roll. Now, as a matter of fact, what did they do? It is sufficient to take their own notice as publicly given of the deposit of their proceedings, in accordance with the municipal code, to see that they did unmistakably make a new roll in 1876. This roll is therefore a complete nullity.

On the question of the legality of the proceedings taken in this case to contest this valuation roll, I am also of opinion with the court appealed from, that whatever name should be given or ought to have been given to these proceedings cannot affect the redress the plaintiffs have clearly established themselves to be entitled to in this case. In *France*, in matters requiring urgency, the judge could always grant *un ordre provisoire* (1).

Chief Justice *Meredith's* judgment, in *Carter* v. *Breakey* (2), relied upon before us by the appellants, has so little to do with the present case that it was not even noticed in the *Montreal* Court of Appeal. Judge *Meredith* held in that case, that the writ of injunction as known in *England* is not known in *Lower Canada*. This we have nothing to do with here. Judge *Ramsay*, speaking in the court appealed from, for the majority of the court, said that the name given to the writ is of no importance, and that it does not signify whether it be called a prohibition or an injunction. I add, call it an *ordonnance provisoire*, or a *mandamus*, or a mandatory

(1) Pigeau Liv. 2, part I. tit. 2, ch. 3. (2) 3 Q. L. R. 113.

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injunction, if preferred, and the result is the same. Then, against Chief Justice *Meredith's* judgment in *Carter* v. *Breakey*, stands the late Judge *Dorion's* judgment in the very same case. The Chief Justice, it is true, says that *Stuart* and *Casault*, JJ., whom he had consulted, are of his opinion But what shows conclusively that *Stuart* and *Casault*, JJ.'s, views cannot be invoked in this case by the appellants in support of their contention, is that these two judges, in *Pentland* v. *La Corporation d'Hibertville*, held distinctly that a municipal corporation can be stopped from selling lands for taxes by the very same process taken by the respondents here.

Then *Bourgouin* v. *Montreal Northern Railway* (1) is the judgment, and the unanimous judgment, of the Court of Appeal. And this fact must not be lost sight of when investigating what is the jurisprudence of *Lower Canada* on the point. At page 66 of the report of the case it will be seen, by the very words of the judgment itself, that the Court of Appeal maintained distinctly a writ of injunction. In the notes of the judges they seem to maintain it rather as a writ of *mandamus*. There the writ, as here, was to prevent the execution of an unlawful act. Call it *mandamus* here, if appellant prefers it, or a mandatory injunction. A writ of prohibition would prohibit from selling lands in question—a writ of injunction would enjoin not to sell such lands—a writ of *mandamus* would order to cease the proceedings on and for the sale of these lands. Is the result not the same in the three cases? By an oversight, Chief Justice *Dorion*, who dissented from the majority of the *Montreal* Court of Appeal in this present case, said:

> A writ of injunction, on the contrary, is not a prerogative writ, and is issued under the provisions of the *Quebec* Act, 41 *Vic.* ch. 14.

(1) 19 L. C. Jur. 56.

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And, by section 4 of that Act, it is provided "that no writ of injunction shall issue unless the person applying therefor first give good and sufficient security in the manner prescribed by and to the satisfaction of the court or a judge thereof, in the sum of six hundred dollars or any higher sum fixed by the said court or judge, for the costs and damages which the defendant or the person against whom the writ of injunction is directed may suffer by reason of the issue thereof"

No security whatsoever is required for the writ of *mandamus*, and none has been given in the present case To allow a writ of prohibition to issue in a case where a writ of injunction is the proper remedy, would be to deprive a defendant from the substantial right of obtaining security, not only for his costs, but also for all damages he might suffer from the proceedings adopted against him. This alone would be a sufficient ground of objection to prevent one writ from being used for another.

Now, this was correct at the time when it was said, but cannot be applied to this case, as the proceedings therein were instituted eight days, or thereabouts, before the said *Quebec* Act 41 *Vic.* ch. 14 came into force. Consequently the respondents in this case did not deprive the appellants of the right of obtaining security for costs and damages

It has been said that in *Bourgouin's* case, an *action négatoire* had been first taken. That is so, but what is the difference? Where is there in the code anything authorizing such a writ during an action more than before such action? It seems to me, that if a party can take an action to-day and apply for such an order to-morrow, he can take his action and obtain the order at the same time. Indeed, it is obvious that if this could not be done, the remedy would often be nugatory and fruitless.

Then, here, there could be no *action négatoire*. What is an *action négatoire*? It is, says *Guyot* (1):

Une action par lequelle nous dénions droit de servitude à celui qui le prétend sur notre héritage.

"An *action négatoire* is an action by which we deny a

(1) Rep. v. *Action.*

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right of servitude that our adversary claims to have over our land." Now, there is nothing of the kind here. *Morgan et al* do not deny that their property is subject to the taxes regularly imposed by the municipal authority ; and, then, this could hardly be called a servitude.

Then, in *Carter* v. *Breakey* it will be seen that Chief Justice *Meredith* saw a difference between it and *Bourgouin's* case, as in the first one, the contestation was purely and entirely between private individuals and on private matters, whilst in the last one, the corporation complained of by *Bourgouin* was a public corporation, and was sued as such. There also the parties complained of are public corporations, and their officers in the discharge of their public duties.

I have mentioned *Casault* and *Stuart*, JJ., in *Pentland* v. *Corporation d'Hébertville*. Then add *Torrance*, J., who granted the order in this case. *Rainville*, J., who dismissed *Coté et al's*, demurrers, and three judges in appeal, *Ramsay*, *Cross* and *Monk*, JJ. Here are seven judges distinctly holding the proceedings as taken here to be legal and valid. *Sanborn*, J. (1), in *Corporation of Sorel* v. *Armstrong*, expressed himself in such a way that he may fairly be taken as having been of opinion that sales for taxes could be stopped as they have been here. Then *Loranger*, J., in the same case, had maintained the proceedings in the court of first instance. To these must be added the late Judge *W. Dorion's* judgment in *Carter* v. *Breakey*, late Chief Justice *Bowen* in *Usborne's* case, and late Judge *Gauthier* in *ex parte Paton*, cited in *Carter* v. *Breakey*, who all three were of opinion that injunction, or an order equivalent to it, could be granted.

This makes twelve judges of the province of *Quebec*, who, either distinctly held that proceedings as taken here by respondents are legal and valid, or that an in-

(1) 20 L. C. Jur. 174.

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junction, not the writ, perhaps, known under that name in *England*, but an *ordre provisiore* to the same effect, did lie in the said province before the 41st *Vic.* Now, on this last point, must be added the four judges of the Court of Appeal in the *Bourgouin* case. I must say that the appellants have failed to make the clear, unmistakable, inevitable case, which, for my part, I would require to see before coming to the conclusion of revising the views and holdings of such an array of *Lower Canada* judges, more especially upon what, after all, is nothing but a question of practice, with which, as held in many instances by the privy council, and more particularly in *Marchioness of Bute* v. *Mason* (1) and *Board of Orphans* v. *Kraeglins* (2), a Court of Appeal ought not, as a general rule, to interfere.

It was argued that there was no summons in this case. But surely the writ as issued contained a summons. In fact, it is nothing else, on its very face, but a writ of summons, and it is upon such summons that the appellants appeared and pleaded, having been served with it, not within the short delays authorized on prerogative writs, but within the delays required in ordinary actions. It was said that there is no declaration. But what is the *requête libellée*, if not a declaration, or rather, what is a declaration if not a *requête libellée*? I take the first case I find on my table, *Chevallier* v. *Cuvillier*, and if reference is made to the declaration there, it will be seen that it is nothing else than a petition addressed to the superior court, alleging certain facts, and praying the court, petitioning the court, upon the proof of such facts, to grant the petitioner certain conclusions.

Morgan, et al. the respondents, were perfectly justified in complaining of the most arbitrary and vexatious proceedings of the municipal authorities in the matter.

(1) 7 Moo. P. C. C. 1. (2) 9 Moo. P. C. C. 447.

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When they instituted their proceedings in this case, no other remedy was available to them They were not obliged to appeal or act in any way when this valuation roll was made, or when these taxes were imposed. They could treat the whole thing as an absolute nullity, as they should have done, and wait till an attempt should be made to levy this unwarrantable taxation before acting.

Even a judgment of a court of justice, if rendered without jurisdiction, can be so treated as a perfect nullity, as per *Attorney General* v. *Lord Hotham* (1), where it was held that " Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal." If such is the case for the judgments of the courts of justice, surely, and *à fortori*, it is so for the proceedings of these municipal corporations. The respondents had, in my opinion, a perfect right to treat the valuation roll in question as a complete nullity.

I am of opinion to dismiss the appeal with costs.

GWYNNE, J.:—

On the first of March, 1878, the plaintiffs sued out of the superior court of the district of *Montreal* what, by reference to the original document itself transmitted to this court, appears to have been an ordinary writ (of summons), addressed "*à aucun des hussiers de la dite cour*," whereby they were ordered to summon the defendants that they should appear in the said court in the city of *Montreal* on the fourteenth day of March then current to answer the demand which should be made against them, for the causes mentioned in the *requête libellée* thereunto annexed. This writ (of summons), together with the *requête libellée* or

(1) 3 Turn. & Russ. 219.

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declaration of the plaintiffs, stating their cause of action or matter of complaint, was served upon all the defendants named in the writ of summons upon the same first of March.

The plaintiffs in the declaration or *requete libellée* so served stated the matter of their complaint to be, in short substance, as follows:—that they are proprietors of real property in the village of *Hochelaga*, and assessed and taxed as such; that in the year 1876 the corporation of that village, while there was a valid subsisting assessment roll for the municipality made in 1875, which by law was, and continued to be, in force for three years, and under the false pretence that there was no such roll, nor any made since 1873, proceeded to make a new assessment roll, which by law could only be made every three years, for which, and other reasons stated in the declaration, it was contended that the assessment roll so made in 1876 was wholly null and void as beyond the jurisdiction of the corporation to make. The declaration also alleged, that the school commissioners of the school municipality of the village had taken for the base of their roll the said illegal assessment roll, and that the corporation of the village and the commissioners of schools for the school municipality of the village had, illegally and with the object of troubling the plaintiffs in the peaceable possession of their property, seized the real property of the plaintiffs, and had, through the secretary-treasurer of the municipality, the defendant *Coté*, caused the same to be advertised for sale, to realize thereby rates calculated upon the said illegal assessment roll, and the plaintiff therefore prayed that "*un bref de prohibition*" should issue out of the said court addressed to the defendants, enjoining them from selling and forbidding them to sell the real property of the plaintiffs so seized, or to proceed in any manner upon the said assessment

roll of 1876, or to collect any taxes in virtue of that roll, and that the proceedings taken against the plaintiff's property might be declared to be illegal, void and of no effect, unless cause to the contrary should be shown by the defendants.

The defendants appeared to the writ of summons and filed an exception to the form, and they also by demurrer objected that no writ of prohibition lies in such a case; they pleaded also to the merits, denying the the truth of the allegations in the declaration, thereby raising an issue as to the validity of the assessment roll. The learned judge of the superior court maintained the action to be well founded, and pronounced judgment for the plaintiffs on the demurrers, but in favor of the defendants upon the issue as to the validity of the rolls, thereby holding the roll of 1876 to be valid as an amendment of the roll of 1875, which was admitted to have been duly made. From this judgment upon the merits the plaintiff appealed to the Court of Queen's Bench, appeal side, the majority of which court reversed the judgment of the superior court, holding the assessment roll impugned not to be an amendment of the roll of 1875, but to be a wholly new roll and absolutely null and void. Two of the learned judges of the Court of Appeal however, of whom the learned Chief Justice was one, were of opinion that the plaintiff's action should be dismissed, upon the ground that in their judgment a writ of prohibition did not lie in such a case. From this judgment the defendants have taken this appeal.

Now, why the above writ of summons should be called a writ of prohibition, or anything else than an ordinary writ of summons I am unable to see. True it is, that on the *requête libellée* there is endorsed a fiat signed by a judge, "Let the writ issue," but the writ which did issue in fact was a writ of summons in the

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ordinary form, and which, both in its form and in the time given therein for appearing and answering the cause of action stated in the declaration served with the summons, conformed to the ordinary writ of summons. It is only in the prayer or conclusions of the *requête libellée* or declaration that the term "writ of prohibition" is used. In this term so used there is no magic—the prayer or conclusions would be just the same in substance if instead of the words "writ of prohibition" had been used the word "*ordre*," and as if the conclusion had been "that the defendants be enjoined by the order and decree of this honorable court from selling, and be forbidden to sell, &c., &c., or to proceed in any manner upon the said assessment roll of 1876; and that the proceedings taken against plaintiff's property be declared illegal and void."

It is admitted, that if an *action négatoire* be brought the court has jurisdiction to restrain a defendant from disposing of or interfering with the property in respect of which the action is brought pending the litigation. If that can be done in such an action as an auxiliary remedy, the right arises not by reason of any article in the code to that effect, it must exist as a right incident to the court as a court of original civil jurisdiction, which the superior court is, and if such right exists as an essentially necessary instrument in administering justice as auxilliary to an action, upon what principle can it be denied to exist as a substantive remedy, and as the only one which, when, after hearing of the case upon the merits, the court comes to give judgment, would be effectual? It is the privilege and the duty of every Court of original civil jurisdiction to provide a remedy suitable to the redress of every wrong. Judge *Rainville* in *Bourgouin* v. *Malhiot* (1), recognizing this principle, says:

(1) 8 Rev. Leg. 396.

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Under the ancient French law there was no wrong without a remedy, and certainly under the ancient law of *France*, if any one was about to commit an illegal act against a third person, such third person always had a remedy.

This principle pervades everysystem of jurisprudence. Now in the case before us there appears no defect in the institution of the suit. The defendants were served with a writ of summons in the ordinary form, and were thereby given fourteen days to appear and answer the complaint served with the summons in that complaint; the plaintiffs alleged a trouble *de droit*, for which they asked a suitable remedy, and the only one which in the circumstances would be effective, namely, that the defendants should be restrained from selling the plaintiffs' land for the purpose of realizing a sum of money as taxes rated, not upon the assessment contained in the only legal assessment roll affecting the lands, but upon an amount stated in an assessment roll which is wholly illegal and void, and made by the defendant municipality contrary to law, and, in fact, without any jurisdiction under the circumstances to make it. Under these circumstances, there is nothing in the objection, as it appears to me, unless it be carried to the extent of insisting that, even though in an action properly instituted by writ of summons, with the ordinary delays for appearing, &c., the plaintiffs should establish, upon an *exception peremptoire* being pleaded, raising an issue upon the validity of the assessment roll, that it was absolutely illegal and void, the court is powerless to give by final judgment or decree at the hearing any redress; and that a superior court of original jurisdiction is so powerless I cannot admit.

Gwynne, J.

In the *Mayor of Sorel* v. *Armstrong* (1), the proceeding by writ of prohibition was disallowed upon the ground that the plaintiff alleged no want of jurisdic-

(1) 20 L. C. Jur. 171.

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tion in the municipality to make the assessment upon the land there assessed, and the claim for relief which the plaintiff relied upon was in the nature of a complaint for a wrong which he alleged was done him in his property being seized to pay a rate assessed upon land which did not belong to him. That case can be of no authority in a case like the present, unless it be to establish the applicability of the writ of prohibition to a case like the present—a position which I understand to have been asserted from time to time by no less than eleven judges of the province of *Quebec*.

Sanborn, J, in giving judgment against the maintenance of the writ of prohibition in that case, expresses his opinion to be that where municipal councils exercise jurisdiction which is in its nature judicial, and usurp power not given by law, a writ of prohibition may issue to restrain them from proceeding with such usurpation. Now, this is the very thing charged here, namely, that while an assessment roll, which was valid and binding for three years from 1875, was in existence, the municipality in 1876, instead of revising that assessment roll and making alterations therein, as they might by law have done, made a wholly new assessment roll, superseding the legally existing one, which they had no jurisdiction or authority by law to make. The whole question in the case is: Was the roll which was made in 1876, a revision or amendment of the roll of 1875? or was it a wholly new and independent roll? If the former it was legal, and the plaintiffs have no cause of action or *locus standi in curiâ*; if the latter, it was wholly illegal and beyond the jurisdiction of the municipality to make, and if beyond their jurisdiction, then, upon the principle enunciated by *Sanborn*, J., in the *Mayor of Sorel* v. *Armstrong*, the writ of prohibition lies; so that, according to that principle, the question of the validity of the assessment

roll of 1876 must be determined before it can be said whether the writ of prohibition lies or not. But, however that may be, in a suit framed as this is, wherein the plaintiffs complain of a trouble *de droit* which they allege to be wholly illegal, upon the ground that the assessment roll, in virtue of which the defendants justify it, is wholly null, void and *ultra vires* of the municipality making it, it is, in my judgment, quite impossible to avoid adjudicating upon the question raised as to the validity of the assessment roll which is assailed; and, agreeing as I do with the majority of the Court of Queen's Bench in appeal, that it was, for the reasons pleaded, invalid, their judgment to that effect must, in my opinion, be maintained.

If the judgment should stop there, it would be incompetent for the defendants to proceed to enforce, by sale of the plaintiff's lands, the payment of rates calculated upon an assessment roll judicially pronounced to be null and void; but it is impossible to say that a court, having power judicially to pronounce the roll to be null and void, cannot add to its judgment what is the natural and inseparable consequence of such adjudication, namely, an order forbidding the defendants to proceed with the steps taken by them with the view of enforcing such void and illegal roll, and whether such addition to its judgment should be effected by a simple direction or declaration in the judgment or decree, or by a writ in pursuance of such declaration issued out of and under the seal of the court, by whatever name such writ should be designated, appears to me to be quite immaterial. The substance is the declaration that the roll is null and void and *ultra vires* of the municipality. The natural and inseparable consequence of such an adjudication must be that it cannot be enforced.

In my judgment, therefore, this appeal should be dismissed with costs, as the above in substance is what

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the judgment of the Court of Queens Bench in appeal declares.

DISMISSED ? SEE HANDBOOK p. 2.

Appeal allowed with costs.

Attorneys for appellants: *Mousseau & Archambault.*

Attorneys for respondents: *Barnard, Monk & Beauchamp.*

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*Dec. 10, 12.

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*Mar. 13.

L. McCALLUM (*Defendant*).....APPELLANT;

AND

D. B. ODETTE (*Plaintiff*).....RESPONDENT.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

In re "THE M. C. UPPER."

Appeal and cross appeal from the Maritime Court of Ontario—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of.

On the 27th April, 1880, at *Port K.* on Lake Erie, where vessels go to load timber, staves, &c., and where the *Erie Belle*, the respondent's vessel, was in the habit of landing and taking passengers, the *M. C. Upper*, the appellant's vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform in-coming vessels where it was. The *Erie Belle* came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the *M. C. Upper*, making a large hole in her bottom.

On a petition filed by the owner of the *Erie Belle*, in the Maritime Court of *Ontario* to recover damages done to his vessel

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

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by the schooner *M. C. Upper*, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one half of the damage sustained by the *Erie Belle*. On appeal by owner of *M. C. Upper* and cross appeal by owner of *Erie Belle* to the Supreme Court of *Canada*,

Held, Per *Ritchie*, C.J., and *Fournier* and *Taschereau*, JJ., that as the *Erie Belle*, being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, and as the *M. C. Upper* had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the *Erie Belle*, the owner of the *Erie Belle* was entitled to full compensation, and the *M. C. Upper* should pay the whole of the damage.

Per *Strong*, *Henry* and *Gwynne*, JJ., that the *M. C. Upper* had a right to have her anchor where it was, and that it was not in the line by which the *Erie Belle* entered and by which she could have backed out; that the strain on the anchor chain when the crew of the *M. C. Upper* were hauling on it all the time the *Erie Belle* was at *K.* sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the *M. C. Upper*.

The court being equally divided, the appeal and cross appeal were dismissed without costs, and the judgment of the Maritime Court of *Ontario* affirmed.

APPEAL from a judgment of the Maritime Court of *Ontario*.

This was a petition filed by the respondent, the owner of the steamer *Erie Belle*, to recover damages for injury done to his vessel by the schooner *M C. Upper*, of which the appellant is owner.

The case made by the petition, as amended, was that on the 27th April, 1880, the defendant's schooner, the *M. C. Upper*, was moored at the dock at *Kingsville*, and had her anchor dropped, at a distance of about 250 feet from the dock, in the channel by which vessels usually depart from said port; that there was no buoy or other signal to indicate the position of the anchor; that about one o'clock in the afternoon of that day, the

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plaintiff's steamer, the *Erie Belle*, in her usual course, called at *Kingsville*, and shortly after, in backing out, struck the anchor of the *M. C. Upper*, being unaware of its being there, making a hole in her own hull, and in order to avoid sinking, ran ashore on *Lake Erie*; and that the disaster was imputable solely to the fault of the *M. C. Upper* in not buoying her anchor.

The plaintiff further alleged that "it is the custom and usage at the said port, for all vessels having an anchor out to mark its position by a buoy or signal."

The defendant's contention was that the anchor lay where the direction of the chain indicated; that *Kingsville* was merely a wharf on the open coast, and that there was no channel leading to it, and plenty of sea-room for the plaintiff's vessel; that the persons in charge of the *Erie Belle* were well aware of the position of the anchor, and that the accident was due solely to the careless and unskilful manner in which the *Erie Belle* was managed, it being proved that the vessel was entrusted to another mariner, Captain *Laframboise*, who voluntarily offered to take the vessel in; that there was no obligation to buoy the anchor, and, in any case, that the absence of a buoy did not contribute to the disaster; that there was no impact between the vessels. The facts of the case appear in the following extract from the judgment of his honor *G. W. Leggatt*, Esq., surrogate judge of the Maritime Court of *Ontario* at *Sandwich*.

"I think it may be premised, for upon these points the evidence preponderates, if all the witnesses do not agree, that the port of *Kingsville* consists of a wharf projecting out in a southerly direction into the lake a distance of about 860 feet, where vessels go to load timber, staves, &c., and where the *Erie Belle* was in the habit of landing, when the weather permitted, on her route between *Windsor* and *Leamington*, with and

for passengers and freight. That around the wharf, extending some distance east and west, there is a uniform sandy or hardpan bottom, interspersed with stones or boulders of greater or less size, the water gradually increasing in depth as the distance from the shore becomes greater, being nine or ten feet at the southerly end of the wharf and increasing to the depth of eleven feet, two hundred feet farther away into the lake in a westerly direction where the accident occurred. That it is customary for vessels in going to a wharf of this kind, exposed as it is on the open coast, for a cargo, to drop their anchor some distance away from the wharf, either to the east or west side thereof, as circumstances suggest or require; and that this mode of dropping the anchor a distance away, when making for the wharf, is taken as a proper precautionary measure to enable them to haul away from the wharf, in case the wind sets in from off the lake and they are required or forced to leave. That it is not usual to buoy the anchor in such a place as this: that the custom of buoying the anchor has gone out of vogue (though it did prevail at one time), in consequence of the liability of propellers to pick the buoys up with their wheels; that there is, as a rule, nothing to indicate to in-coming vessels or propellers where the anchor of a vessel is, except the known or recognized custom which prevails among vessels of casting their anchor as nearly in line with that of the side of the wharf at which they intend to land as they can get, so that the chain or cable would be, when heaved taut, in a direct line from the hawser hole to the place where the anchor would be, and parallel with or in continuation of the direct line of the east or west side of the wharf, just as the vessel may lie on the east or west side thereof. That knowing this practice, a steamer in making the wharf, seeing a schooner lying on the west

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side of the wharf, would get the range of the east side, some distance away, in order to avoid the possibility of coming in contact with the anchor, and thence proceed to the east or opposide side of the wharf to that upon which the schooner lies."

And the learned judge at the trial came to the following conclusions:

"After making due allowance for the probable bias of the officers and crew of both the *M. C. Upper* and the *Belle* in giving their testimony in this cause, and giving the whole of the evidence the greatest possible consideration, I have come to the following conclusions: 1st. That the anchor of the *Upper* was dropped about 200 feet south of the wharf, and about in line with the centre of the wharf, extended in about 11 or 12 feet of water. 2nd. That the obstruction that the *Belle* came in contact with in backing out of the wharf, causing her to keel over the way she did, and making a large hole in her bottom, was the anchor of the *Upper*. 3rd. That the *Belle* in backing out did not retain the range of the east side of the wharf. *Laframboise* says "that she was heading about north when she struck." And *Odette*, the captain, says: "We backed out in range of the east side of the dock—observed great care in backing out, and followed the usual course; we might have diverged 4 or 5 feet." If the boat was heading about north when she struck, she must have been farther west than they imagined. The wharf direction from the shore is somewhat east of south. 4th. It was misconduct, want of proper care and prudence on the part of the *Upper* in dropping her anchor where she did, in water not more than 12 feet deep, without buoying the same, or taking some measure to inform in-coming vessels or steamers where it was.

"On the other hand, I find that the *Belle* is chargeable with contributory negligence. 1st. In going into the

wharf on that day, contrary to the better judgment of the captain or person in command, and when he knew it was dangerous, the water being low; 2nd. In the captain giving over the charge of his vessel for the time being, to an irresponsible person to take her into the wharf, when he would not do it himself; and 3rd. In not taking greater care to observe and maintain the same course in backing out from the wharf that they did in going in.

"The *Belle* having failed to return immediately to the wharf she had just left, to ascertain the extent of the leak, before making for the river, exhibited a manifest want of skill and ordinary judgment, and thereby augmented and increased the expense of raising and repairing her.

"I assess the damage sustained by the plaintiff at $1,000.00; and, both vessels being in fault, do order and decree that the defendant do pay one moiety thereof to the plaintiff or petitioner, and that both parties be left to pay their own costs."

A decree was drawn up accordingly, from which both parties immediately appealed. The plaintiff being the respondent on the main appeal, and the appellant on the cross appeal.

Mr. *Dalton McCarthy*, Q.C., for appellant and respondent on cross appeal, contended, upon the facts, that the *M. C. Upper* had not been guilty of contributory negligence, and that the rule respecting division of damage which obtains in the English High Court of Admiralty in cases of collision, was not applicable to this case, there being no impact between the parties—no collision.

Mr. C. *Robinson*, Q.C., for respondent and appellant on cross-appeal, contended that the *M. C. Upper* was responsible for the total amount of damage sustained.

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RITCHIE, C.J.:—

I think there is sufficient evidence in the case to sustain the finding of the judge that the accident was occasioned by the *Erie Belle* coming in contact with the anchor of the *M. C. Upper*. That the *Erie Belle* had the right to come into the wharf to take on board the passengers; that she did go in successfully and was in charge of a competent and skilled mariner, and that he did navigate the vessel with care and skill; that such being the case, whether he was in the employ and pay of the owner, or took charge of the vessel voluntarily at the request or by consent of the captain in charge, so far as the liability of defendant is concerned, is matter of no consequence whatever. That the *Erie Belle* backed in range with the east side of the dock and out in the usual and customary course and manner, and that had the anchor of the *M. C. Upper* been, as it should have been, in a direct line from the hawser hole in continuation of the direct line of the west side of the wharf, or if not in such direct line the anchor had been buoyed, the collision would not have taken place. That the anchor was dropped too far to the eastward.

That there is evidence that not only with a view to the convenience of the vessel herself, but having a due regard to the safety of other vessels coming in and leaving the pier, it is both prudent and right that anchors so dropped should be buoyed, and though the wholesome, sound and necessary rule of practice may have been abandoned, or not of late generally acted on, I am of opinion that those who choose for their own convenience not to adopt it, but to cast their anchors and leave them without a buoy or other indication of their actual position, do so at their own peril and risk, and if for want of such buoy or indication, vessels lawfully navigating the lake and in coming to or leaving the

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pier, using due, ordinary and reasonable skill and care, collide with such anchors, and damage is the result, it is a damage for which the parties so placing and leaving their anchors must be responsible. I cannot agree with the learned judge that the *Erie Belle* is chargeable with contributory negligence either in going into the wharf as she did, or in the captain having given over the charge of the vessel to a thoroughly skilled mariner, nor was there, in my opinion, any evidence of want of skill or care in backing out from the wharf.

If I could come to the conclusion at which the learned judge has arrived as to contributory negligence of the *Belle* or those in charge of her, I should think the blame rested on her, because if she ought not to have come to the wharf on that day, and doing so was improper, and by reason thereof the accident happened, or if her captain improperly gave up the command to an irresponsible person, and by reason thereof the accident happened, or if they did not take proper care in pursuing and maintaining the same course in backing out from the wharf that they did in going in, it is clear that the plaintiff cannot contend that the accident would not have been avoided by the exercise of ordinary care on his part. If he ought never to have gone into the wharf, and he wrongfully and negligently did so, it is clear that the accident never could have happened but for his wrongful and negligent conduct, and so, if the giving up the charge of the vessel was wrongful and negligent conduct, and the accident resulted therefrom, then equally was it occasioned by his wrongful act. So, if proper care was not taken in coming out, and the accident resulted therefrom, can it be said that in either or all of these cases the accident would not have been avoided by the exercise of ordinary care, in which case the plaintiff would not be liable.

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I cannot agree with the learned judge that both vessels were to blame. I think the blame rests with the *M. C. Upper*, and that the *Belle* is entitled to full compensation, and the *M. C. Upper* should pay the whole of the damage, estimated at $2,000, and costs As then, I think the *Belle* went to the wharf in the usual way, and came out in the usual way, and had a right to assume that the *M. C. Upper* had placed no impediment in her way—and could and would have done so in safety if the anchor of the *M. C. Upper* had been where it ought to have been, or had been buoyed, as it ought to have been, or had the parties in charge of the *M. C. Upper* notified or indicated its position to the *Belle*, as they ought to have done, I can discover no negligence or any want of the exercise of ordinary or proper care on the part of the *Belle*.

The law as to negligence has been settled perfectly well and beyond dispute, as was said by the Court of Exchequer in *Radley* v. *The L. & N. W. Ry. Co.* (1):

> The first proposition is a general one to this effect: that the plaintiff in an action of negligence cannot succeed, if it is found by the jury that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and negligence have avoided the accident which happened, the plaintiff's negligence will not excuse him.

I think there is nothing whatever in the objection that there was "no impact between the vessels." The hawser and anchor were as much a part of the *M. C. Upper* as her masts, sails or hull.

Therefore, I think the appeal should be dismissed and cross-appeal allowed, but as the court are equally

(1.) L. R. 9 Ex. 71. and 1 App. Cas. 754.

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divided and the cross-appeal cannot be allowed, the appeal will stand dismissed but there can be no costs.

STRONG, J. :—

The learned judge before whom this case was heard in the Maritime Court found "that it is not usual to buoy the anchor in such a place as this; that the custom of buoying the anchor has gone out of vogue (though it did prevail at one time) in consequence of the liability of propellers to pick up the buoys with their wheels; that there is, as a rule, nothing to indicate to incoming vessels or propellers where the anchor of a vessel is, except the known or recognized custom which prevails among vessels of casting their anchor as nearly in a line with that side of the wharf at which they intend to land as they can get, so that the chain or cable would be, when hauled taut, in a direct line from the hawser hole to the place where the anchor would be, and parallel with, or in continuation of, the direct line of the east or west side of the wharf, just as the vessel may be on the east or west side thereof." This finding, it appears to me, at least so far as regards the abandonment of the procedure of buoying the anchor, was entirely justified by the evidence. It follows, therefore, that no negligence can be imputed to the vessel in the present instance for having omitted to affix a buoy to the anchor, that practice having been discontinued advisedly and for the purpose mentioned by the learned judge of avoiding the inconvenience caused by the buoys coming in contact with the wheels of propellers. That portion, therefore, of the judgment appealed from which determines that it was "misconduct and want of proper care and prudence on the part of the *Upper*" to drop her anchor where she did without buoying it, is not only not warranted by the proof, but is in direct contradiction to the express find-

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ing of the learned judge himself as a fair and just inference from the evidence.

This leaves, then, the question of negligence to depend altogether on whether the anchor of the *Upper* was dropped too far to the east.

The learned judge having, as I think, properly found that the suggestion or theory that the cable had been fouled by coming in contact with the remains of the old sunken pier is not supported by the testimony, it is clear that the locality of the anchor must have been exactly indicated by the cable on which the crew of the *Upper* were hauling at the time of the collision. Then the captain of the *Erie Belle* and other witnesses for the propeller, who were on board her at the time of the collision, distinctly say that the direction of the *Upper's* chain indicated that the anchor was in a line with the centre of the dock, or to the west of that line, and the hypothesis of the sunken pier being destroyed, the evidence establishes beyond a doubt that this must have been so. The finding of the learned judge upon this point is also, in this respect, directly in favor of the *Upper*. It is: "that the anchor of the *Upper* was about 200 feet south of the wharf and almost in line with the centre of the wharf extending in about 11 or 12 feet of water." This, therefore, disposes of the only ground for the imputation of negligence in the selection of the place of anchoring, and there remains nothing to support the decree of the court below.

I do not discuss the evidence in detail, as I entirely agree in the conclusions of fact at which the judge in the Maritime Court arrived. I only differ from him as regards the legal consequences of these facts, which, in my opinion, should have been directly opposite to those which the decree has attached to them.

The decree should be reversed and the action dismissed with costs to the appellant in both courts.

FOURNIER and TASCHEREAU, JJ. concurred with the Chief Justice.

HENRY, J., :—

I adopt all the conclusions of the learned judge before whom this case was tried, except the one as to the right of the respondent to recover.

To sustain the action it is necessary to establish by evidence that the appellant's schooner was guilty of negligence in dropping her anchor where she did; that the damage to the *Erie Belle* was caused by the striking on the anchor; and that the *Erie Belle* was not guilty of contributory negligence.

According to the facts as found by the judge, there was not any negligence on the part of the schooner. He negatives the allegation that there was any custom in relation to placing buoys over the anchor in such places, and clearly shows that it having been so at one time it was abandoned.

There was then no want of duty on the part of the schooner in not buoying her anchor.

Was she otherwise guilty of negligence? If so I cannot see in what it consists. It was an exposed situation, and it has been shown to have been a necessary and customary caution for vessels going to the wharf to drop their anchors about two hundred yards from the wharf to haul off by, and, in case of the wind blowing hard on the south end of the wharf, particularly necessary. The finding of the judge shows she dropped anchor in a line with the centre of the wharf and hauled in on the west side of it. If she had dropped it in a line with the east side of the wharf, or further east of that line, there might in such a case have been a liability to intimate its position by a buoy or otherwise, so that a steamer or other vessel might have the power of

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avoiding it, but placed as it was I can see no obligation that rested on the schooner to give any intimation whatever. The commander had no reason to suppose that every steamer coming to the east side of the wharf would touch an anchor so placed, and the fact that the *Erie Belle* came in to the wharf safely shows that the anchor was not improperly placed, and had she gone out as she should have done by the same course the damage would not have been occasioned. The schooner was not guilty of the breach of any law or custom. She had the common law right to do as she did, and the contributory negligence of the *Erie Belle*, as so properly found by the judge, was the sole cause of the damage. In such a case the law throws no liability on the schooner to pay damages. In cases of collision if both vessels are to blame each party bears his own loss.

Abbott at page 614 (11th ed) says:

> But of the sea as of the road the law recognizes no inflexible rule, the neglect of which by one party will dispense with the exercise of ordinary care and caution in the other, one person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—a collision by default of the defendant, and no want of ordinary care on the part of the plaintiff.

Where damage has been caused in cases of collision and both vessels were found in fault.

The principles upon which judgments have been so given are, however, inapplicable to this case. The respondent, as I view the law, cannot recover if guilty of contributory negligence, and such has been found by the judge.

The law of the road, I consider, is that to govern the decision of this case, and under that law a party guilty of contributory negligence cannot recover. I, however, am of the opinion, independently of that defence, that the schooner was not in fault.

Besides, by the evidence of the captain of the *Erie*

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Belle striking took place 100 yards from the wharf, while it is shown that the anchor was dropped 200 yards from it. In that case the striking must have been on a rock or part of the old pier.

I think, therefore, the appeal should be allowed and judgment given for the appellants with costs.

GWYNNE, J.:—

The evidence fails to satisfy my mind that the persons in charge of the defendant's vessel, the *M. C. Upper*, were guilty of any actionable negligence.

The plaintiff's case as stated in his petition is, that the *M. C. Upper*, while moored at the west side of a pier at *Kingsville*, situate on the open shore of *Lake Erie*, had her anchor dropped in the channel by which vessels calling at *Kingsville* usually enter and depart, and that by reason of there being no buoy to indicate the position of the anchor, that plaintiff's vessel, the *Erie Belle*, backing out from the pier by the said channel, struck the anchor of the *M. C. Upper* and was damaged, and the plaintiff averred that the said disaster and the losses and damage consequent thereon occurred through and are imputable solely to the wrongful neglect and improper conduct of the master and crew of the *M. C. Upper* in placing and allowing the said anchor to remain in a shallow channel used for purposes of navigation without any buoy, signal or other thing whatsoever to indicate its position; and had a buoy or other signal been placed where the said anchor lay the said accident would not have occurred, and the plaintiff averred that it is the custom and usage of the said port for all vessels having an anchor out to mark its position by a buoy or signal, and that the defendant, in ignoring said custom and usage and refusing to conform to it, directly brought about the said disaster. The defendant, in his answer, alleged that

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the place which in the plaintiff's petition had been called the "Port of *Kingsville*," is a place on the shore of *Lake Erie*, where vessels go to load timber and staves, but is not a regular port, and that vessels which go to load there, on account of its exposed position and the danger that might be occasioned to them by shifting or rising winds, are compelled, for their safety and to prevent their grounding, to have an anchor and from 50 to 70 fathoms of chain out so as to be ready to heave upon it and haul the vessel off shore in case it should be necessary, and that the said vessel, the *M. C. Upper*, then being in charge of the defendant's servants, the master and crew of the said vessel, was loading at the dock at *Kingsville* and had her anchor out, and at the time of the alleged disaster the crew of the said vessel were endeavoring to haul the said vessel off as the wind was rising and the vessel was grounding astern, and the person in charge of the *Erie Belle* and her crew knew that the said *M. C. Upper* had her anchor out and that her crew were hauling on it and endeavoring to haul the said vessel off, and that if the damage to the *Erie Belle* was occasioned as alleged by the anchor of the *M. C. Upper*, the same arose from the negligent and careless manner in which those in charge of the *Erie Belle* backed that vessel out, and the defendant alleged that there is no such custom or usage at the place as stated in plaintiff's petition as to mark the position of the anchor when out by a buoy or signal.

At the trial the contention of the plaintiff was, that while the *M. C. Upper* was moored on the west side of the wharf at *Kingsville*, her anchor was dropped some distance out in the lake east of the eastern side of the wharf extended, thus bringing her cable directly across the end of the wharf from east to west, and that though the cable when hauled taut, as it was when the

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Erie Belle entered, did indicate that the anchor was about in range with the westerly side of the wharf extended, that circumstance was attributable to the fact that the cable was fouled with an obstruction consisting of the corner of an old pier or crib, and that by reason thereof the true position of the anchor which was on the east of the east side of the wharf extended, which was the course of the *Erie Belle* to enter and leave by, was not indicated.

The defendant's contention, on the contrary, was that there was no custom or usage there of buoying anchors, and that the strain on the anchor chain, when the crew of the "*Upper*" were hauling on it all the time the *Erie Belle* was at *Kingsville*, truly indicated the position of the anchor as well as a buoy, which position was the spot where the plaintiff contended that the *Upper's* cable was fouled by the corner of the old pier.

The learned judge before whom the case was tried came to the conclusion that *Kingsville* is situate as described in the defendant's answer, and that it is not usual, nor is there any custom, to buoy the anchor in such a place. That there was nothing left of the pier which the plaintiff contended had fouled the chain of the *M. C. Upper's* anchor, which could foul or obstruct that chain, and that the theory of the plaintiff, that if the trend of the chain from the *M. C. Upper's* hawser hole would indicate that her anchor was not as far east as the plaintiff contended it was, that was owing to the fact that the chain had caught on and been fouled by the corner of the old pier, must be abandoned, and he found further that in fact the anchor of the *M. C. Upper* was dropped about 200 feet south of the wharf extended, and about in line with the centre of the wharf extended in about 11 or 12 feet

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of water. The precise position, I think, upon the evidence, would be at a point from 10 to 15 feet west of the centre line of the wharf produced, and, in fact, at the place where the anchor cable when hauled taut indicated it to be, that is to say, at the spot which the plaintiff insisted was the corner of the old pier; and that being the position of the *M. C. Upper's* anchor, such position was as well indicated by the hauling on the anchor as if it had been buoyed, and, moreover, the evidence shows that if such was the position of the anchor it was not in the line by which the *Erie Belle* entered and by which she should have backed out, and that in fact those in charge of the *Upper* were not guilty of the negligence charged or of any negligence. How the learned judge notwithstanding could find, as he did, that it was misconduct and want of proper care and prudence on the part of the *Upper* in dropping her anchor where she did without buoying the same, I fail to see. This latter finding is not, in my judgment, supported by the evidence, nor is it consistent with the other findings of the learned judge himself.

The plaintiff has, in my judgment, failed to establish the position on which he based his claim, and if the anchor of the *Upper* was, as I think it is established to have been, to the west of the centre line of the wharf produced, its position was sufficiently indicated to those in charge of the *Erie Belle* by the strain upon it in hauling in the cable, and if, under such circumstances, it was the *Upper*'s anchor which did to the *Erie Belle* the damage complained of, I cannot see that those in charge of the *Upper* can be said to have been guilty of any negligence to which such damage can properly be attributed.

I think, therefore, that the appeal of the defendant

should be allowed, and the cross appeal of the plaintiff dismissed, with costs.

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Appeal and cross appeal dismissed without costs.

Solicitors for appellant: *Miller & Cox.*

Solicitors for respondent: *Patterson & McHugh.*

THE QUEEN .....APPELLANT;

AND

SIR NARCISSE FORTUNAT BELLEAU, KNT., AND OTHERS..... } RESPONDENTS.

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*May 17.

1881

*Feb'y. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

16 *Vic., ch.* 235—*Construction—Debentures issued by Trustees of the Quebec Turnpike Roads—Legislative recognition of a debt—Trustees—Parliamentary agents, Liability of the Crown for acts by.*

Held, (*Ritchie,* C.J., *and Gwynne,* J., dissenting,)—That the trustees of the *Quebec* North Shore Turnpike Trust, appointed under ordinance, 4 *Vic.*, ch. 17, when issuing the debentures in suit, under 16 *Vic.*, ch. 235, were acting as agents of the government of the late province of *Canada,* and that the said province became liable to provide for the payment of the principal of said debentures when they became due.

Per *Henry* and *Taschereau,* JJ., That the province of *Canada* had, by its conduct and legislation, recognized its liability to pay the same, and that respondents were entitled to succeed on their cross appeal as to interest from the date of the maturing of the said debentures.

Per *Ritchie,* C.J., and *Gwynne,* J.: That the Trustees, being empowered by the ordinance to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed

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

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and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of this province" the debentures did not create a liability on the part of the province in respect of either the principal or the interest thereof (1).

APPEAL and cross appeal from a judgment of the Exchequer Court of *Canada* (December 24, 1879) decreeing that appellant was legally liable to the respondents for the payment of the principal of certain debentures issued by the Trustees of the *Quebec* Turnpike roads under the authority of 16 *Vic.*, c. 235.

The respondents by petition of right set forth in substance:

That the province of *Canada* had raised, by way of loan, a sum of £30,000 for the improvement of provincial highways situate on the north shore of the river *St. Lawrence*, in the neighbourhood of the city of *Quebec*—and a further sum of £40,000 for the improvement of like highways on the south shore of the river *St. Lawrence*—that there were issued debentures for both of the said loans, signed by the *Quebec* turnpike road trustees, under the authority of an act of the Parliament of the province of *Canada*, passed in the sixteenth year of Her Majesty's reign, intituled: "An act to authorize the trustees of the *Quebec* turnpike roads to issue debentures to a certain amount and to place certain roads under their control"—that the moneys so borrowed came into the hands of Her Majesty, and were expended in the improvement of the highways in the said act mentioned—that no tolls or rates were ever imposed or levied on the persons passing over the roads improved by means of the said loan of £30,000—that the tolls

(1) The judgment of the Supreme Court of *Canada* was reversed by the Judicial Committee of the Privy Council and the holding of the minority of the court was affirmed. See 7 App. Cases 473. See also appendix to this case.

imposed and collected on the highways improved by means of the said loan of £40,000 were never applied to the payment of the debentures issued for the said last mentioned loan in interest or principal—that the trustees accounted to Her Majesty, as well for the said loans as for the tolls collected by them—that at no time had there been a fund in the hands of the said trustees adequate to the payment, in interest and principal, of the debentures issued for said loans—that the respondents are holders of debentures for both of the said loans to an amount of $70,072, upon which interest is due from the first day of July, 1872—that the debentures so held by them fell due after the union, and that Her Majesty is liable for the same under 3rd sec. of British North America Act, 1867, as debts of the late province of *Canada* existing at the union.

In his defence to this petition, Her Majesty's Attorney-General did not deny the liability of Her Majesty for the debts of the late province of *Canada*, but he denied that the debentures in question were debentures of the province of *Canada*—that the moneys for which they issued were borrowed and received by Her Majesty—that there was any undertaking or obligation in the province of *Canada* to pay the whole or any part of the said debentures.

The questions of law arising out of the defence set up by the Attorney-General and argued at length may be resumed into the following:—

Whether the debentures in question were or not debentures of the late province of *Canada*?

Whether the moneys for which they issued, did or not come into the hands of Her Majesty, and were expended in the improvement of provincial highways?

Whether there was any undertaking or obligation in the late province of *Canada* to pay the said debentures?

And whether *Canada* is or not liable to pay the said

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debentures under the provisions of the British North America Act, 1867?

The case was argued in the Exchequer Court, *Fournier*, J., presiding, by Mr. *Irvine*, Q. C., and Mr. *Andrew Stuart*, on behalf of the suppliants, and Mr. *Langelier*, Q. C., and Mr. *Langlois*, Q. C., on behalf of the Crown, and the following judgment in favor of the suppliants was delivered:—

FOURNIER, J.:—[*Translated.*]

"This is a petition of right, by which the suppliants seek to recover from Her Majesty the sum of $70,072, with interest from the 1st July, 1872, in payment of an equal sum loaned on debentures issued by "the trustees of the *Quebec* Turnpike Roads" under the authority of an Act passed by the legislature of the province of *Canada*, 16 *Vic.* ch. 235.

"The question submitted for the decision of this court is whether the crown can legally be held liable for the payment at maturity of the debentures so issued.

"In order to determine this point it will be necessary to refer to the special legislation originally effected in reference to these turnpike roads.

"It was by the ordinance 4 *Vic.* ch. 17, that this mode of improvement of roads was introduced in the late province of Lower *Canada*, now the province of *Quebec*. The object and the intention of this legislation, in making the change in the system then followed for the management of the roads, are thus stated in the preamble to the ordinance:

"'Whereas the state of the roads hereinafter mentioned, in the neighborhood of, and leading to the city of *Quebec*, is such as to render their improvement an object of immediate and urgent necessity, and it is therefore expedient to provide means for effecting such improvement, and to create a fund for defraying the

expense thereof, and the expenses necessary for keeping the said roads in permanent repair.'

"It then proceeded to enact, that the powers and authorities vested by 36 *George III.*, in any magistrates, *grand voyer* and other officers should cease and determine from and after the time when the trustees, authorized to be named by the ordinance, should assume the management and control of the roads. The governor is authorized by letters patent, under the great seal of the province, to appoint not less than five, nor more than nine persons, to be, as well as their successors in office, trustees, for the purpose of opening, making and keeping in repair the roads specified in the ordinance.

"In case of a vacancy in the said trust the governor was to supply and fill such vacancy by the appointment by letters patent of another trustee.

"The trustees are then declared to be a corporation to be known by the name of 'The trustees of the *Quebec* 'Turnpike Roads' and may sue and be sued, and 'may acquire property and estate, movable and immovable, which, being so acquired, shall be vested in Her Majesty for the public uses of the province, subject to the management of the said trustees for the purposes of this ordinance,' and who are given all the necessary powers to cause to be improved and widened, repaired and made anew all the roads and bridges put under their control.

"By the 4th, 5th, 6th and 7th sections provision is made for expropriation and the payment of compensation for damages.

"The trustees are also authorized to levy on each of the said roads, at the turnpike gates or toll bars to be thereon established, the tolls specified in said ordinance.

"The trustees were authorized to raise by way of loan, on the credit and security of the tolls, and of other moneys in the possession of the trustees, under

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and by virtue of this ordinance, 'and not to be paid out of or be chargeable against the general revenue of this province, any sum or sums of money not exceeding £25,000.'

"The trustees are authorized to issue debentures in the form contained in the schedule A, bearing interest at six per centum per annum, and redeemable at such times as the trustees may think convenient. With the approval of the governor the debentures may be redeemed before the time they are made redeemable. All arrears of interest were to be paid before any part of the principal sum. In case of deficiency of funds at the disposal of the trustees to pay interest accrued, the governor, by warrant under his hand, may authorize the Receiver General to advance to the said trustees out of any unappropriated moneys in his hands the necessary amount sufficient to pay such arrears of interest, and which sum shall be repaid by the trustees to the Receiver General in the manner specified in the ordinance.

"The trustees were also authorized, with the approval of the governor, to raise further sums to pay off the principal of any loan becoming due at a certain time, under the same provisions as the previous loans.

"It was further enacted that due application of all public moneys, whereof the expenditure or receipt was authorized, shall be accounted for to Her Majesty through the Lords Commissioners of Her Majesty's treasury for the time being, in such manner and form as Her Majesty, her heirs and successors, shall be pleased to direct.

"The trustees were also bound to lay detailed accounts of all moneys by them received and expended, supported by proper vouchers, and also detailed reports of all their doings and proceedings before such officer, and in such manner and form, and publish the same in such a

way, at the expense of the trustees, as the governor shall be pleased to direct.

"The ordinance was declared to be a public and permanent ordinance.

"All the provisions of this ordinance were put into force by trustees duly appointed, who took the management and control of these roads for the use and benefit of the public.

"The late province of *Lower Canada* borrowed through these trustees the sum of £25,000 for the amelioration of these roads as authorized by the said ordinance.

"This amount was employed in conformity with the provisions of the Act—detailed accounts of the same as public moneys were rendered to Her Majesty as ordained by the ordinance, as well as of the tolls collected on said roads.

"After the union of *Canada*, the provisions of this ordinance were extended and made applicable to divers other roads. The legislature and the executive government of the late province of *Canada* have always exercised over these roads, and other property under the control of the trustees, the most absolute and unlimited powers.

"By 16 *Vic.* ch. 235, the statute under which the debentures now in question were issued, the provisions of the ordinance 4 *Vic.* ch. 17 which I have just summarized, and the powers of the trustees, are extended and made applicable to a certain number of other roads and bridges therein mentioned, and situated on the north and south shores of the *St. Lawrence.*

"The principal provisions of this Act, which have reference to the point raised in this suit, are contained in the following sections:—

"The seventh section authorizes the issue of debentures for a loan of £30,000 for the construction and

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completion of the works authorized by this Act, and an Act of the preceding session, on the roads on the north shore of the *St. Lawrence*, and which loan is made subject to the provisions of the ordinance 4 *Vic.* ch. 17, as follows: 'and this loan, the debentures which shall be issued to effect the same, and all other matters having reference to the said loan, shall be subject to the provisions of the ordinance above cited with respect to the loan authorized under it: Provided nevertheless, that the rate of interest to be taken under this act shall in no case exceed the rate of six per centum, and no moneys shall be advanced out of the provincial funds for the payment of the said interest, and all the debentures which shall be issued under this act, so far as relates to the interest payable thereupon, shall have a privilege of priority of lien upon the tolls and other moneys which shall come into the possession and shall be at the disposal of the said trustees, in preference to the interest payable upon all debentures which shall have been issued under the provincial guarantee, and also to all other claims for the reimbursement of any sums of money advanced or to be advanced to the said trustees by the Receiver General of this province, and the said debentures as respects the payment of the principal and interest thereof, shall rank after those issued under the act passed during the last session of the parliament of the province and hereinbefore cited.

"A further sum of £40,000 was by the tenth section of the same act authorized to be raised by way of a loan subject to the conditions in the seventh section for the construction and repairing of the roads on the south shore of the *St. Lawrence.*

"These different loans were made by the issuing of debentures, and the moneys raised thereby were employed by the trustees to pay for the works and improvements specified in the said act.

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"Unfortunately for the suppliants the revenues derived from these new roads, as well as from those derived from the roads first made by the trustees, and which constituted the special fund created by 4 *Vic.*, ch. 17, were found insufficient to pay even the interest on the amounts so borrowed. The result has been that the suppliants have not received any interest since 1872, nor have the legislature taken any steps to remedy the present state of affairs by making provision for the repayment of the loans, which matured in part on 2nd March, 1869, and in part on 1st December, 1874.

"In answer to this petition Her Majesty avers that all the debentures guaranteed by the ordinance of 1841 were redeemed in 1853, and that since no debentures have been issued guaranteed by the province, but that on the contrary by 12 *Vic.*, ch. 115, 14 & 15 *Vic*, ch. 132, 16 *Vic.*, ch. 235 and 20 *Vic.*, ch. 125 it was enacted 'that no guarantee for the said debentures should be given by the said late province of *Canada*, that no money of the said province should be advanced for paying the interest or the principal of the said debentures.'

"The facts in issue between the parties to this petition have been settled by a special admission of facts which are sufficient for the determination of the question submitted for decision. It only remains for the court to decide whether the Government of *Canada* prior to the passing of the British North America Act, was responsible for the repayment of the loans in question.

"Before taking this question into consideration, I must acknowledge that I do not do so without great hesitation. In determining this point I have not had the advantage of referring to previous decisions. The learned counsel for the suppliants as well as for respondent, in answer to a question I made on the argument, said that, notwithstanding exhaustive researches on their part, they had been unable to find a decision

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applicable to this question. I have since searched for authorities on this subject, but I must confess with no better success. It is therefore by examining our statutes and comparing them with those passed in *England* on the same subject-matter, that we will be able to arrive at a solution of this question.

"The extracts I have just given of the principal provisions of the ordinance of 1841, and of the subsequent statutes, when compared with the provisions contained in the imperial statutes relating to 'turnpike trusts,' show that there are such essential differences in these institutions in both countries as will justify me in drawing certain inferences useful to the determination of this suit.

"Before stating the peculiar provisions of the organization of turnpike trusts in *England*, I will cite a short passage on their origin: 'A turnpike road is a road across which turnpike gates are erected and tolls taken, and such roads existed previous to the passing of the 13 *Geo.* III, ch. 84, and independently of that statute altogether. A turnpike road means a road having toll gates or bars on it, which were originally called "turns," and were first constructed about the middle of the last century. Certain individuals, with a view to the repairs of particular roads, subscribed amongst themselves for that purpose and erected gates upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions addressed to parliament against them; and acts were in consequence passed for their regulation. This was the origin of turnpike roads.'

"If turnpike trusts in *England*, in their origin, resemble ours by the opposition which was made to their establishment, they differ essentially by the fundamental principle of their constitution.

"The above quotation shows that they were established

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by certain persons associated together and subscribing between themselves the amount necessary for repairing certain roads. There were quite a number of turnpike trusts in existence at the time of the passing of the 13 *Geo.* III, ch. 84, but the statutes which established these trusts were private statutes, and are not to be found in the collection of the imperial statutes. It is easy, however, to ascertain their character by referring to the act of 3 *Geo.* IV, ch. 126, passed for the purpose of legislating on this subject in a general manner for the whole country. After the 1st January, 1823, the provisions of that act were made applicable to all private acts, before, or which might be hereafter, passed, relating to the construction, repair and maintenance of turnpike roads.

"I will now refer to those provisions in the English statute which will obviously show the difference that exists between the laws in force in *England* and those which are under consideration in this case.

"Section 60 of the act enacts: 'that the right, interest and property of and in all the toll gates and toll houses weighing machines and other erections and buildings, lamps, bars, toll boards, direction boards, mile stones, posts, rails, fences and other things, which shall have been or shall be erected and provided in pursuance of any act of parliament for making turnpike roads, with the several conveniences and appurtenances thereunto respectively belonging, and the materials of which the same shall consist, and all materials, tools and implements which shall be provided for repairing the said roads, shall be vested in the trustees or commissioners acting in pursuance of such act for the time being, and they are hereby authorized and empowered to apply and dispose of the same as they shall think fit, and to bring or cause to be brought any action or actions, &c., &c.'

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"Sec. 43 gives power to the trustees to increase or diminish the tolls in accordance to the provisions of the section.

"The 62nd section provides that the trustees shall be qualified in real estate to the amount of £100 and shall take an oath of office.

"The 66th section, which has reference to the mode of appointing trustees, enacts that in case of death, insolvency or incapacity of acting, those surviving or remaining in office can elect trustees in their stead in the manner prescribed by that section.

"72. The proceedings and decisions of the trustees shall be entered in a book kept open to the inspection of the trustees and the creditors of the trust.

"73. Account books shall be kept and be opened to the inspection of the trustees and of the creditors. The eighty-first section empowers the trustees to borrow money and to give a mortgage, in the form given, as a security for the sum borrowed.

"86. When a new road has been opened and completed, the trustees can sell the old road, (sec. 89) but giving to the original proprietor or the adjoining proprietors the right of preemption. Section 135 provides for the mode of recovering a sum of money due by the trustees and enacts 'that satisfaction shall and may be levied and recovered by distress and sale of the goods and chattels vested in the said trustees or commissioners.'

"The above provisions taken in the English statute compared with those I have before cited taken from our own statute clearly show that the legislatures have given an essentially different character to the trusts in both countries.

"By the English statute the trusts are established by private enterprise and the property of the roads, tolls, &c., is vested in the commission or body of trustees

charged with the duty of administering it in the common interest, whilst by our statute, the trusts were created by the government and the property of the trust is declared to be the property of Her Majesty for the public use of the province.

"The appointment of the trustees belongs to the governor, who appoints by letters patent, under the great seal of the province, persons who shall discharge the duties of their office gratuitously, and without deriving any benefit or profit out of the revenue of the roads they manage. On the contrary, in *England*, the trustees appoint others to any vacancy, and choose persons who, like themselves, have a personal interest in the revenues of the roads under their control. They have the extraordinary power of increasing or diminishing the tolls. Here the same power could only be exercised by the Governor-in-Council, or by the parliament. The necessary funds to construct and complete the roads were raised here by the sale of debentures issued by trustees under the authority of the law; whilst in *England* the commissioners or trustees secure the amount by the private subscriptions of persons associated together for that purpose, and who therefore become, not merely creditors, but proprietors of the 'trust.'

"The English act enacts that the trustees must keep books of their orders and proceedings, and also cause to be kept, books of accounts open to their inspection and liable to be audited in their interest. None of these privileges were granted by our statutes to the holders of the debentures of our turnpike roads. The accounts to be kept of the moneys expended, which are said to be public moneys, are to be rendered to Her Majesty, her heirs and successors, through the Lords High Commissioners of the Treasury of Her Majesty for the time being.

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"Under the English statute any goods or property vested in the trustees may be levied against, for the purpose of paying off any liabilities; here they are declared to be the goods and property of the crown, and as such inalienable even for debt. See *Anderson* v. *The Quebec North Shore Turnpike Trust* (1).

"From all these differences it is clear to my mind, that under the English law turnpike trusts are nothing more than private corporations, whilst in this country they are public corporations, acting as the organs of the state in effecting a great public improvement. The principal features of the organization of the 'trusts' under our system of laws are precisely the characteristic features which constitute a public corporation, as shown by the following text writer (2).

"'But where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as the organs of the state in effecting a great public improvement, it is a public corporation.' *Layne* vs. *North-Western T. Co.* (3). Then the trustees of the university of *Alabama* were held to be a public corporation, because the state had the whole interest in the institution without being under any obligation of contract with any one (4).

"'The commission includes all the elements which are essential to a public corporation. It is composed exclusively of officers appointed by the crown, having no personal interest in administering the things under their control, and only acting as the organs of the state, effecting a great public improvement.'

This last expression applied to our turnpike roads may appear exaggerated at the present day, when the country is covered over with a large system of railways and

(1) 14 L. C. R. 90.
(2) Angell & Ames, p. 25.
(3) 10 Leigh 454.
(4) Angell & Ames p. 26, No. 34.

canals, but when we bear in mind that at the time these turnpike roads were contemplated, there were in the province of *Quebec* only a few miles of railroads and two canals of a few miles in length; that the bad state of roads was one of the great drawbacks to the opening of the country; and if we recollect, not only the indifference, but the opposition of the public to make the slightest sacrifice in order to repair the roads, it will be better understood why the construction of turnpike roads was considered a great public improvement. And that in order to effect it, it was found necessary that a public law should be passed by an irresponsible legislature, and at the time only such a body could have enacted such a law and have it put into force in all its details. If this institution was able to surmount all obstacles at first and has since been able to aggrandize itself, it is solely because nothing was left, in organizing it, to private enterprise, and because its character was such as to make it a public body, empowered by the government to effect loans of money in order to execute for the government certain improvements with which it had been charged.

"If one of the peculiar features in the constitution of a public corporate body is that its members are entirely without any personal interest, on the other hand one of the essential elements of a private corporate body is, that its members have a personal interest in the institution. Whatever authority or power is given to the members of a corporate body, or however general may be its object, if the members of the corporation receive a consideration or an emolument to perform the duties imposed upon them, then that corporate body is considered to be a private corporation.

"But the most numerous, and in a secular and commercial point of view, the most important class of private civil corporations, and which are very often

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called "companies," consist at the present day of banking, insurance, manufacture and extensive trading corporations; and likewise of turnpike, bridge, canal and railroad corporations. The latter kind have a concern with some of the extensive duties of the state; the trouble and charge of which are undertaken and defrayed by them in consideration of an emolument allowed to their members; and in cases of this sort there are the most unquestionable features of a contract, and manifestly a *quid pro quo* (1).

"This authority, if applied to 'trusts' as constituted in *England*, shows that they are private corporations, but the authority I first cited, proves evidently that our turnpike trusts are public corporations. The conclusion I draw from what I have stated is, that the 'trustees' in this case were the agents of the crown, authorized to put into force a public law relating to turnpike roads. This is really what has been decided already in the case of *Anderson* v. *The Quebec North Shore Turnpike Trustees*, viz:—'That the *Quebec* turnpike trustees are the agents of the crown.' It follows, then, that when the trustees, acting within the scope of their authority, enter into a contract, it is the government, who, having delegated their power, are liable, and not the trustees. 'It is clear, also, that a servant of the crown, contracting in his official capacity, is not personally liable on the contracts so entered into (2).'

"The government would therefore be liable in this case, unless it is shown that the trustees have not acted within the scope of their authority in issuing these debentures, or unless there can be found in 16 *Vic.*, ch. 235, or in some other act, a positive enactment leaving no doubt that the government is exempted of all responsibility. It was not contended that the trustees

(1) Angell & Ames, p 31, No. 40.

(2) Broom's legal maxims, p 830.

had exceeded the limits of their authority. The defence in this case consists simply in averring that the crown is not responsible to the holders of the bonds, and the statement of defence is as follows: 'Not only was no provincial guarantee given or provided for in favour of the bonds issued by the said trust, from the said year, 1853, but it was especially provided in by several statutes passed by the parliament of the said province of *Canada*, and, amongst others, by the act 12 *Vic.*, ch. 115, by the act 14 and 15 *Vic.*, ch. 132, by the act 16 *Vic.*, ch. 235, by the act 20 *Vic.*, ch. 125, that no guarantee for the said debentures should be given by the said late province of *Canada*, that no money of the said province should be advanced for paying the interest or principal of the sums borrowed by the issue of the said debentures.'

"By referring to the statutes mentioned in that paragraph of the defence, it will be seen that what is there alleged cannot be sustained.

"In 12 *Vic.*, ch. 115, there is no mention of any provincial guarantee. What is there stated is: 'No moneys shall be advanced out of the provincial funds for the payment of the said interest.' It is different from the 4 *Vic.*, ch. 17, which had provided the means of paying any arrears of interest on the loan authorized by that act, by allowing the Receiver General to advance out of the provincial funds to the trustees the necessary amount for that purpose. But I cannot find in that section anything which limited the responsibility of the government as to the payment of the capital except by declaring that the loan is made subject to the conditions contained in the ordinance of 4 *Vic.*, ch. 17. This provision is also found to be inserted in the act 14 and 15 *Vic.*, ch. 235. In the extract I have before given of sec. 7 of this act, there is no question of any provincial guarantee having been given or refused. All we find

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is, as in 12 *Vic*, ch. 115, and in 14 and 15 *Vic.*, ch. 132, that 'no moneys shall be advanced out of the provincial funds for the payment of said interest;' as respects the principal, it only enacts that: 'As respects the payment of principal and interest thereof,' the debentures shall rank after those issued under the act passed during the last session of parliament of the province, and hereinbefore cited.' In this lengthy provision, no word or expression can be found which would authorize me in coming to the conclusion that there was any repudiation of, or even that it was intended to repudiate, all responsibility with respect to that loan. If the inevitable consequence of that act was not to make the province responsible, why take the trouble of limiting their responsibility as regards interest only by stating, 'no moneys shall be advanced for the payment of the interest on the debentures.' If the intention of the government had been to exempt the province from all liability, why not make the same enactment with respect to the capital as they did with respect to the interest? The absence of such a declaration is a strong argument that the government did not intend to exempt themselves from the liability of paying at least the principal of the loan. This section, in my opinion, instead of supporting the contention made by the respondent, that the crown is not responsible, on the contrary supposes the obligation of reimbursing, necessarily arising out of the loan.

"It was also argued, on behalf of the respondent, that the loan effected under the authority of 16 *Vic.*, ch. 235, was subjected to the provisions contained in the ordinance of 4 *Vic.*, ch. 17, and therefore that the principal cannot be paid out of or chargeable against the general revenue of this province. The inference which is sought to be drawn, is that the Crown had incurred no responsibility for the reimbursement of the loan made under the authority of that ordinance, and

consequently the loan made under 16 *Vic.*, ch. 235 is in the same position. Nevertheless, we find that the legislature paid the first loan, and the reason no doubt was, because they admitted the obligation to pay was a consequence of the provisions of the law. The law being the same in both cases, the same obligation to pay the amount of the loan for which the present petition was brought certainly remains.

"The enactment that the general revenue shall not be held liable for the moneys borrowed, is explained, first, because the tolls levied by the trustees were declared to form a special fund for the purpose of paying off these bonds, then also for this other self-evident reason, because the ordinary expenditure of the government was the first charge upon the general revenue it was not intended to adopt a mode of payment which at that time might have created disorder in the financial arrangements of the year. Moreover, does not the fact of the legislature only stating in the act in question that the general revenue shall not be charged with this debt virtually declare that the legislature shall provide other means to pay with than with the general revenue, which is exempted? The government having still other means of providing for the reimbursement of this loan, thereby contracted the obligation of providing these means, viz: either by increasing the revenues of the special fund, by increasing the tolls, or by creating another fund. This seems necessarily to have been the intention of the legislature, for it would be impossible to explain their act otherwise than by supposing that they gave the power to the government to borrow money in the name of Her Majesty, at the same time dispensing with the obligation of reimbursing the amount. Such an interpretation of the act being contrary to the dignity and honor of the crown, cannot be entertained for a single moment.

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"To say that the provisions of the law contained an obligation to raise a special fund is a much more consistent interpretation, inasmuch as at the time this loan was effected, the government were in the habit of creating special funds. We find that there was the common schools fund, superior education fund, the clergy reserves, the court houses fund, the seigniorial fund, &c., &c. It was no doubt on the establishment of such a fund that the legislature relied to reimburse the principal.

"Because the intention has not been carried into effect, is not a reason why there should be any alteration in the legal obligation to reimburse the capital, an obligation arising out of the very terms of the law. It is certainly a matter of indifference to the bondholders to know what mode will be adopted to procure the money.

"But if as a matter of fact the statute in so many words enacted, that the government were exempt from all responsibility, then what I have before said would be of no avail. Fortunately for the suppliants this is not the case. For nowhere do I find in the quotations which I have given from 4 *Vic.* ch. 17, 12 *Vic.* ch. 115, 14 and 15 *Vic.* ch. 137 and 16 *Vic.* ch. 235, the statement put forward in respondent's defence 'that not only was no provincial guarantee given in favor of the bonds issued by the trust under the authority of 16 *Vic.* ch. 235, in 1853, but that it was especially provided in and by several statutes that no guarantee should be given for the said debentures by the said late province of *Canada*; that no money of the said province should be advanced for paying the interest of, or the principal of the sums borrowed by the issue of said debentures.'

"The learned counsel were certainly in error when they formulated that general and sweeping proposition, for it cannot be sustained by any of the acts I have just

cited. It may be correct in so far as it relates to 20 *Vic.* ch. 125, for there we find, for the first time, an enactment stating that the provincial government shall not be held responsible for the payment of the principal and interest of the debentures issued under that act.

"It was also by this act that the legislature divided the turnpike trust into two different trusts, one for the north shore and the other for the south shore of the *St. Lawrence*. Sections 8, 9, 11 and 12 authorized these trusts to effect new loans, and it is with respect to these new loans that the following proviso was enacted: 'Provided always that the province shall not guarantee or be liable for the principal or interest of any debentures issued under this act, nor shall any money be advanced or paid therefor out of the provincial funds.'

"If this proviso was to be found in 16 *Vic.* ch. 235 or in the 4 *Vic.* ch. 17, which is declared by the eighth section to form part of the act, I would not hesitate for a moment and would dismiss the petition on the ground that the government cannot be held liable either for the principal or for the interest of the debentures issued. But as I have already stated, such a provision is not to be found in the previous acts, and it is enacted for the first time in 20 *Vic.* ch. 125. This must necessarily have been effected in consequence of a change of policy on the part of the government of the day, with respect to turnpike roads, a change which is there enacted for the first time.

"I know of no rule of law which would allow me to interpret this provision as being applicable to the previous acts. In order to do so it would be necessary for me to find in the text of the law (what I have not found) a positive declaration stating that such a provision must be considered as forming part of the previous acts. In my opinion, far from helping the respondents' contention, this declaration in this last act

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seems to me to furnish a strong argument in favor of the suppliants. The only reasonable conclusion to draw seems to me to be that if the legislature had intended in the previous acts to repudiate all guarantee or liability as regards the principal and interest, they would in those previous acts have made use of the same language in order to express the same thing. This provision may be even considered as an interpretation given by the law itself, and declaring that as the government had, up till that time, been liable, henceforth it would cease to be liable for any new loan. This interpretation does not extinguish the obligation previously contracted. The contract entered into legally by the trustees, acting within the scope of their authority, by borrowing the moneys, necessarily implies the obligation to pay back the same. And as the loans were effected by the government through its agents (the trustees) the payment of the same devolves on the government and not on the trustees, who entered into no obligation, as may be seen by the form of debenture which was issued, viz:

"NORTH SHORE ROAD LOAN UNDER PROVINCIAL STATUTE OF 1853.

£250 Cy.

"Certificate No. 257. *Quebec*, 24th March, 1856.

"We certify that, under the authority of an Act of the Parliament of *Canada*, passed in the session held in the 16th year of Her Majesty's reign, intituled 'An act to authorize the trustees of the *Quebec* turnpike road to issue debentures to a certain amount and to place certain roads under their control', there has been borrowed and received from *Charles Gethings*, Esquire, two hundred and fifty pounds, currency, bearing interest from the date hereof, at the rate of six per cent. per annum, payable half yearly, on the first day of July and on the first day of January, which sum is reimbursable to the said *Charles Gethings* or bearer hereof, on the twenty-fourth day of March, in the year of our Lord 1871, and is part of the sum to be raised under the said statute to make and complete the roads thereby authorized to be made on the north shore of the *St. Lawrence*.

Registered by J. PORTER, Secretary.

Trustees.—H. GOWEN, L. G. NAULT, L. T. MACPHERSON, A. C. BUCHANAN, JOHN ROWLEY, DANIEL MCCALLUM, JAS. GIBB.

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"I am therefore of opinion that the government of *Canada* became legally indebted to the suppliants, and that under the 111th section of the *British North America* Act, the Dominion of *Canada* was made liable for the principal of the debentures issued under the authority of 16 *Vic.* ch. 235. This interpretation seems to be in accordance with the letter and the intent of the act in virtue of which this loan was effected as well as with the provisions of 4 *Vic.* ch. 17, incorporated in ch. 235.

"The suppliants, however, did not rely so much on the reasons on which I have arrived at a favorable conclusion to them, as upon their argument based on the fact that changes were effected by the legislature in the laws relating to these trusts; such changes, they contend, having virtually destroyed the special fund which was created by means of the levy of tolls, and which was affected to the reimbursement of this loan, are sufficient to render the government generally liable instead of leaving them as theretofore liable only for a limited amount. If this view of the law could prevail the suppliants would, no doubt, benefit by it very much as the government would then be obliged to pay the interest as well as the principal of these debentures.

"I will now examine if this contention can be sustained. The act of 16 *Vic.* ch. 235 did not create any additional revenue in order to pay the interest which would become due on the loan of £30,000 authorized to be made for the *Quebec* north shore roads, but tolls were to be collected on the south shore roads, for the improvement of which the act also authorized a further loan of £40,000, which sum was expended on the said roads.

"Subsequently, four years after, the *Quebec* turnpike trust was divided into two trusts under the authority of the act I have just mentioned, 20 *Vic.* ch. 125, viz.;

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the *Quebec* north shore turnpike roads trustees and the *Quebec* south shore turnpike roads trustees, charged respectively with the management of the roads on each shore. By section five of the said act, all debts and liabilities made before the said division, were charged against the trustees of the north shore roads, as follows: 'The north shore trustees shall be liable for the principal and interest of all debentures issued by the "trustees of the *Quebec* turnpike roads," and for all debts and liabilities of the said trustees, contracted before the day to be appointed as aforesaid for the separation of the trusts.' There is a proviso which declares that should the trustees of the south shore roads have a balance in hand from the roads under their control, they shall, after having paid all expenses, pay over said balance in the hands of the north shore trustees, in order to aid them to pay the principal and interest on the debentures issued prior to the passing of said act.

"Amongst the debts and liabilities for which the north shore trustees were declared to be liable was a loan of £40,000, borrowed and expended for the construction of roads on the south shore of the *St. Lawrence*.

"It is also proved by the admission of facts filed in this suit, that since the separation of the trusts, no moneys levied and collected by the trustees of the south shore were ever employed to pay either the interest or the capital on the said sum of £40,000, and that payments of interest made on account of said sum were so made by means of tolls levied on the north shore roads.

"The effect of this legislation has been very disastrous to the bondholders of these two last mentioned sums. By the separation of the trusts they were first deprived of a part of the special fund which was created for the purpose of paying their loans, to wit, the tolls to be collected on the south shore, and then the north shore trust, being constituted in lieu of the old

trust, was declared to be liable for the loan of £40,000, which were expended for the construction of the south shore roads and in the interest of the south shore trust.

"It cannot be denied, that such legislation has caused great loss to the suppliants. The admission of facts filed in this suit proves it.

"But can damages or losses resulting from a law enunciated in clear, precise and unambiguous language be claimed by suppliants? Certainly not. And it is no doubt for this reason that the suppliants have not sought relief on this ground. Their contention is that the legislature, by abolishing, without their consent, a part of the special fund affected to the payment of their bonds, and by declaring to their detriment, that the north shore trust should pay £40,000 expended on the south shore roads, have substituted the government to the first commission, and have thereby contracted a promissory obligation to pay the total amount due. Thus we find the suppliants relying on a contract alleged to be implied from change of legislation, and not on a 'tort,' which can never arise from the passing of a law, nor consequently give a right of action for damages. I think it correct to say that the legislature, by passing this act, have virtually taken upon themselves to dispose of the turnpike trust as being their property, the trust being in reality the property of Her Majesty, as I trust I have before shown it. Had it been the property of the trustees, and not of Her Majesty, the government could not have disposed of it without violating a well known principle of legislation.

"The public benefit is deemed a sufficient consideration of a grant of corporate privileges; and hence, when a grant of such privileges is made (being in the nature of an executed contract) it cannot, in case of a private corporation which involves private rights, be revoked (1).

(1) Angell & Ames, p. 7, No. 13.

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"This act no doubt passed because the government considered itself, for the reasons I have before given, liable for the debt created by 16 *Vic.* ch. 235. If such was the case, the government has not changed its position. Then also, the provision contained in the fifth section above cited, for the reasons I have given, can be invoked in support of the contention that the province was responsible for the principal, but there is nothing in that section to show that it was the intention of the legislature to contract a new obligation, viz: the obligation to pay the interest, which they were previously exempted from paying. To gather such an intention, it would be necessary to find words which are not there. Such an interpretation would be in violation of the well known rule of law 'that nothing is to be added or taken from a statute' when you construe it. The change in this legislation cannot therefore be said to have implied a contract to pay the interest, as the statute itself contains an express provision as to interest, as I will show. By separating the 'old trust' into two commissions the 20 *Vic.* ch. 125 enacted that the previous acts applicable to turnpike roads would remain in force. The third section is as follows: 'And all the provisions of the ordinance and acts hereinbefore mentioned shall apply as they now do, except in so far as they are altered by or may be inconsistent with this act.'

"I cannot find anywhere that the following provision with respect to interest, which is contained in the seventh section of ch. 235, 16 *Vic.*, has been revoked, altered or modified: 'and no moneys shall be advanced out of the provincial funds for the payment of the said interest.'

"It is utterly impossible, with such clear and precise words before you, to contend that the government can be made liable for the interest. There is no room for construction in such a case as this.

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"When the language is free from doubt it best declares, without more, the intention of the law-giver, and is decisive of it. The legislature, in such a case, must be intended to mean what it has plainly expressed, and consequently there is no room for construction.

"The result of this legislation is, in my opinion, that the bondholders' position as to interest since the passing of 20 *Vic.*, ch 125, remains exactly what it was after the passing of 16 *Vic.*, ch. 235, sec. 7, to wit: they cannot in law render the government liable for the interest. Nevertheless it cannot be denied, as I have before said, that the guarantee and sureties which these bondholders had on the tolls to be levied on the south shore roads have virtually been taken away, and that in this respect this legislation has interfered with their vested rights.

"However serious may be the pecuniary losses the bondholders will have to sustain in consequence of this legislation, it is quite out of my power to give them any relief. The law not being uncertain, my only duty is to administer it such as I find it. This point is so clear that it ought not to be necessary to cite any authorities, but as it will not add much to this already lengthy judgment, I will quote two or three of them.

"'Though vested rights are divested, and acts which were perfectly lawful when done are subsequently made unlawful by a statute, those who have to interpret the law must give effect to it. And they are bound to do this even when they suspect or conjecture that the language does not faithfully express what was the real intention of the legislature when it passed the act, or would have been its intention if the specific case had been proposed to it' (1).

"*Sedgwick* (2) argues that the judiciary have no right whatever to set aside, to avoid, or nullify a law passed

(1) Maxwell on Statutes, p. 5. (2) Stat. and Const. Law t p. 187.

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in relation to a subject within the scope of legislative authority on the ground that it conflicts with the notions of natural right, abstract justice, or sound morality.

"And *Kent* (3)—where it is said that if a statute is contrary to natural equity or reason, or repugnant, or impossible to be performed, the cases are understood to mean that the court is to give them a reasonable construction. They will not, out of respect and duty to the lawgiver, presume that every unjust or absurd consequence was within the contemplation of the law, but if it should be too palpable to meet with but one construction, there is no doubt in the English law of the efficacy of the statute.

"*Blackstone*—'If the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to contest it, and the examples usually alleged in support of this sense of the rule, do none of them prove that where the main object of a statute is unreasonable, the judges are at liberty to reject it for that reason, for that were to assert the judicial power above that of the legislature.'

"For these reasons I am forced to reject the proposition propounded that the effect of the legislation of 20 *Vic.* ch. 125, was to create an obligation on the part of the government to pay any arrears of interest of the debentures issued under the authority of 16 *Vic.* ch. 235.

"In conclusion, I am of opinion that 'the *Quebec* turnpike trust,' as it was constituted at the time of the passing of the act 16 *Vic.* ch. 235, was a public corporation charged with the execution, in the interest of the public, of great works of improvement.

"That the trustees of that trust, acting within the scope of their authority, did not incur any personal liabilities, but were the agents of the Crown.

(3) Vol. 4., p. 247.

"That the roads, bridges and other property put under their control, were not vested in them as their property and were not liable to be levied against, because by the ordnance 4 *Vic.* ch. 17, they were declared to be the property of Her Majesty.

"That the said trustees in issuing, in conformity with the provisions of the act 16 *Vic.* ch. 235, debentures for the various loans therein mentioned, loans effected for the purpose of ameliorating properties declared to be vested in Her Majesty, and the proceeds of which were in fact employed in said improvements, were in law the agents of the government who thereby become liable.

"That independently of the obligation contracted as above by the trustees, under the special provisions contained in the above acts, viz.: 4 *Vic.* ch. 17, 14 and 15 *Vic.* ch. 115, and 16 *Vic.* ch. 235, the government of *Canada* can be held liable for the repayment of the principal of the debentures, which amount is claimed by the present petition.

"That the suppliants have suffered losses by the alterations made in the law by 20 *Vic.* ch. 125, but that the liability of the government remains what it was and cannot be increased in consequence of said alterations, and therefore under the section seven the government should be declared free from all liability as to interest.

"That as the loans in question, at the time of the passing of the *British North America* Act, formed part of the liabilities of the late province of *Canada*, they have become, by virtue of the 111th section of said act, a debt and liability of the Dominion of *Canada*.

"And lastly, that the suppliants are entitled to the relief sought by their petition of right, to the amount of principal, without interest, but with costs of said petition."

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A motion was made on behalf of Her Majesty for an order calling upon the suppliants to show cause why a new trial should not be granted, or a rehearing or a review of the cause directed, or why the judgment for the suppliants herein should not be set aside and a judgment entered for Her Majesty upon the evidence adduced at the trial upon the following grounds:—

1. Because it had not been proved that the late province of *Canada* was ever liable for the amount awarded the suppliants by the judgment in this cause.

2. Because the said judgment was based upon the ground that the trustees of the *Quebec* North Shore Turnpike Trust, when issuing the debentures, the amount whereof is claimed by the suppliants, were acting as agents of the government, and that the said late province of *Canada* was then liable for their acts.

3. Because the said trustees never were agents of the government of the said late province of *Canada*.

4. Because the said trustees never had any authority to pledge the credit of the said late province of *Canada* to the payment either of the principal or of the interest of the said debentures.

5. Because the judgment rendered in this case on the 24th December, 1879, should have dismissed the petition herein of the suppliants.

6. Because the said judgment was contrary to the evidence adduced.

The court rejected the motion, and thereupon an appeal was taken to the Supreme Court of *Canada*.

The case was argued in the Supreme Court by Mr. *Church*, Q. C., and Mr. *Langelier*, Q. C., on behalf of the crown, and by Mr. *Irvine*, Q.C., and Mr. *Dalton McCarthy*, Q. C., on behalf of the respondents.

The arguments, authorities and statutes relied upon are fully reviewed in the judgments of the court.

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So far back as the year 1796, an act, 36 *Geo.* 3, ch. 9, was passed in the then province of *Lower Canada* for making, repairing and altering the highways and bridges within that province. By this act it was provided that all the King's highways and public bridges should be made and repaired and kept up under the directions of the *grand voyer* of each and every district within the province, or his deputy: and the act provides that the occupiers of lands, whether proprietors or farmers, adjoining the King's highways called front roads, should make and keep in good repair the said highways and ditches upon the breadth of their said lands respectively, and also the bridges which are not declared by the *proces verbaux* of the *grand voyers*, or their deputies, to be such as ought to be kept in repair at the public expense. The act contained many provisions and regulations, but all were of a purely local character, and power was given to the justices, in their general quarter sessions of the peace, to hear, examine and determine matters and things relating to *proces verbaux*, that should be made in their districts; the subject of the care, management and regulation of highways being dealt with throughout the act as matter of local and municipal concern, the regulations as to the cities and parishes of *Quebec* and *Montreal* being dealt with in a different manner from the districts under the care of the *grand voyer*, but still as of a local and municipal character. This continued until the year 1841, when the governor of *Lower Canada* and special council, the then legislative authority of the province, under stat. 1 & 2 *Vic.*, chap. 9, and 2 & 3 *Vic*, chap. 53, passed a certain ordinance, entitled "An ordinance to provide for the improvement of certain roads in the neighbor-

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hood of and leading to the city of *Quebec* and to raise a fund for that purpose."

That ordinance proceeded to enact that all powers, authorities, jurisdiction and control over or with regard to the roads therein mentioned, or any of them, which then vested in any magistrate, *grand voyer*, overseer of roads, or road surveyor or other road officer, by the said act passed in the thirty-sixth year of the reign of His said late Majesty *George* the Third, hereinbefore mentioned, or by any other act or ordinance or law whatever, or in any district council, should cease and determine from and after the time when the trustees authorized to be named by the said ordinance should assume the management, charge and control of the said roads; and further, that it should be lawful for the governor of the said province of *Lower Canada*, by letters patent, under the great seal of the province, at any time after the passing of the said ordinance, to appoint not less than five nor more than nine persons to be trustees for the purpose of opening, making and keeping in repair the roads in the said ordinance specified, and for acquiring property and estate, moveable and immoveable, which being so acquired, should vest in her Majesty for the public use of the province.

Suppliants allege in section 23 of their petition, that by 16 *Vic.*, chap. 235, of province of *Canada*, the provisions of this ordinance of 1841 were extended to certain other roads, specifying them.

And by section 25, that the sum of £30,000 was authorized to be raised by way of loan, for which loan trustees issued debentures in the form prescribed by ordinance of 1841.

And by section 31, that the debentures so issued bore date between 22nd March, 1854, and 1st December, 1859, and fell due between the 2nd March, 1869, and 1st December, 1874.

And by section 32, that by said 16 *Vic.*, chap. 235, the provisions of the ordinance of 1841 were further extended to certain enumerated roads on the south shore of the *St. Lawrence.*

Section 33, that a further sum of £40,000 was by the said last mentioned act authorized to be raised for making, etc., these last mentioned roads on the south side, and trustees were empowered to issue debentures in the form prescribed by the ordinance of 1841.

And by section 34, allege that debentures were issued for £40,000, bearing date between 8th June, 1854, and 9th October, 1858, and fell due between 8th June, 1869, and 9th October, 1873.

Section 45, suppliants represent that they are *bonâ fide* holders of debentures issued for loan of £30,000, to the amount of £9,708 = $38,832 currency; and by section 46, that they are likewise *bonâ fide* holders of debentures issued for loan of £40,000, to the amount of £7,810 = $31,240 currency.

And by section 47 they further allege that these debentures having fallen due, no part of principal has been paid and the whole remains due, together with interest from 1st July, 1872.

And by section 48 suppliants allege that there was never any fund created for the payment at maturity of the said bonds and debentures, nor did there exist at any time in the hands of the said trustees (to wit, the trustees of the *Quebec* turnpike roads, the *Quebec* north shore turnpike trustees and the *Quebec* south shore turnpike trustees) any fund whatever for the payment of the said bonds and debentures, nor does there exist now in the hands of the present trustees any fund or funds whatever for the payment of the same.

That the said bonds and debentures were debts and liabilities of the late province of *Canada*, at the time

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"The *British North America* Act 1867" came into force and the dominion of *Canada* came into existence.

That it is enacted by "The *British North America* Act 1867," as follows:

"Section 111.—*Canada* shall be liable for the debts and liabilities of each province existing at the union:" that all debts and liabilities of the province of *Canada* existing at the union, whether due in connection with the turnpike trust, or from any and every other cause, were thus imposed on her Majesty's government of *Canada* for payment, and the imperial legislation which nullified the legal and political existence of the suppliants' debtor, the province of *Canada*, created in their favor a new debtor in her Majesty's government of *Canada*; which sums, amounting to $70,072, they now seek to recover in this proceeding.

The trustees appointed under this ordinance were, in my opinion, constituted a *quasi*-municipal corporation, not to represent the crown or the province, nor to act as agents for either, but to discharge municipal functions in the improvement and care of certain local roads: and to enable them to accomplish this were clothed with power to raise money by means of debentures on a certain specified security, and so to perform duties which up to the time of their incorporation had been discharged by the *grand voyer* with funds or means raised directly from the inhabitants of the districts through which the roads passed; and though these trustees may be consideded in the light of a public corporation, it by no means follows that the holders of such debentures have therefore a claim on the crown or on the general revenues of the country for payment of either principal or interest on their debentures. Though a public corporation, these trustees can act only within the scope of their legislative authority; they can bind neither the crown, the legislature, nor the public

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revenues, nor any person or fund beyond what the statute permits. To the contracts, as contained in the debentures and in the statutes authorizing their issue, must we look to discover the liabilities created and the fund or means which the legislature has provided for meeting such liabilities.

The question is not, have these suppliants in a moral or a political point of view a just and equitable claim on the province of *Quebec*, which should induce its legislature to make provision for indemnifying them for the money advanced, either by imposing the whole burthen on the whole province by granting the money from the general revenues of the province, or by authorizing a local assessment on the inhabitants of the districts more immediately benefited by the expenditure, and upon whom before the passing of the ordinance the legal burthen and liability rested, for the reparation and maintenance of the roads passing through their respective districts, either on the ground that the province or a part of it has practically received the benefit of the expenditure of the money so advanced, or on the ground that by subsequent legislation the security on which the loan was made was impaired, or on any other equitable ground which in *foro conscientiæ* ought to induce the legislature to protect or indemnify the suppliants, if the suppliants can make it appear that any such ground exists.

But the question we have to determine is simply and purely a legal one. Did these suppliants advance their money on the credit of the acts, and on the security of the tolls and means provided by the acts under the authority of which the debentures were issued, and rely on the funds and means so provided for their re-imbursement? or was there in addition thereto a statutory contract or obligation (for there certainly was no other duty when the money was advanced) between the

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debenture holders and the crown or government of the province of *Quebec*, that the government would guarantee the sufficiency and proper management and distribution of the funds and means provided by the act, and in the event of such funds and means proving inadequate, or by reason of mismanagement or dereliction of duty on the part of the trustees insufficient, that the crown or government would provide the money to make good any such deficiency? For the liability of the crown must, if the suppliants' contention is correct, be not only a liability to pay in the event of the tolls and revenues being themselves inadequate, but also should there be a misapplication of the tolls and revenues when collected, or a deficiency from a neglect to collect the tolls, or a loss of tolls by exemptions from payment of tolls contrary to express legislative provisions, or from other reasons; because, in this case, it appears there was a misapplication of some of the money and a neglect to enforce the payment of tolls by granting exemptions in direct defiance of legislation to the contrary, and neglect to collect from proprietors the amounts due and payable as provided by law; for we see that while by the ordinance the proprietors are required to commute by means of an annual sum, the book put in, to be used as evidence, states that it does not appear that this provision has ever been put into execution by the trustees. And again, by the 23 *Vic.* ch. 69, all exemptions are abolished, except funerals, but this same book says that the trustees have not acted on this statute, but have always acted as if this act had not been passed. By the same book £404 appears to have been misappropriated by the secretary of the trustees, and though judgment was obtained the book says no execution was ever issued or proceedings taken against his sureties. In other words, then, did the crown or government agree, in the event of the debentures not being paid at

maturity by the trustees, to pay and discharge them? Did the legislature pledge the crown or the general province for the liquidation of these debentures? Or did the legislature create a fund to which alone the debenture holders were to look for payment of their interest and ultimately for the repayment of the principal sums advanced?

To ascertain this we must in the first instance look to 1 and 2 *Vic.* ch. 9, and 2 and 3 *Vic.* ch. 53, for the authority of the Governor in Council, and to the ordinance of 4 *Vic.* ch. 17. By these acts it is provided, in 1 and 2 *Vic.* ch. 9, section 3, that it shall not be lawful by any such law or ordinance to impose any tax, duty, rate or impost, save only in so far as any tax, duty, rate or impost which at the passing of this act is payable within the province may be thereby continued.

By section 3 of the 2 and 3 *Vic.* ch. 53, so much of the 1 and 2 *Vic.* ch. 9 as provides that it shall not be lawful by any such law or ordinance as therein mentioned to impose any tax, duty, rate or impost, save only in so far as any tax, duty, rate or impost which at the passing of that act was payable within the said province of *Lower Canada*, or might be continued, shall be and the same is hereby repealed: Provided always, that it shall not be lawful for the said governor, with such advice and consent as aforesaid, to make any law or ordinance imposing or authorizing the imposition of any new tax, duty, rate or impost, except for carrying into effect local improvements within the said province of *Lower Canada*, or any district or other local division thereof, or for the establishment or maintenance of police or other objects of municipal government within any city, or town, or district, or other local division of the said province; provided also, that in every law or ordinance imposing or authorizing the imposition of any such new tax, duty, rate or impost, provision shall

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be made for the levying, receipt and appropriation thereof by such person or persons as shall be thereby appointed or designated for that purpose, but that no such new tax, rate, duty or impost shall be levied by, or made payable to the receiver-general, or any other public officer employed in the receipt of Her Majesty's ordinary revenue in the said province, nor shall any such law or ordinance as aforesaid provide for the appropriation of any such new tax, duty, rate or impost by the said governor, either with or without the advice of the executive council of the said province, or by the commissioners of Her Majesty's treasury, or by any other officer of the crown employed in the receipt of Her Majesty's ordinary revenue.

Here, then, we have the governor and council strictly limited to the imposition of charges for local and municipal purposes.

By the ordinance 4 *Vic.*, ch. 17, the governor was, as has been stated, authorized by letters patent to appoint not less than five nor more than nine persons, who, and their successors, should be trustees for the purpose of making and keeping in repair the roads thereinafter specified.

Section 3 provides that these trustees might sue and be sued by a certain name and take and hold property and estate.

By section 9 the roads to and over which the provisions of the ordinance and the powers of the trustees should extend are specified.

Section 10 provides for the trustees exacting and receiving tolls. Sections 13, 15 and 16 provide for certain exemptions from payment of tolls, and authorize trustees to commute.

Section 17 authorizes tolls to be let by auction.

Section 18 provides that the roads are to be under the exclusive control of the trustees; and the powers

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of *grand voyer*, magistrates and road officers to cease, and that the tolls shall be applied exclusively to the purposes of the ordinance.

By section 19, parties bound by law to perform any labor on any of the said roads must commute by payment of an annual sum, with a proviso for compelling commutation; and then we have section 21, authorizing the trustees to raise money by loan. That section is in these words:—

And be it further ordained, etc., that it shall be lawful for the said trustees, as soon after the passing of this ordinance as may be expedient, to raise by way of loan, on the credit and security of the tolls hereby authorized to be imposed, and of other monies which may come into the possession and be at the disposal of the said trustees under and by virtue of this ordinance, and not to be paid out of or be chargeable against the general revenue of this province, any sum or sums of money not exceeding in the whole twenty-five thousand pounds currency; and out of the monies so raised, as well as out of the monies which shall come into their hands, and which are not hereby directed to be applied solely to one special purpose, it shall be lawful for the said trustees to defray any expenses they are authorized to incur for the purposes of this ordinance.

And next sections 22 and 23 provide for the issue of debentures in these words:—

Section 22.—And be it further ordained, etc., that it shall be lawful for the said trustees to cause to be made out for such sum or sums of money as they may raise by loan as aforesaid, debentures in the form contained in the schedule A., to this ordinance annexed, redeemable at such time or times (subject to the provisions herein made) as the said trustees shall think most safe and convenient; which said debentures shall be signed in the manner above provided for in the written acts relating to the said trust and shall be transferable by delivery.

Section 23—And be it further ordained, etc., that such debentures shall respectively bear interest at the rate therein m ntioned; and such interest shall be made payable semi-annually, and may, at the discretion of the trustees, and with the express approval and sanction of the governor of this province, and not otherwise, exceed the rate of six per centum per annum, any law to the contrary notwithstanding, and shall be the lowest rate at which the said sum or sums

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to be loaned on any such debentures, shall be offered or can be obtained by the said trustees; such interest to be paid out of the tolls upon the said roads, or out of any other monies at the disposal of the trustees for the purposes of this ordinance.

The form given of the debenture is as follows:—

Certificate No. .
Currency. } QUEBEC, 18 .

Certificate No. . We certify, that under the authority of the
Currency provincial ordinance of *Lower Canada*, passed
in the fourth year of Her Majesty's reign, and
Interest at per cent. intituled "An ordinance to provide for the im-
18 . provement of certain roads in the neighborhood
of and leading to the city of *Quebec*, and to
Interest on this cer- raise a fund for that purpose," there has been
tificate paid borrowed and received from the
sum of pounds currency, bearing interest
Jan. 18 Receipt No. . from the date hereof at the rate of per cent.
July per annum, payable half-yearly on the
Jan. 18 day of and on the day of
July which sum is re-imbursable to the said
Jan. 18 or bearer hereof on the day of
July in the manner provided for by the provincial
Jan. 18 ordinance aforesaid.
July Registered by .....
Jan. 18 ..... } Trustees.
.....

It is difficult to understand how any lender or holder of debentures issued under the authority of this ordinance could be in any doubt as to the credit and security on which he loaned his money, or as to the fund to which he was to look for re-imbursement of principal and interest; still less could he have any doubt that he was not to be paid out of, or that his loan was not to be chargeable against, the general revenues of the province, but that his money was to be re-imbursable to him, or to the bearer of his debentures, in the manner provided for by the said ordinance; and these provisions but carry out the intention of the legislature as expressed in the preamble, which recites that:

Whereas the state of the roads hereinafter mentioned, in the

neighborhood of and leading to the city of *Quebec* is such as to render their improvement an object of immediate and urgent necessity, and it is therefore expedient to provide means for effecting such improvement, and to create a fund for defraying the expense thereof and the expenses necessary for keeping the said roads in permanent repair.

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And sections 26 and 27 seem to me to show very conclusively that the province was in no way involved in the transaction either as the principal, or as a surety, or guarantor, but that the legislature deals with the province as it would with an outsider wholly unconnected with the trustees, and in a manner wholly inconsistent with the relation of principal and agent which it is now put forward existed between the province and the trustees, wholly inconsistent with the idea of the government of the province being the borrower and liable for the repayment of the debentures. The sections are as follows:

Section 26.—And be it further ordained and enacted, that it shall be lawful for the governor for the time being, if he shall deem it expedient, at any time within three years from the passing of this ordinance, and not afterwards, to purchase for the public uses of this province, and from the said trustees, debentures to an amount not exceeding ten thousand pounds currency, and by warrant under his hand to authorize the receiver-general to pay to the said trustees, out of any unappropriated public monies in his hands, the sum secured by such debentures; the interest and principal of and on which shall be paid to the receiver-general by the said trustees, in the same manner and under the same provisions as are provided with regard to such payments to any lawful holder of such debentures, and being so paid, shall remain in the hands of the receiver-general, at the disposal of the legislative authority of the province for the time being.

Section 27.—And be it further ordained, &c., that if at any time it shall happen that the monies then in the hands of the said trustees shall be insufficient to enable the trustees to make any payment required or authorized to be made by this ordinance, all arrears of interest due on any debentures issued under the authority of this ordinance shall be paid by the said trustees before any part of the principal sum then due upon and secured by any such debenture

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shall be so paid; and if the deficiency be such that the funds then at the disposal of the trustees shall not be sufficient to pay such arrears of interest, it shall then be lawful for the governor for the time being, by warrant under his hand, to authorize the receiver-general to advance to the said trustees, out of any unappropriated monies in his hands, such sum of money as may, with the funds then at the disposal of the trustees, etc., be sufficient to pay such arrears of interest as aforesaid, and the amount so advanced shall be repaid by the said trustees to the receiver-general out of the sums to be commuted, levied and collected as aforesaid, and being so repaid, shall remain in the hands of the receiver-general at the disposal of the legislative authority of the province.

And sections 25 and 28 likewise show, I think, that the redemption of the debentures was to be by the trustees from the funds collected by them, and not by the government, nor from the provincial revenues.

These sections are as follows:

Section 25.—And be it further ordained, etc., that nothing herein contained shall prevent the said trustees from voluntarily redeeming any debentures, with the consent of the lawful holder thereof, at any time before such debentures shall be made redeemable, if the state of the funds of the said trustees shall be such as to warrant such redemption, and if the said trustees shall obtain the approval of the governor to such redemption.

Section 28.—And be it further ordained, etc., that over and above the sums which the said trustees are authorized by the preceding sections of this ordinance to raise by way of loan, it shall be lawful for the said trustees at any time, and as often as occasion may require, to raise in like manner such further sum or sums as may be necessary to enable them to pay off the principal of any loan which they have bound themselves to repay at any certain time, and which the funds in their hands, or which will probably be in their hands, at such time and applicable to such repayment, shall appear insufficient to enable them to repay: Provided always, that any sum or sums raised under the authority of this section shall be applied solely to the purpose herein mentioned; that no such sum shall be borrowed without the approval of the governor of this province, and that the whole sum due by the said trustees under the debentures then unredeemed and issued under the authority of this ordinance shall in no case exceed thirty-five thousand pounds currency; and all the provisions of this ordinance touching the terms on which any shall be borrowed under the authority thereof by the trustees, the

rate of interest payable thereon, the payment of such interest, the advance by the receiver-general of the sums necessary to enable the trustees to pay such interest, and the repayment of the sum so advanced, shall be extended to any sum or sums borrowed under the authority of this section.

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I think nothing can be much more apparent than that the money to be raised under this ordinance was to be solely on the credit and security of the tolls and monies which might come into the possession and be at the disposal of the trustees by virtue of the ordinance, and not to be repaid out of or chargeable against the general revenue of the province, that the government was not authorized by the said ordinance to, and could not by virtue thereof, legally raise a loan on the faith and credit of the government or province, nor to pledge in any way the public funds or property of the province for the repayment of any debentures issued thereunder.

If the language of these enactments does not establish this, I am at a loss to conceive language that could make it very much more clear. Looking, then, first at the ordinance, I think it is abundantly clear that the governor and council did not thereby intend to relieve the locality from the burthen of repairing and keeping in order the roads mentioned therein, or to cast the obligation on the province at large, but adopting the turnpike principle in operation in the mother country as affording the means of raising money for the improvement of the roads, as well as the permanent maintenance, simply transferred the management of the roads from the *grand voyer* to the trustees; and instead of continuing the system by which the proprietors of lands through which the roads passed were bound to keep them in repair, created a fund by imposing tolls on those who should use the roads and by commutation money to be payable by those who up to that time were obliged by law to repair or keep the roads in

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order, and so on the credit of those tolls and commutation moneys, to borrow for the purposes of the ordinance the moneys thereby authorized, taking care, however, from abundant caution, to declare that any money so borrowed was not to be payable out of the general revenues of the province, no doubt to prevent the possibility of any inference being drawn from the receiver-general being permitted to advance by way of loan to the trustees to pay interest, that the government were to be in any way liable or responsible for the principal; and that, so far as the borrowing and obtaining money was concerned, I think this ordinance was suggested by and based on the principles of the English turnpike acts. In *England* the trustees or commissioners were authorized to borrow on the credit of the tolls, and to mortgage the tolls as security to persons advancing the money, and the trustees pursuing the form of security prescribed by the statutes, were exonerated from personal liability, and the lenders left to the security of the tolls for their re-imbursement, a security of which, numerous cases on the books show, capitalists have constantly availed themselves. (See 39 *Geo.* 4, c. 126, sec. 81; 5 *Geo.* 4, c. 92, sec. 61; 7 and 8 *Geo.* 4, c. 24.)

Though from many cases to be found in the English books it is abundantly evident that frequently the revenues of turnpike roads have not only been unequal to the payment of the monies due on mortgage of the tolls, but also unequal to the maintenance of the roads, it has never, that I can discover, been contended that this cast on the government a duty to pay the one or repair the other; but to meet such cases without going into the particular legislation on the subject, it may be said generally, either the common law duty of repairing the roads has been invoked, or legislative provisions have been made, whereby, by assessment,

deficiencies have been made up, or failing the security of the tolls or revenues, toll mortgagees have been compelled to sustain the loss of a bad investment.

The cases of the *Queen* v. *White* (1) and *Reg.* v. *Trustees South Shields Turnpike Road* (2), and *Reg.* v. *Hutchinson* (3) afford illustrations of the course of legislation in *England* when tolls were not of themselves sufficient to defray both the expenses of keeping the road in repair, and that of paying interest and principal on monies due and owing on the credit of the Act, the legislative remedy being by assessment, or from local funds. I think the legislature acted on the principle, right or wrong, that the roads and the traffic over them afforded ample security for any money borrowed necessary for their improvement and maintenance, and that capitalists would be found ready and willing to advance, as in *England*, the necessary means on the security of the tolls and the means provided by the Act.

It has been urged that in *England* the turnpike corporations are generally private companies, while here the trustees are acting not for their own private advantage but for the benefit of the public, and therefore there is no analogy, but this does not, in my opinion, in the least affect the principle on which the money in both cases is to be raised, viz., on the security of the tolls and revenues of the roads, because there as well as here the turnpikes were public highways and the public there derived as much benefit from the expenditure of the money loaned as here.

A good deal of stress has been laid on sections 29 and 37, as indicating that the improving, care and maintenance of the roads under this ordinance was a public

(1) 4 Q. B. 101.
(2) 3 El. & B. 599.
(3) 28 L. & E. 282.

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work belonging to the province. The sections are these:

Section 29.—And be it further ordained, &c., that the due application of all public monies whereof the expenditure or receipt is authorized by the preceding sections, shall be accounted for to Her Majesty, her heirs and successors, through the Lords Commissioners of Her Majesty's treasury, for the time being, in such manner and form as Her Majesty, her heirs and successors, shall be pleased to direct.

Section 37. And be it further ordained and enacted that the said trustees shall lay detailed accounts of all monies by them received and expended under the authority of this ordinance supported by proper vouchers, and also detailed reports of all their doings and proceedings under the said authority, before such officer, at such times, and in such manner and form, and shall publish the same in such way, at the expense of the said trustees, as the governor shall be pleased to direct.

But this is no more than was required by the 36 *Geo.* 3, cap. 9, which enacts that all the King's highways and public bridges shall be made, repaired and kept up under the direction of the *grand voyer* of each and every district within the province, and which we have seen is an enactment containing provisions of a purely local and municipal character, and which imposes no burdens or liabilities whatever on the crown or government of the province. By section 74 it is enacted in these words:

And all monies arising by virtue of this act are hereby granted to His Majesty for the purposes hereinbefore mentioned, and the due application thereof accordingly (that is to say, to the repairs of the highways and bridges) shall be accounted for to His Majesty through the commissioners of His Majesty's treasury for the time being, in such manner and form as His Majesty, his heirs and successors, shall direct.

These provisions, then, 29 and 37 of the ordinance, were obviously not intended to, and did not, any more than the similar sections in the 36 *Geo.* 3, impose any pecuniary liability on the crown, or establish any contract between the crown and the debenture holders, or

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to take the turnpikes out of the category of municipal institutions, but they were, in my opinion, for the protection of the public interested in the proper expenditure of the money on the roads, and also for the security of the debenture holders to ensure, by a direct accountability to a proper authority, the faithful discharge by the trustees of their financial duties to the public and to the debenture holders.

Then, again, it has been urged that, as the property was vested in the crown by the ordinance, that created a contract, obligation, or duty to repay money borrowed, to be expended in acquiring or maintaining such property. Vesting the property in the crown was doubtless to indicate that the character of public highways was to be preserved. It is said in *Regina* v. *Lordimere* (1) "arguendo" that "in many of the local turnpike acts there is an express enactment that the roads, when made, shall be a public highway;" there was such a clause in the act in *Rex* v. *Netherton* (2).

But with whatever intent this was done, this of itself could create no liability to repay the sums loaned to these trustees, the ordinance and the debentures issued under its authority constituted the contract between the trustees and the lenders outside of which neither party as against the other, or as against any third party party, governmental or other, had, in my opinion, any claim.

Let us now examine the 16 *Vic.*, ch. 235, which was passed by the legislature established under the 3 and 4 *Vic.*, ch. 35, an act to re-unite the provinces of *Upper* and *Lower Canada* and for the government of *Canada*, and by authority of which the debentures now in question were issued, to ascertain whether they were placed on any other or different footing than those issued under the authority of the ordinance; to ascer-

(1) 15 Q. B. 692.

(2) 2 B. & Ald. 180.

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tain this it will be only necessary to refer to those sections having reference to the raising money by loan for the purposes of the act. Section 7 provides that:

In order to the making and completion of the several roads described and mentioned in the act passed during the last session of provincial parliament (14 and 15 *Vic.* ch. 132) and also to the improving and macadamizing of the roads hereinbefore mentioned, and the making of the various improvements hereinabove mentioned, it shall be lawful for the said turnpike trustees to raise by loan, a sum not exceeding £30,000 currency, and this loan, the debentures which shall be issued to effect the same, and all other matters having reference to the said loan, shall be subject to the provisions of the ordinance above cited with respect to the loan authorized under it: Provided nevertheless, that the rate of interest to be taken under this act shall in no case exceed the rate of 6 per centum, and no moneys shall be advanced out of the provincial funds for the payment of the said interest, and all the debentures which shall be issued under this act, so far as relates to the interest payable thereupon, shall have a privilege of priority of lien upon the tolls and other monies which shall come into the possession and shall be at the disposal of the said trustees, in preference to the interest payable upon all debentures which shall have been issued under the provincial guarantee, and also to all other claims for the re-imbursement of any sums of money advanced or to be advanced to the said trustees by the receiver-general of this province, and the said debentures as respects the payment of the principal and interest thereof, shall rank after those issued under the act passed during the last session of the parliament of the province, and hereinbefore cited.

And be it enacted: That for the completion of the roads, bridges and improvements mentioned in the two next preceding sections, it shall be lawful for the said trustees to issue debentures to the amount of forty thousand pounds currency, which debentures shall be wholly subject to the provisions of the ordinance hereinbefore cited, shall take precedence of those issued under the provincial guarantee, and of the claim of the government, to be repaid out of the revenues of the said toll-gates, and shall take order and precedence and rank currently with those to be issued by and under the seventh section of this act.

Here we see that this act, so far as relates to the borrowing powers of the trustees, embodies the provisions of the ordinance and makes the debentures issued

expressly subject to the provisions of the ordinance, except that while in the ordinance permission was given the government to advance by way of loan to the trustees, to aid them in paying interest, in this act it is declared that no money shall be advanced out of the provincial funds for the payment of interest.

I do not think it at all necessary to inquire what debentures were here referred to as having been issued under the provincial guarantee, because, assuming the provincial guarantee to have been given to debentures theretofore issued, that guarantee would not attach to the debentures now in question without express legislative authority, and the fact that this act expressly takes away the right of the government to advance on account of interest, and gives these debentures priority over debentures issued under a provincial guarantee, and so clearly distinguishes between those issued under this act without a provincial guarantee and those that may have been issued under a provincial guarantee, without even referring to the clause of the ordinance declaring that the debentures shall not be payable out of the general revenues, shows as strongly as very well can be, that the legislature never intended that the crown or general revenues were to become liable for the repayment of these debentures. Thus we find that by the 16 *Vic.*, ch. 235, the loans authorized by that act and the debentures which shall be issued to effect the same, and all having reference to such loan, shall be subject to the provisions of the ordinance, except that the permissive authority to advance on account of interest is expressly taken away, "no monies shall be advanced out of the provincial funds for the payment of the said interest"; but so far as relates to the interest, the debentures are to have a privilege of priority of lien upon the tolls, in preference to the interest payable on debentures issued under the provincial guarantee and

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other claims for reimbursement of any sums advanced to the trustees by the receiver-general. As we have seen, the 4 *Vic.*, ch. 17 having allowed the receiver-general to advance out of the provincial funds money to pay arrears of interest, providing at the same time for its repayment by the trustees, as subsequent acts were passed, and loans and debentures made, subject to the provisions of the 4 *Vic*, ch. 17, we find that this assistance from the provincial funds is not to apply, and therefore 12 *Vic.* ch. 115, 14 and 15 *Vic*, ch. 132, and the act under consideration, 16 *Vic.*, ch. 235, all provide that "no money shall be advanced out of the provincial funds for the payment of the said interest." It is asked, why was there no provision that no money should be advanced to pay the capital? The answer seems very obvious: for the very good reason that in the 4 *Vic.* the loan is made on the credit and payable out of the funds of the roads, and there is not one word authorizing the advance of a cent from the provincial funds on account of the principal, nor is there one word in that statute directly or indirectly implying a liability on the part of the crown or government to pay the principal or any portion of it. The ordinance which governs this loan expressly provides that it is not to be paid out of the general revenues, and so no necessity or reason for saying that the principal should not be advanced which was never authorized to be advanced; so that when the right to advance on account of interest was ignored the loans simply stood on the security of the act minus the provision for advancing on account of interest. But may it not be much more pertinently asked why, if the crown or government was legally bound to pay both principal and interest as a debt contracted by the agent, as now contended, what possible object could there be in giving the receiver-general a permissive power to advance by way of loan interest, when, if

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what is now contended for is law, there was a legal obligatory duty growing out of the act to pay both principal and interest; and if the crown or government were legally bound to pay principal and interest, as on a loan contracted by duly authorized agents, upon what principle was it enacted that no monies shall be advanced out of the provincial funds for payment of interest, if the loan was to the government and for the public benefit? Surely the duty and obligation to see the interest paid was quite as great as to see the principal repaid; and if liable for principal and interest, why was there such a provision in the 4 *Vic.*, that any money so advanced for interest should be repaid by the trustees, the agents of the government, to their principals, and if there was really a loan to and a debt due by the crown, why was there a positive prohibition to its payment from the general revenue, and there being no other provision made for its liquidation, how could it possibly be paid by the government?

But the suppliants in their petition, section 55, subsection 14, say,

> The provision in the said ordinance that the loans should be made on the credit and security of the tolls to be imposed on the roads for the improvements of which such loans were contracted and should be payable out of the same and not out of or chargeable against the general revenue of the province, was one entirely in the interests of the lenders and was held out as an inducement to them to lend their money, which makes a contract obligation on the province of *Canada* to fulfil, of that highly obligatory character attaching to all promissory obligations, and created no exemptions of the general revenues of the province of *Canada* from liability for the repayment of such loans, except upon the double condition of the said province having created such adequate fund and supplying such fund, in fact, to the payment of such loans.

It passes my ability to comprehend and appreciate the propositions here put forward. Upon what principles can a statute, which enacts affirmatively that a loan shall be made on the credit and security of a par-

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ticular fund, such as the tolls to be imposed on the roads, and should be payable out of the same, and negatively that such loan shall not be payable out of or chargeable against the general revenue of the province, be construed into a contract obligation, binding on the province of *Canada*, to repay such loans in the event of such fund proving inadequate, and creating in such case no exemption of the general revenues of the province of *Canada* from liability for the repayment of such loans? In other words, to give to the language of the act a meaning the exact opposite of what the language used conveys, and while the legislature says in plain unambiguous language that the loan shall be made on the credit and security of one fund and payable thereout, and that such loan shall not be payable out of or chargeable on another fund, we are asked to say that the legislature intended thereby to say that it was to be chargeable on and payable out of both funds—failing one, then out of the other.

I am therefore of opinion that this, though a *quasi* public law, was not, under the ordinance, or the 16 *Vic.*, or both, a government loan for repayment of which either the general revenues of the country or the faith or credit of the government of the country were pledged, that is, it was in the nature of a municipal loan, for repayment of which a specific fund was provided, and to which fund the debenture holder was to look for repayment; that the debenture holders advanced their money on the bargain contained in the act 16 *Vic.*, ch. 235, incorporating the 4 *Vic.*, ch. 17; that they must be taken to have full notice of the provisions of those acts, and of the security those acts afforded those who purchased the debentures issued by virtue of their authority and under their provisions, and have no right to look to any other security than those acts provided.

If, then, there was no liability fixed on the crown by

the combined effect of the ordinance of 1841 and the 16 *Vic.*, ch. 235, has there been any subsequent legislation imposing on the crown a liability to discharge an indebtedness which was not incurred on the faith or credit of the crown, and for which it was not primarily liable, whereby the debenture holders (who, when the money was loaned, advanced it on the credit of the tolls and other resources of the road) became not only creditors on such tolls and resources but creditors of the crown, entitled to judgment against the crown in a proceeding such as this? After a most careful consideration of all that has been urged, and a most critical examination of all legislative and governmental acts, in connection with these turnpikes and the debentures issued in connection therewith, I am constrained to say that I have failed to discover one legislative enactment or one act creating such a liability.

My brother *Gwynne* has kindly permitted me to see the judgment he intends delivering in this case, and he has with so much labor and with such critical skill analysed the legislative and governmental action in connection with these turnpikes, and I so fully concur in the conclusions at which he has arrived in reference to them, that it would be worse than waste of time were I to refer at length to what he will, so much better than I could, say on the subject.

I will only very briefly notice one or two matters which have been put forward very prominently by the suppliants.

In section 43 they say: debentures issued for loans effected under the ordinance of 1841, amounting to £25,000 and the debentures issued under 7 *Vic*, ch 45, to the amount of £8,882, were paid at maturity by the province of *Canada* out of the general revenues of that province.

And in section 44—The province of *Canada*, about

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1850, paid out of its general revenues large sums to pay at maturity home district turnpike trust bonds and debentures, issued under acts of the province of *Upper Canada*, which bonds were not payable by or chargeable against the general revenues of *Upper Canada*, but out of the tolls levied on the same.

Section 57 of the 3 and 4 *Vic.*, ch. 35, provides that, subject to the charges on the consolidated revenue fund mentioned in the act, the said fund shall be appropriated by the legislature of the province of *Canada* for the public service in such manner as they shall think proper. Provided that all bills appropriating any part of the surplus of the said consolidated revenue fund, or for imposing any new tax or impost shall originate in the legislative assembly, and also that it shall not be lawful for the legislative assembly to originate or pass any vote, resolution or bill for the appropriation of any part of the surplus, or of any other tax or impost, to any purpose which shall not have been first recommended by a message of the governor to the assembly during the session in which such vote, resolution or bill shall be passed. From these enactments they claim to fix on the crown a liability to pay these debentures under the 16 *Vic.*, ch 235, and so it has been strongly urged that because the government paid the first loan under the 4 *Vic*, and the home district bonds, ergo, they became liable to pay this loan under the 16 *Vic.* This, to my mind, is a pure fallacy. The legislature in its wisdom or or its liberality continually grants money in aid of institutions and undertakings, public, local, or individual, but I know of no principle by which a simple grant of money to one object can be construed into a binding contract to pay other monies, because the parties seeking to set up such a contract are in a position similar to that of those who, by the grants made, benefited by the bounty of the legislature.

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But it has been much urged that the special fund provided for payment of these debentures having proved insufficient, the government was bound to increase the revenues of the special fund, or to have created another fund. It appears to me this is very easily answered: In the first place, where is any such obligation to be found? I can discover none, statutory or otherwise, and statutory to be obligatory, I think it must be; and in the second place, it was the legislature, not the crown or the government, that created the fund, a fund as I have observed, no doubt in estimation of the then legislature, adequate to the repayment of the loans authorized, and it is very clear the lenders must have thought it so or it cannot be supposed they would have invested their means on its security. If it has unfortunately proved insufficient, what power has the crown or the government to increase the revenues of the special fund beyond what the legislature has authorized, or what power has the crown or government to create another fund? This is all for legislative action.

It is also suggested that the legislature, in this act, having stated that the general revenues should not be charged with this debt, virtually declared that the legislature would provide other means to pay with than the general revenue, which is exempted. If this is so, it seems to me most effectually to put the suppliants out of this court, and requires them to resort for redress to the legislature, which alone can give it in such a case. It might be very just and right the legislature should consider the matter and should come to the aid of the debenture holders, but surely if they do not do so there is no legal liability cast on the crown or government, enforceable by petition of right, to provide, unsanctioned by the legislature, for the deficiency of this special fund. There can be no doubt that the investment, depending on repayment from tolls, was, to

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a certain extent, precarious; but the investor, on lending his money on such a security, assumed the risk, and, as stated in *Chatham Local Board* v. *Rochester Commissioners* (1), in *England* the character of such investments had then greatly changed owing to railways, by reason whereof, it is there said, turnpike tolls do not afford the security they did; but, as I have before stated, in *England*, when the tolls proved insufficient to pay either the interest or principal loaned on the security and to keep the roads in repair, the remedy was not by suing the Queen, but by seeking from the legislature further powers of increasing the tolls, or by calling on the parish or district to contribute. See 4 *Vic.*, ch. 35, 4 and 5 *Vic.*, ch. 59. So here, if the suppliants are to have any relief, the action of the legislature appears to me indispensable, and as was said in *Gibson* v. *East India* Co. (2), relief should be sought for by petition, memorial or remonstrance; not by action in a court of law. In that case it was held that the retiring pension of a military officer of the *East India* Company, granted by the company, but not by deed, did not, upon his bankruptcy, pass to his assignee, as it could not have been enforced by the officer against the company. *Tyndall*, C. J., says of the claim put forward:

> Although it may differ in some particulars from a grant of half-pay by the crown to the officers of the army or navy upon their retirement from actual service; yet it bears a much stronger analogy to it in the mode of its being granted and in the consequences attending it than to any contract. Now it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the crown, unless the money has been specifically appropriated by the government and placed in the hands of the paymaster or agent to the account of the particular officer, and there is no ground on general principle to hold that an action could be maintained against any one unless under the same circumstances as the present case.

(1) L. R. 1 Q. B. 31.

(2) 4 B. & Ald. 273.

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He goes on to say:

> The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations, obligations which want the *vinculum juris*, although binding in moral equity and conscience, to be a grant which the *East India* Company, as governors, are bound in *foro conscientiæ* to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law.

I am therefore of opinion that the relief sought cannot be granted, and that the appeal should be allowed and petition dismissed.

FOURNIER, J. adhered to the judgment delivered by him in the Court below.

HENRY, J.:

I have not thought it necessary in view of the very exhaustive and elaborate judgment of my brother *Fournier* and that of my brother *Taschereau*, which I have had the advantage of seeing, to write out a judgment in this case, and thereby add uselessly to the volume of our reports. I entirely concur in the judgment to be delivered by my brother *Taschereau* on this appeal, except as to interest, for the provision in the 16 *Vic.*, ch. 235, has certainly exempted the province from any liability as to interest, but as to principal I entertain the same views as my brothers *Fournier* and *Taschereau*. It is said the roads were under municipal control and that the act created a quasi-municipal corporation, but by the Act 4 *Vic.*, ch. 17, I find that the policy of the government as to these roads was entirely changed. The municipal control which previously existed is taken away and the legislature declares that the government shall take entire control of the roads, and the property, toll houses, the stock and implements, &c., &c., are all vested in the Crown. Here the officers are appointed by the government and

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no municipal officer or bondholder had any control over them. This is certainly very different from the turnpike roads in *England*, where although, as said by the Chief Justice, the roads are declared to be public highways, if the officers appointed did not fulfil their duties, the bondholders had some remedy. I have also ascertained that the loan in question has been acknowledged by the legislature as a public debt, as they had power to do.

Moreover, I find that the government have actually paid previous loans made under the same authority, and having paid them authorized its officers to effect the present loan. If we were to hold now that this is not a public debt, it would be declaring that the government had been guilty of a moral fraud. Then also we are told that the loan is secured by tolls, &c., but it has been decided that a bondholder cannot levy against Her Majesty's property, and surely if a party gives a mortgage, he is nevertheless answerable for the principal. True, the legislature has said that payment of this loan would not come out of the general revenue, but if the liability exists, it still throws upon the government the obligation of providing other means for the payment thereof.

Under all these circumstances I think the suppliants are entitled to the judgment of this court for the principal of the overdue debentures, with interest from the date of the fyling of their petition of right.

TASCHEREAU, J.:

By their petition of right before the Exchequer Court, the respondents alleged:—

That the province of *Canada* had raised, by way of loan, a sum of £30,000 for the improvement of provincial highways, situate on the north shore of the river *St. Lawrence*, in the neighborhood of the city of *Quebec*—and a further sum of £40,000 for the improvement of

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like highways on the south shore of the river *St Lawrence* – that there were issued debentures for both of the said loans, signed by the *Quebec* turnpike road trustees, under the authority of an act of the parliament of the province of *Canada*, passed in the sixteenth year of Her Majesty's reign, intituled: "An act to authorize the trustees of the *Quebec* turnpike roads to issue debentures to a certain amount, and to place certain roads under their control"—that the moneys so borrowed came into the hands of Her Majesty, and were expended in the improvement of the highways in the said act mentioned—that no tolls or rates were ever imposed or levied on persons passing over the roads improved by means of said loan of £30,000—that the tolls imposed and collected on the highways improved by means of the said loan of £40,000 were never applied to the payment of the debentures issued for the said last mentioned loan in interest or principal—that the trustees accounted to Her Majesty, as well for the said loans as for the tolls collected by them—that at no time had there been a fund in the hands of the said trustees adequate to the payment, in interest and principal, of the debentures issued for said loans – that the respondents are holders of debentures for both of the said loans to an amount of $70,072, upon which interest is due from the 1st day of July, 1872—that the debentures so held by them fell due after the union, and that Her Majesty is liable for the same under 111 sec. of *British North America* Act, 1867, as debts of the late province of *Canada* existing at the union.

Wherefore they demanded the payment of the said sum of $70,072 with interest from the 1st day of July, 1872.

The attorney general, for Her Majesty, by his plea to the said petition of right, denied that the act of the said trustees, when issuing the debentures sought to be

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recovered from Her Majesty by the respondents, was the act of the late province of *Canada*, or that the monies obtained from the respondents had been so obtained for and in the name of the said province, and that there never was any undertaking from the said late province of *Canada* to pay the whole or any part of the debentures sought to be now recovered by the respondents.

It is admitted that under the one hundred and eleventh section of the *B. N. A.* Act, the Dominion of *Canada* is liable for the payment of these debentures, if the late province of *Canada* was responsible for them, and the case is to be considered as being against the said province as constituted before confederation. The question to be determined is, in what capacity did the said trustees act when they issued the said debentures. Were they acting for the province or for a private corporation, and was there any undertaking on the part of the said province to pay the said debentures? At the hearing it struck me that there was a misjoinder of the suppliants in this case, and that they could not, as they have done, being each of them, without any relation whatsoever to the others, holder,individually and for his sole benefit, of debentures, join in one action for the recovery thereof; not more than four different persons holding promissory notes against a fifth, could join in one action for the recovery of these notes. However, no objection on this ground seems to have been taken on the part of the defense. On the contrary, we were told at the hearing by both parties, that any irregularity of this kind in the record was to be considered as waived so as to have a decision on the merits of the contestation between the parties.

It has been contended on the part of the respondents that the trustees under 4 *Vic.*, ch. 17, do not constitute a body in the nature of a corporation. This contention

has not been sustained by the Exchequer Court, and rightly so, in my opinion.

The words "corporation" or "incorporated," it is true, are not used in the statute, but no precise form of words is necessary for the creation of a corporation, and the assent of the legislative power to grant an incorporation may be given constructively or presumptively.

Aldridge vs. *Cats* (1); *Conservators of River Tone* vs. *Ash* (2); *Dean* vs. *Davis* (3); *Angell & Ames on Corporations* (4). In *Standley* vs. *Perry* (5), the commissioners of the *Cobourg* town trust were held by this court to have been duly incorporated by the Act 22 *Vic.*, ch. 72, though this statute did not, in express words, enact it.

Here it is still clearer that the intention of the Act, 4 *Vic*, ch. 17, was to incorporate the said *Quebec* Turnpike Road Trustees. But are they a private corporation? Undoubtedly no. This has been so conclusively demonstrated by Mr. Justice *Fournier* in the Exchequer Court, that I deem it unnecessary to dwell on this point at any length. The *Quebec* Turnpike Roads Trustees are a *quasi* corporation only, what I might call a state corporation. They have no interest whatsoever in the undertaking authorized and ordered by the act. They are not only officers of the body created, but they are the only members of this body. They and they alone constitute it in its entirety. They cannot own any property, real or personal; everything they acquire belongs to the crown. It is crown property that they have to administer and crown property alone that they control. This 4 *Vic.*, ch. 17 which creates them is clear on this. A reference to two statutes of the very same year, 1841 (4 *Vic.*, chs. 11 and 22), shows the difference between a private turnpike road corporation and the *quasi* corporation of the *Quebec* turnpike roads created

(1) L. R. 4 P. C. 413.
(2) 10 Barn. & C. 349.
(3) 51 Cal. 406.
(4) Pps. 76, 77, 78, 80.
(5) 3 Can. Sup. Court R. 356.

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by the 4 *Vic.*, ch 17. By these two first statutes (4 *Vic.*, chs. 11 and 22) companies are incorporated for the construction of turnpike roads, from the river *Richelieu* to *Granby*, and from *Montreal* to a neighboring parish. And it is precisely because no such company was forthcoming to macadamize the *Quebec* roads, that the legislative authority had to intervene and take upon itself, for the common weal, to order, as a part of the public works of the country, the construction of those roads. The very preamble of the ordinances establishes this proposition. It cannot be taken as having been enacted in the interest of the landholders of the vicinity for they pay the tolls as the rest of the public when they use these roads, and those bound before this act to perform any labor on any of these roads, have (sec. 19) to pay an annual sum in commutation of such obligation. In their report, filed in this case, the commissioners appointed in 1876 to inquire into the affairs of this trust, state that it does not appear that these commutation moneys were ever levied. This is an error. In statements Nos. 3 and 7, appendix AA, for 1850, and in appendix G for 1852-53, and appendix I for 1854-55, the trustees, in their accounts to the government, acknowledge having received such commutation from a number of persons. However, this is immaterial, the law ordered this commutation, and if the trustees did not do their duty in the matter the crown would be estopped from invoking its own officers' dereliction of duty. But, moreover, this is not put in issue by the crown on this record. There is no plea that the suppliants would have been paid if the trustees had strictly obeyed the law. It is the state then which assumed the burthen of making these roads and of creating a fund for that purpose. When in 8 *Vic.*, ch. 55, sec. 4, for instance, the purchase of the *Dorchester* bridge, by these trustees, is mentioned, it is called a purchase by the provincial government.

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It is the state which, through the instrumentality of the body created by the act and by and through its administrators, issued the debentures authorized by the act. The very form of these debentures shows this. Debentures issued by incorporated companies in their name are and have always been in an entirely different form. It is the state which borrowed, from the purchasers of these debentures, the moneys necessary to form the fund required for the purposes of the act, a special fund certainly, but a fund belonging to the state; a fund to be employed as directed by the act certainly, but always in the name of and for the state, acting through its own officers, through its own agent, this *quasi* corporation, through its own trustees. It is upon the state's property that the £25,000 borrowed from the debenture holders were expended, and it is the state which benefited from this expenditure. A contrary interpretation has been suggested on the part of Her Majesty, but the act itself says so in clear terms. It enacts in so many words that all property whatsoever, moveable or immoveable, in the hands of the said trustees, shall be vested in Her Majesty for the public uses of the province. That the tolls to be levied are included in this enactment admits of no doubt, and is made still clearer by the preamble of 12 *Vic.*, ch. 115. The ordinance adds, it is true, that such property "shall be subject to the management of the said trustees for the purposes of this ordinance;" but may I ask if, after paying these debentures and making all the works ordered by the act, a surplus had remained in the trustees' hands, would not this surplus, would not the surplus of the tolls every year, have belonged to the crown and formed part of the public revenue of the country? May I ask also, could this corporation make an assignment under the bankruptcy laws, or could it be forced into bankruptcy?

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I find two state corporations of the same kind created by our statutes.

By the 7 *Vic.* ch. 11, "the principal officers of Her Majesty's Ordinance" are incorporated, authorized to sue and to be sued, and *to hold in trust for Her Majesty* all Her Majesty's property connected with the defence of the country.

By the 14 and 15 *Vic.* ch. 67, the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland are in the same manner created a *quasi* corporation, empowered to sue and be sued, and authorized to hold *in trust for Her Majesty* the property therein described.

Under these statutes which are in fact mere re-enactments, for this country, of Imperial statutes to the same effect, the bodies thereby created, can, as the *Quebec* Turnpike Road Trustees, sue and be sued, but everything in their possession, as also in the trustees' possession, is vested in Her Majesty. A judgment can be obtained, but it cannot be executed against the board of ordinance or against the Commissioners for executing the office of Lord High Admiral. So it was held by the Superior Court of *Quebec* for the Turnpike Road Trustees in *Anderson* v. *The Quebec North Shore Turnpike Roads* (1). The plaintiff, in that case, having obtained judgment against the trustees, seized in the hands of the *Quebec* Bank a sum of $5,386.74 which stood there deposited in their name. The trustees contested the validity of this seizure, on the ground that this sum of money, though deposited by them, belonged to Her Majesty, under the 4 *Vic.* The plaintiff demurred to this contestation, but the court held that this seizure was null, as these moneys and all property whatsoever in the hands of these trustees belong to Her Majesty.

(1) 14 L. C. R. 90.

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So was in *England*, the property vested in the board of ordinance by the statute incorporating it, of which I have spoken, declared to continue to be the crown's property, *Doe, Leigh* v. *Roe* (1). In its various clauses and enactments, this ordinance of 1841 demonstrates conclusively that such is the case, for the property under the control of the trustees.

A reference to the preamble of the 16 *Vic.* ch. 235 itself, under which the debentures here claimed were issued, demonstrates that the legislature considered these roads as public works and the trustees as government officers. It reads thus : "Whereas it is expedient * * * to make further improvements in the vicinity of *Quebec through the trustees* of the turnpike roads established under the said ordinance 4 *Vic.*" Is this language used in the statute book, when the legislature gives additional powers to a private company? Certainly not. These improvements that the legislature desires and declares to be expedient, are to be made *through the* trustees ; but by whom and for whom? This preamble does not say in express terms, but I read it as meaning by and for the government, by and for the province through its officers, the said trustees to whom has been given the form of a corporation that they might the more effectually discharge their appointed duties, but, in the performance of these duties, always acting in the name of and for the province.

Now, if it is the province which borrowed these moneys, it follows, as a matter of course, that the province is obliged to re-imburse them. By the very fact of borrowing, the borrower obliges himself to refund. No express undertaking is required, there is an implied promise to pay. These debenture holders lent money to the province. To the province they look for pay-

(1) 8 M. & W. 579.

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ment. They had a right to expect an immediate re-imbursement. But such is not the case. Since 1872 they have not received a single cent of interest on these loans, and now that the capital is due and overdue, they are refused both. But how are they met? Upon what grounds is it contended that he who borrows has not to re-imburse? Upon a plea of payment? No! Of prescription? No! Of set off? No! But upon the most extraordinary contention that the state did not guarantee the repayment of this loan! That the borrower did not guarantee the repayment of this loan! That the borrower did not guarantee the payment of the money lent to him!

But since when is it necessary for the borrower to guarantee the re-imbursement of the loan made to him? Is it not the very essence of this contract that the borrower must re-imburse the lender? Certainly, a stipulation in a private contract that the borrower would not be in any way personally liable for the moneys lent, and that the only recourse of the lender would be against a certain security given, would be lawful; as also, in the case submitted, it would have been in the power of the legislative authority to enact that the province would never be liable for the payment of these debentures, or that they were to be issued without any guarantee whatsoever on the part of the province. But a stipulation, in a private contract, of such a novel, unusual, and I might say startling character, would require to be couched in very clear terms to be sanctioned by a court of justice. And on the same principle, if in this statute the state wants the court to find that it was empowered to borrow upon the condition that it should never repay, I take it that it is incumbent upon its representatives to show a very clear and unambiguous text to that effect, and that the court will not by interpretation or implication find

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such an enactment if it does not appear upon the face of the statute itself, in so many words. Now, no such enactment can be found in the 4 *Vic* ch. 17, or the 16 *Vic.* ch 235. And it is no doubt by inadvertence that in the third paragraph of the plea filed in this case on the part of Her Majesty, it is alleged that the Act 16 *Vic.* ch. 235 contains such an enactment as to the principal of these debentures.

There is not a word in this statute. The only words therein having reference to the nature of the debentures are as follows:

Section 7: And this loan and the debentures which shall be issued to effect the same, and all other matters having reference to the said loan, shall be subject to the provisions of the ordinance above cited with respect to the loan authorized under it.

Now the ordinance here referred to is the 4 *Vic.* ch. 17, and the only words therein upon which the state could perhaps contend that it was authorized to borrow and relieved at the same time of the obligation of refunding, are in the 21st section, to the effect that the trustees are authorized "to raise by way of loan, on the credit and security of the tolls hereby authorized to be imposed, and of other moneys which may come into the possession and be at the disposal of the said trustees, under and by virtue of this ordinance, and not to be paid out of or chargeable against the general revenue of this province, any sum or sums of money not exceeding in the whole twenty-five thousand pounds currency."

On the part of Her Majesty it was alleged in the plea on the record and argued before us that the words "on the credit and security of the tolls" means on the sole credit and security of the tolls. I do not see how this contention can be sustained, for the simple reason that the word "sole" is not in the statute. Upon what principle could we so make an Act of Parliament say what it does not say? If a private individual is

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said to borrow money on the credit and security of the indorser, for instance, is it meant by this that the lender renounces to his recourse against the borrower personally? Surely not! Can such a renunciation be ever presumed? Is it not the obligation on the borrower to refund that is on the contrary to be presumed. As I have remarked before, a special promise to refund is unnecessary in this contract. By the acknowledgment of a loan, there is an implied promise by the borrower to refund

As to the enactment that this loan was not to be paid out or chargeable against the general revenue of the province, I have very little to add to what Mr. Justice *Fournier*, in the Exchequer Court, has said on this part of the case. The province, by the very preamble of the act, assumes the obligation to make these roads and to create a fund for that purpose. It borrows money so to create this special fund, and says to the lenders "you shall be paid out of this special fund and not out of the general revenue of the Province." But they are not and cannot be paid out of this special fund; does it follow that they will not be paid at all? Does it follow that because a pledge or security given for the payment of a debt proves to be worthless or insufficient to pay the debt the debtor is relieved from all personal liability? I take it that the fair and reasonable construction to be put on these words is:—1st, that as the debentures to be issued were to be redeemable only at a remote period, the contingent liability of the province was not to appear, and the amount of these debentures was not to be considered before they matured, as a debt of the province, and 2nd, that it was enacted they were not to be paid out of the general revenue of the province, because it was taken for granted that they would be paid out of the special fund. The contingency of the

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special fund proving worthless was not provided for. It may be that a finance minister, with these words on the statute book, could not pay the amount of these debentures without a special authorization of parliament, and that he could not, without such authorization, fill up a deficiency in a special fund from the proceeds of the general fund. But this is a matter of administration with which the suppliants have nothing to do. The fact that by the statute which authorizes the loan, parliament did not then provide for the repayment of this loan, in case the special fund created thereby should turn out to be inadequate for that purpose, may so put the executive under the necessity to get an appropriation from the parliament to make this payment, but surely does and cannot relieve the state from the obligation of repaying that loan.

If there was any doubt on the construction of these words of this said 21st clause of the ordinance, it seems to me that the lender, not the borrower, should have the benefit of it, and that the presumption in such a case is altogether against the borrower. But whatever doubts there might arise in this case at the reading of this clause by itself, are entirely removed by the interpretation of it given later, by the legislative and administrative authorities of the province itself.

By the Act 12 *Vic.*, ch. 5, intituled: "An act for the better management of the public debt, accounts, revenue and property," it is ordered, "that whereas it is expedient to make better provision for the management of the public debt of this province, it shall be lawful for the Governor in Council to redeem or purchase on account of the province all or any of the outstanding debentures constituting the public debt of the Province of *Canada*, or all or any of the debentures issued by Commissioners or other public officers, under the authority of the Legislature of *Canada* or of the late

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Province of *Canada*, the interest or principal of which debentures is made a charge on the consolidated revenue fund of the province."

Now, under this act the government has paid (see public accounts for 1853, No. 41, under heading "statement of debentures, redeemed under authority of 12 *Vic.*, ch. 5") £33,882 for the redemption of the debentures issued under this 4 *Vic.*, ch. 17 and the 8 *Vic.*, ch. 55. And though (document No. 47 of 1852 and No. 43 of 1853 public accounts) special statements are given of the debentures for which the government is only partially liable, or is liable for the interest thereof only, the *Quebec* Turnpike debentures are not included in these statements Now, if it had been considered that the government was liable for the interest only on those debentures, they would certainly have been so therein included. On the contrary, in document 44 (public accounts) for 1852, all the payments made according to No. 45 thereof, including £11,790 then paid for, the *Quebec* Turnpike Trust debentures are given as made under the 12 *Vic.*, ch. 5, which relates to the public debt of the province and as effected for the construction of public works Is not that acknowledging that these roads are public works? Is not that acknowledging as expressly as possible that these debentures formed part of the public debt?

Now, in the public accounts for 1851 and those for 1855 there is something showing yet more clearly that the government always considered these roads as public works and these debentures as a provincial debt.

I have just said that by the public accounts of 1853 the sum of £33,882 was charged as paid by the province for redeeming the debentures in question. Now, if we refer to the public accounts for the year 1854, page 6, (and the debentures held by the suppliants were to a large amount thereof issued subsequently to this), and

to the public accounts for the year 1855, statement No. 2, page 6, it will be seen first that nowhere is the province credited (or ever was at any time subsequently credited) for that sum as a creditor of the turnpike trust: and this shows that the payment of these debentures was not made as a loan to the trustees, but entirely as a payment by the province of one of its own debts. Statements are to be found in the documents referred to, headed "Loans to incorporated companies." If the contention on the part of Her Majesty was correct, surely this sum of £33,882 which had then been paid by the government for these debentures, would be found in these statements But not a word of it is to be found therein. Was it an omission? Clearly not, for in the very same statement we find this very same sum accounted for, or charged, and under what heading? Under the heading "Provincial Works, *Quebec* Turnpike Trust £33,882," in the same list and category as the St. Lawrence Canals, the Welland Canal, the Provincial Penitentiary and such other works and institutions, the character of which cannot be questioned. And in document 40 (public accounts for 1853), headed "A statement showing the amount of legislative grants towards the construction of public works, and of the outstanding debentures issued under the several acts of appropriation on account thereof," (viz., on account of the legislative grants towards the construction of public works), *Quebec* road trust debentures to the amount of £22,092, paid in 1853, as per statement No. 41 of the said public accounts, are included

It has been contended on the part of Her Majesty that those debentures were so paid by the province under the 12 *Vic.*, ch. 5, simply because the interest, and the interest only, thereof was, under the clause of the ordinance which authorized the government to

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advance it to the trustees, a charge on the consolidated revenue fund of the province.

But 1st, this interest was not a charge on the consolidated revenue of the country by this clause of the 4 *Vic.*, which simply authorized a loan for the payment thereof by the government and at its discretion, to the trustees, a loan from the unappropriated funds of the country to a special fund, a loan which undoubtedly the government would have ceased to make, if these debentures had not been its own debt, when those trustees found themselves in the impossibility to refund the advances previously made.

2nd. If the government had been liable for the interest only of these debentures, they would have been included in the statements, Nos. 47 of 1852 and 43 of 1853, of the public accounts for those years, headed "A statement of debentures for which the government are partially liable," and under which are included debentures for the interest of which only the government is liable; and they are not so included.

3rd. If the government had not been liable for the principal of these debentures, when it paid it in 1854 it would have included it in the statements of 1854 and 1855, headed "Loans to incorporated companies;" and it is not so included.

4th. The government, if the contention on this point on the part of Her Majesty was correct, would not have included the capital of these debentures in their statements of the public accounts of 1854 and 1855 as paid for one of the public works of the country, crediting the country for the amount thereof as an asset, because these roads, the property of the country, on which this amount had been expended, were to that amount increased in value.

It has been said that those *Quebec* roads were local works, and that we cannot presume that the province

intended so to benefit a particular locality at the expense of the public chest. But a reference to the statute book and the public accounts of that period will show that, at that time, the construction of local works of that nature by the province was not an unusual thing. In 1841, for instance, I find that the legislature voted fifteen thousand pounds to macadamize the road between the *Cascades* and the province line, forty-five thousand pounds to macadamize the roads in the district of *Brantford*, and thirty thousand pounds for a road from *Hamilton* to *Port Dover*.

In the public accounts of 1853, for another instance, I find the home district roads, the *Chambly* roads, the *Montreal* roads, the *Hamilton* and *Brantford* roads, the *Queenston* and *Grimsby* road, the *Kingston* and *Napanee* road, the *York* roads, the *Yonge* street roads, paid for in whole or in part by the provincial government; yet all of them were clearly local works.

But I find in the statute book additional evidence that the legislature did not enact, and cannot be interpreted to have enacted, that the province would never be liable for the amount of these debentures.

By the 14 and 15 *Vic.*, ch. 133 (1851), these trustees are authorized to purchase the *Montmorency* bridge, and for the payment thereof to issue debentures, but for these debentures the legislature did not want the province to be responsible. Undoubtedly because this bridge was of such a well established value that it was taken as a certainty that the said debentures would be easily negociated without such guarantee. How for that purpose was this statute framed? Does it say that these debentures and the loan made thereby will be subject to the provisions of the ordinance, 4 *Vic.*? No such words as these are to be found here, and undoubtedly because they would, in the mind of the law giver, have rendered the province liable. But it enacts in

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express terms that "neither the principal or interest of the debentures to be issued under this act, shall be guaranteed by the province or payable out of any provincial funds." Now, when we see this proviso struck out in the very next statute, passed by the same legislature in relation to these turnpike roads, and this only two years later, (the 16 *Vic.*, ch. 235, under which the suppliants hold the debentures in question here) and replaced by one, saying that the loan will be ruled by the provisions of the 4 *Vic.*, have we not clear and unmistakable evidence that the legislature did not intend that these last debentures should not be guaranteed or paid by the province? If this had been intended, would they not have said so in the same clear and express terms of the preceding statute?

Here is a statute saying in so many words that the province will not be liable, and another and the very next one, on the same subject, in which these words are struck out. Surely the fair and reasonable construction is that these words were left out, because under this one the province was to be liable, if the special fund turned out to be unable to pay these debentures. In 1851 the legislature says debentures shall be issued, but neither capital or interest shall be guaranteed by the province; in 1853 it says: "debentures shall be issued, but these debentures will be ruled by the provisions of 4 *Vic.*" It seems to me that the legislature here purposely made a distinction, so as not to exempt the province, the special fund being insufficient from paying the debentures of 1853, as it had done for the debentures of 1851. Otherwise it would have said so in the same terms, and this, I apprehend, the legislature did for the best possible reason. It is evident that the sale of a single one of these new debentures of 1853 would have been utterly impossible if the legislature had enacted that the province would not at all be

liable for them. If we consider the circumstances under which the debentures previously issued through these trustees were paid at their maturity by the province, and if we compare the date of this statute 16 *Vic.*, ch. 235, under which the suppliants base their claims against the crown, with this payment, we find why the legislature did not enact that the new debentures of 1853 would not be guaranteed by the province, and why the province did pay the old debentures. In 1853 (public accounts of 1853, statement No. 41) a sum of £22,092 was due to the holders of matured debentures issued under the ordinance and the 8th *Vic.*, ch. 55. In the same year the legislature, by this 16 *Vic.*, ch. 235, authorizes the issue of £70,000 more of debentures through the said trust. Now how would these £70,000 of debentures have been received on the money market, if the government had repudiated the payment of the £22,092 then overdue by this trust? How could it have been expected that this trust could, on its own credit, obtain a loan of £70,000, when it had at this very time £22,092 of debentures overdue and unpaid, when, in fact, as a special fund, it was and had always been, utterly insolvent? For, though a priority over the claims of the province is given by the act to the new debentures, this priority, in the very words of sec. 7 is only for the interest payable on the said debentures and not for the capital thereof, and there were then on the market, besides the amounts issued under the ordinance and the 8 *Vic.*, £45,000 of debentures not yet matured issued by the trust under the 12 *Vic.*, ch. 115, and the 14 and 15 *Vic.*, ch. 132 and 133. Can we not presume—nay, even take as a certainty—that, if the government had not, before these new debentures were put on the market, paid the old debentures then matured, the sale of a single one of these new debentures would have been absolutely impossible. Who would

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have lent money to an insolvent special fund on the guarantee of that fund alone? To obviate this and to secure the new loan, the legislature strikes out from this statute the enactment that the province would not be liable for the new debentures, which was inserted in the very next preceding statute on the same subject, and the government pay in the very same year the old debentures: they pay these £22,092 overdue, making, with what they had paid previously, £33,882 paid for the redemption of the debentures of this trust. They thus admit the state's responsibility for the debts of this trust, and by so doing secure the new loan and the sale of the new debentures. And they make this payment, not as a loan to this trust, not as if this trust was anything but itself a department of state, but as the province's own debt, as a payment done in the ordinary course of the government business, for provincial public works; as appears by statement No. 2 of the public accounts of 1855, to which I have already referred, headed "A statement of the affairs of the province of *Canada*." They could not have made a loan or a payment, still less a gratuity, to a private corporation without the authority of the legislature, but for this authority they did not ask a special act, they found it in the 4 *Vic.* itself. They come before the legislature, they lay before them a statement of this transaction, and of these payments made in this manner. The Legislature ratifies and sanctions them, not only tacitly, but also as expressly as possible, by voting the supplies and the moneys required for the service of the country, according to this statement of its executive department. Were not the suppliants induced, under these circumstances, to lend their monies by the fact that the province having been responsible for the anterior loans would be so for the new loans, declared in express terms by the 16 *Vic.*, authorizing the new loan,

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to be ruled by the provisions of the ordinance authorizing the old loan. It is a well settled rule of law, that he who holds himself responsible towards the world for the debts of another person cannot later repudiate the debts of this other person, without some notification of his intention not to be any longer so responsible. This principle must rule the governments in their dealing with the individuals, as well as the individuals themselves. Here the case is stronger against the Government, as they paid these old debentures, not as the debt of another, but as their own debt and debentures. In fact it appears to me that, under these circumstances, not only was not this new loan obtained on the sole credit of this trust, but that it was, on the contrary, obtained on the sole credit of the province.

I find further that in the estimates for 1852 (last document in the public accounts for 1851) it is provided for the interest on these debentures as a permanent charge under the 4 *Vic.*, chap. 17, and 8 *Vic.*, chap. 55, on the public revenue, and that in document No. 16 of the public accounts for the same year, 1851, the interest is charged as paid by the government, not as a loan or advance to the trustees, but as a debt of the province. Now sec. 27 of the 4 *Vic.*, ch. 17 merely authorized the government, at their discretion, to advance as a loan, such sums as would be necessary to enable the trustees to pay the arrears of interest on these debentures And sec. 23 of this ordinance enacted in express terms that the interest on these debentures was to be paid out of the tolls or out of any other moneys at the disposal of the trustees for the purposes of the ordinance, whilst sec. 21, already referred to, expressly enacted that the loan to be raised by the trustees was not to be paid out of the general revenues of the country, yet in the public accounts and in the estimates for the public service laid before the legislature of the country, the

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government treats the interest they have already paid and those that they intend to pay thereafter on these debentures as a debt of the country, as a permanent charge on the revenue, and not due, for which a vote is required; for supplies are not voted for them (16 *Vic.*, chaps. 255 and 156), but one already provided for by law, that is to say, by the 4 *Vic.*, chap. 17, and 8 *Vic.*, ch. 55. Now, here again is a clear and unambiguous admission that these debentures were a debt of the province by the government, which submitted these accounts and estimates to the legislature, and by this legislature which accepted them, and this not only for the interest but for the capital, as it is evident that the province in admitting the payment of the interest under the provisions of the ordinance, not as a loan or advance, but as a permanent charge on the public revenue and as one of the public debts of the country, impliedly admitted its liability to the same extent for the capital of those debentures, authorized by the said ordinance. That the province thus paid this interest because it was its own debt and not as a loan under section 17 of the ordinance, cannot be denied when the public accounts give this payment as a permanent charge on the revenue of the country. And then if it had paid it as a loan, the payment would be inserted under the heading "Loans to incorporated companies;" and it is not thus inserted. Moreover, the government had already in 1850 advanced a sum of over £16,000 for the payment of these interests: (Journals of 1851, page 213). Now clearly they would not, in 1851 and 1852, have paid another large sum for these interests as a loan to this trust when this trust was already so largely indebted for amounts previously advanced and was moreover actually insolvent; but they paid it, not under sec. 17 of the ordinance, as a loan, but as one of the liabilities of the province and as interest on sums

borrowed for public works by the country itself. Now, I repeat it, by paying the interest of these debentures, as a permanent charge on its revenue, when the special fund provided is insufficient for that purpose, the province admitted that the capital also of the said debentures was its debt and would have to be paid out of the public funds, at their maturity, if the special fund should then also prove insufficient to pay the said capital.

I find further that, at the very outset, the legislature itself and the executive of the late province of *Canada*, considered the statute 16 *Vic.* ch. 235, and the loan authorized thereby for these roads, as containing an appropriation of public monies.

By the 9 *Vic.*, ch. 114, sec 8, of the said province, combined with the 10 and 11 *Vic.* ch. 71, of the imperial parliament, it was enacted as follows: "The legislative assembly shall not originate or pass any vote, resolution or bill for the appropriation of any part of the consolidated revenue fund, or of any other tax or impost to any purpose which has not been first recommended by a message of the governor to the said legislative assembly during the session in which such vote, resolution or bill is passed."

In conformity to this enactment in the journals of 1853, p. 894, after the entry, that the house do resolve itself into committee on the bill relating to these turnpike roads, now the said statute 16 *Vic.*, ch. 235, under which the suppliants hold their debentures, we find the following words: "The honorable Mr. *Hincks*, a member of the executive council, by command of His Excellency the Governor General, then acquainted the the house that His Excellency, having been informed of the subject-matter of this motion, recommends it to the consideration of the house."

In the like manner, when the resolutions introducing

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the bill, which is now the 14 and 15 *Vic.*, ch. 132, entitled, "An act to authorize the *Quebec* turnpike road trustees to effect a new loan" were first moved before the house, "the honorable attorney-general *Baldwin*, by command of His Excellency the Governor General, acquainted the house that His Excellency, having been informed of the subject of this motion, recommended it to the consideration of the house (Journals of 1851, p. 106)." Why was His Excellency's recommendation deemed necessary and actually given for the introduction of this bill, now on the statute book, as the 16 *Vic*, ch. 235, as well as for the 14 and 15 *Vic.*, ch. 132? Unquestionably, because this loan, and the appropriation of it to these roads, authorized by these acts, were an appropriation of the public moneys of the country. Yet, in these two statutes is to be found the proviso that the interest on the debentures to be issued in accordance thereof, was not to be advanced out of the provincial funds. As to the capital, both of them enact that the debentures to be issued and the loan to be effected thereby shall be ruled by the provisions of the 4th *Vic.* Now, between these two statutes, another one was passed in relation to this turnpike trust, the 14 and 15 *Vic.*, ch. 133, entitled: "An act to authorize the trustees of the *Quebec* turnpike roads to issue debentures to a limited amount," and if we refer to page 186 of the journals of 1851, we find that, for this last statute, His Excellency's recommendation was not obtained and communicated to the house. Why this difference between the two first named statutes and this last one? Why for the two first, have His Excellency's recommendation, and not for the last? Here are three consecutive statutes in relation to the same matter. For the first and third the royal authorization is obtained, but not for the second. Evidently the house and the executive saw a distinction between the last one and

the two others. But where is the difference between them? It appears plainly, it seems to me, on the face of them. For this last one, the 14 and 15 *Vic.*, ch. 133, the royal authorization was not deemed necessary, because it contains a special proviso that neither the principal or interest of the debentures to be issued under it shall be guaranteed by the province or payable out of any provincial funds, whilst in the two others, 14 and 15 *Vic.*, ch. 132 and 16 *Vic.*, ch. 235, this proviso does not appear, and the only words to be found therein concerning the capital of the debentures they authorized, is to the effect that they are to be ruled by the provisions of the 4th *Vic.* It has been suggested that for these two the royal permission was thought necessary, because they contain enactments relating to tolls and taxes. But this cannot have been the reason for it, because first, bills imposing local tolls and taxes though they are generally introduced in committees of the whole house, never require to be accompanied by the royal recommendation, and then that reason would apply entirely to the other one, which is as much as the other two in relation to tolls and taxes; the 14 and 15 *Vic*, ch. 132 more especially authorizing no new tolls on toll-gates—neither can it have been because these two statutes give a priority for the interest of the debentures they authorize over the claims of the province, for the other one contains a clause to the same effect. Nor, because by the 4th *Vic.*, whose provisions were extended to these two statutes, the interest of these debentures was considered to be guaranteed by the province, but not the principal, for as to the interest it is expressly enacted in both of them that the section of the ordinance relating to interest shall not apply to the new debentures. It must have been then, because under the 4th *Vic.* the capital was considered to be guaranteed by the province in the event of the special

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fund proving insufficient and because the enactment that the provisions of the said 4th *Vic.* would rule the new debentures was equivalent to an enactment that the capital of these new debentures would likewise be guaranteed by the government; whilst in the other one, the 14 and 15 *Vic*, ch 133, the debentures to be issued were not so enacted to be ruled by the provisions of the 4th *Vic.*, but on the contrary were especially said to be, either for capital or interest, not payable by the province; this last one not containing an appropriation of public moneys, whilst the other two did so—I fail to see any other reason for the distinction thus made between these statutes.

And, if we refer to the legislation on another trust created at the same time for analogous purposes, the *Chambly* turnpike roads trust, this is made still more apparent. The construction of these roads is authorized in the very same year as the *Quebec* roads, by an ordinance on the very next preceding page, the 4 *Vic.*, ch. 16, and under precisely the same provisions and conditions as to the issue of debentures as those for the *Quebec* roads. In fact one is almost *verbatim* the copy of the other. Now the government in 1850 and 1851 paid £19,000 of matured debentures issued by the trustees of these *Chambly* roads (statement No. 45 of public accounts for 1852); here also acknowledging the liability of the province for these debentures, though as for the *Quebec* roads, the ordinance authorizing them had enacted that they should be issued on the credit of the tolls, and were not to be paid out of the general revenue of the province. But moreover, it being thought expedient, for reasons which do not appear, to take the said *Chambly* roads from the hands of the trust created by the ordinance or statute, the 13 and 14 *Vic.* ch. 106 was passed for this purpose. And under whose control are the roads then put? Under the control of

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the commissioners of public works. The statute enacts in a very few words that "Whereas it is expedient that the turnpike road hereinafter mentioned should be placed under the control of the commissioners of public works, the said road is and shall be thereby transferred from the control of the trustees to that of the commissioners of public works." It enacts also that this property shall be vested in Her Majesty; but this was mere surplusage, as, by the express terms of the ordinance, all the property under the control of the said trustees was already so vested in Her Majesty. The evident purport of the statute is merely to transfer a part of the public works of the country from the control of one state department to another. Now if the *Chambly* roads, under the 4 *Vic.* ch. 16, were part of the public works of the country, clearly the *Quebec* roads, under the 4 *Vic.* ch. 17, are so; this admits of no doubt. And then, though this statute clearly enacted an appropriation of public moneys, as the province is thereby in express words charged with the liabilities of this trust, £19,000 of which appear to have been actually paid out of the provincial chest very soon after, in 1850 and 1851 (public accounts of 1854, statement No. 41). Yet not only was not His Excellency's previous recommendation of it obtained and communicated to the house as required by the 9 *Vic.* ch. 114, before the house could constitutionally take into consideration any such proposed appropriation of public money, but moreover, the bill originated in the upper house (journals of 1850, page 142). Now all money bills, it is well known, must originate in the lower house. Why, then, though on the face of it, it would at first sight seem to contain an appropriation of the public funds, was this bill so allowed to be originated in the upper house, and why was His Excellency's previous recommendation of it not considered necessary in the lower house? Because the

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province was already liable for the debts of this *Chambly* trust, before this statute, and independently of it, by the operation of the 4th *Vic.*, chap. 16, itself; and consequently, this new statute imposed no additional liability on the public chest, but merely transferred an existing liability from the control of the Government's agents or representatives to one of the regular departments of state, in respect to one of the public works of the country. Now, if these *Chambly* roads were a part of the public works and if the ordinance providing for their construction, though not saying so in express words, was to be read as imposing upon the country the cost of that construction in the event of the tolls proving insufficient for it, clearly, the *Quebec* roads are on the same footing, and the cost thereof must, as the revenues from the tolls have also proved to be insufficient to provide for it, fall in the like manner upon the province. I have referred to the statements in the public accounts of the province concerning the debentures issued by this trust under the 4th *Vic.*, chap. 17, and 8th *Vic.* chap. 55, after their maturity, and have shewn that these roads, then, were considered as public works, and these debentures, at and since their maturity, as provincial debentures. That they were also held to be, before their maturity, is made apparent by a reference to the public accounts of the province prior to 1850; and it seems to me great weight must be attached to the official interpretation of the first legislative acts on these roads, given by those who were at the head of the affairs of the province at that time, or a very few years after, when the spirit and intent of the legislation could not have been but well known and understood. In statement No. 19 of the public accounts of 1842 (appendix K), in statement E of the public accounts of 1843, in statement No. 23 of the public accounts of 1844-45, in statement No 25, appendix A, of the public

accounts of 1846 (vol. 5, appendix No. 1 of 1846); in statement No. 23 of the public accounts of 1847, and in statement No. 25 of the public accounts of 1849, I find as assets of the province under the heading "loans to incorporated companies" as the *Quebec* turnpike trust, in 1842, £400 19s. 7½d; in 1843, £21,600; 1844, £21,600, and in the said subsequent years, £33,850. Now, the province then had not paid any money in cash to or for this trust. It was the purchasers of the debentures who alone had advanced these amounts. What is it then that the province credits itself for as a loan to this trust? Clearly for the debentures as successively issued under the statutes. Whatever may be said of this perhaps singular mode of book-keeping, do we not find here again as expressly as possible that these debentures were considered to be provincial debentures? The province had loaned its debentures to this trust and credits itself for their amount. The province of course had its recourse against the trust for the repayment of this loan, but the purchasers of the debentures had their recourse against the province for the moneys by them loaned on the said debentures. I have shown that the province, when these debentures matured, did acknowledge its liability therefor, and paid them all in capital and interest. Now there can be no doubt, and it was conceded at the argument, that if the province was liable for the capital of the debentures issued under the 4th *Vic*, ch. 17, it is liable to the same extent for those issued under the 16th *Vic.*, ch. 235, the amount whereof is claimed by the suppliants in this case; for this last statute, as already stated, positively enacts (sections 7-10) that as to the capital, the debentures to be issued in virtue thereof and all other matters having reference thereto, shall be subject to the provisions of the 4th *Vic*, ch. 17. It is because, in the same terms the provisions of the

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ordinance were extended to the debentures issued under the 8th *Vic.*, ch. 55, that the province paid these last debentures.

The point was taken on the part of Her Majesty that it being enacted by section 17 of this 16th *Vic.*, ch. 235 that the new debentures should take precedence of those issued under the provincial guarantee, this shows that these new debentures were not issued under such guarantee. Read alone, this provision, which, as I have remarked before, applies to these debentures only so far as relates to the interest payable thereupon, to use the words of the act, would bear that construction. But if it is, as it must be, taken in its entirety and connection with the other parts of the section and the ordinance, it not only does not sustain the contention on the part of Her Majesty on this point, but, it seems to me, that, on the contrary, it repels absolutely the theory relied upon to contest the suppliant's claim that none of the debentures of this trust were ever issued with the provincial guarantee. For there is here an express admission by the legislative authority that debentures had been issued with such guarantee. Now to which debentures does the statute refer, as having been so issued? Clearly to the debentures issued under the ordinance, which the province had then paid to the amount of £11,790. (Public accounts for 1852, statements Nos. 41 and 45.) The legislature, in so many words, admits then, in this section, that the debentures issued under the ordinance were guaranteed by the province. Now, the first part of the section 7 enacts that the debentures to be issued shall be subject to the provisions of the said ordinance. That is saying clearly that as the debentures issued under the ordinance were to be considered as guaranteed by the province, in case the trustees should be unable to pay them, the debentures issued under this new statute

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would be so guaranteed. And when the statute adds that these new debentures as to the interest shall take precedence of those issued under the provincial guarantee, and of any claims by the government for moneys advanced to the said trustees, this has reference exclusively, and the Act says so expressly, to the special fund and the tolls in the hands of the trustees. The legislature, by this enactment, merely authorizing the trustees to give to the new debentures priority, for the interest, over the old ones on the moneys in their hands, but not providing, as it had not provided in the ordinance for the old debentures, for the contingency of the trustees having no funds to pay the new debentures. Here again the fact that this contingency was not provided for probably would put a Finance Minister under the obligation to get an appropriation from the Parliament before he could pay these debentures, but could not be invoked as relieving the province of a liability which is imposed upon it by the very same clause of the statute, a contingent liability only then, but now, the special fund being exhausted, an immediate and direct liability.

I may here remark, that it is admitted on the record that all matters of fact which appear by the public accounts of the Dominion of *Canada*, or of the late province of *Canada*, or of the late province of *Lower Canada*, as well as all facts which appear by the journals of the different branches of the legislatures of the Dominion, or of the said late provinces, or by the sessional papers thereof, shall be taken to be proved by reference to the official publications thereof, without it being necessary to specially produce the same in this cause, so that the ruling in *Poliny* v. *Gray* (1), that reports of the public departments of state are not admissible as evidence of facts stated therein, does not govern this case.

(1) 12 Ch. Div. 411.

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Another view of the case suggests itself to my mind. Leaving aside the ordinance, or supposing that under it, the province would have had the right to repudiate its liability for the debentures then issued and might have refused to pay them, is the said province not precluded now from repudiating the payment of the debentures issued upon the same conditions and provisions?

I have shown how, as a matter of fact, the province has, before their maturity, treated these debentures as provincial debentures, and credited itself for the loan of them to this trust. Now, at their maturity, the province had paid them as its own debt; how, since their maturity, and since that payment, it had continued to treat the amount paid therefore as a payment of a provincial debt for a provincial work; how the interest on these debentures has been considered in the legislature itself, not as the loan authorized by the ordinance, but as a permanent charge on the revenue of the country; how the legislature, when ordering the issue of the debentures now held by the suppliants, avoided purposely, to my mind, to reproduce the enactment contained in the preceding statute upon identical debentures, that these debentures would not stand guaranteed by the province; all of these were facts amounting to representations, by the province to the general public, of whom the suppliants form part, that these debentures were, as a matter of fact, provincial debentures.

See remarks of *Blackburn*, J., in *Swan* v. *The North British Australasian Co.* (1).

By these representations, the suppliants have been induced to invest their moneys in these debentures. Now, it is a rule of law that, if any one, by a course of conduct or by actual expressions, so conduct himself

(1) 2 H. & C. 175.

that another may reasonably infer an agreement and undertaking by the one so conducting or expressing himself, the party so conducting or expressing himself cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct, even if he never made such agreement or undertaking.

Per *Pollock*, C. B., *Cornish* v. *Abingdon* (1), or, in other words, when any one, by his expressions or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things.

Per *Denman*, C. J. (2); see also *Stone* v. *Godfrey* (3); *Thane* v. *Rogers* (4); *Newton* v. *Liddeard* (5); *Cairncross* v. *Lorimer* (6); *Carr* v. *London and North Western Railway Co.* (7); and cases collected in 2 *Smith's* leading cases (8).

According to these universally admitted rules of law, the province in the case submitted, is estopped, both by statements and by conduct, from now denying its liability for the debentures held by the suppliants, even if it could have done so at first under the ordinance (9).

I have only one more observation to make. It is with reference to the remark made by one of the learned counsel, heard before us on the part of Her Majesty in the course of his argument, that it would be unjust to make the whole of the province pay for the roads of a particular locality. I have already quoted the public accounts to show that the policy of the government at that time was to so build and improve roads in different parts of the pro-

(1) 4 H. & N. 549.
(2) 6 Ad. & E. 469.
(3) 5 De G. M. & G. 76.
(4) 9 Barn. & C. 586.
(5) 12 Q. B. 925.
(6) 3 Macq. H. L. Cases 829.
(7) L. R. 10 C. P. 307.
(8) 7th Edit. 851 et seq.
(9) *Commonwealth v. Andre*, 3 Pick. 224.

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vince and do not intend to revert to that. What strikes my mind now is this. These debenture holders cannot be paid by the inhabitants of the locality where these roads have been made, no liability is imposed on this locality by the statutes; and this is admitted, they cannot be paid out of the special fund in the hands of the trustees, for this fund cannot meet their claim; this is also admitted. It follows, that, if the province does not pay them, they will lose every cent of the moneys they have lent for making these roads, that consequently they, who may not have the least interest in the locality where these roads have been made, who may reside in *England* or the *United States*, or in any other part of the world, will be made to pay for making and improving the said roads to the amount of the £70,000 they have so lent, that the province whose property these roads are, would thus have become richer by £70,000 at the expense of the said debenture holders. Now, for states as for individuals "*Æquum sit neminem cum alterius detrimento locupletari.*" And would there not be a greater injustice in causing these debenture holders to lose their £70,000, than in oblig. ing the province on whose property this money has been expended to repay it? By the construction I give to this statute, 16 *Vic.*, ch. 235, read in connection with the prior and subsequent acts and proceedings of the province, concerning this trust, not only is such a grave, very grave injustice prevented, but moreover the repudiation of a public debt by the province of *Canada* as constituted before confederation does not receive the sanction and authority of the courts of justice.

I am of opinion that the judgment of the Exchequer Court awarding to the suppliants the capital of the debentures held by them is right, and that the appeal from the said judgment taken on the part of Her Majesty should be dismissed with costs.

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On the cross-appeal the suppliants complain of that part of the judgment of the Exchequer Court by which they were refused the interest accrued on the debentures held by them.

The proviso in the 16 *Vic.*, ch. 235, sec. 7, relating to this part of the case, reads as follows:—"*Provided nevertheless that no moneys shall be advanced out of the provincial funds for the payment of the said interest.*"

The point was taken by the suppliants that the enactment that the interest was not to be advanced out of the provincial funds, referred only to the issue of £30,000 made under this seventh section of the act and did not apply to the issue of £40,000 made under the tenth section, but this is an error. This enactment in section 7 applies by its very terms, not only to the debentures issued under the said section, but also generally to all debentures issued under the act, including those issued under section 10, so that they all stand on the same footing, and must be governed by the same rules.

It is clear, and I apprehend not contested, that the only thing that the legislature intended by so enacting that no moneys were to be *advanced* out of the provincial funds for the payment of the interest on these new debentures, was to repeal, *quoad* the said debentures, the enactment contained in section 27 of the ordinance 4th *Vic.*, ch. 17, by which the Governor General was empowered to authorize the loan to the special fund in the hands of the trustees, of any sum of money necessary to pay any arrears of interest that might be due on the debentures issued by the trust, which loan the trustees were ordered by the same section of the ordinance to repay to the receiver general out of the said special fund. Now, the suppliants here have nothing to do with this loan which was a mere matter of administration between the executive authority and its

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officers, the trustees. Whether the executive lends money to the trustees and whether the trustees repay this loan is not and could not be the ground of their claim. They ask the amount of the interest on their debentures, not as a loan, but as a debt of the government to them. The government, in their legislature, as I have shown by the public accounts, has considered this interest, when it paid it before, not as a loan to an incorporated company, but as a permanent charge on the public revenues of the country, as a debt of the country. It is as such that the suppliants claim it now. Having come to the conclusion that the province was responsible for the capital of these debentures as one of its debts, it seems to me that it follows as a necessary consequence that the interest of these debentures, which on their face are payable with interest, is likewise a debt of the province. There might be some doubt as to the liability of the province for this interest before these debentures matured. But since their maturity, since they have become a direct liability of the province for their capital, the province, if liable at all, is liable for them as they are, that is to say with interest. The provincial chest has received the interest on these moneys; that interest belonged to the suppliants. If the province was not condemned to repay it to the suppliants as accrued since the maturity of these debentures, it would have derived a benefit, and a very large one indeed, from the non-fulfilment of its obligation to pay the capital when it matured. The only way to cause this interest to cease to accrue after the maturity of these debentures, was to call them in, according to section 24 of the ordinance, and this has not been done. It would be unnecessarily going over the same ground again for me to repeat here at length what I have said on the first part of the case as to the capital. The province heretofore paid

the interest of the moneys lent by the debenture holders under the ordinance, and the 8th *Vic.*, as its debt, not as the loan authorized by the ordinance. The suppliants ask the same thing for the debentures issued under the 16th *Vic.*, which are ruled by the same provisions. The fact that this last statute enacts that the loan authorized by the ordinance to be made by the crown to the trustees for the payment of the interest shall not be made for the new debentures cannot affect them; particularly for the interest accrued since the maturity of these debentures, since they have become payable by the province; as, in any case, this enactment would probably be construed to apply only to the interest accruing before the maturity of these debentures, and then, it is not under that clause of the ordinance at all that they here claim these interests but purely and simply as a liability of the province; as an accessory of the capital due to them by the said province, which capital carries interest on the face of the contract. Indeed, even if the interest had not been settled by the contract, I apprehend that, as the detention of these moneys by the province since the maturity of the debentures has been a wrongful detention, the said provinces should be mulcted in interest.

I am of opinion to allow the cross-appeal of the suppliants with costs and to modify the judgment of the Exchequer Court so as to allow them, in addition to the capital awarded by the said court, the interest at six per cent. on the debentures held by them since the maturity thereof, with the costs in the Exchequer Court.

GWYNNE, J.:

The question which we have to determine in this case is whether or not the amounts, or any part of the amounts, purported to be secured by bonds or deben-

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tures issued by the Trustees of the *Quebec* Turnpike Trust, under the authority of the act of the parliament of the province of *Canada*, before Confederation, being 16 *Vic.*, ch. 235, constituted, at the time of the passing of the *B. N. A.* Act, a debt or liability of the province of *Canada*, existing at Confederation, so as to become imposed upon the Dominion of *Canada*, by the 111th sec. of the *B. N. A.* Act. In the view which I take, it appears to me to be free from all doubt that such liability did not then exist, unless it was expressly imposed by the Imperial Act, 3 and 4 *Vic.*, ch. 35, or by some acts or act of the legislature of the province of *United Canada*, as constituted by that act.

Such was the nature of the constitution given to the province of *Canada*, by 3 and 4 *Vic.*, ch. 35, that no debt or liability could be enforced against the executive government, even in a proceeding by petition of right, or become imposed upon it by any executive officer, or by all the executive officers of the government combined, without the sanction of an act of parliament, or a vote or resolution of the legislative assembly. No contract or obligation, arising by way of estoppel, from statements made by a finance minister or other public servant appearing in the public accounts or elsewhere, or from any conduct of any of the executive officers of the government, can be implied against the government of the province. The doctrine of estoppel *in pais*, which is recognized in dealings between individuals or corporations, the principle of which is explained in *Pickard* v. *Sears* (1), *Freeman* v. *Cooke* (2), *Swan* v. *N. B. Australasian Co.* (3), *Cornish* v. *Abingdon* (4), *Carr* v. *London & N. W. Railway Co.* (5), and such like cases, has, in my judgment, no application to the

(1) 6 Ad. & El. 274.
(2) 2 Ex. 662.
(3) 2 H. & C. 175.
(4) 4 H. & N. 549.
(5) L R. 10 C. P. 316.

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case before us, which must be determined upon the construction simply of the act or acts of parliament, vote or resolution which is, or are, relied upon as creating the debt or liability. I shall, I think, best be able to convey the mode of reasoning, which has led my mind to the opinion I have formed, by dealing with the subject in a chronological order of events from the earliest statute which appears to have any bearing upon the case.

At the time of the passing of the Imperial Statute 1 & 2 *Vic.*, ch. 9, whereby the constitution of *Lower Canada*, as theretofore existing, was suspended, the management and repair of the public highways in *Lower Canada* were provided for and regulated under the provisions of the provincial statute 36 *Geo.* 3rd, ch. 9. By the 1st sec. of 1 & 2 *Vic.*, ch. 9, the constitution of *Lower Canada* were declared to be suspended, from the time of the proclamation of the act in *Canada*, until the first day of November, 1840. By the second section, provision was made for the constitution of a special council for the government of the province, and by the third section it was enacted: "that from and after such proclamation, as aforesaid, until the said 1st day of November, 1840, it should be lawful for the governor of the province of *Lower Canada*, with the advice and consent of a majority of the said councillors present, &c., &c., to make such laws or ordinances for the peace, welfare and good government of the said province of *Lower Canada* as the legislature of *Lower Canada* as theretofore constituted was empowered to make, &c., &c., provided always that no law or ordinance so made should continue in force beyond the 1st day of November, 1842, unless continued by competent authority; provided also that it should not be lawful, by any such law or ordinance, to impose any tax, duty, rate or impost, save only in so far as any tax, duty, rate or impost, which

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at the time of the passing of the act was payable within the said province, might be thereby continued. Upon the 17th day August, 1839, the Imperial Statute, 2 and 3 *Vic.*, ch. 53, was passed in amendment of the act just recited, and the duration of the special council was extended. By the third section of this act it was enacted that so much of the said recited act, 1 and 2 *Vic*, ch. 9, as provided that it should not be lawful by any such law or ordinance as therein mentioned to impose any tax, duty, rate or impost, save only in so far as any tax, duty or impost which at the passing of that act was payable within the said province of *Lower Canada* might be continued, should be and was thereby repealed, subject however to this proviso—that it should not be lawful for the said governor and special council to make any law imposing or authorizing the imposition of any new tax, rate, duty or impost, except for carrying into effect local improvements within the said province of *Lower Canada*, or any district or other local division thereof, or for the establishment or maintenance of police or other object of municipal government within any city, town or district or other local division of the said province; and provided also that in every law or ordinance imposing or authorizing the imposition of any such new tax, duty, rate or impost, provision should be made for the levying, receipt and appropriation thereof by such person or persons as should be thereby appointed or designated for that purpose, but that no such new tax, duty, rate or impost should be levied by or made payable to the Receiver-General or to any other public officer employed in the receipt of Her Majesty's ordinary revenue in the province; nor should any such law or ordinance aforesaid provide for the appropriation of any such new tax, duty rate or impost by the said governor either with or without the advice of the executive council of the

said province, or by the commissioners of Her Majesty's treasury, or by any other officer of the crown employed in the receipt of Her Majesty's ordinary revenue.

Now, it seems to me that by this very precise language, the Imperial parliament, while impressed with the necessity, for the preservation of the peace, order and good government of the province, of temporarily suspending the exercise of its ancient representative institutions, was scrupulously careful to interfere as little as possible with the right of the people to impose upon themselves their own burthens, and that they therefore thus, in what appears to be very plain language, declined to invest the special council, so exceptional in its construction, with power to make any law which could be construed as imposing, directly or indirectly, a new burthen upon the public revenues of the province; and in express terms limited the council's power of imposing any rate, duty, tax or impost, of whatever nature or amount, to matters of a purely local or municipal character, in respect of the levying or receipt of which, neither the Lords of Her Majesty's treasury nor the Receiver-General of the province, nor any other public officer ordinarily employed in the collection and receipt of Her Majesty's revenue in the province, should be in any wise concerned or be accountable.

The special council whose powers were thus restricted passed an ordinance upon the 30th day of January, 1841, in the first section of which it was enacted: That it should be lawful for the governor by letters patent under the great seal of the province to appoint not less than five nor more than nine persons to be, and who and their successors, to be appointed in the manner thereinafter mentioned should be trustees for the purpose of opening, making and keeping in repair the roads thereinafter specified. The second section pro-

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vided for the appointment of successors to the trustees, By the third section it was enacted that the said trustees, for all the purposes of the ordinances might, by the name of "The Trustees of the *Quebec* Turnpike Roads," sue and be sued, answer and be answered unto, in all courts of justice and might acquire property and estate, moveable and immoveable, which being so acquired should be vested in Her Majesty for the public uses of the province, subject to the management of the said trustees, for the purposes of the ordinance, and might, in the manner which they should deem fit, cause the said roads and each of them, and the bridges thereupon, to be improved, widened and repaired, etc., etc, and might from time to time appoint and remove surveyors, officers and other persons under them as they might deem necessary for the purposes of the ordinance, and pay them such reasonable compensation as the said trustees should deem meet, and might generally do and perform all such matters and things as might be necessary for carrying the ordinance into effect according to the true intent, meaning and object thereof. By the ninth section it was enacted that the roads over which the provisions of the ordinance and the powers of the trustees should extend should be seven in number, covering thirty miles in the whole, as appears by a paper subsequently laid before the legislature of *United Canada*, but consisting of several short roads varying from one to six or seven miles each in length, radiating in every direction from the city of *Quebec*.

By the 10th section it was enacted that the said trustees might erect toll gates and collect certain specified tolls and rates thereat upon each of the said roads, and that the said trustees might establish the regulations under which such tolls and rates should be levied and collected, and that, with the consent of the governor, they might from time to time, as they should see

fit, alter, change and modify the said rates and tolls and the said regulations.

By the 14th section it was enacted that the said tolls might be levied by the said trustees on the said roads, or on any of them, or on any part of them, or of any of them, from and after the day when the said trustees should have assumed control and management of such roads or road or part of a road in the manner in the ordinance provided and not before, but that the time of such assumption should be at the discretion of the said trustees and should not depend upon the completion or non-completion of the improvements on the roads, road or part of road of which the control and management should be so assumed.

By the 16th section it was enacted that the said trustees might if they should think proper commute the tolls on any road or portion thereof with any person by taking a certain sum either monthly or yearly in lieu of such tolls. By the 18th section it was enacted that the said roads should, respectively, from the time thereinafter mentioned, be and remain in and under the exclusive management, charge and control of the said trustees, and that the tolls thereon should be applied solely to the necessary expenses of the management, making and repairing of the said roads and the payment of the interest on, and principal of, the debentures thereinafter mentioned.

By the 19th section it was enacted that from the time when the said trustees should assume the control and management of any part of any road mentioned in the 9th section of the ordinance, every person, body politic or corporate, who might be bound by any law of the province, or any *proces verbal*, duly homologated (and all such laws and *proces verbaux* were declared to remain in full force except in so far as they were thereby expressly derogated from) to repair or keep up or to per-

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form any service or labor on or with regard to any portion of such road, should, and were thereby required, to commute all such obligations with the said trustees, for such sum of money as might be agreed upon, by such parties respectively and the said trustees, and that such commutation money should be paid annually on the 1st day of May in each year, and that in default of payment the trustees might sue for and recover the same in any court having jurisdiction to the amount, and that if no such agreement should be effected in any case, the trustees might sue the party refusing to come to an agreement and might recover such sum for such commutation as the court should award.

By the 20th section it was enacted that it should be lawful for the governor, at any time, and whenever he should deem it expedient, to appoint the said trustees commissioners for carrying into effect an ordinance of the special council, passed in the same year, intituled "An ordinance to declare and regulate the tolls to be taken on the bridge over the Cap Rouge River, and for other purposes relative to the said bridge," and that during the time the said trustees should be such commissioners the said bridge should be held to be part of the roads and bridges under the management of the said trustees as if it had been mentioned in the 9th section of the ordinance, and that the tolls authorized to be levied by the ordinance relating to the said bridge, from the persons using the said bridge and collected during the said time, should form part of the funds thereby placed at the disposal of the said trustees, and should and might be applied by them in the same manner as the other tolls authorized to be levied under the ordinance.

By the 21st section it was enacted that it should be lawful for the said trustees to raise, by way of loan, on the credit and security of the tolls thereby authorized

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to be imposed, and of other monies which might come into the possession of, or be at the disposal of, the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of the province, any sum of money not exceeding on the whole twenty-five thousand pounds currency.

By the 22nd section it was enacted that it should be lawful for the said trustees to cause to be made out, for such sum or sums of money as they might raise by loan as aforesaid, debentures in the form contained in Schedule A of the ordinance, redeemable at such times, subject to the provisions of the ordinance as the said trustees should think most safe and convenient.

By the 23rd section it was enacted that such debentures should respectively bear interest at the rate therein mentioned, and that such interest should be made payable semi-annually, and might, at the discretion of the trustees, and with the express sanction and approval of the governor of the province, and not otherwise, exceed the rate of six per cent per annum, any law to the contrary notwithstanding, and that the interest should be paid out of the tolls upon the said roads, or out of any other monies at the disposal of the trustees for the purposes of the ordinance.

By the 26th section it was enacted that it should be lawful for the governor for the time being, if he should deem it expedient at any time within three years from the passing of the ordinance, and not afterwards, to purchase for the public uses of the province, and from the said trustees, debentures to an amount not exceeding ten thousand pounds currency, and by warrant, under his hand, to authorize the receiver-general to pay to the said trustees out of any unappropriated public monies in his hands the sum secured by such debentures, the principal and interest of,and on which, should be paid to the Receiver-General by the said trustees in

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the same manner and under the same provisions as are provided with regard to such payments to any lawful holder of such debentures, and being so paid should remain in the hands of the Receiver-General at the disposal of the legislative authority of the province for the time being.

By the 27th section it was enacted that all arrears of interest, due on any debentures issued under the authority of the ordinance, should be paid by the said trustees before any part of the principal sum then due and secured by any such debenture should be so paid, and that if the deficiency of the funds then in the hands of the said trustees should be such, that the funds then at their disposal should not be sufficient to pay such arrears of interest, it should be lawful for the governor for the time being, by warrant under his hand, to authorize the Receiver-General to advance to the said trustees out of any unappropriated monies in his hands, such sum of money as might, with the funds then at the disposal of the said trustees, be sufficient to pay such arrears of interest as aforesaid, which being repaid should remain in the hands of the Receiver-General, at the disposal of the legislative authority of the province.

By the 28th section it was enacted, that it should be lawful for the said trustees at any time, and as often as occasion might require, to raise in like manner such further sum or sums as might be necessary to enable them to pay off the principal of any loan which they might bind themselves to repay at any certain time, and which the funds in their hands, or which would probably be in their hands at such time, and applicable to such repayment, should appear insufficient to enable them to repay; provided always that any sum or sums so raised should be applied solely to the purpose in this section mentioned, and that no such sum should

be borrowed without the approval of the governor of the province, and that the whole sum due by the said trustees under the debentures then unredeemed and issued under the authority of the ordinance should in no case exceed thirty-five thousand pounds currency, and that all the provisions of the ordinance touching the terms upon which any sum should be borrowed under the authority thereof by the trustees, the rate of interest payable thereon, the payment of such interest, the advance by the Receiver-General of the sums necessary to enable the trustees to pay such interest, and the repayment of the sums so advanced should be extended to any sum or sums borrowed under the authority of this section.

By the 29th section it was enacted that the due application of all public monies whereof the expenditure or receipt is authorized by the preceding sections should be accounted for to Her Majesty, her heirs and sucessors, through the Lords Commissioners of Her Majesty's Treasury for the time being, in such manner and form as Her Majesty, her heirs and successors should be pleased to direct, and:

By the 37th section that the said trustees should lay detailed accounts of all monies by them received and expended under the authority of the ordinance, supported by proper vouchers, and also detailed reports of all their doings and proceedings under the said authority, before such officer, at such times and in such manner and form, and should publish the same in such way at the expense of the said trustees as the governor should be pleased to direct.

The true construction of this ordinance, as it appears to me, was to constitute the trustees, when appointed in the manner directed by the ordinance, a body corporate, not, it is true, for purposes of private profit, or for trade, but for a special limited public purpose of

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a purely local, sectional or municipal character, and not at all of a public character, in the sense of being provincial; composed of persons who were no doubt selected and appointed trustees, in consequence of their having an interest in the contemplated local improvements as residents in the locality; but whether the trustees were constituted a body corporate for a private or for a public purpose seems to me to be of no importance, for the first question which arises for our consideration is: Was that body corporate invested with power to impose, and did it impose, by the debentures issued by it under the ordinance, any burthen upon the public revenues of the province of *Lower Canada*, for the payment, either of the interest or the principal, secured by those debentures, or was it invested with power to contract, and did the debentures issued by the corporation constitute a contract, entered into for and in behalf of Her Majesty, with the respective purchasers of the debentures? The answer to these questions must be sought for solely within the four corners of the ordinance itself, which alone gives to the debentures whatever validity and effect they had.

The ordinance, it is true, in its 3rd section, provides that the body corporate constituted by the ordinance might acquire property and estate, moveable and immoveable, which being so acquired should be vested, as indeed all the public highways are, in Her Majesty, for the public uses of the province, but subject, as is provided by the 3rd and 18th sections, to the exclusive management, charge and control of the body corporate so created, and upon the express trust that the tolls and rates which the corporation was authorized to impose, levy and collect, should be applied solely to the necessary expenses of the management of the trust—the making and repairing of the roads, and the payment of the interest on, as well as the principal of, the deben-

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tures which they were authorized to issue. Now, these tolls and rates, which they were authorized to impose, levy and collect upon and from all persons using the roads, or who, by the provisions of the law previously in force, were made liable to contribute to the repair of the roads abutting upon their lands, were in no sense public monies of the province of *Lower Canada*, nor monies received by Her Majesty either through the Lords of Her Majesty's Treasury, or through the Receiver General of the province, or through any other officer employed in the collection or receipt of Her Majesty's provincial revenue, or for the receipt or appropriation of which any of these officers were accountable or with which they had anything to do. This is conclusively established by the terms of 2 and 3 *Vic.* ch. 53, which alone gave to the special council power to enable the trustees to deal with the work and fund placed under their control as a work and fund of a purely local and sectional and municipal character. It is therefore erroneous to speak of the work as provincial, or the rates, tolls and commutation monies constituting the fund created by the ordinance as being part of the public funds or revenue of the province of *Lower Canada*. The 37th section of the ordinance must be read as referring to those rates, tolls and other monies coming into the hands of the trustees to be applied by them to the specially prescribed purposes of the trust, its object being to afford evidence of the manner in which they should be fulfilling their trust; and the 29th section, to have any application, must be applied to all such public monies, if any, as should, in the discretion of the governor, be advanced under his warrant out of the unappropriated public monies of the province, as a loan to the corporation.

It is, however, to the clauses which alone give to the body corporate any power to raise money by loan upon

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its debentures, that we must look, to ascertain whether or not any charge or liability for the redemption, either of the interest or principal of those debentures, is imposed upon the public revenues of the province, or is assumed by, or on behalf of Her Majesty.

Now these clauses in the most express terms exclude and repel all idea of any such charge or liability having been, by the ordinance, imposed upon the provincial revenue or assumed by or on behalf of Her Majesty.

By the 21st sec. the power of the trustees is limited to raising the £25,000 currency, thereby authorized "upon the credit and security of the tolls authorized to be levied, and of other monies; viz. the commutation monies, coming into the possession of, and at the disposal of the trustees under the ordinance, and not to be paid out of or to be chargeable against the general revenue of the province."

This is an express declaration that the monies so raised shall form no charge or liability upon the general revenue of the province, and there is no warrant or authority for our holding that Her Majesty assumed, or could assume, any obligation in respect of the debentures, otherwise than through the medium of and as a charge or liability upon the provincial revenue.

Then the 23rd section again repeats that the interest payable under the debentures shall be paid out of the tolls upon the said roads, or out of any other monies at the disposal of the trustees for the purposes of the ordinance.

The 26th sec. leaves it dicretionary with the governor for the time being, if he should deem it expedient "at any time within three years from the passing of the ordinance, and not afterwards, to purchase for the public uses of the province and from the said trustees, debentures to an amount not exceeding £10,000, currency, and by warrant, under his hand, to authorize

the Receiver General to pay to the said trustees out of any unappropriated public monies in his hands the sum secured by such debentures; the principal and interest of, and on which, shall be paid to the Receiver General by the said trustees in the same manner and under the same provisions as are provided with regard to such payments to any lawful holder of such debentures, and being so paid shall remain in the hands of the Receiver General, at the disposal of the legislative authority of the province for the time being." Now by this clause the governor is empowered, in his discretion, to lend to the corporation out of the unappropriated public monies of the province a sum not exceeding £10,000, and to receive therefor debentures of the corporation, which were to be held by the Receiver General, to and for the public uses of the province The province was thereby authorized to become a creditor of the corporation to that amount, and was placed in respect of such loan precisely in the same position as every other creditor of the corporation who should advance money to it, upon the security of its debentures.

Then, again, by the 27th clause, if the funds at the disposal of the corporation should at any time prove to be insufficient to pay all arears of interest upon the debentures, it was left to the discretion of the governor for the time being, by warrant under his hand, to authorize the Receiver-General to advance to the said trustees, out of any unappropriated monies in his hands, such sum of money as might, with the funds then at the disposal of the trustees, be sufficient to pay such arrears of interest as aforesaid, "and the amount so advanced shall be repaid by the trustees to the Receiver-General, out of the sums, so to be commuted, levied and collected as aforesaid, and being so repaid shall remain in the hands of the Receiver-General, at the disposal of the legislative authority of the province."

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Now these provisions, enabling the province, in the discretion of the governor for the time being, to become creditors of the trust corporation precisely in the same manner and upon the same terms as any private person becoming a creditor of the corporation, advancing to it money upon the security of its debentures, is so utterly inconsistent with the province being made the debtor to the purchasers of the debentures, or subjected to any obligation or liability as guarantors or otherwise, to redeem the debentures, either as to principal or interest, that we can in my judgment come to no other conclusion than that no charge or liability whatever in respect of the debentures was imposed upon the province by the terms of the ordinance.

Such, then, being the true construction to put upon the terms of the ordinance at the time of the re-union of the provinces of *Lower* and *Upper Canada* being effected, it is plain that there did not then exist any charge or liability imposed upon the revenues of *Lower Canada* which could in that character, upon the union, become a charge or liability upon the revenues of *United Canada* to redeem any debentures which should be issued by the trustee corporation under the authority of the ordinance.

Now, the Act of Union 3 and 4 *Vic.*, chap. 35, came into operation on the 10th February, 1841, in pursuance of a proclamation to that effect published in *Canada* upon the 5th February, 1841.

There having been no charge or liability, in respect of any debentures which should be issued by the trust corporation under the authority of the ordinance, imposed upon the revenues of *Lower Canada*, or constituting a debt or obligation of that province before the union, which, in that character, could, by the union, become a charge or liability imposed upon *United Canada*, we must, as I have said at the outset, look to

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the Imperial statute, 3 and 4 *Vic.*, chap. 35, and to the legislation of the parliament of *United Canada* as the only authorities, under the circumstances, competent to impose the charge or liability upon the revenues of *United Canada*, in order to determine whether or not any such charge or liability has ever been, and if ever when, created and imposed.

By the 3rd and 4th *Vic.*, chap. 35, sec. 50, it was enacted that all revenue over which the respective legislatures of the two provinces of *Upper* and *Lower Canada*, before and at the time of the passing of the act, had power of appropriation, should form one consolidated revenue fund, to be appropriated for the public service of *Canada*, subject to the charges by the act directed.

The sections of this act from 50 to 57 inclusive were repealed by an Imperial act passed in the 10th and 11th years of Her Majesty's reign, for the purpose of adopting similar provisions contained in the provincial act, 9 *Vic.*, chap. 149, but I quote from the act of union as it was by it, that the revenues of the two provinces of *Lower* and *Upper Canada* as those revenues existed at the union were united into one consolidated fund under the exclusive control of the legislature of *United Canada.*

By the 55th section of this act of union it was enacted that the consolidation of the duties and revenues of the said province should not be taken to affect the payment out of the said consolidated revenue fund of any sum or sums theretofore charged upon the said rates and duties already raised, levied, and collected, or to be raised, levied and collected, to and for the use of either of the said provinces of *Upper* and *Lower Canada* for such time as should have been appointed by the several acts of the legislature of the province by which such charges were severally authorized, and:

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By the 57th section it was enacted that subject to the several payments by the act charged on the said consolidated revenue fund the same should be appropriated by the legislature of the province of *Canada* for the public service in such manner as they should think proper: "Provided always that all bills for appropriating any part of the surplus of the said consolidated revenue fund or for imposing any new tax or impost, shall originate in the legislative assembly of the said province of *Canada*; Provided also that it shall not be lawful for the said legislative assembly to originate or pass any vote, resolution or bill for the appropriation of any part of the surplus of the said consolidated revenue fund, or of any other tax or impost, to any purpose which shall not have been first recommended by a message of the governor to the said legislative assembly, during the session in which such vote, resolution or bill shall be passed."

As, then, the liability to redeem any debentures which should be issued by the trust corporation, under the ordinance of the special council of *Lower Canada*, 4 *Vic.* ch. 17, did not, on the 10th February, 1846, exist as a charge upon the revenues of *Lower Canada*, and as all those revenues became, by the act of union, part of the consolidated revenue fund of *Canada*, which was placed under the sole control of the legislature of *United Canada*, subject only to the charges thereon imposed by the act of union, and as the liability to redeem such debentures was not among the charges so imposed, we must seek in the proceedings of the legislature of *Canada*, for some vote, resolution, or bill appropriating some part of the surplus of the consolidated revenue fund of *Canada* towards the redemption of the debentures. From the terms of the 57th section of the Union Act, it is impossible to say that the liability could ever arise by implication from any state of facts, nor could

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any court of justice pronounce it to exist upon any authority or evidence, short of the voice of the legislature, expressed in some vote, resolution or bill imposing the charge. Now, that the legislature of *Canada*, as constituted by the Act of 3 and 4 *Vic.*, ch. 35, recognized a clear distinction between those purely local works, such as those which were placed, by the special ordinance, under the control of the trust corporation thereby created, and those public works which, from their provincial character, should be charged up on the consolidated revenue fund of *United Canada*, appears from two acts passed by the legislature of the province in its first session, namely, 4 and 5 *Vic.*, ch. 28 and 72. By the former of those acts, intituled, "An Act to appropriate certain sums of money for public improvements and for other purposes therein mentioned," there was granted to Her Majesty, the sum of £1,659,682 sterling, to be expended, under the superintendence of the board of works of the province, in the proportions in the Act specified, for the erection and completion of the public works therein enumerated, which, besides canals and other works for improving the navigation of the rivers and lakes, comprehended also certain great public highways which, from their provincial importance, were deemed to be fit to be charged upon the consolidated fund, namely:

9th. For improving the Bay of *Chaleurs* road between *Percé Point* and the Indian Mission, and a portion of the *Metis* or *Kempt* road.

10th. For improving and completing the *Gosford* road, between *Quebec* and the *Eastern Townships*.

11th. For improving and completing the main northern road, from lake *Ontario*, at *Toronto*, to lake *Huron*, continuing and perfecting the same from the termination of the portion already undertaken by the district of *Barrie*, establishing toll bars thereon, and im-

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proving sundry parts thence to *Penetanguishene* and on the *Cold Water Portage*.

12th. For improving the main province road from *Quebec* to *Amherstburg* and *Port Sarnia*, building certain bridges on the same, between *Montreal* and *Quebec* and improving these portions of the line along which the rivers or lakes are not now available for the transport of the mails, that is to say, to macadamize, or otherwise improve that portion between the *Cascades* and the province line, and to establish toll bars thereon.

13th. To macadamize, or otherwise complete that portion from the termination of the part already undertaken by the district of *Brantford* to *London*, and to establish toll bars thereon.

14th To drain, trunk, form, and otherwise improve the road thence to *Port Sarnia*.

15th. To drain, trunk, form, and otherwise improve the road from *London* to *Chatham*, *Sandwich* and *Amherstburg*.

19th. For building bridges over the large rivers between *Quebec* and *Montreal*.

17th. For the completion of the military road from the *Ottawa*, near *L'Orignal* to the *St. Lawrence*, and

18th. For the formation of a line of road from *Hamilton* to *Port Dover*.

And by chapter 72, after reciting that it was expedient to extend the provisions of the ordinance 4 *Vic.*, ch. 17, to the road thereinafter mentioned, it was enacted that the provisions of the said ordinance and the powers of the trustees appointed under the authority thereof, should extend to the road leading from that sixthly mentioned in the 9th sec. of the said ordinance, to *Scott's* bridge, including the said bridge, and to the main road running along the north bank of the river *St. Charles*, from *Scott's* bridge aforesaid, to the bridge over the said river, commonly called the red bridge, or

commissioners' bridge, including the said bridge, as fully, to all intents and purposes whatsoever, as if the said roads and bridges had been mentioned and described in the said 9th sec. of the said ordinance, as among those to which the said provisions and powers should extend.

Now, as regards this act, the most that can be said in aid of the contention of the suppliants is, that it may be construed as an adoption by the Legislature of *Canada* of those provisions of the special ordinance 4 *Vic.*, ch. 17, which profess to empower the governor, for the time being, to authorize a loan to the trust corporation, out of the surplus unappropriated revenues of *Lower Canada*, in the hands of the Receiver-General of that province, so as to make those provisions applicable to any surplus of the consolidated revenue fund of *Canada*, in the hands of the Receiver-General, or other finance officer of the united province, and so as to authorize the governor for the time being, of *Canada*, to issue his warrant upon this fund for the special purposes of the provisions so adopted, which, in view of the provisions of the Imperial statute, 3 and 4 *Vic*, ch. 35, it would not have been lawful for the Governor to do without the special authority of the legislature of *Canada* for that purpose given; but it is plain that the Act cannot be construed as imposing any other or greater liability upon the consolidated fund of *Canada* than that purported to be imposed upon the revenues of *Lower Canada* by the terms of the special ordinance, and as that ordinance was only permissive, in so far as it authorized the Governor for the time being, if he should deem it to be expedient, to lend public monies to a prescribed amount to the trust corporation, upon the security of its debentures, so, likewise, must the 4 and 5 *Vic.*, ch. 72, be construed to have been permissive only; and, therefore, the latter act cannot be construed

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as imposing any liability to redeem any debentures which might be issued by the trust corporation any more than the special ordinance itself could have been so construed.

In the session of parliament commencing on the 8th September and terminating on the 12th October, 1842, and upon the 29th day of September during that session, there appears to have been a petition presented to the Legislative Assembly from the trustees of the *Quebec* turnpike roads praying to be authorized to raise, by way of loan, a sum sufficient to complete the said roads and also for certain alterations in the ordinance constituting the trust. The only action which appears to have been taken upon this petition during the short remainder of the session was, that upon the 10th October, it was resolved that an humble address be presented to His Excellency the Governor General, praying that His Excellency will be pleased to cause to be laid before the house within ten days after the opening of the next session of the provincial parliament, detailed accounts of all monies received and expended by the trustees of the *Quebec* turnpike roads under the authority of the ordinance to provide for the improvement of the roads in the neighbourhood of and leading to the city of *Quebec* and to raise a fund for that purpose, but in the public accounts laid before the house during that session, accompanying the estimates for appropriations for the public service, in a "schedule of accounts and state-"ments respecting the public income and expenditure "for the province of *Canada*, for the year 1841," and in a statement, forming part of that schedule, of warrants issued on the Receiver General, on account of the expenditure of the civil government of that part of the province formerly *Lower Canada*, for the year 1841, is the entry of a warrant for £360 17*s.* 8*d.* sterling as issued to *John Porter*, secretary of the *Quebec* turnpike

road trustees, to enable him to pay the interest on loans effected under 4 *Vic.*, ch. 17, to the first of January, 1842, and in another statement, being No. 19 of the same schedule, entitled "statement of the affairs of *Canada*, on the 31st of Dec., 1841 and under the heading of 'loans to incorporated companies and commissioners of turnpike roads,' is an entry of £400 19*s* 7½*d*. currency, as a loan to the *Quebec* turnpike trust," which sum it will be seen precisely represents the sum of £300 17*s*. 8*d*. sterling in the other entry.

In similar documents laid before the House in the session held in 1843, for the year ending the 31st December, 1842, is the entry of a payment made to *John Porter*, secretary to the trustees of the *Quebec* Turnpike Roads, being for interest to the 31st of December, 1842, of the sum of £1,041 6s 10d. sterling, equal, as it will be observed, to about £1,157 0s. 10d. currency, and in the statement under the head of "Loans to incorporated companies," is the entry of the sum of £21,600 currency as a loan to the *Quebec* Turnpike Trust. In reply to the address of the legislative assembly in the previous session, there was in the session of 1843 laid before the assembly, a general account of monies received and disbursements made by the trustees of the *Quebec* Turnpike Roads, from the 1st March, 1841, to the 27th March, 1843. By this account it appears that upon the 1st January, 1842, there accrued due for interest upon debentures to the amount of £12,800 previously issued to divers persons, the sum of £400, 19s. 7d. which was liquidated by the Governor-General's warrant of January 1st, 1842, for that precise amount; that upon the 1st July, 1842, the trustees received by the Governor-General's warrant the sum of £524 6s. 5d. to pay the interest then accrued due, and upon the 1st January, 1843, by like warrant, the sum of £632 14s. 5d. to pay the interest which accrued due upon

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the 31st December, 1842, upon all debentures then issued, which amounted to the sum of £21,600, these two sums of £521 6s. 5d. and £632 14s. 5d., making together the sum of £1,157 0s. 10d. represent the £1,041 6s. 10d. sterling, entered in the accounts laid before the legislature in the session of 1843, as paid out of the consolidated fund. Now, by these returns it appears that the £400 19s. 7d., the first item which was entered in the accounts laid before the legislature in 1842, as a loan to the *Quebec* Turnpike Trust, was in fact advanced to the trust corporation to pay interest upon all the debentures then issued, and was correctly represented as a loan to the corporation, but the entry of £21,600 as a loan to the corporation in the accounts laid before the legislative assembly in 1843, does not, it must, I think, be admitted, correctly represent the state of the case, for in fact no such amount had been advanced by the executive government to the trust corporation. It is urged by way of explanation of this entry, that the government officials, whose duty it was to make out the accounts, entered this sum of £21,600 as a loan to the trust corporation, because they regarded the monies obtained upon the trust corporation's debentures, as monies borrowed upon the credit of the Province and to be paid out of the public revenues of the province, but if that was the idea entertained, it could surely have been easily expressed and the account would have been made out so as to show the province to be the debtor to the holders of the debentures and not creditors of the trust corporation for a loan made to the corporation. It is difficult to understand or explain the entry, for before the passing of the Act, 12 *Vic.*, ch. 5, to which I shall have to refer by and by, there was no act of parliament, nor any vote or resolution of the Legislative Assembly which could be construed as subjecting the consolidated fund to the payment of the

principal of the debentures issued by the corporation, or as authorizing the loan of such a sum to the corporation; but whatever explanation may be suggested for the entry, it is clear that if any inference is to be drawn from any conduct of the legislative assembly, founded upon the public accounts laid before it, such inference must be drawn from what is stated in those accounts and not from what is not stated therein, but is thrown out in argument by way of suggested explanation of a statement in those accounts which must be admitted to be incorrect; and it is equally clear, as it seems to me, that from the mere statement in the accounts, no inference whatever can be drawn which could impose upon the province any liability to pay the debentures, for payment of them out of the public revenue of the province could be only authorized or sanctioned, or the liability to pay, be imposed only by some vote or resolution of the legislative assembly, or by some bill originating therein being passed into an act of parliament.

In the accounts laid before the legislative assembly, in the session which commenced on the 28th November, 1844, and terminated on the 29th March, 1845, there appear to be two entries, the one showing that there was paid by the Governor-General's warrant, between the 1st of January and 31st of December, 1843, to *John Porter* to pay interest on turnpike trust debentures, the sum of £1183 8s. 5d. sterling, amounting to £1314 18s. 4d. currency, which, at 6 per cent. (which appears to have been the rate of interest at which all the debentures were issued) would pay one year's interest on £21,915 of debentures; and the other shewing that there was paid by a like warrant, to *John Porter*, secretary, to pay the interest on debentures issued by the *Quebec* Turnpike Trust, to 1st July, 1844, the sum of £695, 3s. 2d. currency, while the entry, under "Loans

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to Incorporated Companies," of a loan to the *Quebec* Turnpike Trust, remains the same in both years 1843 and 1844, namely, £21,600; although, by the trustees' return of monies received and disbursed by them from the 1st January to the 22nd July, 1844, it appears that the sum of £695 3s. 4d. was paid to the trustees by the Governor-General's warrant, on the 1st July, 1844, which, with £3 0s. 0d. in the hands of the trustees, enabled them to pay, and was applied by them in paying, the interest then due upon the sum of £27,100, for which it appears that the trust corporation had then issued debentures, so that the amount entered under "Loan to the trust," does not purport to represent in those years the amount of the principal of the debentures issued. Now, in this session, there were presented to the House, petitions of divers persons, inhabitants of the county of *Quebec*, praying for certain amendments in the ordinance relating to these turnpike roads, and praying that the tolls imposed might be diminished, as more beneficial to the revenue to be realized by the trust, and that the rate at which they might be commuted should be fixed by law, and a petition of the trustees praying for authority to raise a further loan of £8,882, to complete the works; all of which petitions, together with the returns of the accounts and transactions of the trustees, were referred to a special committee which reported recommending, among other things, the prayer of the trustees to be granted if recommended by a message from His Excellency the Governor-General, and accordingly a bill was introduced which, adopting the several suggestions made in the report of the committee, was passed into law as 8 *Vic*, ch. 55. By this act, it was enacted that it should be lawful for the trustees to raise, by way of loan, for the purposes of the ordinance cited in the preamble, a further sum, not exceeding £8,882 currency,

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to which loan and to the debentures issued in consequence thereof, and to the advance of monies out of the provincial funds to pay the interest thereon, if need should be, and to all other matters, incident to the said loan, all the provisions of the said ordinance touching the loan thereby authorized are extended and shall apply, excepting always, that the rate of interest on the loan to be raised under the authority of this act, shall not, in any case, exceed the rate of 6 per centum per annum.

By the 4th section, it was enacted that if the bridge, commonly called *Dorchester Bridge*, should at any time thereafter be acquired by the provincial government, and placed under the control of the said trustees; the toll gate, near the entrance of the road leading to *Beauport*, should be removed to the end of the said bridge, and the tolls payable at such gate for the use of the road and bridge, should not be greater by more than one half than the tolls which will be payable at any other toll gate, and shall be subject to commutation, and that then the *Charlesbourg Road*, up to the church of the parish of *Charlesbourg*, shall come under the operation of the ordinance, as thereby amended, and under the care, control, and management of the said trustees of the *Quebec* turnpike roads. And, by the 5th section, it was enacted that the provisions of the said ordinance as thereby amended, should also immediately after the passing of the act, extend to the road leading from *Champigny Hill*, the said hill included, to the bridge commonly called the *Red Bridge* or *Commissioners' Bridge*.

It seems to be a fair construction to put upon this act that it is a legislative recognition by the province of *Canada* of the provisions contained in the special ordinance, and of the powers vested in the trust corporation to raise, by way of loan, upon its debentures,

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the sum of £33,882; and an application by the legislature of *United Canada* of those provisions, as well as to payment of interest upon the monies secured by the debentures, as to loans to be made by the governor of *Canada*, for the time being to the trust corporation, out of the consolidated revenue fund of *United Canada*, but only upon the like terms and conditions as are mentioned in the special ordinance in relation to the revenues of *Lower Canada*. In the public accounts laid before the legislature in the year 1846, is entered the sum of £2,445 13*s*. 11*d*. to *John Porter* to pay the interest on debentures issued by the trustees of the *Quebec* turnpike trust, for the 18 months ended on 31st December, 1845, and in the accounts of the trust laid before the legislative assembly, in reply to an address for that purpose, this sum appears to have been applied as follows: £720 *s*8. 4*d*. to pay the interest on the 1st January, 1845, upon £25,000; £760 12*s*. 0*d*. to pay the interest on the 1st July, 1845, upon £27,500; and £964 13*s*. 7*d*. to pay the interest on the 1st January, 1846, upon £33,850, which sum is that which is entered in the statement of loans to incorporated companies as an amount loaned to the *Quebec* Turnpike Trust.

During this session also, several petitions were presented to the legislative assembly, praying for amendments in the act of the preceding session, relating to the trust. The trustees also presented a petition praying for authority to borrow a further sum of £12,000 for the improvement of the roads. These petitions, together with the accounts of the trustees, were referred to a special committee, which committee, among other things, reports that the committee had not yet abandoned the hope that something would be done either to acquire the *Dorchester Bridge* on the part of the government, or to vest the right of the crown to purchase the

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same in the trustees, and they suggested that, in the event of the bridge being purchased, the *Charlesbourg* road should be macadamized to a certain point therein mentioned. They added further that they were informed that if the trustees were authorized to borrow a sum of £20,000 on the guarantee of the province, it would enable them to macadamize the several roads and portions which they have recommended to be improved, and to purchase the *Dorchester Bridge* from its present proprietors. "The completion of the said roads," they add, "and the additional tolls that would "accrue from the bridge would so increase the revenue "of the trust as to relieve the province from paying in "future the interest on the loans already guaranteed." They further say, "your committee perceive with satisfaction that the reduction of the tolls effected last year has caused no diminution in the revenue, but on the contrary has increased it, and they suggest a new schedule of tolls."

This report, having been referred to a committee of the whole house, resulted only in the adoption by the house of that part which recommended a new schedule of tolls, and a resolution was passed and agreed to by the house, "that it is expedient to amend the act passed in the 8th year of Her Majesty's reign, intituled, &c., &c., *Vic.* 9, ch. 55, by repealing the schedule of tolls established by the said act, and by substituting the following," &c., &c., and leave was given to bring in a bill in conformity with the resolution which was accordingly brought in, and was passed into law as 9 *Vic.*, ch. 68.

In the public accounts laid before the legislative assembly, in the session held in the year 1847, there is the entry of a payment to *John Porter*, secretary, to pay interest on debentures issued by the *Quebec* turnpike trust, in the year ended 31st December, 1846, of the

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sum of £2,031 currency, which it will be seen is jus the interest at 6 per cent upon a principal of £33,850 which is the amount entered in the statement of "Loan to incorporated Companies," as loaned to the Trust.

During this session, also, petitions relating to the trust were presented to the legislative assembly, one praying for an enquiry into the conduct of the trustee s, another praying that the *Dorchester* bridge should be placed under the control of the trustees, another praying that the *L'Ormière* road might be macadamized, and another praying for a grant to extend the improvements of the *Cove* road, and to macadamize the *route de l'Eglise.*

In reply to an address for copies of correspondence between the executive government and the trustees of the *Quebec* turnpike trust, such correspondence was laid before the house, and together with the above petitions was referred to a special committee, which, six days before the house was prorogued, presented their report, wherein among other things, they express regret "that the government had not thought proper to recommend during the present session, a vote of public credit for the purpose of completing the roads in the neighbourhood of *Quebec*, and they regret still more that the government had not thought proper to recommend the purchase of *Dorchester* bridge, with the view of placing it under the control of the *Quebec* turnpike trustees, according to the recommendation several times made by different committees of your honorable house." In the short session of 1848, which commenced on the 25th February, and terminated on the 23rd March, there is nothing which throws any light upon the acts or conduct, either of the executive government or of the legislature in any respect bearing upon the trust. The government, in that session, obtained a vote of credit which may or may not have provided for the interest

accruing upon these debentures, but the journals or appendices throw no light upon the subject.

In the public accounts laid before the legislative assembly in the session held in the year 1849, there appear two entries of monies said to have been paid to *John Porter*, secretary, to pay the interest on debentures issued by the *Quebec* turnpike trust, the one of £2,033 8s. 10d. currency for the year ending 31st December, 1847, and the other of £2032 18s. 4d., for the interest accrued in the year 1848. And under the head of "loans to incorporated companies," in both years is the entry £33,850 as a loan to the trust, whereas the interest paid in those years represents a capital a little in excess of the £33,882 which was the utmost amount the trust corporation was authorized to borrow.

During this session, also, several petitions were presented in relation to the trust; one praying that the trustees might be authorized to borrow a sum of money for the improvement of the *Beauport* road; another, that certain roads in the parish of *St. Foye* be put under the control of the trustees and that they be empowered to raise funds in the usual way to complete and keep the road in repair; another praying a grant of money to improve certain roads therein mentioned under the direction of the trustees; another praying that the road leading from the church of *Charlesbourg* to *Dorchester* bridge be placed under the control of the trustees and that aid be granted for macadamizing the same; and another praying that *Dorchester* bridge should be placed under the control of the trustees.

On the 21st May the house resolved itself into committee on the subject of the *Dorchester* bridge and the roads in the vicinity of *Quebec*. The committee reported several resolutions, which were agreed to by the house as follows:—

"1. Resolved that it is expedient to authorize and

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enable the trustees of the *Quebec* turnpike roads to acquire and assume the possession and property of the bridge called *Dorchester* bridge over the river *St Charles* near the city of *Quebec*.

"2. Resolved that it is expedient to extend the provisions of the ordinance (passed in the 4th year of Her Majesty's reign, entituled 'an ordinance to provide for the improvement of certain roads in the neighborhood of, and leading to the city of *Quebec*, and to raise a fund for that purpose,) to the said bridge as well as to certain roads and parts of roads in the vicinity of *Quebec*;' and

"3. Resolved that for the above purposes it is expedient to authorize the said trustees to raise a further loan not exceeding £25,000 currency on the security of the tolls and other monies which might come into their hands, and to give a preference or priority of lien on the said tolls and monies to the interest on the said loan over the interest on all loans already authorized to be raised by the said trustees, as well as over the claims of Her Majesty's government for repayment of advances made by the Receiver General out of the provincial revenues."

The house having agreed to these resolutions gave leave to the Solicitor General to bring in a bill to give effect to them, which was accordingly brought in and passed into law, as 12 *Vic.*, ch. 115, whereby the 4 section of 8 *Vic.*, ch. 55, was repealed, and it was enacted that it should be lawful for the trustees to raise, by way of loan for the purposes of the Act, a sum not exceeding £25,000 currency, to which loan and to the debentures to be issued in consequence thereof, and to all other matters incident to the said loan, all the provisions of the ordinance 4 *Vic.*, ch. 17, touching the loan thereby authorized, were extended and should apply, excepting always that the rate of interest on the loan to be raised under the Act, should not in any case exceed the rate

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of six per centum per annum, and "that no money shall be advanced out of the provincial funds to pay such interest; and all debentures issued under this Act shall, so far as regards the interest payable thereon, take precedence and have priority of lien on the tolls and other monies, which may come into the possession and be at the disposal of the trustees, over the interest payable on the debentures granted or to be granted by the said trustees for any loan already authorized by law, as well as over all claims for repayment of any sums of money advanced or to be advanced to the said trustees by the Receiver General of the province." By the second section the trustees were required, as soon as possible after the passing of the Act, to purchase the bridge; and by the 5 section the several roads for which upon different occasions petitions were presented, praying that they might be placed under the control and management of the trustees, were placed under such their control. Now, when the legislature not only declined to adopt the recommendation of the special committee, to grant a sum out of the provincial funds to complete the roads, or to authorize a loan to be effected by the corporation upon the guarantee of the province, or to purchase the *Dorchester* bridge, but repealed the 4th section of the 8 *Vic.*, ch. 55, which pointed to and provided for the contingency of the province purchasing the bridge and in lieu of the province purchasing it, authorized the trust corporation to raise a further sum of £25,000 upon security of their debentures, for the purpose, among other purposes, of purchasing it, and required them to purchase it and to take control of it under the provisions of the special ordinances, which were re-enacted for the purpose, it seems to me to be very clear that the legislature never contemplated that the bridge, when purchased, should be regarded as provincial property. The provision as to the Governor,

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for the time being, in his discretion authorizing an advance of monies out of the provincial revenues to pay the interest upon the debentures had been the sole cause and excuse for the government having paid such interest out of the consolidated fund throughout, from the issue of the debentures; and the manner in which, as we have seen from the public accounts, annually laid before the Legislative Assembly, that body dealt with those payments adopting them, as I think we must hold that they did every year upon the occasion of the vote being annually taken for the supply of the civil governments, based upon those accounts, may well be considered to have given to the holders of those debentures a strong moral, if not legal claim to have the interest continued to be so paid to them, and when we find the legislature assuming to give to the newly authorized issue of debentures a preference upon the trust funds, in so far as interest upon those debentures is concerned, over the firstly authorized issue, it may well be held that the legislature gave this preference because they had assumed, or were assuming, the payment of interest upon the first issue, if the trust fund should be insufficient for both; and when in addition to this preference so given to the newly authorized issue, we find the act expressly enacting that no money shall be advanced out of the provincial funds to pay interest upon those debentures, I can come to no other conclusion than that the object of this enactment was to prevent the possibility of any claim upon the province being ever made in respect of the newly authoized issue and to remove the sole foundation for such a claim being made. From this time forth I think it may without impropriety be said (at any rate it may be granted without prejudice to the argument urged before us in this case upon behalf of the Dominion Government) that the holders of the previous issue of deben-

tures to the amount of £33,882 had from this time forth a right to regard the Province of *United Canada* as guarantors of the payment of the interest upon that amount of debentures, although they had no such nor any claim as yet upon the province for the payment of the principal secured by the debentures, and although, for all payments of such interest then already or thereafter to be made out of the consolidated fund, the province should be creditors of the trust corporation for the amount of such advances. It was, however, enacted by an act passed in the same session, viz: 12 *Vic.*, chap. 5, that it should be lawful for the Governor, by and with the advice of the executive council of the province from time to time, and as the interests of the public service might require, to redeem or to purchase, on account of the province all or any of the then outstanding debentures constituting the public debt of the province of *Canada*, or of either of the late provinces of *Lower* or *Upper Canada*, or all or any of the debentures issued by Commissioners or other public officers under the authority of the legislatures of either of the late provinces of *Upper* or *Lower Canada*, or of the legislature of Canada, the principal or interest of which debentures is made a charge on the consolidated revenue fund of this province, and to issue new debentures to an amount not exceeding that of the debentures so redeemed or purchased.

Now, if the true construction of this act was that it authorized the redemption or purchase on account of the province of the debentures for the £33,882 issued by the *Quebec* Turnpike Road Trust Corporation, it can only be so upon the ground that the payment of the interest upon those debentures was, or was deemed by the legislature, to be charged upon the consolidated revenue. The past accrued interest had been, as we have seen, in fact, paid annually out of the consolidated

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fund, and in the public accounts laid before the legislative assembly, as the basis upon which the annual votes of supply were granted, such payments were charged to that fund. This fact, together with the preference given by 12 *Vic*, ch. 115, in respect of the interest upon the debentures by that act authorized, as well over the interest accruing upon the previously issued debentures, as "over all claims for repayment of any sums of money advanced or to be advanced to the trustees by the Receiver-General of this province," as provided by the last recited act, afforded, as I have said, just ground for the holders of the £33,882 debentures, asserting a claim to have all future interest accruing upon those debentures paid, in like manner as the past interest had been, out of the consolidated fund; but whether a strict legal construction of the act if construed by a judicial tribunal before the redemption or purchase by the government of any of those debentures would or not have justified the adjudication that those debentures did properly come within the description of debentures "the interest of which was made a charge on the consolidated revenue fund" so as to bring them within the authority by the 12 *Vic.*, ch. 5, conferred upon the government to redeem or purchase them on account of the province, it is not now necessary to enquire; for, certain it is, as I have said, it could only be by reason of the interest having been so charged that the decision could be upheld, there having been no act whatever purporting to have charged, nor before the passing of 12 *Vic.*, ch. 5, purporting to charge upon the province, or its consolidated fund, any liability whatever—or, indeed, purporting to confer any permission or power upon the provincial authorities—to redeem or pay the principal of any of these debentures. But for this act the holders of those debentures would have had no claim whatever upon or against the province for pay-

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ment of the principal of them which a court of justice could recognize, and it was solely upon the authority of this act, as we shall see, that those debentures were subsequently paid by, or purchased on account of, the province. It was suggested that there was the same liability to pay those debentures as there was to pay those issued in *Upper Canada*, for what were called "The York or Home District Roads." It is, I think, very possible that the liability which did rest upon the province of *Canada* to pay those debentures may have operated, as a motive and reason, for the legislature of *Canada* affirming, authorizing or assuming the payment of the *Quebec* Trust debentures ; but, from their issue, the York Roads debentures stood upon quite a different footing. The acts which authorized their issue were acts of the legislature of the province of *Upper Canada*, passed before the union of *Lower* and *Upper Canada*, viz: 1 *Wm.* IV, ch. 16 ; 3 *Wm.* IV, ch. 37 ; 6 *Wm.* IV, ch. 30, and 7 *Wm.* IV, ch. 76. The debentures issued under the authority of those acts were, and were always considered to be, provincial debentures, issued and signed by the Receiver-General, like all other provincial debentures, and the loans obtained upon them were received by the Receiver-General, accounted for and handed by him to the trustees or commissioners entrusted with the duty of expending them on the roads. The tolls imposed by the acts, when received by the trustees or commissioners, were required to be paid over by them to the Receiver-General, by whom the interest upon the debentures was paid. So that, notwithstanding that those debentures, as the *Quebec* Trust debentures, were charged specially upon the tolls imposed, it is clear that in form and character they were essentially provincial debentures, constituting part of the debt and obligations of the province of *Upper Canada* existing at the union, and so quite different

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from the *Quebec* Trust debentures which, as I have shewn, were not provincial debentures and did not constitute part of the public debt of *Lower Canada* existing at the union; accordingly, among the public accounts laid before the legislative assembly of *Canada*, in the year 1842, in a paper intituled "A schedule of government debentures redeemed and outstanding, issued under the authority of acts of the provincial legislature of that part of the province of *Canada*, heretofore *Upper Canada*," all debentures which had then been issued upon the authority of the above Acts of *Upper Canada*, are entered. These debentures were also, it is true, redeemed under the authority of 12 *Vic.*, ch. 5, but it is plain that this Act authorized their payment, under the authority given in the Act to redeem, &c., "any of the then outstanding debentures constituting the public debt of either of the late provinces of *Lower* or *Upper Canada*," these debentures constituting part of the public debt of *Upper Canada*, whereas, as I have shewn already, the *Quebec* trust debentures never constituted part of the debt of the then late province of *Lower Canada*.

By the public accounts laid before the legislative assembly in the session held in 1850, there appears to have been paid out of the consolidated fund, in payment of interest upon the trust corporations debentures, for the year 1859, the sum of £2,032 18s. 4d, in two equal sums, being each for a half year's interest upon the principal sum of £33,882, but in the statement of the affairs of the province under the head of "loans to incorporated companies" there is no longer the entry of this or of any sum as a loan to the *Quebec* turnpike trust.

During this session a petition was presented praying for the passing of an Act to authorize the trustees to continue the *Charlesbourg* road towards *St. Pierre*, for

seven miles, which was referred to a special committee with power to report by bill. An address from the legislative assembly was also presented to His Excellency, praying that he would be pleased to lay before the house copies of all accounts made and rendered by the trustees, for the years 1848-9, and also copies of all documents and correspondence between the executive and the trustees, upon the subject of the management of the roads, and copies of the proceedings of the trustees and of their correspondence with the proprietors of *Dorchester* bridge, on the subject of the purchase of the said bridge, in conformity with the Act of the last session of parliament for that purpose. By the papers laid before the house in reply to this address, it appeared that in the month of July, 1849, application had been made to the trust corporation by the holders of some of the debentures for the £33,882, all of which were then overdue, for payment of the debentures, and that the trustees, being unable to redeem them, had applied to the executive government for permission under the provisions of the ordinance to effect a loan at a rate of interest not exceeding 8 per cent. to redeem £2,500 of debentures, the holders of which were very urgent for repayment of their principal, and that His Excellency had declined to give the requested permission; that thereupon the holders of those debentures in December, 1849, petitioned His Excellency to the like effect, and setting forth that they had advanced their money in the purchase of the debentures, relying upon the provisions of the 28th section of the ordinance, which section authorized the trustees, with the approval of the Governor, to raise money by a loan to redeem the debentures fallen due. To this petition His Excellency replied, through the provincial secretary, informing the petitioners that he was advised not to consent to the application which had been made by the trustees and

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that His Excellency saw no reason to depart from the decision then arrived at, "as the government does not consider itself pledged to the redemption of the bonds but only to the payment of the interest accruing thereon." To this the holders of the debentures replied by a further petition wherein they state that from the terms of the above answer to their former petition, they are persuaded a misapprehension still exists, both with regard to the original application from the trustees and to the prayer of the petitioners, whose object was merely that a loan should be sanctioned at a rate not exceeding 8 per cent. to enable the trustees to pay the overdue debentures, and repeating that they had invested their capital in the debentures upon the faith that they would either be paid at maturity, or that the special powers conferred upon His Excellency by the 28th section of the ordinance to authorize the trustees to borrow money, would be exercised, they again prayed that His Excellency would be pleased to approve of the trustees effecting a loan at a higher rate of interest than 6 per cent., as the petitioners would be likely to remain a long time without a return of their capital unless the trustees should be so authorized, and they urged as a reason in support of the prayer of their petition that the tolls and the commutation thereof on the roads might be fully adequate to the payment of interest even at a higher rate than 6 per cent., although the capital represented by the debentures might not be paid for years out of the proceeds of such tolls.

To this petition His Excellency, in like manner, replied through the provincial secretary, that he saw no sufficient reason in the allegations of the petitioners to induce him to depart from his former decision on the subject.

I have drawn attention to these documents so laid before the legislature, for the purpose of showing that

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the opinion I have expressed as to the legal position of the executive government, with respect to the debentures, namely, that they were not liable at all for the principal, although, under the circumstances already above detailed, they then were, as the government was ready to admit, responsible for the payment of the interest accruing upon them, was not only the opinion which the executive government then entertained, but that this opinion was concurred in by the holders of the debentures, all of which were then overdue, and for the purpose of drawing attention to the fact that the legislative assembly with those documents before them and with the knowledge of the position in which the executive government claimed to be in respect of the debentures, passed a Bill which became an Act, viz., 13 and 14 *Vic.*, ch. 102, wherein, after reciting that the Act 12 *Vic.*, ch. 115, had not obtained the object the legislature had in view in passing it, which was the speedy purchase of the *Dorchester* bridge and the speedy completion of the roads mentioned in that Act, it was enacted that if, at the expiration of two months, the trustees should not have purchased the bridge they should immediately proceed with the construction of a new one, and that they should set apart the sum of £10,000 out of the £25,000 they were authorized to borrow by 12 *Vic.*, ch. 115, for the above purpose, and appropriate the residue towards the improvements of the other roads by that Act placed under their control, thereby compelling the trustees to effect the loan contemplated, upon debentures to be issued under the authority of an Act which, in express terms enacted that no money should be advanced out of provincial funds even for the payment of interest upon the debentures so to be issued. This confirms the opinion I have already expressed that the object of the legislature in that enactment was thereby to remove all possible

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foundation for any claim being ever made against the province, in respect of those debentures, as to the interest as well as to the principal. In the public accounts laid before the legislative assembly in 1851 we find the entry of two payments to the trust corporation out of the consolidated fund, the one of £1,016 9*s.* 9*d.* to pay interest upon £33,882 debentures for the six months ending June 30th, 1850, and the other for £48 15*s.* 2*d.* to pay interest on £28,292 of debentures, for the 6 months ending 31st December, 1850, and in this year and from this year forward under the head of "Loans to Incorporated Companies," there is no longer the entry of any sum as loaned to the trust corporation. By a return made to an address of the house of assembly praying that His Excellency would cause to be laid before the house a debtor and creditor account, between the provincial government and the trust, from the commencement and the amount of debentures held, and of the interest paid and received by the government from year to year, on account of the trust, it appeared that from 1841 to 1850 inclusive, the government had paid for interest upon the debentures issued by the trust, in all £16,009 6*s.* 3*d* on account of which they had received nothing, but were entered as creditors of the trust for that amount. It also appeared that the trustees were in receipt of an annual income from tolls exceeding £3,000, their receipts from that source for the year 1850 being £3,370 13*s.* 4*d.*, an amount sufficient to pay interest at 6 per cent. upon £50,000. Possessed of this information the legislative assembly passed two bills, which became Acts 14 and 15 *Vic.*, ch. 132 and 133, the former to authorize the trust to effect a new loan and to extend the provisions of the *Quebec* turnpike road ordinance to certain other roads, and the other to authorize the trustees to issue debentures to a limited amount, for the purpose of buying

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and rebuilding the *Montmorency* bridge. By the former it was enacted that it should be lawful for the trustees to raise by way of loan a sum not exceeding £15,000 currency, and that such loan and the debentures which should be issued in conformity with the provisions of the act, and all other matters relating to the said loan should be subject to the provisions of the ordinance (4 *Vic.*, ch. 17,) relative to the loan authorized under the said ordinance; Provided, nevertheless, that the rate of interest to be allowed, under the authority of the act, should in no case exceed the rate of 6 per cent. per annum, and that no money should be advanced out of the provincial funds for the purpose of paying the said interest, and that all debentures issued under the authority of the act, so far as regards the interest payable thereon, should take precedence and have priority of lien on the tolls and other monies which might come into the possession and be at the disposal of the trustees over the interest payable on all debentures which should have been issued upon the guarantee of the province, or which should thereafter be issued by the said trustees upon the guarantee of the province, as well as over all claims for repayment of any sums of money advanced, or to be advanced, to the said trustees by the Receiver-General of the province. Now, it will be observed, that up to this, the frame and phraseology of the act is almost identical with the frame and phraseology of 12 *Vic.*, ch 115, the only difference at all, in fact, being in the manner of describing the debentures over which the newly authorized debentures were to have precedence as to interest, for that the same debentures were referred to by both acts may be admitted, instead of the words used in 12 *Vic.*, ch. 115, namely "over the interest payable on all debentures granted, or to be granted by the said trustees, for any loan authorized by law" are used, the words "over the

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interest payable on all debentures which shall have been issued upon the guarantee of the province, or which shall hereafter be issued by the said trustees upon the guarantee of the province." I cannot see, I must say, that anything was gained by this difference in expression, for it is plain that it leaves open the question whether there were then any, and if any, what debentures issued upon the guarantee of the province, and what was the extent of such guarantee, if any? I have already shown that although neither the terms of the ordinance 4 *Vic.*, ch 17, nor of 4 and 5 *Vic.*, ch. 72, nor of 8 *Vic.*, ch. 55, had made the province liable as guarantors or otherwise, either for interest or principal, upon the debentures which had been issued, yet that the regular payment annually out of the consolidated fund of the interest upon the £33,882 debentures, statements of which were annually laid before the legislature in the public accounts, upon the vote of supply being taken, together with the action of the legislature in 12 *Vic.*, ch. 115, postponing the payment out of the trust funds of interest upon those debentures to the debentures authorized by 12 *Vic.*, ch. 115, might from that time forth justify the expression that in so far as interest upon the first issued debentures was concerned it was assumed or guaranteed by the province, but that there was nothing to warrant a contention that the payment of the principal of those debentures was assumed or guaranteed by the province. It may therefore be admitted that in this sense the reference in 14 and 15 *Vic.*, ch. 132 to those debentures as issued upon the guarantee of the province, such guarantee being limited to the interest upon them, is not in appropriate; but it is really of little importance whether the expression "issued upon the guarantee of the province, was, or not, appropriate as applicable to any of th debentures previously issued, for the question with

which we have to deal is, whether or not debentures issued in virtue of and under the authority of an act subsequently passed, viz., 16 *Vic*, ch. 235, were issued upon the guarantee of the province to any, and if any, to what extent, and that is a question which must be answered irrespective of any propriety or impropriety in the expression used in 14 and 15 *Vic.*, chs. 132 and 133 as applicable to the previously issued debentures. Now, the 14 and 15 *Vic.*, ch. 132, having provided for the precedence which the debentures to be issued under that act should have, as to interest, over all debentures having the guarantee of the province, said nothing as to the rank, order and precedence, either as to interest or principal, between the debentures to be issued under 14 and 15 *Vic.*, ch. 132 and those issued or to be issued under 12 *Vic.*, ch. 115, which latter had not the guarantee of the province, therefore *ex magnâ cautela* the above clause of 14 and 15 *Vic.*, ch. 132 proceeds to enact, "and the debentures, issued under this act shall, as regards both the payment of interest and the principal thereof, rank after those issued under the authority of the act last above cited, passed in the 12th year of Her Majesty's reign," viz., 12 *Vic.*, ch. 115. This latter sentence does not in any manner affect or relate to the debentures for the £33,882, whether they are properly or improperly referred to in the act as debentures issued upon the guarantee of, the province, and the result is that these debentures as regards the liability of the province to have redeemed them, remained precisely in the same condition as they were prior to the passing of the 12 *Vic.*, ch. 5. The like observations may be applied to 14 and 15 *Vic.*, ch. 133, but with greater force, for the frame and phraseology of that act are totally different from the frame and phraseology of ch. 132, inasmuch as in ch. 133 no reference is made to those provisions of the ordinance which relate to the

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power of borrowing money on debentures, as there is in ch. 132. By the ch. 133 the trustees are authorized to purhase the *Montmorency* bridge and to rebuild it, and for that purpose to borrow a sum not exceeding £5,000, at a rate not exceeding six per cent. per annum. Then when they shall have purchased the bridge they are invested with all the rights and privileges vested in the properties thereof, by virtue of 52 *Geo.* 3, ch. 17. Then it is provided that the revenue arising from the bridge shall be applied exclusively to the improvement and gradual completion of the high road of the *Coté de Beaupré*, and the only reference to the terms of the ordinance is to place the bridge and the above road when completed under the control of the trustees, subject to the provisions of the ordinance, which plainly means subject to those provisions as to control and management, but in so far as the trustees have any power to borrow under this act, a step necessarily to be taken before acquiring and completing the bridge and road, the provisions of the ordinance are not mentioned, but the act simply authorizes the trustees to borrow a sum of money not exceeding £5,000, to purchase the bridge ; it then enacts, as did ch. 132, that the interest of the monies to be borrowed under the act should be privileged over the interest on the debentures issued or to be issued by the trustees with the guarantee of the Province, and should, as regards the interest on those debentures lastly mentioned have priority of lien on the tolls and other monies then in or thereafter to come into the hands of the said trustees, but should rank after the debentures issued or to be issued under 12th *Vic.*, ch. 115.

No reference being made in this act to the terms, expressions and provisions of the ordinance, 4 *Vic.*, ch. 17, relating to borrowing, it seems to have been certainly prudent, if not necessary, that some provision should

have been made in order to avoid any question arising as to whether the province could be made liable for those debentures, a question not unlikely to have been raised without such provision, as appears by the question raised here; accordingly we find that such provision was made, for it is added in the section here in recital that: "Neither the principal nor interest on the debentures to be issued under this act shall be guaranteed by the provinces, or be payable out of any provincial funds," thus providing, (as appears to me to have been the deliberate determination of the legislature in despite of the recommendation of several special committees) to take special care in every act authorizing the trustees to effect a loan passed subsequently to 8 *Vic.*, chap. 55, that there should be no liability whatever imposed upon the province, nor any pretence or excuse afforded for setting up any claim asserting any such liability, for the payment of the loans which the trust corporation was by such acts authorized to effect; and it is in my judgment impossible to argue (from the fact of the province by this act, chap 133, being exempted from all liability as to principal as well as to interest) that the province is liable for principal, although not for interest, under chap. 132, because in that act so, differently framed, the word principal is not inserted. I have already shewn, I think, how unnecessary it was to insert it in an act framed as chap. 132 is. It is to my mind quite an inconclusive argument, because the word principal is inserted in one act and not in another, that for this reason the province is liable for the principal of the debentures issued under the one act and not under the other.

In the public accounts laid before the legislative assembly in the year 1852, there appears to have been paid out of the consolidated fund, to the trustees, the sum of £1697. 10s. 4d., to pay twelve months' interest

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upon £28,292, of debentures issued by the trust corporation for the year 1851, and the sum of £356. 15s. 2d., to pay interest which accrued due 1st July, 1852. In this year a statement is introduced with the public accounts, intituled a "Statement of debentures redeemed under the authority of 12 *Vic*, chap. 5, to 31st January, 1853," wherein there is stated to have been redeemed, of the *Quebec* Road Trust debentures, in 1850, the sum of £5,590; in 1851, the sum of £6,100; in 1852, the sum of £100, making in all to the 31st January, 1853, the sum of £11,790.

During this session several petitions were presented, praying that divers other roads might be placed under the control of the trustees. The House resolved itself into committee to take into consideration the expediency of authorizing the trustees to effect a new preferential loan and by extending the roads to be placed under their control; the committee reported six resolutions, the first three of which enumerated several roads situate upon the north side of the River *St. Lawrence*, which the committee recommended should be placed under the control of the trustees, and as to these roads it was in the 4th resolution resolved—"That in order to provide for the improvements mentioned in the preceding resolutions, and also to complete those mentioned in the act passed in the last session of parliament, 14 and 15 *Vic.*, chap. 132, the said trustees be authorized to borrow a sum not exceeding £30,000 currency, and that the loan effected for that purpose be subject to the provisions contained in the ordinances and statutes now in force in that behalf; the rate of interest on which loan shall in no case exceed six per cent. per annum; and that it is expedient, that, while it shall not be lawful to advance any monies out of the funds of the province to pay the interest of the said loan, all debentures issued for the purposes hereinbefore mentioned, shall, as re-

gards the interest payable thereon, entitle the holders thereof, to a priority of privilege on the tolls and other monies which shall come into the hands and be at the disposal of the said trustees, in preference to the interest payable on all debentures which have been issued by the said trustees with the provincial guarantee as well as in preference to any claims for the re-imbursement of any sums advanced or to be advanced to the said trustees by the Receiver General of this province ; and that the said debentures so issued as aforesaid shall take order and precedence in respect to the repayment thereof, both principal and interest, after those issued under the guarantee of the Province by virtue of acts passed in previous sessions of parliament and now in force."

The 5th resolution recommended that certain roads situate on the south side of the river should be placed under the control of the trustees, and as to these, it was in the 6th resolution resolved—"That in order to provide for the improvements mentioned in the foregoing resolution, the said trustees be authorized to borrow a sum not exceeding £40,000 currency, and that such loan be subject, etc., etc., etc., etc, using the same words as in the 4th resolution to the end. These resolutions were agreed to by the House and leave was given to introduce a bill founded upon them which was accordingly introduced and passed into an act as 16 *Vic.*, ch. 235, by the 7th section of which it was enacted that in order to the making and completion of the several roads described and mentioned in the act passed during the last session of the provincial parliament, chap. 132, and also to the improving and macadamizing of the roads hereinbefore mentioned, and the making of the various improvements hereinabove mentioned (*i. e.* the improvements mentioned in the first three of the above resolutions of the house), it should be lawful for the

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said turnpike road trustees to raise, by loan, a sum not exceeding £30,000 currency, and that this loan and the debentures which should be issued to effect the same, and all other matters having reference to said loan, should be subject to the provisions of the ordinance above cited (4 *Vic.*, chap. 17), with respect to the loan authorized under it, "provided, nevertheless, that the rate of interest to be taken under this act shall, in no case, exceed the rate of 6 per centum per annum, and no monies shall be advanced out of the provincial funds for the payment of the said interest," (that is the interest accruing under this act) "and all the debentures which shall be issued under this act, so far as relates to the interest payable thereupon, shall have a privilege of priority of lien upon the tolls and other monies which shall come into the possession and shall be at the disposal of the said trustees, in preference to the interest payable on all debentures which shall have been issued by the said trustees under the provincial guarantee, and also to all other claims for the reimbursement of any sums of money advanced, or to be advanced to the said trustees by the Receiver-General of this province, and the said debentures, as respects the payment of the principal and interest thereof, shall rank after those issued under the act passed during the last session of the parliament of the province and hereinbefore cited (viz.: 14 and 15 *Vic.*, chap. 132);" and by the tenth section it was enacted that "for the completion of the roads, bridges and improvements mentioned in the two next preceding sections—being the roads on the south side of the *St. Lawrence*—it shall be lawful for the said trustees to issue debentures to the amount of £40,000 currency, which debentures shall be subject to the provisions of the ordinance hereinbefore cited, shall take precedence of those issued under the provincial guarantee and of the claim by the government to be paid out

of the revenues of the toll-gates and shall take order and precedence, and rank concurrently with those to be issued under the 7th section of this act."

It will be observed that there is a difference between the provisions of the 7th and the 10th sections of the act and the provisions of the corresponding resolutions of the house, to give effect to which the act was introduced. By the resolutions it was provided that all the debentures to be issued under the authority of the act were to have precedence, as to the payment of interest, over all debentures which had been issued with the provincial guarantee, that is to say, assuming the £33,882 debentures to be those referred to under this description, the debentures to be issued under the 16 *Vic.*, ch. 235, were, as to interest, to have precedence upon the trust funds over the debentures already issued for £33,882; but as to repayment of the principal, the debentures to be issued under 16 *Vic.*, were to take a rank and order "after those issued under the guarantee of the province, by virtue of acts passed in previous sessions of parliament, and now in force," that is to say, after the £33,882 debentures or such of them as had not been already paid under 12 *Vic.*, ch. 5, whereas under the provisions of the act, all the debentures to be issued under it were to have rank and precedence over all debentures then already, or which thereafter, if any should thereafter be, issued upon the guarantee of the province. That plainly means, the guarantee as to interest, but as to repayment of principal, those to be issued under 16 *Vic.*, chap. 235, were to rank after those which had already been issued under 14 and 15 *Vic.*, chap. 132, which by that act were declared to rank next after those issued under 12 *Vic.*, chap. 115. Taking, however, the expressions contained in the act as passed as what are to govern, there is, I think, no doubt (and in this I concur with the learned judge

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before whom this case was tried in the Court of Exchequer) that notwithstanding the form of expression used in the 10th sec. all the debentures authorized to be issued by the act, whether for the improvement referred to in the 7th sec. or those referred to in the 10th sec., are alike subject to the provisions of the 7th sec., that "no monies shall be advanced out of the provincial funds for the payment of interest thereon." It is quite clear from the 10th sec. that the intention of the legislature was that all debentures to be issued under the act, whether for the purposes of the 7th or of the 10th sec., should rank alike, those mentioned in the 10th sec. concurrently with those mentioned in the 7th, both as to principal and interest, and that both alike should have precedence over the debentures referred to as having the provincial guarantee,—then if the debentures for the £33,882 (these being the only debentures to which it is suggested the above description then could apply) should be taken out of the way, by being paid, if they should be paid by the provincial government, until there should be another tissue of debentures, if ever there should be, which should have the guarantee of the province as to interest, the provision in respect of precedence over such class of debentures would become nugatory, and to authorize such further issue there would need have to be another act of parliament: the only construction which, as it appears to me, can be given to the words "or which shall hereafter be issued by the said trustees under the provincial guarantee" in this and all previous acts having the same expression, is that the legislature treating the £33,882 debentures as having the provincial guarantee as to interest only, (as we have seen the government to have admitted in reply to the petition of the bond-holders, who prayed that the trustees might be authorized to raise a loan under the provisions of the 28th section of the ordinance,

4 *Vic.*, chap. 17, to redeem the overdue debentures,) had in view the possibility of a loan being authorized and effected under the provisions of that section. It is, however, obvious that the act 16 *Vic.* draws a plain contrast between two distinct classes of debentures, namely, those which had already been, or which thereafter should be, if any should be, issued upon the guarantee of the province, and the debentures to be issued under 16 *Vic.*, ch. 235. A contrast is drawn between these two classes as distinct and diverse, and precedence is given to the one over the other; the same precedence is given to those to be issued for the purposes of the 10th section as to those for the purposes of the 7th section; they rank the one concurrently with the other; they must, then, both belong to the same class, and being contrasted with, and given precedence over, the class designated as being under the provincial guarantee, how can any debenture belonging to a class having precedence over another ever be held to belong to the class over which it has the precedence? The act says that all debentures to be issued by the trust corporation under the authority of this act, 16 *Vic.*, ch. 235, shall have precedence of another class of debentures issued by the same corporation, namely, debentures having the guarantee of the province. Why shall such precedence be given? What is the *rationale* of its being given? No answer can be given to these questions, but that the reason is because those to be issued under 16 *Vic.* have not the guarantee of the province. Therefore it is that they, having only the trust funds of the corporation to look to, have not had that fund diminished by being applied to a different class of debentures which have another fund to look to than the guarantee of the province. The act 16 *Vic.*, ch. 235, in the plainest terms, as it seems to me, pronounces the debentures to be issued under its authority to be de-

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bentures not having the guarantee of the province. If, then, any one of the debentures issued under its authority can be said to belong to a class of debentures having the provincial guarantee, it must be by reason of something outside of the act 16 *Vic.*, authorizing their issue equally, as the fact of the provincial guarantee having become attached to the debentures for £33,882, was to be found, not in the terms and provisions of the acts which authorized their issue, but in proceedings and dealings outside of those acts. In the public accounts laid before the legislative assembly in the session held in 1854-5, there was presented to the assembly "a statement of debentures redeemed under the authority of 12 *Vic.*, ch. 5, to 31st January, 1855," wherein, besides the debentures of the *Quebec* turnpike trust already mentioned as having been redeemed prior to the 31st December, 1852, there is the entry of £22,092 more of such debentures, redeemed in the year 1853, making, with the £11,790 previously redeemed, the whole principal of £33,882 debentures, which sum is thenceforth entered as charged on the consolidated funds. As it is not pretended that the government ever paid any part of the interest accruing on debentures issued under 16 *Vic*, ch. 235, and as therefore there could be no such returns in the public accounts laid before the legislative assembly in respect of those debentures, as there were in relation to the debentures for £33,882, it becomes unnecessary to make any further reference to the journals and appendices of the legislative assembly. The question, therefore, is to be determined upon the construction of 16 *Vic.*, ch. 235, as if prior to the issues of any debentures under it the question had arisen whether the province would be liable by the terms of the act for the payment either of interest or principal of the debentures, if issued. I have already, I think, shown that if the construction of the

ordinance had come up for adjudication immediately after the passing of 4 and 5 *Vic.*, ch. 72, and before the issue of any of the first class of debentures, and the question had been whether the terms of the ordinance had imposed a charge or liability upon the province for the payment of interest or the principal of the debentures there authorized to be issued, the answer must have been in the negative. I think I have also shown that it was the fact of the payment of the interest by the Governor-General which was permitted but not made compulsory by the provisions of the ordinance, and the dealings of the legislature, upon such payments being annually shown in the public accounts, which in progress of time caused the payments of interest on those debentures to be recognized as a charge upon the consolidated fund. I have shown, also, that as regards payment of principal, the terms of the ordinance did not only not impose any charge or liability upon the province, but that they did not authorize or permit the appropriation of any part of the provincial funds towards payment of principal. If, then, the terms of the ordinance had been adopted *verbatim et literatim* by the act 16 *Vic.*, without the prohibition as to the application of any provincial funds towards the payment of interest, there would have been no charge or liability whatever imposed upon the province in respect of the principal of the debentures to be issued under 16 *Vic.*, ch. 235; neither would any such charge or liability have been imposed upon the province in respect of interest on those debentures. There would only have been conferred a permission or power upon the Governor-General, which, in his discretion, he might have exercised or refused to exercise, as seemed to him best. Now, as the terms and provisions of the ordinance are adopted by the act 16 *Vic.*, subject only to the qualification that no monies shall be advanced out of provincial funds for

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the payment of interest, the permission and power vested in the Governor-General to pay, in his discretion, such interest out of provincial funds is taken away; so that the effect simply is that whereas it was permissible and lawful for the Governor in his discretion, but not compulsory upon him, to pay the interest upon debentures issued under the provisions of the ordinance, it is not now permissible or lawful for the Governor, much less compulsory upon him to pay or authorize payment of interest upon debentures, issued under 16 *Vic.*; and as by the provisions of the ordinance it was not permissible or lawful for the Governor to pay or to authorize payment of the principal out of the provincial funds, much less was there a charge imposed upon those funds for such payment, so neither can payment of the principal of the debentures issued under 16 *Vic*, ch. 235, be a charge imposed upon provincial funds; nor is such payment out of such funds permissible or lawful, by the terms simply of the act. Therefore, such charge to be imposed at all must be imposed by some other act, in like manner as the charge and liability to pay the principal of the other debentures for £33,882 out of provincial funds became imposed only, if at all, by 12 *Vic.*, ch. 5.

There is only one act more to which there appears to be any occasion to refer, and that act confirms rather than shakes my view of the construction of 16 *Vic.*, ch. 235; it is 20 *Vic.* ch. 125; the act which divides the old *Quebec* trust corporation into two corporations, the one for the north shore and the other for the south shore of the *St. Lawrence*. That act puts an end to all doubt which may have before existed by reason of the language of the ordinance upon the question whether the property of the trust was vested in Her Majesty or in the corporation, and vests it in the corporations carved out of the old one, if it was not

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already vested in the old one: and the act seems to be declaratory that it was; for in the 4th section it provides that all property, moveable or immoveable vested in the *Quebec* turnpike road trustees and being on the north shore of the river *St. Lawrence*, should be transferred to and vested in the *Quebec* north shore turnpike trustees; and all such property lying on the south shore of the said river should be transferred to and vested in the *Quebec* south shore turnpike road trustees, and that each of the said corporations should have full power and authority to receive or recover from any former trustee or any other person or party wheresoever any property "hereby" vested in it. The 5th section then provides that the north shore trustees should be liable for the principal and interest of all debentures issued by the trustees of the *Quebec* turnpike road, and for all debts and liabilities of the said trustees contracted before the division into two corporations, provided always that whenever the south shore trustees should have any balance remaining in their hands out of the revenues arising from the roads and works under their control, after paying the expenses of completing, maintaining and managing the said roads and works and the interest upon the debentures they shall have issued under the authority of this act, and the principal thereof, they shall pay over such balance to the said north shore trustees, as an aid towards enabling them to pay the interest and principal of the debentures issued by the said trustees of the *Quebec* turnpike roads before the passing of this act. Now, it is impossible to conceive that the legislature would thus have imposed this burden upon the north shore trustees and have taken also the pains exhibited in this section to relieve the south shore trustees and their property from all liability in respect to the £40,000, which 16 *Vic.*, ch. 235 authorized to be borrowed for the south shore roads, if, as is contended, it was the pro-

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vince that, in fact and in reality, was subject to the charge and liability of redeeming these debentures upon whichever side of the river the money raised upon their security was expended. Much was said about the injustice of this provision ; with that we have nothing to do ; that was a point to be urged in the legislature. But after all,the provision was not perhaps so unjust as was contended, when we consider that the legislature had already sanctioned the gift out of the public funds to the amount of £33,882 principal, and about £20,000 interest in creating a property for the corporation upon whom the burthen objected to was cast; which property by the papers laid before the legislature at the time of the passing of the Act 16 *Vic.*, ch. 235, and before the monies thereby authorized to be raised were raised,or the improvements thereby authorized were made produced an annual income exceding £8,000. Then the south shore corporation being by this act, 20 *Vic.*, authorized to borrow £12,000 on their debentures, provision is made for this purpose, not in the form that provision is made in the 7 sec. of 16 *Vic.*, ch. 235, for the loans by that act authorized, but in a short form closing with the provision that the province shall not be guarantor or liable for the principal and interest of any debentures issued under this act, nor shall any money be advanced or paid therefor out of the provincial funds, thereby carrying out what appears to me to be the determination of the legislature as apparent in 12 *Vic.*, ch. 115, and in every act passed subsequently thereto. It was urged that as the word "principal" as well as "interest" is inserted here, and "interest" only in 16 *Vic.*, ch. 235, that therefore the province is responsible for the "principal" although not for the "interest" of the debentures issued under 16 *Vic.*, ch. 235. I have already dealt with this contention when treating of 14 and 15 *Vic.*, ch. 133, but I may add that the contention

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raises a collateral point, which is the contention expressly raised under 16 *Vic.*, namely, was the insertion of the word "principal" absolutely necessary to relieve the province from liability in respect of the debentures authorized by 20 *Vic.*, ch. 125? That it was not necessary to relieve the province from liability in respect of the principal of debentures issued under 12th *Vic.*, ch. 115, the frame and provisions of which are identical in that respect with 16 *Vic.*, ch. 235, I think I have already shewn. The provision as to the exemption of the province from liability upon debentures issued under the latter act is precisely the same as in the former, and such exemption as regards those issued under 12 *Vic.*, ch. 115, as I think I have shewn could not be questioned successfully.

The contrast also which in 16th *Vic.*, ch. 235, is drawn between the debentures to be issued under the authority of the act and debentures having the provincial guarantee, and to which I have drawn attention, is to my mind conclusive, that the debentures issued under 16 *Vic.* cannot themselves have that guarantee; and there is no vote or resolution of the legislative assembly of *Canada*, nor any act of its legislature which subjected that province to the payment of them in whole or in part, unless that liability is to found in the act itself, which authorized their issue.

Upon the passing of the *B. N. A.* Act, the property and civil rights of the corporation which issued the debentures, and the rights of their creditors, became under the exclusive control of the legislature of the province of *Quebec*, under the 91st section of the act, while certain bonds, issued by the corporation to the amount, as appears, of £9,000, which constituted assets of the late province of *Canada*, were by the 113 sec. made the joint property of the provinces of *Quebec* and *Ontario*. It is impossible for us to hold that bonds of the trust corpo-

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which in the hands of the executive government of *Canada* were assets of the province, were when in the hands of another creditor liabilities of the province.

It is to the government of *Quebec* that the creditors of the corporation should apply, if the corporation are unable to pay their debentures as they fall due, to procure action to be taken under the 28th sec. of the ordinance, which is adopted and enacted as part of the act 16 Vic., chap. 235, under which the debentures have been issued; and if, as I understand it to be contended that, but for mismanagement on the part of the trust corporation, the revenue from the roads would have been sufficient to have created a fund to redeem the debentures, complaint upon that head should be made to the legislature, or the courts of the province of *Quebec*, as the competent authorities to afford redress for such a wrong.

Upon the whole it appears to me to be clear that at the time of the passing of the *B. N. A.* act, there was no charge or liability whatever existing upon the late province of *Canada*, or which subjected it to the payment of any part of the interest or principal secured by the debentures, authorized to be issued by the *Quebec* turnpike trust corporation, under 16 *Vic.*, chap. 235, and that therefore the Dominion of *Canada* is subject to no such liability, and that this appeal should be allowed with costs.

Appeal allowed with costs.

Attorney for appellant: *F. Langelier.*

Attorneys for respondent: *Stuart & Stuart.*

This case was appealed to the Privy Council and the Lords of the Judicial Committee reversed the judgment

of the Supreme Court of *Canada*. The following is the judgment:—

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Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal and cross appeal of the Queen v. Belleau and others, and Belleau and others v. the Queen, from the Supreme Court of Canada; delivered 20th June, 1882.

Present:

SIR BARNES PEACOCK,
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR JAMES HANNEN.
SIR RICHARD COUCH.

This is a petition of right against the crown, by the holders of certain debentures issued by "the trustees of the *Quebec* turnpike roads," for payment of the principal and interest of their debentures.

No question has been raised as to the form in which the suppliants seek to have the question in dispute determined, which is, whether the late province of *Canada* was liable to pay the principal and interest of the debentures sued on. By "*The British North America Act*, 1867," the debts and liabilities of each province existing at the union were transferred to the Dominion of *Canada*, and it is conceded by the crown that if the debentures created a debt on the part of the province, the suppliants are entitled to a decision in their favor.

The debentures purport on their face to be and were in fact issued under the authority of an act of parliament of the province of *Canada* (16 *Vic.*, c. 235), intituled "An act to authorize the trustees of the *Quebec* turnpike roads to issue debentures to a certain amount, and to place certain roads under their control."

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The debentures are in form certificates by the trustees, that under the authority of the said act there had been borrowed and received from the holder a certain sum bearing interest from the date of the certificate, which sum was reimbursable to the holder or bearer on a day named.

The act, after reciting that it was expedient to extend the provisions of a certain ordinance (4 *Vic.*, c. 17) to certain roads other than those to which they then extended, and to such further improvements through the trustees of the roads established under the said ordinance, and that in order to the construction and completion of the roads then undertaken by the trustees, it was expedient to provide for the raising of the necessary funds by the issue of debentures by the said trustees, enacted that the provisions of the said ordinance, and the provisions of all acts and statutes in force amending the said ordinance, and the powers of the trustees appointed under the said ordinance, should extend or apply to the roads in the said act mentioned, in the same manner as if the said roads had been mentioned and described in the said ordinance.

By the 2nd and subsequent sections down to and inclusive of the 6th, the trustees were required to execute certain works, and were authorized to execute others, and the roads are enumerated to which the provisions of the ordinance were to be extended.

By the 7th section it is enacted that, in order to the making and completion of certain roads, described in a previous act, and the making of the various improvements above mentioned:—

> It should be lawful for the trustees to raise by loan a sum not exceeding £30,000 currency, and this loan and the debentures which shall be issued to effect the same, and all other matters having reference to the said loan, shall be subject to the provisions of the ordinance above cited with respect to the loan authorized under it.

This is followed by a proviso which it will be neces-

sary to refer to hereafter. Thus we are obliged, in order to see what were the obligations created by the debentures issued under the 16th *Vic.*, and now sued on, to examine the provisions of the ordinance 4 *Vic.*, c. 17.

By that ordinance the governor was empowered to appoint not less than five nor more than nine persons to be and who and their successors should be trustees for the purpose of opening, making and keeping in repair the roads thereinafter specified.

By section 3 it was enacted that the said trustees might, by the name of the trustees of the *Quebec* turnpike road, sue and be sued, and might acquire property and estates moveable and immoveable, which being so acquired should be vested in Her Majesty for the public use of the province, subject to the management of the said trustees for the purposes of the ordinance.

By the 18th section it was enacted that the roads should be and remain under the exclusive management, charge and control of the said trustees, and the tolls thereon should be applied solely to the necessary expenses of the management, making and repairing of the said roads, and the payment of the interest on and the principal of the debentures thereinafter mentioned.

The 21st section is the most important, and is as follows:—"21. And be it further ordained and enacted that it shall be lawful for the said trustees, as soon after the passing of this ordinance as may be expedient, to raise by way of loan on the credit and security of the tolls hereby authorized to be imposed, and of other moneys which may come into the possession and be at the disposal of the said trustees, under and by virtue of this ordinance, and not to be paid out of or chargeable against the general revenue of this province, any sum or sums of money not exceeding in the whole £25,000 currency."

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Unless, therefore, it can be shown that some qualification of these words is to be found expressed or implied in the ordinance or the statutes amending it, it is clear that the suppliants lent their money on the credit and security of the tolls, "and not to be paid out of or chargeable against the revenues of the province."

Their contention is that, notwithstanding these words, the province was bound to pay the debentures.

The trustees, it is said, were the agents of the province, and in that character they borrowed money for the province, to be applied to provincial purposes; thus the province became the principal debtor, and the tolls are to be regarded only as a first source of repayment of the debt of the province.

These general propositions cannot afford assistance in the consideration of the question we have to determine. It is of no avail to call the trustees agents of the province if it is admitted, as it must be, that the extent and limits of their agency must be sought in the act of the legislature which gives them existence. To make the trustees the agents of the province, it must be shown that, by their constitution, they have authority to act for the province, and to create obligations binding upon it. But this has not been shewn. The trustees are a corporate body, the absolute creation of the legislature, and their rights, duties, and powers are exclusively contained and defined in the instrument by which they were incorporated. Such corporations are well known to the law as well of this country as of *Canada*. They are created for a great variety of purposes, some of local, others of general importance. In the present instance the corporation is created for the local object of improving the roads round *Quebec*, and to this end the trustees are empowered to borrow money on certain specific terms, for the purposes of the trust as defined in the ordinance. The benefit which the province may be

supposed to derive from the expenditure of the money borrowed no more imposes a liability on the province to repay it than it imposes such a liability on the adjoining landowners, the value of whose property may be increased by the construction of the roads authorized to be made.

In order to ascertain the powers of the trustees we must examine the provisions of the ordinance.

By the 21st section it appears that the loan is to be raised on the credit and security of the tolls authorized to be imposed, and other moneys which may come into the possession, and be at the disposal of, the trustees under and by virtue of the ordinance. On this it is observed that it does not say the "sole" credit and security of the tolls, &c., but, in the absence of any other credit or security defined by the ordinance, those only can be looked to which are expressly mentioned. It is, however, evident that it was for the very purpose of guarding against the possibility of the present claim that, in addition to the affirmative words already quoted, negative words were introduced that the loan is "not to be paid out of or be chargeable against the general revenue of the province."

It does not appear possible to use language more carefully framed to exclude from the minds of proposed lenders the idea that they were in any case to look to the province for repayment of the moneys advanced by them.

The only criticism which has been offered upon this passage is that it does not negative the contention that the loan is to be paid out of revenue other than the "general" revenue of the province. But no other revenue can be suggested.

The government has no power to raise or apply revenue in any other way than is authorized by law. It is obvious that revenue already appropriated to parti-

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cular objects cannot be diverted from them, and, when it is forbidden to apply the unappropriated or general revenue to the payment of the loan, all possible sources of reimbursement out of revenue of the province are excluded. It is a contradiction in terms to say that that which the province is by express enactment forbidden to pay out of its revenue remains nevertheless a liability of the province.

The 26th section enacts that it shall be lawful for the Governor, if he shall deem it expedient, at any time within three years from the passing of the ordinance, and not afterwards, out of any unappropriated public moneys in his hands to purchase for the public uses of the province and from the said trustees debentures to an amount not exceeding £10,000 currency, the interest and principal of and on which shall be paid to the Receiver General by the said trustees in the same manner, and under the same provisions, as are provided with regard to such payments to any lawful holder of such debentures.

Thus the Governor is enabled to purchase, on behalf of the province, debentures, and so to become the creditor of the trustees, but this power is limited to three years.

This is wholly inconsistent with the idea that the province was already the debtor for the whole amount of the loan.

The province cannot stand in the relation both of debtor and creditor to itself; and if the process be regarded as a means of redeeming the debt of the province, no reason can be suggested why this power of purchasing debentures should be limited in amount and to a period of three years.

The 23rd section enacts that the debentures shall bear interest, and concludes thus :—

Such interest to be paid out of the tolls upon the roads, or out of

any other moneys at the disposal of the trustees for the purposes of this ordinance.

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Here there are no negative words excluding the liability of the province, but the obligation to pay interest primarily follows that of paying the principal, and it lies upon the party asserting that it is imposed elsewhere to establish it.

So far from there being anything in the ordinance to support the contention that the interest is to be paid by the province, everything on the subject of interest tends strongly in the opposite direction.

By the 27th section it is enacted that all arrears of interest shall be paid before any part of the principal sum :—

> And if the deficiency be such that the funds then at the disposal of the trustees shall not be sufficient to pay such arrears, it shall be lawful for the Governor for the time being, by warrant under his hand, to authorize the Receiver General to advance to the trustees out of any unappropriated moneys in his hands such sum of money as may, with the funds then at the disposal of the trustees, be sufficient to pay such arrears of interest as aforesaid, and the amount so advanced shall be repaid by the trustees to the Receiver General.

This provision, empowering the Governor General to authorize a loan to the trustees to enable them to pay interest, is inconsistent with the idea that the province was already under an obligation to pay the interest.

If then the case had rested upon the effect of the ordinance alone, their lordships are of opinion that no liability on the part of the province for payment of either the principal or interest could be established; but it has been argued that by subsequent legislation and conduct the province of *Canada* has recognized its liability to pay the principal and interest of the debentures issued under the authority of the ordinance of 4 *Vic.*

The first Act which is relied on is the 12th *Vic.*, c. 5, by which it was provided that it

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Should be lawful for the Governor to redeem or purchase on account of the province all or any of the debentures constituting the public debt of the province of *Canada*, or such or any of the debentures issued by commissioners or other public officers under the authority of the legislature of *Canada*, or of the late province of *Canada*, the interest or principal of which debentures is made a charge on the consolidated revenue fund of the province.

It is said that the government, under the authority of this act, paid off the debentures issued under the ordinance.

It appears highly probable, as is stated in the very able judgment of Mr. Justice *Gwynne*, that the power given to the Governor by the 27th section of the ordinance to advance, by way of loan, money to the trustees to pay arrears of interest did, in fact, lead to the idea that the province was under a legal liability to pay the interest, and it would seem, though the manner in which the transaction was carried out is very obscure, that the debentures issued under the ordinance were, in fact, redeemed under the powers supposed to be conferred by the 12 *Vic.*, c. 5.

All that need be said upon this subject is that, if the Governor did suppose himself to be acting under the authority of this statute, he mistook his powers. The debentures issued under the ordinance did not constitute part of the public debt of the province, and neither the interest or principal of them was made a charge on the consolidated revenue fund of the province.

But, whatever considerations may have led to the redemption by the government of the debentures issued under the ordinance, it is clear that they cannot affect the construction of the 16th *Vic.*, c. 235, under which the debentures now in suit were issued.

The 7th section of that act authorized the trustees to raise a loan, which

Loan, and the debentures which shall be issued to effect the same, and all matters having reference to the said loan, shall be subject to

the provisions of the ordinance with respect to the loan authorized under it;

But this important proviso is added—

Provided nevertheless that the rate of interest shall not exceed 6 per cent., and no moneys shall be advanced out of the provincial funds for the payment of the said interest.

Thus the power to make advances out of provincial funds for payment of interest which was given by the 27th section of the ordinance as to the debentures issued under it, and which had possibly led to misconception as to the liability of the province, is expressly taken away by the 16th *Vic.* as to the debentures now in question.

They must therefore be treated as issued not merely on the express condition that they were not to be paid out of or chargeable against the general revenues of the province, but with the further express condition that no moneys should be advanced out of provincial funds for the payment of interest.

And again, as though for the purpose of guarding against the possibility of the debenture holders contending that the debentures issued under the 16th *Vic.* had the provincial guarantee, the proviso to the 7th section enacts that

All the debentures which shall be issued under this act, so far as relates to the interest payable thereupon, shall have a privilege of priority of lien upon the tolls, &c., in preference to the interest payable upon all debentures which shall have been issued under the provincial guarantee, or which shall hereafter be issued by the said trustees under the provincial guarantee.

What debentures had been or could be issued under the provincial guarantee does not appear, but this at least is clear, that the debentures issued under the act, and now sued on, have no provincial guarantee, since they have a preference given to them over all that have, and are thus distinguished from them.

It remains only to consider some general arguments

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which have been advanced on behalf of the suppliants. It has been urged that the government of the province, by redeeming the debentures issued under the ordinance, induced the belief that the same course would be pursued with regard to the debentures issued under the act of 16 *Vic.*, c. 235, and that without such belief the debenture holders would not have lent their money on the security of the tolls, &c., which had proved entirely insufficient even to pay the interest of the former loan.

Their lordships do not desire, by any observations, to diminish the force of these arguments, if addressed to the proper tribunal. It may be that the legislature of the province of *Canada* or that of the Dominion may see reason to listen to the prayer of the suppliants to be relieved in whole or in part from the loss of their money, which has been expended for the benefit of the province. But this tribunal cannot allow itself to be influenced by feelings of sympathy with the individuals affected. Its duty is limited to expressing its opinion upon the legal question submitted to it, and upon that their lordships entertain no doubt.

Another argument of a similar kind has been based upon a subsequent statute of the province of *Canada*, 20 *Vic.*, c. 125, by which the *Quebec* turnpike roads were divided into two parts, and by which it is contended some of the debenture holders have been deprived of a part of the special fund created for the payment of their loan.

Assuming the correctness of this contention, it might have been made a ground for opposing the later enactment, or it may now be used by way of appeal to the legislature for redress, but it cannot supply a reason for putting a construction on the obligations created by the 16th *Vic.*, c. 235, different from that which must have

been put upon them immediately after the passing of that statute.

Some minor points have been relied on by the learned judges who have held that the suppliants were entitled to succeed on this petition. It is from no disrespect to those learned judges that these points have not been particularly dealt with, but from a belief that, however they may tend to fortify the general argument in support of which they are used, they do not by themselves afford a basis upon which their lordships' judgment can be founded.

For these reasons, their lordships are of opinion that the judgment of the Exchequer Court of *Canada*, as well as the judgment of the Supreme Court confirming the judgment of the Exchequer Court so far as it decided that the respondents were entitled to the principal of their debentures, but varying the same by declaring that the respondents were entitled in addition to the principal to interest from the date of filing the petition of right, are erroneous, and their lordships will humbly advise Her Majesty that they should be reversed and judgment entered for the crown.

Their lordships are further of opinion and will advise Her Majesty that the cross appeal of the respondents asserting the liability of the crown to pay interest on the debentures from the date of their falling due should be dismissed, and that the costs of the appeal and of the cross appeal and of the proceedings in the courts below should be paid by the respondents.

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*Jan'y 14.

*May. 13.

THE QUEEN ..... APPELLANT;

AND

JOHN McFARLANE, *et al* ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Non-liability of the Crown for the negligence of its servants—Crown not a common carrier—Payment of Statutory Dues.

Held: 1st. That a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work.

2nd. That an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

3rd. That in such a case Her Majesty cannot be held liable as a common carrier.

APPEAL from a judgment rendered by Mr. Justice *Henry* in the Exchequer Court of *Canada*, on a demurrer to the petition of right of *John McFarlane* and *Duncan McFarlane*, the above named respondents.

The petition of right sets out:—

1. That under the Consolidated Statutes of *Canada*, ch. 28, Dominion Act, 31 *Vic.*, ch. 12, her Majesty the Queen owned, as public works of the late province of *Canada*, and of the Dominion of *Canada*, "certain slides, dams, piers, booms and other works on the *Ottawa* river, and the river *Madawaska*, one of its tributaries."

2. That under said statutes the Governor-General

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

in Council was empowered by Orders in Council to impose and collect tolls and dues on such public works, for the proper maintenance thereof, and "to advance the public good" to enact such regulations as might be deemed necessary for the management, proper use and protection of such works, and for collection of the tolls, &c., and might impose fines—not exceeding in any one case one hundred pounds for any infraction of such orders.

3. That the Governor in Council made orders authorizing the collection of the tolls or dues.

4. That the orders provided works "should be under the control and management of the superintendent of the works, slide master, deputy slide master, or other officer duly appointed by the Commissioner of Public Works, and that these officers, and no others, should have the power of regulating the supply of water required for the passage of timber, of alloting the space for rafting or mooring of timber, of determining the quantity of timber that might pass daily through the slides or booms, of collecting the slidage dues, of awarding the amount that might be due by the owner or owners of timber," &c., for damages done to works or penalties for violation of regulations, of seizing the timber and selling same, and recovering the dues, penalties or damages when the owners of timber or persons in charge thereof should refuse or neglect to pay same.

5. That the orders provided that the order of said superintendent, &c., duly appointed should be obeyed by owners, &c., and if refusing to obey to be subject to fines and penalties.

6. That no timber should enter any slide without the owner, &c., giving notice to superintendent, &c., under penalty.

7. Any interference by owners with certain works

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under control of deputy slide master at *Arnprior* station, or with duties of that officer, to subject owner not duly authorized to a penalty of not less than one hundred dollars nor more than two hundred dollars over and above amount awarded by Superintendent of *Ottawa* works for any damage arising from such interference or violation of orders.

8. That at time of damage and loss sustained by suppliants, they were lumbering on *Madawaska* river, owned licenses to cut timber on crown lands bordering on that river, had cut logs there which it was necessary to float down that river to *Ottawa* river, on way to *Quebec*, in usual manner.

9 That such timber in course of transit passed over certain slides, booms and river improvements belonging to Her Majesty, viz: the retaining boom at *Arnprior*, the slide at *Arnprior* and the main retaining boom at the mouth of the *Madawaska* river in the river *Ottawa*, (*Chat's* lake).

10. That suppliants had notified slide master, obtained permission to pass the timber and performed all conditions on their part to entitle them to have timber passed.

11. That one *John Harvey* was duly appointed slide master, and had control and management of works over which timber passed.

12. That the said timber and logs were passed from the retaining boom at the village of *Arnprior* over the said timber slide at said village into the main retaining boom in the *Ottawa* river (*Chat's* lake) by the said *Harvey*, whose duty it was, under the said orders, to direct and control the passage of the same, and by other servants of the Crown under his directions; and by reason of the unskilful, negligent and improper manner in which this duty was performed by the said *Harvey* and

the said other servants of the Crown, a larger quantity of timber and logs than the said main boom was capable of holding was allowed to pass over the said slide into the said main boom, and in consequence thereof the said boom broke away, and the timber and logs of the suppliants floated out of the same.

13. That the suppliants repeatedly objected to so much of the timber and so many of the logs being passed over the said slide by the said slide master, and frequently warned the said slide master that the consequence would be that the boom would break away, as it did; but the said slide master ignored and refused to heed the objections and warnings of the suppliants.

14. The suppliants also charged that the said boom at the mouth of the *Madawaska* was negligently and unskilfully constructed, and was wholly insufficient for the purpose it was designed to serve.

15. The suppliants charged that the said slide master was incompetent to discharge the duties he was employed to discharge in connection with the said works, by reason, as well of his want of knowledge of the duties required of him in his said capacity of slide master, as at the said time and for some time preceding, of his intemperate habits, as was well known to Her Majesty, and that Her Majesty did not exercise due and proper care in the employment of the said slide master, and in continuing to employ him.

The petition then alleged that a great many of the pieces that floated away were lost to suppliants, they suffered loss on collecting those not lost; many of the pieces were injured and depreciated in value, and by reason of the delay of getting timber not lost to the market, they suffered a heavy loss, and they claimed $5,967.04 and interest.

19. The suppliants submitted, that under the said statutes, the said Orders in Council, and the facts as

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above set forth, Her Majesty was and should be declared to be liable for the losses sustained by the suppliants, and for the labor and expense they were at by reason of the unskilful, negligent and improper conduct of the said slide master in passing the said timber and logs, the particulars of which were set forth in the paper thereto annexed marked "A."

The suppliants therefore prayed that Her Majesty might under the said statutes, Orders in Council, and the facts as above set forth, be declared to be liable to the suppliants for the losses sustained by the suppliants, and for the labor and expense they were at by reason of the unskilful, negligent and improper conduct of the said slide master as aforesaid.

To this petition the Attorney-General, on behalf of Her Majesty, demurred on the following grounds:—

1. That no liability existed on the part of Her Majesty towards the suppliants, in respect of which a petition of right could be maintained for the losses alleged to have been sustained through the negligence of the persons mentioned in said petition, the Crown not being liable for the negligence of its servants.

2. That no contract with the suppliants on the part of Her Majesty was shewn, and a petition of right does not lie to recover damages not arising under a contract with the Crown.

3. That no liability on the part of Her Majesty towards the suppliants existed by reason of the insufficiency of the boom referred to in the said petition.

4. That no liability on the part of Her Majesty towards the suppliants exists by reason of any want of care in the selection or employment of the slide master referred to in said petition.

5. That under the statute in that behalf, the public works referred to in the petition were placed under the control and management of the Minister of Public

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Works, and Her Majesty was not liable for the negligence of the persons having charge of said works.

The demurrer was argued in the Exchequer Court for the suppliants by Mr. *Hector Cameron*, Q C., and Mr. *McIntyre;* and for the Crown by Mr *Lash*, Q. C.

On the 25th of May, 1881, the following judgment overruling the demurrer, was delivered by *Henry*, J. :—

"This is an action brought by the plaintiffs by a petition of right to recover damages for losses sustained by them through the breaking of a boom in the *Ottawa* river situated below the timber slides at or near to *Arnprior*, by means of which several logs of the plaintiffs were wholly lost and the plaintiffs put to trouble and expense in recovering others, all, as alleged, through the improper and negligent conduct of *John Harvey*, who then was, and had been for some years before, slide master at that place duly appointed by the government, under the provisions of ch. 28 of the Consolidated Statutes of *Canada* and of the Act 31st. *Vic.*, ch. 12.

"To this petition a demurrer was filed and served on behalf of the Attorney-General, setting out as causes of demurrer in substance,

"1st. That Her Majesty is not liable for the losses sustained through the negligence of the Slide Master under the circumstances as alleged in the petition.

"2nd. That no contract with the suppliants is shown.

"3rd. That no liability on the part of Her Majesty exists by reason of the insufficiency of the boom referred to in the petition.

'4th. That Her Majesty is not liable by reason of any want of care in the selection or employment of the Slide Master.

"5th. Because the public works in question were placed by the statute under the control and management of the Minister of Public Works, Her Majesty is

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not liable for the negligence of the persons having charge of said works under him.

"The demurrer admits all the allegations contained in the petition.

"The first cause of demurrer would, in my opinion, be sustainable if the action was founded solely on a tort. That it is a defence in this case largely if not altogether depends upon the fact whether the dealing with the logs in question created a contract. That I will now proceed to consider. The property in the public works in question is vested in the Queen as the head of the government and legislature of the Dominion. Public moneys were spent to erect and maintain the works. Tolls for the use of them were imposed. A slide master always managed and controlled the use of them. When logs reached the retaining boom at *Arnprior* above the slides, he assumed the possession of them and the conduct of them through the slides and into the boom below them, from which they were re-delivered to the owners. By Orders in Council, under the acts, tolls were levied and collected and paid into the public treasury. No logs could get down the river without coming through the slides, and the legislature by the acts before referred to, provided the slides and the other works connected with them as the only means of passage for logs. To obtain the use of such works it became necessary for the owners of logs to transfer the actual temporary possession and control of them to the slide master to be retained by him until he re-delivered them out of the lower boom. There was in this case not only a voluntary, but under the circumstances an absolutely necessary transfer of the logs to the slide master for the purposes of transit. All control over the direction of the operation was out of the owners and in the slide master, and the suppliants complain that, whilst so, through the improper and negligent conduct of the

slide master and the insufficiency of the lower boom, the loss complained of was occasioned.

"To test the objection that no contract existed, let a private individual or chartered company occupy the place of Her Majesty. Suppose the works in question to be private property, and the owner of logs by causing them to enter the retaining boom for transmission virtually delivers them to the agent or the owner of the slide for that purpose.

"By the act he impliedly agrees that if they are so transmitted he will pay the accustomed charges for the service, and if the other takes possession of them he adopts the offer and enters into a contract to transmit them in a proper manner and re-deliver them to the owner from the lower boom.

"If then through the improper conduct of the owner of the slides his agents or servants he is prevented from so re-delivering them, can it be contended there was no contract, and therefore no breach or liability. If then the legislature has thought proper to invest the government with carrying powers for the transmission of logs by water why should not a private individual have a remedy for a failure to perform obligations and duties in the exercise of such powers as he would have against a private contractor, and why should he not have redress in the same mode and on the same principle that he might do for the breach of duty in regard to the carriage of goods by means of a government railway? If, for instance, goods for transmission from one place to another are delivered to and received by the proper officers of the Intercolonial Railway, there arises a contract to deliver them accordingly, and if lost or destroyed would it not be evidence of an improper state of the law if the government would not be bound to make good the loss by means of a petition of right, there being no statutory exemption from such liability.

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The principles of the common law, which provide that where parties enter into a contract they are in every case bound by its terms express or implied, are applicable.

"A good many cases were cited at the hearing to establish the position that an action by petition of right cannot be maintained for negligence not arising out of a contract, but for damages arising from breaches of duty otherwise; but I need not refer to them as the claim here arises from the alleged failure to perform a contract. The English cases to which my attention has been turned give little aid in the determination of this one, as none that I can find is exactly applicable. The property in the public works in question was by the acts vested in the Queen—not as personal to her, but in trust for the dominion—the management and control being vested in the government of the dominion and the operations to be conducted by persons appointed by the government, or what is the same, by the Minister of Public Works. The funds for their erection and maintenance were provided to come from the public chest and the earnings to be paid into it. It is not necessary to enquire whether the investment has been found profitable or otherwise. An examination of the profit and loss account might shew either result, but it would not affect the liability. The erection of the slides and connecting works was no doubt principally undertaken as an improvement of the river for the public benefit, and if they were of such a character that they might be utilized by the public without charge and without being obliged to transfer the custody and care of private property in the course of transmission to the government's agents there would be then good reason to contend that if losses occurred they should be borne by those who suffered them without any recourse, but when, on the contrary, the

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government, through its appointees and agents, take charge of property for a special purpose, there is an implied contract to provide the necessary means to effect that purpose, in the same way as a private party would be required to do. It is therefore answerable in my opinion in this case, for the improper and negligent conduct of the slide master and for any negligence in keeping in use imperfect and insufficient booms or other appliances.

"The petition of right is founded on a violation of some right in respect of which, but for the immunity from all process with which the laws surrounds the sovereign, a suit at law or in equity could be sustained. The petition must shew on the face of it some ground of complaint which but for the inability of the subject to sue the sovereign may be made the subject of judicial procedure.

"In *Feather* v. *The Queen* (1), it was held that the 'cases in which the petition of right is open to the subject, are where the lands or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service.' According to the doctrine just cited a petition of right will lie for the breach of the contract in this case.

"By section 58 of the Supreme and Exchequer Court Act, it is provided that this court 'shall have exclusive jurisdiction in all cases in which the demand shall be made or relief sought in respect to any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown or any officer of the Crown.' This provision was

(1) 6 B. & S. 294.

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subsequently amended by striking out the concluding words 'or any officer of the Crown.'

"As therefore an action by petition of right founded on a contract with the government can be maintained in *England*, it is maintainable here under the provision of the statute I have just quoted. I am, for the reasons given, of the opinion that the petition of right in this case is properly founded.

"I therefore decide that the demurrer is bad and give judgment for the suppliants with costs."

On the 30th September, 1881, motion was made by the counsel for Her Majesty, pursuant to rule No. 231 of the Exchequer Court Rules and of the practice of the said court for an order *nisi* calling upon the suppliants to shew cause why the judgment rendered by this court in favor of the suppliants upon the hearing of the demurrer of the defendant to the suppliants' petition of right, should not be set aside and judgment entered for the Crown upon the following grounds :—

"1. That no liability exists on the part of Her Majesty towards the suppliants in respect of which a petition of right can be maintained for the losses alleged to have been sustained through the negligence of the persons mentioned in said petition, the Crown not being liable for the negligence of its servants.

"2. That no contract with the suppliants on the part of Her Majesty is shewn, and a petition of right does not lie to recover damages not arising under a contract with the Crown.

"3. That no liability on the part of Her Majesty towards the suppliants exists by reason of the insufficiency of the boom referred to in the said petition.

"4. That no liability on the part of Her Majesty towards the suppliants exists by reason of any want of care in the selection or employment of the slide master referred to in said petition.

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"5. That under the statute in that behalf, the public works referred to in the petition are placed under the control and management of the Minister of Public Works, and Her Majesty is not liable for the negligence of the persons having charge of said works."

This motion was refused. From this decision the Crown appealed.

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

1. There is no contract shewn. Whatever duty may exist on the part of the Crown towards those using the boom, such duty does not arise out of contract and no claim for damages by reason of the breach of this duty can be enforced by petition of right. The elements of a contract are wanting. There is no *consensus*. The rights of the parties are declared by statute and Orders in Council having the force of statute.

It has been said that there is a *quasi* contract between the Crown and those using the boom, but a *quasi* contract is not a contract and has not the necessary elements of one (1).

As to the duty of a Canal Company with respect to the management of their canal, see *Parnaby* v. *Lancaster Canal Company* (2). In this case it was not suggested that the duty arose out of contract.

See also *Gibbs* v. *Trustees of the Liverpool Docks* (3), where, had the claim been treated as arising out of contract, the demurrer must necessarily have been overruled, whereas it was allowed.

In that case the defendants were a corporation owning the *Liverpool* docks and having power to impose tolls upon vessels navigating the port and using the docks, but by statute the control and management of the docks, &c., were vested in a committee. By reason

(1) Maine's Ancient law, p. 344. (2) 11 A. & E. 223.
(3) 1 H. & N. 230.

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of the improper state of the entrance to the docks, the plaintiff's vessel in endeavouring to enter was injured. Judgment was given for the defendants on the ground that they were not liable for the improper acts of the committee, the committee itself only being liable. Had the case been treated as one of contract, this decision could not have been given, as if any contract existed it was one with the trustees and not with the committee.

The above judgment was reversed in the Exchequer Chamber (1), but not on the ground that a contract existed. The defendants agreed that the plaintiff should not be required to commence another action against the defendants on the record. See judgment of Mr. Justice *Blackburn* in same case on appeal to the House of Lords (2).

The learned judge in the Court below seems to have treated the case as if the Crown were a carrier of the logs and that the possession of the logs was given over to the Crown who impliedly contracted to redeliver them to the owner after their passage through the works, and that the Crown is liable for breach of contract in not so redelivering them. It is submitted that the learned Judge is wrong in holding that there was a delivery of the logs to the Crown to be carried through the works and redelivered to the suppliants. The suppliants themselves have the right as part of the public to use the works subject to the regulation made with respect to their use and the Crown is entitled to collect tolls upon the logs passing through the work. The suppliants' right to use the works does not depend upon an implied contract, as the learned Judge holds that they will pay the accustomed charges for the services rendered by the Crown. The right to collect the charges does not depend upon contract. It is a right given by

(1) 3 H. & N. 439. (2) L. R. 1 H. L. 109.

statute to levy tolls upon certain articles quite irrespective of any contract. A Log driving and Boom Co., has been held in the *U. S*, not to be a carrier: *Mann* and *White River L. & B. Co. Mich., S. C.*, referred to in *Albany* Law Journal (1).

It is submitted that the fallacy in the learned judge's argument in this respect consists in holding that the Crown undertook to do anything with respect to the suppliants' logs - the true position is that the suppliants themselves made use of the public work in question and had the right under the law so to do, irrespective of any consent or contract on the part of the Crown, provided that when using it they complied with the law, viz.: the regulations for its use. *Morgan* v. *Ravey* (2).

In view of the decisions of this court with respect to the claims which may be enforced by petition of right it seems hardly necessary to refer to any authorities for the position that a petition of right lies only when the claim sought to be enforced is upon contract, but for convenience of reference the following cases are alluded to: *Thomas* v. *The Queen* (3); *Tobin* v. *The Queen* (4); *Jones* v. *The Queen*, judgment of Sir *William Ritchie*, Exchequer Court of *Canada*; and *Halifax City Railway* v. *The Queen*, judgment of Sir *William Richards*, Exchequer Court of *Canada* (5).

But assuming that there is a contract in this case it is submitted that the Crown is not liable for the negligence of the boom master or other servants of the Crown. See *Viscount Canterbury* v. *Attorney General* (6).

This case is confirmed by *Thomas* v. *The Queen*, *Tobin* v. *The Queen*, *Jones* v. *The Queen*, and *Halifax City Railway* v. *The Queen*, above mentioned.

(1) Vol. 23, (1881,) p. 384.
(2) 6 H. & N. 276.
(3) L. R. 10 Q. B. 31.
(4) 16 C. B. N. S. 310.
(5) A report of these cases will be found printed as an appendix to the present vol.
(6) 1 Phill. 306, 321, 325.

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There is no pretence that any action can be maintained against the Crown by petition of right for negligence in the selection of its servants It is not pretended that any contract existed between the Crown and the suppliants, that the Crown would use care in the selection of its servants: *Viscount Canterbury* v. *Attorney General* (1).

The suppliants have alleged that the boom was unskilfully constructed and was insufficient for the purposes it was designed to serve, but the petition does not state that such was the cause of the damage, and the prayer of the petition is confined to the loss sustained by the suppliants by reason of the unskilful, negligent and improper conduct of the boom master. If, however, it might be held that the suppliants may rely upon this statement it is submitted that the general principles above alluded to, show that the duty (if any) on the part of the Crown to construct the boom skilfully does not arise out of contract.

It cannot be pretended that there was any contract with the suppliants at the time the boom was constructed, and any duty which might arise towards them by reason of the insufficiency of the boom did not arise out of contract.

There are many duties which the Crown owes towards its subjects for breach of which the Crown should in fairness make compensation, but it is one thing to say that the Crown should make compensation, and quite a different thing to say that the suppliants are entitled to enforce their claim by petition of right. The suppliants are not entirely without remedy. The Statute 33 *Vic.* (1870) ch. 23, providing for a reference to the official arbitrators of certain claims against the Crown expressly covers the claim in this case, and it is submitted that

(1) 6 B. & S. at pp. 321, 322; S. C. 1 Phill. 306.

the suppliants have no other remedy but that provided for by that statute.

It is also submitted that the fifth ground of the demurrer is valid.

Paragraphs 4, 7 and 11 of the petition, and the Act 31st *Vic.* (1867, *Canada*) ch. 12, and the old Consolidated Statutes of *Canada*, ch. 28, show that the control and management of the boom in question were vested in the Department of Public Works.

It is contended by the suppliants that the Minister of Public Works is merely the agent of Her Majesty and that Her Majesty is liable for his acts.

It is true that the Minister of Public Works is in one sense the agent of Her Majesty, but with respect to the works placed under his control by statute he is not the agent of Her Majesty in the sense that makes Her Majesty responsible under the maxim *respondeat superior*. As the officer having the control and management of the work he is appointed by Parliament and not by Her Majesty. The statute vests the control and management of the work in the Minister irrespective of Her Majesty's desire in the premises. The Crown may refrain from appointing a Minister of Public Works, but if one be appointed he becomes by force of the statute clothed with control of the works, and so long as the statute is in force his powers under it cannot be interfered with. Therefore, deriving his powers from a statute and not because they are given to him by the Crown, Her Majesty cannot be made responsible by petition of right for the improper exercise of those powers. See *Gibbs* v. *Trustees of the Liverpool Docks* (1); *Viscount Canterbury* v. *Attorney General* (2); *Hall* v. *Smith* (3); *Duncan* v. *Findlater* (4).

(1) 1 H. & N. 439.
(2) 1 Phill. 306.
(3) 2 Bing. 160.
(4) 6 C. & F. 894; Broom's Legal Maxims, 62.

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Mr. *Bethune*, Q.C., and Mr. *McIntyre*, for respondents.

The facts alleged in the several paragraphs of the petition which are admitted by the demurrer, and are to be found summarized in the judgment of Mr. Justice *Henry*, constitute an implied contract on the part of the Crown with the respondents, for the passage of the timber and logs of the respondents over the slide at *Arnprior*, into the retaining boom in the river *Ottawa*, at the mouth of the *Madawaska* river, rendering the Crown liable, as a common carrier, upon any breach of said contract. *Smith's* Merc. Law (1); *Simpson* v. *London General O. Coy.* (2); *Richardson* v. *The Great Eastern Ry. Co.* (3).

But even if these facts did not raise a contract between the respondents and the Crown, as a common carrier, with its corresponding liabilities, they at any rate constitute an implied contract upon the part of the Crown, with the respondents, to use due and reasonable skill and care in passing the timber and logs of the respondents over the said slide into the said boom. *Addison* on Contracts (4); *Leake* on Contracts (5); *Morgan* v. *Ravey* (6); *Dugdale* v. *Lovering* (7); *Marzetti* v. *Williams* (8); *Redhead* v. *Midland Ry. Co.* (9); Mr. Justice *Blackburn's* remarks in that case citing *Brown* v. *Edgington* (10); *Addison* on Torts (11); *Brown* v. *Boorman* (12).

That a petition of right will lie to enforce an implied contract against the Crown cannot be denied.

The case of *Churchward* v. *The Queen* (13), in which

(1) 9th Eng. Ed., pp. 275, 277.
(2) L. R. 8 C. P. 390.
(3) L. R. 10 C. P. 486.
(4) 7th Eng. Ed. pp. 21-2, 649-51, 653, 717, 1048.
(5) Eng. Ed. 1867, pp. 7 & 13.
(6) 6 H. & N. judgment of Pollock C. B. p. 276.
(7) L. R. 10 C. P. 196.
(8) 1 B. & Ad. Judgments of Parke & Patteson, JJ., pp. 425-27.
(9) L. R. 2 Q. B. 433.
(10) 2 M. & G. 279.
(11) Pp. 1 & 15.
(12) 11 C. & F. 1, and Lord Campbell's judgment, p. 43.
(13) L. R. 1 Q. B. 173.

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case it is admitted in all the judgments that if the suppliant could have established an implied contract with the Lords Commissioners of the Admiralty, representing the Crown, his petition would have been successful, is an authority. *Feather* v. *The Queen* (1); *Thomas* v *Queen* (2); and this also has been held by the Exchequer Court here in *Wood* v. *Queen* and *Isbester* v. *Queen*, E. C. of *Can.*, which judgments were not appealed (3); see also secs. 58 and 61, 31 *Vic.*, c 12.

Her Majesty as the representative of the Executive Government of *Canada* is liable on the implied contract to the respondents and is properly sued for a breach of the same as the management of said works by the Minister of Public Works referred to in the 5th paragraph of the Attorney General's demurrer is the management by him as one of her superior servants. The property in these works is by the acts vested in the Queen not as personal to her, but in trust for the Dominion, the management and control being entrusted to the Minister of Public Works and other employees and servants of her Majesty; the funds for their construction and maintenance being provided to come from the public chest and the earnings to be paid into it. 31 *Vic.*, c. 12, sees. 1, 2, 3, 10, 13, 58, 61, 63, 65, 66. *Thorne* v. *Commrs. of Public Works* (4); *Churchward* v. *Queen*; *Thomas* v. *Queen*; *Wood* v. *Queen*; *Isbester* v. *Queen* (5).

The learned counsel then referred to and distinguished the case of *Parnaby* v. *The Lancaster Canal Co.* (6); *Mersey Docks Trustees* v. *Gibbs* (7).

(1) 6 B. & Sm. Argument of Mr. Bovil, p. 280, and judgment of Cockburn, C. J., p. 294.
(2) L. R. 10 Q. B. p. 33.
(3) These cases will be found reported in appendix to the present volume.
(4) 32 Beav. 490-93.
(5) Referred to above.
(6) 11 A. & E. 223.
(7) L. R. 1 H. L. 93.

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The respondents rely upon the judgment of Mr. Justice *Henry*.

RITCHIE, C J., [after reading the statement of the case proceeded as follows :]

There is, in my opinion, no analogy whatever between this case and that of private individuals or corporations owning slides and undertaking by themselves or their agents to take charge of, and to pass, for a consideration, timber through such their private property. In such a case no one can doubt that if such timber was lost or damaged by reason of the unskilful, negligent and improper conduct of the proprietors or their servants in passing such timber through their slides, they would be responsible to the owners thereof for such loss.

But this, in my opinion, is an entirely different case, governed by principles wholly inapplicable to that just suggested. The Queen, not being a private individual, is not subject to the liabilities of private individuals.

The slides, booms and property in question are not private property but public property, created by the expenditure of public money for public purposes and for the public benefit, and vested in Her Majesty, as the learned judge who heard this case justly remarks, "not as personal to Her, but in trust for Her Dominion."

The management and control of this public property is through the instrumentality of orders of the Governor General in Council, and the operations in connection therewith are conducted by persons appointed by a high officer of state, the Minister of Public Works, under whose general management the public works of the Dominion are placed. The river in its natural state was evidently unfitted for the transport of the timber in the great lumbering district through which it passed, and "to advance the public good," and to make the

river fit for the transportation of timber, so that by its improvement it might be made a great highway for the development of a great Dominion industry, public property and public works, such as these, were required; and the liability of Her Majesty in reference thereto cannot for a moment be placed on the same footing or governed by the same principles as private property in which private individuals invest their capital for their private gain.

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I am of opinion there was no contract or breach of contract to give to the suppliants any claim against the Crown, nor do the suppliants put forward their claim to relief on any such ground. The claim set forth in the petition is a tort pure and simple.

There is no allegation that the suppliants had any contract with the Crown; there is no allegation of any breach of any contract on the part of the Crown. The allegation in paragraph 12 is that *Harvey*, whose duty it was to direct and control the passage of the lumber, "by reason of the unskilful, negligent and improper manner in which this duty was performed by him," the boom broke away and the timber floated out of the same. By paragraph 15: "That the slide master was incompetent to discharge his duties, as well by reason of want of knowledge as, at the said time and for some time preceding, of his intemperate habits, as was well known to Her Majesty, and that Her Majesty did not exercise due and proper care in the employment of the said slide master and in continuing to employ him." And by section 19 the suppliants distinctly ask that Her Majesty shall be declared liable for the losses they have sustained "by reason of the unskilful, negligent and improper conduct of the said slide master in passing the said timber and logs," and they put forward no contract, breach of contract or other ground whatever. And in the prayer in like manner they pray that Her

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Majesty may be declared liable "by reason of the unskilful, negligent and improper conduct of the said slide master." So that they rest their claim solely and entirely on the negligent and improper conduct of the slide master; on his intemperate habits; on the knowledge of Her Majesty of those intemperate habits and on a charge that with such knowledge Her Majesty "did not exercise due and proper care in the employment of the said slide master, and in continuing to employ him." This last amounting simply to a charge that Her Majesty carelessly and improperly exercised Her Royal Prerogative.

Now clearly all this claim is based on an injury sustained by a wrong properly so called, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the term shews no right to legal redress against the sovereign.

But it is said that the Crown was, as to this timber in passing through the slides, a common carrier, and as such the relation of the Crown to the owners of such timber is in the nature of and to be treated as a contract between man and man. But to my mind there is not the slightest analogy between this case and a common carrier; these improvements made for the benefit and convenience of the public are vested in the Crown in trust for the public, and their management and direction is entrusted to certain officers appointed in accordance with statutory provisions.

It has been repeatedly held that there is no analogy in the case of the postmaster and a common carrier. If the post office department cannot be considered in the light of common carriers, I am at a loss to conceive how it is possible to establish in a case such as this that the Crown is a common carrier.

Lord *Mansfield*, in *Whitfield* v. *Lord Le Despencer* (1),

(1) 2 Cowper 764.

treats the post office as a branch of the revenue and a branch of police created by act of parliament; he says: as a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are trifling) under government and entrusts the management and direction of it to the Crown and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier.

Lord *Mansfield* at page 765 points out that an action on the case lies against parties really offending, &c., that is, that all inferior officers are responsible for their personal negligence.

In *Rowning* v. *Goodchild* (1), an action against a deputy postmaster for non-delivery of letters, as to duty of postmaster *De Grey*, C.J., says:

> This is not to be considered in the nature of a private contract between man and man, nor is the postmaster to be looked upon (as urged at the bar) in the light of a common carrier. But the duty arises out of a great public trust since the legislative establishment of the post office by the statutes of *Charles II.* and Queen *Anne.*

Chancellor *Kent* says (2):—

> It has been the settled law in *England*, since the case of *Lane* v. *Cotton* (3), that the rule respecting common carriers does not apply to postmasters, and there is no analogy between them. The post office establishment is a branch of the public police, created by statute, and the government have the management and control of the whole concern. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. In the case referred to the postmaster-general was held not to be answerable for the loss of exchequer bills stolen out of a letter while in the defendant's office. The subject was again elaborately discussed in *Whitefield* v. *Lord Le Despencer* (4), and the same doctrine asserted. The postmaster-general was held not to be responsible for a bank note stolen, by one of the sorters, out of a letter in the post office. But a deputy postmaster or clerk in the office is still answerable in a private suit, for

(1) 2 Wm. Bl. 908.
(2) 2 Kent's Commentaries, 12 Ed. 1873, p. 610.
(3) Ld. Ray. 646.
(4) 2 Cowper 754.

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misconduct or negligence; as, for wrongfully detaining a letter an unreasonable time. The English law on this subject was admitted in *Dunlop* v. *Munroe* (1) to be the law of the *United States;* and a postmaster was considered to be liable in a private action for damages arising from misfeasance or for negligence, or want of ordinary diligence in his office, in not safely transmitting a letter (2). Whether he was liable himself for the negligence of his clerks or assistants was a point not decided; though if he were so to be deemed responsible in that case, it would only result from his own neglect in not properly superintending the discharge of his duty in his office.

The most that can be said of this case is that the legislature has improved this river and rendered it navigable, giving the public the use of it so improved on complying with certain regulations and paying certain tolls wholly independent of contract. If, in using the river and so availing themselves of the government improvements, their property should be lost or injured by the improper conduct of the servants of the government or any other person, doubtless for any such wrong the law would furnish a remedy against the party whose wrongful conduct occasioned the injury, for I suppose it will scarcely be doubted that inferior officers are responsible for their personal negligence.

If the judgment in this case is allowed to stand it would be a direct adjudication that the Crown was not only responsible in damages for wrongs done by her servants, but also responsible in damages to her subjects for not exercising due and proper care in the exercise of her royal prerogative, that is to say: in the employment of this slide master, and in continuing to employ him, well knowing his intemperate habits and consequent unfitness for the situation.

As to the first, in contemplation of law the sovereign can do no wrong and is not liable for the consequences of her own personal negligence, so she cannot be made

(1) Cranch 242. (2) *Schroyer* v. *Lynch*, 8 Watts 453.

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answerable for the tortious acts of her servants The doctrine of *respondeat superior* has no application to the Crown, it being a rule of the common law that the Crown cannot be prejudiced by the wrongful acts of any of its officers, for as has been said long ago, no laches can be imputed to the sovereign. "nor is there any reason that the king should suffer by the negligence of his officers or by their compacts or combination with the adverse party."

As to the second, the allegation in the petition attempts to make Her Majesty amenable to her subjects in her courts for the proper exercise of her prerogatival rights and amounts to a direct and unwarrantable attack on Her Majesty's prerogative rights and is derogatory to the honor of her Crown and an imputation that ought not in my opinion to be permitted to appear on the records of this court.

And while it has been determined in the *United States* (1) that the maxim that the King can do no wrong has no place in the system of constitutional law as applicable either to the government or to any of its officers, it has been held that the restriction of the jurisdiction of the Court of Claims to cases of contract express or implied has reference to the well understood distinction between cases arising *ex contractu* and *ex delicto*, and is founded on the sound principle that while Congress was willing to subject the government to suits on valid contracts which would only be valid when made by some one vested with the authority to do so, or something done by such authority which raised an implied contract, it did not intend to make the government liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good.

It is unnecessary to cite authorities to show a peti-

(1) *Langford* v. *United States*, 21 Albany Law Journal, 397.

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tion of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, inasmuch as a petition will not lie for a claim founded upon a tort on the ground that the Crown can do no wrong. The cases of *Tobin* v. *Reg.* (1), and *Feather* v. *Reg.* (2), Viscount *Canterbury* v. *Attorney General* (3), sufficiently establish this if authority was needed.

In my opinion the appeal should be allowed with costs.

STRONG, J.:

I am of opinion that this appeal must be allowed. The well-known case of *Lord Canterbury* v. *The Queen* (4) establishes that the Crown is not liable for injuries occasioned by the negligence of its servants or officers, and that the rule *respondeat superior* does not apply in respect of the wrongful or negligent acts of those engaged in the public service. The case of *Lane* v. *Cotton* (5) had in effect decided this, it having there been determined that the great officers of the Crown were not liable for the acts of subordinate officers whom they might employ to assist them in the execution of their offices. That was an action against the Postmaster-General, in which the plaintiff sought to recover for the negligence of a clerk in the post office—who was the officer of the Postmaster-General and not of the Crown—in losing a letter; it was held on principles of public policy that the defendant was not liable. Lord Chief Justice *Holt* dissented from the judgment, but it was afterwards held to be law by Lord *Mansfield* and the whole Court of Queen's Bench in the case of *Whitfield* v. *Le Despencer*(6).

(1) 16 C. B. N. S. 310.
(2) 6 B. & S. 257, p.
(3) 1 Phill. 306.
(4) 1 Phill. 306.
(5) 1 Lord Raymond, 646.
(6) 2 Cowper, 754, 765.

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This exemption was founded upon the general ground that the Postmaster General was a public officer, and that the whole establishment of the post office being for public purposes, and the officers employed therein being appointed under public authority, it would be against public policy to make the head of the department liable for the acts of his subordinate officers, though employed by him and actually in his service and not in that of the Crown, since it would be impracticable for him to supervise all their acts. If, therefore, the officers of the Crown are not thus responsible, it must follow *a fortiori* that the Crown itself cannot be liable, and such has been the course of decision not only in *England*, where Lord *Canterbury's* case is decisive of the principle, but also in the *United States*, for the exemption is rested entirely on grounds of public policy. The law is well stated by Mr. Justice *Story* in the following extract from his Commentaries on the Law of Agency:

> It is plain that the government itself is not responsible for the misfeasances, wrongs, negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interests, and indeed laches are never imputable to the government.

In *Gibbons* v. *U. S.* (1), Mr. Justice *Miller*, in delivering the judgment of the Supreme Court of the *U. S.* says:

> But it is not to be disguised that this case is an attempt under the assumption of an implied contract to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

(1) 8 Wallace 269.

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And again,

The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occuring while engaged in the discharge of official duty.

This doctrine is indeed not confined to an exoneration of the Crown from liability for the torts of its agents and servants, but is carried so far as to exonerate the Crown or government from the non-performance of contractual obligations, which in the case of private persons would be fatal to their rights, when such non-performance or negligence consists in the omissions of public officers to perform their duties (1). A strong instance of this is afforded in the case of the neglect of the officer of the Crown to give notice of dishonor of a bill or note taken under an extent, which is held not to prejudice the right of the Crown to recover against the drawer or endorser. And the reason for this is said by Sir *John Byles* in his work on Bills of Exchange to be the principle already stated, that the laches of its officers is not to be imputed to the Crown.

The learned judge who heard this case in the Exchequer Court has placed his judgment on the ground that the petition of right shows a breach of contract on the part of the Crown, that the Crown contracted to pass the suppliants' timber safely through the slides, and that, being liable for breach of contract though not for the torts of its servants, its liability in the present case is analogous to that of a carrier who can be sued for breach of contract arising from the defaults of his servants and agents. Without enquiring whether this analogy between the liability of the Crown and a private person for a breach of contract arising from the laches and negligence of an agent is correctly assumed, it

(1) *Seymour* v. *Van Slych*, 8 Wend. 403; *U.S.* v. *Kirkpatrick*, 9 Wheat. 720.

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appears very clear that there is no room for applying it in the present case, for the petition of right does not show any contract on the part of the Crown, to pass the timber safely through the slides, either expressly or impliedly entered into by the parties, as in the case of a carrier undertaking the carriage of goods, or arising by operation of law. At the most it shows a duty on the part of the slide master to take due and proper care, and alleges a state of facts which, in the case of a private owner of a slide, would make him liable for the omission of such care arising from the negligence of his servant or agent, but for which in the case of the Crown there is not, for the reasons and on the authorities already stated, any responsibility. The consequence is that the only remedy open to the suppliants for the wrong of which they complain was an action against the slide master (1).

The judgment of the Exchequer Court must be reversed with costs, and judgment on the demurrer entered for the Crown with costs.

HENRY, J., adhered to his judgment rendered by him in the Exchequer Court.

TASCHEREAU, J., concurred with the Chief Justice.

GWYNNE, J.:

It was admitted by the learned counsel for the suppliants that upon the authority of *Viscount Canterbury* v. *Attorney General* (2) and *Tobin* v. *Regina* (3), a petition of right will not lie against Her Majesty for any tort or negligence committed by any person in the employment of the Crown. The losses in respect of which the suppliants claim compensation are, in the petition in this case, alleged to have been occasioned

(1) 2 *Baker* v. *Ranney*, 12 Grant 228.

(2) 1 Phil. 306.

(3) 16 C. B. N. S. 310.

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by the "unskilful negligent and improper conduct" of a slide master, at one of the slides constituting part of the public works of the Dominion, and who is alleged to have been duly appointed to his office under the provisions of ch. 28 of the Consolidated Statutes of *Canada* and the Dominion Statute 31 *Vic.*, ch. 12. But although it was admitted that Her Majesty could not be made responsible for any injury occasioned to the suppliants by the negligence of such slide master, it was contended that indirectly Her Majesty could be made responsible for the negligence by implying a contract made between the suppliants and Her Majesty through the medium of the slide master, to the effect that in consideration of the tolls to be paid by the suppliants for their logs passing through the slide Her Majesty would become a carrier of the logs and would convey them through the slide and would deliver them safely to the suppliants after having passed through the slide. It would be sufficient in this case to say that no such case is made by the petition, which plainly rests the suppliants claim upon the alleged unskilful negligent and improper conduct of the slide master. But in truth if Her Majesty's non-liability in case of tort and negligence could be gotten over by such a novel and ingenious device, it would be idle to say that there existed that exemption which is admitted in cases of tort and negligence. No authority was cited in support of this novel proposition, nor can it be supported upon any principle. Her Majesty was not a carrier of the logs for hire and reward, nor has the slide master any authority whatever to make an express contract which would be binding on Her Majesty, either of the nature of a contract for carriage for reward or of any other nature. The petition alleges, as the fact is, that although the slide at which the alleged loss and damage to the suppliant occurred, as

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a public work of the dominion, is vested in Her Majesty, it is by statute placed under the control of the Minister of Public Works, by whom, and not by Her Majesty, the slide master is appointed and removed; and he, upon his appointment, acquires, in virtue of the provisions of the statute in that behalf, and the Orders in Council made in pursuance thereof, the control and management of the slide of which he is appointed slide master or superintendent in subordination to the Minister. He is not a servant or agent of Her Majesty at all. The Minister of Public Works himself comes within the description mentioned in 1 *Ph* 323–4 of a public officer appointed to perform certain duties assigned to him by the legislature, and the slide master is a subordinate public officer also appointed to perform certain duties in like manner attached to his office. The tolls which the suppliants pay for their logs passing through the slide are not paid as the consideration for any service or duty undertaken by Her Majesty, but by force of the statute which imposes the tolls upon all persons using the slide. The slide master has no power or authority other than such as is conferred upon him in virtue of his appointment under the authority of the statute. He has no authority to enter into any contract with any person using the slide. He is not placed in his office or appointment to make any contracts, but to perform statutory duties. If he neglect those duties he is himself responsible, but having no authority to enter into any express contract binding on Her Majesty no contract to affect her Majesty can be implied from any acts or conduct of his. The receipt therefore by him of tolls which it is his statutory duty to collect can afford no foundation from which any promise by Her Majesty can be implied. Between such a case and that of a promise being implied from the acts and conduct of

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private persons capable of entering into express contracts, either by themselves or their agents duly authorised for the particular purpose, there is not that I can see any analogy; all the acts of the slide master must come either within the class of those acts which are authorized by force of the statute, or within that of those which are not so authorized. In respect of the former, the statute is his sole authority and at the same time his justification, and her Majesty cannot be affected thereby: for such as come within the latter class he himself is alone responsible. If public opinion should think that some provision ought to be made by statute for the compensation of injuries occasioned by the misconduct of such a statutory officer, application should be made to the legislature and not to the courts. In the meantime the plaintiff must assert whatever remedy he has against the person whose misconduct causes the injury. The appeal must, in my opinion, be allowed with costs.

Appeal allowed with costs.

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

Solicitors for respondent: *Cockburn & McIntyre.*

CONTROVERTED ELECTION OF QUEEN'S COUNTY, PRINCE EDWARD ISLAND.

1883
*Feb'y. 21, 22.
*Feb'y. 27.

JOHN THEOPHILUS JENKINS.....APPELLANT;

AND

FREDERICK DE ST. CROIX BRECKEN .RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE FOR THE PROVINCE OF PRINCE EDWARD ISLAND.

Election petition—Ballots—Scrutiny—37 *Vic., ch.* 9, *secs.* 43, 45, 55 *and* 80; 41 *Vic., ch.* 6, *secs.* 5, 6 *and* 10. *Effect of neglect of duty by a deputy returning officer.* 37 *Vic., ch.* 10, *secs.* 64 *and* 66.—*Recriminatory case.*

In ballot papers containing the names of four candidates the following ballots were held valid:

(1)—Ballots containing two crosses, one on the line above the first name and one on the line above the second name, valid for the two first named candidates.

(2)—Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments, valid for the first named candidate.

(3)—Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment.

(4)—Ballots marked in the proper compartments thus Y.

The following ballots were held invalid:

(1)—Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side.

(2)—Ballots marked with an x instead of a cross.

On a recount before the County Court Judge, *J.*, the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling

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

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districts, in which the appellant had polled only 331 votes and the respondent, *B.*, 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot. On appeal to the Supreme Court of *P. E. Island*, it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice *Peters* held that the ballots of the said three polls ought to be counted and did count them. Thereupon *J.* appealed to the Supreme Court of Canada, and it was

Held,—Affirming the judgment of Mr. Justice *Peters*, that in the present case the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters, and the neglect of the deputy returning officers to put their initials on the back of these ballot papers, not having affected the result of the election, or caused substantial injustice, did not invalidate the election. (The decision in the *Monck* Election Case commented on and approved of (1).

In this case *J.*, the appellant, claimed under sec. 66 of 37 *Vic.*, ch. 10, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, and fyled no counter petition, and did not otherwise comply with the provisions of 37 *Vic.*, ch. 10, The Dominion Controverted Elections Act.

Held,—That sec. 66 of 37 *Vic.*, ch. 10, only applies to cases of recriminatory charges and not to a case where neither of the parties or their agents are charged with doing any wrongful act.

Quœre,—Whether the County Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of sec. 56 37 *Vic.* ch. 10, at the time of the counting of the votes by the deputy returning officer.

APPEAL from a judgment of Mr. Justice *Peters*, of the Supreme Court of Judicature for the province of *Prince Edward Island*, declaring that the petitioner, *F. De St. Croix Brecken*, in the election petition against the return of *Theophilus Jenkins*, as the member elect representing *Queen's* county, *Prince Edward Island*, in

(1) Hodgins Elec. Cases, 725

the House of Commons of the Dominion of *Canada*, was the duly elected member of the Dominion Parliament for said *Queen's* county.

The election was held on the 20th of June, 1882. At the election the candidates were the petitioner and respondent, who ran together as the liberal-conservative candidates, and *Louis Henry Davies* and *David Laird*, who ran as the opposition candidates.

On the 27th day of June, the returning officer added up the votes and declared the result of the poll, as follows:—

Petitioner, (*Brecken*)	3472
Davies	3516
Respondent, (*Jenkins*)	3462
Laird	3062

And Messrs. *Davies* and *Brecken* were by him returned elected.

A recount was then applied for by the said *John T. Jenkins*, and held before a county court judge, and on such recount the said judge certified the result of poll, as follows:—

Davies	3164
Jenkins	3122
Brecken	3120
Laird	2759

The county court judge, in arriving at his conclusion, struck out all the ballots cast at three polling districts, namely, at districts Nos. 23, 27 and 33, at which districts the total number of votes cast were as follows:—

Brecken	345
Davies	334
Jenkins	331
Laird	289

The ground of rejecting these votes, was that the deputy returning officer had neglected to place his initials upon the back of the ballots. To this ruling

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and certain other rulings on the recount, which are hereafter mentioned, the petitioner objected, and accordingly filed this petition.

The cause was tried before Mr. Justice *Peters*, who declared that the petitioner (present respondent) was duly elected for *Queen's* county at said election.

On a scrutiny of the votes, and on appeal to the Supreme Court, there were objections taken to several ballots.

The first ballot objected to by the appellant was one marked thus:—

Election for the Electoral District of Queen's County, June 20th, 1882.

	I.	**BRECKEN.** X Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
	II.	**DAVIES.** X Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
	III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
	IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

This ballot was allowed by Mr. Justice *Peters*, and his ruling was affirmed on appeal.

The next ballot objected to was marked thus: Election for the Electoral District of Queen's County, June 20th, 1882.

I.	**BRECKEN.** X Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** X John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

First cross allowed for Mr. *Brecken*, second cross disallowed.

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The next ballot was marked thus:

Election for the Electoral District of Queen's County, June 20th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon. Y
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist. 1

Allowed for Mr. *Jenkins*.

The next ballot was marked thus, with the slight pencil straight line in the first division :

Election for the Electoral District of Queen's County, June 29th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

Disallowed by Mr. Justice *Peters* and allowed on appeal for Mr. *Jenkins*.

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The next ballot was marked thus:

Election for the Electoral District of Queen's County, June 29th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister. X
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon. X
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

Disallowed by Mr. Justice *Peters* and his ruling affirmed.

The next ballot, the × was found to be on the back of the ballot corresponding with the division containing Mr. *Jenkins*' name and was disallowed

The other material facts of the case and objections raised sufficiently appear in the judgments hereinafter given.

Mr. *Lash*, Q.C., for appellant, and Mr. *Hector Cameron*, Q.C., for respondent.

The main arguments of counsel and cases cited are fully set out in the judgments.

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RITCHIE, C. J.:—

This was an appeal from the decision of Mr. Justice *Peters*, on the petition of *Frederick de St. Croix Brecken*, deciding against the return of *John Theophilus Jenkins*, as a member of the House of Commons, for the electoral district of *Queen's* County, in the Province of *Prince Edward Island*.

The candidates at the election were the respondent, *Louis Henry Davies*, the appellant and *David Laird*.

The Returning Officer declared the respondent and *Louis Henry Davies* elected and declared the total number of votes polled for each candidate to be as follows:—The respondent, 3,472; *Louis Henry Davies*, 3,516; the appellant, 3,462; *David Laird*, 3,052.

The appellant demanded a recount of votes before the Judge of the County Court; a recount was held before the said judge, and the result of such recount is as follows:—The respondent, 3,120; *Louis Henry Davies*, 3,264; the appellant, 3,122; *David Laird*, 2,759.

Thereupon the said appellant and *Louis Henry Davies* were declared duly elected to represent the said county in the House of Commons.

The County Court Judge, in arriving at his conclusion, struck out all the ballots cast at three polling districts, namely, at districts Nos. 23, 27 and 33, at which districts the total number of votes cast were as follows:—*Brecken*, 345; *Davies*, 334; *Jenkins*, 331; *Laird*, 289.

The ground of rejecting these votes was, that the deputy returning officer had neglected to place his initials upon the back of the ballots, he having by mistake placed them on the counterfoil. To this ruling and certain other rulings on the recount the petitioner objected, and accordingly filed this petition.

The appellant contended at the trial and still contends that the rules and provisions contained in the

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act were not complied with and that mistakes were made which did or might affect the result of the election.

Mr. Justice *Peters* ruled that the ballots at said three districts ought to be counted and did count them.

The appellant filed objections and recriminatory case under 66th section of "The Dominion Controverted Elections Act, 1874," which are on fyle.

By 41 *Vic.*, ch. 6, sec. 43 of 37 *Vic.*, ch. 9 is repealed and the following substituted :—

Each elector, being introduced one at a time, for each compartment, into the room where the poll is held, shall declare his name, surname and addition, which shall be entered or recorded in the voters' list to be kept for that purpose by the poll clerk; and if the same be found on the list of electors for the polling district of such polling station, he shall receive from the deputy returning officer a ballot paper, on the back of which such deputy returning officer shall have previously put his initials, so placed that when the ballot is folded they can be seen without opening it; and on the counterfoil to which he shall have placed a number corresponding to that opposite the voter's name on the voter's list.

The 45 section of the same act is also repealed and the following substituted :—

The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments of the polling station, and there mark his ballot paper, making a cross with a pencil on any part of the ballot paper within the division (or if there be more than one to be elected, within the divisions) containing the name (or names) of the candidate (or candidates) for whom he intends to vote, and shall then fold up such ballot paper so that the initials on the back can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it, ascertain by examining his initials and the number on the counterfoil, that it is the same that he furnished to the elector, and shall first detach and destroy the counterfoil, and shall then immediately, and in the presence of the elector, place the ballot paper in the ballot box.

It is clear from the substituted section 45 of the Election Act, 1874, that the sole object of the initialling of the ballot is to enable the deputy returning officer

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to ascertain, by examining his initials on the ballot and the No. on the counterfoil, that the ballot is the same that he furnished to the elector; this is to all intents and purposes as practically effected when the ballot paper with the counterfoil attached is handed to him and he examines the number and his initials upon the counterfoil as if the initials had been on the ballot paper, for the ballot paper and counterfoil are but, in fact, one paper, until after such examination he detaches and destroys the counterfoil. In this case, having by such examination established beyond the possibility of a doubt that the paper handed to him by the voter was the identical paper furnished by him to the elector, he then detached and destroyed the counterfoil, and immediately, and in the presence of the elector, placed the ballot paper in the ballot box, whereby all that the legislature intended to accomplish was effected beyond all question or doubt, viz.:—that the elector had handed back to the officer the very paper which the officer had furnished to the elector. The requirements of the statute having been substantially fulfilled, upon what principle can we, in the absence of any enactment declaring that misplacing his initials by the officer, though working no injury whatever, shall destroy the vote, punish by disfranchisement the voter who, so far as he is concerned, has been guilty of no violation of the law, but has marked his ballot and returned it to the officer as the law directs, and the officer has the means of identifying the ballot as effectually to all intents and purposes as if the initials had been on the ballot itself?

But we are not left to inference to discover the duty of the deputy returning officer in counting the ballots. The substituted section 55 as to the counting of the votes by the deputy returning officer, and on proceeding to count the number of votes given for each ca

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didate, declaring what ballot papers he is to reject, enacts that "he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified." Does not this enumeration contain all the grounds which would justify a rejection of a ballot, and is not the maxim we find so often made applicable to the interpretation of statutes, viz.: *expressio unius est exclusio alterius* very applicable; for the grounds of rejection named are not put by way of example; but we have in addition this express language showing that the enumerated ballots only are to be rejected. In sec. 10, following the sub-sec. 55, are these words, "the other ballots being counted," &c. How is it possible the deputy returning officer could legally reject ballot papers which he had the means of identifying beyond a peradventure as having been supplied by him to the voters; which he has identified, and which he swears were the very ballot papers he had actually supplied to the electors respectively, and which they had marked, and from which he had, after such identification, detached the counterfoil, and which immediately, in the presence of the elector, he had placed in the ballot box?

And by sub-section 4 of section 14 of the act 41 *Vic.*, ch. 6, the judge is to proceed to recount the vote according to the rule set forth in sec. 55 of the Dominion Elections Act, 1874, as amended by 41 *Vic.*, ch. 6.

Again, where do we find in the act the slightest indication that the mere fact of non-initialling shall absolutely and arbitrarily destroy the vote? On the contrary have we not section 80 of 37 *Vic.*, ch. 9 which, though held in *Woodward* v. *Sarsons* (1) to apply to the conducting of the election generally, may serve as a guide

(1) L. R. 10 C. P. 733.

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to the construction which ought to be placed on the act in reference to initialling. The section reads thus:

No election shall be declared invalid by reason of a non-compliance with the rules contained in this act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the person signing a nomination paper received by the returning officer, under the provisions of this act, or of any mistake in the use of the forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election.

Is not this misplacing of the initials merely a non-compliance with the rules contained in the act as to the taking of the poll, or a mistake in the use of the form contained in the schedules of the act? And does it not appear beyond all question or doubt that as regards those uninitialled ballots, notwithstanding this non-compliance or mistake, the election was conducted, so far as initialling is concerned, in accordance with the principle laid down in the act in reference thereto?

What was that principle, but that the deputy returning officer should have the means of identifying the ballot returned to him by the voter as the ballot furnished by him to the voter, and that he should not count any ballot not supplied by him? And is it not clear that notwithstanding his non-compliance or mistake he had the means of identification and did identify the ballot by means of his initials, and in fact did not count any ballots not supplied by him? Has not the taking of the poll and the counting of the ballots been to all intents and purposes practically and substantially on the principle laid down in the act? And is it not equally clear that the non-compliance of the deputy returning officer with the strict provisions of the act and the mistake of putting the initials on the counterfoil instead of the ballot did not in this election in the most remote degree affect the result of the election?

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I do not wish to be understood that under no circumstances will the non-initialling of the ballots destroy the vote; on the contrary, if there are more ballots found in the ballot box than persons on the deputy returning officer's list, as polled, or if the returning officer is not enabled to identify them as having been furnished by him, or there is any evidence of fraud or collusion, or the irregularity complained of has in any way affected the result of the election, it is right enough that they should not be counted: but the evidence before us shows the very reverse to have been the case.

Kelly, deputy returning officer to district number twenty-three, says:

This is the poll book which I kept for this district; it was sent by ballot box by the sheriff. I took the oaths contained in it. I have put down the names, occupation and place of residence. I opened and examined the ballot box on opening poll in the morning. The candidates were all represented by agents. I emptied the box in the presence of agents, then locked the box and kept the key. I counted the ballot box in presence of agents at close of poll. I counted the votes in presence of agents. I put the ballot papers in envelopes (No. 1) *Brecken & Davies*. This is my writing on the back of envelope (No. 2); this is the envelope in which I put the ballots marked for *Brecken* and *Jenkins* (No. 3) marked 1 for *Davies* and *Jenkins*, 1 for *Laird* and *Jenkins* (No. 4.) Three disputed papers not counted, one voter made cross on back of ballot paper and two wrote their names instead of cross (No. 5.) Forty-four votes, forty-three marked for *Laird* and *Davies*, one for *Davies* alone. I counted the number of unused ballots and of rejected; none spoiled. I made up a return, and this is it. I and Poll Clerk swore to it. I gave each candidate a statement similar to this; kept one myself. I put this statement, the poll book and the ballots both used and unused into the box, locked and sealed the box and delivered it in Sheriff's office. I did not initial any of the backs of the ballots. When a voter asked for a ballot I put my initials and a number corresponding with the voter's name in the book on the counterfoil. I delivered that ballot to the voter with the counterfoil on it and with my initials and No. on the counterfoil. The voter then took it into the room, and when he brought it out I would take the ballot from him, I would look at my initials and the counterfoil then annexed, to see it was the same ballot I had given to him, and then I tore off the

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counterfoil in the presence of the voter and then put ballot in box and destroyed the counterfoil. I did same with every ballot and every vote, and I looked when it was right back at every counterfoil to see that initials were there. I never separated the counterfoil until I had looked at my initials. No ballots were put in box except what I put in. I think it impossible that a ballot could be put in without my knowledge. I totted up the votes and the number of votes in the poll book agreed with the number of ballots found in the box. There was no objection made to the ballots on the ground that they were not initialled on the back. At the polling place there were three ballots disputed. These are they. I rejected them and they were not counted. I don't think it probable there was any ballot found in the box that I had not supplied.

Alexander Home—Deputy returning officer for district number 33, at the Engine House, in *Charlottetown*:

This is the poll book kept by me. I was sworn. It contains the name, occupation and residence of the voters. This is my signature to the book. The candidates were represented each by two agents. They were there all day, I examined the ballot box in the morning before poll opened in the present of the agents of all parties, nothing in them, then I locked it and kept the key. I remained in polling place all day. On poll closing I opened and examined box in presence of the agent. I counted the votes and made a return and swore to it. I gave a certificate to each party the same as this produced and I kept a copy. *Donald McKinnon* was poll clerk. I put all the unused ballots in envelopes and the writing on them is that of my poll clerk. I rejected four ballots, (these are they uninitialled by me). After adding up the ballots, I ascertained that the number found in the box corresponded with the number in the book, I then put the poll in the box and sealed the box and gave it to the sheriff. My initials are not on any of the ballots. A voter came in, I wrote his name, occupation and residence. As soon as poll clerk had that down I numbered the ballots on the counterfoil, according to number in the book. I numbered and initialled it on the face of the counterfoil. I folded it so that I could see the number and initials without seeing the face of the ballot, and when he returned it I tore that off, but before doing so I satisfied myself that that was the ballot I had given to the voter. I then put the ballot in the box and threw the counterfoil on the floor. I did this in every case. *There was no objection made by the agents that day, they could see the ballots put in.* I don't think it could be possible that any ballots could get in except what I put in. None could be taken out. If any were put in, it could not agree with the poll book.

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Peter Burke:

I was deputy returning officer, district number twenty-seven. My initials are not on the back of the ballots. I initialled and numbered them on the counterfoil in every case before I delivered them to the voters. When they brought ballots back, I looked at my numbers and initials. I tore off the counterfoil and destroyed it, I satisfied myself in every case that the paper was the one I delivered to voter. I kept the ballot boxes under my own charge. I delivered them to the deputy sheriff. The number of ballots agreed with the number of voters.

There is no way in which I can identify the ballots. I swear that no ballots were put into the box but what passed through my hands. I initialled the ballots on the back of counterfoil. I won't be certain which side I initialled them, whether back or face. There was no official mark on the ballot after the counterfoil was taken off. I covered the box with paper and tied it round with tape and sealed it. I also enclosed the key in an envelope addressed to returning officer. No one could drop a ballot into the box, when I gave it up, without removing paper round the box and breaking seal. [Witness shews how he folded the ballot when he delivered it to the voter.] When I recovered it back from the voter, I tore off the counterfoil but did not open it or see inside of it.

It is probable that another ballot might not have been inside, I think it could not.

The evidence of these witnesses is uncontradicted. Their credit stands not only unassailed, but all evidence of fraud or wilful misconduct, either on the part of the returning officers or the candidates or their agents, is negatived, and any mistake or irregularity is admittedly attributable solely to mistake or inadvertence on the part of the election officers.

No doubt it is the duty of all officers engaged in the holding of an election to inform themselves fully of the provisions of the statutes under which they are acting and to be most careful strictly to comply with all requirements of the law, but though they do not do so it by no means follows all and every error they may commit or mistakes they may make necessarily invalidate the election and disfranchise the electors, though under circumstances such errors or mistakes may have such

effect, but for neglect of duty the statute, by section 108, prescribes a penalty in these words:—

> Any returning officer, deputy returning officer, election clerk or poll clerk, who refuses or neglects to perform any of the obligations or formalities required of him by this act, shall for each such refusal or neglect forfeit the sum of $200 to any person suing for the same.

Under section 66 the respondent seeks to have the election invalidated by reason of the returning officers not having properly regulated the districts as to numbers of voters, not having supplied the deputy returning officer in certain districts with a sufficient number of ballot papers, and not having in one district provided sufficient accommodation in the polling booths.

One cannot help being struck with the peculiarly anomalous, inconsistent and unreasonable position which, through his counsel, the respondent has placed himself in by his contention in this matter.

He accepts the return which gives him a majority of votes, takes his seat in Parliament as a duly elected member, and when his right to hold the seat is attacked urges on this court to adjudge that at a legal election, regularly and properly held, he was elected by a majority of the electors, and that the majority being so in his favor he is lawfully entitled to hold the seat he now occupies, but with the same breath he says :—if you cannot find the majority in my favor, then the whole election is irregular, illegal and void, and must be set aside ; so that the validity or invalidity according to his contention is made to depend upon his having or not having a majority of votes ; in other words he says through his counsel: "If you find I have a majority of votes it's a right good election and should not be disturbed, but if you find Mr. *Brecken* has the majority it's a dreadfully bad election by reason of divers illegalities and irregularities, and forsooth, in the public interests should not be allowed to stand." In the

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meantime, bad as this respondent contends the election is, great as is the public exigency, when he has not the majority, that it should be set aside, he finds it a good enough election to enable him to take his seat in Parliament and make laws for those unfortunate electors who have by these illegalities, mistakes, or irregularities of the returning officers, been prevented from legally electing their members.

But this contention cannot prevail. It shocks common sense. If he wished to attack this election he should have attacked it by petition, depositing his $1,000 as security, when all the candidates at the election would be respondents, as would the returning officer whose conduct is complained of, as provided by section 64, which is as follows:—

> Whenever any election petition complains of the conduct of any returning officer, such returning officer shall, for all the purposes of this act, except the admission of respondents in his place, be deemed to be a respondent.

But he claims the right to do this under sec. 66, but this section does not, in my opinion, give him any such right to attack the election on grounds which, if sustained, must make the election void *in toto*, and this, too, without the candidate whose election is not impeached, and without the returning officer whose conduct is complained of, and whose misdoings it is now contended avoids the election, being made parties.

As I read, sec. 66, which is as follows:—

> On the trial of a petition under this act, complaining of an undue return and claiming the seat for some person, the respondent may give evidence to show that the election of such person was undue, in the same manner as if he had presented a petition complaining of such election—

it only enables the respondent to show that the election of the person claiming the seat is undue as for corrupt or improper practices by himself.

Even if this view is incorrect and the respondent

could attack the election on the ground of irregularities by the returning officer, the respondent has not, in my opinion, on the facts of the case shown that this was not substantially an election by ballot, or that the constituency had not a fair and free opportunity of electing the candidate which the majority might prefer, or that there is any reasonable ground for believing that a majority by reason of the alleged irregularities might have been prevented from electing the candidates they preferred, nor that such irregularities affected the result of the election.

I express no opinion as to the necessity of objections to ballots being raised at the time of the count by the deputy returning officer under sec. 56, which is as follows :—

> The deputy returning officer shall take a note of any objection made by any candidate, his agent or any elector present, to any ballot paper found in the ballot box, and shall decide any question arising out of the objection; and the decision of such deputy returning officer shall be final, subject only to reversal on petition questioning the election or return.

The legislature seems to have been very particular to provide that the candidates or their agents should be present, or in their absence that the electors should be represented, and the provision seems to contemplate that matters in reference to the ballots should be then finally settled. Whether any such objection afterwards made is not too late, is a question, in the view I take, there is no necessity for investigating or settling; should the point hereafter arise in a case to render its determination necessary, it will, in my opinion, be worthy of serious consideration.

The appeal is dismissed with costs in this court, and in the court below, and a certificate will be issued in accordance with the provisions of the statute that *Frederick de St. Croix Brecken* has been duly elected a member of the House of Commons for the electoral dis-

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trict of *Queen's* county, in the province of *Prince Edward Island*.

STRONG, J.:—

By the section which the amending act of 1878 substitutes for the 55th section of the original act of 1874, the ballots which the deputy returning officer is to reject are distinctly specified, and it is enacted that, "he shall reject all ballots which have not been supplied by himself."

The question arising on the scrutiny, as to the admissibility of the ballots which the deputy returning officers omitted to mark with their initials pursuant to the requirements of the substituted sections 43 and 45, must, it seems to me, depend entirely on the construction to be given to this provision of section 55.

It is to be observed that the words of the statute are, not that ballot papers not marked with the officer's initials are to be rejected, but only those which appear not to have been supplied by him.

In the present case it has been established to the satisfaction of the judge who tried the petition—and the evidence was ample to justify his finding—that the uninitialled ballot papers had all been supplied by the deputy returning officers. The very words of the statute have thus been complied with.

It seems plain, therefore, that we cannot now reject the uninitialled papers which have been counted by the officers who supplied them, merely because one of the directory provisions of the act has not been followed, and thus disfranchise a large body of electors in consequence of omissions arising from the mistakes of the officers.

Principle and authority both require that we should hold the requirements of initialling to be merely directory and not mandatory, and that in cases like the

present, where the officers are able to establish beyond a doubt that no ballots have been deposited which were not furnished by them, the election court, on a scrutiny, must hold they would not have been justified in rejecting ballots not initialled.

The act must be regarded as only requiring that it should appear to the satisfaction of the deputy returning officer that no ballots other than those supplied by him had been used by voters, and the initialling must be taken to have been a device to secure that end, and not to exclude the officers from identifying the ballots in another way, as they have done in the present case. This was the determination of Vice-Chancellor *Blake* in the *Monk* case, where that learned judge determined this identical point (1); and I think that decision affords us a sound and safe precedent to be followed in the present appeal. Then the 80th section, although I am of opinion it has no direct application to the question of rejecting or admitting votes on a scrutiny, but applies only to the case of an election impeached as being altogether void for irregularity, yet indirectly confirms the construction which I place on section 55, as showing that the provision requiring initialling is not absolute but directory only.

As regards the avoidance of the election for irregularities, either as respects the omissions to initial the ballots or on the other grounds urged, no case raising such a complaint is before us on which we can pronounce a judgment.

The petition was filed by Mr. *Brecken* claiming the seat as having a majority of the legal votes. If the appellant desired to raise this question as to the validity of the election he should have presented a petition himself praying its avoidance, but this he has not done.

(1) Hodgins' Election cases, 725,

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The 66th section of the act of 1874 manifestly does not enable him to impugn the election as wholly void and irregular, without a petition; it merely enables a respondent to a petition, by which the seat is claimed, to recriminate, by shewing that even if the petitioner should prove that he has a majority, he is, by reason of the illegal conduct of himself or his agents, disentitled to have the seat awarded to him

I think the appeal must be dismissed with costs, and a certificate granted that Mr. *Brecken* is entitled to the seat.

FOURNIER, J.:

Le résultat du scrutin devant cette cour, comme devant l'honorable juge *Peters* en première instance, a donné une majorité en faveur de l'Intimé.

L'Appelant, qui n'a pas jugé à propos de produire une réponse à la pétition, a cependant donné avis, en vertu de la section 66 de l'Acte des élections contestées, qu'il demanderait la nullité de l'élection pour deux raisons :

1o. Parce que dans trois bureaux de votation les voteurs n'ont pu voter en conséquence de l'insuffisance du nombre de bulletins dont le député officier-rapporteur avait été pourvu ; et que dans un autre, le no. 36, il n'y avait pas l'espace suffisant pour permettre aux voteurs d'arriver au bureau de votation, et qu'il y avait plus de deux cents voteurs dans cette division.

2o. Parce que dans trois bureaux de votation les bulletins ne portaient pas les initiales des députés officiers-rapporteurs. Ces députés officiers-rapporteurs ayant, par erreur, mis leurs initiales et le no. du votant sur le talon du bulletin, il s'est trouvé environ 675 bulletins ne portant pas d'initiales. Dans le décompte fait par le juge de comté, tous les bulletins ont été rejetés et l'Appelant s'est trouvé avoir une majorité de quinze

votes. Un rapport a été fait en sa faveur et il a pris possession de son siége. L'Intimé ayant produit une pétition contre le retour de l'Appelant, l'honorable juge *Peters* appelé à décidé cette contestation a admis la validité des bulletins retranchés. Cette décision a eu l'effet de rendre la majorité à l'Intimé.

Quant aux moyens de nullité invoqués dans la première question, on doit se demander d'abord, si l'Appelant a bien le droit de demander la nullité de l'élection en vertu de laquelle il siége actuellement. Peut-il en même temps affirmer la validité et la nullité de l'élection ? Peut-il en loi prendre cette position contradictoire de considérer l'élection comme légale pour lui et comme illégale s'il doit faire place à son adversaire ? Il ne le peut certainement pas d'après les nombreuses autorités citées dans le jugement de l'honorable juge *Peters*. En outre, un examen sérieux de la preuve démontre la futilité de ces moyens de nullité. En réalité, il est bien prouvé que personne n'a été privé du droit,de voter ni par manque de bulletins, ni par défaut d'accommodation dans les bureaux de votation.

Mais, était-il bien nécessaire pour l'honorable juge d'entrer dans l'examen de tous ces détails ? L'Appelant n'ayant pas jugé à propos de faire une contestation régulière de l'élection, pouvait-il en se prévalant seulement de la section 66 de l'Acte des élections contestées demander la nullité de l'élection ? Quel droit lui confère cette section ?

The Respondent may give evidence to show that the election of such person (claiming the seat) was undue, in the same manner as if he had presented a petition complaining of such election.

Cette section s'applique aux accusations récriminatoires que le membre siégeant peut faire pour démontrer non pas la nullité de l'élection d'une manière générale, mais faire voir que pour des motifs particuliers, corruption ou autres, le rapport (*return*) de son adversaire serait illégal et demander aussi sa déqualification. Ici

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l'Appelant ne demande pas seulement à faire déclarer que le rapport de l'Intimé serait illégal, mais il demande la nullité de l'élection ; il se trouve à attaquer par son procédé non-seulement le droit de l'Intimé mais aussi la légalité du rapport de M. *Davies*, membre siégeant pour la même division, sans que ce dernier ait été mis en cause. Pour arriver à ce résultat il aurait été nécessaire de se conformer à toutes les dispositions de l'Acte concernant les élections contestées. Il fallait faire un dépôt de mille dollars, mettre en cause les parties intéressées et donner les différents avis requis par le statut ainsi qu'il a été décidé dans la cause de *Sommerville* et *Laflamme* (1) et *Devlin vs. Ryan* (2). Rien de tout cela n'a été fait. Toute cette partie de la preuve, qui n'avait pour but que de prouver la nullité de l'élection et non pas seulement la nullité du rapport de l'Intimé, a été reçu illégalement. En conséquence il n'y a pas lieu de décider si les moyens invoqués auraient été suffisants pour faire annuler l'élection. Cependant comme la preuve en a été faite, quoique illégalement, je n'hésite pas à dire que je partage entièrement l'opinion de l'honorable juge *Peters* sur son insuffisance.

Quant à la question de l'omission des initiales, elle a déjà été décidée dans l'élection de *Monk* par l'honorable ex-vice-chancelier d'*Ontario* (3). Je concours dans les raisonnements sur lesquels cette décision est fondée Bien que la loi électorale ait été amendée depuis, elle n'a pas dispensé, cependant, de la formalité obligeant l'officier-rapporteur à mettre ses initiales sur chaque bulletin. Les députés officiers-rapporteurs qui ont présidé aux polls où cette formalité a été omise ont tous été entendus comme témoins. Chacun d'eux a établi de la manière la plus positive que les bulletins trouvés dans la boîte du scrutin à la clôture de la votation était identi-

(1) 2 Can. Sup. C. R. 216. (2) 20 L. C. Jur. 77.
(3) Hodgins' Elec. R. 725.

quement ceux qu'ils y avaient respectivement déposés eux-mêmes. Ils ont aussi déclaré que personne n'a pu y introduire sans leur connaissance d'autres bulletins que ceux qu'ils y ont mis eux-mêmes. Aucune circonstance ne fait supposer qu'il y a eu fraude ou intention d'éluder la loi. Cette omission n'est due qu'à une erreur accidentelle. Il est vrai que la loi dit dans la forme impérative :

The voter shall receive from the Deputy Returning Officer a ballot paper, on the back of which such Deputy Returning Officer shall have previously put his initials.

Le devoir de l'officier-rapporteur est clair ; mais l'omission de sa part de se conformer à la disposition de la loi emporte-t-elle nullité du vote ? Si telle était l'intention de la loi, ce serait laisser le sort de la plupart des électeurs à la merci de l'impénitie, de la négligence, ou même de la mauvaise foi des députées officier-rapporteurs. La loi n'ayant pas prononcé la nullité on ne doit pas conclure qu'elle résulte de la forme du langage adopté. Les dispositions de cette nature adressées aux officiers publics sont généralement considérées comme directoires (*directory*) d'après l'autorité de *Maxwell* :

When the provisions of a statute relate to the performance of a public duty they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed or directory only. The neglect of them may be punishable indeed, but it does not *affect* the *validity* of the act done in disregard of them * * * It is no impediment to this construction that there is no remedy for non-compliance with the direction (1).

D'ailleurs la loi électorale, section 80, contient au sujet des irrégularités qui ne peuvent manquer d'avoir lieu en matière d'élections, une disposition formelle qui doit nous guider dans l'appréciation des effets de ces irrégularités.

No election shall be declared invalid by reason of a non-com-

(1) Maxwell on Statutes, p. 337.

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pliance with the rules contained in this Act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the Returning Officer, under the provisions of this Act, or of any mistake in the use of the forms contained in the schedules to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.

Il est évident d'après la preuve en cette cause que l'élection dont il s'agit a été faite conformément aux principes contenus dans l'Acte des élections et que les irrégularités constatées n'ont pas affecté le résultat. En faisant application de cette section on doit donc déclarer que l'élection a été légalement faite.

En lisant la section 10 de l'acte amendé de 1878, la question ne fait plus difficulté. La section 55 de l'acte de 1874 qu'elle amende dit quels sont les votes que l'officier-rapporteur doit rejeter lors du dépouillement du scrutin.

In doing so he shall reject all ballot papers which have not been supplied by the Deputy Returning Officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark, by which the voter can be identified.

Nous avons la preuve ici que les bulletins sont ceux fournis par les députés officiers-rapporteurs ; et tous ceux qui ont été admis par le jugement de première instance ne comportent aucune des causes de nullité mentionnées dans cette clause, si ce n'est ceux dont il a été disposé conformément à la seconde partie de cette clause concernant les bulletins qui ne doivent pas être comptés.

Pour ces raisons et pour celles développées dans le jugement si complet de l'honorable juge *Peters*, je suis d'avis que l'Intimé doit être déclaré légalement élu au lieu et place de l'Appelant. Le tout avec dépens.

HENRY, J.:—

The decision of the question of the validity of the ballots given at three of the polls, in the electoral district in question, having for its effect the seating of the respondent or of the appellant, it becomes very important to see whether the statute authorizes the rejection of these ballots, and to do so we have to look to the different clauses of the statute The 43rd section of the act 37 *Vic.*, ch. 9 provides that electors "shall receive from the deputy returning officer a ballot paper on which such deputy returning officer shall have previously put his initials." In the first place I may say that that portion of the provision of the law has not been complied with. The returning officer, therefore, handed to each elector a paper not authorized by law. The question, therefore, is of very great importance to decide whether the returning officer can pay disrespect to the law and put in a paper which is not in strict compliance with its provisions. If we say he can in that respect, why not in another, and the result would be the virtually giving to the deputy returning officer the power to do what he pleased. Was it then the intention of the legislature to place such a power in the hands of the deputy returning officers? The legislature, as I take it, must have had some object in making that provision, and must have had some good reason, some valid reason, for doing so. Now, in looking for the reason, we must first ascertain what the law is in regard to the Dominion elections. As I have already stated, the deputy returning officer must provide a ballot paper on which he shall have previously put his initials. He is but a ministerial officer and has been given no discretion—as to the placing of his initials on the ballot paper—to carry out or to violate the act at his pleasure, and by the judgment now

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appealed from it is shown he did not initial the ballot papers in question, there is therefore nothing but his testimony to show the identity and validity of the ballot papers. Was it the intention of the legislature that this should be?

If we turn to section 55 as amended it will be found that after the close of the polls it is the duty of the deputy returning officer when he counts the ballots to "reject *all* ballot papers which have not been supplied by the deputy returning officer." But what has he got to guide him in his decision? He finds no mark on the ballot papers to identify them. Has not the legislature, in order to prevent ballot papers being tampered with, directed that those which have not been supplied by the returning officers shall be rejected? And here the deputy returning officer could not identify them after once passing from his sight. If a recount takes place, under 41 *Vic.*, ch. 6, section 14, sub-section 4, the county judge is called up to make a recount, he has simply to do so, and when he finds ballot papers not initialled, how can he say they are those supplied by the deputy returning officer? He is bound to reject all ballots not supplied by the deputy returning officer, and I think, with the law before him, would be justified in rejecting all uninitialled ballots. He, too, is but a ministerial officer, and not entitled to take evidence. The only one who could testify at all would be the deputy returning officer, but how could he, days or weeks after parting with the possession of them, identify the ballots without any private mark to distinguish them? Besides, did the legislature intend to leave the whole question of the regularity of the votes to depend upon the statements to be made by the deputy returning officer? I confess that I find it difficult to come to any such conclusion. I have also some difficulty in arriving at the

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conclusion that the non-compliance with mere formalities should avoid an election ; but then, on the other hand, it is seen that the security provided in this respect by the legislature is not found. We have section 80, which declares that mistakes of form only are not fatal.

[The learned judge then read the section.]

I think, however, that in the present case there is more than a mistake as to form. Besides the reference to rules in this section only applies to the rules in the act of 1874. When I look at these rules there is not one of them that refers to this question. Then as to mistake of forms, there is no mistake in the forms complained of here.

I am reasoning it out to show there is a difficulty in coming to a conclusion either one way or the other. The petitioner in this case has received a clear majority of votes, and unless the act has made it very clear that this majority is illegal, I would be reluctant to so declare. It is not in the province of the court to unseat a member for mere irregularities in carrying out the provisions of the law, which do not affect the result, unless the court can declare that the provisions are mandatory, and that the error on the part of the deputy returning officer shall, therefore, have the effect of avoiding an election.

The consequences of the decision of this court will be very serious, if it were not in the power of the legislature to clear up the doubt by further legislation, as no returning officer will hereafter be required to initial any of the ballot papers. With section 80 still in force, I shall not interpose any decision of mine to affect the judgment of the majority of this court, but shall content myself by expressing my doubts as to the correctness of it.

As to the other point, I think it was the duty of the sitting member, if he did not wish to allow the respon-

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dent to take the seat, to resign his own seat, and file a petition setting forth grounds to avoid the whole election. Then all parties interested would have been heard, which has not been the case here. They are not here, and this court cannot take upon itself to decide upon the rights of parties who have not been brought before it.

I concur, therefore, with my brother judges, in giving the seat to the respondent, expressing doubts as I have before stated, as to the powers of the deputy returning officers.

I hope the matter will be settled by the legislature, in order that these occurrences may not take place again, and that the legislature will determine whether or not the legality of the ballot papers should be left entirely to depend upon the option of the deputy returning officers.

TASCHEREAU, J.:—

I am of opinion that, upon the scrutiny, the ballots not initialled should not be counted, and that the judgment of the court below, on this point, should consequently be reversed. The legislative power, with the view of providing for fair and free elections, has ordered and decreed that they should be held according to certain rules laid down in the act on the subject.

What right has the judicial power to say that these rules are not to be followed? Parliament has devised certain means by which its elections are to be regulated, and the votes of the electors are to be given and admitted. Have we the right to say that other means, in our judgment, are equally good for the same purpose, and can be legally substituted for those decreed and adopted by parliament? The court below says "yes," and rules that in virtue of section 80 of the act of 1874 it has that power. But this is a grievous error, a pal-

pable misapplication and a gross misinterpretation of this section of the statute. By its very terms this section has no application whatever to a scrutiny of the votes; but has reference purely and simply to the avoidance of the whole election. Then the section would virtually be a repeal of the most important provisions of the act, if the construction put upon it by the court below was to prevail.

Section 27, as amended by 41 *Vic.*, ch. 6, of the act, for instance, orders that the ballot shall be a printed paper. But this is not necessary, says the court below, a written paper is just as good. The names of the candidates, for another instance, are ordered to appear on the ballot paper alphabetically arranged. But this is a mere matter of form according to the court below, and, if it is not proved that any elector has been deceived by this formality not having been followed, how the names of the candidates appear on the ballots is of no importance whatever. The voter, says the act, shall make a cross within the division containing the name of the candidates for whom he intends to vote. But these are mere formalities—simple directions, entirely optional, says the court below. And so on. If the judgment appealed from was to stand, not one of the rules laid down in the statute is to be held as imperatively ordered. Yet the language of this enactment itself leads to no ambiguity. "It shall be done," says the law-giver. But, says the court below, "It need not be done." The Interpretation act vainly decrees that the word "shall" is to be construed as imperative: the court below decrees that it is not imperative.

And upon what ground does the respondent ask us to support this judgment? Virtually none, except that to reject all non-initialled ballots would, as he contends, be virtually to leave it in the power of a deputy returning officer to control the election.

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But it is Mr. Justice *Peters'* decision that leaves the result of the election entirely depending on the arbitrary and illegally arrived at conclusion the deputy returning officer has come to at the counting of the votes, or on his evidence before the courts when the return is questioned.

Then are courts of justice now to presume that a sworn public officer will not do his duty? Is it not the contrary that must always be presumed? It is also obvious that the deputy returning officer, if unscrupulously disposed to do so, must necessarily have it in his power, without his being obliged to resort to these means of not putting his initials on the ballot papers, to more or less control the election. And, moreover, it is clear that under the Imperial statute, from which was taken 35-36 *Vic*, ch. 33, sec. 2, the omission by the returning officer to stamp the ballot with the official mark avoids the vote. The Imperial parliament, then, did not think that to leave such a power to the returning officer was objectionable. The initials of the deputy returning officer are substituted, with us, for the official mark of the Imperial Act; why their absence from the ballot should not, with us, avoid the vote, as the absence of the official mark in England avoids it, I cannot understand.

True, it is, that the Imperial statute, in express words, says that, in such a case, the vote is void. But a special enactment of that kind in our act would, it seems to me, have been superfluous, since the act decrees that the ballot paper to be given to the voter must be one on the back of which the deputy returning officer shall have previously put his initials. But, says the respondent, section 55 of the act (as amended) enacts that the deputy returning officer shall reject only the ballots which have not been supplied by him, so that if he is otherwise satisfied that the ballot is one he supplied,

he must count it, even if not initialled by him. But this is not so: the respondent reads this section 55 without reference to the other parts of the act. It is quite clear, as said Lord *Ormidale*, in the *Wigtown* case (1), that the statute does not contemplate that there should be an investigation by the deputy returning officer, when counting the votes at the close of the poll. He has to count only the ballots that he has supplied. But how is he to ascertain whether such and such a ballot has been supplied by him? Only, and clearly so, it seems to me, by his initials on the back of such ballot. If his initials are not there, he is to treat the ballot as not supplied by him. Section 45 of the act, as amended makes this clear. The voter "shall fill up such ballot paper so that the initials on the back can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it, ascertain by examining his initials and the number upon the counterfoil, that it is the same that he furnished to the elector." Here, it is plain, there is a special order, an imperative order, to this officer not to receive the ballot paper, except after having ascertained that it bears his initials. Yet, says the court below, it is not necessary that this ballot paper should be so initialled.

According to the statute, the deputy returning officer is prohibited from receiving as a vote, any ballot not initialled. If one is offered to him, he is obliged to refuse it—if he admits it, he disobeys the law, and there is no legal vote received. The ballot not initialled is not the ballot which, according to the principles of the act, can be counted as a vote. It is a nullity—a blank paper.

Section 55, it is argued, does not authorize the deputy returning officer to reject ballots not initialled by him. This contention is, it seems to me, opposed to the very

(1) 2 O'M. & H. 215.

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language of that section. It enacts, in express words, that the deputy returning officer shall reject all ballot papers which have not been supplied by him.

Now, section 43 orders him not to supply the voters with any but initialed ballots. And section 45 commands him, when the voter returns the ballot to him, to ascertain first that it is initialled, and then, and then only, to put the ballot in the box. Now, when in section 55 the legislature orders him to reject all ballots not supplied by him, does this not mean that all not initialled ballots are to be rejected, and that the initialled ones only are to be counted ? The statute can mean nothing else, since, in the box, under the statute itself, the initialled ballots only are those that the deputy returning officer can have supplied. All those that are not initialled he has not supplied under the terms of the act. There can be, under the act, no ballot in that box not supplied by him other than those not initialled by him. In other words,the statute contemplates that all the ballots in the box that have been supplied by the deputy returning officer shall bear his initials. And so, when it orders the deputy returning officer to reject all ballots not supplied by him, it orders him expressly to reject all ballots not initialled by him.

Then, on a re-count, the judge has also to reject all ballots which have not been supplied by the deputy returning officer (41 Vic., ch. 6, sec. 14, sub-sec. 4.) Now, how can he ascertain which have been and which have not been so supplied, otherwise than by the initials on the back ? The deputy returning officer is not before him, and he does not receive any evidence. Is he not obliged, then, to reject all non-initialled ballots ? Is he not bound to treat all non-initialled ballots as not having been supplied by the deputy returning officer ?

The case of *Woodward* v. *Sarsons* (1), relied on by the

(1) L. R. 10 C. P. 733.

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respondent, is, as I read the report, entirely adverse to his contentions. The respondent cannot rely upon that part of the remarks of Lord *Coleridge* upon the question of the avoidance of an election. We are here on the question of scrutiny simply. Then Lord *Coleridge* bases his judgment mainly on the ground that the Imperial Act, as to the rules under consideration in that case, was purely directory. I have already said that the rule as to the initialling of the ballots, in our act, is imperative. Many of the rules, which in the Imperial Act are contained in the schedules to the act and in a directory form, are with us inserted in the body of the statute, in the imperative form. For instance, how the ballot shall be marked, in the Imperial Act, is, as remarked by Lord *Coleridge*, in the directory part of the act. With us it is in the body of the act, in imperative terms. Now Lord *Coleridge* lays down the rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." To illustrate the principle he so lays down in relation to this act, Lord *Coleridge* adds that as the second section of the Imperial Act enacts that "the voter having secretly marked his vote on the paper," there is, in the act, an absolute enactment that the voter shall mark his paper secretly so that this enactment as to secrecy must be obeyed exactly. Now, how can the respondent invoke that case in his favor? Is it not clear that Lord *Coleridge's* decision is directly in the sense that what the statute has ordered must be followed exactly, whilst what the statute has merely directed is sufficiently obeyed, if obeyed substantially?

Is it not imperatively ordered, in our statute, that the ballot shall be initialled by the deputy returning officer. And, I may add, sec. 80 of our act forms also part of the Imperial Act, and in fact has been taken from it. Yet,

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Lord *Coleridge* did not seem to think, as the court appealed from here seems to have done, that this enactment left to the courts the arbitrary power to declare the act not applicable to all elections. But says the respondent, it would be very hard to deprive a voter of his vote for the neglect of a public officer. To this, I will quote Lord *Ormidale's* answer to a similar objection in the *Wigton* case. "No doubt," he says, "this is a hardship upon the voter in one sense, but in the 'directions as to voting' which was put up in conspicuous places at the polling booths, reference is made to the official mark, and the voter has a particular duty to perform in reference to it; that is to say, he must fold up the ballot paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is on his voting paper."

This language is entirely applicable here. With us the deputy returning officer, not the voter as in *England*, puts the ballot in the box. See *Pickering* v. *James* (1); but here, as in *England*, the directions for the guidance of the electors are posted up in the poll, sec. 28, Act of 1879. And these directions tell the voter that the initials of the deputy returning officer must be on the back of the ballot, as they in *England* inform him that the official mark must be on it. The difference between the Imperial statute and ours being that, in the Imperial statute, this enactment, as to the voter being obliged to see that the ballot paper is duly marked or initialled is in what Lord *Coleridge* calls the directory part of the statute, whilst, with us, the similar enactment is, in imperative terms, in the body of the act itself.

I may remark that besides the deputy returning officer, whose duty it is to initial the ballots, besides,

(1) L. R. 8 C. P. 489.

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the voter who has a right to ask a legal ballot, and consequently to insist that one duly initialled be given to him, there are in the polls the candidates or their agents, who also have a right to insist that the formalities required be fulfilled, and, if need be, to call the deputy returning officer's attention to the necessity of his initials being on the back of the ballot paper. This demonstrates that, after all, the deputy returning officer, who would be disposed to wilfully neglect to initial the ballot papers, would not find it so very easy to do so.

I am of opinion to allow this appeal. Upon the scrutiny the non-initialled ballots being rejected, this would give *Jenkins* a majority of two votes. I would therefor dismiss the petition complaining of his election and return.

Upon the other part of the case, I would find it difficult to say that *Jenkins* who has been duly elected was obliged to fyle a petition. How could he when elected, complain of the return? How could he be expected to attack the very return which declares him elected, before that return was at all questioned? How could he be expected to take the anomalous position of a member of Parliament asking a Court of Justice to annul the election under which he is such member, before his said election was at all impugned? Courts of justice are to redress wrongs, but *Jenkins* had no wrong to complain of, to ask redress from, when the returning officer returned him as the member duly elected. For my part, I have never heard yet of the case of a member depositing $1,000 and fyling a petition for the purpose of complaining of his own return. *Jenkins*' position here seems warranted by sections 7 and 66 of the statute (1).

(1) *Waygood vs. James*, L. R. 7 C. P. 361.

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GWYNNE, J.:—

It is not, in my opinion, open to the sitting member to raise under the 66 sec. of the Dominion Controverted Elections Act, the objection having relation to the ballot papers having run short at some of the polling places, insufficiency of accommodation, &c. Objections of that kind, if they should prevail at all, should prevail wholly independently of a scrutiny. If the defect in the supply of ballot papers was so small as to leave no doubt that the vast majority of the electors had exercised their franchise, the objection should not, I think, be open as between two of several candidates, the votes given for whom were so even that the want of two or three ballot papers might have turned the scale in favor of the one over the other, and that therefore as to them the election should be avoided while it remained unaffected as to the other candidates elected. I think that the want of a sufficient supply of ballot papers in order to constitute a good ground for avoiding an election, should be such a defect in the supply as to justify the avoiding it altogether, and that therefore the objection is one which should be raised upon a petition expressly relying upon it, and to which all the candidates elected should be made respondents.

Upon the point as to the allowance or rejection of the uninitialled ballots, I cannot so construe the act as to give to an act passed for the purpose of securing to the electors perfect freedom from all influence in the exercise of their elective franchise, the effect of disfranchising 675 electors, not for any default of theirs, but for a mistake of the deputy returning officers in the use of a form prescribed by the act, which mistake, as appears by the evidence, did not occur with any fraudulent intent, but arose from a mere misapprehension (*bonâ fide* entertained) as to the manner in which they should perform the act which the statute directed them to perform, and had not the effect of, in any manner, interfer-

ing with that secrecy which constitutes the essential principle of vote by ballot, and which cast no doubt upon the authenticity of the ballots when put by the officer into the ballot box, and when there was no suggestion or shadow of suspicion that it had been tampered with.

The act does not, in express terms, require me to give it a construction which would have the effect of avoiding all those uninitialled ballot papers, and in the absence of all suspicion of any fraud having been committed or attempted, and, indeed, in the particular case, of any suggestion of the possibility of any fraud having been committed, I do not think I am justified in putting on the statute such a construction by implication. The statute, no doubt, directs the deputy returning officer to put his initials upon the back of the ballot paper—for what purpose this is directed to be done the statute does not say. It does not in terms declare that the effect of the deputy returning officer neglecting to put his initials as directed, shall cause the vote of the innocent elector to be rejected. If the statute had intended such to be the result, in the absence of all fraud or suspicion of fraud having been attempted or contemplated, it would have, as I think, and should have, said so in express terms, and not having said so, I cannot think that we should supply the omission by implication The 55th section of the dominion statute of 1874, as amended by 41st *Vic.*, ch 6, although apparently taken from the Imperial act 35th and 36th *Vic.*, ch. 33, makes a provision as to the counting and rejection of ballots markedly different, as it appears to me, and as I must hold intentionally so, from the English act. By the 2nd sec. of the latter it is enacted that each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of vot-

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ing the ballot paper shall be marked on both sides with an official mark and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper and folded it up so as to conceal his vote shall place it in a closed box in the presence of the officer presiding at the polling station, after having shewn to him the official mark at the back, and *any ballot which has not on its back the official mark, or* on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, *shall be void and not counted.*

Now, although by the 43rd section of the Dominion statute the deputy returning officer is directed to give to each voter coming up to vote a ballot paper with his initials on the back of it, so placed that when the ballot is folded they can be seen without opening it, yet by the 45th section it is the deputy returning officer who, upon being satisfied that the ballot paper brought up by the voter after having inserted his vote in it is the one which he had supplied to the voter, puts it into the ballot box in the presence of the elector and not as in the English act the elector in the presence of the officer, and when we look to the 55th section which regulates the counting and rejection of ballots when the ballot box shall be opened by the deputy returning officer in the presence of the poll clerk, the candidates or their agents, and of at least three electors, we find the direction to the deputy returning officer in counting *not* to be, as in the English act, to reject all ballot papers not having on their back the initials of the deputy returning officer, *but to reject all ballot papers* which have *not been supplied* by the deputy returning officer, all those by which votes have been given for

more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter can be identified. *All others* are to be counted, for the section proceeds to provide that: "All others *being counted*, and a list kept of the number given to each shall be put into separate envelopes, &c., &c." Now, what the deputy returning officers in the case before us did was this: they placed their initials upon the counterfoil in the honest belief that in so doing they were complying with the statute, and they gave the ballot papers with the counterfoils attached so initialled to the voters. Upon receiving them back from the voters so folded that they could see their initials without opening the ballots, they themselves detached the counterfoils from the ballot paper, both of which up to that time were one paper, and thus, being satisfied beyond doubt that the ballot papers brought back to them were those they had respectively themselves supplied to the voter, they put the ballot papers containing the votes into the ballot boxes, and upon opening them at the close of the polls in the presence of the candidates, their agents, and at least three electors, finding the number of votes in the respective boxes to correspond precisely with the number of ballot papers by them respectively supplied to the voters, they without any objection whatever being made, counted the uninitialled ballots (unless avoided for some other reason), as good votes, being perfectly satisfied, as they swear they were then and still are, that the ballot papers which they had respectively so put into the boxes were the identical ballot papers which they had respectively supplied to the voters. The deputy returning officers were therefore under these circumstances justified by the literal terms of the statute in counting those ballots, notwithstanding that they had made a mistake as to the place where their initials should have been placed.

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The power of the county judge upon recounting is prescribed by section 14 of 41st *Vic.*, ch. 6, and he is ordered to recount according to the rule above given in section 55 of the Act of 1874, as amended by 41 *Vic.* ch. 6, as governing the deputy returning officers upon their counting. So that the county judge cannot reject any ballot papers which had been supplied by the deputy returning officers. The directions to him are not to reject all ballot papers not having the initials of the deputy returning officers on the back. Now without evidence, as to his taking which no provision is made, that the ballot papers not initialled were not supplied by the deputy returning officers, I cannot see how he could be justified in rejecting ballots which the deputy returning officers, being well satisfied they had supplied, had counted, unless there should be some appearance of fraud, as for example the number of ballots in a box exceeding the number appearing by the poll book to have been supplied by the officer, or the like. Upon the evidence given before the learned Chief Justice upon the petition in this case, and in the absence of all suggestion or suspicion of fraud, or that any thing occurred which had interfered with the election being conducted according to the principles of the act, that is, as I understand it, being conducted with that perfect secrecy which constitutes the principle of vote by ballot, I think the learned Chief Justice was right in counting those uninitialled ballots, and that therefore his judgment should be affirmed and the result reported to the House of Commons.

Appeal dismissed with costs.

Sollicitors for appellant: *McLean & Martin.*

Solicitor for respondent: *F. Peters.*

PETER ROSS.....APPELLANT; 1881

*Oct. 27, 28.

AND

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JAMES HUNTER.....RESPONDENT. *March 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trespass—Registration—Notice.—Rev. Stats, N. S., 4 Series, c. 79, secs. 9 & 19.

R. (the appellant) brought an action against *H.* (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. *H.* pleaded, *inter alia*, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one *C.*, who then owned *R's* property, granted by deed to *H.* the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than *R's*. *R.* purchased in 1872 the property from the Bank of *Nova Scotia*, who got it from one *F.*, to whom *C.* had conveyed it—all these conveyances being for valuable consideration. The deed from *C.* to *H.* was not recorded until 1871, and *R's* solicitor, in searching the title, did not search under *C's* name after the registry of the deed by which the title passed out of *C.* in 1862, and did not therefore observe the deed creating the easement in favor of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, That the continuance of illegal burdens on *R's* property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of *C.*

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

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2. That the deed creating the easement was an instrument requiring registration under the provisions of the *Nova Scotia* Registry Act, 4 series, Rev. Stats. *N. S.*, ch. 79, secs. 9 & 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from *N.* to *F.*, that the deed of grant to *H.* became void at law against *F.* and all those claiming title through him.

3. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to *R.* in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Per *Gwynne*, J., dissenting: That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule to set aside verdict for the appellant, and to enter a verdict and judgment thereon for the respondent. The facts and proceedings are fully stated in the judgments hereinafter given.

Mr. *Thompson*, Q.C., for appellant: The question in this case chiefly turns upon the *Nova Scotia* Registry Act, Rev. Stats. *N.S.* (4th series), ch. 79.

If the agreement from *Caldwell* to defendant is to be considered as a grant, or as a conveyance of the land or of any part of *Caldwell's* estate therein, I contend it comes under the operation of the Registry Act, and the conveyances from *Caldwell* to *Nash*, from *Nash* to *Forman*, and from *Forman* to the bank, took priority of it. In that case, *Caldwell* had no interest in the land at the time of recording the agreement, which could be bound by the agreement. The bank having taken a title free from any such encumbrance, conveyed to the plaintiff a title equally free. *Wash.* on Real Prop. (1); *Wade* on

(1) Pp. 285-292.

Notice (1); *James Bates* v. *Amos Norcross* (2); *John Lomes* v. *Brewer* (3); *Trull* v. *Bigelow* (4); *Rawle* on Cov. for Title (5).

The only other defence left to the respondent is, that appellant had constructive notice, viz.:—that the encroachment was so obvious that the plaintiff was bound to take notice of it. In the first place, I contend that the purchaser was not put on enquiry. The height of the buildings was such that the overlapping of the wall would not attract notice, but would only be observed by a person whose attention was called to it.

There is no evidence in the case that the chimneys of the *Victoria* block or the want of chimneys in the defendant's building was visible. Such may have been only visible from the roofs of the buildings, and in respect of this matter, at least the plaintiff had a right to damages and an injunction. On this point I will cite *Allen* v. *Seckham* (6). It is only in equity that notice is a defence; and a purchaser without notice is protected in equity. *Sugd.* on Vend. & Pur. (7); Doe dem. *Robinson* v. *Allsop* (8); Doe dem. *Nunn* v. *Lufkin* (9).

The facts being found for the plaintiff, the plaintiff was and is entitled to judgment.

The other two points on which I rely, as stated in my factum, are 1st—that the plaintiff had no actual notice of the agreement or of the burden on the property. The registry of the agreement, out of its regular course, and at a period when the title to the property would not be searched for conveyances to or from *Caldwell*, was not actual or constructive notice. It was,

(1) Pp. 60-62, 92.
(2) 14 Pick. 226.
(3) 2 Pick. 184.
(4) 16 Mass. 406.
(5) Pp. 428, 435,
(6) 11 Ch. D. 790.
(7) 707, 723, 8th Ed.
(8) 5 B. & Ald. 142.
(9) 4 East 221.

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in fact, a nullity. *Hine* v. *Dodd* (1); *Underwood* v. *Lord Courtown* (2).

2nd. If the agreement is to be considered a license, it is revocable, and was sufficiently revoked. *Gale* on Easements, 20.

Mr. *Rigby*, Q. C., for respondent: My first point is that under the pleadings, the plaintiff cannot take advantage of the Registry Act, as it was not set up in any of the replications. But if this Court holds that the pleadings are suffiicient, then I contend that this document does not come within the 19 sect. of Ch. 79, Rev. Stat., *N.S.*, 4 series. No instruments are required to be registered except deeds, mortgages, judgments, attachments, leases and grants. Under 19th section deeds not registered shall be void against a subsequent purchaser, who shall first register his deed. In this case defendant had first registered the agreement; and it was, and for some time had been, on registry, previous to the purchase by plaintiff of his property.

My next point is: plaintiff had notice, both express and constructive, of defendant's easement in his said wall. Express, by the said agreement between plaintiff and defendant registered for nearly two years before his purchase of his said property and also by its being patent to every one who looked at the two properties; constructive, by the fact that the only wall between the two buildings was one of a brick and a-half thick, by which as seen it appeared as a wall common to both parties, and as was also apparent by defendant's shop window. *Wolseley* v. *Dematros* (3); *Winter* v. *Brockwell* (4); *McMechan* v. *Griffin* (5); *Davis* v. *Sear*

(1) 2 Atk. 276.
(2) 2 Sho. & Lefroy 64.
(3) 1 Bur. 474.
(4) 8 East 308.
(5) 3 Pick. 149.

(1); *Morland* v. *Cook* (2); *Allen* v. *Seckham* (3); *Dart* V. & P. (4).

There could be no revocation of a license to do an act executed. *Winter* v. *Brockwell* (5); *Wallace* v. *Harrison* (6); *Duke of Devonshire* v. *Elgin* (7).

This was a license under a sealed instrument. *Croker* v. *Cooper* (8).

This was a license to an easement on the lands of another: *Washburn* on Easements (9); *Moody* v. *Steggles* (10).

Easements are not incumbrances. *Dart* V. & P. (11).

Mr. *Thompson*, Q. C., in reply.

RITCHIE, C. J.:—

This was an action wherein the plaintiff claimed that he was lawfully possessed of a certain messuage and building situate on *Hollis* street, in the city of *Halifax*; that defendant wrongfully and injuriously erected and kept erected a building on *Hollis* street contiguous and adjoining to the messuage and building of plaintiff, and used and continues to use the wall of plaintiff's building for defendant's building, and pierced holes, &c., &c., and wrongfully and injuriously built a wall and projection in connection therewith over and upon the building and wall of plaintiff, and the same kept and continued for a long period of time, by reason whereof plaintiff's building was injured, &c.

And he claims two thousand dollars damages.

And the plaintiff also claims a writ of injunction to restrain the defendant from the continuance and repetition of the injuries above complained of in each and

(1) L. R. 7 Eq. 427.
(2) L. R. 6 Eq. 25.
(3) L. R. 11 Ch. 790.
(4) P. 865.
(5) 8 East 308.
(6) 4 M. & W. 538.
(7) 14 Beavan 530.
(8) P. 563.
(9) 1 C. M. & R. 418; 3 B. & C. 238.
(10) L. T. 41 N. S. 6 Sep. 79.
(11) P. 1157.

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every of the said counts respectively, and from the committal of other injuries of a like kind relating to the same rights.

The defendant pleaded several pleas, but the seventh and eighth are the only ones which raise the questions in controversy in this case.

The seventh plea sets out that one *Caldwell*, being owner of the land now owned by plaintiff, by deed granted to defendant, and to his heirs and assigns, the right to make use of the south end wall of the building on said *Caldwell's* land, and granted the defendant the right to raise a new wall on the top of the south end, &c., by virtue of which deed defendant, before plaintiff became owner of said building and while *Caldwell* continued owner, made use of wall and raised said wall; and the said plaintiff became the owner of said building, land, close and messuage, with notice of the said rights and easements of the defendant and subject thereto, and the defendant has ever continued since to enjoy and possess said rights and easements, and to use said *Victoria* block, and said south wall, chimney, roof and cornice in accordance with the terms of said deed and grant, and the alleged trespasses were or are an enjoyment by the defendant of the said rights and easements.

"8. And for an eighth plea to said declaration, first suggesting as aforesaid, and for a defence upon equitable grounds, the defendant says that long before the plaintiff became possessed of or entitled to the reversion in the said lands and premises, in the said declaration set forth, one *Samuel Caldwell* was the owner thereof, and of the said building known as the *Victoria* block, then and ever since standing thereon, and the south wall of said building was the northern boundary of a lot of land belonging to the defendant, and of which he then was, and ever since has been, the owner in fee.

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That the defendant, being desirous of pulling down the building then upon his said lot, and erecting thereon a new and more valuable building, and also being desirous of using the south end wall of said *Victoria* block as the north end wall of his said new building, as far as the same could be made available for such purposes, entered into an agreement under seal with the said *Samuel Caldwell*, on or about the twenty-second day of August, in the year of our Lord one thousand eight hundred and fifty-nine, which agreement is in the words following; that is to say:—

"Memorandum of agreement, made the 22nd day of August, in the year of our Lord, one thousand eight hundred and fifty-nine, between *Samuel Caldwell*, of *Halifax*, Esquire, of the one part, and *James Hunter*, of the same place, gasfitter, of the other part. Whereas, the said *James Hunter*, lately purchased the lot of land, dwelling house and premises, situate in *Hollis* street, in the city of *Halifax*, joining the south end of the brick building called *Victoria* block, lately in the occupation and possession of *Henry Pryor*, Esquire, as an office, and by his tenants as a dwelling house, and the said *James Hunter*, being about to pull down the said dwelling house, and to erect on the site thereof a brick building, with an iron front, and four stories high, suitable for his trade and business. And whereas, the said *Samuel Caldwell*, as the owner of the said *Victoria* block, hath consented and agreed with the said *James Hunter*, for the consideration hereinafter mentioned, to permit and allow the said *James Hunter*, his contractors, builders, and workmen, to make use of the south end or wall of the said *Victoria* building, in the erection of the said new store, so as to save to the said *James Hunter* the expense of a new wall or end to his new building about to be erected. Now, this agreement witnesseth that the said *Samuel Caldwell*, for

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himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said *James Hunter*, his executors, administrators, and assigns, in manner following; that is to say, that he, the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency, to him in hand paid by the said *James Hunter*, hereby agrees to permit and allow the said *James Hunter*, his contractors, builders, and workmen, to make use of the south end or wall of the brick building or *Victoria* block in every way that may be requisite and necessary, so as to save the said *James Hunter* the expense of a new north wall to his own building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the said south end or wall of the *Victoria* block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building. And as it is intended that the new building shall be higher than the *Victoria* Block, it is further agreed by and between the said parties that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said *Victoria* Block, and continue the same upwards, to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove pipes, and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary, and to make good the new wall on the top of the present finish or cornice of the *Victoria* block, and round the chimney, to prevent leakage, and further, that in the erection of the said new building, as little damage as possible shall be done to the south wall of the *Victoria* building, and that all holes

or any other damage shall be filled up and made good by the said *James Hunter*. In witness whereof, the said parties have hereunto their hands and seals subscribed and set the day and year first above written."

"JAMES HUNTER, [L.S.]
"SAMUEL CALDWELL, [L.S.]

"Signed, sealed and delivered in the presence of
WM. ROBINSON."

"And thereupon the said *James Hunter*, having paid the sum mentioned in said agreement as the consideration for the rights and easements thereby granted, pulled down the building then standing upon his said lot, and at a very large expense erected a new and valuable building thereon, adjoining said *Victoria* block, and made use of the said south end wall of *Victoria* block, in every way that was requisite and necessary so as to save the defendant the expense of a new north wall to his said building, and did pierce the end of the said wall to allow the ends of the timbers and joists of said new building to be inserted therein, and the same were inserted therein, and defendant used said south wall of *Victoria* block in all respects to the depth and height of his said new building, as if the defendant had built a new north wall for his building, and did raise a new wall on the top of the south cornice of the said *Victoria* block, and continued the same upwards to the full height and depth of defendant's said new building, and did cut holes in the chimney of said *Victoria* block for the stove pipes of and from said building of defendant, and did insert defendant's stove pipes therein, and has ever since used and enjoyed said south wall of said *Victoria* block, and said chimney and said cornice, for the purpose and in the manner aforesaid, and his enjoyment and use thereof has been visible, public and notorious, and he was in the enjoyment thereof when

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the plaintiff became the owner of, or entitled to, the reversion in said land and premises and said *Victoria* block, and the same was known to the plaintiff, and he had notice of the foregoing facts and circumstances when he became the owner thereof, or entitled to said reversion, and he took the same subject to said easements, and said right enjoyed by defendant as aforesaid, and said alleged trespasses were the said use and enjoyment thereof by defendant."

As to the 7th plea, plaintiff replied, no such deed or grant; and that "when he became owner of said building, close and messuage, he had no notice of such rights, easements and privileges, and did not become such owner subject thereto as alleged; as to the 8th plea, plaintiff, by his 9th replication, denies each and every allegation and statement contained in said plea.

"And for an eleventh replication the plaintiff, as to said eighth plea, and for a defence upon equitable grounds, says that the plaintiff, when he became the owner of said land and premises, and said *Victoria* block, or entitled to said reversion as set out in the declaration, had no notice or knowledge of the alleged agreement or the said alleged facts and circumstances set out in said plea, and did not take the said land and premises and said *Victoria* block, or said reversion, or any of them, subject to said alleged easements and rights as alleged in said plea, and purchased and acquired and became owner of the said land free from any of the alleged easements and rights."

It may be as well to mention here, that on the argument before this court, a question was raised by defendant's counsel as to plaintiff's right to refer to or rely on the registry acts of *Nova Scotia*; when both parties desiring to get an adjudication on the respective rights of the parties apart from technical objections, the objection, that the registry acts had not been pleaded,

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was withdrawn by Mr. *Rigby*, and it was mutually agreed between the counsel that it if was necessary that plaintiff should have by his pleading relied on the registry acts, they were to be considered as having been duly pleaded, and on this understanding and agreement the argument proceeded. In this connection it may be well to notice the statutory enactments in *Nova Scotia*, which provide by R. S. N. S., cap. 94, sec. 26:—"That the form of the action need not be mentioned in the writ or other proceedings."

"By sec. 112—That after writ issued, the parties may, by leave of the Court or a judge, state any question for trial, which they may think fit, without any pleadings, &c."

"Sec. 114—Questions of law, after writ issued, may be stated for the opinion of the court without pleading."

"Sec. 116—Every declaration, whether in the body of the writ or annexed, and subsequent pleadings which shall clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient; and it shall not be necessary that such matters should be stated in any technical or formal language or manner, or that any technical or formal statements should be used."

"Sec. 121, on demurrer—The court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form."

Secs. 162 and 163—Equitable pleas and replication to plea on equitable grounds allowed.

Sec. 182—Different causes of action of whatever kind, except local causes arising in different counties, may be joined in the same suit.

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Sec. 191—All defects and errors may be amended and all such amendments may be made as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties.

Sec. 53—In all cases of breach of contract or other injury where the party injured is entitled to maintain, and has brought an action, he may claim a writ of injunction, and may also in the same action include a claim for damages with redress.

No question arises as to the title of either plaintiff or defendant in their respective lots. The deed from *Caldwell* to *Hunter*, conveying right to use wall, is dated 22nd August, 1859; that by which *Caldwell* conveyed property to *Nash*, 15th July, 1862, registered 17th July, 1862. *Nash* to *Forman*, 15th July, 1863, registered 1st August, 1863. *Forman* to Bank, 26th July, 1870, registered 27th July, 1870. *Caldwell* to *Hunter*, registered 20th May, 1871. Bank to plaintiff 1st November, 1872.

The leading facts are as follows:—The plaintiff owns the store to the north, measuring 16 feet ten inches on the street under a deed of 1st of November, 1872, from the Bank of *Nova Scotia*, who derived title through intermediate conveyances from *Samuel Caldwell*, whose deed to *John D. Nash* bears date 15th July, 1862, and makes no mention of any incumbrance on the property, nor was such incumbrance known to the Bank nor, as far as appears, to *Forman*, who conveyed to them. *Hunter* became the owner of the site on which his store is erected, measuring 24 feet 4 inches, by deed from *Merkel*, dated 22nd June, 1859, when *Caldwell* was the registered owner of the northern store, and on the 22nd of August, 1859, an agreement under seal was made between the two, whereby *Caldwell*, for the consideration of the sum of £75, granted to *Hunter*, in order to save him the expense of a new north wall to his own

building, the privilege of piercing the end of his, that is, *Caldwell's* wall, allowing the ends of the timbers and joists of the new building to be inserted therein, and using the south wall or end of *Caldwell's* lot in all respects to the depth or height of the new building, as if *Hunter* had built a new north wall to his own building; and *Caldwell* further agreed that *Hunter* might raise a new wall on the top of *Caldwell's* south wall, and might cut holes in the chimney then erected for stovepipes, and use the same at all times thereafter. This agreement, under which the encroachments now complained of were made, was not recorded, either from neglect, or from a notion that it did not come within the Registry Acts, until the 30th May, 1871, which was before the conveyance to the plaintiff; and two questions under these acts have arisen. The plaintiff, before completing his purchase, had the title searched by a solicitor of great experience, who traced it back to the year 1797, and in so tracing it looked for no conveyance or incumbrance from *Caldwell* after the title passed out of him, which was on the 15th July, 1862, by deed recorded two days after, in Book 137, the agreement being entered in Book 171.

As to this Registry the Chief Justice says:—"It was unknown to the plaintiff or to the solicitor he employed."

In the court below the case was decided solely on the ground that there was, when plaintiff purchased, a visible state of things existing "which could not legally exist without being subject to a burthen of the extent and nature of which the law implies plaintiff to have had notice,"; and therefore plaintiff could not disturb defendant in his enjoyment of the easements he had acquired—in other words, that the plaintiff had constructive notice of the defendant's incumbrances or charges, and therefore bought the property subject to

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them. If the case turned on this question, I think the judgment should have been for the plaintiff. The erection or incumbrance was not such an one as could be seen by all passers-by. It could be seen but from one side of the street, and whether readily seen from that would depend much on the relative height of the building and the width of the street, of which no evidence is given; and not one person was called to prove that in passing the street he had noticed the incumbrance. Mr. *Thompson*, plaintiff's solicitor, though a Q.C. practising law in *Halifax*, and who constantly, if not daily, passed through *Hollis* street, one of the leading street sof Halifax, clearly had never observed it, nor had the plaintiff, though he bought the property in November, 1872, until he had a conversation with defendant in 1876, when he asked for an extension of a privilege he said he already enjoyed by a paper he had from *Caldwell*. He speaks thus:—"I said this is quite new to me. It was the first time I had heard of the privilege he claimed—of the privilege to insert his joists in my wall. I had never heard of the paper before nor of the privilege;" and plaintiff swears he never knew it was there.

Austin, the surveyor, who prepared a plan of the building, says, on cross-examination: "Looking from the west side of *Hollis* street I saw the projection marked on this plan (N). Any one could see it;" but he does not say he saw it till he was called on to make the plan, and his attention called to it. And I think the fair inference from his evidence is, that he saw it after his attention was then called to it for the first time, and when he necessarily critically examined the building. *McKenzie* the builder, who worked at the erection of defendant's building in 1860, on examination, says: "Any one could see the projection from the street." No doubt any one could see it from the

west side of the street, and as the witness assisted in the erection of the encumbrance, he of course well knew it was there. But *Hendry* the surveyor, called by the defendant, and who prepared plan (N), says: "A wall 1½ brick wide projects over plaintiff's. It is plainly visible to any person looking at it, so also the fact of defendant's having no north wall by examining the windows." But this witness shews the force of the observation I have made in respect to the evidence of *Austin* and *McKenzie*. Cross-examined, he says: "I did not notice this until Mr. *Lynch* (defendant's attorney) spoke to me. Any person would observe all this if his attention were called to it." And on this evidence, and this only, defendant rests his case as establishing constructive notice against the plaintiff. Of the innumerable number of persons in *Halifax* who must have daily passed this building from the 22nd August, 1859, the date of the license, until the 1st November, 1872, when plaintiff bought from bank, not one individual was called who had noticed the incumbrance by defendant's erection on plaintiff's property. Was it then a structure so visible—so apparent to the eyes that it could not have escaped the notice of any reasonable man.

Under the evidence it appears to me the erection was such that might most easily and innocently have escaped the observations of an intending purchaser, who would, most naturally, finding the property clear on the records, and not having his attention called to to it, assume it to be unencumbered. I cannot think that a purchaser was bound to go to the opposite side of the street and look up to see if he could discover any encroachments, or that it would enter the mind of any ordinary purchaser to do so. Of the case of *Hervey* v. *Smith* (1), referred to and relied on by the learned

(1) 22 Beav. 299.

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Chief Justice in the Court below, a much stronger case than this, Mr. *Sugden*, in his work on Vendors and Purchasers, thus speaks:—"This seems to carry con-"structive notice beyond its proper limits, and this "rule requires a purchaser of a house to look upwards "as well as 'about him" before he completes his pur-"chase," and it may be added that Mr. *Dart* in his work in a note puts "*sed q.*" to this case. Had plaintiff's attention been called to it, or had the obstruction been of that character or in that position that it was necessarily visible and could not reasonably have escaped observation, then a visible state of things would exist apart from registry acts which, as Lord Justice *Brett* (2) says, could not legally exist without the property being subject to some burthen, and plaintiff would be taken to have notice of the extent and nature of that burthen. But, as the same learned judge says:—"The 'doctrine of constructive notice ought to be narrowly "watched and not enlarged. Indeed, anything 'con-"structive' ought to be narrowly watched, because it "depends on a fiction." I think in this case the incumbrance was not so prominent and conspicuous and necessarily visible, as to make the purchaser guilty of negligent ignorance, and as it is clear the plaintiff had no actual notice, and that his attention never was called to this incumbrance, and the evidence, to my mind, shows it was not an obstruction which would be noticed unless attention was called to it, therefore to detect it extraordinary circumspection would be required (2). To extend the law of constructive notice to a case such as this would, I think, be dangerous and unwarranted. And Mr. *Sugden* on Vendors and purchasers goes even further than this, and says:

(1) *Allen* v. *Seckham* 11 Ch. D. 795.

(2) See observations of Alderson, B., in *Whitbread* v. *Jordan*, 1 Y. & C. 203, and 1 Story Eq. 400. Ed. 1867, 622.

"The question upon constructive notice, is, not whether the purchaser had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

But if there had been constructive notice—notice of that character would not be sufficient as against a registered deed. By the *Nova Scotia* Revised Statutes, Pt. II., Title XVIII., cap. 79, sec. 9:—"All deeds, judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie."

Sec. 19.—" Deeds or mortgages of lands duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration, who shall first register his deed or mortgage of such lands."

Now, as to the deed from *Caldwell* to *Hunter*, under which he claims, I quite agree with the learned Chief Justice of *Nova Scotia* that it was a deed such as the statute contemplated should be registered. He says:

> Now, first of all, was it necessary to record this agreement? It is a deed by which *Caldwell* for a consideration in money imposed a serious burden upon his title, and to that extent unquestionably it affected his estate in the lot he owned and comes within the 9th section of our Registry Act, Rev. Stat. Chap. 79, directing that all deeds, judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie, and by the 19th section deeds of lands duly executed but not registered, shall be void against any subsequent purchaser for valuable considerations who shall first register his deed of such lands.

The cases clearly establish that to defeat a registered deed there must be actual notice or fraud.

The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice therefore to the principal or his agent, and of fraud, it has been held that a later registered deed will have priority over a prior unregis-

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tered charge notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendors, but were in the hands of certain other persons, but abstained from inquiry.

In *Wyatt* v. *Barwell* (1) the Master of the Rolls (Sir *Wm. Grant*) says:—

A registered deed stands upon a different footing from an ordinary conveyance. It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, "We cannot permit fraud to prevail;" and it shall only be in cases, where the notice is so clearly proved, as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.

and after stating that—

Even under this limitation, the security, derived from the register, is considerably lessened; * * * * *

concludes:—

However, it is sufficient for the present purpose to say that it is only by actual notice clearly proved that a registered conveyance can be postponed. Even a *Lis pendens* is not deemed notice for that purpose.

Upon the head of notice Mr. *Sugden* on Vendors and Purchasers says:

It has been decided: That the registry is not notice, and therefore a purchaser without notice obtaining the legal estate will not be prejudiced by a prior equitable incumbrance registered previously to his purchase.

That a purchaser with notice of a prior unregistered instrument is bound by it. But of course notice of a prior unregistered instrument is unimportant at law.

A purchaser, therefore, may in equity be bound by a judgment or a deed, although not registered; but it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the person having the prior deed; and, knowing that, registered, in order to defraud them of that title he knew at the time was in them (2).

(1) 19 Ves. 439. (2) P. 728.

Apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an Act of Parliament.

And again, *Sugden* (1),

Nor is registration of deeds of itself notice to a purchaser who was seized of a legal estate at the time of the purchase. If a man search the register he will be deemed to have notice; but if a search is made for a particular period the purchaser will not by the search be deemed to have notice of any instrument not registered within that period.

In *Chadwick* v. *Turner* (2) it was held under the East Riding Registration Act, 6 *Anne*, c. 35, that a title which has been registered can only be affected by a clear and distinct notice amounting to fraud.

Sir *J. J. Turner* says:

That the facts which are proved on the part of the defendants raise a strong suspicion of notice cannot be denied, but I think that they fall short of what is required to affect a registered title, for which purpose the notice must be clear and distinct, amounting, in fact, to fraud.

and cites *Wyatt* v. *Barwell* (3). So in *Rice* v. *O'Connor* (4).

In this case, where a purchaser under a registered deed had not express notice of an alleged parol contract under which the tenant was in possession, the Master of the Rolls treated it as clear that the purchaser was not liable to it, unless his conveyance bound him, for there was not that "clear and undoubted notice which is necessary to affect a party claiming under a registered deed."

In the *Agra Bank* v. *Barry* (5) Lord *Selborne* held it was inconsistent with the policy of the Irish registration law to impose on a mortgagee or purchaser the duty of inquiring with a view to the discovery of previous unregistered interests; but quite consistent with it, if he

(1) P. 76.
(2) L. R. 1 Ch. App. 310.
(3) 19 Ves. 435.
(4) 11 Ir. Ch. Rep. 510.
(5) L. R. 7 H. L. 147.

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knows of the existence of those instruments, to estop him from contending that as to him they are void merely because they are unregistered.

In *Lee* v. *Clutton, Jessel*, M. R. (1):

I am clearly of opinion that in this suit, as it is framed, I cannot treat the defendant *Clutton* as having had actual notice of the plaintiff's security. But, then, as I understand the law on the subject of postponing a person who has registered under the Registry Acts with notice of a prior unregistered incumbrance, the notice which is to postpone him must be actual notice, in the sense of positive notice given to the person or his agent; or it may possibly be sufficient, instead of alleging actual notice, to charge the person whom you seek to postpone with something actually amounting to fraud. I say that it may possibly be sufficient, because, although the earlier cases apparently indicate that actual notice must be proved, I am aware that there are some observations in the judgment of Lord *Cairns*, in the recent case of the *Agra Bank (limited)* v. *Barry* (2) to which I shall presently allude, which point to something else as being sufficient.

In regard to the earlier cases, in *Hine* v. *Dodd* (3), Lord *Hardwicke*, speaking of the object of the Registration Act (7 *Anne*, c. 20) as being to prevent parol proof of notice, goes on:—"But notwithstanding, there are cases where this court has broken in upon this, though one incumbrance was registered before another, but it was in cases of fraud. There may possibly heve been cases upon notice divested of fraud, but there the proof must be extremely clear. But though, in the present case, there are strong circumstances of notice before the execution of the mortgage, yet upon mere suspicion only, I will not overturn a positive law." That is to say, he considered it necessary to prove either fraud or clear positive notice, Then Sir *William Grant* in *Wyatt* v. *Barwell* (4) says:—"It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance, but they have said, 'We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.'" It is hardly necessary to go through all the cases, but I must refer to *Chadwick* v. *Turner* (5), where Lord Justice *Turner*

(1) 24 Weekly Reporter, p. 107.
(2) L. R. 7 H. L. 135.
(3) 2 Atk. 275.
(4) 19 Ves. 439.
(5) L. R. 1 Ch. App. 319.

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says :—"That the facts which are proved raise a strong suspicion of "notice cannot be denied, but I think they fall short of what is re- "quired to affect a registered title, for which purpose the notice "must be clear and distinct, and amounting in fact to fraud." Lord *Hatherley's* view in *Rolland* v. *Hart* (1) is the same :—"It is not perhaps very easy to see the exact shades of distinction between the cases, but this appears to be decided from the time of *Hine* v. *Dodd* downwards, that a mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second incumbrance to deprive him of priority thereby gained over the first incumbrance."

In all these cases down to *Wyatt* v. *Barwell*, the expression is, that there must be actual notice amounting to fraud. It is very well put in Mr. *Dart's* book (2), that it must be actual notice, which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the Registration Act.

The only notice charged by this bill is, that the defendant *Clutton*, when he took his conveyance, knew that the deeds were in the hands of the plaintiff, and made no enquiry; the whole of the case attempted to be made is a neglect or omission to enquire, and it is now admitted at the bar that that cannot be put higher than being constructive notice of the plaintiff's charge. That being so, and constructive notice being insufficient according to the authorities I have referred to, I find further, that no case of fraud is made by the bill, as that *Clutton* actually knew at the time of his purchase of facts which would affect his title, and that he purposely and fraudulently abstained from inquiring into them. Whether or not an allegation of that kind would be sufficient I am not called upon to decide. On the authorities I am inclined to think that actual notice is necessary. The very object of the Registration Acts is to exclude prior charges of which you have no actual notice, and to absolve you from the necessity of inquiring. So far is the register relied upon in practice as entitling the person registering to priority that I have known solicitors in *Yorkshire* actually complete purchases in the registry office to prevent any questions from arising. The judgment of the House of Lords in the case of *The Agra Bank* v. *Barry*, to which I have referred, entirely supports the view which I have expressed as to the necessity for actual notice. (His lordship

(1) L. R. 6 Ch. 681. (2) 4th Ed. p. 873.

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read passages on the subject from the speeches of Lords *Cairns*, *Hatherley* and *Selborne* in that case), There are, however, these words used by Lord *Cairns* (1), which give me difficulty :

" Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy* v. *Green* (2) commented on in the case of *Jones* v. *Smith* (3) by Vice-Chancellor *Wigram*, conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that, by reason of a suspicion entertained by the person whose conduct you are examining that there was an unregistered deed before his, he will abstain from enquiring into the fact, because he is so satisfied that the fact exists that he feels persuaded that if he did inquire he must find it out. I do not wish to express any decided opinion at this moment upon a case of that kind. If such a case should arise, I do not desire to say whether, in my opinion, such a case could or could not be deemed sufficient to get rid of the provisions of the Irish Registry Act."

In the same case on appeal, (4) :—

JAMES, L.J., says :—

It appears to me that the law applicable to this case is very clearly summed up by Lord *Selborne* in the *Agra Bank* v. *Barry*, and that having regard to the law as there laid down, it is impossible for us to come to any other decision than that arrived at by the Master of the Rolls. Lord *Selborne* there says :—"I entirely agree with the opinion which your lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee, and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man, dealing *bonâ fide* in the proper and usual manner, for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case, and among these the existence of a public registry, in a county in which a

(1) L. R. 7 H. L. at p. 149.
(2) 3 My. & K. 699.
(3) 1 Hare 43.
(4) 24 Weekly Reporter, p. 942,

registry is established by statute, must necessarily be very material. It would, I think, be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent." The appeal must be dismissed with costs.

Mellish, L.J., and *Baggallay*, J.A., concurred.

It has been suggested, that supposing the deed did not give defendant a right to this incumbrance as against plaintiff, still plaintiff could not recover in this action. I cannot appreciate this objection. It does not appear to have been taken on the trial, or suggested by counsel, or noticed by the bench in the court below, nor is to be found in the factum of the defendant; nor, according to my notes, was it urged by defendant's counsel on the argument, nor, had it been presented, do I think it could have been of any avail. If this incumbrance had been legally erected as against *Caldwell*, when *Caldwell* ceased to own, and the title and possession of the property became absolutely vested in the bank without notice, defendant ceased to have the right to continue the incumbrance, and when the title and possession of the property passed to the plaintiff, plaintiff had a right to require its removal, and when he did so, on the 1st September, 1876, the continuance by defendant of the incumbrance or nuisance became a legal wrong for which plaintiff was entitled to seek redress, and the declaration and pleadings in this case, in my opinion, in the words of the statute of *Nova Scotia* "clearly and distinctly state all such matters of fact as are necessary to sustain the action," and as are necessary for the pur-

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pose of determining in this suit the real question in controversy between the parties.

It may be very hard on the defendant, who possibly may have acted, and most probably did act, on the supposition that he had the right to erect and continue for all time the incumbrances, but it would be equally hard on the plaintiff, who *bonâ fide* purchased his property free of all incumbrances, to have it burthened with incumbrances such as this. But of the two, on whom should the hardship rest? Certainly not on the plaintiff, who bought and paid for his property without any knowledge that anything had been done to encumber it; and equally certainly on the defendant who has brought this difficulty on himself by neglecting to register his deed. The conduct of the plaintiff in this matter is, in my opinion, without reproach; he is only seeking to obtain what he bought and paid for, and which the law gives him, and in reference to which his conduct has been most considerate and perfectly upright, and so far from desiring to use his rights against defendant harshly, he seems to me to have been disposed to act in the most considerate and liberal manner towards defendant when he "offered to allow the encroachments to remain if defendant admitted his right."

STRONG, J.:—

I am of opinion that the evidence supports the second, fourth and fifth counts of the plaintiff's declaration which are in trespass. It makes little difference, since the abolition of forms of action, whether the injuries complained of are to be classified as wrongs which were formerly remediable in actions of trespass, or in some other form of action; so long as the declaration shows a legal injury that is sufficient. The wrongs complained of in the counts I have mentioned

would, however, under the old system of actions, have been the subjects of an action of trespass inasmuch as they amounted to direct injuries to the plaintiff's land. Thus driving nails into another's wall, or even placing objects against it, have been held to be trespasses (1).

The acts of the defendant in inserting his beams in the wall of the house then belonging to *Caldwell*, and now the property of the plaintiff, and in cutting holes in the wall and chimney were therefore illegal acts, that is trespasses, except in so far as they were justified by the grant or license of *Caldwell*. Then the continuance of these illegal burdens on the plaintiff's property since the fee has been acquired by him are also in law fresh and distinct trespasses against the plaintiff, for which he is entitled to recover damages unless he is bound by the license or grant of *Caldwell*. This is shewn very clearly by the case of *Holmes* v. *Wilson* (2), where the trustees of a turnpike road having built buttresses to support it on the land of A, and A thereupon having sued them and their workmen in trespass for such erection, and having accepted money paid into court in full satisfaction of the trespass, it was held that after notice to the defendant to remove the buttresses and a refusal to do so, A might bring another action of trespass against them for keeping and continuing the buttresses on the land to which the former recovery was no bar. In this case the court considered that the continued use of the buttresses for the support of the road under the circumstances was a fresh trespass. And in *Hudson* v. *Nicholson* (3), there was a decison to the same effect, and the court likened the case to that of a defendant who persists in holding out a pole over his neighbor's land and who they say would be liable in trespass as long

(1) *Gregory* v. *Piper*, 9 B & C. 591; *Reynolds* v. *Clarke*, 1 Strange 634; *Lawrence* v. *Obee*, 1 Stark. 22; Cooley Torts 332.
(2) 10 A. & E. 503.
(3) 5 M. & W. 437.

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as he continued to do so. In *Russell* v. *Brown* (1) it was held that a mere continuance of a building wrongfully erected on the land of another is a continuing trespass, for which the owner of the land may bring new actions after recovery and satisfaction for the original erection. And it is well settled that where an injury to property is actionable without proof of actual damage, new suits for the damage caused by its continuance may be brought from day to day (2). Therefore as the injuries complained of were not and could not be denied in point of fact, the plaintiff made out a sufficient *primâ facie* case so soon as he had proved his title, which he did by putting in and proving the title deeds shewing a clear chain of title from *Caldwell* to himself, through *Nash*, *Forman* and the Bank of *Nova Scotia*; the three latter deeds in this chain of title being conveyances for valuable consideration.

The defendant is consequently compelled to resort to his defence under the pleas of justification. These are two, first, that of leave and license by the plaintiff, and secondly, the grant by deed of an easement by *Caldwell* authorizing the commission of the acts complained of as trespasses. There is no pretence for saying that there was any license by the plaintiff, and even if an irrevocable license given by *Caldwell* or *Nash*, to do the acts complained of, were admissible under the plea of leave and license, it is clear that there was no such license apart from the deed of grant which is the subject of the other pleas of justification. The defence must therefore depend altogether on this deed of grant. The operative part of this deed, which is dated the 22nd day August, 1859, and purports to have been made between

(1) 63 Maine 203.

(2) Cooley on Torts, 619; *Thompson* v. *Gibson*, 7 M. & W. 456; *Esty* v. *Baker*, 48 Maine 495; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *Bowyer* v. *Cook*, 4 C. B. 236; *Elder* v. *Bemis*, 2 Met. 599; Bullen & Leake's Prec. 416.

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Samuel Caldwell (who was then seized of the fee simple in the plaintiff's land) of the first part, and the defendant of the second part, is in form a covenant in the words following:

Now, this agreement witnesseth that the said *Samuel Caldwell* for himself, his heirs, executors and administrators doth hereby covenant, promise and agree to and with the said *James Hunter*, his executors, administrators and assigns in manner following, that is to say: That he, the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency, to him in hand paid by the said *James Hunter*, hereby agrees to permit and allow the said *James Hunter*, his contractors, builders and workmen to make use of the south end or wall of the brick building or Victoria block, in every way that may be requisite and necessary, so as to save the said *James Hunter* the expense of a new north wall to his own building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the said south end or wall of the Victoria block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building; and as it is intended that the new building shall be higher than the Victoria block, it is further agreed by and between the said parties that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said Victoria block, and continue the same upwards to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove-pipes, and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary, and to make good the new wall on the top of the present finish or cornice of the Victoria block and round the chimney to prevent leakage; and, further, that in the erection of the said new building as little damage as possible shall be done to the south wall of the Victoria building, and that all holes or any other damage shall be filled up and made good by the said *James Hunter*.

It is apparent from the mere perusal of this instrument that all the rights conceded by it were properly the subject of easements in the strict definition of the word, being the privilege of imposing certain burdens on the land of the grantor for the benefit of the adjoining land of the grantee. That a mere covenant under seal will

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enure as a grant for the purpose of creating an easement, even though the technical word "grant" is not used as a word of conveyance is well established by authority (1). This covenant or agreement is therefore *primâ facie* a complete defence to the action, and in the record as originally framed it was not in any way impeached.

It appears, however, from the note of the learned Chief Justice who tried the case, that at the trial the objection was made that the grant of an easement effected by this instrument was avoided under the Registry Act of *Nova Scotia*, by reason of its non-registration until after the conveyance from *Nash* to *Forman*, which was the first conveyance for valuable consideration of the plaintiff's property subsequent in date to the agreement set up by the defendant, and afterwards in the argument *in banc* the same question of the Registry Act, and the sufficiency of the evidence as shewing that its operation was obviated by notice was the only point argued, and that on which the court below proceeded, it being there held that the Registry Act applied, but that there was such notice of the defendants' rights as in equity to disentitle the plaintiff to insist upon it.

Upon the argument of this appeal, attention having been called by the court to the state of the record, as not containing any replication setting up the registry laws as an answer to the defendant's plea of justification under the agreement, it was agreed by counsel on both sides that the record should be considered as amended in that respect, and the case was argued as though such amendment had been made, and subsequently, at the suggestion of the court, the coun-

(1) *Rowbotham* v. *Wilson* 8 H. L. 348; *Northam* v. *Hurley* 1 E. & B. 655; *Holms* v. *Seller* 3 Lev. 305; *Low* v. *Innes* 10 Jur. N. S. 1037; *Shove* v. *Pincke* 5 T. R. 129; Goddard Easements 2 Ed., p. 99; Gale on Easements, Ed. 5, p. 85.

sel drew and filed with the Registrar two replications and three rejoinders, which it was agreed by them should be considered as being added to the record. The replications which are replied to the 7th and 8th pleas, being those by which the deed of the 22nd August, 1859, is pleaded, are as follows :—

The plaintiff says that the alleged deed or grant from said *Caldwell* to the defendant was not recorded in the registry of deeds until the year 1871, and that said *Caldwell* had long previously to said recording, to wit, in the year 1862, conveyed the lands and buildings now of the plaintiff, and referred to in the plaintiff's declaration to one *Nash*, who had recorded his deed thereof, and the said *Nash* had sold and conveyed the said lands and buildings to one *Forman*, who was a *bonâ fide* purchaser thereof for value, without notice of said deed or grant, and who also had recorded his deed thereof; and the said *Forman* had sold and conveyed the said lands and buildings to the Bank of *Nova Scotia*, who was a *bonâ fide* purchaser thereof for value, without notice of said deed or grant, and who also had recorded the deed thereof to the said bank, and all the said conveyances and sales mentioned herein had been made, and all the deeds mentioned herein were recorded in the registry of deeds for the county of *Halifax* (in which county the said lands and buildings are situate), prior to the recording of the deed or grant set up in said seventh plea.

By the first of his added rejoinders the defendant takes issues upon the replications. By the second, he alleges, by way of a legal answer, that

Said grantees, before and at the time when they became entitled to said property, were put upon enquiry and had notice of said privileges, easements, and rights acquired by defendant in and under said agreement, deed or grant of said *Caldwell*, in and over and upon said land and property of the plaintiff.

And the third rejoinder is in the same words, but pleaded on equitable grounds.

The question of priority under the registry laws is therefore now formally presented in the record.

The dates of the execution and registration of the several deeds are as follows: The deed granting the

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easement by *Caldwell* to the defendant was executed on the 22nd August, 1859, and not registered until the 20th May, 1871. The deed from *Caldwell* to *Nash* was executed 15th July, 1862, and registered 17th July, 1862. The deed from *Nash* to *Forman* dated 15th July, 1863, and registered 1st August, 1863. The deed *Forman* to the Bank of *Nova Scotia* was dated 26th July, 1870, and registered 27th July, 1870, and the deed Bank of *Nova Scotia* to the plaintiff was dated 1st November, 1872, and registered on the 20th January, 1873.

The first point raised against the application of the Registry Act in the plaintiff's favour is that the deed of 22nd August, 1859, by which the easement in question was orignally granted, was not an instrument requiring registration under the provisions of the *Nova Scotia* Registry Act. This question appears to have been raised in the court below, and though no explicit decision is pronounced upon it, it is to be inferred from the judgment that the court considered it an instrument requiring registration. The material clauses of the registry act, Rev. Stats., N. S., 4th series, ch. 79, are the 9th and 19th. By the 9th sec. it is enacted that

> All deeds judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie.

The 19th sec. is as follows:

> Deeds or mortgages of lands duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such land.

It is contended, as I understand the argument, that the deed of 22nd August, 1859, is not a "deed of lands" within this 19th sec., and is consequently not avoided by the prior registration of a subsequent conveyance for valuable consideration. I have no difficulty in decid-

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ing against this contention. In the first place, I am of opinion that the two sections—the 9th and 19th—are to be read and construed together, and that sec. 19 is to be taken as attaching the consequences of non-registration to all deeds which the 9th sec. says "shall be registered," the consequence of which construction must be that the words "deeds of lands" in sec. 19 must be read as convertible with the terms "deeds affecting lands" in sec. 9; and if this is so there can be little doubt that a grant of an easement or servitude is a deed "affecting" the land to be burdened by it. Without the help of the context afforded by the 9th sec., I should, however, have held the words "deeds of lands" in the 19th sec. standing alone sufficient to include an instrument of this kind. The general policy of the registry laws, which has for its object the protection of purchasers against surprise from secret conveyances, and the interpretation placed upon the *Middlesex* and *Yorkshire* Acts in *England*, alike authorize such a construction.

In applying the provisions of both the English and Irish Acts it has been held that any writing, however informal, affecting lands is to be deemed a "conveyance" within the meaning of that expression as used in those acts. And a mere memorandum constituting an equitable charge on lands is held to be subject to avoidance for non registration upon the subsequent registry of another instrument (1). A late writer of high authority (2) thus states the law:

> It seems to be now well settled that every instrument which transfers an interest in or creates a charge on lands is a conveyance within the meaning of the Registry Acts.

The whole scheme and policy of the law in requiring the

(1) *Moore* v. *Culverhouse*, 27 Beav. 639; *Neve* v. *Pennell*, 2 H. & M. 170; *Credland* v. *Potter*, L. R. 10 Ch. App. 8.

(2) Dart V. & P. (Ed. 5.) p. 679.

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registration of titles would be frustrated if such were not the law. Therefore I am of opinion that the deed of 22nd August, 1859, was liable to be defeated in favour of a subsequent purchaser for value, holding under a registered chain of title from the same grantee, who first registered his conveyance. *Nash* seems not to have been a grantee for valuable consideration, in fact it appears that he was in truth the vendor of the easement to the defendant, for the deed was made at his request, and the consideration money was paid to him, as is stated by *Caldwell* in his evidence. *Forman* was however a purchaser for value, and as such entitled, upon registering his conveyance, to the protection of the Registry Act. The consequence is that from the date of the registration of the conveyance from *Nash* to *Forman* the deed of grant became, at least at law, void against *Forman* and all those claiming title through him as the plaintiff does.

It is however alleged in the equitable rejoinder which the defendant has filed that the plaintiff and those through whom he claims had notice of the defendant's title to this easement at the time they obtained their conveyances. This is only material as regards *Forman*, the first purchaser for value, for if the deed of 22nd August, 1859, became void as against *Forman* upon the registration of his conveyance, as it did if he had no actual notice of that instrument, it is equally void against all subsequent purchasers claiming under him, even though they may have had notice. Notice to the plaintiff himself is therefore wholly immaterial if *Forman* had no notice.

The court below determined that the state of the premises was itself sufficient notice; and proceeding upon this ground, and upon the supposed authority of cases which seem to me totally inapplicable to the question presented for decision, they held the plaintiff disentitled to the benefit of the registry laws.

It is well settled that nothing short of actual notice, such notice as makes it a fraud on the part of a purchaser to insist on the registry laws, is sufficient to disentitle a party to insist in equity on a legal priority acquired under the statute.

In *Wyatt* v. *Barwell* (1), Sir *William Grant* puts this proposition very clearly. He says :

It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance ; but they have said: "We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another that we will suffer the registered deed to be affected."

Again, in *Agra Bank* v. *Barry* (2), Lord *Cairns* states the principle and the reasons for it as follows :

Any person reading over that Act of Parliament would, perhaps, in the first instance, conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered till afterwards. But by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still, if a person in Ireland registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed ; and I take the explanation of those decisions to be that which was given by Lord *King* in the case of *Blades* v. *Blades* (3), upwards of 150 years ago, the case which was mentioned just now at your lordship's bar. I take the explanation to be this : that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished, if the person coming to

(1) 19 Ves. 438.
(2) L. R. 7 E. & I. App. 147.
(3) 1 Eq. C. p. 358.

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register a deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register, as if he had found upon the register notice of the earlier deed. If that is so, your Lordships will observe that those cases depend and depend entirely upon the question of actual notice, either to the principal or to his agent, whose knowledge is the knowledge of the principal.

Lord *Selborne* in the same case also affirms the same doctrine. He says:

It would be quite inconsistent with the policy of the Registry Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any enquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

In *Lee* v. *Clutton*, the Court of Appeal decided the same point, following, of course, the previous decision of the House of Lords in the *Agra Bank* v. *Barry*, and affirming the judgment of *Jessel, M. R.* (1).

I have dwelt more on this point than I otherwise should, for the reason that in the interval between the judgment of *Sir William Grant* in *Wyatt* v. *Barwell*, and the decision of the House of Lords in the *Agra Bank* v. *Barry*, the authority of the previous case had been disregarded by Vice Chancellor *Stuart*, who, in the case of *Wormald* v. *Maitland* (2), had held constructive notice to be sufficient to postpone a registered deed, and his decision had been followed by the Vice Chancellor of *Ireland*, *in re Allen's Estates* (3). Both these cases were, however, overruled by the later cases in the House of Lords and Court of Appeal already referred to. So far

(1) 24 Weekly R. 106. & 942. (2) 35 L. J. Ch. 69.
(3) 1 Ir. R. Eq. 455.

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indeed from the courts having evinced any inclination to carry the principle of notice of an unregistered deed any further, so as to make constructive notice sufficient to take away the priority given by the statute to the grantee in the registered deed, I find in a very late case before the Court of Appeal in England (1) the whole doctrine of Courts of Equity in this matter impugned and severely criticized by a judge of great experience, Lord Justice *Bramwell*, who, although he reluctantly yielded to the force of authority, thus concludes his judgment:

> I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by statute. I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have they seem to me to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases.

Applying the law of Courts of Equity thus settled to the facts of the present case, it is obvious that the defendant does not support his equitable rejoinder unless he proves actual notice of the deed of 22nd August, 1859, to the plaintiff, or to his properly authorized agent. Then, it is not sufficent, to enable us to answer this enquiry favourably to the defendant, to find that from the state of the property purchased by the plaintiff there was ocular proof that the wall of the house had been built upon for the purpose of the defendant's house, and was used by the defendant as a party wall, and that holes had been cut in the chimney; if, indeed, the evidence is sufficient to warrant any such inference, a question, which I do not stop to consider, as it seems to me to be entirely immaterial. What we must find, in order to hold that the defendant is entitled to a verdict, is that he had knowledge of the deed conferring the title to the

(1) *Greaves* v. *Winfield*, 14 Ch. D. 577.

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easement, not merely that the defendant was in fact in the enjoyment of such an easement; and of this I need scarcely say there is not a particle of proof. There is consequently nothing to affect the priority gained by the plaintiff, claiming through a registered chain of title under *Forman*, by reason of the registration of the conveyance to the latter anterior to the registration of the deed of grant.

The equitable rejoinder admits the allegation in the replication that *Forman* was a purchaser for value. There is, however, a rejoinder added to the record, in which all the allegations of the replication are traversed, and amongst those so put in issue is the averment that *Forman* was a *bonâ fide* purchaser for value. Strictly speaking, there ought to have been evidence of this fact *aliunde* the conveyance from *Nash* to *Forman*, which, though on its face it purports to be a conveyance for value, is, as regards the defendant, *res inter alios;* having regard, however, to the admissions made at the bar by which *Forman* was treated as a purchaser for value, and to the desire expressed by counsel for both parties, that the appeal should be decided on its merits, and particularly with reference to the question of registration and notice, I do not feel disposed to raise any difficulty upon the want of evidence in this respect, but, I think, an affidavit should be filed in the court below, showing *Forman's* purchase to have been for value.

The result is, therefore, that we must treat the deed of 22nd August, 1859, as wholly void as against the plaintiff. The defendant, therefore, although not liable to either *Nash* or *Caldwell*, so long as the title to the plaintiff's property remained in them, cannot justify his present continued acts of interference with it as against the plaintiff.

The cases referred to in the judgment of the court

below have no application. They were not cases arising on the registry laws, but cases of what may be called equitable easements. It is well settled, that if on the sale of land the purchaser covenants not to use it in a specified manner, or the vendor covenants not to use adjoining land retained by him in a particular manner, this negative covenant, although amounting to a mere personal covenant at law, not in any way affecting the title, will in equity be held binding on all subsequent assigns of the covenantor, who may have notice of it. This, of course, does not apply in the case of a grant of an easement effectual at law, for in that case a purchaser takes the land subject to the burden, whether he has notice or not, just as he would be held to take it subject to a legal lien or mortgage, of which he had no notice. But as the covenants, in the class of cases I have mentioned, are binding, on the general principles of equity, only on subsequent purchasers from the covenantor *with notice*, courts of equity, when asked to enforce such covenants against assignees for valuable consideration, apply the ordinary equitable doctrine of constructive notice, which raises a very different question from that of actual notice, sufficient to save an unregistered deed from the operation of the statute; the enquiry, in these cases of covenants, being, not whether the purchaser had any actual knowledge of the deed, but whether he had notice of such facts as would, if he had pursued enquiries, which they ought to have induced him to make, have ultimately led him to the discovery of the deed. It is precisely notice of this kind—constructive or imputed notice—that the House of Lords have most emphatically said, in *Barry* v. *Agra Bank*, is not sufficient in cases under the registry laws.

For these reasons, I am of opinion that we ought to allow this appeal with costs, and that, upon the affidavit I have mentioned being filed in the court below,

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the rule *nisi* for a new trial should be discharged with costs.

FOURNIER, J.:

La question en cette cause est de savoir si la propriété de l'appelant doit être considérée comme encore grévée de la servitude imposée en faveur de *Hunter*, l'intimé, par *Caldwell*, un des quatre propriétaires qui ont possédé avant *Ross* l'immeuble dont il s'agit. Cette question me paraît devoir être uniquement réglée par la loi d'enregistrement de la *Nouvelle-Ecosse*. D'après la sec. 9 du ch. 79 statut refondu, "All deeds, judg- " ments and attachments affecting lands shall be regis- " tered in the office of the County or District in which " the lands lie." L'acte du 22 août 1859, intitulé *Memorandum of agreement*, par lequel *Caldwell* a cédé pour £75 à *Hunter* les droits de se servir du mur sud-est de sa maison, avec faculté de l'exhausser de manière à éviter à ce dernier les frais de construction d'un nouveau mur, est revêtu de toutes les formalités pour en faire un acte (*deed*) suivant la loi anglaise. Il est signé par les parties, scellé et délivré en présence de témoins. Il comporte à sa face, qu'il a été fait pour bonne et valable considération. Il est évident que la transaction dont il fait preuve était de nature à affecter l'immeuble de *Caldwell*. Cet acte renferme donc toutes les conditions des actes qui doivent être enregistrés d'après les dispositions de la sec. 9. La section 19 nous dit quelle sera la conséquence du défaut d'enregistrement d'un tel acte. " Deeds " or mortgages of lands duly executed but not registered, " shall be void against any subsequent purchaser or " mortgagee for valuable consideration, who shall first " register his deed or mortgage of such lands." Les termes de cette section sont clairs et prononcent en faveur d'un acquéreur, pour valable considération, la déchéance absolue de tous les droits antérieurs, que pou-

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vait avoir sur un immeuble ainsi acquis, celui qui n'avait pas fait enregistrer son titre lorsque l'immeuble a changé de mains. L'acte de *Caldwell* à *Hunter* n'a été enregistré que le 20 mai 1871. La propriété avait déjà passé des mains de *Caldwell* à *Nash*, et de *Nash* à *Forman*, et de ce dernier à la banque de la *Nouvelle-Ecosse* par acte du 26 juillet 1870, et enregistré le même jour à *Halifax*, dans le livre B, 167, p. 598. Par cet acte la banque était devenue l'acquéreur de la propriété en question pour la somme de $27,000. Il n'y avait pas alors d'enregistrement de l'acte de *Caldwell* à *Hunter*; et la propriété se trouvait par conséquent exempte des servitudes imposées par *Caldwell* en faveur d'*Hunter*. L'enregistrement a été fait le 20 mai 1871, lorsque *Caldwell* avait depuis longtemps cessé d'être propriétaire, et lorsque la banque était propriétaire et en possession pour valable considération. Cet enregistrement ne pouvait, d'après la sec. 19 de l'acte d'enregistrement, conférer aucun droit à *Hunter* qui, faute d'enregistrement dans le temps voulu, avait perdu tous ses droits. L'enregistrement qu'il a fait alors n'a pu les faire revivre à l'encontre de l'Appelant. Mais on objecte encore à ce dernier que les marques de cette servitude étant visibles, il doit être considéré comme en ayant eu avis. D'abord ce fait est loin d'être clairement prouvé. Il faut faire une attention toute particulière et regarder bien haut, dans une rue très étroite, pour s'apercevoir qu'*Hunter* a construit sur le mur de la maison de *Ross*. Les autres usages qu'*Hunter* a fait du mur ne paraissent pas à l'extérieur. Je ne considère donc pas ces indices comme suffisants pour faire preuve que *Ross* doit être considéré comme acquéreur avec avis de l'existence des servitudes en question.

Pour empêcher l'effet de la loi d'enregistrement, il ne fallait pas moins qu'un avis spécial (*actual notice*) de l'existence des droits en question. C'est la doctrine

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développé dans la cause de *Lee* vs. *Clutton*, (1) soutenu par les nombreuses autorités qui y sont citées. Ce jugement consacre la véritable doctrine applicable à cette cause en exigeant en pareil cas avis spécial (*actual notice*).

The very object of the Registration Act is to exclude prior charges of which you have no actual notice, and to absolve you from the necessity of inquiry.....The judgment of the House of Lords in the case of the *Agra Bank vs. Barry*, to which I have referred, entirely supports the view I have expressed as to the necessity for actual notice.

Pour ces motifs je suis d'avis que l'appel devrait être accordé.

HENRY, J. :

I have arrived at the same conclusion. Registry acts, such as have been passed in *Nova Scotia*, are supposed to be known to every person, and there is a duty thrown upon everyone who acquires a title or interest in lands to register his title, and when he does not do so it must be taken that he fail to do so at his peril—that he does so knowing that he is failing in that portion of his duty to himself in securing a proper title to the property which he has purchased. I consider the Registry Act makes the law totally different to what it ever was before in regard to notice, and I agree with the doctrine that actual notice amounting to fraud is necessary to void the operation of the Registry Acts. If the Registry Act, or the provisions and objects of it, can be set aside to enable a party to get the benefit of a conveyance for an easement, he may obtain such a benefit as would destroy the value of the property to the party purchasing it to a large extent. That would, therefore, defeat the object that the legislature had in view. The legislature, in view of passing the Registry Acts, requires everybody to register any conveyance he

(1) Vol. 24 Weekly Reporter, p. 106.

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receives with regard to land and makes it void as regards the next subsequent purchaser unless it is registered. That being the case, a party purchasing is presumed to know what the law is, and to act upon it so as to protect his own rights, and when a person searches the registry office and finds no conveyance, he has a right to assume that there is no conveyance which will interfere with the right of the party to convey him the title that he has purchased. I therefore, *in petto*, give my views as to what I think the registry laws are applicable to, at least in *Nova Scotia*, and I agree with my brethren that this appeal should be allowed.

GWYNNE, J.:

The declaration in this action, which is one of tort alleged to have been committed on lands of the plaintiff in his own possession and in the possession of his tenants, the reversion being in him at the time of the committal of the alleged wrongs, contains five counts; but as the whole substance of the tort complained of and relied upon is contained in the second count it will be sufficient to set out that count, wherein the plaintiff complains:

That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and still is lawfully possessed of a certain messuage and building situate on *Hollis* street, in the city of *Halifax*, that the defendant wrongfully and injuriously erected and kept erected a building situate on *Hollis* street aforesaid, contiguous and adjoining to the said messuage and building of the plaintiff, and used and continues to use the wall of the plaintiff's said building as and for a wall for the defendant's said building, and pierced holes in said wall, and inserted and kept inserted therein beams and timbers and other materials of defendant's said building, and pierced holes in the chimney of plaintiff's said building and inserted and kept inserted in said chimney divers stove pipes and fire places, and filled up the said chimney with soot from defendant's said building, and removed the cornice from plaintiff's said building, and also wrongfully and injuriously put, placed and built a certain wall and projection in connection therewith over

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and upon the said building and wall of the plaintiff, and the same so put, placed and built as aforesaid, kept and continued for a long space of time, and by reason of the premises the said roof and wall of the plaintiff's building were weakened and injured, and the plaintiff was and is prevented from building upwards and adding to his said wall and building, and by reason of the premises the plaintiff has been greatly annoyed and incommoded in the use, possession and enjoyment of his said messuage and building, and the same have become thereby and are greatly damaged, deteriorated and lessened in value.

To the whole declaration the defendant pleads several pleas. It is only, however, necessary to set out three, namely:—

Secondly. That the plaintiff was not possessed as alleged.

Seventhly. A special plea of a grant under seal of one *Samuel Caldwell*, while he was owner in fee of the said premises now of the plaintiff, and before the plaintiff had any estate therein, to the defendant to do the several acts complained of, and the doing of the several acts under and in virtue of such grant while the said *Samuel Caldwell* continued so seized, and that the alleged trespasses were and are the enjoyment by the defendants of the rights and easements so granted by the said *Samuel Caldwell*. And eighthly:

For an eighth plea to said declaration and for a defence upon equitable grounds, the defendant says that long before the plaintiff became possessed of or entitled to the said lands and premises in said declaration set forth one, *Samuel Caldwell* was the owner thereof and of the said building known as the *Victoria* Block, then and ever since standing thereon, and the south wall of said building was the northern boundary of a lot of land belonging to the defendant, and of which he then was and and ever since has been the owner in fee; that the defendant being desirous of pulling down the building then upon his said lot and erecting thereon a new and more valuable building, and also being desirous of using the south end wall of said *Victoria* Block as the north end wall of his said new building, as far as the same could be made available for such purposes, entered into an agreement under seal with the said *Samuel Caldwell* on or about the 22nd day of August, 1859, which agreement is in the words following, that is to say:

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Memorandum of agreement made the 22nd day of August, in the year of our Lord one thousand eight hundred and fifty-nine, between *Samuel Caldwell*, of *Halifax*, Esquire, of the one part, and *James Hunter*, of the same place, gas-fitter, of the other part. Whereas the said *James Hunter* lately purchased the lot of land, dwelling house and premises situate on *Hollis* street, in the city of *Halifax*, adjoining the south end of the brick building called *Victoria* Block, lately in the occupation and possession of *Henry Pryer*, esquire, as an office, and by his tenants as a dwelling house, and the said *James Hunter* being about to pull down the said dwelling house and to erect on the site thereof a brick building with an iron front and four stories high, suitable for his trade and business, and whereas the said *Samuel Caldwell*, as the owner of the said *Victoria* Block, hath consented and agreed with the said *James Hunter*, for the consideration hereinafter mentioned, to permit and allow the said *James Hunter*, his contractors, builders and workmen to make use of the south end or wall of the said *Victoria* building in the erection of the said new store so as to save to the said *James Hunter* the expense of a new wall or end to his new building about to be erected. Now this agreement witnesseth that the said *Samuel Caldwell*, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said *James Hunter*, his executors, administrators and assigns in manner following, that is to say: That he the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency to him in hand paid by the said *James Hunter*, he the said *Samuel Caldwell* hereby agrees to permit and allow the said *James Hunter*, his contractors, builders and workmen, to make use of the south end or wall of the brick building or *Victoria* block in every way that may be requisite and necessary to save the said *James Hunter* the expense of a new north wall to his new building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the south end wall of the *Victoria* block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building. And as it is intended that the new building shall be higher than the *Victoria* block, it is further agreed that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said *Victoria* block and continue the same upwards to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove pipes and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary and to make good the new wall on the

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top of the present finish or cornice of the *Victoria* block and round the chimney to prevent leakage, and further that in the erection of the said new building as little damage as possible shall be done to the south wall of the *Victoria* building, and that all holes or any other damage shall be filled up and made good by the said *James Hunter*.

In witness whereof the said parties have hereunto their hands and seals subscribed and set the day and year first above written.

Signed, *JAMES HUNTER.* (L.S.)
SAMUEL CALDWELL. (L.S.)

Signed, Sealed and Delivered
in the presence of
WM. ROBINSON.

And thereupon the said *James Hunter*, having paid the sum mentioned in the said agreement as the consideration for the rights and easements thereby granted, pulled down the building then standing upon his said lot, and at a very large expense erected a new and valuable building thereon adjoining said *Victoria* block, and made use of the said south end wall of *Victoria* block in every way that was requisite and necessary so as to save the defendant the expense of a new north wall to his said building, and did pierce the end of the said wall to allow the ends of the timbers and joists of said new building to be inserted therein, and the same were inserted therein, and the defendant used the said south wall of *Victoria* block in all respects to the depth and height of said new building as if the defendant had built a new north wall for his building, and did raise a new wall on the top of the south cornice of the said *Victoria* block and continued the same upwards to the full height and depth of defendant's said new building, and did cut holes in the chimney of said *Victoria* block for the stove pipes of and from said building of defendant, and did insert defendant's stove pipes therein and has ever since used and enjoyed said south wall of said *Victoria* block and said chimney and said cornice, for the purpose and in the manner aforesaid, and his enjoyment and use thereof has been visible, public and notorious, and he was in the enjoyment thereof when the plaintiff became the owner of or entitled to the reversion in the said land and premises and said *Victoria* block, and the same was known to the plaintiff, and he had notice of the foregoing facts and circumstances when he became the owner thereof; and he took the same subject to said easements and said right enjoyed by defendant as aforesaid; and said alleged trespasses were the said use and enjoyment thereof by defendant.

To these pleas the defendant replies :—

1st. By joining issue upon all of them—and further, 4th, as to the 7th plea, that the deed therein alleged was not the deed of the said *Samuel Caldwell.*

5th. As to the said 7th plea, that there was and is no such deed and grant as is set up in said plea, and the alleged rights, easements and privileges were not, nor was any of them granted to the said defendant as alleged, and the plaintiff, when he become owner of the said building, close and messuage, had no notice of such rights, easements and privileges, and did not become such owner subject thereto as alleged.

6th. As to said 7th plea, that the alleged deed was a license and not otherwise, and the same was revoked before the plaintiff became such owner of said building, land, messuage and close—before the alleged grievances and trespasses, as the defendant well knew.

8th. As to the said 8th plea—that the agreement set out in said plea is not the agreement of the said *Samuel Caldwell,* and he did not agree as alleged.

9th. As to 8th plea—that he denies each and every allegation and statement contained in said plea.

10th. And for tenth replication—as to the said 8th plea, and for a defence upon equitable grounds, the plaintiff says that the sum mentioned in the said agreement was not nor was any part thereof paid as alleged, and the said agreement and license thereby given were rescinded, cancelled and revoked before the grievance and trespasses set out in the plaintiff's declaration, as the defendant well knew.

11th. And for an eleventh replication the plaintiff as to the said 8th plea, and for a defence upon equitable grounds, says that the plaintiff when he became the owner of the said land and premises, and the said *Victoria* block, or entitled to said reversion as set out in said declaration, had no notice or knowledge of the alleged agreement, or said alleged facts and circum-

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stances set out in said plea, and did not take the said lands and premises and said *Victoria* block subject to said alleged easements and rights as alleged in said plea, and purchased and acquired, and became owner of the said land free from any of the said alleged easements and rights.

The plaintiff also replied, by way of new assignment, but it is unnecessary to refer to this, because it was not suggested at the trial that the plaintiff was proceeding for, or that the defendant had done anything not mentioned in the deeds pleaded in the 7th and 8th pleas.

The plaintiff thus joined issue on the pleas of not guilty and not possessed, and also upon all the material matters alleged in the 7th and 8th pleas.

The 4th replication, which is to the 7th plea, and which denies that the deed therein pleaded as the deed of *Samuel Cadwell* is his deed, is but a repetition of the denial of one of the material matters alleged in the 7th plea and necessary to be proved in order to sustain that plea, and was therefore a matter already put in issue by the joinder in issue.

The 5th replication as to that part of it which denies that there was, or is such a deed as that set out in the 7th plea, is but another mode of repeating the 4th replication, and as to the residue is either a denial of facts not material to the establishment of the substance of the plea, or which if material had already been put in issue by the joinder in issue, or it is matter relied upon as a conclusion of law, namely, that the plaintiff did not become owner of the premises in question, subject, as had been alleged in the plea to the terms of that deed, because he had not, as he alleges he had not, notice of the easements and rights mentioned in the plea having been granted as is therein alleged when he became owner of the premises consisting of the *Victoria* building.

The 8th replication is open to the same observations as to the 8th plea as is the 4th replication as to the 7th plea.

The ninth replication is a precise repetition in a different form, of the joinder in issue. The tenth replication is an attempt to set up as a matter of fact the non-payment of the sum of money which is in the deed set out in the eighth plea, admitted under the hand and seal of *Samuel Caldwell* to have been paid in hand; and to offer as a point of law that thereby, that is by such alleged non-payment, the deed set out in the plea became rescinded, cancelled and revoked before ever the defendant did the acts complained of.

The eleventh replication, while admitting the execution of the deed set out in the eighth plea, sets up the claim that in point of law or equity the plaintiff, when he acquired and became owner of the *Victoria* building, did so free from the easements and rights mentioned in the deed set out in the plea, for the reason that, as he alleges, he had no notice or knowledge of the agreement so set out in the eighth plea when he purchased.

The appeal case brought before us does not show what course the defendant adopted in relation to the above fifth, tenth and eleventh replications. The case was argued as if he had joined issue thereon, and in so far as the merits of the case can be affected we may assume this to have been done.

The case was brought down for trial before a judge without a jury, and, briefly, it may be said that the acts complained of appeared to have been all committed in the years 1859 and 1860, and in the manner and under the authority of the deed set out in the eighth plea. It was also proved that the £75 in the deed mentioned was paid to one *Nash*, at whose request *Caldwell*, as he himself testified, executed the deed of the 22nd August, 1859. That *Nash* was the person at that time bene-

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ficially interested in the premises in question would appear from the fact that by deed dated the 15th July, 1862, *Caldwell*, for the expressed consideration of five shillings, conveyed the premises under the description of "The *Victoria* Buildings" to *Nash* in fee. It was further proved that by deed dated the 15th July, 1863, registered the 1st August, 1863, *Nash* conveyed the premises by the same description to one *Forman* and that *Forman*, by deed dated the 26th of July and registered the 27th July, 1870, conveyed the same premises with another lot of land to the president, directors and company of the Bank of *Nova Scotia* in trust to sell the same, and to apply the proceeds in liquidation of a debt due by *Forman* to the bank. It was further proved that the deed of the 22nd August, 1859, was registered on the 20th May, 1871, and that by deed dated the 1st November, 1872, and registered the 20th January, 1873, the Bank of *Nova Scotia* conveyed the premises in question to the plaintiff in fee under a special description concluding as follows: "The property now in description being known as Victoria Buildings."

The learned Chief Justice of the Supreme Court of *Nova Scotia*, before whom the case was tried, rendered a verdict for the plaintiff, subject to the opinion of the court upon the facts and law, which verdict the court in term, by a judgment delivered by the learned Chief Justice himself, set aside and entered for the defendant, and issued a rule for judgment for the defendant thereon. It is from this judgment and rule that the plaintiff has appealed.

Now, from the above statement of the pleadings, it is obvious that, inasmuch as it appeared that all the acts complained of were committed in 1859 and 1860, when *Caldwell* was seized in fee in possession of the premises now owned by the plaintiff, and twelve years before

the plaintiff had any estate or interest therein, the continuing existence of a house so erected while *Caldwell* was seized in fee could not give to the plaintiff any cause of action of the nature of the present one which is in trespass. The issue joined upon the plea of not possessed raised directly the question whether the plaintiff was possessed of the Victoria building at the time the defendant did the acts complained of, and this issue, upon the evidence, could be found only in favor of the defendant, and is conclusive against the plaintiff's right to recover upon this record. It was suggested that under the doctrine of relation, the plaintiff, although he became entitled only in November, 1872, twelve years after the complete erection of the defendant's house, which the plaintiff desires now to have pulled down, can recover in this action as for a trespass committed before he became entitled, being continued after, but that doctrine of relation applies only where the original act was a trespass, the continuance of which is said to constitute a continuing trespass; it has never, that I am aware of, been applied so as to make an act, perfectly legal when completely executed, acquire by mere continuance the character of a trespass committed against a person, who, at the time of the completion of the act, had no estate or interest whatever in the land upon which the act was done, but who subsequently acquires the land while the thing so done remains upon it.

It was suggested that the defendant not having withdrawn his house from the support of the south wall of the *Victoria* building, upon plaintiff's notice to him to do so after the plaintiff's purchase, constituted an act of trespass sufficient to support this action, but the answer to that is obvious, namely, that nonfeasance never can in itself constitute an act of trespass (1). Then as to the 7th and 8th pleas—these

(1) Bullen & Leake, 416.

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pleas respectively set up a good and sufficient grant at common law executed by the owner in fee of the *Victoria* building, under his hand and seal, granting to the defendant the easement, right and privilege to do the several acts now complained of; and the pleas allege the complete performance of those acts by the erection of the defendant's house under and in pursuance of the provisions of the deed granting the easement. These pleas, if true, show a complete defence in law to the plaintiff's action, and the facts pleaded in them have neither been disputed on the record nor disproved; in fact, on the contrary, they have been admitted upon the record and proved also to be true in fact in every particular. They have been admitted upon the record by the replications thereto, which allege by way of answer to the facts pleaded in the defendant's plea, that the plaintiff, when he purchased and became owner of the premises in question called the *Victoria* building, had no notice of the facts relied upon in the pleas. Now, as to the mere matter of fact involved in the issue joined upon this replication, it sufficiently appears that the plaintiff had full opportunity of observing the position and precise condition of that particular thing which he was purchasing under the designation of "the *Victoria* buildings," and I must say that in my judgment it would be competent and proper for a jury, or a judge acting as a jury, to apply to the determination of that issue the rule laid down in *Allen* v. *Seckham* (1), namely, that where one purchases property where a visible state of things exists, which could not legally exist without the property being subject to some burden, he should be taken to have notice of the extent and nature of that burden.

Common sense does not, in my judgment, permit a doubt to exist, that the erection of the south wall of the

(1) 11 Chy. D. 796.

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Victoria building (which building as it then stood appears to me to have been what the plaintiff was purchasing,) above the roof of that building to the height of another story in defendant's house by which the defendant's house exceeded the *Victoria* building in height, and which south wall so raised supported the roof of the defendants house, constituted such a visible state of things that no intending purchaser seeing the building at all, could fail to see; and such a state of things should have conveyed, and should have been held to have conveyed, to the mind of the intending purchaser, when purchasing, full and actual notice and knowledge, that the defendant was in the actual visible enjoyment of an easement in the south wall of the house the plaintiff was about purchasing for the support of the roof of the defendants house; and that he had such notice and knowledge is in substance and effect the finding of the judges of the court below acting as jurors upon this question; and they would, in my judgment, have been justified in finding, and should have found, as a mixed proposition of law and fact, that what the plaintiff contracted to purchase under the designation of the "*Victoria* buildings," and what was in fact conveyed to him by the terms of his deed, namely, "the property now in description being known as *Victoria* buildings" was that building, just as it then stood, with its south wall constituting the support of the adjoining house in the row just as if the description had been the building known as No. 2 in a named row of buildings erected upon the east side of *Hollis* street; but, wholly apart from these considerations, upon what principle could the plaintiff's ignorance of acts done by the defendant twelve years previously under a legal common law grant, executed by the owner in fee of the premises upon which the acts were done, have the effect of attaching to the continuance of the house so erected the

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character of a trespass on the plaintiff's possession upon his acquiring title by purchase of the premises upon which the acts so authorized were done? Such a replication plainly admits the grant as pleaded, and that the acts were done, and in pursuance thereof, and offers no answer in law to the defendant's pleas. If such ignorance as is pleaded would give to the plaintiff any *locus standi* in equity entitling him to consider the defendant's house, so erected 12 years previously to the plaintiff's purchase, a nuisance which, upon purchasing without notice of defendant's right to do the acts complained of at the time they were done, the plaintiff could cause to be abated or enjoined against, then the replication is bad as a departure from the legal cause of action stated in the declaration, and can entitle the plaintiff to no relief upon this record. Such an equity, if such exist, must be stated on the record with a full statement of the facts which give rise to the equity expanded upon a bill in equity (1).

In the argument before us the contention of the learned counsel for the plaintiff was that by reason of the *Nova Scotia* Registry Act, section 19 of chapter 79 of the revised statutes, fourth series, the deed of the 22nd August, 1859, although registered on the 20th May, 1871, eighteen months before the plaintiff acquired any interest in the premises in question, was void as against him, and that for this reason this action could be maintained. The learned counsel for the defendant objected that the record opened no such point, and upon the following day expressed his willingness to withdraw that objection, and that the case should be considered as if that point had been raised by the pleadings.

For my own part I must say that in my opinion no

(1) *Thames Iron Works Co.* v. *R. Mail S. Packet Co.*, 13 C. B. N. S. 358.

court should in any case accede to any such suggestion, although consented to by counsel, unless the amendment be, in fact, made at the time, so that the argument may be proceeded with in view of the new pleadings, and the court be placed in the position of calling for an argument in support of the sufficiency of the pleadings in point of law, if such should appear doubtful, and be also in the position of being able to see before the close of the argument whether any new issue in fact raised by the added pleadings requires further investigation before a jury; for in my opinion this court should not, if it has the power, allow any new pleading to be put upon the record which is not framed in such a manner as to accord with, and be supported by, the evidence already given, and to be a good and sufficient answer in law to the pleas pleaded by the defendant in bar of the plaintiff's action; for so long as the defendant's seventh and eighth pleas remain unanswered the defendant must recover upon this record, as indeed he must with the plea of not possessed proved and established beyond dispute in his favor.

Now this was not done in this case, but the argument was proceeded with and was closed upon the record as it came up to us from the court below; but ten days after the close of that argument the plaintiff appears to have filed with the registrar of this court a replication, as follows:—

"And for a further replication to the defendant's seventh plea the plaintiff says that the alleged deed or grant from said *Caldwell* to the defendant was not recorded in the registry of deeds until the year 1871, and that said *Caldwell* had long previously to said recording, to wit, in the year 1862, conveyed the lands and building now of the plaintiff and referred to in the plaintiff's declaration to one *Nash*, who had recorded his deed thereof, and the said *Nash* had sold and conveyed the

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said land and building to one *Forman*, who was a *bonâ fide* purchaser thereof, for value, without notice of the said deed or grant, and the said *Forman* had sold and conveyed the said land and building to the said Bank of *Nova Scotia*, who was a *bonâ fide* purchaser thereof, for value, without notice of said deed or grant, and who also had recorded the deed thereof to the said bank, and all the said conveyances and sales mentioned herein had been made, and all the deeds mentioned herein were recorded in the registry for the county of *Halifax*, in which county the said lands and building are situate, prior to the recording of the deed or grant set up in said seventh plea."

At the foot of this replication is added a note to the effect following :—

"The same matter is to be considered as replied to "the eighth plea in addition to the replications already "pleaded and as a part of such replications."

I stop not now to enquire whether the brevity which is so conspicuous in this mode of replying to the eighth plea has so much merit in it as to justify us in adopting this novel and unprecedented form upon a document which is intended to be preserved as a record of the issues joined between the parties upon which the court pronounces judgment in favor of one or other of the parties, and which, being so preserved, might be regarded as establishing a precedent for this concise method of pleading to be followed in other cases. There appear to me to be matters of still graver importance to be considered arising out of the replication which is set out at large to the seventh plea and the rejoinder thereto, and which should lead us to the conclusion not to allow these pleadings to be now added to the record.

And firstly, as to the substance of the replication, it is to be observed that it admits everything averred in the

seventh plea, namely, that all the acts complained of by the plaintiff in his declaration as wrongs and trespasses committed upon his property and his possession, were done and legally completed by the defendant before the plaintiff had any estate whatever in the premises, and were so legally done under in pursuance of the provisions of a good and sufficient grant executed under the hand and seal of the then owner in fee of the premises in question, and while he continued to be such owner, and that the alleged acts which the plaintiff complains of as trespasses consist merely in the continuance of the enjoyment by the defendant of the easement so granted. To avoid this confession the replication sets up the registry of a deed for value executed to one *Forman* by one *Nash*, who may be said to have claimed title to the premises in question by deed, not for value, from the defendant's grantor, and who was a party privy to the deed executed to the defendant, and who received the consideration therefor, and the registry also of a deed for value executed by *Forman* to the Bank of *Nova Scotia* before the registry by the defendant of the deed relied upon by him in his seventh plea, which deed, however, is admitted to have been registered long before the plaintiff purchased, and the replication adds that neither *Forman* nor the bank at the time of their respective purchases had any notice of the deed or grant relied on by the defendant. And if we are to consider the replication to be upon the record as pleaded to the eighth plea (notwithstanding the peculiarity in the form of pleading it), then it admits, in addition to the above, that the plaintiff when he purchased had notice of the grant to the defendant, and of his having done all the acts (complained of as trespasses) under and in pursuance of the terms of such grant. Now, it being admitted that the acts complained of, when done, were legally done in virtue of a good and sufficient deed authorizing them

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to be done, assuming for the present the contention of the plaintiff to be well founded, that the registry of the deeds to *Forman* and the bank of *Nova Scotia* before the registry of the deed of grant to the defendant deprived the latter of all right to continue any longer to avail himself of the easement granted to him by his prior legal grant completely executed though it was, still the plaintiff's right to recover in this action would not be advanced, nor would the defendant's right to have judgment in his favor upon the seventh and eighth pleas, as also upon his plea of not possessed, be at all prejudiced, for the reasons I have already before stated, namely, that the mere continuance of an act perfectly legal when completely executed cannot become an act of trespass committed against a person, a perfect stranger to the possession, and the title, at the time the acts were completely executed, upon his acquiring title to the premises with the thing so done remaining upon them; and that the nonfeasance of the defendant in not acceding to the plaintiff's demand to remove his the defendant's, house from continuing to rest upon the south wall of the *Victoria* building, after the plaintiff's purchase of that building, cannot constitute an act of trespass.

The plaintiff, in virtue of the prior registry of the deeds to *Forman* and the bank, in priority of title with whom the plaintiff claims, may perhaps, I do not say it does, but it may perhaps give to the plaintiff a right to file a bill in equity to attain the object sought to be attained by this action of trespass, but in face of the matters abundantly proved, and indeed admitted on the record, the plaintiff cannot sustain the present action. When such a bill shall be filed, it will, in my opinion, be time enough to consider what effect (if any) the registry laws of *Nova Scotia* have upon the facts appearing in the present case.

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In the view which I take it is quite beside any question which is or can be raised in the present action to inquire whether a deed of the nature of that of the 22nd August, 1859, granting only an easement of the character therein described, and which does not profess to be, and never was intended to be, a deed of land, is of such a nature as to be avoided by non-registry within the provisions of sec. 19 of ch. 70 of the Revised Statutes of *Nova Scotia*, 4th series, which enacts that—

> Deeds or mortgages of lands, duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such lands.

Besides joining issue on the plaintiff's replication above added, the defendant for a further rejoinder to said added replication says, that when said lot of land and premises of plaintiff were conveyed to the several grantees in said replication mentioned, the defendant had done and performed the several acts set out in the eighth plea under and by virtue of said deed, grant or agreement from said *Samuel Caldwell* in said plea referred to and set forth, and which are the alleged grievances, and the same were visible and apparent to the plaintiff and said grantees before and at the time when they became entitled to said property, and they were put upon inquiry and had notice of said privileges, easements and rights acquired by defendant in and under said agreement, deed or grant of said *Caldwell* in over and upon said land and property of the plaintiff.

Now, if this rejoinder had stopped with the averment that the acts complained of were all completely done and performed before any of the grantees mentioned in the replication had purchased, it would, in my opinion, have afforded a complete answer to the replication as relying upon the position asserted in the plea, that acts so perfected could not be treated by the

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plaintiff as trespasses committed to his possession after his purchase; but the defendant proceeds to aver, not only that the same were visible and apparent to the several grantees before they respectively purchased, but that they had notice of the privileges, easements and rights required by the defendant in and under said agreement, deed or grant of said *Caldwell* in, over and upon said land and property of the plaintiff.

The plaintiff does not appear to have joined issue upon this rejoinder, so that either the added pleadings have resulted in no issue, and for that reason should not be allowed to be put upon the record, or we must add the joinder for the plaintiff, and in the latter case we have an issue joined upon a material fact as to which no evidence whatever has yet been given. Now, what right has the court to pass judgment in respect of a matter of fact when no issue joined between the parties in respect of such matter has been found in favor of either party by the constituted tribunal for that purpose? What right has this court to constitute itself a jury for the purpose of finding the fact? or if it has such right, by what law is it enabled to determine the fact so in issue, without any evidence being offered or any opportunity being given to the parties to offer evidence upon the subject? For, whether *Forman* or the bank had or had not notice of the grant of the easement to the defendant, which is affirmed upon one side and denied upon the other, there is not a particle of evidence as yet given. I confess I am unable to see upon what principle we can countenance a proceeding so utterly novel and unprecedented.

For these reasons, I am of opinion, that we are not justified in permitting the record sent to us to be altered in the manner which is proposed, and that our judgment should be upon the record as sent to us. At the same time, I must say, that even as altered, I cannot see any

issue joined between the parties upon which it would be possible for us to order a verdict and judgment in favor of the plaintiff to be entered, which would be supported by the evidence which has been given. The same remarks apply to the other rejoinders which, in in their form, adopt the looseness of the plaintiff in his manner of replying to the eighth plea. Upon the whole, I can see nothing whatever to justify a verdict in favor of the plaintiff either upon the record as sent up to us, or upon it if altered in the manner proposed.

This action, as framed, cannot, in my opinion, be sustained, for the reasons given, and I cannot see anything of a meritorious character in the plaintiff's case which would justify us in allowing any alteration in the record to be made, if any could be made, which would entitle the plaintiff to succeed in compelling the defendant to pull down his house, and in so perpetrating what, as it appears to me, would be a great injustice and wrong to the defendant, and thereby deprive the defendant of the full defence of title by prescription which he would have to any future attempt by the plaintiff to perpetrate so great a wrong.

I am of opinion, therefore, that the only judgment we should give upon this record is that the rule granted by the court below to set aside the verdict for the plaintiff and to enter a verdict and judgment thereon for the defendant should be sustained, and that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *Wallace Graham.*

Solicitor for respondent: *Peter Lynch.*

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*Oct. 25, 26, 27.
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*March 28.

WILLIAM H. CREIGHTON, Assignee of LEWIS P. FAIRBANKS, under the Insolvent Act of 1875..... } APPELLANT.

vs.

SAMUEL CHITTICK, JOSEPH CHITTICK AND JOHNSTON CHITTICK, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insolvent Act, 1875—*Trader*—*Pleading.*

This was an appeal from a judgment of the Supreme Court of *Nova Scotia*, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by *C.* as assignee of *L. P. F.*, under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the *Shubenacadie* Canal property, and for conversion by *C. et al.* to their own use of the ice taken off the lakes through which that canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of *F.* Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said plaintiff was not, nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule *nisi* for a new trial to be granted accordingly, and filed.

The rule was taken out as follows:—"On reading the minutes of the learned Judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent subject to the opinion of the court, with

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

power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs, and a new trial granted herein."

This rule was made absolute in the following terms:—"On argument etc., it is ordered that the rule *nisi* be made absolute with costs and judgment entered for the defendants against the plaintiff with costs." Thereupon plaintiff appealed to the Supreme Court of *Canada*, and it was

Held (*Henry*, J., dissenting), that by traversing the allegation of plaintiff being assignee, the defendants put in issue the fact implied in the averment, that the plaintiff was assignee in insolvency, and that *F.* was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that *F.* bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue.

Per *Gwynne*, J: Assuming *F.* to be a trader still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the court to render a verdict for plaintiff or defendant according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as judgment of the court below in favor of the defendants was substantially correct to sustain it; and it having been objected that as the rule *nisi* asked for a new trial the rule absolute in favor of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule *nisi*, having, as it did, recited the agreement at *nisi prius*, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of *liberum tenementum*, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants.

The facts and pleadings sufficiently appear in the head note and in the judgment of Mr. Justice *Gwynne*, hereinafter given.

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Mr. *Thompson*, Q. C., for appellant:—

The verdict in this case was set aside upon the ground that the insolvent was not a trader, and therefore his assignee could not recover in an action of trespass. I will first argue this point and then discuss the merits.

The certificate from the officer of the court was at least *primâ facie* evidence of *Fairbanks* being an insolvent and having regularly and properly assigned, and of the plaintiff's appointment, and of the regularity of all proceedings antecedent to the certificate (1).

Moreover the denial of *Fairbanks* being a trader should have been made explicitly in the pleas, especially in view of the following section, 152 of chapter 94, revised statutes of *N. S.*, 4th series: "The general issue and all general pleas are abolished, and every pleading shall specify particularly and concisely the facts intended to be denied." *Church-wardens* v. *Vaughan* (2).

It was not necessary, as the Supreme Court of *N. S.* seemed to adjudge it to be, that in order to make the insolvent a trader within the meaning of the Act, he should have assets and books which had resulted from his trading business. Ex-parte *Dewdney* (3); *Doe* v. *Laurance* (4); *Baillie* v. *Grant* (5).

On the question of fact as to *Fairbanks* having been a trader, there was some evidence at least for the plaintiff and none for the defendants. The assignee, in his evidence, says: "*Fairbanks* bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron." The Supreme Court said: "We all do that when necessary," and thence concluded that *Fairbanks* was not a trader (6).

The verdict in the plaintiff's favor, therefore, should

(1) Insol. Act of 1875, sec. 144.
(2) 2 Russ. & Ches. 443.
(3) 15 Ves. 495.
(4) 2 C. & P. 134.
(5) 9 Bing. 121, 6 Bligh 459, 2 Rose, 428.
(6) Insol. Act of 1875, sec. 1.

not have been disturbed, and was a finding of that issue in plaintiff's favor.

The learned counsel then argued at length on the merits of the case, claiming that the plaintiff showed a complete title to the *locus*, and proved the trespasses thereon, but the Supreme Court of *Canada* having affirmed the judgment on the ground that *Fairbanks* was not a trader, this branch of the argument is omitted.

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

It was upon a consent of the parties in the case that the whole matter was referred to the court *in banc*. It was "agreed that a verdict shall be entered for the plaintiff, with $10 damages, subject to the opinion of the court, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to enter judgment for or against the defendants, with costs." Now, the case was heard before the full court, and I contend that the court has as a matter of fact decided that respondent was not a trader, and if this judgment upon this matter of fact can be sustained by any evidence, this court cannot interfere. The court below was put by consent of parties in the position of a jury. What was put in by plaintiff was only *primâ facie* evidence, and in order to rebut it, we cross-examined the insolvent, and proved that his insolvency had only relation to lands. I contend that as the assets and liabilities of *Fairbanks* had reference entirely to this canal property, unless he can be considered as a trader in relation to that, he was not subject to the provisions of the act.

None of the trades, callings, or employments specified in section 1 of the Insolvent Act of 1875, include that alleged to have been followed by *Fairbanks*, nor was his a trade, calling or employment like that of any of them; besides, the property in question was not of a

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character to admit of its being made the subject of trade; it could be serviceable as a canal property in its entirety only. See *Clarke's* Insolvent Law (1). In *re Cleland* (2); *Stuart* v. *Sloper* (3). It is urged also that we did not raise the issue of plaintiff not being a trader. I contend that by denying title in plaintiff, the burthen of proof was on them. See *McMahon* v. *McArdle* (4).

[The learned counsel then argued that the title to the land in question was not in plaintiff.]

RITCHIE, C. J.:—

These were actions brought by the plaintiff, as assignee under the Insolvent Act of 1875, of *Lewis P. Fairbanks*, an insolvent, to recover damages for an alleged breaking and entering certain lands, and lands covered with water of the plaintiff, as such assignee, digging the soil thereof, throwing earth, &c., thereon, and cutting and carrying away the ice formed on the said land covered with water, the property of plaintiff, as such assignee, and converting the same. The defendants pleaded several pleas, *inter alia*, "that the said *Wm. H. Creighton* was not, nor is, such assignee as alleged." An objection was taken at the trial, and at the argument, that *Fairbanks* was not shown to have been a trader, and that plaintiff, as assignee, took nothing by the assignment, purporting to be made by *Fairbanks*, under the Insolvent Act of 1875, unless he was a trader within the meaning of that Act. The Supreme Court of *Nova Scotia* were of opinion that *Fairbanks* was not shown to have been a trader within the meaning of the Act, and therefore plaintiff could not succeed in the action. From this judgment the present appeal is taken. The plaintiff offered no evidence of the insolvent having been a

(1) P. 14 et seq.
(2) L. R. 2 Ch. 466.
(3) 3 Exch. 700.
(4) 33 U. C. Q. B. 252.

trader—the only evidence on the point was brought out by defendants' counsel on cross-examination of the plaintiff, and is as follows: *W. H. Creighton*, cross-examined:—

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business, nor cash book. His books had reference only to the Canal property; other lands of his had been wound up. I gave no bond for this estate; it was not required.

The plaintiff was not re-examined to explain, if he could, favorably to himself, that the insolvent had bought and sold, and whether as a trader or not, or what the nature of his dealings were with the insolvent. There is not the slightest evidence that *Fairbanks* purchased articles of merchandise for the purpose of selling them again at a profit, or that he bought the articles referred to with any intention of selling again with a view to profit, or that he was considered a trader by any person who knew or dealt with him.

Lewis P. Fairbanks, the insolvent, was examined, and he does not appear to have been interrogated, or to have said one word, as to having been a trader, or as to his dealings in any way, nor do any other witnesses. The burthen was clearly on the plaintiff under the pleadings to establish that the insolvent was a trader. As it appears by the evidence that the insolvent "had no debts or assets of any kind;" "that his business had relation solely to land;" "that he handed the plaintiff, his assignee, no books of business, nor cash book; that the books he had had reference only to the canal property;" and "other lands of his had been wound up;" and as the objection was taken at the trial that there was no proof that *Fairbanks* was a trader, and as *Fairbanks* himself was on the stand and examined, and if he had been a trader could have established that fact beyond

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all question, I think, so far from the fact of *Fairbanks* having been a trader having been proved, the Court below, had it been necessary, which it was not, would have been quite justified under the circumstances, and the fair inferences to draw therefrom, in coming to the conclusion that *Fairbanks* was not a trader.

The plaintiff in the court below, and also on the argument before this court, invoked the 144th section of the Insolvent Act of 1875, as establishing that the assignment itself was *primâ facie* evidence of the insolvent being a trader. This section enacts that :

> The deed of assignment and transfer shall be *primâ facie* evidence in all courts, whether civil or criminal, of such appointment (the appointment of the assignee), and of the regularity of all proceedings at the time thereof and antecedent thereto.

But this cannot possibly avail the plaintiff for two conclusive reasons. In the first place, whether the insolvent was a trader or not was not matter of procedure, and proceedings having been taken against him as a trader, the deed of assignment by sec. 144, is made *primâ facie* evidence only of the regularity of all such proceedings, but no evidence whatever of the insolvent having been a trader to justify such proceedings. If the statute, however, had the effect claimed for it, the deed is only made *primâ facie* evidence, and the evidence, in the case rebuts such *primâ facie* evidence and uncontroverted, unexplained and unanswered, established that the insolvent was not a trader, at any rate sufficiently so to overcome the *primâ facie* evidence of the deed; and there being no evidence of the insolvent having been a trader, and though the question was distinctly raised by the pleadings, and at the trial, and the plaintiff not having attempted to prove that he was, the circumstances before referred to and the fact that the plaintiff and the insolvent both were allowed to

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leave the witness stand without being questioned on this point—a matter peculiarly within their own knowledge—are conclusive to my mind that the buying and selling referred to by the plaintiff was not a buying and selling by the insolvent as a trader, and that his business transactions, which it is said by plaintiff were solely in relation to land, were not only no evidence whatever of a trading within the meaning of the Insolvent Act of 1875, but the whole evidence justifies the contrary inference, viz.:—that he was not a trader.

As the court below based their judgment on this point alone, as it is a perfect answer to plaintiff's case, and refrained from expressing any opinion on the other questions raised in the case, I feel I should be exceeding my appellate duties in discussing or determining questions not passed on by the court below, and not necessary for the determination of this appeal.

Had the rule *nisi* been taken out for entering judgment for the defendants, I think it should have been made absolute in those terms, but as the rule *nisi* taken out in the court below appears to have been only "to set aside the verdict with costs" and a new trial granted, it is admitted that, in accordance with the practice in *Nova Scotia*, that the court can only make the rule absolute to the extent asked in the rule *nisi*. I believe it is a rule that the court will never go beyond the rule *nisi* and grant more than is there asked for.

STRONG, J.:—

I think the rule absolute granted by the court below should be modified so as to make it a rule to enter a verdict for the defendants, and, subject to that alteration, the appeal should be dismissed with costs. By traversing the plaintiff's title as assignee the defendants put in issue the fact, implied in the averment that the

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plaintiff was assignee in insolvency, that *Fairbanks* was a trader within the meaning of the Insolvency Act of 1869 (1). This issue the plaintiff failed to prove. The only evidence of trading was that of the plaintiff himself, and was very brief and meagre; he says:

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash book. His books had reference only to the canal property; other lands of his had been wound up. I gave no bond for his estate; it was not required.

The assignment was a voluntary one, but it was in the form prescribed by the Act, and could have no operation to pass the legal estate in the lands in question unless the Act applied. By the 1st section of the Insolvency Act of 1869 it is enacted that it shall apply to traders only. It contains, however, no definition of a trader. The authorities on the Bankruptcy Acts and the description of traders contained in the English Bankruptcy Statutes of 1849 and 1869 show conclusively that the evidence in the present case was entirely insufficient to establish trading so as to bring the insolvent within the operation of the Act. Mr. *Robson* in his treatise on bankruptcy lays it down that buying and selling and dealing in land are insufficient to constitute a person a trader (2). Again the same writer (3) says:

In order to constitute a trading by buying and selling, or by buying and letting for hire, or the workmanship of goods and commodities, these occupations must be followed as a means of gaining a livelihood; one or two isolated transactions willnot do * * * Buying without selling, or letting for hire, at least without an intention to sell or to let for hire, or *vice versâ*, will not constitute a trading * * * So, also, the buying and selling ought to be in the general way of business and not in a qualified manner, or only for a special purpose.

The evidence does not establish that *Fairbanks* bought or

(1) In *McMahon* v. *McArdle*, 33 U. C. Q. B. 252.

(2) Robson on Bankruptcy, 2nd edit., p. 96.

(3) At p. 98.

sold in the course of any trade or business, or that he carried on any business, or got his livelihood by buying and selling in the way mentioned; it is consistent with the plaintiff's testimony that what he refers to were mere isolated transactions and not in the course of any general dealing. It is therefore insufficient to prove the affirmative of the issue which was on the plaintiff—that *Fairkanks* was subject to the operation of the Insolvency Act of 1869. The consequence is that the plaintiff has no title to sue, and a verdict should have been found at the trial for the defendants.

At the trial leave was reserved to move to enter a verdict for the defendants, at least such is the construction which I place on the note of the learned Chief Justice, which is as follows:

> The evidence being closed, both counsel decline addressing the judge, and it is agreed that a verdict shall be entered for the plaintiff with $10 damages, *subject to the opinion of the court*, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to *enter judgment* for or against the defendants * * * A rule *nisi* for a new trial to be granted accordingly and filed.

I read the words "enter judgment" in this minute as synonymous with "enter a verdict," for in no other way would they have any sense or meaning.

Then the rule *nisi* granted was, it is true, a rule *nisi* for a new trial, but it refers to this leave to move, and was granted in pursuance of it. I see, therefore, no reason why the court should not have made it absolute to enter a verdict, which was, no doubt, what was intended instead of judgment for the defendants, as is directed by the rule in its present form. The rule being, therefore, varied in the way I have indicated, will effect such a disposition of the case as the court and the parties contemplated by their consent at the trial, in the event which has occurred, of the court in *banc* being of

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opinion that the plaintiff failed to prove his case. The rule absolute should, therefore, be altered by substituting the word "verdict" for "judgment," and, subject to that variation, the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J.:—

Having ascertained that a majority of the court had decided to disallow the appeal in this case and to grant a new trial, solely on the ground that there was not sufficient evidence that the appellant was the assignee of *Fairbanks*, in which character he brought the action, without considering the merits of the action, I concluded it would serve no good purpose for me to do so, differing from them, as I do, on the point upon which their decision rests.

By the Practice Act in *Nova Scotia* the representative character of the assignee of a bankrupt is not in issue, unless specially pleaded, and sec. 144 of the Insolvent Act of 1875 provides that "deeds of assignment shall be *primâ facie* evidence in all courts, whether civil or criminal," *of the appointment of the assignee*, "and of the regularity of all proceedings at the time thereof and antecedent thereto." The assignment in this case furnished that *primâ facie* evidence. The words of the section "shall be *primâ facie* evidence of his appointment" to be of any service, must mean his regular and legal appointment to the same extent as the statutory provision, that letters of administration or probate of a will would be *primâ facie* evidence, except, perhaps, in suits as to land, of the death of the intestate or testator, and that the party died in the place over which the judge of probate had jurisdiction. To make the provision of any real value by the power of the words I have quoted

they must be construed to go to the length I have stated. The object was clearly to prevent the necessity of proving that the assignment was legally made in every case where a suit should be tried in respect of any asset of the estate, real or personal.

In the fifteenth and last plea of the respondent that character was denied. The onus of proof was therefore put upon plaintiff. I think there is sufficient evidence furnished by the assignment that *Fairbanks* was a trader. The assignment by him would be sufficient, I think, to vest in the appellant a right to property, so that he could maintain an action against a wrong doer. It was made to the appellant as interim assignee, and he was subsequently appointed assignee by the creditors of the estate. The assignment is in the form prescribed by the statute, 38 *Vic.*, ch. 16, under which it was made; and it vested in the assignee by virtue of the 15th sec. "all the right, power, title and interest," which the insolvent had in and to any real or personal property. It is said, however, that if he were not a trader within the terms of the statutes the assignment passed nothing. The uncertainty and generality of the assignment, as to the property intended to be conveyed, if in an ordinary deed, would, no doubt, render it void, but here we have a statutory provision supplying that defect and removing that objection—for that is certain which can be made certain. As between the insolvent and his assignee, the voluntary assignment is a binding transfer. The former, in the case of a sale of the property by the latter, would be estopped from saying he had not conveyed the title to his assignee. It was in my mind a sufficient transfer to have enabled the assignee to have recovered in an action the property from the bankrupt himself, and the latter would not be permitted to plead that at the time of the assignment he was not a trader. If he were not

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such, and that therefore the assignment was voidable, as I hold it only to have been, as respects creditors, one who did not adopt it, or a debtor of the insolvent whose debt was assigned, might challenge the legality of the assignment, but I don't think outside parties should be permitted to do so in the way contended for in this case. The creditors, at the meeting before mentioned, adopted the assignment by unanimously appointing the appellant assignee, and those who did so would be estopped from saying that he was not such assignee. The assignment was registered in the Insolvent Court and adopted, and all parties interested acknowledge it as correct and valid. Is it then for outside parties to impeach it in the way attempted here?

There is still another objection. The plea in question raises an issue which I think does not touch the question as to whether the insolvent was a trader or not. The words are "that the said *Wm. H. Creighton* was not nor is such assignee as alleged." Notwithstanding the authorities cited in the court below, I am of opinion that the plea is but a denial of the fact that he was *de facto* such assignee. It does not allege that *Fairbanks* was not a trader within the terms of the Insolvency Acts, and therefore that the assignment was void as being unauthorized. They are two separate and distinct issues requiring altogether different evidence to be adduced by the respondent It is one thing to deny the mere making of the instrument and another to allege circumstances that make it void or voidable as the case may be. In the one case the burden of proving the fact of the making of the instrument is thrown upon the party producing it, and although the affirmative of the issue in the other case is on the same party the proof is essentially different. By merely denying the making of the assignment the respondent cannot, therefore, by any rule of evidence that

I know, be permitted to throw the onus of proof on the other party, of proving that which is not denied. That doctrine is applicable to the plea in this case. The appellant should have been notified that it was intended to question the right of *Fairbanks* to make the assignment. The plea gives no such intimation, and that is the test applied by the rules of pleading. It should, in my opinion, have done so, and without that statement I think the issue raised was only as to the execution of the assignment.

If, however, the issue in question was raised by the plea the evidence in respect of it was all on one side, that of the appellant; he was examined as a witness and amongst other things said that he was the official assignee of the estate and produced the assignment which was put in evidence. He said further:—

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash books. His books had reference only to the Canal property; other lands of his had been wound up.

This evidence was given in reply to questions of the respondent's counsel and is all that was given by the witness or any other on that subject. Here then is a comprehensive statement that the bankrupt "bought and sold all sorts of things," and, no doubt in answer to a further request to name some of the articles he traded with, he replied "he bought oats and wood and iron," meaning clearly that the witness knew of his trading in those articles. It appears to me that is sufficient *primâ facie* evidence of trading of which the respondent's counsel by not going into a more critical examination would leave the impression that he felt satisfied; or, that further inquiries would lead to the fact being more fully and completely established.

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Suppose that evidence had formed part of the examination in chief, and that no cross-questions were asked as to it, how could it be said to be insufficient? Is it the less strong because it was given on the cross-examination of the witness?

It was contended that because the evidence was brought out in that way, the appellant should have given additional and more specific evidence, but I cannot adopt that proposition and know of no rule of evidence requiring it. The evidence was such that no judge would be justified in withdrawing it from the consideration of a jury, particularly when there was nothing in rebuttal of it; and I cannot feel justified in sending back the case upon such a point and one which leaves the merits untouched. It has been said that, because the insolvent had no assets, nor owed any debts in immediate relation to his trading, nor handed over any books relating thereto to the assignee, he could not have been a trader; but if while a trader he contracted debts not immediately connected with his trading—such as for the support of his family, or as security for another—that he had real and personal estate while he was such trader, but not the immediate result of his trading, the fact of his having neither assets nor owing debts connected with his trading, would not make him the less a trader, nor would the fact that he handed over no books of account of his trading transactions necessarily disqualify him to make an assignment to creditors for other debts contracted while he was a trader, merely because his trading operations, technically speaking, had been closed.

Section 1 of the act awards the benefit of it amongst others to "persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise in gross or by retail." The section excepts from the operation of the act farmers,

graziers, common laborers and workmen for hire, so that the operation of the act extended to all other classes and all were deemed traders who came within the provisions of the section.

I wish it to be distinctly understood that I do not hold that the evidence as to the bankrupt having been a trader was at all conclusive, or that it might not have been shewn under proper pleas that the debts he owed were incurred after he ceased to be a trader or were barred by the statute of limitations, but it was not alleged or shown that he ceased to be a trader before his assignment, nor that his debts were barred by the statute of limitations. I do not contend that such would not have been a good defence, but what I do hold is that, under the issue raised by the plea in question, the appellant was not bound to prove them, nor was he, I think, any more bound to prove further than he did that he was a trader.

The rule *nisi* in this case was for a new trial but the court appealed to gave a judgment for the defendant. I understand that at least a majority of this court feel that the judgment cannot be sustained and I am of that opinion. The court in *Nova Scotia* has no power to give a judgment in such a case. Our judgment should therefore be to set it aside with costs.

I think on all the grounds I have stated that the appeal should be allowed, the judgment below reversed, and judgment given for the appellant with costs.

TASCHEREAU, J., concurred with the Chief Justice.

GWYNNE, J.:

This is an action of trespass *qu. cl. fr.* wherein the plaintiff, as assignee of the estate and effects of *Lewis P. Fairbanks*, under the Insolvent Act of 1875, complains in his first count that the defendants broke and entered

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certain lands and close of the plaintiff, as such assignee, situate at *Dartmouth*, in the County of Halifax, described as follows, that is to say: "Certain land, and land covered with water, known as section number 2, of the *Shubenacadie Canal*, and forming the reservoir thereof and called "the first and second *Dartmouth* Lakes," &c.; and in his second count, that the defendants entered upon certain lands and lands covered with water of the plaintiff, as such assignee, situate at *Dartmouth* aforesaid, and described as in the said first count, and deposited thereon large quantities of stone, earth and rubbish, and made an embankment thereon, and erected buildings and fences thereon, and dug the soil thereof, and drove posts and stakes therein, and cut and carried away the ice formed on the said land covered with water and converted the same to their own use.

And in his third count the plaintiff complained that the defendants took and carried away and converted to their own use and deprived the plaintiff, as such assignee, of the use and possession of large quantities of ice, to wit: five thousand tons of ice, the property of the plaintiff, as such assignee.

There were also three other counts in the declaration, in the fourth of which the plaintiff complained of an entry by the defendants on the close and lands described in the first count, calling them the close and lands of *Lewis P. Fairbanks*. In the fifth count the plaintiff complained that the defendants broke and entered the close and lands described in the first count, but calling them the close and lands of *Lewis P. Fairbanks*, and committed therein similar trespasses to those set out in the second count. The sixth count was similar to the third, except that the ice was alleged to be the property of *Lewis P. Fairbanks* and of the plaintiff.

The defendant pleaded to the first and second counts as follows:—

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1st. Not guilty.

2nd. That the closes, land, and land covered with water and ice, was not the plaintiff's, as alleged, nor was he in possession thereof.

3rd. That the said closes, land and land covered with water are the freehold of the defendants.

4th. *Liberum tenementum* in the defendant *Johnston Chittick*, and others, and that he in his own right and the other defendants, as his servants and by his command, committed the said alleged grievances.

5th. *Liberum tenementum* in one *George A. S. Creighton*, and that the defendants, as his servants and by his command, committed the said alleged grievances.

6th. As to the 3rd count—not guilty.

7th. As to the 3rd count, that the ice therein mentioned was not the property of the plaintiff as such assignee as therein alleged.

There were precisely similar pleas to the 4th and 5th counts, and the defendants lastly and 15thly pleaded:

That the plaintiff was not, nor is, such assignee as alleged in his declaration.

At the trial before the late Chief Justice of *Nova Scotia* sitting as a jury at *Halifax*, the plaintiff produced in evidence divers documents and deeds, by force of which, and of divers acts of parliament, he contended that a certain canal or water communication called the *Shubenacadie* canal, undertaking, works and property, became vested in a certain corporation known as "The Lake and River Navigation Company." He also produced a deed bearing date the 1st April, 1870, purporting to be between "the Lake and Navigation Company," of the one part, and *Lewis P. Fairbanks* of the other part, whereby it was witnessed that the said company did grant, &c., &c., &c., unto the said *Lewis P. Fairbanks*, his heirs, and assigns, all the lands, lands covered with water, messuages, locks and other

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works, water-powers and appurtenances described in a deed from the Hon. *James McNab* to the 'Inland Navigation Company', reserving out of said lands a sufficient quantity of land for roads throughout the same, for the use of Her Majesty's subjects, saving and excepting nevertheless, from the said lands, the premises conveyed to *James Marshall*, and also other estate and interest which the said company have in, or to the said land and premises with the appurtenances; to have and to hold the said lands and premises conveyed, or intended so to be, with the appurtenances, unto the said *Lewis P. Fairbanks* his heirs and assigns forever, &c. This deed purports to be signed by *James F. Avery*, president, and *G. A. S. Crichton*, secretary. The plaintiff also produced a deed of assignment, purporting to be made on the 31st day of May, 1876, under the insolvent act of 1875, between *Lewis P. Fairbanks*, described therein as trader of *Dartmouth* in the county of *Halifax* of the first part, and *William H. Creighton*, official assignee of the county of *Halifax*, of the second part, whereby it was witnessed:

That under the provisions of the insolvent act of 1875, the said party of the first part being insolvent has assigned and hereby does assign to the said party of the second part, accepting thereof as assignee under the said act, and for the purposes therein provided, all his estate and effects real and personal of every nature and kind whatsoever, to have and to hold to the party of the second part as assignee for the purposes, and under the act, aforesaid.

At the trial it was contended that the *Lewis P. Fairbanks* executing this assignment was not proved to be a trader, and competent as such to make such an assignment under the Insolvent Act. The only evidence of this point was that of the plaintiff himself, who said:

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debt or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash book. His books had only reference to the canal property; other lands of his had been wound up.

Lewis P. Fairbanks having been himself subsequently called gave no evidence of his being a trader. In his evidence he said:

I did not know I owned the shore of the lake till five years ago. [The trial was in 1878.] The property is not used for canal purposes now, some small parts of what is necessary for canal purposes have gone out of me. The first section is entirely gone, the second section, including the lake, remains to me. *I sold the machinery.*

Counsel for the defendants moved a non-suit at the close of plaintiff's case, but nevertheless a vast deal of evidence was entered into upon the part of the defendants, partly with the view of insisting that the description in certain deeds which were produced on the plaintiff's part did not cover the places where the plaintiff stated the alleged trespasses or some of them to have been committed, and partly to shew title in the defendants under their pleas of *liberum tenementum*, and to shew possession in them, or those under whom they claimed, of part of the premises at the time of the execution of some of the deeds under which the plaintiff claimed the title to be in *Fairbanks*. At the close of the evidence, counsel for both parties, instead of addressing the learned Chief Justice, who tried the cause upon the evidence as a jury, declined doing so, and entered into an agreement which was recorded by the learned Chief Justice, as follows:

That a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the court, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to enter judgment for or against the defendants with costs, each party to prepare brief abstracts instead of copies of the documents put in by him, the originals to be produced, if required by the court, a rule *nisi* for a new trial to be granted accordingly and filed.

In the following term of the Supreme Court sitting in *Halifax*, on motion of Mr. *Weatherby*, Q.C, defendants' counsel, a rule *nisi* was issued in the following terms:—

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On reading the minutes of the learned judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants with costs, be set aside with costs, and a new trial granted herein on the following grounds:—Because the said verdict is against law and evidence. For the improper rejection and reception of evidence, and on other grounds appearing in said evidence, minutes and papers, unless cause to the contrary be shown before this honorable court within the first four days of the ensuing December term at *Halifax*.

After argument of this rule, and upon the 11th January, 1881, a rule absolute entitled in the cause was issued in the following terms; namely,

On argument of the rule *nisi* to set aside the verdict herein for the plaintiff and on motion. It is ordered that said rule *nisi* be made absolute with costs, and judgment entered herein for defendants against the plaintiff, with costs.

Against this rule the plaintiff appealed, and the case was argued fully upon its merits during three days on the 25th, 26th and 27th October, 1881, by Mr. *Thompson*, Attorney-General of *Nova Scotia*, for the plaintiff (appellant), and by Mr. *Rigby*, Q.C., for the defendants (respondents).

The plaintiff claims title to the closes, lands and lands covered with water in the first count of the declaration described as being "section number 2 of the *Shubenacadie* Canal, forming the reservoir thereof, and called the first and second *Dartmouth* Lakes," and which are declared to be in the second count the same lands, &c., as are in first count mentioned, and which by the evidence taken in the cause appear to be the same lands, &c., &c., &c., from which the ice mentioned in the third count is alleged to have been taken, solely as assignee of the estate and effects of *Lewis P. Fairbanks*, under the Insolvent Act of 1875. The fourth, fifth and sixth counts seem to have been inserted by error, as

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claiming the lands to be the property of *Fairbanks*, the alleged insolvent, and not in the only person who is plaintiff upon the record, although no objection thereto seems to have been taken by the defendants, who have pleaded thereto similar pleas to those respectively pleaded to the first three counts; but on this record no judgment could be rendered upon the fourth, fifth and sixth counts, nor otherwise than upon the issues joined on the first, second and third counts, in which the plaintiff asserts title solely as assignee, under the Insolvent Act, of the estate and effects of *Lewis P. Fairbanks*, and it was upon these issues only that the argument upon the whole merits of the appeal before us took place. The court below, acting upon the agreement entered into at *nisi prius*, set aside the verdict which had been entered *pro formâ* for the plaintiff; upon the ground that *Lewis P. Fairbanks* was not, or was not shown to be, a trader, so as to enable him to assign to the plaintiff, or the plaintiff to take his estate and effects under the Insolvent Act, and to vest such estate and effects in the plaintiff, as the official assignee for the county of *Halifax*. It was argued before us on the part of the plaintiff that the pleadings did not raise any issue upon that point, but I was of opinion at the argument, and still am, that the plea, that the plaintiff was not nor is such assignee as alleged in the declaration, does put the trading in issue and casts the onus of the proof thereof upon the plaintiff, and indeed in an action of this nature, the plaintiff not appearing to have been in possession of any of the closes in which, &c, and being therefore, in order to sustain this action, compelled to show a good title, the onus is cast upon him of proving everything necessary to the vesting of the estate of *Lewis P. Fairbanks* in the plaintiff, as his assignee under the Insolvent Act, as well as to show that the property in question had been, before the In-

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solvent Act operated upon it, the property of *Lewis P. Fairbanks*, the alleged insolvent. After the long argument before us upon the whole case, which extended over three days, during which the learned counsel for the plaintiff strenuously insisted that the plaintiff was entitled to judgment upon all the points, I do not think it desirable that we should dispose of the case solely upon the point as to the trading.

If the question of the trading was the only one which stood in the way of the plaintiff's right to recover, the better course would no doubt be to send the case to a new trial, if the plaintiff wishes to have an opportunity to supply further evidence upon that point, but if, assuming the trading to be established, the plaintiff is not entitled to recover upon the other points, as to which it is not suggested that any further evidence can be given, I cannot see, after the very full discussion which these points have undergone, what possible object there can be in our protracting an expensive litigation by withholding our opinion upon points so exhaustively argued during three days. If the case was to be decided upon the point of trading alone, I do not think we should have thought it necessary to reserve our judgment upon that point, or to have heard the argument upon the other points, but having heard the whole case very exhaustively argued upon a judgment rendered upon an agreement entered into by the parties at *nisi prius*, whereby it was stipulated that the court should be at liberty upon the whole case to render judgment for or against the defendants, I think that in the absence of any suggestion that upon a new trial further evidence could be supplied by the plaintiff, we are called upon to express an opinion upon the whole case, and if the plaintiff, assuming the trading to be established, is nevertheless upon the other and main

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grounds not entitled to recover, to terminate the continuance of an expensive and fruitless litigation.

Upon the close of the evidence at the trial, which took place before the learned Chief Justice of the Supreme Court without a jury, the counsel for both parties entered into an agreement whereby it was agreed "that a verdict should be entered *pro formâ* for the plaintiff, subject to the opinion of the court in term, and that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants, with costs."

Nothing is said in this agreement to the effect that the court above should have power to draw inferences of fact as a jury could, which words do appear to have been introduced into an agreement made at *nisi prius* in a case of ejectment tried at the same time upon the same title at the suit of the plaintiff against one *Graham*, whereby it was agreed that the agreement in the suit v. *Chittick et al.*, with a verdict for the plaintiff, should extend to the ejectment suit with power for the court to draw the same inference from the facts in proof as the judge on trial or a jury could do. Whether such a provision is necessary in the case of a trial before a judge without a jury seems to me to be questionable, and, indeed, the provision that upon the evidence taken at the trial the court above should have power to enter a verdict for or against defendants without any actual finding of facts by the learned judge who tried the case without a jury, seems to imply the necessity for an adjudication and finding of matters of fact by the court from the evidence so laid before them. The court also seems to have been of opinion that it was competent for them upon the agreement in the trespass case, equally as in the ejectment case, to discharge the functions of a jury and to draw inferences of fact, for that they did in

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fact in this trespass case exercise that jurisdiction, appears from the judgment of the court setting aside the verdict for the plaintiff, wherein it is said:

> The objection that he, *Fairbanks*, was not shown to be a trader was taken at the trial and in the argument, and at the former the plaintiff should, if he could, have given evidence, to justify us in holding that he was such, but that was not done, unless we are to regard the assignment alone as evidence.

And upon this point it is said:

> But admitting that the assignment is *primâ facie* evidence of the insolvent being a trader, how can we uphold the presumption *in the face of the evidence given by the plaintiff himself showing clearly that Mr. Fairbanks was not a trader.*

So that from this it appears the Court proceeded, not upon the absence of all evidence to go to a jury upon the question, but construing evidence offered as a jury, they have found that in point of fact *Fairbanks* was not a trader, thus plainly discharging the functions of a jury, and accordingly they set aside the verdict for the plaintiff and ordered judgment to be entered for the defendants against the plaintiff with costs.

This rule is not printed in the appeal case, as it should have been, but having been called for by us during the argument it has been supplied, and appears to be to the above effect.

Now to order a verdict to be entered for the defendants upon this record, even though it should be amended by striking out the 4th, 5th and 6th counts, and the pleas thereto, on the ground of misjoinder, would give to the defendants judgment upon the pleas of *liberum tenementum* to the first two counts, which it cannot be said that they have clearly established by evidence, and which judgment when entered would operate as an estoppel in the defendants favor as against *Fairbanks*, in whose right the plaintiff claims. Judgment therefore upon the issue proved upon the pleas of

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liberum tenementum should be for the plaintiff unless that plea be removed from the record. But if we amend the record by expunging the 4th, 5th and 6th counts, and the pleadings relating thereto, and by expunging also the pleas of *liberum tenementum* pleaded to the 1st and 2nd counts, I think that for the reasons hereinafter stated the defendants are entitled to judgment in their favor upon the 1st, 2nd and 3rd counts, to which counts the argument before us was confined. As to those counts upon the record being so amended, I can see no object in protracting this litigation by ordering a new trial, as the defendants are, in my judgment, entitled to succeed, even though it should be established that *Fairbanks* was a trader, so as to be within the operation of the Insolvent Act.

As to the close upon the margin of the second lake, the plaintiff's first step in his claim of title to it, is to shew that the canal company acquired the fee simple therein under the 13th section of their act of incorporation. He accordingly produced a petition of the company to the justices in quarter sessions, a precept to the sheriff thereon, and an inquisition taken by the sheriff with a jury in 1826, but no map was produced shewing the lands intended to be covered by the description set out in the inquisition of the lands therein referred to, and if we had such a map, and if it plainly comprised the close in question, there is no evidence that the verdict rendered upon the inquisition has been allowed and confirmed by the quarter sessions as required; and it is not contended that payment was made to any one of the amount assessed, nor, indeed, does the inquisition determine the amount, but leaves it to be ascertained by a measurement to be made after the close should be flooded by the works of the company. Under these circumstances, and as the act of incorporation of the company makes the confirmation

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of the inquisition when taken and the payment to the proprietors of the amount assessed for their lands taken conditions precedent to the vesting of the fee in such lands in the company, it is clear that the plaintiff has not shown that the close in question ever became vested in the canal company. By flooding the close, by the waters of the lake being raised by the works of the company, the latter may have acquired a prescriptive right to keep the close so flooded, but they have not acquired the fee in the close, so that as to this close the plaintiff for that reason alone must fail in this action.

As to the rest of the alleged trespasses which were said to have been committed by the taking of ice from places in the first lake, the act of incorporation of 1824 did not vest or profess to vest in the company the soil and bed of the lakes; it vested in them only, so far as the lakes are affected, "the waters and streams of the said river and lakes, so far as the same might be required or necessary to be used, retained, diverted or appropriated to and for the use and benefit of the canal and the beneficial enjoyment thereof," and also all real estate purchased or obtained for such canal and through which it shall be made, with the towing paths along the canal, river and lakes, for the term of 99 years.

This is the provision contained in the eighth section of the Act of 1824, and it left untouched the title in the bed and soil of the lakes, whether that title was then in the Crown or in some private person or persons.

The Act of 8th *Geo.* 4, c. 17, A.D. 1827, made no difference in this respect, for all that act did was to declare that all and singular those things which by the eighth section of the Act of 1824 had been granted to the company for 99 years should be and were vested in and declared to be the sole and exclusive property of

the company forever ; and as the eighth section of the Act of 1824 did not affect the soil and bed of the lakes, so neither did the Act of 1827. The company therefore had no title in virtue of the acts of Parliament, to the soil and bed of the lake at the places where the defendants took the ice, for the taking of which this action is brought. But the plaintiff alleges that the canal company became seized of a large portion of the soil and bed of the first lake, comprising those portions from which the ice was taken by the defendants, under and in virtue of a deed dated the 12th April, 1831, and made between *Richard* and *James Tremain* of the one part, and the *Shubenacadie* Canal Company of the other part, whereby after reciting that under and by virtue of an indenture dated the 13th October, 1815, between one *Laurence Hartshorne*, since deceased, of the one part, and the above-named *Richard Tremain* of the other part, and by virtue of another indenture dated the 14th June, 1816, and made between one *Jonathan Tremain*, of the one part, and the above-named *James Tremain* of the other part ; and by virtue of another indenture dated the 25th October, 1823, and made between *Abigail Hartshorne*, widow and executrix, and *Laurence Hartshorne*, surviving executor of the late will of the above named *Laurence Hartshorne*, deceased, of the one part, and the said *James Tremain* of the other part ; and by virtue of another indenture, dated the 1st September, 1830, and made between *Phœbe Tremain*, executrix, and *Thomas Boggs* and *George Norton Russell*, executors of the will of the said *Jonathan Tremain*, deceased, of the one part, and the said *Richard* and *James Tremain* of the other part, they, the said *Richard* and *James Tremain*, then stood seized of

all that flour mill and bakehouse or bakery, and all those lands partly covered with water, and tenements, situate lying and being in *Dartmouth* aforesaid, and hereinafter firstly and secondly described, and also of and in the mill stream or water course and lands

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partly covered with water, hereinafter thirdly described, with the appurtenances in fee simple in possession; that is to say, as tenants in common, each of and in one equal and undivided moiety or half part of the said described premises, as by reference to the said four several indentures will at large appear,

they, the said *Richard* and *James Tremain* conveyed to the company, among other lands, a piece described as follows:—

Secondly: all that piece of land lying between the south end of *Dartmouth* lake, and the two roads leading, the one from *Dartmouth* to the west side of the said lake, and the other to *Preston*, and measuring from the angle formed by the said roads on the road towards *Preston*, north-eastwardly to a marked stone near a spruce tree marked; thence to run into the said lake north 35° west to the north side line of the lot conveyed on the 20th February, 1815, by the executor of the will of *James Creighton* the elder, deceased, to the said *Laurence Hartshorne*, deceased; thence S. 55° west to the stump of a hemlock tree formerly standing at the north end of the mill dam; thence N. 35° W. to the side of the highway leading from *Dartmouth*; thence by the several courses of the said road to the place of beginning at the angle of the said roads. Thirdly: all that mill stream and watercourse and lands wholly or in part covered with water lying between the south end of *Dartmouth* lake at the mill dam from whence the said mill-stream and water-course flows to the *Dartmouth* cove aforesaid.

Now, the plaintiff's contention is, that the piece of land described under the head "Secondly," and above set out, extends along the easterly side of the *Dartmouth* lake, all of which he claims to come under the designation in the deed of "the south end" to a point distant nearly half a mile beyond the point at which the "road towards *Preston*" first reached the lake, and thence on a course N. 35° W. 11½ chains into the lake to a point which, as he contends, is made by the deed of the 26th February, 1815, the north west angle of the piece of land therein described. Now, upon this point it is to be observed that, as the plaintiff does not attempt to trace title from Letters Patent from the crown, he must needs, in order to launch a case

against the defendants upon this record, prove that at the time of the execution of the deed of the 12th April, 1831, by *Richard* and *James Tremain*, they were in the actual possession of the soil and bed of the lake, as it is described in the deed of the 20th February, 1815, and which the plaintiff now claims to have passed under the deed of April, 1831, of which actual possession there is no evidence, Moreover, from the recitals contained in the deeds of April, 1831, and of 25th October, 1828, therein recited, it is plain that all that was intended to be conveyed by those deeds was the flour mill and bakery, lands and mill stream, with the appurtenances thereto, in which *Laurence Hartshorne*, deceased, and *Jonathan Tremain* originally were interested as tenants in common, and in which *Richard* and *James Tremain* became in like manner interested by the deeds of the 13th October, 1815, and the 14th June, 1816, recited in the deed of April, 1831. Now, by the deed of October, 1815, *Laurence Hartshorne*, deceased, conveyed to *Richard Tremain* one undivided part of the property in question by the following description:—

> One full undivided half part of that certain lot or parcel of land lying between the two roads leading from the main road through *Dartmouth* to the lake, as purchased lately at auction at the sale of *James Creighton's* estate, together with one full undivided half part of all and singular the houses, mills, stores, barns, stables, buildings, ways, water watercourses, easements, &c., to the same belonging.

If the purchase "lately at the auction at the sale of *James Creighton's* estate," here referred to, is that represented by the deed of 20th February, 1815, it is plain that the whole of the land described in that deed was not intended to be passed by the deed of October, 1815, but only so much as lay between the roads and the lake, which, as there is evidence to show that the road towards *Preston*" touched the lake at a point

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south of what is called *Glendenning* ice house, on the plan G. G. would seem to indicate a piece of land somewhat in the shape of a triangle, of which the two roads formed the legs and the south end of the lake the base. In the deed of the 14th June, 1816, the description is the same.

From the deed of April, 1831, and from the descriptions contained in the petition by the Company to the Quarter Sessions in 1826, from line 42 to line 68 it is plain that what was regarded and called the south end of the lake was that end of the lake lying between the "road towards *Preston*, where, as the evidence shews, it touched the lake south of *Glendenning* ice house, in the plan G. G., and the opposite or westerly side, where the road from *Dartmouth* struck the west side of the lake, and that a line drawn from the former point of junction of the road with the lake, on a course N. 35° W. to what is called the "north side line," as described in the deed of 13th October, 1815, more properly the "westerly side line" would seem to accord with the description in the deeds of 12th April, 1831, the 13th October, 1815, and the 14th June, 1816; and the piece of land so described, in view of the limits described in the Company's petition to the quarter sessions in 1826, and in the mortgage to the Hon. *Sampson Bowers* and Sir *Rupert D. George*, and in the deed executed upon foreclosure of the mortgage to the treasurer of the province, Mr. *McNab*, and in other subsequent documents, as the northern boundary of section No. 1 of the canal, would seem to constitute the northern extremity of that section. The continuance of the "road towards *Preston*," passed the point where it first touched the lake, and past *Glendenning's* ice house and along the lake shore to the point where the northerly boundary of the line described in the deed of 20th February, 1815, struck the *Dartmouth* lake run-

ning on a course N. 35° W., would be a line running along the eastern side of the lake. I think, therefore, that it must be concluded that the plaintiff has failed to establish, and I confess that I think there will be very great difficulty in its ever being established, that the deed of April, 1831, conveyed to the company the bed and soil of the lake, as is contended by the plaintiff, and to establish which, beyond all reasonable doubt, the onus lies upon him. No argument in support of the plaintiff's contention can, as was contended there could, be adduced from the papers produced in the matter of the partition of the *Hartshorne* estate in the case of *Inglis* v. *Hartshorne* in 1852, for, as the road which ran along the eastern shore of the lake separated the lake from the lands divided, it may well be that the heirs of *Hartshorne* either never considered *Hartshorne* to have had title to the soil and bed of the lake, or that if he had, it was valueless, without drawing from the fact of its not having been divided in the partition suit the inference that the reason was the knowledge of its having been conveyed to the company by the deed of April, 1831, or to the *Tremains*, who executed that deed. Neither the Act of 1824, nor that of 1827, appears to have contemplated the company's borrowing money upon the security of a mortgage, or to have authorized the execution by the company of a mortgage upon the lands acquired by the company, and in and through which the canal should be constructed and necessary for the beneficial use and enjoyment thereof as a water communication. Their power seems to have been limited by these acts to constructing, maintaining, having and holding the canal, when constructed, for the public use and benefit, subject to the payment of tolls, or as is expressed in the fifth section of the act of 1824: "To use and appropriate the waters of the said river,

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lakes and streams, and the channels and water courses thereof, to and for the benefit of, and for rendering effectual, navigable and useful the said intended canal." The mortgage to Mr. *Blowers* and Sir *Rupert George* was executed under the authority of and in pursuance of the power contained in an act of the Imperial parliament (11 *Geo.* 4th and 1st *Wm.* 4, ch. 34), whereby the lords commissioners of Her Majesty's treasury were authorized to advance and lend to the *Shubenacadie* Canal Company for the completion of their canal a sum not exceeding £20,000, and that all sums so advanced should be secured by an assignment of the tolls and profits of the canal to such persons in such manner and under such conditions and regulations as the said commissioners of the treasury should order and direct.

In an act of the general assembly of *Nova Scotia* passed in the year 1837, for the purpose of increasing the capital stock of the company, and of enabling it to make various alterations in the line and direction of the canal and in its depth and width, and in the position, nature and dimensions of the works as originally designed, "whereby the said canal would be rendered more suitable to the purposes for which a great inland water communication through the province with its capital is required and be made more conveniently navigable by steamboats and sea-going vessels, and of greater extent and magnitude than were first intended," it is recited among other things that the Imperial loan of £20,000 stg. was made on the security of the canal and the tolls and profits thereof, pursuant to an act of the Imperial parliament, and that all the funds of the company, consisting of 1,962 shares in the capital stock of the company, £15,000 grant of the general assembly of *Nova Scotia* and the above £20,000 were exhausted, and that the works were still unfinished and had so remained since 1831 for want of funds, and that "foras-

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much as completing the said enterprise is deemed an object of great public utility and importance," it was deemed expedient to authorize the Company to increase its capital stock, and to grant to the corporation certain other and further powers for facilitating the enterprise and works of the company, and for more convenient management of its affairs. From these acts it is apparent that the canal authorized to be constructed was designed to be a great public work of vast commercial and provincial importance, and whether or not the mortgage to Mr. *Blowers* and Sir *Rupert George*, which was executed under and in pursuance of the above act of the Imperial parliament, which expressly declared that the security for the loan should be on the tolls and profits of the canal, could be foreclosed in such manner that the fee simple estate in the canal works and in the property necessary for the beneficial use and enjoyment of the canal could become vested in the mortgagees, or transferred to any person or persons and vested in him or them as a fee simple estate, freed and discharged from application to the purposes of a canal or water communication by any authority short of the authority of an act of parliament, it is not necessary now to enquire, because the canal and all the property of the canal company comprised in the mortgage, whatever may have been the effect of the mortgage and of its foreclosure, was subsequently by act of parliament vested in a company, incorporated under the name of the Inland Navigation Company, for the express purpose of acquiring the property of the *Shubenacadie* Canal Company, and of completing the work which the latter company had been authorized but failed to complete.

What was the effect of this mortgage and of its foreclosure? Whether the foreclosure could and did vest in the mortgagees, or in any person, an estate in fee simple

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in the canal and its works and in the property necessary for the beneficial enjoyment of the canal, are questions which will have to be considered in the light of the provisions of the Acts of 1853 and 1859 relating to the Inland Navigation Company, by the 6th section of the former of which the company was empowered "to use the channels and waters of such rivers, lakes and streams in every way necessary for constructing such inland water communication and for rendering and keeping the same at all times navigable and in operation;" and by the eighth section of which it was enacted that "the inland water communication and towing paths should at all convenient times after the construction thereof be kept open for the use of the public, their boats, vessels, goods, horses, and cattle, upon payment of a certain rate of toll money, to be regulated by the company and approved by the Governor in Council and revised every five years." And by the fifteenth that the legislature might at its option at any time after twenty years from the passing of the act take such inland water communication with all the works and appurtenances thereof and keep the same in operation for the benefit and under the control of the government upon paying to the company a sum equal to twenty years purchase of the annual profits divisible upon the subscribed and paid-up capital stock of the company, provided such average rate of profits shall not be less than eight per cent. It was by the act of 1859 alone that the company was authorized to borrow money upon mortgage of the company's property and works, and by that act it was enacted that every mortgage of the property and works of the company for securing payment of monies to be borrowed should be a good legal and valid charge and lien upon such property and works; and that the directors of the company should be, (and they were then first) "at liberty to sell

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and dispose of all and any parts of the lands and property which they might deem not actually required for the due and convenient working of the canal.

Now, whether the forclosure of a mortgage executed under this authority can be construed to vest the fee simple estate in the property of the company, which is necessary for the actual and beneficial use and enjoyment of the canal as a water communication, in the mortgagees, or in any person, as their private property freed and discharged from the appropriation of the property to the use intended by the acts incorporating the company authorized to construct it and required to keep it navigable and in operation, and so in effect to disfranchise the company—to terminate its existence,—or relieve it from its obligations, and to defeat the provisions of the Act of 1853, enabling the province to take the work for the public use, raises so grave a question that, as it is not absolutely necessary to decide it to entitle the defendants to judgment in this action, and as there appears to be a probability that it will arise in some other action to which other persons will be parties, I withhold the expression of my opinion upon it.

Then again as to the Lake and River Navigation Company—that company was not incorporated by any special Act of Parliament authorizing it to acquire the property and privileges of, and subjecting it to the obligations of, the Inland Navigation Company. It claims to have been incorporated under the general act, ch. 2 of the acts of 1862, to be found at p. 750 of the 3rd series of the revised statutes; that company in its declaration professes to have been formed under the name of the Lake and River Navigation Company under the provisions of the above act "for the purpose of purchasing, holding and disposing of the property and works formerly belonging to the Inland Navigation Company."

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Now, whether a company so formed could acquire the canal and its works, and the property necessary for its beneficial use which the acts incorporating and affecting the Inland Navigation Company, had vested in that company and their successors for ever, to have and to hold subject to the obligation of being at all times kept open for the use of the public as a navigable water communication from Halifax harbor to the bay of mines? whether Messrs. *Gray* and *Stairs* ever acquired any estate in the canal, its works and property necessary for its use? whether any deed purporting to convey that property to any one executed by them could have such operation? whether such property could be conveyed or pass from the Inland Navigation Company to any other company or individual by any mode of conveyance other than an act of parliament passed for the special purpose? whether the Inland Navigation Company is not still an existing corporation having vested in it the canal, its works and the property necessary for its beneficial use, subject to the obligation of its being kept open for public use? whether, if the Lake and River Navigation Company could, and did, ever acquire any estate in the canal, its works and the property necessary for the beneficial use of the canal, they acquired such property otherwise than as a canal company, as their name indicates, and on any other condition than subject to the obligation of keeping the canal open, and subject to the provisions and obligations to which the property was subjected as a water communication, by the acts affecting the Inland Navigation Company? and whether, in view of the terms of the Act of 1859, authorizing the Canal Company to sell only "such lands as should not be required or necessary for the due and convenient working of the canal," the company could sell the canal itself, its works and the property actually

necessary for the use of the canal, freed and discharged from, or even subject to, the obligation of being used as, and appropriated to, the purpose of a navigable canal or water communication, maintained and kept open for public use? these are grave questions upon which, for a like reason, I withhold the expression of my opinion. Independently of these questions, even though the plaintiff should be able to supply sufficient evidence upon the point of trading, I think that upon the record being amended as suggested, the defendants are entitled to judgment in their favor, and in my opinion the form of our order should be to the effect—that the 4th, 5th and 6th counts of the declaration, together with the pleadings relating thereto and the pleas of *liberum tenementum* pleaded to the 1st and 2nd counts be struck off the record, and that then the rule for judgment in favor of the defendants made by the court below shall be upheld as applied to such amended record, and that judgment be entered thereon and this appeal dismissed with costs.

Appeal dismissed with costs, the rule varied and made absolute for a new trial.

Solicitor for appellant: *J. S. D. Thompson.*

Solicitors for respondent: *Rigby & Tupper.*

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*May 2, 3.
*June 22.

ANTOINE GAGNON.....APPELLANT,

AND

DAME HERMINE PRINCE.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

"Débats de comptes"—Sale of stock in trade by a father to his son—Onus probandi—Affidavit of a person since deceased not evidence.

In a "*débats de comptes*" between *A. G.* (appellant) in his quality of tutor to *M. L. H. C. R.*, a minor, and Dame *H. P.* (respondent), universal legatee of her late husband *L. R.*, who had had possession of the minor's property (his grandchild) as tutor, the following items, viz.:—$5,466.63 (for stock of goods sold by *L. R.* to his son) and $451.07, and $90.76, for "cash received at the counter," charged by the respondent in her account, were contested.

In 1871, *L. L. R.* the minor's father, married one *M. C. G.*, and by contract of marriage obtained from his father, *L. R.*, two immoveable properties, *en avancement d'hoirie*. At the same time *L. R.*, the father, retired from business and left to *L. L. R.*, his son, the whole of his stock in trade, which was valued at $5,466.63. making an inventory thereof. *L. L. R.* died in 1872 leaving one child, said *M. L. H. C. R.*, and *L. R.*, her grandfather, was appointed her tutor. There was no evidence that the stock in trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when *L. R.*, in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of $5,466.63.

Held, (reversing the judgment of the court below) that it was for the respondent to prove that there had been a sale of the stock in trade by *L. R.* to his son *L. L. R.* the minor's father, and that there being no evidence of such a sale the respondent could not legally charge the minor with that amount.

As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they

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

had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of one *Hébert*, the bookkeeper of *L. R.* filed with the *reddition de comptes* before notary, prior to the institution of this action.

Held, reversing the judgment of the Court below, that the affidavit of *Hébert* was inadmissible evidence, and therefore these two items could not be charged against the minor.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side) (1), reversing judgment of the Superior Court in favor of the appellant. The facts of the case are as follows:—

Louis Ludger Richard, of *Stanfold*, in the district of *Arthabaska*, died on the 15th of July, 1872, leaving one child, *Marie Louise Hermine Célanire Richard*, issue of his marriage with Dame *Célanire Gagnon*. On the 23rd October of the same year, the Honorable *Louis Richard*, father of *Louis Ludger Richard*, was appointed tutor to the minor child of his son. Thereupon *Louis Richard* took possession of the estate and succession of his son, and administered it up to the time of his death, which occurred on the 13th November, 1876. By his last will, Mr. *Louis Richard* constituted his widow, Dame *Hermine Prince*, the present respondent, his universal legatee, and she took possession of all the property of her deceased son, *Louis Ludger Richard*, which then belonged to her minor grand-child. On the 8th January, 1877, Dame *Célanire Gagnon*, widow of *Louis Ludger Richard*, was appointed tutrix to her child, and in June, 1879, she instituted an action against the present respondent to recover an account of the administration of the minor's property by *Louis Richard*, as tutor, and by his widow, since his death. On 21st February, 1880, the Superior Court at *Arthabaska* rendered judgment condemning the present respondent to account in the manner asked for by the action. In conformity with this judgment

(1) 2 Dorion's Q. B. Rep., 74.

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the respondent rendered an account. Pending these proceedings, Madame *Célanire Gagnon* (widow *Louis Ludger Richard*) having married a second time, her father, *V. Antoine Gagnon*, was appointed tutor to the minor, and took up the proceedings in that quality.

The account rendered by the respondent showed a total expenditure by the tutor, *M. Louis Richard* of..... $15,362 07½
and a total receipt of..... 15,270 51½

leaving a balance of..... $91 56

in favor of the respondent.

The appellant contested several items charged as expenditure, and the court of the first instance, in its judgment, struck off the following items from the expenditure:—

1st. A stock of merchandise..... $5,466 63
2nd. Upon the expenses of the rendering of the account..... 25 95
3rd. A promissory note by *Louis Ludger Richard* to his father..... 600 00
4th. A certain sum entered in the books as "cash received at the counter"..... 451 07
5th. Another similar sum..... 190 16

$6,734 41

The judgment also added to the receipts, a few small sums amounting in all to $105.30.

The result now was this:—

1st. The receipts by this addition of $105.30 were increased to the total sum of..... $15,375 81½
2nd. The expenses being cut off of the sum of $6,734.41, were reduced to..... 8,627 66¼

$ 6,748 15

This left a balance of $6,748.15 against the respondent, for which amount judgment was rendered against her.

On appeal to the Court of Queen's Bench, that court agreed with the court below upon several items, but declared that the item of $5,466.63 (for the stock of goods) and the items of $451.07 and $190.76 for "*cash received at the counter*" had been improperly struck off from the expenditure and should be reinstated therein.

These sums being reinstated in the expenditure, the total expenditure then amounted to $1,736.12; this left a balance of $639.69 against the respondent.

On appeal to the Supreme Court of *Canada* the three *items* struck off by the Court of Queen's Bench were under consideration, viz: 1st, $5,466.63 (for the stock of goods); 2nd, item $451.07; and 3rd, item $190.76 for "cash received at the counter." Item of $5,466.63 (stock of goods).

This item was entered in the account, under the head of expenditure, and is in the following language:

"The accounting party charges in expenditure, the sum of $5,466.63, being part of the sum of $5,676.94 entered in the inventory under the head of debts due to the said *Louis Richard*, for goods sold and delivered to the said *L. L. Richard*, as per statement now fyled as exhibit H."

The contestation of this item is as follows:

"And the party accounted to, declares that she contests the following items of the account:"

"1o. The sum of $5,466.63 for goods sold and delivered to the said *L. L. Richard*, as per statement."

"Because the goods in question never were sold by the said honorable *Louis Richard* to the said *L. L. Richard*, but on the contrary, had been given to him and were charged against the said *L L. Richard* in the books of the said honorable *Louis Richard* several months only after the death of the said *L. L. Richard*, to wit, in November, 1872. That moreover, that sum of $5,466.63 is charged for a stock of goods, the inven-

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tory of which had been made more than six months before the said *L. L. Richard* had obtained delivery of the goods in question, the said honorable *Louis Richard*, having continued his trade during the said six months, and having sold a large portion of the goods, thus entered in the inventory."

There was no writing to establish whether it was as a gift or as a sale that these goods had been left by the father to his son, nor was there any witness who could relate what was the greement which may have taken place between the father and the son with regard to those goods.

It was proved, however, that in October, 1871, *Louis Ludger Richard*, who up to that time had been a clerk in his father's establishment, was married to the plaintiff, *Marie Célanire Gagnon*; and that Mr. *Richard* on that occasion withdrew from business, and left him the whole of his stock-in-trade, valued, according to the inventory which was then taken of it, at the sum of $5,466.63. That inventory was closed on the same day that the marriage contract was passed, or on the previous day.

By this marriage contract, Mr. *Richard*, the father, gave to his son, *en avancement d'hoirie*, a house to make a dwelling-house, and the store or building wherein he had carried on his trade at *Stanfold* for a great many years.

As the other two items $451.07, and $190.76, a Mr. *Hébert*, the bookkeeper of Mrs. L. *Richard*, in his affidavit, which is appended to the first account rendered before a notary by the respondent, declares as follows:

"To my personal knowledge, all the different amounts above mentioned and forming the sum of $693.45 are entered in the cash book by the said *Louis Richard* and are entered under the heading of "cash received at the counter."

This Mr. *Hébert* was not examined as a witness, having died previous to the institution of the action.

As to items $451.07 and $190.76, making together the sum of $641.83. They were allowed on the ground that they are twice credited to the minor in Mr. *Richard's* books, once in the account of moneys received for cash sales over the counter, and again in the general account book. The Superior Court rejected this charge, as being entirely unsupported by evidence. The Court of Queen's Bench restored it.

The appellant, thereupon, appealed to the Supreme Court of *Canada.*

Mr. *Irvine*, Q. C., and Mr. *Felton*, with him, for appellant :

The first point to be considered is, the item number I in the *débats de comptes*, amounting to $5,466.63, charged in the account, for goods sold and delivered by the Honourable *Louis Richard* to his son, *Louis Ludger Richard.* The pretension of the appellant is, that this merchandise, which formed the stock in trade of Mr. *Louis Richard*, was not sold but given by him to his son. There is conflicting evidence upon this head, but the onus of proof is upon the respondent to show that these things were sold, and that the amount charged was due by *Louis Ludger Richard* for the price of them. At the time of the death of *Louis Ludger Richard*, this stock of goods was in his possession, and had been in his possession for several months. *Louis Richard*, the father, was a merchant who kept accurate books of account, and yet no entry was made in any of them showing that his son was indebted to him in any sum of money, as the price of this stock, until several months after the death of *Ludger Richard*, when an entry to that effect was made by *Louis Richard*, although, from time to time various small items were charged against

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Ludger Richard during his lifetime and at the dates when the payments were made. Under these circumstances, if the respondent desires to claim against the succession of her son for the price of these goods, it was upon her to establish by proof that they had been sold to him, and that this sum of money was due. No satisfactory evidence to this effect has been given.

As to items $451.07 and $190.76. The only evidence is that of *Hébert*, who died before the case came on for trial, and who had under other circumstances, made an *exparte* affidavit, in which he stated that these amounts taken from the account book known as the "*livre de recettes*" were also included in the cash receipts, "*argent au comptoir*." It is plain that in order to recover this amount in contradiction to her own account books, it was incumbent on the respondent to establish its correctness by legal evidence. No proof has been attempted beyond the production of the affidavit of *Hébert*. It is difficult to find any precedent for such a case. The court below has charged the minor, who is interested in this account, with a large sum of money on the evidence of a witness never examined in court, whom the appellant has had no opportunity of cross-examining, and who has in fact given no legal evidence whatever. The books of account of the late Mr. *Richard* and of his succession were carefully kept, and it is difficult to suppose that they would have contained so serious an error as *Hébert's* affidavit suggests, and one which must have been continued and repeated over a considerable length of time. Moreover, an examination of the books will shew that the statement of Mr. *Hébert* is impossible. On many of the days on which the amounts are shewn by the "*livre de recettes*" to have been paid, the amount received as "*argent au comptoir*" was not sufficiently large to include them.

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

As to the first item $5,466, the Superior Court came to the conclusion that *L. L. Richard* had received the stock in trade from his father as a pure gift, at the time he went into business. The Court of appeals held that it was not a gift, and that it was properly charged as a debt due by *L. L. Richard* to his father. The question therefore is, whether the stock of goods, put in the hands of his son by Mr. *Richard*, the father, at the time of the former's marriage, was an absolute gift or not? The evidence in this case does not support the appellant's pretension. Casual conversations are not sufficient to prove an absolute gift, or a *don manuel*. See *Richard Voyer* (1)

I submit also that a donation cannot be proved by parol evidence, but must be proved according to the ordinary rules of law.

The principle which decides that a donation of moveable property exceeding $50 must be proved by written evidence, though the donation can be made by verbal agreement, is the principle which applies to all contracts in the French law. The contract of sale, for instance, can be made by verbal agreement, but if it exceeds $50, it has to be proved by written evidence. Nothing is more certain. The *don manuel* is no exception to this rule, and though the point was at one time controverted, it can no longer admit of a doubt, since the latest commentaries upon the code *Napoléon*.

Moreover, notwithstanding what has been said by the learned counsel for the appellant, I submit there is proof of record establishing that there was a sale.

In the first place, Mr. *Richard* himself treated it as a sale, and so entered it in his books. But it is said that Mr. *Richard* made that entry in his books only after his son's death.

(1) 5 Revue Légale, 591.

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If this contention, on the part of the appellant, means anything, it means that Mr. *Richard* would have been guilty of a most dishonest act, that after having made a gift to his son he would have, after the latter's death, taken the means of depriving his child of it. But the facts as proved vindicate his memory.

In the first place, it is true that Mr. *Richard* made that entry in his day book and in his ledger, only after his son's death, but there was an entry made in another book, and the whole circumstances are fully explained by the testimony of *Octave Ouellet*. In October, 1871, previous to *Ludger Richard's* marriage and to Mr. *Richard's* withdrawing from business, *Octave Ouellet* was employed by the latter to make the inventory of the stock.

That inventory is entered in a book marked "H" in this cause; the goods footed up to the sum of $5,909.42. *Ouellet* says that Mr. *Richard* let his son have these goods at the price of 16*s.* 9*d.* in the £. Then there are added, a certain quantity of goods from the *Somerset* store, for which *Ludger Richard* was paying the full price. The total amount of the goods from the stores of *Stanfold* and *Somerset* amounted to..... $6,574 61

The following entry is then found in the book, viz.:

Cr. by deduction of 3*s.* 9*d.* upon the account of the inventory of 1871, to wit: $5,909.42..... 1,107 98

$5,466 63

Ouellet says in his deposition that that entry was made by himself, and that to the best of his recollection it was so made at the time that the inventory was taken. The following year after *Ludger Richard's* death, he was again called to take part in the inventory of the estate, and then he advised Mr.

Richard to report that entry from that book, to his day-book and his ledger.

All this not only explains how, and when, the entries were made in the books of Mr. *Richard*, but it also shows that the transaction was a sale, that there was a price agreed upon and delivery.

As to the two other items, one of $150.07 and the other of $190.76, which have been struck off the expenditure, the appellant has made the best possible proof under the circumstances, that these two sums had been entered in the receipts, as "cash at the counter," and again in the collection. This double accounting is due to the fact that the appellant, viz : the present respondent has entered in the receipts the cash received at the counter, and also the cash received for collections according to the ledger when such collections were also included in the "cash received at the counter."

Hébert, who could have established that fact in a precise manner, is dead and could not be heard as a witness. His affidavit alone cannot make a complete evidence. But we believe that this is one of the cases, where in a case for an account, the appellant, the accounting party, has a right to be believe don her oath after having proved the practice followed by Mr. *Richard* and the death of her principal witness.

TASCHEREAU, J., delivered the judgment of the court:

In this case, I am opinion to allow the appeal. Three items of the *débats de comptes* are in controversy. As to the first one, amounting to $5,466.63, the only question is, were goods to that amount sold by the honorable *Louis Richard* to his son *Ludger Richard*? Upon the respondent, who alleges such a sale, was the onus of proving it. Now, where is the evidence of it in this record? I cannot find any, and the Court of Appeal, although it reversed the judgment of the Su-

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perior Court as to this, could not find any. If there was a sale, what were the conditions and terms of payment? None that I can find out in the evidence adduced. On the cross-examination of the witness *Jean Baptiste Allard*, the respondent attempted to prove terms of payment, but not only failed to do so, but established clearly that *Louis Richard* never sold these goods to his son—but gave them under certain charges and conditions.

The appellant has, in my opinion, clearly proved that these goods were a donation by his father to him; but I base my judgment on the ground that the respondent had to prove a sale and failed to prove one.

As to the other two items submitted to our consideration, I am also of opinion that the judgment of the Superior Court was right, and that the Court of Appeals erred in reversing it. They are small items, one of $451.07 and the other of $190.76 They have been allowed by the Court of Appeal on the ground that, in *Richard's* books, the minor child is twice credited for them, once in the account of monies received for cash sales over the counter, and once in the general account book. Now, in order to recover this amount, in contradiction to her own account books, the respondent had to establish it by legal and clear evidence. What evidence has she produced? None whatever, but an affidavit of a deceased person given, voluntarily and extra-judicially, before a commissioner of the Superior Court. It may well be asked what authority has this Commissioner to receive this affidavit. If he had none, there is no affidavit, no oath whatever. But leaving this question aside, and taking this affidavit as duly given, how could it be admitted as evidence in this case, is a question which the respondent's counsel failed to answer at the hearing before us. The oath of the respondent cannot be construed in her favor. She swears that these items are

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correct, but swears it, not of her own knowlege, but only because *Hébert*, the deceased person, said it in his affidavit. It is unfortunate that *Hébert* died before he could be examined in this case, but, according to the Court of Appeal, it is not the respondent's misfortune whose witness he would have been, that such should be the case, but the appellant's misfortune.

This appeal should, in my opinion, be allowed with costs in all the courts against the respondent.

Appeal allowed with costs.

Solicitors for appellant: *Felton & Blanchard.*

Solicitors for respondent: *Laurier & Lavergne.*

Application was made on behalf of respondent to the Privy Council for leave to appeal, but leave was refused.

TERTULLUS THEAL..... ....APPELLANT;

AND

THE QUEEN..... .....RESPONDENT.

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*Oct. 25.

*Dec. 4.

Criminal Appeal—Indictment—Misjoinder of Counts—Evidence.

An indictment contained two counts, one charging the prisoner with murdering *M. J. T.* on the 10th November, 1881; the other with manslaughter of the said *M. J. T.* on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

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

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Held,—Affirming the judgment of the Court *a quo*, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, (17th October preceding) the prisoner had knocked his wife down with a bottle: she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On the reserved questions, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment?

Held,—Affirming the judgment of the Supreme Court of *New Brunswick*, that the evidence was properly received, and that there was evidence to submit to the jury that the disease, which caused her death, was produced by the injuries inflicted by the prisoner.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) on points reserved at the trial of a criminal case.

The prisoner was tried and convicted of manslaughter at the *St. John* circuit in November, 1881. Chief Justice *Allen*, before whom the prisoner was tried, reserved the following case under the statute (2) for the consideration of the Supreme Court of *New Brunswick*:

"The prisoner was convicted of manslaughter at the *Saint John* circuit in November last, on an indictment containing two counts.

"The first count charged that he did on the 10th November, 1881, at the parish of *Lancaster*, feloniously, wilfully, and of his malice aforethought, kill and murder one *Mary Janet Theal*.

(1) 5 P. & B. 449.

(2) Cons. Stats., N. B., ch. 158, p. 1088.

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"The second count charged that he did on the 10th November, 1881, at the parish of *Lancaster*, &c., feloniously and wilfully kill and slay the said *Mary Janet Theal*.

"When the prisoner was arraigned, and before he pleaded, his counsel moved to quash the indictment on the ground of the misjoinder of the counts for murder and manslaughter, and that the finding of the grand jury 'A true bill,' was uncertain. The counsel for the prosecution having elected to proceed on the count for murder only, I refused to quash the indictment, and the prisoner pleaded 'not guilty.' In opening the case, the counsel for the prosecution stated that he would prove the ill-treatment of the deceased by the prisoner for a considerable time before her death; that his systematic abuse brought her to the condition which caused her death; that he had beaten her on the 17th October last, and that she died on the 10th November.

"The evidence shewed that the prisoner was in the habit of using violence to the deceased, by knocking her down and kicking her on different occasions, for more than a year before her death, which took place on the 10th November last.

"One witness testified that the deceased had sent for her in October last, she could not state the day; that she found the deceased ill in bed, her left eye black and bloodshot, and complaining of pain in her back and right side. That she asked deceased in presence of the prisoner what caused her black eye, to which she answered that the prisoner wanted her to get out of bed and get him a bottle of beer; that she (deceased) said she was tired and told him to get it himself; that he got out of bed and went for the beer; that she got up and followed him; that he met her in the door and hit her with a bottle; that she fell over against the door and did not know any more about it till she came

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to; that she did not know how long she lay there; that she got up and crawled into bed in the morning. That the witness asked the prisoner the cause of his doing this, to which he answered that he did not recollect doing it. This witness visited the deceased frequently between that time and her death, sometimes remaining with her during the night, and during the principal part of the time the deceased was unable to sit up, and complained of great pain. Other witnesses proved that the prisoner knocked the deceased down and kicked her at different times, one in June or July, 1880, others in September and December, 1880; another in January or February, 1881; another in March, 1881, and between April and July, 1881. Some of the witnesses swore that he kicked her in the side; and that on two occasions when he was beating her, he swore that he would take her life if he was hanged for it. It was also proved that in consequence of his violence one night she was obliged to leave the house, and remained in the barn all night. The evidence of the assaults was given after the medical testimony, and was received subject to objection by the prisoner's counsel, that no evidence could be given of assaults prior to the 10th November, when Mrs. *Theal* died; or, at all events, prior to the 17th October, as stated by the counsel for the prosecution in opening the case.

"Dr. *White*, who visited the deceased at the request of her brother on the 26th of October, prior to her death, stated that he found her in bed, that she complained of severe pain and soreness in her right side and tenderness on pressure directly in the region of the liver. That he visited her again on the 7th November and found all her symptoms considerably aggravated, the pain in her side greater than before, more fulness, and extending more over the liver, and her pulse much more rapid than on the 26th

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October. That she was very weak and complained of pain in the region of the liver, extending from the region of the right to the left lobe, and at that time he considered her condition very critical. This witness made a *post mortem* examination the day after Mrs. *Theal's* death, with the assistance of Dr. *McFarlane*. He stated that there was a great deal of fulness on the side of the deceased, extending from the right side over to the left in the region where she complained of the pain, that the condition of the liver was unusually large, about twice its natural size; that they examined the liver very carefully and found it much darker than its natural color, very soft and breaking down with the slightest pressure of the finger, particularly the right lobe, indicating that it was very much disorganized and had undergone a high degree of inflammation, and that, as it broke down, a peculiar fluid issued from it, which, though not pure pus, they concluded contained pus matter; that their opinion was, that the disease of the liver was the immediate cause of death, and that they believed the disease of the liver to be acute, and thought the disease was of three or four weeks duration; that they did not notice any indications of chronic disease in any of the vital organs; that a blow or a fall on a hard substance might cause the acute inflammation of the liver; that inflammation would cause the appearance of the liver which they found. That in his experience, cases of acute inflammation of the liver were not common in this climate.

"On cross-examination he stated that he could not say positively what caused the inflammation of the liver of the deceased; that a change of temperature might cause it, by a person being overheated and then exposed to a lower degree of temperature; that extreme heat might cause it, and it was very common in tropical climates. That they found no mark on the right side

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of the abdomen over the region of the liver That a blow might be received in the abdomen which would cause death without producing any local manifestation, and he believed a blow could be given which would cause inflammation of the liver without producing any external mark.

"Dr. *McFarlane*, the other medical witness who assisted at the *post mortem*, stated that they found the liver much larger than in a normal state—that it was very much softened and broke easily on pressure, and when separated, a large quantity of brownish fluid flowed out, in which, in his opinion, there was pus; that it had undergone a process of disintegration, shewing that serious structural changes had taken place, exhibiting that the liver was in an advanced stage of inflammation; that he considered the immediate cause of death was acute inflammation of the liver: it had probably lasted for two or three weeks; that acute inflammation was caused in tropical climates by using alcoholic stimulants; that it was not a common disease in the temperate zone; that he thought it might be caused by a kick or a blow, or external violence, without leaving any external mark.

"On cross-examination, he said that he did not know how the inflammation of the liver was caused; that it would not be remarkable in this case that there were no external marks of violence; that he had known cases of persons receiving injuries in the abdomen without any external marks; that the injury which would cause the state of the liver they found, might have remained eight or nine weeks; that in ordinary cases pus begins to form in two or three weeks after the inflammation commences; that a patient would feel pain very soon after acute inflammation commenced; that acute inflammation would be likely to run its course in from eight to ten days; that in his opinion

inflammation of the liver as they found it, would be more apt to be caused by external violence than by other causes; that the effects of food, a heavy meal, might cause inflammation; that pus begins to form between two and three weeks after acute inflammation.

"I directed the jury to consider: 1st. Whether inflammation of the liver was the immediate cause of Mrs. *Theal's* death; and 2nd, If it was, was such inflammation produced by natural causes, or by injuries and violence inflicted by the prisoner. If the cause of death was inflammation of the liver, and that was produced by a series of acts of violence committed by the prisoner, at least, if they were committed within a year of the death, the crime would be murder or manslaughter according to circumstances, though no one act of violence by itself would have produced that result. I directed them to exclude from their consideration, evidence of assaults committed more than a year before the death. I explained to the jury the principles which would distinguish murder from manslaughter. The questions which I reserved for the opinion of the court are—

"1st. Whether the indictment should have been quashed for the reasons before stated.

"2nd. Whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received.

"3rd. Whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment.

"(On this point it was understood that all the evidence might be referred to.)"

The Supreme Court of *New Brunswick* held that the conviction should be affirmed, Mr. Justice *Palmer* dissenting. The prisoner thereupon appealed to the Su-

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preme Court of *Canada*, under section 49 of the Supreme and Exchequer Court Act.

Mr. *Lash*, Q. C. for appellant: On the first question I rely upon Mr. Justice *Palmer's* judgment (1). The counts being joined are repugnant and contradictory, and therefore bad. The motion to quash was made before the crown officer elected to proceed on the first count only, and in a criminal case the power of amendment is not given to the court on a matter of substance without the consent of the Grand Jury.

Then as to the second question, the evidence of assaults a year and a-half previous to her death was clearly inadmissible. The prisoner was the husband of the deceased and in the habit of quarrelling, and assaulting his wife, but as it was proved that prior to the 17th of October, 1881, she was in her usual good health, evidence of assaults prior to that date was improperly received. It was proved that the death was caused by acute inflammation of the liver, and if that was caused by violence it could only be by recent violence. *Roscoe's* Criminal Evidence (2).

The case of *The Queen* v. *Lute* (3), though not in favor of the prisoner, is important as it is the converse of this case. In that case had the indictment been for manslaughter, the evidence would have been improper.

Then was there evidence to leave to the jury on the count of murder, of assault to causing death? [The learned counsel then reviewed and commented on the evidence, and contended that the death had not been the result of violence.]

Mr. *E. McLeod*, Q.C., for the Crown.

[On the first point he relied on *Reg.* v. *Young*, (4); *Reg.*

(1) 5 B. P. & B. p. 454.
(2) Ed. 1875, 655.
(3) 46 U. C. Q. B. 555.
(4) 3 T. R. 106.

v. *Strange*, (1); *Reg.* v. *Downing*, (2); *Reg.* v. *Trueman*, (3); *Reg.* v. *Davis*, (4); and *Reg.* v. *Craddock*, (5); and contended that the evidence of ill treatment prior to the 17th October was properly received to shew the prisoner's intention, (*Archbold* Crim. Ev. 226,) and that there was sufficient evidence to justify the learned Chief Justice in leaving the question to the jury, whether the death was caused by the prisoner's violence.]

RITCHIE, C J.:—After reading the reserved case proceeded as follows:—

As to the first point, it is too clear for argument, that there are cases where a greater offence includes the less, that upon an indictment for the greater the prisoner may be found guilty of the less. Of this, the case of murder and manslaughter is an example, for upon an indictment for murder, the prisoner may be found guilty of manslaughter. It is, therefore, unnecessary and useless to add a second count, but if a second count is added for manslaughter, how can this make the indictment bad? It cannot be doubted that offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and, on the trial, he may be convicted on the one and not upon the other.

It is true that, if different felonies be stated in several counts of an indictment, while no objection can be made to the indictment on that account, in point of law, the judge, in his discretion, may quash the indictment, or require the counsel for the prosecution to select one of the felonies and confine himself to that. This is technically termed putting the prosecutor to his election, and is done when the prisoner, by reason of two charges

(1) 8 C. & P. 172.
(2) 2 C. & K. 382.
(3) 8 C & P. 727.
(4) 3 F. & F. 19.
(5) 14 Jur. 1031.

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being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter, however, only of prudence and discretion, to be exercised by the judge. In this case, the prosecutor elected to proceed on the count for murder, and the prisoner was tried on that count alone. There was no necessity for this election, for the prisoner was in precisely the same position on the trial upon the count for murder that he would have been on the two counts for murder and manslaughter. Upon the count for murder, the prisoner was not found guilty of the murder, but was found guilty of manslaughter. The result would have been precisely the same, had he been tried on both counts; he would not have been found guilty on the count charging murder, he would have been found guilty on the count charging manslaughter. I am wholly at a loss to conceive upon what principle or technical rule of law any objection to the course pursued can be sustained, or how the prisoner was in any way embarrassed or confounded in his defence, or otherwise aggrieved.

As to the second point, evidence of other facts are admissible where those facts tend to prove the point in issue, as where the intent of the prisoner forms part of the matter in issue, and such other facts tend to establish the intent of the prisoner in committing the act in question; so the deliberate menaces or threats of a prisoner made at a former time are admissible, when they tend to prove the intent of the party and the prisoner's malice against the deceased.

It was quite proper on the count for murder to give evidence of the prisoner's assaults and threats to shew the animus of the prisoner.

On the third question, I think there was evidence the learned Chief Justice could not withdraw from the jury, and quite sufficient to justify them in arriving

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at the conclusion they did, that the deceased came to her death, not from natural causes, but by reason of the violent and unprovoked assaults committed on her by the prisoner. The evidence shows that the deceased was in good health on the night when defendant assaulted her, and though no person witnessed the assault, it is very apparent from the evidence that it was of the most violent character; and this evidence the judge was, in my opinion, bound to submit to the jury, and from which, I think, they could form a very accurate estimate of the extent of the violence—and which, in connection with the medical testimony, justified the jury in concluding that from the effects of such violence the deceased gradually languished until she died.

STRONG, FOURNIER and HENRY, JJ., concurred.

GWYNNE, J.:—

The questions reserved in this case do not present to my mind any point of any difficulty. The judgment of the court below must be affirmed upon all points, and the appeal be dismissed. No doubt, it is quite unnecessary to insert in an indictment a count charging a homicide, amounting to manslaughter only, in addition to a count charging the homicide to have taken place under circumstances amounting to murder; for the prisoner, being put on his trial for the murder, although acquitted of that crime, may upon the same count be convicted of manslaughter. That the joinder of two such counts is unnecessary, is all that can be said about it. The homicide charged in such case is but one, and it is the presence or absence of malice aforethought in the committal of that offence which gives to it the character of murder or of manslaughter The manslaughter charged in the count for manslaughter being

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comprehended in the count for murder, a prisoner, when he has pleaded to, and is given in charge to the jury upon this latter count only, is, in truth and substance, given in charge upon every thing included in that count, and therefore upon the charge of manslaughter, just as much as if he had pleaded to, and had been given in charge to the jury, upon the two counts; the insertion therefore of these two counts, although quite unnecessary, does not lay the indictment open to the exception that it contains two separate counts for distinct felonies, within the meaning of the rule, that a prisoner ought not to be charged with several felonies in the same indictment; even where that rule does apply, it is a matter left to the prudence and discretion of the judge, whether he will or not quash the indictment,—a discretion which he usually exercises by quashing, if there appears to him to be any danger that, by pleading to the whole indictment, the prisoner might be confounded in his defence or prejudiced in his challenge of the jury. See *Young* v. *Rex* in error (1). But where the crime charged in the second count, as here, is involved in the crime charged in the first count, it is plain that the prisoner could not possibly be prejudiced. It was contended, however, that the indictment by reason of its containing the two counts was incurably defective as containing two inconsistent charges, namely, a charge in the second count that a man already killed with malice aforethought was afterwards killed again without such malice, a point which, if there were anything in it, is disposed of in *Regina* v. *Downing* (2). Here the counsel for the crown only called upon the prisoner to plead to, and he was only given in charge to the jury upon, the count for murder, and the trial which took place was quite regular.

Upon the objection as to there not having been any

(1) 3 T. R. 106. (2) 2 C. & K. 382.

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evidence proper to be left to the jury, I cannot see how any doubt can be entertained upon the point of the sufficiency of the evidence to convict the prisoner; the jury was the tribunal to be satisfied; but that there was evidence, and that of considerable weight, to be submitted to them, does not, in my judgment, admit of a doubt.

The appeal must be dismissed and the conviction affirmed.

Appeal dismissed.

Solicitor for appellant: *John Kerr.*

Solicitor for respondent: *E. McLeod.*

ELIZABETH J. MONAGHAN. .....APPELLANT;

AND

SARAH HORN.....RESPONDENT.

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*Dec. 10.

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*June 22.

IN RE "THE GARLAND."

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Maritime Court of Ontario, jurisdiction of—Rev. Stats. Ont. ch. 128.—Collision.—Negligence, causing death.—Action in rem by mother of deceased child.—Master and servant.

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them—"The Garland."

Petition against "The Garland"—libelled under the Maritime Court Act at the port of *Windsor*—on behalf of the appellant claiming $2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of said "Garland." The respondent intervened, and

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

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demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court.

Held, (*Fournier* and *Taschereau*, JJ., dissenting), that the Maritime Court of *Ontario* has no jurisdiction apart from R. S. O. ch. 128 (re-enacting in that Province Lord *Campbell's* Act 9 and 10 *Vic*, ch. 93), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought her action as the personal representative of the child.

Per *Fournier*, *Taschereau*, *Henry* and *Gwynne*, JJ, (reversing the judgment of the Maritime Court of *Ontario*), that Vice-Admiralty courts in British possessions and the Maritime Court of *Ontario*, have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property."

Per *Fournier* and *Taschereau*, JJ., dissenting, that apart from and independently of ch. 128 Rev. Stats. *Ont.* the Maritime Court of *Ontario* has jurisdiction in a proceeding *in rem* against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant.

APPEAL to the Supreme Court of *Canada* from a judgment of His Honor Judge *Leggatt*, the surrogate judge of the Maritime Court of *Ontario*, at *Sandwich* and *Windsor*, allowing a demurrer to and dismissing the petition of the appellant against the steamboat "Garland," libelled under the Maritime Court Act at the port of *Windsor*.

The petition of the appellant of *Detroit* in the *United States* of *America*, in a cause of damages for death from collision, sets out: That the steamboat "The Garland," belonging to the port of *Detroit*, in the State of *Michigan*, then lying in the port of *Windsor*, was and is engaged in navigating the inland waters, of which the whole or part is in the province of *Ontario*.

That plaintiff, at the time when the cause of action arose, was the mother of *Joseph Monaghan*, who, on the night of July 22nd, 1880, was a passenger upon the

steam yacht "Mamie," of twenty tons burthen, used in inland navigation, on the *Detroit* river and adjacent waters.

That on the 22nd day of July, A.D., 1880, the said steam yacht "Mamie," being then and also at the time of the collision, tight, staunch, strong, and in every respect well manned, tackled, apparelled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts, upon the lookout for the protection and safety of said vessel, and with all her lights in their proper places and brightly burning, was bound up the *Detroit* river from the city of *Monroe* to the city of *Detroit*, returning from a pleasure excursion, and when said steam yacht had reached a point about abreast of *Mammy Judy* light, the evening being clear and bright moonlight, and it being about ten o'clock in the evening of said day, she sighted the steamer "Garland" coming down the river, also on a pleasure excursion from *Detroit* down the *Detroit* river and back, and overloaded with about twelve hundred excursionists on board, which steamer was then between one and two miles away, and showing her green and white lights; that the said "Mamie" continued in her proper course until said "Garland," when between half a mile and a mile from the "Mamie," changed her course, by porting her wheel and showing all three of her lights, and steering directly for the "Mamie," and down the river; that the "Mamie" thereupon blew one blast of her whistle and put her wheel to port so as to pass the said steamer "Garland" upon her port hand, and the said steamer "Garland" responded to said signal by blowing one whistle; but by the gross carelessness and negligence of the officers and crew of the said steamer "Garland," failed to port her wheel as she ought to have done, but, on the contrary, continued on her course, and swung over to the other side of the

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channel, across the course which the "Mamie" was properly pursuing, and struck said steam yacht "Mamie" upon the port side, aft of the pilot house, crushing her and breaking her down to the water's edge, so that within five minutes said "Mamie" sank.

The petition alleges insufficiency and incompetency of master and pilot, and particularly of boats and crew, &c., and that by reason of the collision aforesaid, and the sinking of said steam yacht "Mamie," and by the carelessness and negligence of the steamer "Garland," her officers and crew, and the failure to keep a proper lookout on board of said steamer, and to employ proper persons for officers, and to provide a sufficient and competent crew, and to keep the life boats and other boats of said "Garland" in a proper and fit condition for use, said *Joseph Monaghan*, son of said plaintiff, came to his death by drowning, and his said death was the direct result of the negligence of said steamer "Garland" in causing said collision, and fifteen other persons, passengers on the said steam yacht "Mamie," were drowned at the same time.

That plaintiff, by reason of the premises, was wrongfully deprived of the earnings, services and society of her said minor son.

That said son was of the age of thirteen and one-third years at his death. That your plaintiff was put to a large expense in searching for, and recovering the body of her said son, and in and about the funeral and burial of said body, to wit, $100 or thereabouts, and plaintiff claimed $2,000 and to have a lien on vessel, enforceable in the court.

Sarah Horn, the owner of the *Garland*, having intervened, demurred to the petition, and showed for cause of demurrer.

"1. That the said petition does not contain any matter wherein this court can ground any decree or give to the

plaintiff any relief against the said steamboat *Garland*, or against the owner thereof, intervening.

"Wherefore, and for divers other good causes of demurrer appearing in the said petition, the defendant demurs thereto, and prays judgment whether she ought to be compelled to make further or other answer to the said petition, and she prays to be hence dismissed with her costs.

"Statement in margin of demurrer of matters of law intended to be argued.

"1. The said petition does not allege or aver the death of the father of the said *Joseph Monaghan*, or that he has abandoned said child.

"2. The plaintiff as mother is not entitled, and has no remedy to recover damages for the loss of the child alleged in said petition as against the steamboat "Garland" or her owner.

"3. Even if the mother has a remedy for the loss of the child she is not authorized to pursue the remedy in her own name if she is suing under the statute in that behalf, that statute provides who must be the plaintiff.

"4. That the plaintiff by her said petition does not show that the collision which caused the death for which damage is claimed took place within the Province of *Ontario*.

"5. There was no obligation on the part of the mother to search for and recover the body of her said son, or to incur expense on account thereof, or for the funeral or burial of said body.

"6. That the plaintiff in and by the said petition does not set forth a cause of action against the said steamboat "Garland" within the jurisdiction of this court."

The petition having been amended by the introduction of the following averment: — "That *Joseph Patrick Monaghan*, the father of the

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said *Joseph Monaghan* departed this life on the third day of July, 1869, intestate, and at the time of his death was a resident of the said city of *Detroit*," the first matter alleged was disposed of. The Maritime Court of *Ontario* held the demurrer good and allowed the same with costs.

Mr. *Scott* for appellant:—

The question raised by the demurrer, and on this appeal is: 1st, whether the appellant could sue for the death of her son and consequent loss of service independently of Lord *Campbell's* Act; and 2nd, if she had a right to sue, whether the Maritime Court of *Ontario* has jurisdiction to entertain a claim of this nature?

As to the first point, I submit that even if such an action would not lie at common law, the admiralty court, which acts upon different principles will entertain the action. There is no decision in *England*, binding upon this court, holding that such an action would not lie at common law. The only decision, except at *nisi prius*, is *Osborne* v. *Gillett* (1), and although in that case the court decided, by a majority of one, that it would not lie, the weight of reasoning is, to my mind, strongly in favor of the view taken by *Bramwell*, B. The common law rule is not a rule which prevails in any other system of jurisprudence. The rules upon which they proceed in admiralty courts are the rules of the civil law; that court, independently of statute, would entertain the action brought by the mother for the death of her son and consequent loss of service. On this point I will refer the court to the 12th Central Law Journal (2), where the English authorities on this point are reviewed. See also *Thompson* on Negligence (3);

(1) L. R. 8 Ex. 88.

(2) P. 464.

(3) P. 1274.

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Plummer v. *Webb* (1); "*The Sea Gull*," (2); "*The Highland Light*" (3); "*The Towanda*," (4); "*The Charles Morgan*," (5); *Holmes* v. *The O. & C. R. W. Co.*, (6); *Dow* v. *Brown & Co.* (7).

It is admitted a wrongful act has been done, and that another person has suffered in consequence of that wrongful act. Now, on what principle can it be successfully contended that you can bring an action if your servant is injured, and that you have no remedy, if killed?

The decision of *Osborne* v. *Gillett* (8) is not binding upon this court, and was decided after the English law had been introduced in *Upper Canada.*

Then, if appellant has a claim against the wrongdoer, the next question is whether our Maritime Court of *Ontario* has jurisdiction to entertain it?

The judgment of the learned judge in the court below is based upon the difference between the Admiralty Court Act of 1861 (9), relying chiefly upon the absence in the Vice-Admiralty Court Act of the word "any" before the word "claims." The absence of this word is immaterial. In all the discussions upon the construction of the clause in the Admiralty Court Act, the question agitated was the extent of the meaning of the word "damage," and whether it included personal injury. No mention has anywhere been made of the word "any" as affecting the matter, and it is impossible for that word to have enlarged the meaning of the word "damage," or for its absence to narrow the sense in which that word is used.

By the Admiralty Court Act of 1861 (10), it is enacted

(1) 1 Ware 75.
(2) Chase's Decisions 145.
(3) Chase's Decisions 150.
(4) 23 Int. Rev. Rec. 384.
(5) 27 Law Reg. 624.
(6) 5 Federal Reporter 75; Pritchard's Admiralty Dig. 203.
(7) 6 D. 534, 16 Jur. 248 (Scotch.)
(8) L. R. 8 Ex. 88.
(9) 24 Vic. ch. 10, s. 7 and 26 Vic, ch. 24 (Imp.)
(10) 24 Vic., ch. 10, s. 7.

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that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Whether this enactment comprises a claim for damage such as the one sought to be enforced in this case, has been the subject of much judicial discussion in the cases of "*The Sylph*" (1); "*The Guldfaxe*" (2); "*The Explorer*" (3); "*The Beta*" (4); *Smith* v. *Brown* (5); *James* v. *London and South-Western Railway Co.* (6); *Simpson* v. *Blues* (7); and "*The Franconia*," (8). The result of these cases may be shortly stated as being that the English Admiralty Court has held that this claim does come within the section, and that opinion has been upheld in "*The Beta*" by the unanimous judgment of the judicial committee of the Privy Council; but, on the other hand, the Court of Queen's Bench (Lord *Blackburn* doubting) has held that it does not, and that opinion has been concurred in by the Courts of Common Pleas and Exchequer. The Court of Appeal, in the case of "*The Franconia*," was equally divided.

In this state of the English authorities, the law must be considered, as far as this Province is concerned, as settled by the decision in the case of "*The Beta*," the Judicial Committee of the Privy Council being our court of final resort, and that unless a clear distinction can be shown between the jurisdiction conferred by the Acts upon the High Court of Admiralty and the Vice-Admiralty Courts, the appellant is entitled to succeed.

Under the maritime law, a tort arising out of a collision, gives a lien on the ship doing the damage, and follows the ship, and when the ship comes within the jurisdiction of the admiralty, the only question for the court is whether a lien was created. See 7 *Moore's* P. C. 284; *Anne Joehanne* in *Stuart's* Vice Admiralty

(1) L. R. 2 A. & E. 24.
(2) L. R. 2 A. & E. 325.
(3) L. R. 3 A. & E. 289.
(4) L. R. 2 P. C. 447.
(5) L. R. 6 Q. B. 729.
(6) L. R. 7 Ex. 187.
(7) L. R. 7 C. P. 290.
(8) L. R. 2 P. D. 163.

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Reports, (1); and I submit, therefore, that we had a perfect right to file this petition in the Maritime Court of *Ontario* for a lien upon the steamboat "Garland," libelled at port *Windsor*, in the province of *Ontario*, and that the respondent's demurrer should have been dismissed.

Mr. *McCarthy*, Q.C.:—

The appellant was a foreigner, the vessel was a foreign ship, and the collision took place upon foreign waters. It is under these extraordinary circumstances that a suit is brought against a foreign vessel in the Maritime Court of *Ontario* by the parent of the child killed.

The jurisdiction of the Admiralty Court is conferred by the first section of the act creating the court, 40 *Vic.* cap 21, and it confers the same rights and remedies arising out of or connected with navigation, &c., "as such persons would have had in any then existing British Vice-Admiralty Court if the jurisdiction of such court extended to the province of *Ontario*." By reference to the act defining the jurisdiction of the Vice Admiralty Court, 26 and 27 *Vic.* (Imperial) chap. 241, sec. 10, ss. 6, and comparing that with the 13th section of the Imperial Act 24 *Vic.*, cap. 10, s. s. 7 and 13, conferring jurisdiction upon the High Court of Admiralty, it will be seen that, whereas the jurisdiction is given to the High Court of Admiralty over any claim for damage done by any ship, the jurisdiction conferred upon the Vice Admiralty Court is over "claims for damage done by any ship," the word "any" before "claims for damage" being omitted.

Chap. 128 of R. S. O. does not give any remedy *in rem* such as is sought in the Maritime Court in this petition, but merely a right of action *in personam*, and the act conferring jurisdiction on the Vice Admiralty

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(1) 2 Vol. P. 43

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Courts, which defines and limits the extent of the jurisdiction of the Maritime Court of *Ontario*, does not purport to give a right of lien where none existed before; and the natural interpretation of the words "claim for damages" does not mean damages to person but to property. See the reasoning in the case of "*The Sylph*" (1). Nor had the Vice Admiralty Courts, by virtue of Lord *Campbell's* Act or otherwise, jurisdiction over matters of the kind sought to be entertained here.

Unless the appellant shows that he had a lien upon the ship, this court has no jurisdiction.

I will now refer to the English cases to show that it is upon the words of the act respecting the jurisdiction of the High Court of Admiralty, which are quoted, that jurisdiction over claims of this nature is said to exist. The first case is that of "*The Sylph*" (2); then "*The Guldfaxe*" (3). This case disposes of the argument that the court would have jurisdiction independent of Lord *Campbell's* Act. "*The Explorer*" (4); "*The Franconia*" (5); S. C. on appeal (6); also *Smith* v. *Brown* (7), in which the jurisdiction in the High Court of Admiralty was denied by the Court of Queen's Bench.

It is a mistake to say that the Maritime Court is governed entirely by the principles of the Roman or civil law (8).

The learned counsel also referred to the following cases:

"*The Leon*" (9); "*The Moxam*" (10); "*The Saxonia.*" (11).

(1) L. R. 2 Ad. & Ec. 24.
(2) L. R. 2 Ad. & Ec. 24.
(3) L. R. 2 Ad. & Ec. 324.
(4) L. R. 3 Ad. & Ec. 289.
(5) L. R. 2 P. D. 163.
(6) L. R. 2 P. D. 170.
(7) L. R. 6 Q. B. 728.
(8) 4 C. Rob. Adm. Rep. p. 73.
(9) 44 L. T. N. S. 613.
(10) 1 Prob. Div. 107.
(11) L. T. N. S. p. 6.

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If, however, it should be determined that the court had jurisdiction over such a claim, I will now contend that, having sued as parent of the child, independent of Lord *Campbell's* Act, she cannot recover. The common law of England has been declared to be the law of *Ontario*.

No such action could be maintained or was maintainable at common law. The cause of action died with the person injured, and it was only under the Statute Law (Lord *Campbell's* Act, as the original act is known) ch. 128 R. S. O. in that province that an action for the loss of a person's life could be maintained, and by section three of that statute it is affirmatively enacted that such action should be brought in the name of the executor or administrator of the person deceased. The action can therefore only be brought in the name of the personal representative, which the petitioner in this case does not pretend she is. In support of the proposition that an action could not be maintained at common law for the death of another or for any negligence causing the death of another, I refer to *Osborne* v. *Gillett* (1). The rule is the same in the Admiralty Courts. See "*Hall's* Admiralty Practice" 21, "*Dunlop's* Admiralty Practice" 87, "*Benedict's* Admiralty Practice" 185, and "*Parson's* Ship and Admiralty" 350. Then the child in this case was under the age of fourteen years, and it is a presumption that a child under fourteen is incapable of earning anything or of being a servant. The mother therefore, if otherwise entitled to sue, could not maintain an action against a person whose wrongful act had caused the death of the child, because the child was not old enough to be capable of rendering any act of service, or to be treated by the law as a servant, in other words because it would be a presumption of law that the mother could not have sustained any such

(1) 2 L. R. 8 Ex. 88.

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injury as, under Lord *Campbell's* Act, would entitle her to damages. See "*Macpherson* on Infants," *Evans* v. *Walton* (1); *Grinell* v. *Wells* (2); *Hall* v. *Hollander* (3). Then again the question does not disclose facts upon which my learned friend could be allowed to argue that there is a ground of action for loss of a servant's services. There is no allegation of the value of these services. The allegation in the petition of the expenditure of money by the mother in searching for and recovering the body of her son, is not such damages as would entitle her to maintain a suit. See *Pim* v. *The G. N. Railway Co.* (4); and *Dalton* v. *The South Eastern Railway Co.* (5), and if the proceeding is sought to be maintained on the ground that the deceased being the petitioner's servant she is entitled to damage on account of the loss of services, it is clear that there is no right arising when death happens instanter as there would be in the case of a servant being injured, and so incapacitated from performing the services he had undertaken to render, but had not been killed. See *Baker* v. *Bolton* (6); *Osborne* v. *Gillett* (7); *Hyatt* v. *Adams* (8).

Mr. *Scott* in reply:

If the allegation in the petition as to damages resulting to plaintiff from the loss of the services of her son as servant is not sufficient, I pray for leave to amend the petition accordingly.

RITCHIE, C.J.:—

No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord *Campbell's* Act, 9 and

(1) 2 C. P. 615.
(2) 7 M. & G. 1033.
(3) 4 B. & C. 660.
(4) 2 B. & S. 759.
(5) 4 C. B. N. S. 296.
(6) 1 Camp. 493.
(7) L. R. 8 Ex. 88.
(8) 16 Mich. 180.

10 *Vic.*, c. 93, there was in *England* no right of action for the recovery of damages in respect of an injury causing death nor until R. Stats. c. 128 in *Ontario*.

Kelly, C. B., in *Osborne* v *Gillett* (1), an action by a father against defendant for negligently causing death of plaintiff's daughter, whereby plaintiff lost the services of his daughter and the benefits which would otherwise have accrued to him from such services, and for expenses in conveying to his house the body of his daughter and her burial expenses, says :—

No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority, that such an action is maintainable. All the authority that exists is against it.

And Lord *Campbell's* Act expressly recites that

No action at law is now maintainable against a person, who by his wrongful act, neglect or default, may have caused the death of another person.

And

That it is oftentimes right and expedient that the wrong-doer in such cases shall be answerable in damages for the injury so caused by him.

And in *Ins. Co.* v. *Browne* (3) *Hunt*, J., delivering the judgment of the court, says :—

The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts, and in many of the State courts, and no deliberate well considered decision to the contrary is to be found.

In *Hilliard* on Torts (4) the rule is thus laid down :—

Upon a similar ground it has been held that at common law the death of a human being, though clearly involving a pecuniary loss, is not the ground of an action for damages.

Shearman and *Redfield* on Negligence, (5) says :—

(1) L. R. 8 Ex. 88.
(2) P. 99.
(3) 5 Otto 756.
(4) P. 87 sec 10
(5) Sec. 290.

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The common law allowed of no remedy, by way of a civil action, for the death of a human being. [A private criminal action was allowed in cases of murder. The last instance of the kind was the famous case of *Ashford* v. *Thornton*, 1 B. & Ald. 405, in which defendant insisted upon his right to trial by battle. The right of action was soon after taken away by statute.] Obviously, the deceased person never would have had a cause of action for his own death; therefore none could survive to his legal representatives, even if the law had allowed, as in fact it did not allow, a cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant, therefore, worked no injury to the master of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. Whatever may be said of the logic of these arguments, it is certain that the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife or child, or in any other right or capacity whatsoever, could maintain an action for damages on account of the death of a human being. The earliest reported decision upon this point was in an action for the battery of the plaintiff's wife, "whereby she died." It was held that the right of action was merged in the felony, *Higgins* v. *Butcher*, Yelv. 89, 1 Bro. & Gold., 205. The first reported case of negligence in which the question arose was before Lord *Ellenborough* (*Baker* v. *Bolton*, 1 Camp. 493) who instructed the jury that the plaintiff, who sued for the loss of his wife's services, could only recover for his loss during her lifetime, although her death was caused by the defendant's negligence. All the decisions in cases where an executor or administrator sought to maintain the action have been one way. But an attempt was made to distinguish between this claim and the claim for loss of service, which seems to have been successful in two instances, one an action brought by a father for the loss of his son, and the other brought by a husband for the loss of his wife. But in these cases the legal question does not appear to have been argued; and in well-considered cases it has been uniformly and unanimously adjudged that a husband cannot sue for the death of his wife, nor a wife for the loss of her husband, nor a master for the death of his servant. Neither can any one maintain an action for any indirect loss which he sustains by the death of another person; such, for example, as the loss which an insurer of the life sustains by that event.

If an action such as this ought to be maintainable at common law, as *Bramwell*, B., so strongly urges in his dissenting judgment in *Osborne* v. *Gillett* (1), the long established principle that the death of any human being cannot be complained of as an actionable injury must be changed by the legislature, and the provisions of the *Ontario* Revised Statutes, ch. 128, founded on the principle of Lord *Campbell's* Act (2), must be extended by the legislature, and not by the courts, to meet a case of this kind.

I do not think it necessary to discuss or determine the question, on which such a contrariety of judicial opinion exists in *England*, as to whether the admiralty has jurisdiction *in rem* in a case in which the right of action is under the 9th and 10th *Vic.*, ch. 93; but, assuming that an action given by the 9th and 10th *Vic.*, ch. 93, is within the words and meaning of the Admiralty Court Act, 1861, and that the action given by the Rev. Stats. *Ont.* (3), is within the words and meaning of the *Ontario* Maritime Court Act (4), this action cannot be maintained, because it is not brought under that act; the mother here does not sue as the personal representative of her deceased son. No action is given by the statute, but to the personal representative. The words of the statute (5) are as follows:

Sec. 2.—Action given to recover damages for the death of any person caused by any wrongful act, neglect or default.

Sec. 3.—Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

Sec. 5.—Not more than one action shall lie for and in respect of the same subject-matter of complaint.

But it has been argued that though this may be so

(1) Ch. 128.
(2) 9 & 10 Vic., ch. 93.
(3) Ch. 128.
(4) 40 Vic., ch. 21, s. 2.
(5) Rev. Stat. ch. 128.

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at common law, and though the *Ontario* statute cannot be applied to this case, nevertheless that the Court of Admiralty has jurisdiction, in a cause of damage for loss of life happening by a collision instituted against a ship; but I think this cannot be sustained. Whatever may be the rule in the *United States* with respect to a remedy in the admiralty, independent of statute, for a wrong or injury incurred by the death of a person, as by a parent in a proceeding *in rem* against the vessel, which by collision caused the death of the child, there is no such remedy, independent of statute, in the admiralty of *England*, and consequently none in the Maritime Court of *Ontario*. In *The Guldfaxe* (1), a suit to recover damages by the personal representative of a person killed in a collision between two vessels, Sir *Robert Phillimore* says:—

> Though it has been suggested, and is possible, that this court (Admiralty Court) may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the court, or from other sources, to warrant me in pronouncing in favor of the jurisdiction of the court upon this ground. If the court be competent to entertain this suit, it must have derived such competence from statute law. The counsel for the plaintiff have mainly—I might almost say exclusively—relied upon certain recent statutes as having conferred this jurisdiction upon the court.

The learned Judge then proceeds to examine "Lord *Campbell's* Act," and of it says:—

> The effect of this statute then was to give a new right previously unknown to the common law; according to which all suits founded on a personal injury or tort died with the person. * * * This statute though it effected the material alteration in the common law which I have mentioned, conferred no jurisdiction upon the Admiralty Court.

He then considers the Merchant Shipping Act, 1854, and the Admiralty Court Act, 1861, and finally concludes, although not without doubt, that the court had

(1) L. R. 2 Ad. & Ec. 325.

jurisdiction, under Lord *Campbell's* Act and the Admiralty Court Act, 1861, to entertain the suit.

I think this appeal must be dismissed with costs.

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FOURNIER, J.:

L'appelante *E J. Monaghan* réclame contre le steamboat "Garland" $2,000 de dommages pour la mort de son fils, *Joseph Monaghan*, arrivée dans une collision qui a eu lieu dans la rivière *Détroit*, entre le "Garland" et le yacht à vapeur "Mamie." Il est allégué que cette collision a été causée par la faute et négligence du commandant et de l'équipage du "Garland."

Sarah Horn, l'intimée, propriétaire du yacht "Mamie," a soulevé par défense en droit (demurrer) en réponse à cette réclamation la question de savoir si la Cour Maritime d'*Ontario* a juridiction pour adjuger sur une réclamation de cette nature. L'honorable juge, qui présidait la Cour Maritime a décidé que cette cour n'avait pas juridiction en pareille matière, et c'est de ce jugement qu'il y a maintenant appel.

En vertu de la sec 2 du ch. 21, 40 Vict., la juridiction de la Cour Maritime d'*Ontario* est précisément la même que celle de la Cour de Vice-Amirauté d'*Angleterre*. La juridiction de cette dernière par l'acte impérial (1863), 26 Vict., ch. 24, s'étend aux réclamations pour dommage causé par tout bâtiment—"claims for damage done by any ship," sec. 10, ss. 6. Ces termes sont-ils suffisants pour donner jurisdiction dans le cas dont il s'agit? La 24e Vict., ch. 10, sec. 7, (1861) avait déjà confié à la Haute Cour d'Amirauté la même juridiction dans des termes un peu différents, mais comportant absolument le même sens. Le texte est ainsi: "The High Court of Admiralty shall have jurisdiction "over any claim for damage done by any ship." La question de savoir si ces termes sont suffisants pour conférer le pouvoir à la Haute Cour d'Amirauté d'entre-

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tenir une demande de dommages, résultant de la mort accidentelle causée par la négligence ou la faute de ceux qui ont le commandement d'un vaisseau, a été beaucoup discutée en *Angleterre*. Elle y a donné lieu à un conflit de décisions entre la Haute Cour d'Amirauté d'un côté, qui a maintenu sa juridiction, et la Cour du Banc de la Reine, de l'autre, présidée par le Lord Chief Justice *Cockburn*, décidant le contraire. Les décisions citées dans le factum de l'appelant, sont discutées dans la cause du "*Franconia*." (1) Sir *Robert Phillimore* les passe en revue en ces termes:

In the case of "*The Sylph*" (2), decided in 1867, I ruled, and allowing the opinion of Dr. *Lushington*, that the Court of Admiralty had jurisdiction under the Admiralty Court Act, 1861, to entertain a cause for personal damage done by a ship, and I stated my reasons. This judgment was not appealed from. In the following year, 1868, I again had occasion to consider the question, and stated my reasons at length for considering that the same Court had jurisdiction to entertain a suit for the recovery of damages by the personal representative of a person killed in a collision between two vessels.

In 1869, in the case of "The *Betsy*" (3), I again held that this Court had jurisdiction in a cause of damage instituted against a ship for personal damage. From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council in 1869, and that Court consisting of Lord *Romilly*, Sir *W. Erle*, Sir *James Colville* and Sir *Joseph Napier*, said: "The words of the 7th section of the "Admiralty Court Jurisdiction Act, 1861, which had been referred to, "clearly include every possible kind of damage. Personal injuries are "undoubtedly within the words "damage done by any ship." The "case of "*The Sylph*" which has been referred to, and in which it was "so held, has not been appealed from." In 1870, in the case of "The *Explorer*" (4) I entertained a suit brought against a foreign ship by the personal representative of persons killed in a collision. There was, I believe, an appeal to the Privy Council, but it was never prosecuted; and if the cases on this subject ended here, I should have no difficulty in reaffirming the principle laid down by Dr. *Lushington*, myself and the Judicial Committee of the Privy Council. But in the case of "*The Black Swan*," in 1871, where injury and death had been

(1) 2 Pro. Div. 163.
(2). L. R. 2 Ad. & E. 24.
(3). L.R. 2 P. C. 447.
(4). L.R. 3 Ad. & E. 289.

caused by a collision at sea and the suit had been entertained by this Court, an application was made to the Court of Queen's Bench for a prohibition, which was granted: *Smith v. Brown* (1). I need not say that to such a Court, it is my inclination, as well as my duty, to pay the highest possible respect; but the unfortunate conflict between the judgment pronounced when the prohibition was granted and the judgment of the Judicial Committee of the Privy Council in the case of "*The Beta*," compels me to consider the circumstances attending the proceedings before the learned judges of the Court of Queen's Bench and the grounds upon which their decision was founded. The case was heard before Lord Chief Justice *Cockburn*, Mr. Justice *Hannen* and Mr. Justice *Blackburn*. The latter learned judge said: "I have entertained doubts in this case, not altogether "removed, but which are not strong enough to make me dissent from "this judgment, or even to make me require further time for consi- "deration." The Lord Chief Justice and Mr. Justice *Hannen* considered the question "one of considerable difficulty," but decided in favour of the prohibition.

It appears to me that the main ground, I will not say the *ratio decidendi* of the Lord Chief Justice's judgment, was that the word "damage" was used as applicable to mischief done to property, and not to injuries done to the person; and his Lordship said: "And "that this distinction is not a matter of mere verbal criticism, but is "of a substantial character and necessary to be attended to is appa- "rent from the fact that the legislature in two recent acts in *pari* "*materiâ* both having reference to the liability of ship-owners in "respect of injury or damage, namely, the Merchant Shipping Act, "1854 (2) and the Merchant Shipping Act Amendment Act, 1862 (3), "has, in a series of sections, carefully observed this distinctive phra- "seology, speaking in distinct terms, in the same section, of loss of "life and personal injury on the one hand, and loss and damage done "to ship's goods or other property on the other. In those acts the "term "damage" is nowhere used as applicable to injuries done to "the person; it is applied only to property and inanimate things. "We see no reason to suppose that the Legislature, in using the term "in the enactment we are considering, had lost sight of the distinc- "tion uniformly observed in the preceding statutes."

Tel est actuellement l'état de la jurisprudence en *Angleterre* sur cette importante question. Comme on le voit par la citation ci-dessus, Lord Chief Justice

(1). L.R. 6 Q. B. 729. (2). 17 & 18 Vict. c. 104, part. IX.
(3). 25 & 26 Vict., c. 63, § 54.

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Cockburn se range à l'opinion contraire en donnant pour raison que le mot *damage* ne s'applique qu'aux dommages faits à la propriété et non à ceux faits à la personne. Toutefois, cette signification limitée n'a pas été admise par le Conseil privé.

La position prise sur cette question par la Haute Cour d'Amirauté, confirmée par la décision égale de la Cour d'Appel, a été approuvée par le jugement unanime du comité judiciaire du Conseil privé, dans la cause du *Beta* (1). La Cour du Banc de la Reine, comme on l'a vu dans la citation donnée plus haut, avait décidé le contraire. Le principal motif de sa décision fut que la juridiction de la Cour d'Amirauté ne s'étend pas aux dommages faits à la personne "*does not extend to personal injuries*"—que le terme "dommage" employé dans la section 7 n'a rapport qu'au dommage causé à la propriété. Cette interprétation ne fut pas admise par l'honorable Conseil Privé. L'appel était d'un jugement de la Haute Cour d'Amirauté déclarant qu'elle avait juridiction dans une poursuite intentée contre un bâtiment pour dommages causés à la personne. Lord *Romilly* en prononçant le jugement au nom de la Cour s'exprima ainsi (2):

Their Lordships are of opinion that the order appealed from ought to be affirmed. The words of the 7th section of the *Admiralty Court Jurisdiction Act*, which had been referred to, clearly include every possible kind of "*damage done by any ship.*" The case of "*The Sylph,*" which has been referred to, and in which it was so held, has not been appealed from. There was every reason for the legislature enacting that which the judment of the Court below holds to have been enacted. Their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court below with costs.

Puisqu'il y a conflit d'opinion dans les plus hautes cours en *Angleterre* sur cette question, le jugement de l'honorable Conseil Privé, qui est la cour de dernier ressort pour notre pays, doit dans ce cas faire la loi

(1). L.R. 2 P.C. 447. (2). L.R. 2 P.C. 447.

pour nous. C'est par ce haut tribunal que notre décision dans cette cause serait susceptible d'être reformée, si les parties en appelaient, et non à aucune autre cour d'Angleterre, quelque digne de respect que soit d'ailleurs ses décisions.

L'honorable juge qui a décidé en première instance a rejeté toute prétention admise par le Conseil privé. Il a cru voir entre les deux textes donnant juridiction sur cette matière à la Haute-Cour et à la cour de Vice-Amirauté une différence suffisante pour faire admettre cette juridiction dans la première et la rejeter dans la seconde. Il attache une grande importance au mot *any*, (*any claim*), qui précède le mot *claim* dans l'acte de 1861 et qui ne se rencontre pas dans celui de 1863, concernant la cour de Vice-Amirauté. Ce dernier acte dit au lieu de "*any claim*" "*claims for damage done by any ship.*" L'omission du mot *any* dans cette phrase est absolument sans importance. Les deux phrases signifient exactement la même chose,—toutes deux disent d'une manière générale, et sans restriction aucune, que les réclamations pour dommages seront de la juridiction des deux cours d'amirauté. Dans toute la discussion qui a eu lieu sur la question qui nous occupe, on ne voit nulle part qu'il ait été attaché la moindre importance à la différence de rédaction des deux actes. Ce qui a divisé les tribunaux, c'est l'étendue de la signification à donner au mot "dommage." Lord Chief Justice *Cockburn*, avec la majorité de la Cour du Banc de la Reine, a été d'avis qu'il ne devait s'appliquer qu'aux dommages causés à la propriété et non à la personne. La cour d'Amirauté et la Cour d'Appel divisée également et l'hon. Conseil Privé ont au contraire maintenu que le mot "dommage" était assez général pour comprendre aussi bien les dommages à la propriété que ceux faits à la personne. Dans la cause du "*Beta*," il est vrai que l'accident n'avait pas causé la mort, mais

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je crois que s'il se fût agi de dommages résultant de la mort, l'honorable Conseil Privé aurait encore fait, avec plus de raison, le même argument au sujet de l'interprétation du mot dommage. N'admettant aucune différence dans les deux textes dont il s'agit, je pense que l'on doit en conclure que ce qui a été décidé, au sujet de la compétence de la Haute-Cour d'Amirauté, l'aurait été également par rapport à la Cour de Vice-Amirauté, car dans l'un et l'autre cas il ne se serait agi que de la signification à donner au mot "dommage." La Cour Maritime d'*Ontario* ayant la même juridiction que la Cour de Vice-Amirauté d'*Angleterre*, j'en conclus qu'elle a, comme cette dernière, juridiction pour décider sur la réclamation dont il s'agit.

Une autre objection faite à la présente demande, c'est que l'appelante aurait dû poursuivre en vertu de l'acte de Lord *Campbell* (9 et 10 Vict., ch. 93, 1846) comme administratrice de la succession de son fils et non comme sa mère, seule qualité qu'elle a prise dans la procédure. L'honorable juge qui a décidé en première instance n'a pas exprimé d'opinion sur ce point. Etant d'avis que la cour n'avait pas juridiction pour juger la question principale, il était tout-à-fait inutile pour lui de se prononcer sur cette question. Mais étant d'une opinion contraire à la sienne sur la juridiction de la Cour Maritime, et pensant que les conclusions de la demande devraient être accordées, si elles sont plus tard justifiées par la preuve, il devient important de savoir si l'appelante a qualité pour porter sa présente demande.

Je dois d'abord dire en réponse à cette objection que l'on ne peut tirer contre l'appelante aucun argument de l'acte de Lord *Campbell*. La procédure n'est pas fondée sur cet acte, mais bien seulement sur l'acte donnant, comme il a été démontré ci-dessus, juridiction à la Cour de Vice-Amirauté en pareille matière. La

juridiction qu'elle a sur ce sujet ne lui vient pas de l'acte de Lord *Campbell*. Ceci est évident par les dispositions de cet acte, qui donne au jury le pouvoir de répartir le montant des dommages entre les diverses parties intéressées dans la poursuite en dommage dans le cas de mort causée par faute ou négligence. La Cour de Vice-Amirauté n'aurait pu faire cette répartition, parce qu'alors elle n'avait pas le pouvoir, qui lui a été conféré depuis, de référer à un jury certaines questions de fait. Conséquemment une action en vertu de l'acte de Lord *Campbell* n'y pouvait pas être portée. C'est, sans doute, pour remédier à cette omission, que plus tard la juridiction lui a été conférée d'une manière générale comme on l'a vu plus haut. Comme il n'était pas nécessaire de poursuivre en vertu de l'acte de Lord *Campbell*, il n'était donc pas nécessaire de le faire dans la forme indiquée par cet acte, c'est-à-dire au nom de l'administrateur de la succession du défunt. Mais faut-il au moins que l'appelante ait une qualité légale pour représenter la succession de son fils. Celle de mère du défunt qu'elle a prise est-elle suffisante en loi ? Je me dispenserai de discuter cette question si importante qu'elle soit, car je trouve sur ce sujet une dissertation dans le 12me vol. du "*Central Law Journal*" (1), qu'il suffit de citer. L'article dont le titre est ainsi: "Was death by wrongful act, default or negligence "actionable at common law ? If so, by whom could the "action be brought," discute deux questions: celle de savoir si l'action existait d'après la loi commune,—et qui avait qualité pour la porter. C'est à la partie traitant cette dernière question que je réfère particulièrement. La question y est discutée d'une manière très savante, et la conclusion à laquelle en arrive l'auteur est fondée sur les plus hautes autorités légales. Je n'en citerai que la conclusion :—

(1) P. 464.

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Death by wrongful act, or negligence, was actionable at common law, as the law stood in the year 1758, when *Blackstone* delivered his lectures, and the right of action was in favor of the wife and heir at law, or any others having an interest in the life of the person killed.

Fournier, J.

Je dois ajouter que je donne mon entière approbation aux vues exprimées par mon honorable collègue, le juge *Taschereau*, dans la savante dissertation qu'il a faite sur cette même question. Je crois aussi qu'il a établi de la manière la plus certaine l'existence du droit d'action du maître pour réclamer des dommages contre celui qui, par sa faute ou négligence, a causé la mort de son serviteur. La réclamation en cette cause, il est vrai, n'est pas faite par la Demanderesse en qualité de maîtresse pour recouvrer la valeur des services de son enfant comme serviteur; mais comme en pareil cas les actions sont ordinairement portées dans cette forme, la déclaration en cette cause pourrait être amendée de manière à soulever la question de responsabilité dans cette forme.

Pour ces raisons, je suis d'avis que la Cour Maritime d'*Ontario* a juridiction pour entretenir la présente réclamation et que l'Appelante a qualité légale pour porter la dite demande.

HENRY, J.:

To some extent I am reluctantly compelled to arrive at the conclusion that the appellant here is not entitled to the process of the Admiralty Court in the mode adopted. I have satisfied myself that the court has not jurisdiction in the matter, and that the plaintiff was precluded from bringing an action for personal damages. The powers conferred on the Vice-Admiralty Court are by the statute conferred upon the Maritime Court of *Ontario*. I think the appellant would have been entitled to our judgment had the suit been brought so as to have brought the plaintiff within the position

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pointed to in the *Ontario* Statues (1), which is a copy of Lord *Campbell's* act, giving the representatives of the deceased party the right to bring an action for damages. I think the court has jurisdiction over the subject-matter, but I fail to see, nor have I been able to find, any authority for sustaining the action in the Vice-Admiralty Court on the part of a mere friend or relation of the party who was killed. Under these circumstances, I am of opinion, that the appeal should be dismissed.

TASCHEREAU, J.:

I can see no difference between the Admiralty Act of 1861 and the Vice-Admiralty Act of 1863, and, in my opinion, if the High Court of Admiralty has jurisdiction over all claims in respect of damage done by any ship, whether to person or to property, the Vice-Admiralty Courts, and consequently the Maritime Court of *Ontario*, have the same jurisdiction. I concur fully in what my brother *Gwynne* says on this part of the case.

Now, has the Admiralty Court such jurisdiction? Upon this point I consider myself bound by the decision of the Privy Council in the "*Beta*" case (2). Independently of that decision, were I called to interpret for the first time the Admiralty Act of 1861, or the Vice Admiralty Act of 1863, I would read them both as giving jurisdiction over "claims for" any "damage done by any ship," whatever may be the nature of the damage, and whether to person or to property.

One of the reasons given by Lord Chief Justice *Cockburn* in *Smith* v. *Brown* (3), why no action at all for personal injuries should be entertained by the Admiralty Courts, is, that as in the Merchant Shipping Act of 1854 and the Merchant Shipping Act amendment

(1) R. S. O. c. 128.

(2) L. R. 2 P. C. 447.

(1) L. R. 6 Q. B. 729.

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act of 1862, the term "damage" is nowhere used as applicable to injuries done to the person, it must be presumed that, in the Admiralty Court Act, the same term "damage" is used in the same sense, and likewise applies only to mischief done to property, and not to injuries done to the person.

Sir *Robert Phillimore* in the "*Franconia*" case (1) has fully answered that objection. I will merely observe that the Admiralty Court Act in question was passed in 1861, so that the Merchant Shipping Act amendment act of 1862 did not precede it. Then as to the Merchant Shipping Act of 1854 (2), it plainly, as I read it, provides for the case where the owner of a ship may be answerable in damage for loss of life or personal injury. It enacts that no owner of any sea-going ship shall be answerable in damages to an extent beyond the value of his ship, in case where any loss of life or personal injury is, by reason of the improper navigation of such ship, caused to any person carried in any other ship, without the actual fault and privity of such owner. Does not this enactment recognize that damages for loss of life and personal injuries may, in certain cases, be recoverable from the owner? So that, in this enactment, the word "damages" clearly applying to loss of life and personal injury, the same word must receive the same application in the interpretation of the Admiralty Court Act of 1861, and consequently of the Vice-Admiralty Court Act of 1863, if comparision between these acts is to be considered as a criterion on the interpretation of the said word "damage."

On this question, whether the admiralty courts have jurisdiction over actions for personal injuries, I observe that one of Mr. Justice *Bramwell's* grounds of reasoning in "*The Franconia*" case, against the jurisdiction of the said court, in actions under Lord *Campbell's* Act, is that

(1) 2 P. D. 163. (2) 17 & 18 Vic., c. 104, s. 504 Imp.

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as under Lord *Campbell's* Act the damages are to be necessarily assessed by a jury, and as a jury cannot be had in the admiralty court, it is evident that the admiralty court cannot entertain such cases. A word will suffice to show that this argument cannot any how be invoked in *Ontario*, and it is this: Ch. 128 of the Revised Statutes (*Ontario*) distinctly enacts that, in such actions, the damages are to be assessed by the jury or by the judge. It is clear, then, that whatever force that argument may have had in "*The Franconia*" case, it could not avail in *Ontario*. Then, another reason why it cannot apply to the present case, is that the present action is not brought under our re-enactment of Lord *Campbell's* Act. I have a further observation to make as to this "*Franconia*" case. The Admiralty Court there held, in first instance, that it had jurisdiction in an action for personal injuries under Lord *Campbell's* Act. In the Appeal Court the judges being equally divided, the decision of the Admiralty Court was affirmed. *In re The Attorney General* v. *Dean of Windsor* (1), it was held by Lord *Campbell*, that when there is an equal division of opinion among the Lords, and in consequence the judgment of the court below stands, the result is the same, as to the authority, as if the Lords had been unanimous in their judgment. On this principle, the holding of the Admiralty Court in "*The Franconia*" case, that it has jurisdiction in an action *in rem* for personal injuries, should, be considered as to authority, as unanimously affirmed by the Court of Appeal. This principle may, however, not be applicable to the Court of Appeal, but I do not deem it necessary for me to consider this point here, or to dwell any longer on this part of the case, as I think myself bound, as I have already stated, by the decision of the Privy Council on this question in the "*Beta*" case.

(1) 8 H. L. Cases 367.

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I will merely add that, to shut the door of the Admiralty Court to those who are personally injured by any ship, is obviously to deny them the right of proceeding *in rem* against such ship. Now, it must be evident that this, in a great many cases, is virtually to deprive the sufferers of all remedy or redress whatsoever. It seems to me that this consideration gathers special weight for us from the circumstances of the geographical position of our country. Divided territorially as we are, for hundreds of miles, from the *United States*, by a now imaginary line across the water, it is evident that, as by moving a very short distance only, ships on our inland waters can go from this country to the *United States*, and from the *United States* to this country, the owners, if their ships are not subject to proceedings *in rem* are in a position, in the event of their causing loss of life or personal injury, to easily rid themselves, in a great many cases, of the consequences of their wrong doings.

The other and most important question in this case, and one which, I need not say, causes me the greatest embarrassment, and which I approach with great diffidence, is whether, according to the common law of *England*—for the present suit is not under any statute similar to Lord *Campbell's* Act—an action lies, at the suit of the mother of a child killed by negligence, to recover damages against the party whose negligence caused the death, in the character of mistress for the loss of her servant; this being, it is admitted, the form of action allowed and usually resorted to by a parent, to recover damages in such cases (1), and the plaintiff's declaration to be amended, if necessary, to fully cover this ground.

It is a matter of special regret for me, I need hardly remark, that, as this case comes before us, not only are we deprived of the advantage of having, on a question

(1) Smith, Master and servant, p. 96.

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of this importance, and to me, so difficult of solution, the most valuable aid of the always so well-considered judgments of the learned judges of the superior courts of *Ontario*, but that even the Maritime Court itself, from which this appeal is brought directly to this court, has not examined and determined the question it is now my duty to consider, having disposed of the case on other grounds. The assistance that is afforded by the discussion of the same point in *Osborne* v. *Gillett* (1) by learned and eminent judges in *England*, is, under these circumstances, of an obviously increased value to me. The majority of the court in that case held, Baron *Bramwell* dissenting, that a master cannot maintain an action for the immediate death of his servant. If this decision was binding upon this court, I would, of course, have to follow it, and the discussion would be at an end But as it is clearly not so, and the matter is for us *res integra*, I must say that, in my opinion, the weight of reasoning and logic is entirely with Baron *Bramwell*, the dissenting judge in that case.

I will not venture to try and add anything to what that learned judge has said as to *Baker* v. *Bolton* (2), and the other cases relied upon by the majority of the court in that case of *Osborne* v. *Gillett*. It would be presumptuous on my part to do so. Neither do I think it necessary to notice the cases cited, *inter alia*, by the defendant, of "*The Halley*" (3), and the "M. *Moxham*" (4), wherein questions as to the application of foreign law, in certain cases, have been raised and determined, more than to say, that they have here no application, as no such questions of foreign law have to be considered in the present case, the only point in controversy and argued before us being whether or not, under our own law, the plaintiff's action lies.

(1) L. R. 8 Exch. 88.
(2) 1 Camp. 493.
(3) L. R. 2 P. C. 193.
(4) 1 Prob. Div. 107.

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As to *Glaholm* v. *Barker* (1) and some cases from the Admiralty Court, cited by the defendant, and, I believe, relied upon by my brother *Gwynne*, they certainly contain various *obiter dicta* to the effect that no action lies at common law for damages arising from the wrongful killing of any one, but it is evident that these cases are not directly in point. In every one of them, that no such action lies is taken for granted, but not decided. The same may be said of the judgments in "*The Franconia*" case, I have already referred to. In none of these cases was the point, as between master and servant, directly in issue, or necessarily determined for the solution of the litigation between the parties.

I may also remark that Mr. Justice *Bramwell*, in the "*Franconia*" case, did not, in any way, as contended before us, show any tendency to recede from the position he had taken upon this question, in *Osborn* v. *Gillett*. In the "*Franconia*" case, he was of opinion that the Admiralty Court has no jurisdiction *in rem* in a cause for damages under Lord *Campbell's* Act; in *Osborne* v. *Gillett* he held that a master can maintain an action against the wrong-doer before the ordinary civil courts for damages resulting from wrongful killing of his servant, even when the death of the servant is immediate. There is no conflict in these two opinions of the learned judge. *Baggally* and *James*, L. JJ., in this "*Franconia*" case, answer fully the objection taken in *Smith* v. *Brown* (2) against the right of action in the Admiralty Court, on the difference between the common law rule and the admiralty rule on contributory negligence. I may add that in the "*George*" and "*Richard*" (3) it was admitted by counsel on both sides, and accepted as law by the court, that the rule of the common law must supersede the admiralty rule, even in the admiralty

(1) L. R. 1 Ch. App. 223. (2) L. R. 6 Q. B. 729.
(3) L. R. 3 Ad. & Ec. 466.

courts, in actions for loss of life under Lord *Campbell's* Act. In cases of collision the admiralty rule, since the Judicature Act of 1873 is, it is true, in *England*, followed in the common law as well as in the admiralty courts (1), and this is now so, for us, in virtue of 43 *Vic.*, ch. 29, sec. 8 (D), but this probably would not apply to actions under Lord *Campbell's* or similar acts, or to any actions whatsoever for loss of life or for personal injury,

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It is argued that Lord *Campbell's* Act and our corresponding statutes contain a legislative declaration that, according to the common law of *England* or of this country, no action is maintainable against a person, who, by his wrongful acts, may have caused the death of another person. Mr. Justice *Bramwell* answers that argument in *Osborne* v. *Gillett*. It seems clear by the titles, recitals and the context of Lord *Campbell's* Act, and our Canadian re-enactment of it, 10 & 11 *Vic.*, ch. 6, consolidated by ch. 78, C. S. C., and for *Ontario* now contained in ch. 128 Rev. Stat., that the legislature, by these statutes, intended nothing else than to provide for the families of persons killed by negligence, and to legislate only as to the damages suffered by their families The relation of master and servant cannot, it seems to me, be affected by these acts, or the declaration they contain as to the previous state of the law, even if those of father and child, &c., were so affected by this declaration. Moreover, if our Act 10 & 11 *Vic*, ch. 6, was held to declare that previous to its enactment no action was given in any case for the death of any one, it would be holding it to declare what would have been, and would be, a most flagrant untruth, as to *Lower Canada* at least, to which this statute applied as well as to *Upper Canada*; for under the French civil law an action unquestionably

(1) Marsden on Collisions p. 61. A.

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lies, and always did lie, by a parent for the wrongful killing of his child) or by the child for the wrongful killing of his parent.

Then, if this declaration in Lord *Campbell's* act and our re-enactment of it, could at all be relied upon in support of the defendant's contention, an argument of the same nature, against it, can be based on a declaration contained in another of our statutes. By the 43 *Vic.* ch. 29 (D) sec. 13 (a re-enactment of 31 *Vic.* ch. 58, sec. 12 (D), in force at the time of the collision in question, it is enacted that the owners of any ship shall not, where any loss of life occurs through the negligence of those in charge of such ship, or by reason of the improper navigation of such ship, without the actual fault or privity of the said owners, be answerable in damages for such loss of life to an amount exceeding $38.92 for each ton of the ship's tonnage. This act applies whether the collision occurs in British or foreign waters, or on the high seas (1). The liability in damages, for loss of life, of the owner of a ship is thus, in this enactment, clearly recognized. Now, this said enactment extends to all the Dominion, and to every province thereof. In those of the provinces, like *Ontario* and *Quebec*, where statutes similar to Lord *Campbell's* act are in force, this recognition of liability for loss of life, it may fairly be argued, must be construed as applying simply to actions brought under these statutes. But in those of the provinces where there are no statutes similar to Lord *Campbell's* Act (in *Nova Scotia* for instance), and for which, as well as for the other provinces, this Dominion statute provides for the case of damages due by the owner of a ship for loss of life caused by his negligence or the negligence of those in charge of his said ship, is not this provision of the said statute equivalent to a declaration by the legislative

(1) 1 Moo. P. C. C. N. S. 471.

authority, that, at common law, an action does lie for loss of life in certain cases?—this declaration to be necessarily construed as applying only to the subject of navigation and shipping over which the Dominion parliament has jurisdiction? Otherwise, causing loss of life by improper navigation would be actionable in *Ontario* and *Quebec*, and not actionable in *Nova Scotia*, though the Dominion statute was passed to render the rule in this respect uniform all through the Dominion. However, as this point has not been taken at the argument, I will not dwell any longer upon it.

I now come to the consideration of the main ground, upon which is based the contention that an action by the master, for the wrongful killing of his servant, is not maintainable where the death of the servant was immediate.

Actio personalis moritur cum personâ, it is argued, and consequently the master's action for damages in such a case is gone. This, in my opinion, is entirely a misapplication of the maxim.

What action dies with the person? Clearly the action of the one who dies. Well the one who died never had an action for being killed. The action that, according to the maxim, died with the deceased is the action he, the deceased, had for the injuries, if any, he suffered in his lifetime. But the present plaintiff's action is not at all for injuries and damages caused to her deceased son, but purely and simply for injuries and damages caused to herself, the plaintiff. These injuries and damages she complains of and claims in the present action did obviously not exist when her son was living; her right to the present action had not accrued, and could not accrue when and as long as he lived. How then can it be contended that her right of action died with him? How could her action die before it came to existence,

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before it originated, before the fact that created it happened?

It is plain that, when the death is immediate, the maxim cannot apply, because, the deceased never had an action against the person who wrongfully caused his death. *Actio personalis moritur cum p rsonâ* means that, if one, for instance, who has suffered damages from slander, battery, and false imprisonment, etc., etc, etc., dies before instituting an action for these damages, the right of action dies with him, his representatives will not have, in such cases, the action which in his lifetime belonged to him, for damages to his person, and which he did not care or refused to bring—that is all that the maxim says. It is true that it has sometimes been made to also apply to the defendant, and to mean that, if one who is answerable in damages, say, for a battery, for instance, dies before an action is instituted against him, the action for such damages is not then maintainable against his representatives. *Nox's* Maxims, 9th ed. 20; 1, *Williams* v. *Saunders* 239; note *a* to *Wheatley* v. *Lane*, (edition of 1871); *Bird* v. *Ralph* (1); *Canterbury* v. *Atty. Genl.* (2). But this principle is not derived from the maxim. *Actio personalis moritur cum personâ* applies only to the party who had the action, to the party who would have been plaintiff if he had lived. It does not apply to the deceased wrong-doer, against whom the action would have been taken. In other words, it is the *actio personalis*, the action for injuries to the person itself, not the *actio in personam*, that dies with the person. A contrary interpretation would have the maxim say that all personal as distinguished from real actions die with the person, which would be an absurdity.

I may here observe that in *Potter* v. *Metropolitan Dis-*

(1) 4 B. & Ad. 830. (2) 1 Phil. 306.

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trict Ry. Co. (1); affirmed by the Exchequer Chamber (2); and in *Bradshaw* v. *The Lancashire & Yorkshire Ry. Co* (3); it was held that damages suffered by the personal estate of a deceased person, arising from breach of contract, can be recovered after his death by his personal representatives, though there was previously no instance of any such action ever having been brought. In this last case, the deceased had died in consequence of injuries received whilst a passenger on a railway, and the plaintiff was suing the railway company in an action for breach of contract, claiming the damage to the personal estate of the deceased arising in his lifetime from medical expenses and loss occasioned by his inability to attend business in the interval between the accident to him and his death. The court held that the maxim *actio personalis moritur cum personâ* did not apply, though death had resulted from the injuries complained of. There, the plaintiff claimed, not the damages caused to the person of the deceased, but the damage caused to the personal estate of the deceased before he died, and the claim for which formed part of his succession. Here the plaintiff claims, not the damages caused to the person of her deceased son, but the damages caused to herself. These two cases differ in this, that here the plaintiff claims damages done to her own personal estate, whilst in the other case, the plaintiff claimed damages done to the personal estate of the deceased, but they are similar in this, that in both the maxim *actio personalis moritur cum personâ* is inapplicable, for the reason that, in both, the damages claimed are not damages to the person, or, in other words, that in both the action is not *actio personalis* in the sense of the maxim.

The doctrine contended for by the defendant seems

(1) 32 L. T. (N.S.) 765. (2) 32 L. T. (N.S.) 36.
(3) L. R. 10 C. P. 189.

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to me, moreover, anomalous and unjust. A widow, for instance, has a minor son who is her only support. A physician, whom she has called to attend him for a slight indisposition, gives him a violent and deadly poison instead of a soothing draught. He dies on the spot, and she is deprived, by the gross negligence of this physician, of the only support for existence she had in this world. That she suffers damages by the loss of her son's services till at least he would have been of age, is undeniable. That this physician is the author of these damages is also clear. That these are her damages, not her deceased son's damages, is as clear. Yet, says the defendant, "this mother would have no action against the physician." And why? because he killed her son instead of disabling him only, or only rendering him ill, say, for a month. "But, just because he killed my son" (would think this mother) "I am entitled to heavier damages." "No," says the defendant, "the law exonerates this physician just because he killed your son. Had he disabled him for a short space of time only, you would be entitled to damages, but as he killed him, though he must admit that you suffered damages, and that he caused you these damages, yet the law says that he is not answerable for these damages." For, a fact which must not be lost sight of is that, on this demurrer, the defendant admits that his wrongful act caused the death of the plaintiff's son, who was her servant, that the plaintiff, by this wrongful act of the defendant, lost her son's and servant's services, and that she, the plaintiff, suffered damages in consequence. Here is the admission of a wrongful act and of a damage, of a *damnum cum injuriâ*, yet there would be, according to the defendant, no remedy, no action, no redress whatsoever. If, by his culpable negligence, this physician had sent her child to the hospital, this mother would be entitled to

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damages, but, as he has brought him down to his grave, her right to any redress whatever is denied. Upon what principle can this doctrine be upheld? I may here make this observation, that the law of *Scotland* is clear upon this point, and recognizes, under the term of assythment, the right to recover the damages caused by the wrongful killing of a person. *Bell's* principles of the law of *Scotland* (1); *Weems* v. *Mathieson* (2). I have already said, I believe, that under the Roman law and the French law, the action in such cases is also given.

But it is further argued that the immediate death of the servant cannot give a right of action to the master, because a master's claims to the services of his servant arise by contract with the servant, and that any cause therefore which terminates the contract of service must terminate the master's claim for compensation for the loss of the benefit of a contract which no longer exists. This, it seems to me, is easily answered. It is conceded, and indeed cannot be doubted, that if the child and servant, is by a wrongful act or neglect of a third party, disabled from work, but not killed, the father and master has his action for loss of service. If the child is so seriously disabled or maimed that his father is for ever deprived of his services, this would be, it is likewise conceded, an aggravation of the damages. Now, in this case also, as in the case of death, the contract or presumed contract is broken and terminated. Yet the action lies. Why then should the action not lie where it is the death of the child that terminates the contract, whilst it lies where it is a wounding or a maiming that terminates it. It is, in fact, in both cases, just because the contract is terminated that the action lies, just because the wrong-doer tortiously terminated it that he is answerable to the parent for the damages

(1) P. 749. (2) 4 Macq. H. L. Cases, 215.

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to him caused by this premature termination of it. To say that the cause which terminates the contract of service must terminate the master's or father's claim for compensation, is to say that the claim for compensation would cease before having existed, for, as I view it, it is the termination of the contract that creates the action against the wrong-doer. In other words, the termination of the contract by the wrong-doer, far from terminating the master's claim, is the origin, the cause, the sole ground of his claim and of this action.

Then suppose that the master's ground of damages is the pre-payment of wages to his deceased servant. Could it be said that because the contract is terminated, the action is terminated? I repeat it, it is because the contract is terminated, but the action lies in such a case.

It is somewhere advanced as a reason why the action should be refused, in the case of immediate death, that to give it would be setting a price upon human life, or estimating its value by a pecuniary standard. But would not this reason equally apply to the action given by Lord *Campbell's* Act and our own corresponding statutes. Then, does not the law of insurance, for instance, allow any one, who has an interest in the life of another, to insure that life, and so to put, as it were, a premium on his death, or, in other words, convert this interest in a life to an interest in death, in the termination of that life? Moreover, in this very doctrine contended for by the defendant, is not an interest given in death? To say to the wrong-doer, that if he crushes my servant's foot he will be answerable to me in heavy damages, but that if he kills him he will escape scot free, is, it seems to me, almost inciting the wrong-doer, when he is put in the alternative, to kill my servant.

I now pass to the consideration of the *United States*

cases. The majority of them, it cannot be denied, support the defendant's contention, and refuse, or seem to refuse, the right of action at common law where death is immediate. There are, however, some where the right of action is admitted. In *Ford* v. *Monroe*, for instance (1), the Supreme Court of *New York* maintained an action by a father for the loss of the services of his child, who had been killed by the negligence of the defendant. *Cross* v. *Guthery* (2) is also cited in the same sense, but I have been unable to see the report itself. In *James* v. *Christy* (3) the Supreme Court of *Missouri* also held that the father whose son was killed by the negligence of the defendant, a common carrier, has an action for the damages he suffered from the loss of his son's services.

In *Lynch* v. *Davis* (4) *Harris*, J., delivering the judgment of the court, says :

> The common law gave the husband and the father a right to recover of the wrong-doer the pecuniary injury he had sustained by the reason of the killing of his wife and child.

In *Shields v Yonge* (5) it was held that a father, whose son has been killed by negligence, has an action for the damages suffered by the loss of his child's services, if the son is old enough to render service.

In that case the son killed was eighteen years old. In the present case, the libel shows that the libellant's child was between thirteen and fourteen. The defendant contends that there is a presumption that a child under fourteen is incapable of earning anything, or of being a servant, and that the libellant cannot therefore be injured by his death. The answer to this, it seems to me, is that we cannot now-a-days admit such a presumption. We all know that thousands and thousands

(1) 20 Wendell 299.
(2) 2 Root Conn. 90.
(3) 18 Mo. 162.
(4) 12 How. Pract. Rep. 323.
(5) 15 Ga. 349.

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of children under fourteen, in *America* at least, earn good wages and even make sometimes from four to five dollars a month or more by their industry, as for example, our newspaper boys. Moreover, this, it seems to me, will be a matter of proof. On this demurrer, the defendant admits that he, by his negligence, deprived the plaintiff of her child's services, and that thereby he caused her damage. Any presumption that the child could not render any service, if such presumption there was, must surely be taken as rebutted by the admission, on the part of the defendant, that the plaintiff, by the loss of this child's services, suffered two thousand dollars damages. Another case in point, and where the whole question is thoroughly reviewed, by one whose ability and science is universally, in this as in his own country, acknowledged. *Dillon*, J, *In re Sullivan* v. *Union Pacific Railroad Co.* (1). That eminent jurist there repudiated the doctrine contended for here by the defence, and held directly that where a servant is killed on the spot by the wrongful act of any one, the master may recover for the loss of service. "Is it then," he says, "a principle of the common law that where the "death of the servant immediately ensues from the "wrongful act of another, there is no remedy for the "master, and that where it ensues therefrom afterwards, "the master's loss connot be estimated beyond the period "where the death occurred. Such a principle cannot be "indicated on considerations of reason, justice or policy, "and I could only consent to recognize it upon being "satisfied that it was one of the rules of the common law, "so long and so well settled that the courts are bound "to accept it and apply it until it is changed by legisla-"tive action." The learned judge then reviews the English and American cases on this point, and shows that Lord *Ellenborough*, upon whose dictum, in *Baker* v.

(1) 3 Dill. 334.

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Bolton (1), is based the doctrine that where the death is immediate, no action lies, cites no cases, enters into no discussion, and does not profess to rest upon precedent. He then justly remarks that the majority of the court, who, in *Osborne* v. *Gillett* (2), felt bound to follow *Baker* v. *Bolton*, did not attempt to vindicate the doctrine therein enunciated, its policy, or reasonableness. The learned judge concludes by holding that a father, whose minor son has been killed by the wrongful act of another, can, in law, recover the value of his son's services from the date of his death until he would have become of age. An able note by the reporter is attached to the report.

But even if such an action could not be maintained at common law, the Admiralty Courts, according to some decisions, will entertain it.

In *Cutting* v. *Seabury* (3), *Sprague*, J., whom *Chase*, C J., *in re The Sea Gull* (4), calls "a very enlightened and able judge," said " * * * the weight of authority in common law courts seems to be against the action, but natural equity and the general principles of law are in favour of it," and held that the Admiralty Courts would entertain such an action.

Plummer v. *Webb* (5), has been cited as being in the same, but I could not lay my hands on the report.

In re "The Sea Gull" (6), that distinguished jurist, the late Chief Justice *Chase*, held that the rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in the admiralty, and that a husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby. The learned judge, after ob-

(1) 1 Camp. 493.
(2) L. R. 8 Ex. 88.
(3) 1 Sprague 522.
(4) Ubi Post.
(5) Ware 80.
(6) Chase's Decisions 145.

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serving that it is difficult to explain why a father may maintain an action for the loss of his son's services personally injured by the wrongful act of a third party, if the son survives, but should have no action if the son is killed on the spot, adds:

> Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.

I have considered carefully, amongst other cases cited by the defendant, *Insurance Co.* v. *Browne* (1), from the United States Supreme Court, a tribunal, whose decisions are always entitled to the greatest consideration. That case does not seem to me in point, though there is in the judgment of *Hunt*, J., a re-statement of the maxim that, at common law, actions for injuries to the person abate by death. I have already said that this means that an action for injuries and damages, for instance, to *B.* abates by *B's* death, but that this is not an action for the injuries and damages caused to *B.*, the deceased, but purely and simply for the injuries and damages caused to *A.*, the plaintiff, and which she the plaintiff, has suffered by *B's* death. In other words, the plaintiff *A.* does not claim the damages that *B.*, the deceased, suffered, but damages that she, the plaintiff, suffers, and which the defendant, on this demurrer and for the purposes of this argument, admits to have, by his wrongful act, caused, not to the deceased, but to her, the plaintiff. We have been referred by the defendant to quite a number of decisions in the *United States* wherein, as he reads them, the doctrine he contends for here has been approved of and received as law. In not many of them can the decision be said to be directly in point, as between master and servant. It must be conceded, however, that if the cases are to be counted merely, the defendant's contention must prevail. But if, on the

(1) 95 U. S. R. 754.

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contrary, they are to be weighed, if we are to be guided in the determination of this question by the best established principles of justice, this doctrine appears to me utterly indefensible. I would allow the appeal, and overrule the demurrer.

GWYNNE, J.:—

This case cannot be determined upon any supposed distinction between the extent of the jurisdiction given to the High Court of Admiralty by the Imperial Statute 24 *Vic.* c. 10, sec. 7, and of that given to the Vice Admiralty Courts by the Imperial Statute 26 *Vic.* c. 24, sec. 10, sub-sec. 6.

By the former of those acts it is enacted that, "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," and by the latter that, "the matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows:" then follow eleven subjects, all commencing with the word "claims," the sixth of which is, "claims for damage done by any ship." This form of expression comprehends when expressed in the singular number, "every claim for damage done by any ship." The only difference between the two acts is, that the former uses the singular number "any claim," while the latter uses the word "claims" in the plural, comprehending "all" claims and "every claim" in the singular, so that whatever jurisdiction the High Court of Admiralty has over "any claim for damage done by any ship," the Vice Admiralty Courts in the British possessions have to entertain and adjudicate upon a like claim.

In the present case, we are not called upon to express any opinion whether, upon a question arising as to the jurisdiction of the Maritime Courts of this Dominion upon a claim for compensation for loss of life under the provisions of what is called in *England* Lord *Campbell's*

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Act, Imperial Statute 9 & 10 *Vic.* c. 93, with which the statute of *Canada* 10 & 11 *Vic* c. 6, corresponds, we shall be governed by the decisions of the High Court of Admiralty in *England* in the cases of "The Guldfax," "*The Explorer*" and "*The Franconia*," affirmed by the judgments of Lords Justices *Baggallay* and *James* in the case of "*The Franconia*" (1) or by the judgment of the Court of Queen's Bench in *Smith* v. *Brown* (2), approved by the Court of Common Pleas (3), although the point did not directly arise, and by the Court of Exchequer in *James* v. *London & South-Western Railway Co.* (4), although the point did not there arise either, and by the judgments of Lord Justices *Bramwell* and *Brett* in the case of "*The Franconia*" in the Court of Appeals, where the point did directly arise.

The question raised upon this record is not whether the jurisdiction of the Dominion maritime courts extends to cases of personal injuries resulting in death, within the provisions of Lord *Campbell's* Act, for this suit is not instituted by a personal representative of the deceased, as it must be, if brought under that Act, or the corresponding Canadian Act (5.)

The questions raised upon this record are whether, wholly independently of the above acts, an action lies in the maritime courts of *Ontario*, at the suit of the mother, of a child under age killed by negligence, to recover damages against the party whose negligence caused the death, either in the character of parent for the loss of her child, or of mistress for the loss of a servant, and, if it lies in respect of the latter relationship, whether the record is so framed as to enable the petitioner to recover in respect of that relationship. But as the jurisdiction given to the maritime courts is, by

(1) 2 Pro. Div. 172.
(2) L. R. 6 Q. B., 729.
(3) L. R. 7 C. P. 300.
(4) L. R. 7 Ex. 187.
(5) 10 & 11 *Vic.*, ch. 6.

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the Act constituting those courts (1) stated to be, such jurisdiction—

"In all matters, including cases of contract and tort "and proceedings *in rem* and *in personam*, arising out "of, or connected with navigation, shipping, trade or "commerce on any river, lake, canal, or inland water, "of which the whole, or part, is in the province of "*Ontario* as belongs in similar matters within the reach "of its process, to any existing British Vice-Admiralty "Court;" the question becomes one as to what the jurisdiction of the existing British Vice-Admiralty Courts in like case would be, if the area of jurisdiction of such courts extended over the above mentioned waters.

The petition does not state whether the waters upon which the collision, which is alleged to have taken place, occurred, were within the limits of any of the *United States* of *America* or within the Province of *Ontario*, nor do the pleadings raise any question, as to there being any foreign law affecting the case, if the collision occurred within the limits of any of the *United States* of *America*; so that, in fact, the question which we have to determine is finally resolved into this, namely:—whether according to the law of *England*, as administered in the Court of Admiralty in *England*, as that court was constituted before the constitution of the High Court of Justice, an action would have lain at suit of the plaintiff under the circumstances set out in the petition, in the Court of Admiralty, if the collision causing the damage had occurred within the jurisdiction of that court.

Now the law as administered in the Court of Admiralty, as regards the point in question, is in substance the same as that which is administered in the courts of common law. There is no *lex maris* placing trespass to the person upon a different foundation at sea from

(1) 40 *Vic.*, ch. 21.

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what it has on land, or which subjects a party to damages for an injury sustained by another at sea, under circumstances which would not subject the same party to damages, if the injury had occurred on land, although as to the remedy, the party complaining of the injury has greater remedial relief by proceeding *in rem* where the injury is committed at sea. There is no variety in the subject matter of torts whether committed on sea or land. They cannot, like contracts, relate some to terrene and some to marine affairs. Treason, murder, *battery*, must be the same in their nature and their punishment, whether committed on land or water (1). Neither is it of any importance, that in some countries where the civil law prevails, an action does lie at the suit of the widow and children for the loss of a husband or father by death caused by negligence against the party causing it, and at the suit of the husband for the loss of a wife, so killed, for the law, which is administered in the Court of Admiralty in *England*, is not the law simply of any foreign country. The courts admit the proof of foreign law as part of the circumstances upon which the existence of the tort, or the right to damage may depend, and then applies and enforces its own law, as far as it is applicable to the case thus established; but it is alike contrary to principle and authority to hold that an English court of justice will enforce a foreign municipal law and will give a remedy in the shape of damages in respect of an act, which, according to its own principles, imposes no liability on the person from whom the damages are claimed. This was the principle enunciated by the Privy Council in the case of "*The Halley*" (2); and in "*The M. Moxham*" Lord Justice *Mellish*, in the Court of Appeal, says:

> The law respecting personal injuries and respecting wrongs to

(1) 2 Brown Civil and Ad. law 110.

(2) L. M. 2 P. C. 203-4.

(3) 1 Pro. Div. 111.

personal property, appears to me to be perfectly settled, but no actions can be maintained, in the courts of this country, on account of a wrongful act, either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country.

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Neither the civil law, as administered in any foreign country, nor any other foreign law, if any such had been pleaded, could affect this case, unless such law is also adopted as part of the law of *England*.

In the case of "*The Sylph*" (1) it was held by Sir *Robt. Phillimore* that the jurisdiction of the Admiralty Court was so extended by 24 *Vic.* c. 10, sec. 7, as to give to the court jurisdiction to entertain a cause of damage for personal injuries caused to a person engaged in diving, in the river *Mersey*, by a steamer employed as a ferryboat on the river. The learned judge was of opinion that the court originally had jurisdiction over such a case, of which it had been deprived by 13 *Ric.* 2, c. 5; which enacted, "that the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea as it had been used in the time of *Edward* III." But in the case of "*The Guldfaxe*" (2) the question of the jurisdiction of the court in the case of an injury resulting in death, first arose. That was a cause of damage on behalf of the administratrix of one of the crew of a vessel called "The Four Brothers" who was killed by collision with "The Guldfax," caused, as was alleged, by the mismanagement of "The Guldfax," The contention of the counsel for the defendant was: 1st. That until the passing of Lord *Campbell's* Act 9 & 10 *Vic.*, ch 93, there was no right of action for the recovery of damages in respect of an injury causing death. Upon the part of the plaintiff it was admitted

(1) L. R. 2 Ad. & Ec. 24. (2) L. R. 2 Ad. & Ec. 325.

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that before the passing of Lord *Campbell's* act the action would not have lain, but that that act gave a new right, not a new remedy. The learned Judge, Sir *Robt. Phillimore*, pronouncing judgment, says:

> Though it has been suggested, and is possible, that this court may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the court, or from other sources, to warrant me in pronouncing in favor of the jurisdiction of the court upon this ground. If the court be competent to entertain this suit it must have derived such competence from statute law. The counsel for the plaintiff have mainly, I might almost say exclusively, relied upon certain recent statutes as having conferred this jurisdiction upon the court, it becomes therefore necessary to examine those statutes.

He proceeds then to examine Lord *Campbell's* Act, and says:

> The effect of this statute then, was to give a new right previously unknown to the common law.

And again:

> This statute, though it effected the material alteration in the common law, which I have mentioned, conferred no jurisdiction upon the Admiralty Court.

He then proceeds to examine 24 *Vic.*, ch. 10, and other acts, and finally concludes, not without doubt and hesitation, that by the combined effect of Lord *Campbell's* Act and the other acts, the court had jurisdiction to entertain the suit. The same learned judge in the case of "The Explorer" (1,, came to the same conclusion, and that the provisions of Lord *Campbell's* Act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was, at the time of the wrongful act, neglect or default which caused his death, on board a foreign vessel on the high seas.

In the case of "The Franconia" (2), it was not contended that the Court of Admiralty had jurisdiction in

(1) L. R. L. 3 Ad. & Ec. 289. (2) 2 Pro. Div. 163.

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the case of personal injury resulting in death apart from and independently of Lord *Campbell's* Act. That Act was treated as having first created the right of action, and the question whether the action *given by that statute* could be entertained by the Admiralty Court under the extended jurisdiction given to it by 24th *Vic.*, ch. 10, s. 7.

In the case of "The George and Richard" (1), which was a suit for limitation of liability, instituted under the provisions of the Merchants' Shipping Act, on behalf of the owners of a brig, charged with having caused death by collision with another vessel, Sir *Robt. Phillimore*, giving judgment, says (2):—

> It has been contended that the men, whose lives were lost, were guilty of negligence which contributed to the catastrophe, and therefore that their representatives cannot recover damages under Lord *Campbell's* Act, it was not denied that if the facts shew this negligence the law is as has been stated.

The learned judge also held that the measure of damages recoverable was regulated by the judgment of the Court of Queen's Bench, in *Blake* v. *The Midland Ry. Co.* (3), so that in effect, in accordance with what appears to be just and reasonable, the learned judge held that in causes of damage for injury resulting in death the same principles must be applied in the Admiralty Court as would be applied in the same case in the courts of common law, thus adopting the alternative of giving up in cases of personal injury to which the injured person himself contributed the admiralty rule as to contributory negligence, which in the subsequent case of "The Franconia" was one of the objections relied upon by Lord Justice *Bramwell* to the Admiralty Court having jurisdiction under Lord *Campbell's* Act, when he says:—

(1) L. R. 3 Ad. & Ec. 466. (2) P. 476.
(3) 18 Q. B. 93.

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The admiralty rule must be given up or an action be given where Lord *Campbell's* Act gives no action.

In *Osborne* v. *Gillett* (1), the Court of Exchequer, *Bramwell*, *B*, dissenting, held that no action lies at the suit of a master for injuries which cause the immediate death of the servant. It is not necessary, as it appears to me, to inquire whether or not the foundation upon which this conclusion has been rested by some is satisfactory or otherwise; the fact, as stated by *Kelly*, C. B., that:

> No decision is to be found in the books from the earliest times by which an action for this cause has been sustained—no dictum, is to be found, by any judge, or upon any competent authority that such an action is maintainable—all the authority that exists is against it.

is conclusive, to my mind, that no such action lies by the law of *England*; if, however, I entertained a different opinion, as the point which we are called upon to determine here is, what is the law of *England* under the circumstances in issue in *Osborn* v. *Gillett*, I should feel myself bound by the law as enunciated in that case, which is the only decision upon the point in the English courts, until the judgment rendered in that case shall be overruled by competent authority. I am sensible that I expose myself to the imputation of being presumptious when I say that (but still, with the most deferential respect for the high judicial attainments of Mr. Justice *Bramwell*, I must say that) there does appear to my mind good reason why, where death is instantaneous, the action should not be maintainable, and why, when death is not immediate but the injury eventually results in death, no damages should be recoverable for any portion of time subsequent to the death.

It has never been suggested that an action lies at the suit of one person for personal injury done to

(1) L. R. 8 Ex. 88.

another, except upon the ground that by the injury the plaintiff was deprived of the services of the injured person, to the benefit arising from which service he was, in law, entitled; *per quod servitium amisit* is the very gist and sole foundation of the action. The master's claim to the services of his servant arises out of a contract with the servant, and the right to compensation for the loss of services is based upon and commensurate with the continuing existence of the contract, in virtue of which alone they are due and can be claimed. If then a servant, be injured by the tort of a third person, and can no longer render to his master the services due under the contract of service, both master and servant have their separate action for the damage accruing to each from this injury, but the measure of the master's damage is the loss of the service to which he was entitled under the contract of hiring with the servant. The contract of service still continuing, notwithstanding the injury to the servant which incapacitates him from rendering the services due thereunder, the master is entitled to compensation for the loss of such services still due; but in such a case of injury to the servant, supposing that the servant, finding himself incapable by reason of the injury received, of rendering any further service, for which damage he has a complete cause of action against the wrong-doer, declines to continue in the service of the master any longer, and in express terms puts an end to the contract of service, can it be said that the master would nevertheless still be entitled to recover damages from the person who injured the servant for loss of service during any portion of time subsequent to the servant so terminating the contract of service? The answer must clearly, in my judgment, be in the negative, and for the reason that, the contract of service being terminated, the master cannot be entitled to demand compensation for the loss of services to

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which he is no longer entitled. The gist of the master's action is not that the act of the wrong-doer to his servant has caused the termination of the master's contract with his servant, in virtue of which contract, if not terminated, the master would have been entitled to the benefit of the services of the servant, but that the act of the wrong-doer has deprived the master of the benefit of services to which he continued to be entitled under a still existing contract with his servant, so when the death of the servant results from the injury, the contract of service and the master's claim to any future service thereunder is conclusively determined, and so all claim for damages for loss of service subsequent to the death must cease. Up to the death, if the contract still continues, the master is entitled to recover damages, but *ne plus ultra*. It is no answer to say, but the tort feaser, who injured the servant, has been the cause of the termination of the contract, and for such injury to the master he should render compensation, notwithstanding the death of the servant, and for a period of time subsequent to the death. In my mind, the answer to this suggestion is complete, and is, that as there is no cause of action in the master against the person who has injured the servant which the law recognizes, except for compensation for the loss of service to which in virtue of a continuing existing contract the master is entitled, when the death of the servant occurs, (no matter from what cause occurring), the contract of hiring being determined, the right of the master to all service under the contract ceases, and such right ceasing, all claim for damages for loss of service must cease also. It would be very anomalous if the same common law, which gave no cause of action to the personal representatives of the injured person to recover damages for a period subsequent to the death of the injured person, should give to a master damages for

such period founded upon the claim that he had lost the benefit of the services of the deceased person to which alone he was entitled in virtue of a contract with the deceased, and which contract was in law terminated by his decease.

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The case, then, may be said to stand thus:—

The Admiralty Court exercises jurisdiction in cases of personal injury resulting in death under the provisions of Lord *Campbell's* Act; as to the right to exercise the jurisdiction, the Court of Appeal from the judgments of the Admiralty Court is divided. The majority of the common law judges who have had the matter before them, is of opinion that the Admiralty Court has not the jurisdiction which, however, it continues to exercise. All the judges of all the courts, including the judge of the Admiralty Court hold that, except in virtue of Lord *Campbell's* Act, the Admiralty Court has no jurisdiction in a case of the nature of the present, and no such jurisdiction in such a case has ever been asserted. This action, therefore, cannot be maintained in the Maritime Courts of the Dominion by the petitioner, either in the character of mother or of mistress of the deceased.

In the view which I take, it is unnecessary to inquire whether the plaintiff's petition is framed upon the relationship of master and servant having been in existence. As it is only for loss of service that a master can recover in respect of an injury done to his servant, which loss must be averred and proved, *Grunnell* v. *Wells* (1) and cases *ibi*, it seems to be essentially necessary, and this is the invariable practice, to aver that the person injured was, at the time of the injury being received, the servant of the plaintiff. This, the petitioner in this case seems studiously to avoid doing. The petitioner preferring to rest

(1) 7 M. & G. 1042.

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her claim upon the relationship of parent, and although as parent, she may have been entitled to the service of her deceased child, still that was not necessarily so, for consistently with what is alleged in the petition the deceased at the time of the collision may have been *de facto*, the servant of another. It certainly is not averred that he was the servant of the plaintiff, and if he was not so *de facto* the plaintiff would have no cause of action; but this is a point of no importance, as in the case of master and servant, the action does not lie at all when the death of the servant is the immediate result of the injury. The appeal must, in my opinion, be dismissed with costs for the reasons above stated.

Appeal dismissed with costs.

Solicitors for appellant: *Robinson, O'Brien & Scott.*

Solicitor for respondent: *Duncan Dougall.*

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*Nov. 8.

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*Mar. 29.

DONALD McDONALD.....APPELLANT;

AND

JOSEPH N. LANE *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Replevin—Possession as against wrong-doer—Mixture of logs.

L. et al., claiming certain lands in the township of *Horton* under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years.

In 1877 *McD.*, setting up a title under certain proceedings adopted at a meeting of the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which

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

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certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside *L. et al's* boom mixing them with some 900 logs already in said boom and cut by *L. et al*, in such a way that they could not be distinguisded. *McD.* then claimed the whole as his own, and resisted *L. et al's* attempt to remove them. On an action of replevin brought by *L. et al* for 1,440 logs cut on said lands.

Held, that *L. et al's* possession of the lands in question was sufficient to entitle them to recover in the present action against *McD.* who was a wrong-doer, all the logs cut on the lands in question.

Per *Strong*, J.: When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*. This was an action of replevin (brought by the respondents in the Supreme Court of *Nova Scotia*, against appellant,) for 1,440 spruce and pine logs cut on lots 315 and 316 in the township of *Horton*, in the County of *King's*, chiefly known as the *Johnston* lot. The writ contained, besides the first count in replevin, two other counts in trover, but the verdict for the plaintiffs was taken only on the first count. Plaintiffs claimed and had actual possession of the land under an agreement, under seal, made in 1873, with one *Moore*, to whom the lots had been conveyed by deed in 1854. In 1875 having built a barn and also a camp on the land, plaintiffs commenced and continued logging all winter and cut 1,700 trees, and so also in subsequent years. In 1877 defendant, claiming title under one *Benjamin*, cut 500 trees on the disputed lot, and put them partly inside and partly outside of the plaintiff's boom, mixing them with some 900 logs cut by the plaintiffs in such a way that they could not be distinguished. As to *Benjamin's* title, it consisted in a deed dated 2nd March, 1872, by which certain parties, who had been authorized at a

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meeting of the inhabitants of the townships held in 1847 for the purpose of making provision for the poor, conveyed to him and others a certain tract of land situate in *Horton* township and known as vacant lands, containing seven thousand acres. This deed was accompanied by a power of attorney, empowering *Benjamin* and the other grantees, to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. The defendant then claimed the whole of the logs as his own, and resisted the plaintiffs attempt to remove them, whereupon the plaintiffs took out a writ of replevin, under which they took all they could identify and enough to make up the number cut on the *Johnston* land and by themselves.

The cause was tried before the Hon. Mr. Justice *Des-Barres* and a jury at *Kentville*, and resulted in a verdict for the respondents. The appellant having taken out a rule *nisi* to set this verdict aside, the Supreme Court of *Nova Scotia* after argument gave judgment discharging the rule *nisi* with costs, from which judgment the present appeal was taken.

The appeal was argued *exparte* by Mr. *Rigby*, Q.C., for appellant:

This was an action of replevin with counts in trover, and although the Judge at the trial directed a verdict to be entered on the replevin count alone, I contend this does not remedy the defect and that the jury have found on a bad writ (1). This was taken as one of the grounds in the motion for non-suit.

Appellant having entered upon the lands described in his deed, was in possession with color of title and had a legal right to the trees, all of which were cut upon those lands, as against the respondents, who were trespassers without right other than could be obtained

(1) See Rev. Stats. N. S., 4 series, p. 447, sec. 25.

by the mere act of cutting them. *Washburn* on Real Property (1).

But admitting respondents to be entitled to the trees cut by them, these only amounted to 930, whereas they replevied 1443, or over 500 that had been cut by appellant.

The alleged admixture by appellant of his logs with those cut by respondents, (a point taken for the first time in the judgment of the Court below) is not sufficient to justify the verdict for the following reasons:

The fact of the admixture or confusion was not submitted to the jury, and was not found by them, it is a question of fact, and cannot be set up by the Court as a matter of law, as it has been in this case.

The appellant having intermixed the logs innocently, and under a claim of right, believing that those placed within the boom by respondents had been cut upon his land and were his property, the whole quantity became the common property of the appellant and respondents, and the latter had no right to take more than their own property, *i. e.*, 930 trees.

In any case, admitting that the admixture was wilful and wrongful, yet still the respondents have got 209 trees at least more than they were entitled to. They placed all that they had cut within the boom, and while appellant placed some that he had cut with these, within the boom, he also placed 209 on the landing outside the boom where they were not commingled with any logs of the respondents, but these latter were taken under the replevin and the respondents right to them confirmed by the verdict, whereas, at least as to them, there should have been a judgment *de retorno habendo*. *Spence* v. *Union Marine Ins. Co.* (2); *Ryder*

(1) 4th Edit., vol. 3, p. 137, 150 to 151.

(2) L. R. 3 C. P. 427, 439.

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v. *Hathaway* (1); *Lawrie* v. *Rathbun, et al.* (2); *Waterman* on Trespass (3).

I also submit there was evidence improperly admitted

The alleged plan of the township of *Horton*, most material evidence for respondents, upon which their whole title rested, was admitted, in the face of the objection of appellant's counsel, upon the evidence of a clerk from the Crown Land Office that he got the plan in that office where it had been since he first became a clerk there eleven years previously, and that he had been told it was the plan of *Horton* township. No evidence of any partition or survey was given.

RITCHIE, C.J.:

The plaintiffs were in actual possession of the property in dispute, and, neither party showing title to it, the party in possession, as against the wrong doer, was entitled to claim for trespass. In my opinion the mixing of the logs is not important in this case, it has no bearing upon the case in any way.

STRONG, J.:—

I think this appeal ought to be dismissed, but not for the reasons given in the judgment of the court below. The mixing by the defendant of the 500 logs cut by him with the 930 cut by the plaintiffs did not entitle the plaintiffs to replevy the whole 1,430, as held by the Supreme Court of *Nova Scotia*.

The question of title to chattels caused by one party wrongfully commingling his own property with that of another, has frequently arisen with reference to chattels of the description of those in question here, and it is well settled that all that the party whose logs are intermingled can require, is that he should be permitted

(1) 21 Pick. 298. (2) 38 U. C. Q. B. 255.
(3) Vol. 1, sec. 405, 406, 497.

to take from the whole lot an equivalent in number and quality for those which he originally possessed.

Mr. Justice *Cooley* thus states the results of numerous authorities on this point in *Michigan* :—

> This rule has been applied to the case of quantities of saw logs belonging to different parties but commingled together, and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity or quality, or of demanding the value, is all that in justice he can require (1).

For another reason, however, I am of opinion that the plaintiffs were entitled to recover. It is apparent from the evidence that whether the true boundaries of lot 315 were or were not those contended for by the plaintiffs, they were in possession constructively of all the land claimed by them to be lot 315, upon which their own 930 logs as well as the 500 logs of the defendant were cut. The possession of the plaintiffs was not of course such possession as would be had of cultivated land, but it would have been sufficient, in the course of time, to have conferred upon them a title to this land under the Statute of Limitations, supposing they had not a title under the agreement in pursuance of which they took possession. The plaintiffs claimed the whole of this land, by the description of Lot 315, under a paper title. Therefore, when they took actual possession of part and built a barn upon it, they were, on the authorities under the Statute of Limitations, constructively in the possession of the whole. Then the defendant had not any possession, for mere occasional acts of trespass cannot constitute a possession, and he had no title, it being absurd to call that a title, which was derived from the pretended authority of the town meeting held in 1847. The consequence is that the plaintiff's possession being *primâ facie* evidence of seisin in fee, the title to the logs cut by plaintiffs as well as by

(1) Cooley on Torts, p. 54.

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Strong, J.

defendant, vested as soon as cut in the plaintiffs, who were therefore entitled to recover the whole in this action of replevin, and for that reason this appeal must be dismissed with costs.

FOURNIER and TASCHEREAU, JJ., concurred with *Strong*, J.:

HENRY, J.: —

For the reasons given by the learned Chief Justice when delivering the judgment of the court in the court below and in the charge of Mr. Justice *Des Barres*, before whom the issues in this case were tried, I think the respondents entitled to recover. They were in possession of the lands upon which the greater number of the logs were cut for several years under a purchase from *Daniel Moore*, and, for three or four or years previous had been in the sole occupation of it, and each year had cut logs on it and hauled them off it They had also erected upon it a barn. While so in possession they cut during the winter of 1878 930 trees and hauled them out to a lake on the same land upon which they had been cut, where they placed them on the ice protected by a boom which they placed around them to prevent their being floated away when the ice should break up. Some few of the logs were marked, but the far greater number were not. Some time shortly afterwards, the appellant placed five hundred and thirteen logs, cut on the same land as those cut by the respondents, unmarked, inside the respondents boom and mixed up with those of the respondents. The respondents subsequently attempted to distinguish their logs from those of the appellant and mark them, but were prevented from doing so by the appellant's servants and the appellant claimed all the logs in the boom placed there by both parties. The respondents then commenced the present action by a writ containing the

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declaration with one count in replevin and two in trover. At the trial the joinder of those counts was objected to, and thereupon, the presiding judge left the case to the jury solely on the first count, and the jury found a verdict for the respondents. It was shown on the trial that *Daniel Moore* from whom the respondents had several years before received a conveyance of the land in question, and had previously sold it to another party, who went into possession of it, and occupied it several years by working on and taking logs from it, but failing to pay for it, gave back the possession of it to *Moore*. The respondents therefore were in possession, not as squatters or trespassers, but as purchasers from one who also claimed it under a title and had possession of it. The logs or trees were therefore in the possession of the respondents claiming them as owners, and no person would be justified in interfering with that possession but one who could show himself to be the titled owner of the land upon which they had been cut. The appellant claimed title by a conveyance from parties who had themselves no title, and who were never shown to have ever been in possession of the land. The deed to *Benjamin*, under whom the appellant claims was not made until 1872, while *Moore's* title was in 1852, and at the time when the former deed was given he was in the adverse possession of the land. By the law in *Nova Scotia*, the deed so made would be void as against *Moore*, and therefore no title would pass to *Benjamin*.

The defence is set up under the pleas of *non cepit* and *non detenit*, and other pleas alleging title. There is sufficient evidence of the taking and detaining. No title, as I previously said, is shown in *Benjamin* in the 930 trees cut by respondents, and there was no pretence of any in *McDonald*.

As to the balance of the logs, 513, I entirely agree

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with the law as laid down by the learned Chief Justice of the court below. It is clear that the unmarked logs of the two parties in the boom could not be distinguished. The law in such a case gives the right of selection, without any account, to him whose property was originally invaded, and its distinct character destroyed (1.)

I am of opinion the appeal should be dismissed, and the judgment below affirmed with costs.

Appeal dismissed with co ts.

Attorneys for appellant: *Chipman & Borden.*

Solicitor for respondent: *W. E. Roseve.*

1881

*May. 7.

*Nov. 14.

JAMES CORBY *et al*.....APPELLANTS;

AND

GEORGE E. WILLIAMS.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Vendor and purchaser—Jus disponendi—Delivery.

W., a commission merchant residing at *Toledo, Ohio*, purchased and shipped a cargo of corn on the order of *C. et al.*, distillers at *Belleville*, and drew on them at ten days from date for the price, freight and insurance. This draft was transferred to a bank in *Toledo* and the amount of it received by *W.* from the bank, and the corn, having been insured by *W.* for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading

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

(1) See 2nd Stephen's Commentaries, 85, and Kent's Commentaries, 9th Ed. 454.

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to their agents at *Belleville*, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by *C. et al.*, but the cargo arriving at *Belleville* in a damaged and heated condition, between the dates of the acceptance and the maturity of the said draft, *C. et al.* refused to receive it and afterwards to pay draft at maturity. Thereupon the bank and *W.* sold the cargo for behalf of whom it might concern, credited *C. et al.* with the proceeds on account of draft, and *W.* filed a bill to recover balance and interest.

Held, Reversing the judgment of the Court of Appeal of *Ontario*, (*Strong*, J., dissenting), That the contract was not one of agency and that the property in the corn remained by the act of *W.* in himself and his assignees, until after the arrival of the corn at *Belleville* and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in *W.* and his assignees, *C. et al.* should not bear the loss.

APPEAL from the judgment of the Court of Appeal of *Ontario*, whereby the decree pronounced in favor of the appellants by the Court of Chancery for *Ontario*, was reversed with costs, and a decree made in favor of the respondent (1).

This was a bill filed in the Court of Chancery for *Ontario* to recover portion of the amount of a bill of exchange drawn by the respondent on the appellants by their request and accepted by them in payment of a cargo of corn purchased and shipped by the respondent, a commission merchant, residing at *Toledo, Ohio*, on the order and for account of the appellants, distillers, at *Belleville, Ontario*. Upon the arrival at *Belleville* of the cargo, between the dates of the acceptance and the maturity of the said draft, the appellants refused to receive it and afterwards to pay the said draft at maturity, alleging the corn to be heated and useless, and the respondent thereupon sold the cargo for behalf of whom it might concern and for the best price he could obtain, giving the appellants credit for the proceeds on account of their said acceptance, and sued appellants for the balance and interest.

(1) 5 Ont. App. R. 626.

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The appellants, by their answer, set up that they had contracted with the respondent for the delivery of the corn in good order, at *Belleville*, and that they had refused to honor their acceptance, as the corn was discovered to be musty and in bad condition on its arrival.

The pleadings and facts are fully set out in the judgments hereinafter given.

Mr. *Walter Cassels* for appellants:

The appellants do not admit that there is any evidence showing that they were contracting with the plaintiff as an agent in the matter, and on the contrary, as will be shown hereafter, the conduct of the plaintiff shows conclusively that he was not contracting as a commission agent, but that he was contracting as a principal.

The Court of Appeal assume that under the true construction of the contract the defendants were entering into a contract whereby they only agreed to pay for the corn when delivered in *Belleville*. It is clear from the correspondence and telegrams which passed between the parties that such was the intention on the part of the defendant, and the appellants submit that unless it is determined that a commission agent cannot enter into a contract whereby he binds himself to deliver at *Belleville*, then the contract must be construed according to its legal effect, and it is of no consequence whether the plaintiff was a commission agent or not.

This was the first contract entered into between the plaintiff and the defendants. It appears from the evidence of the plaintiff himself that the ordinary rate of commission which should be charged was one-half cent a bushel. It appears that in this case however, the plaintiff purchased the corn in question from different people. It appears that he purchased from *Howe, Son & Co*, about 6,600 bushels at forty-one cents. In order to fulfil his contract the plaintiff borrowed the remainder

of the corn to make up the cargo from *King & Co.*, and on the following Monday purchased corn at 40½ cents and replaced with the corn so purchased that borrowed from *King & Co.*, therefore in regard to the portion of the corn so purchased the plaintiff so purchased it at a half a cent a bushel less than charged to the defendants these appellants. This difference would, had the plaintiff been acting as agent in the matter, have accrued to the benefit of the defendants, but the plaintiff appropriated this difference for his own use.

We submit that it is of no consequence what the amount of the commission retained by the plaintiff was, whether a large or a small sum. It is a cogent and convincing piece of evidence that the plaintiff was not acting as agent in the matter, because if he was, the benefit of the reduction should have gone to the purchaser. The position assumed by the Court of Appeal, viz., that if he had had to pay more to *King & Co.*, than forty-one cents, the plaintiff would have been the loser, demonstrates the force of this contention.

In due course, as appears by the evidence, the corn would have reached *Belleville* within five days after leaving *Toledo* If the judgment of the Court of Appeal is correct, so soon as the corn reached *Belleville* it would be the property of the defendants, the present appellants. The plaintiff chose to give ten days time within which the defendants were to pay for the corn, but the plaintiff assigned to the Merchants' Bank, in *Toledo*, the bill of lading and the policy of insurance, and this bill of lading and policy of insurance were transmitted to *Belleville* with instructions that the corn was not to be delivered over until payment of the draft. Therefore, had the vessel not been detained on the voyage the corn would have been at the wharf in *Belleville* for five or six days before the defendants could have obtained the same, pending the maturity of the draft.

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Again, when the corn was damaged the plaintiff without reference to the defendants, the present appellants, applies to the insurance company for the insurance due by reason of the damage to the corn. The insurance company and the plaintiff, each appointing an arbitrator, an award is made assessing the amount due. All this is done in the absence of the present appellants and without reference to them. Whereas if the contention of the plaintiff and the judgment of the Court of Appeal is correct, the plaintiff had no right to the insurance money, and any loss due by the insurance company was payable to the present appellants. The plaintiff also, without reference to the present appellants, sold the corn in question.

We contend, also, that the plaintiff was a vendor. If this be so, the question is one entirely of the construction of the contract under telegrams A & B especially the words "will you deliver here at 47." Under this contract the property would have remained vested in the plaintiff.

In addition to the authorities referred to in the judgment of the Court of Appeal we would refer to *Ireland* v. *Livingstone* (1); *Jenkins* v. *Brown* (2); *Addison* on Contracts (3); *Kirchner* v. *Venus* (4); *Lewis* v. *Marshall* (5); *Leake* on Contracts (6); and *Bartlett* v. *Pentland* (7); *Parsons* on Contracts (8); *Robinson* v. *Mollet* (9); *Sotilichos* v. *Kemp* (10); *Hodgson* v. *Davies* (11); *Rogers* v. *Woodruff* (12); *Inglebright* v. *Hammond* (13); *Hayes* v. *Nesbitt* (14).

As to the construction of the contract, the learned judges of the Court of Appeal have held that the con-

(1) L. R. 5 H. L. 408.
(2) 14 Q. B. 496.
(3) 7th ed. p. 185.
(4) 12 Moo. P. C. 361.
(5) 7 M. & G. 745.
(6) P. 197.
(7) 10 B. & C. 760.
(8) Vol. 2, 561.
(9) L. R. 7 H. L. 815.
(10) 3 Ex. 105.
(11) 2 Camp. 532.
(12) 23 Ohio 632.
(13) 19 Ohio 337.
(14) 25 U. C. C. P. 101.

tract contended for by these appellants is the correct one. We would refer to *Dunlop* v. *Lambert* (1); *Gilmour* v. *Supple* (2); *Leake* on Contracts (3); *Story* on Contracts (4); *Bundy* v. *Johnson* (5); *M'Giverin* v. *James* (6).

Mr. *Bethune*, Q.C, and Mr. *Machar*, for respondent:

The evidence establishes that the plaintiff acted in the transaction of the purchase of the cargo of corn in question herein as the agent of the defendants, as was held by the Court of Appeal, and therefore the cargo was at the risk of the defendants from the time it was shipped on board the schooner "*Annandale*."

The defendants, having, after receipt of advice from the plaintiff of the purchase by him for their account and risk (in terms of the invoice enclosed in plaintiff's letter of advice) without objection or dissent, accepted the bill of exchange drawn by plaintiff at their request, accompanied by the bill of laiding and other shipping documents, must be held to have thereby adopted the construction of their order in the sense understood and now contended by the plaintiff, and could not afterwards repudiate their engagement under pretence of a different construction, and cannot now be heard to advance a different contention.

The defendants at all events by their silence and subsequent acceptance recognized and ratified the plaintiff's action as in compliance with their instructions.

The evidence establishes (and it was conceded by the defendants upon the argument at the trial) that the said cargo when shipped was in good order and condition, and was of the quality or description known as old high mixed corn, and therefore the responsibility for any deterioration or alteration in its condition

(1) 6 Cl. & Fin. 622.
(2) 11 Moo. P. C. 560.
(3) P. 826.
(4) P. 803.
(5) 6 U. C. C. P. 221.
(6) 33 U. C. Q. B. 212.

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observable upon its arrival at *Belleville* was not in anywise due to or chargeable against the plaintiff.

The evidence further establishes that the said cargo was really paid for by the defendants, the plaintiff not having advanced any money of his own in order to pay for the same, but the whole price, including commission, insurance, &c., was derived through the draft upon the defendants, which was discounted at the Merchants' National Bank of *Toledo*, and was accepted by the defendants upon presentation to them.

The learned counsel then referred:

A.—As to the relation of agency between plaintiff and defendants *inter se* and construction of orders and ratification of acts: *Benjamin* on Sales (2nd Am. ed.), p. 476; *Story* on Agency (8th ed.), ss. 33 (note 3), 34, 74-77, 82, 111, 112, 199 (note 6), 400-401 a.; *Paley* on Agency, by *Boyd*, 248, 373, 382; 2 *Bell's* Commentaries, § 799-802.

English cases—*Ireland* v. *Livingston* (1); *Baring* v. *Corrie* (2); *Grissell* v. *Bristowe* (3).

American cases—On construction and ratification: *Abbott's* N. Y. Digest (4).

B.—As to cargo being at defendants' risk, even as between vendor and vendee: *Chitty* on Contracts (10 ed.), vol. 1 pp. 519 (note), 520; *Benjamin* on Sales, pp. 542, 546, 551.

English cases—*Bull* v. *Robinson* (5); *Dickson* v. *Zizinia* (6); *Tarling* v. *Baxter* (7); *Martineau* v. *Kitching* (8).

American cases—*Crawford* v. *Smith* (9); *Willis* v. *Willis* (10); *Hooben* v. *Bidwell* (11); *Merrill* v. *Parker* (12).

(1) L. R. 5 Q. B. 515.
(2) 2 B. & Ald. 143.
(3) L. R. 4 C. P. 36.
(4) Sec. 3 p. 392.
(5) 10 Ex. 342.
(6) 10 C. B. 602.
(7) 6 B. & C. 362.
(8) L. R. 7 Q. B. 436.
(9) 7 Dana 59-61.
(10) 6 Dana 48.
(11) 16 Ohio 509.
(12) 24 Maine 89.

Mr. *Walter Cassels* in reply.

RITCHIE, C. J. :—

The plaintiff is doing business as a commission merchant at *Toledo*, in the *U. S. A.* The defendants are grain dealers, residing and doing business at *Belleville*, in the dominion of *Canada*. This was the first business transaction between the parties; defendants had had dealings with plaintiff's brother, in whose employ plaintiff was, and to whose business he succeeded. The communications between the parties in reference to the matters in controversy were by means of telegrams, and from these telegrams must be gathered the contract in this case. The first, of which we have any evidence, was from the plaintiff to one of the defendants, and is as follows :

1 Telegram.—(A.)—*Toledo*, Sept. 13th, 1878. To *H. Corby*, jun., *Belleville, Ont.:* Schooner *Annandale* obtainable 5c., vessel paying unloading. High mixed costing 47.

Geo. E. Williams.

It is very obvious that this must have been preceded by some inquiry as to the transportation and cost of corn in the *Toledo* market; if so, it must have been by letter or telegram, the contents of which either party might have shown; as neither did do so, it may be inferred that any communication which did take place would throw no additional light in support of the contention on either side.

To this telegram of the 13th, defendants on the same day reply,

(B.) *Belleville, Ont.*, Sept. 13th, 1878, 6.45 p.m. To *Geo. E. Williams:* Do you not think corn will be lower next month ? Will you deliver here at 47.

H. Corby & Sons.

To which plaintiff immediately answers :

(C.) *Toledo*, Sept. 13th, 1878. To *H. Corby & Sons, Belleville, Ont.:* Higher corn predicted by exporting customers. *England* advancing. October selling here half above cash. We don't antici-

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pate lower prices. Receipts light. Roads bad. Good shipping demand, offer cargo 47, cost freight, commissions, insurance. Prompt acceptance.

Geo. E. Williams.

Plaintiff not receiving a prompt acceptance of this offer from the defendants, the next day telegraphs as follows:

(D.) *Toledo*, Sept. 14th, 1878.—To *H. Corby & Sons, Belleville, Ont.:* 13,000 or 16,000 spot, vessel obtainable, vessel paying unloading expenses. Hurry answer. *Geo. E. Williams.* (Pencilled by *Clark.*) The captain is waiting answer. He wants to give *Randell* by two o'clock, but will wait for your answer.

Clark.

On the same day defendants answer as follows:—

(E.) *Belleville, Ont.*, Sept. 14th, 1878.—To *G. E. Williams:* Will take 13,000 old high mixed 47 delivered here, vessel paying loading. Draw ten days through Merchants' Bank here. Send prime corn.

H. Corby & Sons.

And on the same day plaintiff telegraphs his acquiescence and execution of the order in these terms:—

(F.) *Toledo, Ohio*, Sept. 14th, 1878.—To *H. Corby & Sons, Belleville, Ont.:* Telegram received. Executed order—limit. Loading schooner *Annandale.* About 13,000.

Geo. E. Williams.

These are all the communications that passed with reference to the purchase of this corn.

On the 16th of Sept. plaintiff thus enclosed the invoice and advised the drawing of the draft and sailing of the vessel:

(K.) *Toledo, Ohio*, Sept. 16th, 1878.—To Messrs. *H. Corby & Sons, Belleville, Ont.:* Gentlemen, we enclose invoice of 12,965 $\frac{30}{100}$ bushels H. Mix. corn per schooner *Annandale*, draft as stated made to-day. This cargo of corn we know will please you. It is as nice a one as has left here this season. The schooner sailed this p.m. with a fair wind. Corn ruled dull to-day, and prices are a shade lower. Any demand, however, would set prices up again rapidly, as the stocks are not heavy and our receipts only moderate. See P. C. enclosed.

Yours truly,

Geo. E. Williams.

EXHIBIT (L.) Account purchase by *George E. Williams* of 12,595·30

bushels high mixed corn, for account and risk of Messrs. *H. Corby & Sons.* Shipped schr. *Annandale:*

1878—Sept. 14, purchased 12,965·30 bush., at 42c	$5,445 51	
Freight, 5c. Cost afloat, *Belleville*, 47c.		
Advanced Captain	20 00	
		$5,465 51
CREDIT.		
Sept. 16, by draft 10 days	$5,492 16	
Less interest 10 days at 10 p. c. and exchange ½	26 65	
		$5,465 51

E. & O. E.

Toledo, Ohio, Sept. 16, 1878. *George E. Williams.*

Part of the corn thus shipped was purchased at different prices by plaintiff and part borrowed by him from another party, and subsequently returned. As to this purchase by defendants, plaintiff's brother in his employ, a witness on his behalf, says:

In this case, on the purchase of this specific cargo, it was out of the usual course, in that time was asked for in payment. The defendants asked a ten days draft, equivalent to 13 days time.

The corn was shipped under the following bill of lading:

EXHIBIT X.—(*Annandale's* BILL OF LADING).

Toledo, O., Sept. 16th, 1878.

Shipped, in good order and condition, by *George E. Williams*, successor to *E. R. Williams & Co.*, as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner *Annandale*, whereof————is Master, bound from this port for *Belleville*, the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (dangers of navigation, fire, and collision excepted).

And it is agreed between the carriers, and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns, and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination (except when grain is heated or heats in transit), and that they will deliver the full quantity hereon named, or pay for any part of cargo not

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delivered, at the current market price; the value thereof to be deducted from the freight money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers and owners rights of property and action therefor.

And said shippers or owners hereby assign their claim and right of action for such deficiency or deficiencies to the carrier.

In witness whereof, the said master of said vessel hath affirmed to ——— bills of lading of this tenor and date, one of which being accomplished the other to stand void.

The Merchants' Nat. Bank,
Toledo, O. *C. C. Doolittle*, Cr.

Order of 12,965 30 Bus. H. M. Corn.
Merchants' National Bank, Freight 5c. per Bu.
Toledo, O., Vessel to unload.
To the Merchants' Bank of *Canada*, Advanced $20 on acct. freight.
Belleville, Ont., *Peter Mowat.*
Care *H. Corby & Son*,
Belleville, Ont

The draft is as follows :—

EXHIBIT (Z.) ACCEPTANCE IN SUIT.

Protested by me for non-payment this 30th day of Sept., 1878. Charges $1.32. *R. J. Bell*, N.P.

Accepted payable Merchants' Bank, *Belleville.* *H. Corby & Son.* Sept. 19, 1878.

Geo. E. Williams, successor to *E. R. Williams & Co.*
Grain Commission Buyers,
$5492.16. *Toledo, Ohio*, Sept. 16th, 1878.

Ten days after date, with exchange on *New York* and *Belleville* Bank charges, pay to the order of ourselves, fifty-four hundred and ninety-two $\frac{16}{100}$ dollars, at

Value received, and charge the same to account of *Geo. E. Williams.*

To Messrs. *H. Corby & Sons, Belleville, Ont.*

This draft was transferred by the plaintiff to the Merchants' National Bank, *Toledo*, and the amount of it realized from them by plaintiff; and with it the bill of lading and policy of insurance were handed to the bank as security for the payment of the draft, the amount of which they had so advanced to plaintiff. The plaintiff thus describes his mode of dealing with the bank:—

Q.—Whose name was used in the purchase of that corn? A.—The general custom is for us to notify our banks what orders we have, and they supply us with the currency, and we agree to give them a bill of lading. The bank furnishes the money on my promise to give them the bill of lading and draft on our customer when the corn is loaded, and in this case it was on *Corby & Son.*

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With this arrangement, it must be borne in mind, the defendants had no connection. Under ordinary circumstances in the usual course of dealing, when payment was made by draft at sight it would no doubt work satisfactorily to all parties, but was in my opinion quite inapplicable to such a case as this, which, as the witness says, "was out of the usual course, in that time was asked in payment." The bill of lading was by the Merchants' National Bank of *Toledo* indorsed over with the draft and policy of insurance and transmitted to the Merchants' Bank of *Canada, Belleville*, for collection and remittance, with instructions to that bank not to hand over the bill of lading or allow the cargo to be delivered till the draft was paid.

The draft was accepted by defendants on the 19th September, 1878.

The evidence shows that under ordinary circumstances the voyage between *Toledo* and *Belleville* is under five days, so that, as the vessel sailed on the same day the draft was drawn and dated, the cargo ought in due course, without accident, to have reached *Belleville* eight days before the draft became due; in fact the grain arrived at *Belleville* several days before the draft fell due, in a damaged condition, having been injured in course of transportation, and defendants refused to have anything to do with it. The plaintiff and the bank took possession of the cargo, disposed of the same and settled with the underwriters and discharged them. On the draft maturing, the defendants allowed it to go to protest, denying any liability to pay for the corn, hence the present action to recover the difference between what the bank and plaintiff received on account of insurance and the amount of the draft.

The defendants resist this claim on two grounds. First, that under the contract, as it is to be collected from those telegrams, the plaintiff agreed to deliver the

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corn in good condition at *Belleville* for 47 cents, and, not having done so, cannot recover the price; and secondly, that plaintiff, having assigned the bill of lading and policy of insurance to the Merchants' Bank of *Toledo*, and the same having been transmitted by them to *Belleville* with instructions that the corn was not to be delivered to defendants until payment of the draft, no property passed to defendants and the corn continued and was at the time of its injury the property and at the risk of plaintiff or the bank and not of the defendants.

As to the first point, had plaintiff in reply to the question in defendants' telegram of the 13th Sept., '78, "will you deliver here at 47c.," simply assented thereto, I should have found it extremely difficult, if not impossible, to put any other construction on the language used than that plaintiff was to deliver the corn at *Belleville;* but plaintiff does not so answer, his reply is "offer cargo 47 cost, freight, commission, insurance." I think we have here a clear interpretation of the language of defendants' telegrams, as understood by plaintiff, viz., that the corn was only to cost the defendants 47 cents at *Belleville*, including cost, freight, commission and insurance, and the subsequent telegram of the 14th I think supports this view, for there he adds this additional item, "vessel paying unloading expenses." If plaintiff was to deliver at *Belleville* at 47 cents, what possible interest had defendants in any of these items, cost, freight, commission, insurance, or unloading expenses? But defendants' next telegram still more strongly confirms this, and shows it was defendants' view also, for plaintiff, having, as we have seen, mentioned "unloading expenses," defendants, in their telegram in reply accepting plaintiff's offer, seem to have thought that if there might have been a question as to the unloading expenses, there might also be as to the

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loading expenses. To set that at rest, as plaintiff had already done as to the unloading, defendants still further expressed, or rather make more manifest the meaning of the first telegram ("delivered here,") or at any rate of their understanding of plaintiff's offer, by saying "will take 13,000 old high mixed 47 delivered "here, vessel paying loading."

If by 47 delivered here, it was intended that the corn was to be delivered by plaintiff at *Belleville*, and defendants were to have nothing to do with it till it was so delivered, what concern was it of defendants what the commissions cost, or what commissions and freight were paid, or whether the corn was insured or not; or what matter was it to defendants whether the plaintiff or the vessel paid the expense of loading or unloading? Clearly the stipulations that defendants were to receive the corn free of all these charges must have been based on the idea that the corn was shipped at their risk, and were inserted for the protection of the defendants; and to show that, though the corn was, on shipment and delivery of shipping papers to defendants, and the accepting the draft, to be defendants, it was only to cost them 47 cents at *Belleville*; if otherwise, and if plaintiff was bound to deliver at *Belleville*, and until so delivered the corn was to be the property and at the risk of plaintiff, all this as to these expenses would be meaningless. I therefore think the true construction of the agreement between these parties is not, as defendants contend, that plaintiff bound himself to deliver at *Belleville* this corn to defendants in good condition, and that until so delivered it was to be at plaintiff's risk.

I am unable to distinguish this case from that of *Tregelles* v. *Sewell* (1). The principles and reasons that induced the Court of Exchequer and the Exchequer

(1) 7 H. & N. 574.

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Chamber, (on a contract whereby plaintiffs bought of defendants 300 tons of old bridge rails at £5 14*s.* 6*d.* per ton, delivered at *Harburgh*, cost, freight and insurance; payment by net cash in *London*, less freight, upon handing bill of lading and policy of insurance; a dock company's weight note or captain's signature for weight "to be taken by buyers, as a voucher for the quantity shipped,") to hold that the true construction of the contract was that the defendant did not undertake to deliver the iron at *Harburgh*, but that when he put it on board a ship bound for that place and handed to the plaintiffs the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchaser, are applicable, in my opinion, to the facts of this case. When the case of *Tregelles* v. *Sewell* was in the Common Pleas, *Martin*, B., who had tried the cause and who on trial entertained a strong impression that under the contract defendant was bound to deliver the iron at *Harburgh*, says on the argument that his view was altered by considering that a document of this kind ought to be construed according to the known practice of merchants in respect of such transactions, and adds:

> The goods were to be put on board by the vendor, and he was to receive a dock company's receipt for the weight or the signature of the captain, and he was to take that to the vendors, who were then to pay him at the rate of £5 14s. 6d. a ton, deducting the amount of the freight. That would be a common and ordinary transaction. Then the question is whether the insertion of the words, delivered at *Harburgh*, costs, freight and insurance, leads to a different conclusion. It seems to me that their more natural meaning is the true meaning, and that when £5 14s. 6d. was mentioned the parties were desirous of ascertaining beyond all doubt what was included in that amount. It is as if they had said: "Take notice the £5 14s. 6d. is to cover the cost of the iron, the freight from *London* to *Harburgh*, and the premium on the policy of insurance."

Therefore he says:

> On consideration I think the true meaning of the ntract is this:

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When you, the defendant, have performed what you were bound to do, and put the goods on board a ship destined for *Harburgh*, and handed me the bill of lading and a policy of insurance, I will pay you £5 14*s.* 6*d.* per ton, less the freight.

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It is true in that case that payment was to be by net cash in *London*, less freight upon handing bill of lading and policy of insurance, but in what respect in principle does that differ from this case? Here the payment was to be by draft at ten days, and plaintiff was to ship to defendants and clearly was to insure the corn, and when he was in a position to hand over the bill of lading and policy of insurance he was entitled to require acceptance of the draft, but unquestionably not before. Had he done so the property would, in my opinion, have passed to defendants and have been at their risk. These telegrams are equivalent to the construction as suggested by *Pollock*, B. (1):

I buy of you; you are to ship and insure the goods, which are to go to *Harburgh*, (*Belleville*), and if you do all that, I will pay you for them, (not in *London*), but by accepting a draft for ten days.

If, then, it is not the true construction of these telegrams that plaintiff agreed to deliver the corn at *Belleville*, then, as to the second point, the only other construction must necessarily be, that in consideration of the acceptance of a draft at ten days, plaintiff bound himself to ship to defendants the corn on board a certain vessel at *Toledo*, deliverable to defendants by the vessel on its arrival at *Belleville*, and to insure it for defendants' benefit, and on defendants' acceptance of the draft at ten days, to hand the necessary shipping papers over to defendants to vest the property in them and enable them to deal with and obtain possession of it on the arrival of the vessel at *Belleville*. The defendants, by accepting the draft, clearly fulfilled their part of the contract. Did plaintiff then so fulfil his as to entitle him to recover from

(1) P. 589.

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defendants the amount of the draft, or rather the price of the corn? or was there a failure of consideration relieving defendants from the obligation of paying the draft to plaintiff, or rather of paying plaintiff for the balance claimed to be due, after crediting the amount received from the insurance company for the price of the corn? It appears to me the plaintiff entirely failed in the fulfilment of his contract. It cannot be gainsaid that the defendants never received the corn and never were placed in a position to receive it, or entitled in any way to deal or interfere with it. When it was agreed that the corn should be paid for by draft at 10 days, it was no part of the contract that defendants should not be entitled to the corn until payment of the draft; the contract clearly was that the corn should be shipped to defendants, and on acceptance of draft be deliverable to them by the carrier on arrival at *Belleville*. After shipment and obtaining acceptance of the draft, plaintiff was to retain no property in or right to the corn, except possibly his right of stoppage *in transitu*. But plaintiff never so shipped the corn, to defendants, never parted with the property or control of the corn and never placed defendants, though they accepted the draft, in a position to demand or be entitled to receive delivery of the corn on its arrival at *Belleville*; on the contrary, the plaintiff shipped the corn deliverable to the Merchants Bank of *Toledo*, and most clearly never could have intended that the property should pass, or the bill of lading be handed to defendants, until they paid the draft. The plaintiff without doubt made, outside of his contract, a conditional appropriation of these goods on payment of the draft, instead of an absolute appropriation on acceptance of the draft. He clearly, to use the words of *Cotton*, L. J., in *Mirabita* v. *Imperial Ottoman Bank* (1):

(1) 3 Ex. Div. 173.

Made use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract.

By shipping the corn to the order of the bank and transferring to them the bill of lading and policy of insurance, he disabled himself from fulfilling his contract with defendants. For if the bill of lading was to be held by the bank as security till the draft was paid, as we shall see was done in this case, then the result necessarily was that the defendants could not be entitled to receive the goods on the arrival at *Belleville*, which it was the clear intention, as gathered from the telegrams, he should do, unless indeed he should pay the draft on the arrival of the goods, in which case he would be deprived of the credit of ten days, on which terms he agreed to buy the corn. To say under such circumstances that the property in this corn had passed to defendants and was at their risk, seems to me preposterous. Suppose the corn had arrived at *Belleville* in due course, eight days before the maturity of the bill, what was to become of the corn? who was to take charge of it? at whose risk was it to be during those days? where is there anything in the telegrams justifying or authorizing plaintiff to transfer this corn to the bank, or authorizing the plaintiff or the bank to hold it after acceptance till the falling due of the draft? The vessel under the bill of lading would be entitled to unload on arrival; to whom was the cargo to be delivered? not certainly to the defendants. The bank held the bill of lading, to them only could the master deliver the cargo, and yet what is there in these telegrams to justify the detention from defendants of the corn for those days, or so detaining the corn, to impose any duty or risk in respect thereof on defendants. It is to my mind abundantly clear that all plaintiff's dealings with the cargo, in transferring it to the bank

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and subsequently in disposing of the corn after being damaged, and settling with the underwriters in reference to the damage it sustained, are entirely inconsistent with any idea of the property vesting in defendants or being at their risk, and equally so with the contract, as indicated by these telegrams. Plaintiff, instead of shipping the corn to and insuring it for the defendants, reserved to himself a *jus disponendi*, by virtue of which he, for his own purpose, dealt with the corn in a manner wholly inconsistent with the property vesting in the defendants, and wholly inconsistent with his contract, whereby the property in the corn continued in the plaintiff or his assignee the bank, and so, never having vested in, was never at the risk of, defendants, and therefore the consideration for which the draft was accepted wholly failed. If the plaintiff's contention could be sustained, it would amount to this, that he was not only not bound to deliver the goods at *Belleville*, but that he was not bound to ship the goods to the defendants; that he was not only entitled to the acceptance given in payment of the goods and to use it for his own purposes, but he was also entitled to retain the control over his goods and use them for his own benefit, as in this case, for the purposes of realizing on the acceptance, and in so using them so to deal with them as to put it out of the power of the defendants, though they had fulfilled their contract by accepting the draft, to claim or receive delivery of the goods on their arrival at *Belleville*, and also so to insure the goods for his own benefit and deal with the insurance company in relation thereto, without reference to the defendants, and still at the same time, while so retaining the property in and the control and disposition of the goods and the insurance thereof, they were to be at the defendants' risk. Had plaintiff shipped the corn and effected the insurance for defendants' benefit, as the contract con-

templates he should do, and on acceptance of the draft, had handed the necessary papers, that is, the invoice, the bill of lading and policy of insurance, to the defendants, I think there can be no doubt the property in the corn would have passed to the defendants, and it would have been at their risk; the amount of the insurance money would then be received by them, and the plaintiff would be entitled in this case to recover the amount of the draft, the price of the corn. But plaintiff's conduct having been the exact opposite of this, whereby he changed the whole character of the operation, I think he has no right to claim from defendants the price of the corn, inasmuch as he never had parted with the possession or property except to the bank.

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But that we are reversing the unanimous judgment of the Court of Appeal for *Ontario*, I should not have deemed it necessary to refer to any authorities to establish that in this case the property never passed to the defendants, and therefore was never at defendants' risk. I think the following cases, and those therein referred to, will place this beyond all doubt. *Benjamin* on Sales (1):

However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If *A.*, in *New York*, orders goods from *B.*, in *Liverpool*, without sending the money for them, there are two modes usually resorted to, among merchants, by which *B.* may execute the order without assuming the risk of *A's* inability or refusal to pay for the goods on arrival. *B.* may take the bill of lading, making the goods deliverable to his own order or that

(1) 2 Ed. p. 288.

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of his agent in *New York*, and send it to his agent, with instructions not to transfer it to *A.*, except on payment of the goods. Or *B.* may not choose to advance the money in *Liverpool*, and may draw a bill of exchange for the price of the goods on *A.*, and sell the bill to a *Liverpool* banker, transferring to the banker the bill of lading for the goods to be delivered to *A.*, on payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that *B.* had the least idea of passing the property to *A.*, at the time of appropriating the goods to the contract. So that although he may write to *A.* and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice stating plainly that these specific goods are shipped for *A's* account, and in accordance with *A's* order, making his election final and determinate, the property in the goods will nevertheless remain in *B*, or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to *A.*

Mr. *Benjamin* says this principle, *inter alia*, is established by the authorities (1):

Secondly.—Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. This principle runs through all the cases, and is clearly enunciated by *Parke*, B., in *Wait* v. *Baker* (2) and by *Byles*, J., in *Moakes* v. *Nicholson* (3), and the above two points are approved as an accurate statement of the law by Lord *Chelmsford* in *Shepherd* v. *Harrison* (4).

Thirdly.—The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee (5).

In *Shepherd* v. *Harrison* (6) Lord *Chelmsford* says:

My Lords, in a book to which my learned friend near me (Lord *Cairns*) has referred me, and which appears to be very ably written, on the sale of personal property, the authorities on the subject of

(1) P.306
(2) L. R. 2 Ex. 1.
(3) 19 C. B. N. S. 290.
(4) L. R. 4 Q. B. 196-493.
(5) *Wilmshurst* v. *Bowker*, 7 M. & G. 882; *Ellershaw* v. *Magniac*, 6 Ex. 570; *Waite* v. *Baker*, 2 Ex. 1; *Van Casteel* v. *Booker*, 2 Ex. 691; *Jenkyns* v. *Brown*, 14 Q. B. 496; *Shepherd* v. *Harrison*, L. R. 4 Q. B. 196, 493.
(6) L. R. 5 H. L. 127.

reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage. (quoting the 1st and 2nd.)

Lord *Westbury* (1):

The house at *Pernambuco* accepted a commission and agency to buy cotton on behalf of *Shepherd & Co.*, the present appellants. They did so, and they paid for that cotton out of their own money. It was expressly agreed that funds which they happened to be in possession of, belonging to *Shepherd & Co.*, should be altogether separated from the transaction, and should not be resorted to for the purposes of the cotton purchase. They shipped the cotton on board the *Olinda*—I am speaking of the 200 bales—and when they delivered the cotton to the captain of the *Olinda*, they took from him the ordinary bill of lading to their own order.

Now, what was the effect of that transaction in law and according to mercantile usage? The effect was this—that they controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had, therefore, all the incidents of property vested in themselves. Now that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. That is perfectly consistent with the property, as evidenced by the bill of lading remaining in the possession of the vendors of the cotton in question.

Lord *Cairns* (2):

There was an order given to the house at *Pernambuco* to buy and ship cotton. Two portions of the cotton were shipped in the *Capella* and the *La Plata*, and a third portion in the *Olinda*. In the invoice the goods are described as being shipped on account and at the risk of the plaintiff. But along with the invoice a bill of lading was taken from the captain making the cotton deliverable, not to the plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi*

(1) P. 128. (2) P. 131.

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being reserved by the shipper through the medium of the bill of lading.

In *Gabarron* v. *Kreeft* (1) *Bramwell*, B., thus expresses himself:

Then there is the case of *Falke* v. *Fletcher* (2) in which *Willes*, J., uses expressions which go to shew that a shipper may ship saying nothing, and then demand a bill of lading in exchange for the mate's receipt on such form as he pleases. *Wait* v. *Baker* (3) is not in point, because there the vendor had a right of lien. But *Parke*, B., said: "The delivery of the goods on board the ship was not a deliv- "ery of them to the defendant, but a delivery to the captain to be "carried under a bill of lading, and that bill of lading indicated the "person for whom they were to be carried."

He said the same thing in *Van Casteel* v. *Booker* (4). In *Moakes* v. *Nicholson* (5) it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendor had a lien. * * * *

The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shippers property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

* * * * * * *

I feel bound by the authorities, which perhaps establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person while the property was in another.

And *Cleasby*, B., (6) says:

But upon the effect of delivering a cargo contracted for on board the vessel of the vendee, the authorities are too numerous to refer to. I may mention *Turner* v. *Trustees of the Liverpool Docks* (7) as an early one (with *Ellershaw* v. *Magniac* (8) in the note in that case) and *Shepherd* v. *Harrison* (9) as the last. The effect of these is that the delivering of goods contracted for on board a ship when a bill of lading is taken is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply where the ship is the ship of the vendee.

(1) L. R. 10 Exch. p. 280.
(2) 18 C. B. N.S. 400.
(3) 2 Ex. 1.
(4) 2 Ex. 691.
(5) 19 C. B. N. S. 290.
(6) P. 285.
(7) 6 Exch. 543.
(8) 6 Exch. 570.
(9) L. R. 5 H. L. 116.

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In *Browne* v. *Hare* (1), in the course of the argument *Waite* v. *Baker* being mentioned, *Crompton*, J., says:

In that case the vendor kept his hand upon the goods by not indorsing the bill of lading to the vendee.

And again he says:

In *Turner* v. *The Trustees of the Liverpool Docks* (2) the Court seem to affirm the proposition, that if a vendor says: "I will send goods so as to be delivered if the vendee pays for them," it shows that he is shipping to himself.

Erle, J., delivering the judgment of the Court, says:

The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed "free on board," in performance of the contract.

In this class of cases the passing of the property may depend according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. Here it is passed by the act of the vendor alone. If the bill of lading had made the goods "to be de-"livered to the order of the consignee," the passing of the property would be clear. The bill of lading made them "to be delivered to the order of the consignor," and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them "free on board;" or for the purpose of retaining a control over them and continuing to be owner, contrary to the contract, as in the case of *Waite* v. *Baker* (3), and as is explained in *Turner* v. *The Trustees of the Liverpool Docks* (4), and *Van Casteel* v. *Booker* (5).

In a note to this case (6), citing *Coulurie* v. *Hastie* (7), it was said:

The goods are either shipped free on board, when they are thenceforward at the risk of the vendee, or they are shipped "to arrive", which saves the vendee from all risk till they are safely brought to port.

(1) 4 H. & N. 822.
(2) 6 Exch. 543.
(3) 2 Exch. 1.
(4) 6 Exch. 503.
(5) 2 Exch. 691.
(6) P. 286.
(7) 5 H. L. 673.

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In *Mirabita* v. *Imperial Ottoman Bank* (1), *Bramwell*, L.J., says :

A long series of authorities beginning with *Waite* v. *Baker* (2), and ending with *Ogg* v. *Shuter* (3) is cited.

It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add that I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a *jus disponendi*. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor.

This appears from *Waite* v. *Baker* (4); *Gabarron* v. *Kreeft* (5); and to some extent from *Ellershaw* v. *Magniac* (6).

And *Cotton*, L.J., in whose judgment *Bramwell*, L.J., said he entirely agreed, thus states the law (7) :

Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by a vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as an agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and consequently that there is no final appropriation, and the property on shipment does not pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite* v. *Baker* (8), *Ellershaw* v. *Magniac* (9), and *Gabarron* v. *Kreeft* (10), in each of which cases the vendors had dealt with the bills of lading for

(1) 3 Exch. Div. 169.
(2) 2 Exch. 1.
(3) 1 C. P. D. 47.
(4) 2 Ex. 1.
(5) L. R. 10 Ex. 274.
(6) 6 Exch. 570.
(7) Page 172.
(8) 2 Ex. 1.
(9) L. R. 10 Ex. 274.
(10) 6 Ex. 570.

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their own benefit, the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for, or had paid the price So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (1); *Shepherd* v. *Harrison* (2); *Ogg* v. *Shuter* (3).

STRONG, J.:

This is a bill in equity filed under a practice established by a statute, until lately in force in the Province of *Ontario*, whereby parties were at liberty to sue in the Court of Chancery in respect of legal rights.

The defence is failure of consideration under the following circumstances:—The appellants are distillers at *Belleville* in *Ontario*, and the respondent is a commission merchant carrying on business at *Toledo* in *Ohio*. On the 13th and 14th Sept., 1878, certain telegrams passed between the parties, which resulted in one sent on the latter day by the appellants to the respondent in the words following:

Will take 13,000 old high mixed 47 delivered here, vessel paying loading. Draw ten days through Merchants' Bank here. Send prime corn.

In pursuance of this order, which the respondent considered and acted upon as an order by principals to their agent, the respondent purchased a cargo of corn amounting to 12,965 bushels, which he shipped on board the schooner "*Annandale*," the price at *Toledo* being 42 cents per bushel, and the freight, including charge for unloading, making the gross price 47 cents, the limit

(1) 6 Ex. 543. (2) L. R. 4 Q. B. 196.
(3) 1 C. P. D. 47.

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mentioned in the appellants' telegram. The vessel sailed on the 16th Sept. The respondent took from the captain a bill of lading, dated the same day, for the cargo to be delivered as "addressed per margin," the margin being left blank. On the same day he drew on the appellants the bill of exchange, for the recovery of the amount of which the suit is brought—a bill at 10 days after date for $5,492.16. This amount was made up of a charge of 42 cents per bushel to cover price paid for corn and respondent's commission, and five cents per bushel for freight, with $20 advanced to the captain, and $26.65 interest for 10 days added. This draft the respondent procured to be discounted by the Merchants' National Bank of *Toledo*, to whom he at the same time and by way of collateral security for the draft, transferred the bill of lading. The Merchants' Bank of *Toledo* immediately endorsed both the draft and the bill of lading to the Merchants' Bank of *Canada* at *Belleville* for collection, and sent them forward in order that the appellants' acceptance of the draft might be procured On the 19th Sept. the appellants accepted the draft. The vessel did not reach *Belleville* until the 23th Sept., some days later than the usual time of a voyage between the ports of *Toledo* and *Belleville*; the cause of the delay being unavoidable detention in the *Welland* canal. Upon the arrival of the vessel it was found that the corn, which the evidence shews to have been shipped in good order, had become heated in the voyage and was much damaged. Under these circumstances the appellants refused to accept delivery, and it was subsequently sold for the benefit of whom it might concern. The appellants refused to pay the draft which the respondent subsequently retired and then brought this suit for the recovery of the amount for which it was drawn.

On the day on which the vessel sailed, the 16th

Sept., the respondent also sent to the appellants an invoice of the corn, (exhibit L.) headed as follows:

Account purchase by *George E. Williams* of 12,965 bushels high mixed corn, for account and risk of Messrs. *H. Corby & Sons.* Shipped schr. *Annandale.*

This invoice was enclosed in a letter of the same date from respondent to appellants, in which he says:

We enclose invoice of 12,965 bushels high mixed corn per schr. *Annandale,* draft as stated made to-day.

The Court of Appeal, upon this state of facts and upon a consideration of the evidence of usage prevailing among commission merchants in the grain trade at *Toledo*, reversed the decree of the Court of Chancery by which the bill had been dismissed, and determined that the respondent was entitled to recover.

It was decided by the Court of Appeal that the relation between the parties was that of principal and agent, and that the telegram of the 14th Sept., already stated, was to be regarded as an order by the appellants to the respondent, to purchase for them a cargo of corn within the limit of 47 cents a bushel for cost and freight. I entirely concur and adopt the judgment of the court in this respect as well as in their conclusion that the charges made by the respondent were fair and legitimate, and such as he was entitled to make in his character of an agent or commission merchant. It appears to me, however, that the contract of agency was not the only one between the parties, but that there also existed the relation of vendor and purchaser in respect of this corn. A passage in the opinion of Mr. Justice *Blackburn* in the case of *Ireland* v. *Livingston*, in the House of Lords (1), seems to me to afford a very precise definition of the legal effect of the contract between the parties to the present appeal. He says:

It is quite true that the agent who in thus executing an order, ships

(1) L. R. 5 H. L. 395.

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goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. * * * * The property in the goods passes from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*.

The decision of the present case, which depends, in my opinion, altogether on the questions whether the property in this corn had vested in the appellants before it became damaged, or whether, if the property in the corn had not passed to the appellants, it was by the stipulations of the parties at the risk of the purchasers, is to be governed by the ordinary principles of the contract of sale. The passing of the property under a contract for the sale of goods is said to be altogether a question of intention—the rules laid down being merely intended as guides for discovering or presuming the intention when the parties have not clearly expressed it There can be generally no stronger evidence of a vendor's intention not to pass the property to the vendee than the fact that he takes the bill of lading in his own name. In the present case, by the terms of the bill of lading, the goods were deliverable to the person whose name should be inserted in the margin, and the name inserted was that of the bank which discounted the draft for the price, and to whom the bill of lading was delivered as collateral security. The effect of this was clearly to vest a special property in the corn in the bank, and this special property was in the nature of a hypothecation of the goods, designed to secure the payment of the draft, and subject to which the absolute

legal property either remained in the respondent or became vested in the appellants (1).

Had the bill of lading been taken originally in the respondent's own name and then endorsed by him to the bank, it would be strong evidence, even between parties whose relations were such as those before us, to shew that the vendor intended to reserve the property, subject to the rights of the bank, to himself, at least until by some further act he indicated an intention to pass it to the purchasers. Here, however, the vendor seems to have parted with all power over the disposition of the property, when he handed over the bill of lading to the bank.

However this may be, it seems to me clear, both upon authority and principle, that when, on the same day as that on which the vessel sailed and the bill of lading was handed over to the bank, the respondent sent the letter of advice enclosing the invoice, stating that the goods were for account "*and risk*" of the appellants, he did an act which divested him of any property in the goods and vested it in the appellants. In other words, when he said the goods were to be at the risk of the appellants he meant what he said. Had the invoice merely stated the goods to have been purchased on account of the appellants, it might not have been so conclusive, but even in that case, I should have thought every presumption ought to be made against any intention on the part of the respondent, a mere factor,

(1) Note: the effect of a transfer of the bill of lading by way of security is only to vest a special legal property in the goods in the secured creditor, and to leave the general legal property in the owner subject to the charge, and not to vest the whole legal property in the secured creditor, leaving only an equitable right of redemption in the transferor. See the case of *Glyn, Mills, Currie & Co.* v. *The East and West India Dock Company*, 6 Q. B. D. 475—per *Baggallay* and *Bramwell*, L.JJ., against the opinion of *Brett*, L.J., p. 449—and *Burdick* v. *Sewell*, 10 Q. B. D. 363; both decided since the present case. Also *Campbell* on sales, p. 338.

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whose commission had been included in the bill drawn for the price, to retain the property, and so subject himself to the risk of any loss which the insurance might be insufficient to cover, more especially as he had so dealt with the bill of lading as to authorise its delivery to the vendees upon payment of the draft drawn for the price; but the insertion of the word "risk" in the invoice seems to me to make it unnecessary to resort to any such presumption, and to be amply sufficient to vest the property in the appellants from the date at which the invoice and letter of advice were transmitted—the 16th September,—the day on which the vessel sailed. In the case of *Jenkyns* v. *Brown* (1), which I mentioned during the argument of this appeal, the facts were almost identical with those in the present case, and the decision itself entirely warrants the opinion already expressed as to the legal result from those facts.

In Mr. *Benjamin's* work on Sales (2), he thus summarises the facts of that case:

Klingender, a merchant in *New Orleans*, had bought a cargo of corn on the order of plaintiffs and taken a bill of lading for it deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a *New Orleans* banker, to whom he also endorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs showing that the cargo was bought and shipped on their account and at their risk. Held, that the property did not pass to the plaintiffs, as the taking of a bill of lading by *Klingender* in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the endorsed bill of lading to the buyer of the bills of exchange he had conveyed to them "a special property" in the cargo, and by the invoice and letter of advice to the plaintiffs he had passed to them the general property in the cargo subject to this special property, so that the plaintiffs right of possession would not arise until the bills of exchange were paid by them.

I am unable to distinguish this case of *Jenkyns* v.

(1) 14 Q. B. 496. (2) 2 Am. Ed. p. 347.

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Brown from the present, and I am therefore of opinion that in the present case the property, subject to the rights of the bank, was vested in and at the risk of the appellants from the 16th of September, the day on which the schooner sailed from *Toledo*, and as the damage to the corn occurred after that date there was no failure of consideration, and the respondent was entitled to recover. Further, as showing that the terms of the invoice, making the goods as shipped at the buyer's risk, was a sufficient indication of intention to pass the property, I refer to the cases of *Castle* v. *Playford* (1) and *Martineau* v. *Kitching* (2), which are also authorities for the respondent in another view of the case, which I shall hereafter state.

I see nothing in the fact that the bill was drawn at ten days, whilst the usual length of voyage from *Toledo* to *Belleville* was only five or six days, to raise any presumption against an intention to vest. The only difference this would make would be that in case the corn arrived and the vessel unloaded before the maturity of the bill, it would have to be left in store for some two or three days before the appellants, by paying their acceptance and obtaining the bill of lading, would get possession.

But even if the property in the corn did not pass to the appellants, I should still have been of opinion that there was no failure of consideration. The effect of the contract of sale depends entirely on the intention of the parties, and they may always provide that, though the property is not to pass to the buyer, it shall be at his risk, so that, if it perishes by fortuitous circumstances before delivery, the vendor shall still have the right to be paid the price. That this is the law is well established by the case of *Castle* v. *Playford* (3), and also by

(1) L. R. 5 Exch. 165, S. C. L. R. 7 Exch. 98.

(2) L. R. 7 Q. B. 436.

(3) L. R. 5 Exch. 165; S. C. L. R. 7 Exch. 98.

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the case of *Martineau* v. *Kitching* (2), per *Blackburn* and *Lush*, L.JJ, already referred to. Then, in the present case, by the express terms of the invoice,—which was retained without objection by the appellants,—it was a term of the contract that the property from the time of shipment was to be at the risk of the purchasers, and this was such a reasonable and natural provision, having regard to the relationship existing between the parties, that it could not have been expected that it would have given rise to any objection, at all events none was ever made, and we have therefore a right to presume it was part of the contract of sale, and if so it constitutes a complete answer to this attempt to throw the loss on the respondent. This conclusion is in accordance with the well understood usage of the grain trade, found by the witnesses called by the respondent at the trial.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J., concurred with the Chief Justice

HENRY, J.:—

This is an action brought in the Court of Chancery for *Ontario* by the respondent against the appellants, and in which a decree was pronounced in favor of the latter. On appeal to the Appeal Court of *Ontario*, it was reversed and a decree made in favor of the respondent. From the latter it came by appeal to this court. The decision of the matter in controversy depends mainly on the construction to be put on the contract entered into by means of telegraphic communications between the parties.

The respondent was a commission agent at *Toledo*, *Ohio*, *U.S*, and commenced the correspondence by a telegram which finally ended in an agreement that he

(2) L. R. 7 Q. B. 436.

should ship 13,000 bushels of "high mixed corn" to the appellants at *Belleville*. The telegram is dated the 15th September, 1878, as follows:

Schooner "Annandale" obtainable, 5c., vessel paying unloading. High mixed corn 47c.

On the same day the appellants answered by telegram:

Do you not think corn will be lower next month? Will you deliver here at 47c.?

The respondent on the same day replied:

Higher corn predicted by exporting customers. England advancing. October selling here half above cash. We don't anticipate lower prices. Receipts light. Roads bad. Good shipping demand. Offer cargo 47 cost, freight, commissions, insurance—prompt acceptance.

The latter is a reply to the question—"Will you deliver here at 47c?"

The appellants on the 14th telegraphed as follows:

Will take 13,000 old high mixed (47c.), delivered here: vessel paying unloading. Draw, ten days, through Merchants' Bank here. Send prime corn.

Upon receipt of the latter telegram, the respondent decided to ship the corn, and shortly afterwards did so, and drew on the appellants at the rate of 42c. per bushel, and by letter requested the latter to pay the freight at the rate of 5c. per bushel. The draft spoken of was drawn by the respondent as directed, and was made payable to the order of the National Bank at *Toledo*. He insured the cargo in his own name, and took a bill of lading for it to be delivered to his own order or assigns. He assigned the policy of insurance and the bill of lading to the same bank. The latter forwarded the whole of the documents mentioned to *Belleville*, and the draft was accepted. The respondent had obtained advances from the bank, and the latter was authorized by him to hold the corn as security until the draft should be paid, and in default of payment to sell the

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same to reimburse themselves to the amount of the draft. The corn arrived at *Belleville* between the time of the acceptance and maturing of the draft, but in such a damaged condition that the appellants refused to receive it, and so notified the respondent. It was subsequently sold by him, and he now seeks to recover the difference between the amount it realized and the cost. The respondent contends in the first place that he purchased and shipped the corn as the agent of the appellants; and, secondly, that if that contention be not sustained, that there was such a delivery when it was put on board the vessel as to make it the property of the appellants, and therefore at their risk.

The appellants deny both propositions. There is no evidence whatever that the respondent acted as agent of the appellants, but, on the contrary, the telegrams are evidence of a sale by him as principal. The mere fact that he was a commission merchant or broker can have no weight against the clear language of the telegrams. They show also very clearly that the delivery was to be at *Belleville* at the price named, and the respondent requested the appellants to pay the freight out of the principal sum. The respondent himself took the most effectual means of preventing the appellants from having any property in the corn until delivered. He assigned it to the bank with the policy of insurance, and in case of loss by the perils of navigation, the bank could alone recover for it. The latter were the legal owners, and the appellants had no title whatever to the corn, when it got injured on the voyage. The bank might have sold it to any one they pleased, and the appellants could not have gainsaid their right to do so, and the only redress open to them (if any) would be in the shape of damages from the respondent for not delivering the corn according to the agreement.

The respondent seeks to recover from the appellants

the balance of the price of the corn which was never delivered to them or at their risk, and which in its damaged state they were not bound to receive. By his own act he prevented too the appellants from having any title to the corn until the draft should be paid. He did not ship it in pursuance of the agreement, and by adding the condition of prepayment, he relieved the appellants from the obligation to take it under any circumstances. I am of opinion, for these reasons, that the appeal should be allowed, the judgment of the court below reversed, and the decree of the Vice-Chancellor sustained, with costs.

GWYNNE, J :—

This is an action instituted in the Court of Chancery in the province of *Ontario*, a proceeding authorized by the Administration of Justice Act of that province, for the recovery of a purely legal demand, arising out of a contract between the plaintiff and the defendants; but instead of stating the case, as it would have been in an action at law in the like circumstances—namely, as upon an acceptance by the defendants of a bill of exchange drawn upon them by the plaintiff, the latter, in his bill of complaint, sets out at large what, according to his interpretation and contention, was the contract between him and the defendants out of which the acceptance arose, and he alleges the fulfilment of such contract upon his part and the breach of it by the defendants.

Upon the evidence, as indeed was admitted in the argument, we must take the fact to be that, although the corn was in good condition and of the quality required by the defendants when it was shipped on board the vessel at *Toledo*, it did not arrive at *Belleville* in good condition, and by reason thereof, it was useless for defendants' purposes; and the questions we have to

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decide are, what was the true nature and effect of the contract made between the plaintiff and the defendants; and which of them, under the circumstances appearing in the case, should bear the loss arising out of the transaction?

The plaintiff, on the one side, contends that even if the contract should be held to be one of sale and purchase, still the property passed to defendants on shipment, and that thereafter all risk was theirs; the defendants, on the contrary, contend that regarding them as purchasers they acquired no property and incurred no liability until delivery at *Belleville* in pursuance of the contract, and that even if the contract should be held to be one between principal and agent originally, still the plaintiff so dealt with the corn as to retain in himself the property therein in disregard of what would be defendants' rights as principals, and attached to their getting possession of the corn a condition inconsistent with the plaintiff being merely defendants' agent, and consistent only with his retaining the ownership of the corn until delivery to the defendants at *Belleville*, and so, that the plaintiff retained in himself all responsibility and risk, as well as the property in the corn, until the loss and damage had occurred, and thereafter continued to deal with it as his own.

This appears to have been the first transaction which the defendants had with the plaintiff. They had had dealings for several years with plaintiff's brother, to whose business the plaintiff succeeded in April, 1878. The defendants say that they dealt with the plaintiff's brother, sometimes upon the basis of a contract for the purchase from him of corn delivered at *Kingston*, and sometimes on the basis of a contract of purchase by him as defendants' agent of corn at *Toledo*, deliverable to the defendants f. o. b. there, but that they preferred

the former method. The manner in which the defendants may have been in the habit of dealing with the plaintiff's brother has no bearing upon this case, except as explanatory of the defendants' intention in entering into this contract, and of his *bona fides* in contending that such intention was to enter into a contract of purchase of corn on delivery at *Belleville*.

As to the manner in which the present contract came about, the plaintiff says—and he does not appear to be contradicted in this—that after commencing business for himself, he no doubt wrote to defendants soliciting their orders; that he received some communications from them in September, 1878, prior to the 13th, but whether it was he or the defendants who started such communications, he cannot say—no such communication is produced. With this information that there had been some prior communications, the correspondence out of which this contract arose, so far as is laid before us, commenced with a telegram from the plaintiff at *Toledo* dated 15th September, 1878, to the defendant, *H. Corby* jun., at *Belleville*, as follows:—

Schooner "Annandale" obtainable, 5c., vessel paying unloading. High mixed corn, 47c.

In reply to this upon the same day the defendants telegraph to the plaintiff:

Do you not think corn will be lower next month; will you deliver here at 47c?

To which on the same day the plaintiff replies by telegram:

Higher corn predicted by exporting customers. *England* advancing. October selling here half above cash. We don't anticipate lower prices. Receipts light. Roads bad. Good shipping demand. Offer cargo 47 cost, freight, commissions, insurance—prompt acceptance.

This latter appears to be in answer to defendants enquiry, "Will you deliver here at 47 cents?"

On the 14th the defendants reply:

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Will take 13,000 old high mixed, 47 delivered here, vessel paying unloading; draw ten days through Merchants Bank here; send prime corn.

Now, if it were not for the fact that the plaintiff carried on the business of a commission agent, I should think the natural construction to put upon the correspondence involved in the above telegrams would be—that the defendants only contracted to take, that is to receive on delivery at *Belleville*, corn of the description specified, namely, prime old high mixed corn, and to pay for it by an acceptance of a draft on ten days credit, but the plaintiff contends that the fact of his being a commission agent makes all the difference, and that he understood the defendants to be authorizing him as their agent to purchase corn for them at such price as should not cost them more, but might cost them less than 47c. at *Belleville*, to be paid for by an acceptance of plaintiffs' draft at ten days, and he contends, upon the authority of *Ireland* v. *Livingston* (1), that although the defendants' telegrams may be susceptible of the construction put upon them by defendants, still that they are susceptible also of the construction put upon them by the plaintiff, and that after having, as he contends he has, *bonâ fide* acted upon them in that sense, it is not now competent for the defendants to repudiate their order, upon the ground that the plaintiff did not act upon it in the sense intended by defendants.

That case decides, that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense, of which it was equally capable.

Whether that principle is applicable to a case in which the question is as to the character in which two

(1) L. R. 5 H. L. 395.

parties, who might each have acted in one or other of two characters, did in fact contract, it is not necessary, in the view which I take, now to decide. In such a case, when it may have to be decided, it will have to be considered whether it is not equally incumbent upon both parties to make it clear in what character they are respectively dealing; namely, whether as vendor and vendee, or as principal and agent; or to apply the question to the case here, whether it was not equally incumbent upon the plaintiff, who offered the cargo, to make it clear in what character he offered it, as it was for the defendants to make it clear in what character they accepted the offer. It is not, however, necessary, in the view which I take, to decide that point in this case, for the defendants contend, as I think not without reason, that the acts of the plaintiff have been inconsistent with his having understood the contract assumed by him to be one of agency only, or that the defendants entered into it in the character of principal, employing an agent to purchase for them, and, that he retained the property in himself and transferred it to the bank of *Toledo* and not to the defendants. The plaintiff says that he procured the money with which he carried on business, and did procure the money with which he purchased the corn, which is the subject of this litigation, under an arrangement made by him with the banks at *Toledo*, that he would draw upon his consignees through the bank furnishing the funds, endorsing the draft to the bank, and assigning to them also the bill of lading and a policy of insurance upon the cargo. The question, therefore is, after the plaintiff purchased the corn, which is the subject of this litigation, when and to whom did he part with the property therein? and when, if ever, did that property pass from the plaintiff to the defendants? Upon shipping the corn on board the "Annadale" upon

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the 16th Sept., he received a bill of lading from the master. He effected, at the same time, a policy of insurance on the cargo in his own name. That bill of lading, the symbol of property in the corn, together with the policy of insurance he assigned to the National Bank, *Toledo*, and drew through them at ten days upon the defendants, endorsing at the same time the bill of exchange to the bank, all in pursuance of an agreement to that effect, upon which he had procured the money to carry on his business, and for the purpose of vesting the property in the corn in the bank to hold to their use until the bill of exchange should be paid, and in default of payment to sell to reimburse themselves to the amount of the bill of exchange.

The corn in due course would ordinarily reach *Belleville* in four or five days from *Toledo*, that is upon the 21st or 22nd September. The defendants had contracted for the credit upon a draft at ten days to ensure the arrival of the corn before the draft should become payable. Upon presentation, of the bill of exchange, they accepted, relying as their security upon the arrival of the corn before the bill should be payable on the 1st of October. The corn arrived at *Belleville* on the 27th or 28th September, and was at once refused by the defendants as being so damaged as to be for their purposes useless. Now, when the plaintiff, as above stated, transferred the property in the corn to the bank, he had nothing that he could transfer to the defendants otherwise than subject to the condition of their first paying the draft, that is to say, looking at the ordinary time for a vessel to go from *Toledo* to *Belleville* of seven or eight days in advance of the time which the defendants (according to the plaintiff's own view of the contract) had contracted for. The plaintiff thus imposed upon the defendants a condition precedent to their acquiring possession of the corn

not warranted by their contract, according to the plaintiff's own view of it. Property consigned to the defendants, subject to such condition, could not be property forwarded in pursuance of their contract in any view of it, or which they could be obliged to take.

After having transferred the property to the bank, the plaintiff forwarded to the defendants an invoice, wherein the corn is spoken of as purchased by the plaintiff as an agent upon commission, and which speaks of the cost afloat at *Belleville*, 47c.; whereas, the defendants had contracted for delivery on shore out of the vessel at that price. With the invoice, the plaintiff did not inform defendants of his having transferred to the bank the property in the corn, and that they could only get it upon condition of first paying the draft forwarded for their acceptance. The sending of this invoice to the defendants gave to them—unless and until the latter should pay the draft—no property in the corn, which, and not merely a lien upon it, was what was vested in the bank upon the authority of *Jenkyns* v. *Brown* (1). All that the plaintiff ever gave to the defendants was a right to receive the corn, conditional upon their first paying their draft, which, as appears, wanted three days of maturity when the corn arrived in damaged condition at *Belleville*. This condition, as I have shewn, was not warranted by the contract, according to the plaintiff's own construction of it. He had no right to superadd such a condition to the defendant's contract. The result then is, that the property in this corn remained by the act of the plaintiff, contrary to the terms of the contract, as he alleges he understood it, in the plaintiff and his assignees, the bank, the plaintiff's creditors, until and after the arrival of the corn at *Belleville*. The damage to the corn occurred, then, while the property continued to be in the plaintiff and his

(1) 16 Q. B. 502.

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assignees—the bank. As then the plaintiff, contrary to his own understanding of the contract, as now contended for by him, retained in himself and his creditors, the bank, for their own benefit, the property in the corn until it became damaged, it is but reasonable that they, and not the defendants, should bear the loss. For the above reasons, I am of opinion that the defendants' contention is well founded; that the appeal should be allowed with costs, and that the decree of the Vice-Chancellor should be restored.

Appeal allowed with costs.

Solicitors for appellants: *Blake, Kerr, Boyd & Cassels.*

Solicitors for respondent: *Bawden & Machar.*

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*Nov. 5.

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*March 28.

GEORGE F. TROOP, *et al*.....APPELLANTS;

AND

LEVI HART, (*Assignee, &c.*).....RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of fish in storage—Right to hold goods by bailee for unpaid purchase money—Delivery of part.

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of *W. M. R.* the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One *S.*, who so dealt with appellants, in October, 1877, sent them 77 barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, *S.* sold all the

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

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fish he had, including those mackerel, to one *R.* at $8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received $4,000 and a promissory note for $4,000 at four months. This note was given to appellants by *S.* on account of his general indebtedness. On the 4th March, 1878, *R.* became insolvent and the respondent who was subquently appointed assignee, demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined, the appellants proved against the estate of *R.* on the note and received a dividend on it.

The Chief Justice at the trial gave judgment for $1,888, less $46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held,—(*Strong*, J., dissenting,) that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had as against the appellants' a right to the immediate possession of the fish.

2. That *S.* had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvents' note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* in favor of the respondent. The action was one of trover charging the appellants (who do business under the name of *Black Bros. & Co.*,) with converting 250 barrels of mackerel, which were the property of *William M. Richardson*, the respondent's assignor. One of the branches of the appellants' business was the supplying of merchants who were connected with fishing business in the country, and they were accustomed, as others in the same line, to receive in return the fish which their customers obtained, and to sell such fish, placing the proceeds to the account of their customers. One *D. N. Shaw*, living in *Cape Breton*, so dealt with the

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appellants, obtaining all his supplies from them and sending them all his fish. In October, 1877, he sent to appellants 77 barrels of herring and 236 barrels of mackerel, which they placed in their store. While these fish were in their store *Shaw* came to *Halifax*, and sold the 236 barrels of mackerel along with a quantity of other fish (with which the appellants had no concern), to *W. M. Richardson*, who soon after became insolvent; respondent as his assignee demanded the 236 barrels of mackerel and appellants refused to deliver. On 16th March, 1878, verbal demand was made on appellants for the fish. On the 22nd March appellant sold 200 barrels of the fish to *West*. On the 4th April a written demand was made on the appellants for the fish. The whole amount of the sale by *Shaw* to *Richardson* was $8,101.11, of which half was paid in cash and a note was given for the other half ($4,050.56), and this note was endorsed over by *Shaw* to the appellants, who held it, unpaid and overdue, when the demand was made and action brought. The appellants pleaded not guilty and that the goods were not, nor was any of them, the respondent's as such assignee as alleged. The action was brought 6th April, 1878, and, long after issue joined, viz.: in January, 1880, appellants proved against the estate of *Richardson* on the note, and in February, 1880, received a dividend thereon of $577.20. The late Chief Justice tried the cause without a jury and gave judgment against the appellants for $1,841 90, on the ground that they knew *Richardson* had included the mackerel in his statement of assets and had not objected at the meeting of the creditors. Only one of the appellants was present at this meeting.

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

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The action in this case charging the defendants with converting 250 barrels of fish, which were the property of the plaintiff's assignor, was brought on the 6th April, 1878, and it was long after issue joined, viz.: in January, 1880, that the defendants proved against the estate of *Richardson* on the note and received a dividend thereon of $577.20. Now, the learned judge who tried the case gave judgment against the defendants, on the ground that they knew *Richardson* had included this particular fish in his statement of assets, and that they had not objected at the meeting of the creditors, but accepted a dividend on the note and declared they held no security. Only one of the defendants was present at this meeting, and having great quantities of fish in store from time to time for different persons, he could not be certain that *Richardson* had not any fish there until he should make enquiry. But even if the defendants had knowledge that the fish sued for were included by the insolvent in the statement of assets and made no objection thereto known to the assignee or creditors at the meeting, these facts did not entitle the plaintiff to judgment. Defendants were not bound to make any such objection. The plaintiff cannot claim by estoppel, and these facts did not amount to an estoppel. The assignee can only avail himself of such title as *Richardson* had. *Freeman* v. *Cook* (1); *Clarke* v. *Hart* (2). It was a fact immaterial to the issue—it was not made matter of replication, and any replication of that fact would have been demurrable, and therefore such a ground is not now available to plaintiff.

The case of *ex parte English* v. *American Bank* (3) is an authority that the defendants did not lose their title to the fish by alleging in the proof of claim that they held no security for the claim. A creditor can properly

(1) 2 Ex. 654.

(2) 6 H. L. Cas. 633, 656.

(3) L. R. 4 Ch. App. 56.

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so attest if he holds no security from the insolvent. Insolvent Act of 1875 (1); *McMahon's* Insolvent Act (2).

My second point is that the fish were the property of defendants, either absolutely or as pledged to them by *Shaw*. *Langton* v. *Higgins* (3).

If the fish are the property of *Shaw*, as assumed in and stated by the judgment, and the defendants were merely the custodians of them, they had at least the right on *Shaw's* behalf to hold the fish for the unpaid purchase money. *Benjamin* on Sales (4); *Bullén* and *Leake* (5).

There was a lien on the fish for unpaid purchase money, and whether this lien was in *Shaw* or the defendants, it was an answer to the action. *Butler* v. *Hobson* (6); *Gadsden* v. *Barron* (7); *Leake* v. *Loveday* (8).

There was a lien, according to the Chief Justice's finding, for insurance and storage, which he deducted from plaintiff's damages. The validity of any such charges (which the learned judge expressly affirmed) did not constitute them a set-off against the plaintiff's damages, but constituted a defence to the action, and one that did not require to be pleaded. *Bullen & Leake* (9).

Finally, I submit even if the fish were only left with defendants to sell for *Shaw*, they had such an interest that *Shaw* could not revoke their authority and sell without their consent. *Jones* v. *Hodgskins* (10); *Benjamin* on Sales (11); *Gaussen* v. *Morton* (12); *Walsh* v. *Whitcomb* (13).

(1) Section 84.
(2) P. 146.
(3) 4 H. & N. 402.
(4) Pp. 626, 640.
(5) P. 717.
(6) 4 Bing. N. C. 290.
(7) 9 Ex. 574.
(8) 4 M. & G. 972.
(9) P. 717.
(10) 61 Maine 480.
(11) P. 74.
(12) 10 B. & C. 731.
(13) 2 Esp. 565.

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

A good deal of my learned friend's argument is based upon the assumption that the learned judge only found upon one of the facts in issue. Now, in order to arrive at the conclusion he did, he must have found that the fish was *Richardson's* and had been originally *Shaw's*. This special finding is an addition to the general verdict in our favor. There were only two issues raised by the pleadings: the first issue denies the commission of trover, and second, goods not plaintiff's and he had no right to possession. Now my learned friend rests his contention entirely upon the lien of an unpaid vendor. I contend he cannot raise the question of lien at all under our practice act. Then, we come to the question of fact. Whose property was it? It is not denied that it was *Richardson's*, but they say there was an equitable assignment of it. Surely that must be pleaded.

There is no proof that the appellants are defending this suit for or on behalf of *Shaw*, and if not, they cannot, under any circumstances, set up the non-payment of the note or *Richardson's* insolvency as a defence to this action, and they cannot, under the state of the pleadings herein, in view of the provisions of c. 94 of the Revised Statutes, fourth series, and especially of s. 152 thereof, set up any such defence.

If the appellants' claim to hold the fish be founded on stoppage *in transitu*, there is no proof that *Shaw* ever exercised such right, nor that he authorized the appellants to do so, nor that they did so. In order to constitute stoppage *in transitu*, there must be some act or declaration on the part of the vendor countermanding delivery. *Benjamin* on Sales (1).

If any such right existed, and could under the circumstances in proof herein be properly exercised, it gave at most only the right to detain, and not to sell,

(1) 1st ed. p. 652.

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the goods, and by selling them the appellants were guilty of a conversion, and respondent is therefore entitled to recover. *Roscoe's Nisi Prius* (1).

The *transitus* was at an end when the goods were sold by *Shaw* to *Richardson*.

Part of the fish, viz, 36 barrels, having been delivered, it must, in the absence of proof to the contrary, be deemed equivalent to delivery of the whole, and the right of stoppage *in transitu* was at an end.

The respondent in any point of view—the contract made with *Shaw* never having been rescinded—had the right to tender the portion of the purchase-money remaining unpaid, and thus entitle himself to the goods, and any profit or advantage to accrue from their possession; and the appellants, by not setting up when the several demands were made their alleged right to detain, have misled the respondent, and have also waived and lost all right, if any such ever existed, to insist upon a lien or right to detain.

The only other point I intend to urge is, that the defendants cannot set up either a lien for charges or unpaid balance account, because they filed a claim for their note with a sworn statement that they had no security and received a dividend.

The defendants knew that *Richardson*, at his first meeting, claimed the fish as his, and although *Lewis*, one of the appellants, informed himself, as he says, between the first and second meeting, as to the accuracy of this claim, yet he made no objections to such claim at the second meeting, although the claim on the part of *Richardson* to the fish was repeated at the second meeting.

Mr. *Thompson*, Q.C., in reply.

(1) 13th ed. p. 955.

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RITCHIE, C.J.:—

Defendants were commission merchants and warehousemen. One *Shaw*, living at *L'Ardoise*, in the island of *Cape Breton*, a distance from *Halifax*, was in habit of dealing with them, they supplying him with goods, he sending them his fish, which they stored and sold, and credited him with the proceeds. In the summer of 1877 *Shaw* had in the store of defendants 236 barrels of mackerel. *Richardson*, the insolvent, says, and I think all the surrounding circumstances corroborate his testimony, that

Mr. *Troop* told him they had 236 No. 3 mackerel (large), belonging to *Shaw*. I was asked by *Troop* what they were worth, and I said $8. *Troop* said he did not want to sell these, as *Shaw* was on his way from *Cape Breton* and would dispose of them himself. He said, "I might probably buy them from him," and I said, "probably" and did so.

On the 3rd November, 1877, *Shaw*, being in *Halifax*, sold all the fish he had, including those mackerel, to *Richardson*, the mackerel at $8 a barrel=$1,828 for the 236 barrels. The whole sale amounting to $8,101.11 for which *Richardson* paid, half cash, or - - - $4,050 56
And half by a note at 4 months for - - - 4,050 56

$8,101 12

Shortly after the sale and date of the note at 3 months, *Shaw* endorsed the note to defendants on account of his indebtedness to them. The note would fall due on 6th March, 1878. All the fish sold, except the 236 barrels, were at time of sale in two vessels, and of all these fish *Richardson* got the actual delivery. The 236 barrels remained in defendants' store. On the 4th March, 1878, before the note fell due, *Richardson* assigned under the Insolvent Act of 1869.

Plaintiff became assignee of the insolvent, 15th March, 1878. On the 16th March verbal demand was made on defendants for the fish.

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On 22nd March, 1878, defendants sold 200 barrels of the fish to *West*.

On 4th April a written demand was made on defendants for the fish; and

On 6th April, 1878, the writ was issued in the case; and

On 7th May, 1878, defendants sold the remaining 36 barrels to *Cochran*.

There were three meetings of *Richardson's* creditors after the assignment, and no meeting after the 18th March. At these meetings one of the defendants, *Lewis*, attended, and at these meetings a statement was produced of the insolvent's assets, in which among the items of assets the fish now in dispute was put down as "236 bbls. mackerel, stored at *Black Bros.*" At the first meeting the defendants took a copy of this statement. The witness, *W. H. Hart*, inspector, and a creditor, who was present at the three meetings says:

> Statements of the assets and liabilities were read at them all. "A" was one of them. I heard no objection raised by *Lewis* at any of the meetings, nor by any one else.

And on cross-examination, he says:

> Each of the items in "A" were read over and discussed; and at all these meetings, the statement of the personal property in "A" was generally thought correct. *Lewis* spoke several times. "A" was passed round and read. I heard no objection to the personal items.

This was fully confirmed by other witnesses present. Though taking apparently a very active part, and fully informed as to these fish being claimed as the property of the insolvent, and as an item of his estate available for his creditors, neither this defendant nor his firm ever set up any claim thereto or lien thereon on behalf of themselves, *Shaw*, or any one else, but, on the contrary, filed with the assignee a claim against *Richardson's* estate as follows:—

HALIFAX, N. S., December, 1879.

Mr. *W. M. Richardson* to *Black Bros. & Co*, Dr.

March 6, 1878. To cash retired his note favor *D. N. Shaw*. . $4050 56

And supported the claim by an affidavit sworn to, 8th January, 1880, by *Lewis*, in which he says:

1. I am a member of the firm of *Black Bros & Co.*, claimants, and the said firm is composed of myself and of *George J. Troop*, also of *Halifax*. 2. The insolvent is indebted to the claimants in the sum of four thousand and fifty dollars and fifty six cents. 3. The claimants hold no security for the claim, and I have signed.

And the plaintiff, the assignee, says:

I paid defendants $577.20, 10th February, 1880, a dividend on the note in claim 14½ cents on the dollar.

I think there is satisfactory evidence in this case to show that whatever may have been the general dealings or relations between *Shaw* and defendants with respect to these fish, they clearly refused to sell them on account of *Shaw*, and left *Shaw* to deal with and sell them entirely independent of them, and referred *Richardson* to him to buy them direct from him without their intervention, and necessarily free from any claim that might have existed, growing out of the general dealings of defendants with *Shaw*; and there can be no doubt that under such sale by *Shaw* to *Richardson*, the latter would, up to the time of his insolvency, have been entitled to demand and receive from defendants the said goods, wholly free from any lien or claim arising from such general dealings between *Shaw* and defendants, and also in like manner as against *Shaw*, would have been entitled to have delivery and possession of the goods. Such being the case, and defendants in their own rights having no lien, had *Shaw* a lien? and, if so, did defendants deal with those goods by virtue of such claim, or have they set up *Shaw's* lien as a defence to this action? There can be no doubt that if a vendor sells on time and takes a bill of exchange or promissory note for the price, he loses his lien on the

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goods sold, though in like manner there can be no doubt that it revives on the dishonor of the instrument in the hands of the vendor; that is to say, if a purchaser becomes insolvent before the goods are actually delivered, the vendor's right to refuse delivery revives, the law does not compel the vendor to deliver to an insolvent purchaser, but if the buyer does not become insolvent during the time that the bill is current, there is no vendor's lien, and the vendor is bound to deliver. It is stated in some of the text books that such lien does not revive on the dishonor of the instrument, if it be then outstanding in the hands of a third person, and in support of this proposition the case of *Bunny* v. *Poynts* (1) is generally to be found cited, but that was a case where the agent of the vendor took the notes of the vendee and another for the price and discounted them with his banker and endorsed them, but the vendor, his employer, did not endorse them. The court held the vendor must be considered as having received payment for his goods and could not retain them, though his agent afterwards became bankrupt and the notes were dishonored. It is somewhat difficult to understand why the fact of the notes being endorsed by the agent or the principal should make any difference in the right of the principal to retain the goods on dishonor of the note. If the creditor negotiates the bill or note for value and without rendering himself liable, it will operate as payment though dishonored, for in such a case he has obtained value which he cannot be compelled to refund, and therefore, if by a lien on the goods he could recover the price he would be paid twice. But if the creditor negotiates the bill or note, so as render himself personally liable upon it, in that case it will not operate as a payment, if dishonored.

It is said the bill is still outstanding; that is true, and

(1) 4 B. & Ad. 568.

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it may, perhaps, operate to prevent the seller from having a complete right to the goods so as to be able to give a valid title by re-selling them to a third party, but the only question in the present case is whether he has not a right to hold them till the price is paid.

But if the goods sold are in the warehouse of a third person, and he assented to hold them as agent for the vendee, then there would have been a delivery of the goods, and the possession of the warehouseman would be the possession of the vendee, and all right of lien on the part of the vendor would be gone. In other words, the right of property and possession would both have passed from *Shaw* to the insolvent, and the right of lien would be destroyed, or rather would not exist.

In this case, did not defendants, by their conduct, recognize *Richardson* and his assignee, as having the absolute right in the property and the possession of the goods?

It is in vain to say that defendants did not know of the sale to *Richardson*. It was at their instance that *Richardson* negotiated with and bought from *Shaw*. They received the cash and note given by *Richardson* in payment for these and the other fish, and it is asking too much to expect us to believe that they did not know for what the notes and cash were given; the non-production of the warehouse books and of their warehousman, the sending to *Richardson* the notice of the running out of the insurance (for it is clear it could only have come from their establishment), their non-insuring the goods for the benefit of themselves or *Shaw* after the sale, then allowing the insurance to run out, the statement of *Troop* that the storage was at a fixed rate, and his saying: "I charged *Richardson* the usual rate," taken in connection with the non-repudiation of *Richardson's* property in the goods and the right to them of the plaintiff, as his assignee, at the several meetings of the creditors, the

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not setting up any claim of lien of any sort, or in any person when the property was demanded, or of *Shaw* on the trial, the non-assertion of any lien being on the goods, the entire absence of *Shaw* from any participation in the doings of the plaintiff in reference to securing these goods, the entire absence of the assertion of any claim of lien or otherwise by *Shaw* or by defendants in his behalf, the putting in of their claim to the full amount of the note, their swearing, long after this action was brought, that *Richardson's* estate owed thereon the full amount, and that they held no other security, would, in my opinion, fully justify a jury in coming to the conclusion that defendants acknowledged *Richardson* as owner, and that they actually held the goods for him; if so, then *Shaw* would have no lien, for Lord *Campbell* in *Pearson* v. *Dawson* says (1):

> The title of the purchaser being once acknowledged by the warehouseman, the purchaser has a right to treat the warehouseman as his agent, and the latter cannot afterwards set up a right in respect of a third party.

It is true Mr. *Troop* says in cross-examination:

> The first notice we had of *Richardson's* claim on the fish was after the insolvency.

This may be so, but it is quite consistent therewith that his partner and his warehouseman or managing man may have had full knowledge of the whole transaction, and it is to be remarked that his partner is on this point suggestively silent. He does say:

> I had no knowledge till yesterday (27th April, 1880,) of what fish was sold to *Richardson* or that it extended beyond the two cargoes.

This is entirely irreconcilable with all the evidence in the case, and it is the more strange that with the two cargoes they had nothing to do, these having been sold by *Shaw* himself from the vessels, and it is still more

(1) E. B. & E. 457.

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strange, when it is recollected what took place at the meetings in March, 1878; and the finding of the Chief Justice was, "that defendants had knowledge that the "fish sued for were included by the insolvent in the "statement of his assets, and made no objection thereto "known to the assignee or creditors at the meeting;" and which finding is supported by overwhelming evidence. There is no evidence whatever that notice of dishonor of this note was ever given to *Shaw*, or that the defendants hold him in any way liable thereon as indorser, or that *Shaw* in *Cape Breton* had any notice or knowledge of *Richardson's* insolvency at *Halifax*, or that he had any notice or knowledge of the note having been dishonored. Nor is there any evidence whatever that *Shaw* in any way directly or indirectly authorized defendants to set up any lien on his behalf on the said goods, or that he ever knew that any such claim ever was so set up nor in fact is there a tittle of evidence to show that defendants, with or without the consent or knowledge or authority of *Shaw*, ever did set up such claim on his behalf, or that they ever did deal with or claim to deal with the fish as the agents of or as authorized in any way by *Shaw* so to do; on the contrary, the fair inference from the evidence is that, on the ground that they had a claim on them in their own right, they dealt with the fish of their own mere motion without reference to *Shaw* or anybody else, and that they received the proceeds of the sales to *West* and *Cochran*, without accounting to the plaintiff as assignee of the estate of *Richardson*, or without crediting the proceeds on the note, though they say the amounts of the sales were credited to *Shaw*. If they sold them on *Shaw's* lien they should have credited the insolvent or his assignee on the note, and not *Shaw*, but it does not appear that that fact was ever communicated to *Shaw* by them, or that he ever had any knowledge of it. On the

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contrary, without any apparent communication with *Shaw* on the subject, and, so far as the evidence shows, without any reference to him or to the said sale, some two years after, the defendants prove the whole amount of the note was due by the insolvent estate to them, and claimed and received a dividend on such full amount, a proceeding wholly inconsistent with a sale of the fish under a lien (supposing, if a lien, a sale would be justifiable,) for the fish appear to have been sold;

200 barrels for $7.50 and 36 at $6.30 would amount to	$1,734 00
and deducting charges, &c., in which there are items which could not be charged against the insolvent, supposing there was	67 15
there would be a balance of . . .	$1,666 85

which, if the property had been sold under *Shaw's* or any other lien, would have to be credited on account of the note, for the security of which the lien, if any, must have existed. And would leave only $2,383.71 instead of $4,050.56, due on the note, for which any claim could possibly be made on the insolvent estate. The sworn claim, therefore, that the defendants put in for the full amount of the note, and for which they swore they had no security, is conclusive, to my mind, that they did not dispose of the said fish by virtue of any right of lien or under any authority from *Shaw*, or by or with his consent or approval, and in this connection it may not be amiss to notice that a vendor will lose his right of lien if he prove for the price of the goods under an adjudication in bankruptcy against the vendee. *Exp. Hornby* (1).

Again, if *Shaw* had a lien, neither *Shaw* nor defendants, supposing they were acting for them, had any

(1) Buck's Bank. Cases, 7 Glyn & J. 25.

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right to sell or dispose of the goods, and such sale was a conversion as against the assignee, in whom the property was, subject to the lien. Assuming that under a plea of not possessed a lien may be given in evidence, still, if you admit evidence of a lien you cannot exclude evidence to show that it had ceased to exist at the time of the conversion, so that supposing the defendants had a lien on these goods, and he should prove it under the plea of not possessed, the plaintiff would be entitled to show that the lien had ceased at the time he converted them.

The defendants clearly had no right to sell the goods, as they had no property in them; they do sell the goods and thereby necessarily put an end to the lien, if any existed. Continuance of possession being indispensable to the existence of liens at law, an abandonment of the property over which the right extends divests the lien.

But assuming again that *Shaw* had a lien, the defendants cannot, under the pleadings in this case, set up such a defence to this action, and if they could, under the pleas in this case, set up a lien in *Shaw*, they could not justify, as against the assignee of *Richardson*, in whom the general property in these fish was, a sale and conversion unauthorized by *Shaw*, and unwarranted if authorized.

STRONG, J.:—

This is an appeal from the judgment of the Supreme Court of *Nova Scotia* discharging a *rule nisi* for a new trial. The facts on which the questions presented for the decision of the court arise, are as follows: In October, 1877, one *D. N. Shaw*, a merchant at *L'Ardoise*, in *Cape Breton*, consigned to the appellants, merchants at *Halifax*, trading under the name of *Black Bros.*, a quantity of fish consisting of 236 barrels of mackerel and 77 barrels

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of herring. These fish were stored by the defendants. *Shaw* had for some time previous to this consignment been in the habit of dealing with the defendants, who supplied him with goods, and *Shaw* consigned fish to the defendants, who sold them and credited him with the proceeds. That this was the regular course of dealing between *Shaw* and the defendants is proved by both the latter and not contradicted. The defendant *Troop* in his evidence says:

Shaw lives at *L'Ardoise*. We are still dealing with him. We supply him with goods and he sends us his fish. We store the pickled fish, and when we sell it credit him with the proceeds.

The defendant *Lewis* says:

Shaw dealt with us largely; made all his purchases through us; sent us all his fish to be sold and the proceeds put to his credit. That was the course of dealing. In 1877 we supplied him throughout the year. In the fall of 1877 he sent us fish. * * * During the winter we sold the herring to *Twining*, and the 236 barrels of mackerel to *West*. * * *

Some time in November he (*Shaw*) endorsed the note to us on account of his debt to us. He paid us several sums of money in November. * * * After the note and payment made by *Shaw*, he was still in our debt. He is still in our debt.

He also says:

We had no special agreement with *Shaw* as to those fish.

In November, 1877, *Shaw* came to *Halifax* and *W. M. Richardson*, of whom the respondent is the assignee in insolvency, purchased from him a large quantity of fish comprising, amongst other lots, 292 barrels of mackerel at $8 per barrel. This lot of 292 barrels included the 236 barrels, which had previously been consigned to the appellants, and were at the time of sale held in store by them. The difference, 56 barrels of mackerel and the rest of the fish purchased by *Richardson*, were delivered to him by *Shaw* at the wharf, never having been in the possession of the appellants.

Richardson says in his evidence that before he made

his purchase one of the appellants (*Troop*) told him they did not want to sell the fish in their hands as *Shaw* was on his way from *Cape Breton*, and would probably dispose of them himself, and that *Richardson* might probably buy them from *Shaw*. This conversation is denied by *Troop*. He says :

He (*Richardson*) asked me if we expected *Shaw*, and when he came, to give him a chance or opportunity to purchase fish. *Richardson* in former years had bought *Shaw's* fish, and when he bought from *Shaw* he usually came to us and made an arrangement for the warehouse rent for the fish, the day after the purchase.

The price of all the fish purchased by *Richardson* from *Shaw* was $8,101.11—of this amount, one-half was paid by *Richardson* to *Shaw* in cash, and for the other half, $4,050.56, *Richardson* gave *Shaw* his promissory note, dated 3rd November, 1877, payable four months after date. Dr. *Lewis*, one of the appellants, swears that his firm had given *Shaw* no authority to sell the fish in their warehouse, but some time in November *Shaw* endorsed *Richardson's* note to the appellants on account of his debt to them. *Lewis*, however, says :

I had no knowledge until yesterday of what fish was sold to *Richardson* or that it extended beyond the two cargoes.

Troop swears :

The first notice we had of *Richardson's* claim on the fish was after the insolvency.

Further, *Richardson* states :

I did not go to *Black Bros'*, I got delivery of all the fish in the two vessels. I never went there to look after the fish or make arrangements for storage. I paid them storage in previous years.

There is a seeming inconsistency between these several statements of the appellants and *Richardson* and that of *Troop* on cross-examination, when the latter says :

The storage is at a fixed rate. I charged *Richardson* the usual rate ;

if, by this, it is meant that the appellants charged

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Richardson storage on the 236 barrels of mackerel in dispute.

On the 4th of March, 1878, and before the promissory note, which did not mature until the 7th of March, fell due, *Richardson* became insolvent and executed an assignment under the Insolvency Act of 1869. At this time the appellants still had the 236 barrels of fish in their possession. The respondent was appointed the creditors' assignee of *Richardson's* estate on the 15th March, 1878, and on the next day made a verbal demand on the appellants for the fish; the terms of the appellants' answer to this demand are not stated in the evidence; the respondent merely says, he did not get the fish. On the 4th April following a written demand was made, to which the appellants replied by a letter, referring the respondent to their solicitor.

The appellants, on the 22nd March, 1878, sold 200 barrels of the fish to *West*, and on the 17th May, 1878, they sold the remaining 36 barrels to *Cochrane*. This action was commenced on the 6th April, 1878. In the statement of assets belonging to the insolvent *Richardson*, received by the respondent from the official assignee, the fish now in dispute, described as "236 barrels of mackerel stored at *Black Bros.*," was included. This statement was produced and handed round at two, if not at three, meetings of *Richardson's* creditors, held prior to the 18th March, 1878, at both of which the appellant *Lewis* was present. Dr *Lewis* admits having seen the statement at the first meeting held before the assignment, though there is some contradiction between him and the other witnesses as to whether the statement was read or produced at the subsequent meeting. No objection was made by Dr. *Lewis* to the statement in respect of the fish in question in *Black Bros.* warehouse being the property of the insolvent. Dr. *Lewis's* evidence on this point is as follows:

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I saw the statement "A" at the first meeting; it was handed round; not read aloud; I said to those around me, that I knew of no fish of *Richardson's* stored in our store; I did not see "A" at the second meeting, nor hear it read. Between the first and second meetings I had ascertained that my impression at the first was correct. At the second there was no discussion as to the assets.

In January, 1880, long after this action had been commenced and after appellants must have ascertained the facts of *Shaw* having sold or assumed to sell this identical lot of fish to *Richardson*, and that the price was included in the note, which had been indorsed by them to *Shaw*; the appellants proved their debt on the note in the insolvency matter, the proof of the claim being made by Dr. *Lewis*, who, in his affidavit, swore that the appellants held no security for the claim; and on this proof, a dividend amounting to $577.20 being at the rate declared of 14½ cents on the dollar, was afterwards paid by the assignee to the appellants.

The declaration was in trover for the conversion of the fish, and the pleas were, not guilty, not possessed, and a traverse of the respondents' property in the goods. The action was tried on the 28th of April, 1880, before the late Chief Justice of *Nova Scotia* (Sir *William Young*) without a jury, when a verdict was found for the plaintiff for $1,841.90, being the value of the 236 barrels of mackerel at $8 per barrel, less the sum of $46.10 allowed for insurance and storage.

Shaw was not called as a witness at the trial. It appears from the judge's notes of the trial that the Attorney General, for the defendants, then raised the same point of lien which he insisted on in the argument here. The note being as follows:

Attorney General closes for defendant (*Benjamin* on Sales, 626; 7 B. & P. 567.) Stoppage in transitu and the right of detention for payment on the same principle, 4 B. & Cr. 941, 951; 1 El. & El. 680.

The reference to 4 B. & Cr. 941 is to the cases of

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Bloxam v. *Sander*, and *Bloxam* v. *Morley*, the leading cases on the law of vendor's lien in cases of insolvency. The Chief Justice found for the plaintiff upon the ground, as expressed in his note, that the "defendants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting." The Chief Justice adds to his finding this further note:

> If a rule *nisi* for a new trial is moved for, I shall readily acquiesce in it, that the case may be argued and thoroughly examined.

from which it appears that it was intended that all questions of law arising on the evidence should be open at the argument on the application for a new trial, and, at all events, that the defendants were not to be precluded from raising then the same points which they had insisted on at the trial. The court in banc afterwards granted a *rule nisi* to set aside this verdict, which was upon argument discharged with costs.

It was contended on the argument of the appeal before this court, by the Attorney General, on behalf of the appellants—1st. That *Shaw* had a lien upon the 236 barrels of fish for the unpaid residue of the price of all the fish sold by him to *Richardson*, *i.e.*, for the amount of the promissory note, which lien, the appellants were entitled to set up and enforce. 2nd. That if *Shaw* had not such a lien, the appellants themselves, under the arrangement with *Shaw* upon which the fish had been consigned to them, were entitled to one in their own right for the price of the 236 barrels in question.

There is, I think, nothing in the objection that the defence of a lien either in *Shaw* or in the defendants themselves was not admissible under the pleadings. The evidence of conversion was, as regards all the goods claimed, the demand and refusal to deliver, and also as regards 200 barrels, the sale to *West* before the action;

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the remaining 36 barrels not having been sold to *Cochrane* until after action brought, the demand and refusal constitute the only evidence of the conversion of that quantity. The effect of not guilty, in an action for conversion under the English rule of Trinity Term, 1853, with which section 146 of the Revised Statutes of *Nova Scotia* (4 Series) cap. 94 is identical, is stated in *William's* notes to *Saunders* (1), as follows:

> After some contrariety of decision, it is now settled that under the rule the plea of not guilty puts in issue not only the fact of the conversion, but also its righteousness (2).

And this is not affected by sec. 144 of Revised Statutes of *Nova Scotia* (4 series) cap. 94. Then as the right to the possession, as well to the property in the goods, at the time of conversion is requisite to enable a party to maintain an action of this kind, a right of lien, either in the defendants in their own right or in *Shaw*, whose agents the defendants were, as I shall hereafter establish, is a sufficient defence to the action as disentitling the plaintiff to the possession; and it is clear upon authority that such a lien may be set up under pleas traversing the plaintiff's property and possession (3), for even assuming that the appellant had no right to re-sell, yet, as the buyer had no title to the immediate possession of the goods at the time of conversion, the defence must be admissible under the plea of not possessed. In *William's* notes to *Saunders*, (4) it is said:

> Again, on the principle that there must exist a right of possession as well as property to support trover, it is held, that although a vendee of goods acquires a right of property by the contract of sale, he cannot maintain trover for them, until he pays or tenders the

(1) Vol. 2 p. 114.

(2) *Young* v. *Cooper*, 6 Exch. 259; *Higgins* v. *Thomas*, 8 Q. B. 908; *Bingham* v. *Clements*, 12 Q. B. 260; *Wentmore* v. *Green*, 13 M. & W. 104.

(3) *Owen* v. *Knight*, 4 Bing. N. C. 54; *Brandoo* v. *Barnett*, 1 M. & G. 908; *Richards* v. *Symons*, 8 Q. B. 90; *Bullen* and *Leake's* Precedents p. 741, 3rd Ed.

(4) Vol. 2, p. 93.

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price, for until this is done he does not (unless the goods were sold on credit) acquire a right of possession to them (1).

This principle is also very clearly stated by Mr. *Benjamin* in his Treatise on Sales (2). He says:

In the case of re sale, a buyer in default cannot maintain trover against the vendor, being deprived by his default of that right of possession without which trover will not lie.

I have noticed this question of pleading, not because it gives rise to any difficulty, but for the reason that it was strenously contended by the learned counsel for the respondent that the defence was not open to the appellants on this record.

Then proceeding to consider the substantial question raised by this appeal, I am inclined to the opinion, that although as between themselves and *Shaw*, the appellants originally had, under the arrangement upon which consignments were made to them by *Shaw*, a lien or rather a special property in these goods with a power of sale, and authority to apply the proceeds in payment of *Shaw's* debt to them, their conduct has been such as to have debarred them from insisting upon it as against *Richardson*, or the respondent as his assignee, as a paramount title invalidating the sale by *Shaw* to *Richardson*.

Richardson says:

Shortly before the purchase, Mr. *Troop* told me they had 236 barrels No 3 mackerel belonging to *Shaw*; I was asked by *Troop* what they were worth, and I said $8. *Troop* said he did not want to sell them as *Shaw* was on his way from *Cape Breton*, and would dispose of them himself. He said, I might probably buy them from him, and I said "probably," and did so.

I think we must assume *Richardson's* account of this conversation to be correct, for by purchasing the fish from *Shaw*, he acted upon what he states *Troop* to have said to him, in a way he would hardly have done, had

(1) *Bloxam* v. *Saunders*, 4 B. & Cr. 941; *Milgate* v. *Kebble*, 3 M. & G. 100.

(2) 2 Am. Ed., p. 654.

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he not considered *Shaw* had the right to sell free from all lien or other superior title on the part of the appellants. This view of the evidence is also consistent with the conduct of the appellants in not setting up their claim when they found *Richardson* had included the fish in his list of assets. I assume, therefore, that the appellants are precluded from setting up in their own right any title paramount under the terms of *Richardson's* consignment to them. The property must, therefore be deemed to have been in their hands in the character of bailees, *i.e.* as warehousemen for *Shaw* at the time of the sale by the latter to *Richardson.* Then, assuming for the present that the appellants continued to hold the goods in the character of warehousemen for *Shaw* down to the date of *Richardson's* insolvency, two questions arise—1st. Was it competent to the defendants to set up *Shaw's* rights as an unpaid vendor? 2nd. What was the nature and extent of those rights?

It is clear upon the most elementary principles of the law of agency that an agent, such as a warehouseman, in possession of goods deposited with him by a principal, who has afterwards sold them under a contract of sale which has operated to pass the property to the vendee, is in such privity with his vendor, that he not only may, but must, in order to perform his duty to his principal and protect himself from liability to him, set up any lien or right of retention until payment, which the vendor to the knowledge of his agent may have, in answer to the vendee's demand of possession without payment. If, under such conditions, a warehouseman were to deliver the goods to the purchaser without payment, thus waiving the lien he would be personally liable to indemnify his principal against the loss so caused. It is out of the question, therefore, to say in the present case that the appellants holding these goods as

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warehousemen for *Shaw* were setting up a *jus tertii* in insisting upon *Shaw's* lien (1).

Next we are to consider what were *Shaw's* rights in these fish, still assuming that at the time of the sale to *Richardson* they were held by the appellants as warehousemen for *Shaw*, and that there was never any change in the character of their possession as such.

The promissory note for $4,050.56, which had been given by *Richardson* on account of one-half the price of the whole lot of fish purchased by him from *Shaw*, including the two cargoes delivered at the wharf and those now in question, was, at the time of the insolvency and also at the date of the commencement of this action, in the hands of the appellants as holders for value, having been endorsed to them by *Shaw* on account of his debt to the appellants; and at the date of the insolvency which occurred on the 4th March this note was still current, not maturing until the 7th of March, 1878. The case is therefore to be considered precisely as if this note had been outstanding in the hands of some third person other than the appellants, holding it as *a bonâ fide* indorsee for value. Would it then have been competent for *Shaw*, having taken a negotiable security for the unpaid portion of the price, which he had transferred to a holder for valuable consideration, to have asserted a lien on the goods on the occurrence of *Richardson's* insolvency?

There can be no doubt that the property had passed to *Richardson* by the operation of the sale, the goods having been ascertained and the requirements of the Statute of Frauds having been satisfied by the receipt and acceptance by *Richardson* of the two cargoes delivered at the wharf. The only question is as to the lien or right of retention for the price, arising upon the

(1) Story on agency 9 edit. sec. 217 and notes and cases there cited.

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insolvency of the vendee. It is a well established rule that upon the sale of ascertained chattels upon credit the vendee not only acquires the property in the goods sold, but has also a right to the immediate possession. If, however, the price is not paid at the expiration of the term of credit, or if before that period, and during the currency of the credit, the vendee becomes insolvent a lien at once arises entitling the vendor to retain the goods still remaining in his actual possession or in that of his bailee until payment. Further, the vendor is entitled to insist on this lien as well in the case where a bill or note has been taken for the purchase money as in that where the price is unsecured; and the circumstance that a bill so taken is outstanding in the hands of a *bonâ fide* holder for value makes no difference in the vendor's rights if he is himself liable as an indorser on the bill. It is also settled by authority that the vendor by consenting to hold the goods as a warehouseman for the purchaser, does not disentitle himself to insist on the lien. If, however, the goods are in the custody of a warehouseman who, upon the sale, has attorned to the purchaser, as the goods can then in no sense be said to be in the possession of the vendor, the right of lien is gone.

These principles are so well established that a reference to authorities in support of them is scarcely required. It may be useful, however, to point out a few amongst the numerous decided cases which show that the law is thus settled beyond controversey. Most of these are referred to by Mr *Benjamin* in his Treatise on Sales (1), in which is to be found a very full discussion of the vendor's right in this respect. The leading case is *Bloxam* v. *Sanders* (2). In the course of his judgment in that case *Bayley*, J., states the law very fully and clearly.

(1) Edition 2, Book 5, Chapter 2, beginning at Sec. 766.

(2) 4 B. & C. 941.

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In this case of *Bloxam* v. *Sanders* the term of credit, upon which the goods had been sold, had expired at the date of the resale. The general doctrine here referred to was also clearly expounded and acted upon in the recent case of *Grice* v. *Henderson* (1). But the proposition that goods which have been sold on a credit which has not expired, so that the vendee, being solvent, would be entitled to immediate possession, may, upon the vendee's insolvency occurring be retained by the vendor until payment, and that although bills have been given for the price which have been negotiated and are still current and outstanding in the hands of third parties, holders for value, does not depend merely upon the *dictum* of Mr. Justice *Bayley* in *Bloxam* v. *Sanders*, in which these circumstances did not occur, but is warranted by adjudicated cases in which these facts were actually presented. In the case of *McEwan* v. *Smith* (2), a quantity of sugar had been sold at a credit of four months, and a bill taken for the price, but upon the insolvency of the vendees taking place during the currency of the bill, the vendors were held entitled to refuse delivery until payment of the price. It does not appear in this case that the bill had been negotiated. *Gunn* v. *Bolckow, Vaughan & Co.* (3), was a case decided in the Court of Appeal in Chancery by Lords Justices *James* and *Mellish*. The defendants had contracted to sell to the *Aberdare Iron Company* a lot of railway iron which they manufactured, and which was approved and accepted by the vendees and stacked at the defendants' works. Wharfingers' certificates that the iron was lying at the vendors works ready for shipment were given to the *Aberdare Company*, who, upon receipt of these certificates, accepted bills for the price at six months date, which *Bolckow, Vaughan & Co.* negotiated. The *Aber-*

(1) 3 App. Cases 314. (2) 2 H. L. C. 309.
(3) L. R. 10 Ch. 491.

dare Company handed the certificates to one *Jones*, whose administrator the plaintiff was, as security for a loan The plaintiff had given notice to the defendants that he claimed a lien on the rails for the amount of the loan. Subsequently the *Aberdare Company* became insolvent and filed a liquidation petition. At this time, two of the bills accepted by them had become due and had been dishonored. The other bills had not matured and were outstanding in the hands of holders for value. Upon this state of facts the Lords Justices held that the defendants were entitled to retain the iron for the whole price, as well for that portion which was represented by the bills not yet matured, and which were outstanding in the hands of *bonâ fide* holders, as for that covered by the bills which had been dishonored. Lord Justice *Mellish* says:

> Now, it is said that it is a question of fact to be tried, whether that acceptance was taken in satisfaction. * * * * * * * * * * * * Whoever heard of such a thing in a mercantile contract, where it is said that payment is to be made by buyers acceptance of sellers' drafts, that if the acceptance was dishonored, the right to sue under the original contract did not revive? No one ever heard that if the purchaser became insolvent before the goods were actually delivered, the vendors' right to refuse delivery to an insolvent purchaser did not revive. Or even if he had actually started the goods, and delivered them to a carrier to be carried to the purchaser, it is perfectly well known that at law upon the buyers' insolvency there would be a right of stoppage *in transitu* which would revest the vendors lien. It would make no difference that a bill had been given which had not yet become due, or that credit had been given. No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien and the vendor is bound to deliver. But if the bill has been dishonored before the delivery has been made, there the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser.

Then, in a subsequent part of the judgment, the Lord Justice determines that the vendor's right to the lien

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for the whole price was not affected by the fact that some of the bills were outstanding in the hands of *bonâ fide* holders for value and that two of them had been dishonoured.

A very late writer on the law of sales, (1) thus sums up the result of the authorities:

> If the buyer, being still indebted to the vendor in respect of the price, becomes insolvent before the vendor has parted with the possession, the rights of the latter revive. When I say indebted, I include the case where payment has been made by a bill of exchange, on which the vendor, as well as the buyer is liable, or of which the vendor is himself the holder.

As I have already stated, the fact that the goods have been left in the custody of the vendor, even though he has assented to hold them as a warehouseman for the buyer and has been paid warehouse rent in respect of them makes no difference in the vendor's right to the lien, arising on the insolvency; if they are in the actual possession of the vendor, even although he has agreed to hold as a warehouseman, and has been paid as such for his care, he is entitled to retain until the price is paid. For this proposition *Grice* v. *Richardson* (2), *Miles* v. *Gorton* (3), and *Townley* v. *Crump* (4), are direct authorities, and are recognized as such by Mr. *Benjamin* (5). If, however, the goods are not in the actual possession of the vendor himself, but were, at the time of sale, in the custody of a third party as a warehouseman or bailee, and have, after the sale and up to the date of the vendee's insolvency, remained in the possession of such third party, then the right of lien depends on the question whether the warehouseman has assented to hold the property as bailee for the purchaser or, as it is commonly expressed, has attorned

(1) *Campbell* on the sale of goods and Commercial Agency, 331.

(2) 3 App. Cas. 319.

(3) 2 Cr. & M. 504.

(4) 4 Ad. & E. 58.

(5) *Benjamin* on Sales (Ed. 2) s. 769.

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to him. If the bailee has so attorned to the purchaser, it is clear that the goods can no longer be said to be in the possession of the vendor, and all right of lien is gone. If, however, the warehouseman has not, by his consent to hold for the buyer, established the relationship of bailor and bailee between them, he will not, although he has had notice of the sale and has even had presented to him the vendor's order for delivery to the vendee or to a sub-purchaser from him, be considered as holding for the vendee or sub-purchaser, but the goods will be considered as still remaining in the constructive possession of the seller, whose right of retention will revive on the insolvency of the purchaser. For this proposition I need only cite from amongst numerous authorities the single case of *McEwan* v. *Smith* (1) in the House of Lords, already referred to on another point. In that case the goods were sold on a credit of four months, an acceptance at that date being taken for the price and a delivery order given to the buyers by the vendors directing their agent, in whose name the property was stored in a bonded warehouse, to deliver it to the purchasers. The purchasers having become insolvent before the expiration of the credit, it was held that although the goods had been re-sold by the original purchasers and the delivery order duly transferred to their sub-vendee's, nothing had occurred to interfere with the vendor's right to a lien arising on the insolvency. *Griffiths* v. *Perry* (2) is also a case, in which it was expressly held, that the right of the vendor to retain the goods is not affected by the giving of a delivery order and its transfer to a subsequent purchaser. In short, as is observed by a late treatise writer already referred to (3) :—

> The criteria for transfer of possession so as to divest the vendor's

(1) 2 H. L. C. 309. (2) 1 E. & E. 680.
(3) Campbell on Sales, p. 341.

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rights are exactly the same as those for *actual receipt*, in regard to the Statute of Frauds.

The same author in the following extract also clearly states what is requisite to constitute the warehouseman the bailee of the purchaser (1):—

Where the goods, notwithstanding the engagement to sell, remain in the custody of a middleman, who at the time of sale held them as warehouseman for the vendor, the question of actual receipt within the statute depends upon the consent of the three parties to the effect that the middleman shall thenceforth hold them as warehouseman for the buyer. Such joint consent constitutes an equivalent to delivery for, I think, every legal purpose. The most satisfac tory evidence of it is an order by the vendor, and a note by the middleman acknowledging the order, and stating that the goods have been transferred in his books to the vendee.

Again Mr. *Benjamin* in his work on sales states the law thus (3):

When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself. But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in the possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not affect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed he remains agent and bailee of the vendor.

I have made these quotations for the reason that in the view which I take of the law applicable to this case I find myself dissenting from the other members of the court, and in deference to them I considered it incum-

(1) Campbell on Sales, p. 186. (2) 2nd Edition, Sec. 174.

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bent on me to set forth, with the utmost fulness and clearness, the principles of law which I rely on as warranting the opinion I have formed. The obvious deductions from the foregoing authorities is, that mere notice of the sale to the warehouseman is not sufficient to create a privity between him and the purchaser; there must be beyond that an assent by the agent not merely to the sale, which must be a matter of indifference to him, but such an assent as will be sufficient to create a new contract for holding the goods between himself and the buyer, such as, if the bailment is not gratuitous, will entitle him to sue the latter for warehouse rent.

Then to apply these principles, which I have thus extracted from the authorities, to the facts of the present case, it appears to me that, subject to what I shall hereafter have to say as to a statement contained in the evidence of Mr. *Troop*, one of the defendants, the result must be to sustain the present appeal. The goods at the time of the sale to *Richardson* were in the hands of the defendants as warehousemen for *Shaw*. There is not, subject to the ambiguous passage in Mr. *Troop's* cross-examination to be referred to hereafter, a particle of evidence to show that the character of this possession was ever changed by the attornment of the defendants to *Richardson*, so as to create between them the relationship of bailee and bailor. On the contrary, *Richardson* himself swears positively that nothing was done to change the possession. The property in the fish, no doubt, passed to *Richardson* on the sale, and of this the defendants had notice, but it has been shewn that even an order directing the warehouseman to deliver the goods, much less notice of the sale, is insufficient to work a change of possession, unless the warehouseman in addition, expressly, or impliedly by words, or by conduct with the consent of the vendor, assents to hold for the

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vendee. That the defendants never made any new arrangement to hold for *Richardson* appears very distinctly from *Richardson's* own testimony; he says:

I did not go to *Black Bros.* I got delivery of all fish in the two vessels. I never went there to look after fish or make arrangements for storage. *I paid them storage in previous years.*

It was contended on behalf of the respondent that the notice from the insurance agent of the expiration of the policy which had been effected by the defendants upon the fish must have been sent by them to *Richardson*, and that this implied a recognition of *Richardson's* constructive possession through the defendants as his bailees I am of opinion, however, that the Attorney General's answers to this argument are conclusive. First it nowhere appears in the evidence that this notice was transmitted by or through the defendants. All that is said about this notice is what is stated by *Richardson* and the defendants. The former says:

About three weeks after the purchase, a young man brought me a notice of the insurance on that fish, the day before it was to expire, the 24th Nov. I made enquiry but did not insure.

Dr. *Lewis*, one of the defendants, says:

I never sent any notice to *Richardson* or authorized any. We insured the fish ourselves.

Mr. *Troop* also denies all connection with this notice. He says:

I never sent any notice as to the insurance of this fish to *Richardson.*

The fact of the defendants having forwarded the notice is therefore not established either directly or inferentially. But even if it had been distinctly proved, that the insurance agent having sent to *Black Bros.* the usual notice that their insurance was about to expire, they had transmitted it to *Richardson*, I should not have considered that the right of lien would have been in any way prejudiced by that circumstance. The property

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was undoubtedly in *Richardson*, and the fish were consequently at his risk; an insurance by him, with the assent of, and at the instance of, the defendants, would therefore have been in no way inconsistent with the fact of the goods being still in the constructive possession of *Shaw*, held by the defendants, as they had always held them, in the character of warehousemen for him.

For the like reason, I see nothing in the conduct of the defendant *Lewis*, with regard to the list of assets produced at the insolvency meeting, which can in any way affect the defendants' rights in the present case. The tacit acquiescence of Dr. *Lewis*, if, indeed, it amounted to that, in the statement that these fish belonged to *Richardson*, and were stored in the defendants' warehouse, involved no admission that the fish were held by the defendants as warehousemen for *Richardson*, or that he was entitled to a delivery of them without payment of the price. Further, the defendants' possession of the fish, originally held for *Shaw*, could not have been changed into one for *Richardson*, without the assent and privity of *Shaw*, and there is not the least proof of anything having been said or done by *Shaw* which could have that effect. It does not appear that any order or direction for delivery, either verbal or written, was ever given by *Shaw*, and *Richardson* does not pretend that he ever received such an order. If, therefore, the defendants are to be held in this action to have converted themselves into warehousemen for *Richardson* or his assignee, by force of any admission made at the creditors meeting, it would not relieve them from a like responsibility to *Shaw*; for their liability to the present plaintiff could only proceed on the principle of estoppel, and to warrant the conclusion that there was such an estoppel, involving as it would a double liability, the clearest and most unequivocal proof of representation or conduct, inconsistent with the defence

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put forward in this action, must have been established (1), and no such evidence has been given.

That no estoppel could have arisen from any assent given by the defendants to the list of assets will be apparent from a slight consideration of the facts taken in connection with the first principles of the doctrine of estoppels. It is not shown that any of the creditors were in any way induced to alter their positions, or to do any act of any kind, on the strength of Dr. *Lewis'* silence, and, under the circumstances, it is not easy to see how they could have been led so to act. It was not the case of a compromise with creditors, or a deed of arrangement being entered into with their assent, but *Richardson* executed an assignment to an official assignee under the Dominion Insolvency Act of 1869, to which, of course, the creditors were not parties, and which required no consent of creditors and no previous statement to them of the amount of his assets. It is not even shown for what purpose the meetings preliminary to the assignment were held, and we can only conjecture that it was with a view of obtaining the advice of his creditors as to whether he should continue to carry on his business, compromise, or assign, that *Richardson* called them together. We are in like manner left entirely to conjecture whether the assignment was the result of the advice of the creditors or was made, as *Richardson* had a right to make it, without their consent. But even if we should assume that the assignment was the result of the advice or pressure, there is nothing to warrant the inference that this action of the creditors was in any way induced by the fact of these barrels of fish appearing in the list of assets, and the consequent assumption, that they were the property of the insolvent clear of any lien; and every presumption must be against such a conclusion

(1) Bigelow on Estoppel, 2nd ed., 441.

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from the facts. Therefore, in this respect one of the essential requisites of an estoppel *in pais* is wanting; for no proposition in law can be more plain in reason or better supported by authority than that which affirms it to be essential to the creation of this kind of estoppel, that the representation or concealment relied upon must not only have been made with the intention that the other party should act upon it, but also that the latter should have acted upon it in such a way as to change his position. Mr. *Bigelow* (1) in the treatise on Estoppel states this to be the law in so many words; he says:

> The rule is well settled that if the representation, containing all the foregoing elements, has also been acted upon, the estoppel arises * * * But unless the representation is acted upon the estoppel cannot arise.

And numerous authorities are cited which place this plain and well known principle beyond all controversy. The conclusion must be, that the failure of Dr. *Lewis* to object to the list of assets, or to explain the nature of *Shaw's* lien on this fish, can in no way prejudice the defendants in this action.

It appears, from the Chief Justice's notes of the trial, that a statement of the charges on the fish up to the time of sale delivered to *Shaw* by the defendants was put in and read. This document has not been printed amongst the exhibits, nor was it produced before this court, and I have not had an opportunity of seeing it. From the description given of it, however, it cannot possibly affect the defendants' liability. The mere circumstance that the defendants had rendered *Shaw* an account charging him with the storage up to the date of sale, when the property vested in *Richardson*, does not imply that from that date they held for *Richardson*, or charged warehouse rent to him by his authority, more especially is it not sufficient to prove any such fact when

(1) Ed. 2, p. 492,

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we find *Richardson* himself swearing as he does that he did not authorize such a change. There is, however, in the evidence of *Troop*, in his cross-examination, a statement which certainly requires explanation. He says:

> The storage is at the fixed rate. I charged *Richardson* the usual rate.

Taken by itself, isolated from the rest of *Troop's* testimony and the evidence of *Richardson* and *Lewis*, this might be taken to refer to the lot of fish now in question, but when read in connection with the context of *Troop's* evidence and the statements of the other witnesses, I consider it as referring to fish on former occasions *Richardson* had bought from *Shaw*, and had, under an express agreement with the defendants, warehoused with them. Taken in this sense, the passage I have quoted from *Troop's* evidence is not only consistent with what he had himself just before stated, but also with the statements of *Richardson* and *Lewis*. *Troop* in his examination in chief says:

> *Richardson* in former years had bought *Shaw's* fish, and when he bought from *Shaw*, he invariably came to us and made an arrangement for the fish, so bought, after the day of purchase. * * * I gave *Shaw* no authority to sell the fish. I did not know he had sold them until after the assignment. * * * I did not know that the sale to *Richardson* included the fish.

Dr. *Lewis* says:

> I had no knowledge till yesterday of what fish were sold to *Richardson* or that it extended beyond the two cargoes.

And in his cross-examination, he produced the warehouse book of his firm, from which it may be presumed it would have appeared that the fish had been transferred into *Richardson's* name, if any such transfer had in fact taken place, but no entry of the kind is extracted from the book or in any way referred to, from which I infer it contained none. Then *Richardson* himself entirely supports the view I take, for he swears:

I did not go to *Black Bros.* I got delivery of all the fish in the two vessels. I never went to look after fish or make arrangements for storage. I paid them storage in previous years.

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I come to the conclusion, therefore, that it is impossible on this evidence to hold that the defendants ever attorned to *Richardson*, for there is not a scintilla of proof to warrant such a finding, except the passage in *Troop's* cross-examination, which I have already quoted, and which, read with the context and compared with the unequivocal statement of *Richardson*, can only have the meaning I attribute to it. Moreover, the Chief Justice does not appear to have found that there had been any change of the possession, and, even if there had been such a finding, supported, as it would have been, by no other proof than the vague and ambiguous statement appearing in the note of *Troop's* cross-examination, a statement entirely inconsistent with the testimony of the plaintiff's own witness, and not, so far as it appears, supported by any entry in the defendants' warehouse books, I should have thought a new trial proper in order to ascertain with accuracy what the facts in this respect really were. But, after all, I have, perhaps, attached too much importance to this question of evidence, which, however, was much relied on by the learned counsel for the respondent, for if the law as to the requisites to a transfer of possession by the attornment of a warehouseman is correctly stated, as undoubtedly it is, by Mr. *Benjamin* in the extract I have before made from his book, it could have made little difference even if it had appeared that the defendants had actually charged *Richardson* with the warehouse rent, and had entered the fish in their warehouse book as being held by him, in the face of *Richardson's* positive assertion that he never went to the defendants to look after the fish, or to make any arrangement about storage, for it must be remembered that no change of possession could

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have been worked by the act of the defendants alone, however clear and unequivocal, without the consent of *Richardson*, which, as just shown, he swears he never gave. *Shaw's* consent to the change of possession would also have been indisputable, and of that also there is no proof.

The promissory note for $4,050.56, which had been given by *Richardson* to *Shaw* on account of part of the price of all the fish sold, comprising as well the two cargoes delivered at the wharf as those stored in the defendants' warehouse, was endorsed by *Shaw* to the defendants, and he was liable upon it by reason of that endorsement. At the date of *Richardson's* assignment on the 4th March, 1878, this note had not matured, but it became due on the 7th March, and was overdue and unpaid when the demand of possession was made by the plaintiff, and when the defendants subsequently resold the fish. Therefore, although the authorities before adduced, particularly the cases of *Gunn* v. *Bolckow*, and *McEwan* v. *Smith*, and the quotations from the opinions of text writers, show conclusively that, if the vendee has become insolvent, the vendor is not bound to deliver without payment, upon the demand of the vendee or his assignees during the currency of bills given for the price, yet in the present case, the defendants, being in the position of holders for an unpaid vendor, who has sold on a credit which has expired, do not require the support of those authorities. The defendants were no doubt *bonâ fide* holders for value of the promissory note, and the plaintiff is entitled to put the case against them, when they assert *Shaw's* lien, just as if the note had been outstanding in the hands of third parties, entire strangers to the transaction of the sale and holders for value. But the extract I have before given from the judgment of Lord Justice *Mellish* in

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Gunn v. *Bolckow*, the cases of *Valpy* v. *Oakley* (1), and *Feize* v. *Wray* (2), and the passage extracted from Mr. *Campbell's* work on sales all show that this makes no difference, as in reason it should not, in the right of a vendor to insist upon payment, either to himself or to the holder of the bill or note given for the price, before parting with the possession of goods sold to an insolvent vendee.

The note is put in evidence, and *Shaw* appears upon it as an indorser with the usual liability as such, the indorsement not being without recourse or in any way restrictive. The lien attached on the occurrence of the insolvency on the 4th March, 1878, during the currency of the note, which did not become due until the 7th of March. If it is objected, that it does not appear from the evidence that notice of dishonour was given to *Shaw*, so as to hold him liable upon the note, and that for all that appears he was discharged from liability, and his debt thus in effect satisfied, the answers to that argument are: 1st. That the lien having once attached, it was for the plaintiff, as representing the purchaser, to show that it was afterwards discharged, just as if he had relied on a discharge by actual payment. Secondly, that this same circumstance occurred in the case already cited of *Gunn* v. *Bolckow*, *Vaughan & Co.*, where Lord Justice *Mellish* expressly states of the two overdue bills, that although there was "no evidence one way or the other as to their being indorsed or what has happened," the vendors had a lien in respect of them; in other words, he presumed that the vendors were still liable to take up the bills, a presumption which we must make here as to *Shaw's* continued liability in the absence of all contrary proof. Thirdly, that this point was not made at the trial, when, if it had been raised, the

(1) 16 Q. B. 941. (2) 3 East 96.

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appellants might possibly have shewn that due notice of dishonour was given.

This is an action for the conversion of the goods in question, and the facts relied on as evidence of a conversion are, first, the refusal of the defendants to deliver on the demand of the assignee, implied in the reference by the letter of the plaintiff to their solicitor; and, secondly, the resale of the goods, or at least of part them; for a portion was not sold until after action brought. Had the defendants coupled their refusal to deliver with a claim in any way inconsistent with the vendor's lien which they set up, they might have precluded themselves from now asserting it, but nothing of this kind was done; in answer to the demand of the plaintiff as assignee they wrote the letter of the 8th of April, 1878, which amounts to a refusal to deliver, based on no specific ground.

It was a sufficient defence for the defendants to show that, neither at the time of the refusal to deliver possession to the plaintiff, nor at the date of the subsequent re-sale, had the plaintiff any right to possession, and I cannot discover that the defendants had done anything to disentitle themselves to use any of the facts disclosed in the evidence for the purpose of establishing this defence.

My conclusion upon the whole case, therefore, is that the defendants, at the time of the refusal to deliver, and also at the date of the re-sale of the fish, held it as warehousemen for *Shaw*, an unpaid vendor who had originally sold on credit, and who therefore had a right, on the purchasers insolvency happening, to retain possession of the goods until actual payment either to himself or to the holders of the note given for the price. That this lien or right of retention was not confined to a proportionate part of the price equal to the price of the fish in the hands of the defendants, but extended

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to the whole amount of the unpaid purchase money of the whole lot of goods sold, secured by the promissory note, for the sale having been an entire one of the two cargoes, as well as of the fish in the warehouse of the defendants, the price was also an entire one (1). The principle therefore applies that when there has been a sale of goods for an entire price, part of which have been delivered, the whole unpaid purchase money becomes a lien upon the undelivered residue of the goods (2). The defendants therefore, both as warehousemen holding the property for *Shaw*, and as consignees, under the agreement upon which the fish was originally consigned to them, were entitled and bound to assert *Shaw's* rights and would have made themselves liable to him had they failed to do so. Further, that *Shaw* being liable upon the note as endorser, the fact that it was not held by him, but by the defendants to whom it had been transferred for value, did not disentitle him, and consequently does not disentitle the defendants as his agents, to insist on the lien.

It being clear that the plaintiff is not entitled to maintain an action for conversion, unless he was entitled to the possession as well as to the property at the time of the refusal to deliver and of the sales, it is immaterial to enquire, for the purpose of deciding the present appeal, whether a vendor, having the right of lien or retention arising upon the insolvency of the purchaser, has or has not a legal power of re-sale.

In *Bloxam* v. *Sanders* (3), and *Bloxam* v. *Morley* (4) already referred to, Mr. Justice *Bayley* states the law thus:

> If, for instance, the original vendor sell when he ought not, they (the assignees of the buyer) may bring a special action against him

(1) *Baldeg* v. *Parker*, 2 B. & C. 37.

(2) Benjamin on Sales (Ed. 2, Sec. 805); *Miles* v. *Gorton*, 2 C. & M. 504.

(3) 4 B. & C. 941.

(4) 4 B. & C. 951.

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for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights.

Mr. *Benjamin* points out that this judgment of *Bayley*, J., is said by Mr. Justice *Blackburn* (1), as recently as 1866 to be still a correct exposition of the "peculiar law" as to unpaid vendors, and the last mentioned writer, after having discussed at length (2) the whole question of the rights of unpaid vendors in respect of goods retained for the price in section 794 of his book, gives a summary of the rules which he deduces from the cases, one of which is as follows:

Fourthly. In the case of a re-sale, a buyer in default cannot maintain trover against the vendor, being deprived by his default of that right of possession without which trover will not lie.

Campbell on sales (3) is to the same effect. He says:

These rights, commonly known as "vendor's rights," include the right to retain the goods until payment of the whole price; but they are larger than a mere right of retention or lien, and extend in many cases to a right to re-sell the goods. In the case where the buyer has become insolvent, the vendor's rights extends to a right to sell the goods in order to realise his debt. Where the buyer is not insolvent but is in default: If before the attempted re-sale, he makes tender of the price, the vendor's right is at an end, and the re-sale is void; but if no tender is made, the vendor may re-sell—the buyer having no immediate right of possession and therefore being unable to complain of the act as a wrongful conversion of the goods.

And the author cites the case of *Milgate* v. *Kebble* (4) and *Lord* v. *Price* (5) as authorities for his text. Lord *Blackburn* (6) thus gives his conclusion from the cases which had been decided at the time he wrote; he says:

Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed

(1) *McDonald* v. *Suckling*, 35 L. J. Q. B. 237.
(2) Benjamin on Sales; book 5, edition 2, part I, cap. 3.
(3) P. 329.
(4) 3 M. & G. 1000.
(5) L. R. 9 Ex. 54.
(6) Blackburn on Sales p. 329.

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to the assent of the purchaser, under the contract of sale, the question arises, how much greater than a lien are they? And this is a question which, in the present state of the law, no one will venture to answer positively, but as has been already said the better opinion seems to be, that in no case do they amount to a complete resumption of the right of property, or in other words to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale than to any other common law rights. At all events it seems, that a re-sale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to receive back any deposit of the price, or to resist payment of any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and to entitle the purchaser to sue in trover.

Then it was urged that the proof of the defendants, founded upon the note which had been endorsed to them by *Shaw*, against the insolvent estate of *Richardson*, and the receipt of a dividend upon that proof, was a waiver of the right of the defendants to set up any lien either in themselves or *Shaw*. In considering this objection, it is important to bear in mind the material dates. The refusal to deliver on the demand of the plaintiff was on the 4th April, 1878; part of the fish (200 barrels) was sold to *West* on 22nd March, 1878; the residue was sold to *Cochrane* on 17th May, 1878; the action was commenced on 6th April, 1878; the proof in insolvency was made on 8th January, 1880, and the dividend was received by the defendants on the 10th February, 1880.

It will be remembered that both counts of the declaration were for a conversion or in trover, and that the pleas were not guilty and a traverse of the plaintiff's property and right of possession. It is manifest that the defendants were entitled to succeed on the issue on the plea of not guilty, as well as on that on not possessed, if, at the time of the sale of the fish and the refusal to deliver on the plaintiff's demand, which refusal was merely evidence of a conversion, the de-

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fendants were entitled to set up *Shaw's* rights as an unpaid vendor, and to retain the fish in his right. That they were entitled so to do, I have already endeavored to establish. Then, how could this subsequent proof, *pendente lite*, operate retroactively so as to alter the rights of the parties as they stood at the time the action was brought? A little consideration will, I think, show that for several reasons it could not possibly prejudice the defendants in their defence to this action. *Troop* says in his evidence that the net proceeds of both sales were credited to *Shaw* by the defendants. By this I understand that the money so credited was appropriated by the defendants, not as a payment on account of the note which they held, but to the unsecured balance of account on which *Shaw* was indebted to them. This, I think, was not a proper application of the payment, for the defendants were bound to have given credit for this money as a part payment of the note which had been endorsed to them by *Shaw*, and for the payment of which the fish, held by them as *Shaw's* agents, was in the nature of a collateral security in *Shaw's* hands. That they did not do so, however, but claimed, and were permitted by the assignee to prove for, the whole amount, does not establish that they were guilty of illegal acts in witholding possession of the goods and afterwards selling them, but merely that they have obtained from the insolvent's estate more than they were entitled to claim. But this cannot have the retroactive effect of rendering illegal the acts referred to, which at the time of their commission, if I am right in my view of the law, were unobjectionable as regards the plaintiff, as assignee, if not perfectly legal. The remedy of the assignee in insolvency is plainly one which he must seek in the insolvency matter, viz., an application to reduce the proof and compel the defendants to repay so much of the dividend

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as they have improperly received. That the proof was excessive, I think is apparent. The defendants were entitled to prove only for the amount due for principal and interest upon the note after deducting the net proceeds of the sales. The defendants, it is true, were creditors in their own right, as *bonâ fide* endorsers for value, but the note being overdue, *Shaw* was in the position of a surety to them for the debt which it represented, and the goods remaining constructively in his possession are to be considered as held by him by way of counter security against his liability. Then, upon realising this security by the sale of the fish, *Shaw* through his agents, the defendants, became a trustee of the proceeds for the holders of the note, and was bound to apply the money so received to the payment *pro tanto* of the note. This he did in effect by allowing the defendants to receive and deal with the money as their own. But the defendants, so receiving this money with the knowledge of all the facts, were bound to impute it as a payment on account of the price of the fish —that is, as part payment of the note—in the same way that *Shaw* himself was bound to deal with it, and were not at liberty to apply it as a general and unappropriated payment by *Shaw*, by giving him credit for it on account of the general balance due to them by him, apart from the note. The result of all this, however, is only to show that, in a legal proceeding adopted by the defendants to obtain payment from *Richardson's* estate, they have received, without opposition, as far as it appears, from the assignee or other creditors, more than they were legally or equitably entitled to be paid, and this, not in a conclusive proceeding, but under a proof which it is competent for the court in insolvency at any time to reduce, and in this way to afford the plaintiff as assignee a complete remedy. I cannot think that this has any bearing on the rights of the parties in this

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action; that it either shows the defendants to have been guilty of unlawful conversion, or that the plaintiff had a right to the possession of the fish at the time of the commencement of the action, which are the only questions to be here decided. Had the proof and receipt of dividend been before the action was brought, and prior in date to the sale of the fish and the refusal to deliver, the case might have admitted of different considerations.

I have taken the least favorable view to the defendants in treating them as warehousemen for *Shaw*. It was, as I understood the Attorney-General, contended that, as under the terms of the original consignment the defendants had a right to sell the fish and apply the proceeds in reduction of *Shaw's* debt to them, they were entitled to adopt the sale which *Shaw* made, as though it had been made by him as their agent, in which case they would not only have all the rights which, in my judgment, *Shaw*, if himself the vendor, had, but they would be relieved from any difficulty, even if it should be considered that they had attorned to *Richardson*; since it is clear that if goods remain in the actual possession of the vendor himself, and not in that of a middleman, the lien for the price revives on non-payment or insolvency, notwithstanding the fact that the vendor has expressly constituted himself a warehouseman for the purchaser and has even received warehouse rent from him (1). I have already said I incline to think the defendants are estopped from setting up this title by *Troop's* statement to *Richardson*, but I express no decided opinion upon the point.

I think there should be a new trial on which it will be competent for the plaintiff to establish, if he can, that the defendants had adopted the character of bailees for *Richardson*, and held the fish for him, which would be

(1) *Grice* v. *Richardson*, 3 App. Cases, 319.

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conclusive against the defendants, unless they can make good the position, which I have last alluded to, of having been in legal construction the vendors of the fish through the agency of *Shaw*.

My judgment, therefore, is that this appeal should be allowed with costs, and that the rule *nisi* for a new trial should be made absolute and, in accordance with the *Nova Scotia* practice, with costs.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J. :—

I do not for a moment contradict the law as laid down by my brother *Strong*; the difficulty I have is, that the law, so correctly stated, does not apply to this case. Now, what do the defendants answer to the plaintiff's action: 1st. That they did not convert the property; 2nd. Deny that plaintiff, as assignee of *Richardson*, had any right to the property in question. The question then arises, what was the title of *Richardson* to the fish in question after the purchase by him from *Shaw*? The facts are these: *Richardson* purchased a quantity of fish from *Shaw* for which he paid one half in cash and balance by note at four months. He got delivery of part of the fish which was in vessels, but did not get the balance, viz., 236 barrels, which happened to be at the time of the sale in a store belonging to appellants. What was then the position of *Richardson* with regard to this fish? It cannot matter where the fish was, if it could be identified; the fish became by operation of law the property of *Richardson*. The plea put in is, that the fish does not belong to *Richardson*. If not his, whose property was it? Certainly not appellants, they never had a lien on the property, and did not plead one in themselves or in *Shaw*. If they had put in such a plea there might

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have been a question as to lien as between *Richardson* and *Shaw*, but in that plea they should have alleged the title of *Shaw* to the fish, and that they were holding it by his directions. Now there is no evidence that they held for *Shaw*, or that *Shaw* ever asserted any lien on the fish. If a lien had been pleaded in *Shaw*, it would have been necessary for them to show that *Shaw* was liable on the note which he endorsed over to the appellants; and on this point also there is no such evidence. The property in this case, in my opinion, passed to *Richardson* by a bill of parcels given by *Shaw*, and adopted by appellants, they agreeing from that date to hold the property for *Richardson*. *Richardson's* title depended upon his purchase and payment in virtue of which the property immediately vested in him. For these reasons, I am of opinion, the appeal should be dismissed.

GWYNNE, J.:—

As to the soundness of the principle of the cases upon which the learned counsel for the appellants so much relied there can be no doubt, but their applicability to the case before us is, in my judgment, open to great doubt. The learned judge who pronounced the judgment of the Supreme Court of *Nova Scotia*, sustaining the verdict rendered in favour of the plaintiff by the learned Chief Justice of that court, before whom the case was tried without a jury, referred, among other things, to a fact which appeared in evidence at the trial, namely: that the defendants claimed against the estate of *Richardson* in insolvency, as holders of the note which *Richardson* had made to *Shaw* for the balance of purchase money of the fish purchased by *Richardson* from *Shaw*, and received a dividend out of *Richardson's* estate in respect of that claim, and that in an affidavit made by *Lewis*, one of the defendants, in support of that

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claim, he swore that the insolvent was indebted to himself and the other defendant in the sum of $4,050.56 (the amount of that note) for which they held no security.

At the time of the making of this affidavit the defendants, it is true, did not hold the fish, the conversion of which is the subject of this suit. They had already sold them; a part, in the month of March, and the remainder in the month of May, 1878; but they had received, and, according to their own shewing, had appropriated, the proceeds arising from the sale thereof, amounting to $1,734, to their own use, and gave no credit therefor to *Richardson* upon the note, but took their dividend out of his estate in insolvency upon the full amount of the note. Now, the contention of the learned counsel for the defendants before us was, that the defendants had a perfect right, in law, thus to retain the proceeds of the sale of the fish and to prove on *Richardson's* insolvency for the full amount of the note, upon the authority of *ex parte English* and *American Bank* (1), which the learned counsel contended was conclusively in his favor upon this point.

That case affirmed a rule well established in bankruptcy, that a creditor who has a security from a third person, or a security which belongs jointly to the bankrupt and a third person, can prove in the bankruptcy for the whole debt without giving up the security. Upon the authority of this rule the learned counsel relied in justification of the defendants having (notwithstanding the sale of the fish in 1878) proved for the whole amount of the note. But neither the case, nor the rule affirmed thereby, asserts a right in a creditor, after realizing upon the security, and so reducing the debt by the amount realized, to prove for the whole debt. Moreover, it is obvious that the rule relied upon applies to a security placed in the hands of the bank-

(1) L. R. 4 Ch. App. 56.

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rupt's creditor by way of security for the debt of the bankrupt, and it is equally obvious that such was not the state of the facts in the present case. The fish are clearly shewn to have become the property of *Richardson* in November, 1877, while they were in the possession of the defendants in the only right, whatever it was, by which they ever had possession of them; they continued to be the property of *Richardson* in virtue of his purchase from *Shaw*, the owner of them, until *Richardson's* insolvency on the 4th March, 1878, when they became the property of his assignee, subject, it may be, after the 6th March, when the note became due, assuming the fish not to have previously been reduced into the actual possession of *Richardson* or his assignee, to a right in the nature of the right of stoppage *in transitu* in *Shaw*, who might, in such case, if he had pleased, have given, but he did not, notice to the defendants not to permit *Richardson* or his assignee to have possession of the fish without payment to *Shaw* of the balance of the purchase money. As matter of fact *Shaw* has never interfered in any manner in the matter. He has never claimed or asserted any right of detention of the fish, nor has he offered any impediment to his vendee receiving them, but they were never placed in the defendants' hands by way of security for any debt due by *Richardson* to the defendants, so that the rule referred to has no application to the case. Moreover, this claim, now apparently for the first time asserted, upon the authority of the above rule, is quite inconsistent with the allegation in *Lewis's* affidavit to the effect that he and his partner had no security whatever for *Richardson's* liability to them upon the note, and also quite inconsistent with the position taken by the defendants at the trial, and upon which they wholly rested their defence to the action.

To the plaintiff's declaration, which is for the wrong-

ful conversion by the defendants of the property of the plaintiff, as assignee of *Richardson*, they pleaded not guilty, and that the goods were not, nor was any of them, the plaintiff's as such assignee as alleged. This latter plea enabled them to dispute the title of the assignee, and also of *Richardson*, by setting up the title in themselves or in a third person, and the whole contention of the defendants at the trial, and which is repeated in the third paragraph of the appellant's factum, was, that *Richardson* had never any property in the fish, for that they were consigned by *Shaw* to the defendants as his factors, with authority to them to sell to cover certain advances made by them to *Shaw*, and to apply the proceeds to *Shaw's* credit, and that in virtue of this title and authority they sold the fish, and that in fact they had no knowledge that *Richardson* claimed any interest in the fish until after his insolvency; and that they, the defendants, as stated by *Lewis* in his evidence, gave no authority to *Shaw* to sell them. Upon this title, asserted to be in the defendants themselves, the defendants wholly rested their defence to the plaintiff's action at the trial, and at the close of the plaintiff's case a nonsuit was moved upon the ground of the alleged insufficiency of the evidence to shew *Shaw's* ownership of the fish, so as to entitle him to sell them to *Richardson*; this objection being overruled, the defendant *Lewis* was called as a witness for the defence, when he asserted title as above stated. He said among other things that the defendants received a bill of lading with the fish; but no such document was produced. To that, if, as seems to have been implied, its contents would have supported the defendants claim, its non production constituted a material flaw in defendants' evidence. Upon cross-examination moreover *Lewis* stated that until the day before, "he had no knowledge of what fish was sold to *Richardson*, or that it extended beyond two cargoes," (not

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comprising the fish in question); and the defendant *Troop* admitted that the defendants had no special agreement with *Shaw* as to the fish in question. In view of this evidence and of the evidence given on the part of the plaintiff, which, if believed, was abundantly sufficient to shew that the fish were in truth *Shaw's*, stored only by him with the defendants, and that *Shaw* sold them to *Richardson* in Nov. 1877, whose property they then became and thenceforth remained, it is not at all surprising, as it appears to me, that the learned Chief Justice, before whom the case was tried, came to the conclusion that the defendants wholly failed to prove the title to the fish and their proceeds which they had set up, and rendered a verdict for the plaintiff.

The defendants now raise a point, that inasmuch as the learned Chief Justice has allowed them a sum for storage and insurance, which does not constitute matter of set-off, the effect of his so allowing this sum is to recognize a right of lien in the defendants, which existing is a defence to the action; but the defendants, not only never before the commencement of the action nor at the trial set up any claim of lien, but such a claim, if set up, would have been inconsistent with the position upon which they rested their defence at the trial; and the learned Chief Justice, having allowed them for storage and insurance as against *Richardson* from the time of his purchasing, cannot give to the defendants a right to appeal against a verdict which gives them a benefit to which, in strict law, they were not entitled.

The defendants now also attempt to set up, as another ground of appeal, a point which was not made a ground of objection at the trial and which is also inconsistent with the defence then relied upon, and which, not having been taken at the trial, could not now be entertained, if there were anything in it, viz.: that admitting

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the fish to have been the property of *Shaw* in November, 1877, and to have been then sold by him to *Richardson*, whose property they then became and thenceforth continued to be, still that, upon non-payment of his note by *Richardson* when it became due on the 6th of March, 1878, inasmuch as *Richardson* had not then obtained actual possession of the fish, the defendants can resist this action by setting up, under the doctrine of the *jus tertii*, the right of *Shaw* to have prevented *Richardson's* assignee obtaining actual possession of the fish without payment of the balance of the purchase money. It is certainly true that the defendants, although acknowledged wrongdoers, might, to an action for conversion, under the plea that "the goods were not the plaintiff's as alleged," prove the property in the goods to be in *Shaw* or in any other person, and not in the plaintiff; but no case has been cited to us to show that, to an action like the present, brought by the person in whom the title and property in the goods are, a wrongdoer can resist the right of such owner of the goods converted, to recover, by setting up a right in the nature of a right of stoppage *in transitu*, which a third person might have had it in his power to exercise, but did not exercise, of interfering to prevent the vendee of the goods (who although by the terms of sale entitled to have had, had not yet obtained actual possession of the goods) from receiving such actual possession until he should pay a balance of purchase money; nor has any case been cited to shew that a person who had received possession of the goods only as storekeeper for the vendor could, without any authority from the vendor, sell the goods and apply the proceeds to his own benefit, although in satisfaction of a debt claimed to be due by the vendor, without subjecting himself to an action at the suit of the vendee

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owner, for wrongfully depriving such owner of his property. For our present purpose it is sufficient to say that no such point having been made at the trial it cannot now be entertained.

In fine, the sale of the fish by the defendants was made by them, and, so far as appears in evidence, without any right whatever, when the fish were the property of the plaintiff as assignee of *Richardson;* and the defendants having failed to establish the only title asserted by them in justification of that sale, such sale was wrongful to the plaintiff, as such assignee, who, for anything established in evidence, had as against the defendants a right to the immediate possession of the fish which, together with the right of property, is sufficient to maintain this action. There is no evidence whatever that *Shaw* ever claimed to have had any right to dispute the right of *Richardson* and his assignee to the possession of the fish; that he had such a right is an assumption merely of the defendants, and I do not think that the defendants, who sold *Richardson's* property without any right so to do, and without any direction or authority from *Shaw* so to do, can shelter themselves under an assumed right of detention of the fish in *Shaw*, which right *Shaw* has never claimed or asserted, and so relieve themselves, as a defence to this action, from the consequences of having without any legal right sold *Richardson's* property and applied the proceeds to their own use The point that 36 barrels of the fish were sold after the action brought was never made, and the court is not called upon to suggest it; but the rest of the fish was sold before action and a demand and refusal of the whole before action was also proved, and no claim of lien on them then or at the trial made. In my opinion, therefore, the appeal should be dismissed with costs,

and judgment entered for the plaintiff on the verdict rendered in his favor.

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Appeal dismissed with costs.

Solicitors for appellant: *Thompson & Graham.*

Solicitor for respondent: *John M. Chisholm.*

APPENDIX.

CASES DECIDED

IN THE

EXCHEQUER COURT OF CANADA.

1877

*April 1.

*May 21.

IN THE MATTER OF THE PETITION OF RIGHT OF EPHRAIM A. JONES AND JAMES SIMPSON ..... } SUPPLIANTS,

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Petition of right—Intercolonial Railway contract—31 *Vic.*, *c.* 13, *sec.* 18—*Certificate of Chief Engineer—Condition precedent to recovery of money for extra work—Petition of right will not lie against the Crown for tort, or for the fraudulent misconduct of its servants—Forfeiture and penalty—Liquidated damages.*

On the 25th May, 1870, *J.* and *S.*, contractors, entered into a contract with the Intercolonial Railway Commissioners (authorized by 31 *Vic.*, ch. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of *Canada*, for a bulk sum of $557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th Nov., 1872. The total amount paid on the 10th Feb., 1873, was $557,750, the amount of the contract. The contractors thereupon presented a claim to the Commissioners amounting to $116,463.83 for extra work, &c., beyond what was included in their contract. The Commissioners, after obtaining a report from the chief engineer, recommended that an additional sum of $31,091.85 (less a sum of $8,300 for timber bridging not executed, and $10,354.24 for under drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused.

The contractors thereupon, by petition of right, claimed $124,663.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the chief engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging, further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of mis-

* PRESENT.—Ritchie, J.

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representations in plans and bill of works exhibited at time of letting.

On the profile plan it was stated that the best information in possession of the chief engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the Commissioners and chief engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."

The contract provided *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of $557,750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever, be entitled by reason of any change, alteration or addition, made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said Act, intituled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by the said contract or by-law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretention, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of the Act first cited in the said contract, intituled "An Act respecting the construction of the Intercolonial Railway," 31 *Vic.* ch. 13, and also, in as far as they might be applicable, to the provisions of "The Railway Act of 1868."

The 18th sec. of 31 *Vic.* ch. 13, enacts "that no money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners.

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No certificate was given by the chief engineer of the execution of the work.

Held,—That the contract requiring that *any* work done on the road must be certified to by the chief engineer, until he so certified and such certificate was approved of by the Commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the Commissioners as would give the contractors any legal claim against the Crown; the Commissioners alone being able to bind the Crown, and they only as authorized by statute.

That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants.

In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872.

Held,—That if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages.

The Crown subsequently waiving the forfeiture, judgment was rendered in favor of the suppliants for the sum of $12,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount.

THIS was a petition of right by which the suppliants claimed from the Government of *Canada* the sum of $124,663 33 in connection with their contract with the commissioners of the Intercolonial Railway, for the construction of section number seven of said railway.

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The facts, and pleadings are fully stated in the head note and in the judgment hereinafter given.

Mr. *James Macdonald*, Q.C., and Mr. *J. N. Ritchie*, Q.C., for suppliants, and Mr. *J. Bell*, Q.C., for respondent.

RITCHIE, J.:—

This was a petition of right, presented originally by *Ephraim A. Jones*, *James Simpson* having been subsequently added as a joint petitioner by consent.

The petitioners were contractors with Her Majesty for the construction and completion of a certain portion of the Intercolonial Railway, and the claims now put forward are for works done under that contract and in connection therewith. Provision was made for the construction of the Intercolonial Railway by the 31 *Vic.*, ch. 13, which enacted that the railway should be a public work belonging to the Dominion of *Canada*, and made with a gauge of 5 ft. 6 inches on such grades, on such plans and manner, and with such materials, and on such specifications as the Governor-in-Council should determine and appoint as best adapted to the general interests of the Dominion; that its construction and management, until completion, should be under the charge of four commissioners to be appointed by the Government, who should hold office during pleasure; that the Governor should appoint a chief engineer to hold office during pleasure, who, under the instructions he might receive from the commissioners, should have the general superintendence of the works to be constructed under the act; that the commissioners should appoint and employ a secretary, such engineers (under the chief engineer), and such surveyors and other officers, and also such agents, servants and workmen as, in their discretion, they might deem necessary and proper for the execution of the powers and duties vested in them

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by virtue of the act; and, after giving the commissioners full power and authority by themselves, their engineers, agents, workmen, servants, and contractors to explore, enter on lands, fix the site of the railway, fell timber, take possession of lands and use adjacent lands, and to do such works specified, or other works as they might think proper, and to alter the courses and levels of rivers and roads and to drain into adjacent lands, it was declared, that the commissioners should have all such other powers (not inconsistent with the Act) as might be conferred upon railway companies by any Act which might be passed for the consolidation and regulation of the general clauses relating to railways, and after giving power to the commissioners to contract and agree for the purchasing of lands, and providing for arbitration in case of difference as to value, it was provided, that the commissioners should build the railway by tender and contract after the plans and specifications thereof should have been duly advertised, and that they should accept the tenders of such contractors as should appear to them to be possessed of sufficient skill, experience and resources to carry on the work, or such portions thereof as they might contract for, provided that the commissioners should not be obliged to accept the lowest tender in case they should deem it for the public interest not to do so; and provided also that no such contract involving an expense of $10,000 or upwards should be concluded by the commissioners until sanctioned by the Governor-in-Council; and it was further provided, that the contracts to be so entered into should be guarded by such securities and contain such provisions for retaining a portion of the contract moneys to be held as a reserve fund for such periods of time and on such conditions as might appear to be necessary for the protection of the public, and for securing the due performance of the

contract, and that no money should be paid to any contractor until the chief engineer should have certified that the work, for or on account of which the same should be claimed, had been duly executed, nor until such certificate should have been approved of by the commissioners.

Under this Act certain commissioners were appointed, and the contruction of the railway was commenced, and tenders were advertised for; and by a certain indenture, under seal, dated the 25th day of May, 1870, and made between *James Simpson* and *E. A. Jones*, of the first part; and Her Majesty, represented therein by *A. Walsh*, M.P., the Hon. *E. B. Chandler*, *C. J. Brydges* and the Hon. *A. W. McLelan*, commissioners appointed under and by virtue of said Act of Parliament, of the second part, after reciting, *inter alia*, that such commissioners had duly advertised for tenders for the construction of certain portions of said railway, including the portion described as section No. 7, and that the tenders of said *Simpson* and *Jones*, for the construction of such section in manner in said indenture set forth, had been accepted, and they had, in consequence, agreed, by and with the sanction of the Governor-in-Council, as provided by the said Act, with the commissioners to construct and complete said section, it was witnessed, that in consideration of the sum of $557,750 to be paid to the said *Simpson* and *Jones*, the contractors, by Her Majesty, in manner hereinafter set forth, the contractors did contract with Her Majesty in these words:

"1. That the contractors shall and will, well, truly, and faithfully make, build, construct and complete that portion of the railway known as No. 7 section, and more particularly described as follows, to wit: 'Extending from the southerly end of section number 4, near river *Phillip*, to station O, formerly station 50, at *Polly Lake*, a distance of about twenty-four miles, and all the bridges, culverts and other works appurtenant

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thereto, to the entire satisfaction of the commissioners, and according to the plans and specification thereof signed by the commissioners and the contractors; the plans thereof so signed are hereunto annexed and marked Schedule "A," and which specification is to be construed and read as part hereof, and as embodied in and forming part of this contract; and, after providing that the contractors should be bound to provide all plans and materials and be responsible for all means used for fulfilment of contract, to run all risks of accidents and other provisions not bearing on this case, it was further agreed, in these words:

"The contractors shall perform and execute all the works required to be performed by this contract and the said specification in a good, faithful, substantial and workmanlike manner, and in strict accordance with the plans and specifications thereof, and with such instructions as may from time to time be given by the engineer, and shall be under the direction and constant supervision of such district, division and assistant engineers and inspectors as may be appointed. Should any work, material or thing of any description whatsoever be omitted from the said specification in the contract, which, in the opinion of the engineers, is necessary or expedient to be executed or furnished, the contractors shall, notwithstanding such omission, upon receiving written instructions to that effect from the engineer, perform the work and furnish the same. All the works to be executed and materials supplied to the entire satisfaction of the commissioners and engineers, and the commissioners shall be the sole judges of the work and materials, and their decision on all questions in dispute with regard to the works or material, or as to the meaning or interpretation of the specification or the plans, or points not provided for, or not sufficiently explained in the plans or specifications, is to be final and binding on all parties.

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"3. The contractors shall commence the works embraced in this contract within thirty days from and after the date hereof, and shall diligently and continuously prosecute and continue the same, and the same respectively, and every part thereof, shall be fully and entirely completed in every particular and given up, under final certificate and to the satisfaction of the commissioners and engineer, on or before the first day of July, eighteen hundred and seventy-two, time being declared to be material and of the essence of this contract, and in default of such completion as aforesaid on or before the last mentioned day, the contractors shall forfeit all right, claim or demand to the sums of money or percentage hereinafter agreed to be retained by the commissioners, and every part thereof, as also to any moneys whatever which may be, at the time of the failure of the completion as aforesaid, due or owing to the contractors, and the contractors shall also pay to Her Majesty as liquidated damages, and not by way of fine or penalty, the sum of two thousand dollars ($2,000) for each and every week and the proportionate fractional part of such sum for every part of a week during which the works embraced in this contract, or any part thereof, shall remain incomplete, or for which the certificate of the engineer, approved by the commissioners, shall be withheld, and the commissioners may deduct and retain in their hands such sums as may become due as liquidated damages, from any sum of money then due or payable or to become due or payable thereafter to the contractors.

"4. The engineer shall be at liberty at any time before the commencement, or during the construction of the work, to make any changes or alterations which he may deem expedient in the grade, the line of location of the railways, the width of the cuttings or fillings,

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the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done or the expense of doing the same, and the contractors shall not be entitled to any allowance by reason of any such changes, unless such changes consist in alterations in the grade or line of location, in which case the contractors shall be subject to such deductions for any diminution of work, or entitled to such allowance for increased work (as the case may be) as the commissioners may deem reasonable, their decision being final in the matter.

By section 5 it was provided that the contractors should not sell, assign, or barter the contract.

Payments were provided for in these words:

"6. Cash payments shall be made monthly on the certificate of the engineer, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress measurements, and on the completion of the work to the satisfaction of the engineer, a certificate to that effect will be given, but the final and closing certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter, the progress certificates shall not in any respect be taken as an acceptance of the work or release of the contractors from their responsibility in respect thereof, but they shall at the conclusion of the work deliver over the same in good order, according to the true intent and meaning of this contract and of the said specification."

And after providing that the commissioners should have power to suspend operations or take work out of the hands of contractors, or make payments, or advances on materials, &c, clauses not material to this case, it was agreed in these words:—

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"10. It is distinctly understood, intended, and agreed that the said price or consideration of five hundred and fifty-seven thousand, seven hundred and fifty dollars ($557,750) shall be the price of and be held to be full compensation for all works embraced in or contemplated by this contract, or which may be required in virtue of any of its provisions or by law, and that the contractors shall not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said Act, intituled: 'An Act respecting the Construction of the Intercolonial Railway,' or in the commissioners, or engineer by this contract, or by law, to claim or demand any further or additional sum for extra work, or as damages, or otherwise, the contractors hereby expressly waiving and abandoning all or any such claim or pretension to all intents and purposes whatever, except as provided in the fourth section of this contract."

And in the interpretation clause it is provided as follows: "The words 'the work' or the word 'shall' unless the context require a different meaning, mean the whole of the work or materials, matters and things, required to be done, finished and performed by the contractors under this contract; the words 'the engineer' shall mean the chief engineer for the time being, appointed under the said Act, intituled 'An Act respecting the construction of the Intercolonial Railway,' and shall extend to and include any of his assistants acting under his instructions, and all instructions and directions given by those acting for the chief engineer, will be subject to his approval. The word 'Railway' shall mean the said Intercolonial Railway. The construction of the words given in this clause shall not control

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any more extended signification or construction which may be given to any such words in this contract or the said specification."

"12. This contract and the said specification shall be in all respects subject to the provisions of the herein first cited Act, intituled 'An Act respecting the construction of the Intercolonial Railway,' and also in so far as they may be applicable to the provisions of the Railway Act, 1868."

Note at the end of the contract, and above the signature and seals of *Ephraim A. Jones* and *James Simpson*, the following is added: "On page three, in fortieth line, 'Seventy-two' as the date of completion of contract is an error, and should be read 'Seventy-one,' in conformity with the advertisements for tenders, and published as one of the conditions of contract."

Annexed to the contract is the general specification and the tender; the latter is as follows:

"INTERCOLONIAL RAILWAY."

"FORM OF TENDER"

"for sections Nos. 5, 6 and 7 only."

SECTION No. 7.

"The undersigned, having seen the plan and profiles of section No. 7 of the Intercolonial Railway, hereby tender to construct the said section in accordance with the plans and profiles, and all other detailed plans which may be supplied, and in accordance with the general specification, signed by the commissioners and dated Ottawa, 26th January, 1870, and to execute the contract, a form of which is printed at the end of the specifications, binding ourselves not to demand any extras of any kind whatever, for the sum of five hundred and fifty-seven thousand seven hundred and fifty dollars ($557,750), being at the rate of twenty-three thousand dollars per mile of railway, and we bind our

selves to complete such section for the above-named sum to the satisfaction of the engineer and the commissioners, such sum to be the full payment, without extras of any kind, for the entire completion of the section, and we propose *James Wilson* and *George Romans* as sureties for the due fulfilment of this tender.

(Signed,)

James Simpson & Co,

Londonderry, N S.

Signed,

Neil Grant, witness: May, 2nd, 1870.

"We, the above-named, tendered as sureties, hereby agree to execute such bond or other document as may be required by the commissioners for the due performance of the contract attached to the specifications, &c., upon which the above tender is made.

(Signed,)

James Wilson,
Londonderry, N. S.
George Romans,
Londonderry, N. S.

Signed,

Neil Grant, witness.

"And we hereby further supply, solely for the purpose of informing the commissioners, and not in any way to affect the contract, the following schedule of prices for some of the principal items of construction."

The petition sets forth that the section had previously been under contract to other paties who had done some work thereon, but being unable to carry on operations to the satisfaction of the commissioners, the contract was then taken off their hands; that though the contract of the suppliants was for the lump sum of $557,750, the contractors afterwards agreed to a deduction of $8,200 for wooden bridges taken off their hands, and

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that the said lump sum was to be for grading, bridging and fencing, irrespective of quantities, that the estimates of the contractors were based on the plans and specifications exhibited at the time of the letting, and the well understood rule laid down by the commissioners and previously acted upon, that any diminution should be to the advantage of the contractors.

That in the autumn of 1871, when 90 per cent. of the whole work was done, and when the line was wholly graded throughout, the chief engineer ordered 27 additional culverts to be built, of which seventeen were ultimately constructed, and that, as the line had been completely graded at the time under the supervision of the district engineer, acting under the orders of his chief, it was not within the contract to require the contractors to re-open the embankments or tear up culverts and re-build others, and that they protested against the additional work and alterations by which they were required to do much of their work twice, and the suppliants allege that it was only on the understanding that they should be paid extra for such additional work and alterations, that they agreed to carry out the orders of the chief engineer.

Paragraph 6 sets forth, under eight heads, that extra work was done under protest, and in accordance with the alleged understanding and for which they claim payment, namely:—

1. Nine culverts were constructed which were not on the original plan or bill of works.

"2. Two culverts were rebuilt which were first constructed according to plans furnished to the contractors, but afterwards rebuilt on a new plan.

"3. Six culverts were constructed where divisions had been made of the streams, either by the order or sanction of the engineer, after the work was graded, the bank being re-opened for the purpose.

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"4. One culvert in which the side walls were taken down and rebuilt, the same having been built by the first contractors of the section, and returned in the bill of works as finished.

"5. The abutments of the bridges at *Rushtons* and *Grenville* were partially torn down and rebuilt, the plans being changed.

"6. Additional work was performed on the piers and abutments of river *Philip* bridge, these being carried deeper than originally intended, and in consequence of change of plans the coffer dam was enlarged after it was sunk.

"7. The grade at river *Philip* was raised after the line was completed.

"8. Much extra work was done on station grounds at *Folly Lake*, and the embankment there was widened."

Paragraph 7 states that the commissioners have admitted the justice of the contractors' claim for such extra work, and recommended payment thereof, that is to say: the claim for culverts and extra works on foundations with changes for grading and station grounds, but that the sum estimated therefor does not agree with the statements of the contractors, and no opportunity has been afforded the latter of hearing how the amount of the commissioners had been made up, that the sum recommended by the commissioners was about $30,000, a set off for bridges and chains not required to be completed of about $ 0,000; but no part of said sum has been paid to the contractors.

Paragraph 8 alleges that the contractors were put to large expense and compelled to do much extra work, for which they are entitled to be paid, in consequence of misrepresentations in plans and bill of works exhibited at the time of letting, in which it was stated that certain test-pits had been sunk in the cuttings, some to

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grade and others to various depths much less than represented. That as these cuttings turned out rock instead of earth, as stated in the plans, the quantity of rock was less on the bill of works than it should have been if the return of the test-pits had been correctly made. That the contractors believe that this is not a contingency in the sense intended in the specifications for which they should suffer, but was a positive representation of fact by which they and those who computed the quantities were misled, and for which the commissioners were responsible; and they should, therefore, be paid for the excess of work, for had the test-pits been correctly returned the estimate of rock cuttings would necessarily have been increased, and the contract sum would have been much larger than the sum now claimed.

Paragraph 9 states that in consequence of these misrepresentations the contractors were compelled (1) to remove a very large quantity of rock, 45,000 yards, instead of earth, as falsely represented on said plans. (2.) To haul a large additional quantity of earth to make the fill at *Higgin's Brook*, and to cut a large quantity of rock and clay at station 150, represented as sand, the test-pits not having been sunk as stated. (3.) To clear extra width of line one rod on each side equal to 67½ acres, not included in the quantities in the bill of works, and to finish the clearing partially done by the first contractors, and returned on the bill of works as completed. (4.) To add to the length, 64 feet of *Higgin's Brook* turned beyond length, stated in the bill of works. (5.) To build an upright wall to retain foot of slope at *Smith's Brook*, in consequence of tunnel being laid off too short. (6.) To remove other 12,012 yards of earth and 695 yards of rock in consequence of other errors of quantities stated in the bill of works.

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Paragraph 10. That in May, 1873, the commissioners, having received the account of the contractors, sent the same to the engineer-in-chief for report, and account was referred to *Schrieber*, who reported value of work $82,000, or thereabouts.

Paragraph 11. That contractors faithfully completed contract, as well as extra work ordered to be done, and handed over section to commissioners finished to satisfaction of chief engineer.

Paragraph 12. That in March last Government tendered contractors $12,000, or thereabouts, in full of their claim, which was refused on such conditions and no part since paid

Paragraph 13 states that the sum of $557,750, the contract price, has been paid to the contractors, but nothing has been paid on account of such extra work, and the Government refuses, except as to the said $12,000 tendered, to pay the same, and the suppliants claim that there is now due and owing to them by the Government of *Canada* a large sum of money in connection with the said contract, that is to say :—

"1. For culverts built under the order of the chief engineer, after grading was completed	$42,858 07
"2. For iron pipes in substitution of masonry	3,356 00
"3. For additional rock in cuttings	44,285 50
"4. For sundry errors in bill of works	11,311 70
"5. For re-building sundry works	5,378 00
"6. For River Philip bridge	9,980 53
"7. For difference in currency and iron pipes	7,493 33
	$124,663 33

And prays payment to be adjudged to them of the sum of $124,663.33 and damages and interest for the withholding of the money due to them, and for their costs and disbursements.

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The answer of the Attorney-General sets forth the different clauses of the contract, as to the manner in which the contract was to be completed, the provisions as to the omissions, alterations, extra work, and that contract was subject to the Railway Act, 1868; in fact, all the provisions of the contract bearing on the question raised in this case, and it is alleged by section 10, that "in preparing the said plans and specifications and in inviting tenders for the construction of the work of the said railway, it was contemplated by the said commissioners that plans and specifications might have to be altered or varied, and that other work might be required for the due and proper construction of the line of railway, and I say that before they entered into said contract the said contractors were well aware that the contract price was intended to cover the cost of any such alterations or variations in the plans and specifications, and of any other or additional works which might be required, unless such alterations or variations should arise from changes of grade or of the line of location."

The answer then put forward, that in the bill of works it was stipulated that contract should provide for changes being made without extra charge. The contractors entered into contract with full knowledge of contents of bill of works, that estimates therein, plans, and specifications, were only approximate, subject to be altered as circumstances might require.

The answer then denies misrepresentation, and, if inaccuracy occurs, that contractors were distinctly warned not to rely thereon, but to make such allowances as they thought fit. Right to relief by reason of anything antecedent to contract, or not arising strictly out of terms thereof denied, and claims based upon matters outside of express terms of contract demurred to.

Answer admits of additional culverts ordered and

made, but any understanding with the commissioners that contractors should be paid extra denied. But commissioners took account of all work for which contractors claimed to be entitled to be paid over and above contract price, and recommended payment of so much thereof as was not within the contract at fair, reasonable and proper prices.

The answer sets out the works for which extra payment was recommended, amounting to $31,091.35; that such was and is a fair, reasonable and proper sum or allowance for said works, regard being had to the matter and character thereof, and to the terms of the said contract, and to all the circumstances of the case.

That the deduction for wooden bridges agreed to by contractors was $8,300 instead of $82,000, and that Her Majesty is entitled, under the terms of the contract, to a further deduction of $10,354.24 for drainage works which the contractors did not perform; that the contractors accepted $557,750, and regard being had to the allowance for extra work and to the deductions, the contractors would be entitled to a credit of $12,436.11 over and above contract price, which the commissioners recommended Her Majesty to pay contractors in full satisfaction of all their claims.

Her Majesty offered to pay such sum in full, but contractors refused to accept the same.

The answer then avers, that contractors failed to complete work within time agreed on, and claims, on behalf of Her Majesty, the benefit of the stipulations contained in 3rd paragraph of contract, viz., a forfeiture of all money due, and also $2,000 a week for all the time during which said work remained incomplete after 1st July, 1871, by way of liquidated damages; and leave is craved to deduct, retain and set off $2,000 per week, amounting to upwards of $150,000 from out of

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and against the claims of the suppliants in their petition.

The answer then avers that, with respect to the revision of prices, it was solely for the purpose of monthly estimates.

All right to extra work claimed under paragraphs 8 and 9 of petition denied. That test-pits were sunk as in bill of works, and, if otherwise, right to any relief on that ground denied. Paragraph 10 admitted that *Schreiber* reported all, except $31,091.35, within terms of contract, and his report was adopted by commissioners. Admitted that contractors ultimately completed work in contract, and also extra work, to the satisfaction of engineer, but charged that same was not completed within specified time

Admitted $557,750 was paid, but denies it was paid as contract price. Charges that only $539,095 was paid on contract price; that commissioners deducted $8,300 and $10,354.24 from the $557,750; and balance was paid on account of said allowance of $31,091.35.

Submitted nothing due suppliants.

Paragraph 10 admitted, so far as relates to report of *Schreiber*, but avers report was made irrespective of whether work claimed for was or was not included in contract, and was made only for information of commissioners and chief engineer; anything in 14th paragraph denied.

The chief engineer has not certified as required under Railway Act, in Sec. 8 of contract referred to, nor that work for and on account of which the sums claimed are sought to be recovered, has been duly executed, nor has any such certificate been approved by commissioners, and that contractors have been paid in full for all works for which the said chief engineer has certified, as in said Act provided.

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There does not seem to be any difficulty in discovering what were the intentions of Parliament in regard to the construction of this railway. In an undertaking of such a magnitude, involving such an immense expenditure, the protection of the public and the public revenues of the country would necessarily be matter of paramount importance. To accomplish this Parliament appears to have deemed it absolutely necessary to define and limit and, to use an expression in one of the cases, to restrain and fence in the powers of the commissioners, and to make the chief engineer, upon whose skill and ability the success of the undertaking would greatly depend, independent of the commissioners, so far as his appointment and removal from office was concerned; and with respect to the contractors, we have seen it expressly provided that the road should be built by tender and contract, and the commissioners strictly prohibited from entering into any contract involving an expense of $10,000 or upwards without the sanction of Government, and required all contracts to be guarded by securities and conditions; and as if to prevent the possibility of the Government being called on for claims outside of contracts of an uncertain and implied character, the payment of any of the public money until the chief engineer had certified that the work for which the same was claimed had been duly executed, and until such certificate had been approved by the commissioners is prohibited.

The statute and the contract must be read together. From the statute we must ascertain what powers were delegated to the commissioners, and what restrictions imposed. From the contract we see what the commissioners and contractors respectively undertook, and then, having regard to the statute, determine how far their respective obligations were fulfilled.

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On the hearing the learned counsel for the suppliants classed the works for which payment was claimed, as follows:

1. Additional work done by order of the commissioners and engineers, as for instance, extra culverts.

2. Work for which the first contractors were paid, and which is not included in the contract.

3. Work done by the first contractors, for which they were paid, but which was taken down and rebuilt by order of the engineer.

4. Extra work in consequence of grade and location.

5. Additional work in consequence of changes in plans of bridges.

6. Additional work made necessary in consequence of misrepresentations made in the bill of works and plans, and mis-statements as to measurement.

7. Differences in value between using iron pipes and mason's work for culverts

Adopting the classification of suppliant's counsel, as substantially covering all the various claims put forward in the petition, I will first proceed to deal with that based on the misrepresentations said to be contained in the profile plan and bill of works.

The counsel for the suppliants repudiated the idea of charging the Crown or the commissioners or engineers with any fraudulent misrepresentations, nor is it contended or shewn that the commissioners knew or sanctioned any misrepresentations. It is very clear that, as the Crown can do no wrong, no petition of right can be sustained against the Crown for tort, still less for a claim based on an alleged fraud imputing to the Crown the fraudulent misconduct of its servants See *Thomas* v. *The Queen* (1); *Tobin* v. *The Queen* (2); *Heakin* v. *Queen* (3).

(1) L. R. 10 Q. B. 31. (2) 16 C. B. N. S. 310.
(3) 35 L. J. Q. B. N. S. 200, 266.

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But relief against the Crown is claimed in this case on the ground that the accuracy of the statements and representations in the profile plan and in the bill of works were guaranteed to the contractors, and that portions of such statements and representations were inaccurate, by which they were misled as to the extent and character of portions of the work, more particularly as to the extent of the rock excavations, and thereby were compelled to do a large quantity of work of a much more expensive character than the plan and bill of works exhibited. A careful perusal of the contract will show that there is nothing whatever that by the most forced construction can be construed into any thing approaching an express guarantee of any information whatever. The contract is absolute and unconditional that the contractors would, for a certain sum, within a certain time, build, construct, and complete section No. 7, as described in the contract, and all bridges, culverts and other works appertaining thereto, to the entire satisfaction of the commissioners and according to the plans and specifications thereof, signed by the commissioners and contractors, the plans so signed being deposited at *Ottawa*, and the said specifications being annexed to the contract and forming part thereof, and with such instructions as might be, from time to time, given by the chief engineer. There being then no express covenant, can such a covenant or guarantee be implied? The contract being silent as to any such warranty, and nothing in the contract indicating any intention of binding the parties to any obligation beyond the express provisions contained in the contract itself, can this court presume, nevertheless that such was the intention of the parties, and that the Crown did impliedly warrant that the statements and representations complained of as being incorrect

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were correct and true? I think the law will imply no such warranty; that no principle of law will justify me in saying that parties to a contract have by that contract contracted for something which is not to be found within, or indicated by, the written contract to which they have attached their hands and seals. By the contract, and by the contract alone, in the absence of fraud, must the parties to it be bound. No stipulation can, in my opinion, be implied in any contract at variance with the express terms of the contract. To imply a covenant there must be something in the instrument manifesting an intention to bind the parties, or, as Mr. Justice *Lush* puts it in *Jones* v. *St. John College* (1): "You must find words in the instrument capable of sustaining the meaning which you mean to imply from them." The authorities on this point are very clear and, I think, decisive. Among them may be named: *Scriver* v. *Pask* (2); *Thorne* v. *Mayor of London* (3), which went to House of Lords (4); *Churchward* v. *The Queen* (5). But wholly apart from, and independent of this, the documents themselves show that, not only had the parties no intention of entering into any such covenant or guarantee, expressed or implied, but that the very reverse was the case; that it was the clear intention, so far as language can express it, that there should be no guarantee.

The commissioners gave persons intending to tender such information as they had of the surrounding circumstances, but, so far from guaranteeing the accuracy of such information, they, on the contrary, expressly, both in the profile plan and bill of works, disclaimed all responsibility for its correctness, what they furnished

(1) L. R. 6 Q. B. 126.
(2) L. R. 1 C. P. 718; 18 C. B. N. S. 785.
(3) L. R. 9 Exch. 163.
(4) L. R. 10 Exch. 112.
(5) L. R. 1 H. L. 107.

being previously nothing more than a representation of the information they had received, with a distinct warning not to place implicit reliance on it, or, in the language of Lord *Chelmsford*, "not to place blind confidence in it," leaving parties before tendering to examine particularly for themselves; and it is difficult to conceive how they could have done this in clearer or more unequivocal language than on the profile plan and in the bill of works in which the alleged misrepresentation is stated to be. Six propositions are printed on the profile plan, and are as follows:—

"1. This is the profile of that portion of the line of railway extending from O in ridge (north of *River Phillip*) to station O (formerly station 50), at *Folly* Lake, in the Province of *Nova Scotia*, a distance of about 24½ miles, for the completion of which the commissioners have advertised for tenders, to be received at *Ottawa* on the 7th day of May, 1870.

"2. This profile is made from levels taken on the centre line as it is now located.

"3. The work done by *Sutton & Angus*, (the former contractors) is colored on the profile, and detail information as to quantities executed is given in the printed schedules and bill of works. These quantities are believed to be correct, and must be assumed as such by the new contractors.

"4. The number and character of structures at present believed to be required will generally be found within in red on the profile and described in the schedule of structures. These are, however, subject to any modifications which additional information respecting the freshet discharge of streams and other circumstances may render necessary.

"5. The best information in the possession of the undersigned respecting the probable quantities of the

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several kinds of work will be found in the schedule of cuttings and embankments, the schedule of structures and the bill of works, which are printed to accompany this; *but contractors must understand that these quantities are not guaranteed.*

"6. Lithographed general plans, sheets Nos. 1 to 24, inclusive, showing the character of structures intended to be constructed, will be exhibited with this to intending contractors. Special drawings will be furnished as required.

(Signed) *Sandford Fleming*,
Chief Engineer.

ENGINEER'S OFFICE,
Ottawa, 11th April, 1870.

Attested.
(Signed) *W. T. Forrest.*

And in the printed bill of works referred to, the following forms part.

"This bill is an abstract of all information in the possession of the commissioners and the undersigned with regard to the quantities of work to be executed.

"The quantities here in given, asascertained from the best data obtained, are, as far as known, approximately accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate.

"The quantities of excavation are for the most part ascertained from cross sections; the proportion of rock excavation is estimated from information furnished by test-pits dug at intervals along the line of railway; the information thus ascertained, and the nature of the soil to be excavated, will generally be found written in the profiles, but the accuracy of this information is not guaranteed. Contractors must satisfy themselves on this as well as on every point, as no addition or deduction will be made in the event of any excavation turning

out more than or different from what may be represented or supposed.

"A schedule of cuttings and embankments is furnished showing the approximate quantities in each, and giving an estimate of the probable proportions of earth and rock which will be required to be excavated in the contract, inclusive of all the work which has been done to this date. The excavations are calculated *net measurement*, and the contractors will observe that a percentage allowance is added to embankments for waste, subsidence, wash beyond slope lines, &c."

"The contractor is required to make every allowance which he may deem necessary to cover the risk of any of the quantities of work being increased in execution. A schedule of structures proposed for the passage of streams and general surface drainage across the line of railway is also furnished. The structures proposed are, from all the information obtained, believed to be the most suitable, but should circumstances require any change in the number, position, water-way or dimensions, the contract will provide that all changes should be made by the contractor without any extra charge. This schedule gives the probable quantities in the structures now proposed and the data upon which these quantities are ascertained; much, however, depends on additional information to be obtained with regard to the freshet discharge of streams, as well as the nature of the foundations, and, with respect to the latter, accurate information can only be had during the progress of the work.

"A third schedule showing the quantities of work actually done on this portion of the line up to this date is also furnished. These quantities form the basis of the final certificate in favor of the old contractor. This bill which follows is intended to show (approximately)

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the total quantities actually executed to date, and the balance to complete this portion of the line."

And after giving the approximate quantities actually executed to date and the balance to complete this portion of the line, and after giving the approximate quantities and description of work, this is added: "In addition to the quantities herein given, the attention of the contractors is drawn to other services mentioned underneath, for which all allowances must be embraced in the tenders;" and among omissions and contingencies, for which it is stated allowance should be made, is the following: "For any errors in measurement or calculations, or deficiencies in quantities for all work of protection required for slopes of embankments and cuttings; for all alterations considered necessary in structures that may be found inadequate in water-way or strength; for removing all buildings and other obstructions on the line of railway; for re-building fences destroyed by fire, and for repairing all injuries done before the completion of the contract, and generally for all omissions, and to cover all possible risks and contingencies."

How in the face of this can the contractors be permitted to say that there was any guarantee expressed or implied, or how can they complain of being misled by misrepresentations? If the accuracy of the test-pits, as delineated on the profile, or if the quantities named in the bill of works were of the grave importance now put forward, with the intimations given on the plan itself and in the bill of works, it does seem somewhat strange that the intending contractors should have tendered for a work of such magnitude for a gross sum, and that by a contract excluding all extras and omissions which might become necessary for completing the undertaking, without the most careful and most

searching examination of the ground, and a minute comparison of the statements in the profile and in the bill of works, with the ground itself, when a discovery of the real state of the case would have been inevitable.

The opportunities of knowledge were not only equal between the contractors and the commissioners, but the contractors were, if anything, in a better position. Having the information furnished, they had, not only the opportunity of testing the accuracy of such information, but the opportunity of making such further examination as they might deem necessary, if that so furnished was found imperfect or too limited to enable them to judge with precision of the difficulties they would have to encounter, or the work they would have to perform. If they did not do so, the language of the learned judge in the House of Lords, in the case of *Thorne* v. *The Mayor, &c.* (1), is extremely apposite:

> It is much to be regretted that the contractors omitted a precaution, which, in so grave a matter, would seen to have been reasonable and wise. It is unfortunate that they should be subject to such serious loss, but I do not think that Your Lordships can intervene to save them from the result of their own improvidence by making for the parties a contract they never contemplated, and inserting in it a warranty of which no one ever thought, which was never demanded on the one side, and if it had been, would, I feel assured, have been refused on the other.

With respect to the work done by the first contractors, many of the observations just made are to a certain extent applicable.

This work, as far as the present contractors are concerned, was put on the same footing as if it had been done by themselves, under the contract. The profile plan and bill of works professed to show what had been done by *Sutton & Angus*; the accuracy of this was no more guaranteed than were the representations of the test-pits and quantities of rock excavations. The

(1) L. R. 1 H. L. 137.

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profile plan says; "No. 4, the work done by *Sutton & Angus* (the former contractors), is colored in the profile plan, and detail information as to quantities executed is given in the printed schedules and bill of works. These quantities are believed to be correct and must be assumed as such by the new contractors;" and in No. 5, to the statement that the best information respecting the probable quantities of the several kinds of work in possession of the chief engineer would be found in the schedules and bill of works, is added, "but contractors must understand these quantities are not guaranteed;" and in the bill of works it is stated that quantities of work done by the old contractors were believed to be correct, and must be assumed as such by the incoming contractors, and among the omissions and allowances which persons tendering were notified their tenders should embrace, were "for any errors in measurements, or valuations or deficiencies in quantities."

As to the culverts they do not appear to have been either additional or extra. The embankments, it appears, were cut down and culverts put in at the bottom after the road was graded by the written order of the engineer. The evidence of Mr. *Schrieber* shows that they were culverts that ought to have been put in in the first instance but were left out, and the chief engineer objected to the omission, and it would seem that in all there were not so many culverts actually put in as are shown by the profile plan. Mr. *Schrieber* says the alterations from the original plan were made by the district engineer without the chief engineer's authority. The contractors, no doubt, protested against doing this work as not included in their contract, and Mr. *Schrieber* says he gave them some little encouragement to do it, but that the contractors refused to continue doing that kind of work unless paid for it as they

went along, but, notwithstanding this, they appear to have done it. Now, on reference to the contract, it will be seen, that express provision is made that the works shall be executed "*in strict accordance with the plans and specifications, and with such instructions as may, from time to time, be given by the chief engineer, and that instructions and directions given by those acting for the chief engineer shall be subject to his approval,*" and it was also provided that in the event of any bad materials being delivered, or bad work being executed at any time, the same shall be immediately removed, on notice being given by the chief engineer; and the work shall be reconstructed at the expense of the contractors, in strict conformity with the contract and the specifications, and to the entire satisfaction of the chief engineer; and in cases of omissions from the specifications and contract, it is provided that should any work, material or thing of any description whatsoever, be omitted from the said specification, or the contract, which, in the opinion of the chief engineer, is necessary or expedient to be executed or furnished, the contractor shall, notwithstanding such omission, upon receiving written directions to that effect from the chief engineer, perform and furnish the same.

By section 4 it is provided that: "the engineer shall be at liberty at any time, before the commencement or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the *width* of *cuttings* or *fillings*, the dimensions or *character* of *structures*, or in any other things connected with the works, whether or not such changes increase or diminish the work to be done, or the expense of doing the same, and the contractors shall not be entitled to any allowance, by reason of any such changes, unless such

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changes consist in alterations in the grades or the line of location, in which case, the contractors shall be subject to such deductions, for any diminutions of work, or entitled to such allowance for increased work (as the case may be) as the commissioners may deem reasonable, their decision *being final in the matter;*" and, if this was not sufficiently clear and explicit, the contract declares it to have been "*distinctly understood, intended* and *agreed*, that the said price or consideration of five hundred and fifty-seven thousand seven hundred and fifty dollars ($557,750.00) shall be the price of, and be held to be *full compensation* for, all the works embraced in, or contemplated by this contract, or which may be required in virtue of any of its provisions, or by law, and that the contractors shall not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in, or to such works, or in the said plans and specifications, or by reason of the exercise of the powers vested in the Governor in Council by the said Act intituled: 'An Act respecting the construction of the Intercolonial Railway,' or in the commissioners or engineers, by this contract, or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise; the contractors hereby expressly waving and abandoning all and any such claim or pretention, to all intents and purposes whatsoever, except as provided in the fourth section of this contract." And though by the contract "the contractors are to be under the direction and supervision of said district engineer and assistant engineers and inspectors as may be appointed," it is only in carrying on the works in accordance with the contract and specifications and instructions of the chief engineer; nowhere in the contract is any power or authority whatever given to any such district or assistant engineer or inspector to

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alter, vary or depart in any the slightest particular from such plans and specifications or instructions. Still less, had they any power or authority to incur any liability outside of and beyond the contract, and it is equally clear that neither the protest of the contractors to the district engineer, that the work was not within his contract, and he would not do it unless paid for, nor any encouragement, great or little, which such engineer might have given him, could create a legal claim against the Crown. The commissioners alone could contract for a liability on the Government, and they only as authorized by statute. If this work is to be considered *extra*, additional, or varied work, as the contract clearly contemplates there may be, then the contractors have, by the contract, waived all claim for payment for any such work. If it, or any portion of it, is additional or varied work of a character so peculiar, so unexpected and so different from what any person could be supposed to reckon or calculate upon, that it is not within the contract, but altogether *dehors* the contract (which I cannot think it is, for it was only done to make the road according to the plans and specifications and instructions of the chief engineer), then I can discover no such contract with the commissioners as would give the contractors any legal claim against the Crown; the commissioners alone, under the statute, can bind the Crown, and they only as authorized by the statute. No doubt the insisting on the putting in of these culverts after the embankment had been graded, apart from any question of obligation on the part of the contractors to do it, and of all legal considerations, would seem to have been a very great hardship on the contractors, as they may most fairly have considered, that when the line was brought to grade level, under the superintendence of the district engineer, it would not have to be cut down

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and rebuilt at their expense, unless, indeed, the omission which the cutting down was to remedy was the fault of the contractors, which does not appear to have been the case (though, on the other hand, prudence, in view of the terms of their contract, would perhaps have dictated, that the plans and specifications should not have been departed from unless the express approval of the chief engineer had been first obtained,) and would, under such circumstances, commend them, if not legally, at any rate, *in foro conscientiæ*, to the favorable consideration of the Crown; and as will be seen by the report of the commissioners they were so commended by the commissioners, and the Crown tendered them the amount recommended by the commissioners as being by them deemed reasonable.

As to extra work in consequence of changes in plans of bridges, the contract, section 4, says: "The engineer shall be at liberty, at any time before the commencement or during the construction of any portion of the work, to make any change or alterations which he may deem expedient in the grade, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the work, whether or not such changes increase or diminish the work to be done or the expense of doing the same, and the contractors shall not be entitled to any allowance by reason of any such changes, unless such changes consist in the grades of the line of location, in which case the contractors shall be subject to such deductions for any diminution of work, or entitled to such allowance for increased work (as the case may be) as the commissioners may deem reasonable, their decision being final in the matter."

And section 10 provides that "the contractors shall not, upon any pretext whatever, be entitled by reason

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of any change, alteration or addition made in or to such work, or in the plans or specifications to claim or to demand any further or additional sum for extra work, or as damages or otherwise," the contractors expressly waiving and abandoning as before set forth.

And the bill of works states with reference to the structures, "A schedule of structures proposed for the passage of streams and general surface drainage across the line of railway is also furnished. The structures proposed are, from all the information obtained, believed to be the most suitable, but should circumstances require any change in the number, position, waterway or dimension, the contract will provide that any change shall be made by the contractors without any extra charge. This schedule gives the probable quantities in the structures now proposed and the data upon which these quantities are ascertained; much however depends on additional information to be obtained with regard to the freshet discharge of streams, as well as the nature of the foundation, and with respect to the latter accurate information can only be had during the progress of the work, and among omissions and contingencies, parties tendering are informed that allowance should be made for all alterations considered necessary in structures that may be found inadequate in waterway or strength." Under these circumstances I know of no principle by which I can adjudge the contractors payment for which they have themselves declared they are not upon any pretence whatever to be entitled to.

As to the difference of value between iron pipes and mason work for culverts.

There are no averments in the petition with reference to this matter, except the item 7 in section 15, which is simply "for difference in currency and iron pipes," and nothing in the contract, except the power, herein before

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referred to, of the chief engineer to change or alter the dimensions or character of structures, nor in the evidence do I find anything explanatory of this claim, nor does it appear in any way whether the change was from mason work to iron, or from iron to mason work, unless indeed it was to be inferred from the bill of works, the only place that I can discover any reference to the subject. It is there stated, that "the commissioners will consent to the substitution of iron cylinders for box culverts of masonry at certain points to be designated by the engineer. Such as those places where the inclination of the streams or hill side ground renders the plan of construction shown on sheet No. 17 necessary. Wherever these cylinders are employed they must be three feet in diameter in the clear, and weigh not less than 450 lbs per lineal foot; they must be embedded throughout in concrete and furnished with substantial wings and parapets of masonry at the ends. They must be made and laid according to the plans and directions of the engineer, and such precautions taken as he may consider necessary to render the whole solid and permanent. Where iron cylinders or other structures are allowed or directed to be used in place of those mentioned in the schedule of structures, they will be paid for at the prices in the schedule to the tender, and a deduction will be made from the contract sum of the total saving effected thereby, according to reduction in total quantities calculated at the schedule prices," from which it would appear that a deduction and not an increase was contemplated by the parties as the effect of the change.

As to the claim for extra work, in consequence of changes of grade and location of line.

This was the only extra work for which the contract provides for any allowance for increased work, should

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the change of grade or location involve an increase in the work to be done; but it is only such an allowance "as the commissioners may deem reasonable, their decision being final in the matter." The petition does not allege any sum as having been allowed by the commissioners, and the only statement or reference we have in the evidence of change of grade or location is in the report of Mr. *Brydges*, which will be referred to hereafter more fully, in which he says: "there is one item which ought to be allowed for raising the grade at *Clifton* station $1,773.24." Looking upon this as the item considered reasonable by the commissioners, the suppliants would be entitled to recover for it, if not already paid, but then it is included in and forms part of the balance of the $12,427.61 admitted to have been tendered by Government.

But, independent of all these considerations, there are general provisions in the contract, and in the law, which are conditions precedent to the suppliants right to recover, but which have not been complied with. Section 6 of the contract says: "cash payments will be made monthly, on the certificate of the engineer, equal to eight-five per cent. of the value of the work done, approximately made up from returns of progress measurements; and on the completion of the work to the satisfaction of the engineer a certificate to that effect will be given, but the final and closing certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter. The progress certificate shall not in any respect be taken as an acceptance of the work or release of the contractors from their responsibility in respect thereof, but they shall, at the conclusion of the work, deliver over the same in good order, according to the true intent and meaning of this contract and of the said specification;"

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and the language of the statute is that no money shall be paid to any contractor until the chief engineer shall have certified that the work for, or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved by the commissioners.

If these clauses mean anything, it can only be that the work done on the road must be to the satisfaction of the Chief Engineer, and until he so certifies, and such certificate is approved of by the commissioners, the contractors are not entitled to any pay.

The petition sets forth (section 11) that the said contractors faithfully completed their contract, as well as the extra work they were ordered to do, and handed over the section to the satisfaction of the Chief Engineer.

The petition is conspicuous for the absence of any direct or inferential averment that any such certificate, as indicated by the contract or law, was ever obtained, or that there had been such approval by the commissioners. On the trial what was called the engineer's final certificate was put in evidence, and is as follows:

"INTERCOLONIAL RAILWAY,

"Office of the Chief Engineer,

"*Ottawa*, 10th Feb., 1873.

"*Ralph Jones*, Esq., Secretary.

"Dear Sir,—I have now received a final return of quantities executed on section No. 7, and taking the contract as the basis for settlement with the contractors, the account will stand as follows, that is if we assume that the work has been executed properly, with respect to which I cannot say I am fully satisfied.

"The contract sum is.....$557,750 00

From which deduct work taken off the contractors' hands:—

"Timber bridging.....$8,300 00

"Under drains, 64,714 lineal feet, at 16 cts.....10,354 24

18,654 24

"Balance.....$539,095 76

"The contract for this section is dated 25th May, 1870; the whole was to have been finished by 1st July, 1871.

"Although at the present date everything is not satisfactorily and entirely completed, the works are sufficiently far advanced to admit of the rails being laid and the line opened for traffic on the 11th November, 1872.

"During the progress of the work changes of various kinds have been made, and I herewith furnish a statement prepared from the return received from the district engineer, showing the total quantities of the various kinds of work executed as compared with the original quanties of work estimated when the contract was entered into. From this statement it appears that the contractors have done work in excess of the original quantities as follows:—

Clearing &c.....	$40\frac{80}{100}$	acres.
Rock excavating.....	42,225	cub. yds.
Private road crossings.....	2	
Tunnelling at Caldwell's Brook.....	366	lineal feet.
" Jobes.....	114	do
" Hartz.....	174	do
" L. Whitstone.....	106	do
" Whitone.....	206	do
Cast iron pipes.....	576	do
	say $115\frac{1}{5}$	tons.

"The statement further shows that the contractors have done work in diminution of the original quantities, as follows:

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"Earth excavation, 46,661 cubic yards.

Rip-rap,	544	"
Concrete,	1,052	"
1st class masonry,	1,430	"
2nd class "	6,590	"
Paving,	857	"

Public road crossings, 2.

"According to the terms of the contract the commissioners are required to place a valuation on the altertions referred to, so that the same can be added to or deducted from the contract sum. Having furnished data for their valuation, I now await further instructions.

"Yours very truly,

"(Signed) SANDFORD FLEMING,

"*Chief Engineer.*"

This so far from being the certificate contemplated, that the work has been duly executed to the satisfaction of the chief engineer, is directly the contrary. It would seem to be merely information conveyed to the commissioners (taking the contract as the basis of settlement with the contractors) as to how the account would stand on the assumption that the work had been properly executed, with respect to which, however, he says, "I cannot say that I am fully satisfied." And again, after stating that the whole work was to have been finished by July 1, 1871, he says, "although at the present date everything is not satisfactorily and entirely completed, though," he says, "the works were sufficiently advanced for laying the rails on 11th November, 1872." On this basis and assumption $539,096.76 would be due as the contract price. He then states, that during the progress of the works various changes had been made, and furnishes a statement, prepared from the returns received from the district

engineer, showing the total quantities of the various kinds of work executed, as compared with the original quantities of work estimated when the contract was entered into; and furnishes in detail the work that appears from the statement to have been done in excess and in diminution of the original quantities, giving no certificate of the extra work having been done to his satisfaction, nor pointing out in any way why the changes were made, or whether any and what part were extras, payment for which the contractors had agreed to waive all claim to, or whether they arose from change of grade or location of line which the contract especially provided for. In conclusion, he says: "According to the terms of the contract, the commissioners are required to place a value on the alterations referred to, so that the same can be added to or deducted from the contract sum;" and that he had furnished the data for their valuation. The inference from this would certainly be that these items related solely to change of grade or location of line, the only work for which any provision is made in the contract; but these items themselves, as well as the suppliants' petition, and the evidence in the cause, very clearly show that such could not be the case. The chief engineer must therefore have supposed that all alterations and changes were, by the contract, placed on the same footing as changes or alterations in the grades or line of location which, as will be seen from section 14, is quite the reverse; but even if it was, as the chief engineer appears to have supposed, I cannot see that the suppliants would be any better off, because the allowances to which they would be entitled are only such as the commissioners might deem reasonable, and their decision is declared final in the matter. Now, the suppliants neither in the petition aver the obtaining the chief engi-

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neer's certificate, nor do they aver, directly or indirectly, that the commissioners ever fixed any sum or sums as the reasonable allowance to be made them, nor does the evidence show that the commissioners ever did fix the amount of any such allowance, unless it is to be found in the report made by them through Mr. *Brydges*, which is as follows:

"*Ottawa*, Feb. 5, 1874.

"SECTION No. 7.

"The undersigned, on behalf of the commissioners for the construction of the Intercolonial Railways, begs leave to report to the Governor General in Council upon the claims made by the contractors upon Section No 7, as follows:

"The general remarks in regard to the terms of the contract and bill of works, made in the report upon Section No. 4, will apply to Section No. 7 as well.

"The contract for this section was completed about the same time as that for No. 4, and the road opened at the same period.

"Enclosed is the report of the chief engineer, dated 10th February, 1873, showing the total amount of work done upon the contract. The contract was dated 25th May, 1870, and was for the sum of $557,750, from which was to be deducted timber bridging not executed $8,300, and under drains taken off the contractors' hands $10,354 24; total, $18,654.24, leaving the balance due to the contractors $539,095.75.

"The total amount paid to the contractors up to the present time is the amount of the contract, $557,750. From the engineer's report it seems that in rock excavations there was an excess of 42,225 yards, in earth excavation a decrease of 1,430 yards, and in second class masonry a decrease of 6,590 yards. Part of the diminution in masonry is accounted for by the construction

of tunnels in substitution of culverts, and also, in part, by the rise in iron pipes. The cost both of tunnels and pipes is less than the cost of masonry. The contractors for this section presented a claim to the commissioners amounting to $116,463.83, for extra works beyond what was included in their contract. The same course was pursued in this case as in No. 4, and the claims were referred through the chief engineer to Mr. *Schrieber*, who had been charged with the completion of the works.

"Mr. *Schrieber* reported, as per letter annexed, on the 29th July, 1873, his letter being transmitted to the commissioners by Mr. *Fleming*, on the 26th August, 1873. Mr. *Fleming*, in this case also, declined to make any recommendation upon the subject. The undersigned has therefore gone carefully over the report made by Mr. *Schrieber*, and now submits the following recommendations: —

"In this case as in No. 4, certain works were ordered by the engineer in charge not to be executed, and the work was completed without them.

"Mr. *Fleming* subsequently directed, after the completion of the works, that some of the culverts, &c., which had been omitted to put in should be built, and also ordered new culverts which had never been completed, and which were not shown in the original bill of works.

"In regard to the culverts which were originally in the bill of works, which were ordered not to be built, and were subsequently again directed by the chief engineer to be constructed after the embankments, &c., were completed, it seems only reasonable that the contractor should have some allowance made to him. It is therefore recommended that the cost, as reported by Mr. *Schrieber*, less the masonry, which is provided for

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in the aggregate quantities, should be allowed, and in those cases where entirely new culverts, not originally at all in the bill of works, and ordered after the embankment, &c., were completed, the cost as set out by Mr. *Schrieber* should be paid; also, that in cases where culverts were built, and after completion ordered to be altered, the cost of such alterations as reported by Mr. *Schrieber* should be paid.

"These three classes of works, on the basis here described, amount to the total sum of $20,789.28, as set out in the accompanying memorandums, and attached to Mr. *Schrieber's* report. The only other items which, in the opinion of the undersigned, ought to be entertained are the following, all the rest being covered by bill of works, and disposed of by the quantities executed under the lump sum of the contract:—

"Item No. 36. Tearing down and rebuilding a culvert built by old contractors, but subsequently condemned; it was not covered by new contract.....	$ 458 00
"Item No. 38. Bridge torn down and rebuilt to suit changed plans.....	2,208 00
"Item No. 37. Taking down and rebuilding bridge to suit iron superstructures instead of wood.....	188 80

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"The cost of the foundations in this work proved to be exceedingly different from what had been originally shown on the bill of works, and the contractors were no doubt deceived as to the amount of work which they would have to execute in this particular case. There is nothing more uncertain than the foundations of such structures, and unless every contractor made a thorough examination of the foundations of each bridge before he tendered he could only act upon the information given

him in the bill of works; he can judge with some degree of accuracy of cuttings and embankments, but what is beneath the water can only be ascertained by actual borings and by examination. The undersigned is of opinion that such extensive changes, involving such a large additional cost, entitles the contractors to be paid extra when the works executed differ so much from what is shown in the bill of works. The amount claimed by the contractors is $5,674.83, which Mr. *Schrieber* puts down in his report, and which he considers fair and reasonable.

"There is one other item which ought to be allowed for raising the grade at *Clifton* station, $1,773.24.

"There is a claim made for difference between Canadian and Nova Scotian currency which the undersigned cannot recommend to be paid.

"The various sums proposed to be allowed amount to—

1. Extra work on culverts.....	$20,789 28
2. Rebuilding masonry at bridges in consequence of altered plans.....	2,854 50
3. Foundation of *River Philip* bridge.....	5,674 83
4. Raising grade at *Clifton*.....	1,773 24
Total amount of contract, less deductions.	539,095 76
	$570,177 61
Less amount paid.....	557,750 00
Balance.....	$12,427 61

"If this proposed settlement is approved of by the Governor in Council, it should only be paid upon receiving a full discharge of every kind or description under the contract.

"(Signed) C. J. BRYDGES,
"*Chairman.*"

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Here we find an allowance made for the change of grade only to $1,773.24, which has been before referred to, but the petitioners allege that the commissioners have admitted the justice of the contractors' claim for the extra work set forth in section 6 of the petition, but I fail to discover any admission of any claim. The most that can be said of the report of the commissioners is that, evidently under the impression that there was no legal claim they would be justified in paying, but considering that, under the circumstances, the contractors had experienced great hardships, and had performed a great deal of extra work not anticipated in carrying out the contract, they had a fair claim on the clemency of the Crown, therefore commended their case to the favorable consideration of the Crown, and recommended various sums to be allowed the contractors, but only to be paid upon receiving a full discharge of all claims of every kind or description under the contract, amounting in all to $31,091.85, as follows:—

The various sums proposed to be allowed amounted to—

Extra work on culverts	$20,789 28
Re-building masonry at bridges in consequence of altered plans	2,854 50
Foundations of *River Philip* bridge	5,674 83
Raising grade at *Clifton*	1,773 24
	$31,091 85

This amount the Government were willing to recognize, and tendered to the contractors.

In section 4 of the petition it is put forward, that the estimates of the contractors were based on the plans and specifications exhibited at the time of letting, and the alleged well understood rule laid down by the commissioners and previously acted upon, that any diminu-

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tion in the estimated quantities should be to the advantage of the contractors, that the prices fixed for the said works were revised in May, 1871, the scale being based on an estimate by the engineer of the work actually required to be done and made after the contract was half completed. I cannot see how this at all affects the legal bearing of the question; it is very evident the scale of prices was only to regulate the amount of the monthly certificates; there is nothing whatever put forward in this paragraph that could alter or affect the rights of the parties under the contract; we have no evidence of any such rule as that put forward, and if we had it would not alter or affect the contract. I only notice the allegation to show it has not been overlooked, but, in my opinion, the allegation amounts to nothing.

It is obvious, that the engineer had no right to dispense with any of the provisions, either of the law or the contract, or to make or substitute any contract in lieu thereof, or to involve the Crown in any liability in addition to or outside the contract, and that neither the engineer, nor the commissioners themselves, could dispense with any of the provisions of the law. If this or any other court undertook to dispense with the certificate of the engineer, the approval of the commissioners and the sanction of the Governor in Council, and adjudge to those suppliants $124,663.33, as due from the Crown to them as extra, outside of and beyond the written contract, without tender or contract, or any conditions or sureties for the protection of the public, and without any sanction of the Government, it would be simply to set at naught all the securities provided for the due performance of the contract, and to abrogate all the checks and guards solemnly imposed by law for the public safety and security, and enable parties to do and

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obtain what Parliament has expressly forbidden to be done or had. The contract may be of a stringent nature, but whether more so than the nature of the subject-matter, the magnitude of the undertaking and the large public interests involved required and the action of Parliament necessitated, may be extremely doubtful. It must be borne in mind that the commissioners and chief engineer, with whom the contractors had to deal, and in whom such large powers were, no doubt, vested, stand in a very different position from private parties or corporations contracting on their own behalf, or engineers employed by parties so situated. They were appointed by the Crown to manage, superintend and carry to completion a great Dominion undertaking in which they had no private or individual interest. Disinterested public officers, who stood indifferent, as it were, between the Crown and the contractors, and who could have no interest in bearing hardly or unjustly on the contractors, and whose only interest could be honestly and faithfully to discharge their public duties. Very probably considerations of this character may have influenced the contractors in agreeing to be bound by stipulations so stringent; be this so or not, the parties voluntarily entered into the contract, and by it must they be bound. It is difficult to recognize any very great hardship, still less any wrong, in requiring parties to be bound by and fulfil contracts fairly entered into according to their plainly expressed terms and conditions.

In conclusion it may be satisfactory to see how contracts of this character have heretofore been viewed, not only in *England*, but in the *United States* of *America*, for in both countries such contracts have frequently been discussed, as the English and American reports abundantly show. Out of a great number of cases

bearing on the subject, I will quote the language of several distinguished jurists as found in several prominent analogous cases.

In *Sharpe* v. *San Paul Ry. Co.* (1), Sir *W. M. James*, L.J., says :—

In this case the contractors undertook to make the railway and to do certain works, but they undertook to complete the whole line, with everything that was requisite for the purpose of completion from the beginning to the end, and they undertook to do it for a lump sum something short of two millions sterling, which was the amount upon which the Brazilian Government had undertaken to guarantee the interest. It is important to bear in mind, that the company was formed upon the basis of this guarantee, and it would be a singular hardship upon the shareholders—almost a fraud upon them—if they found, when they had taken shares in a company based on this guarantee, that they were to be compelled to pay something entirely different, and to do so in consequence of some conversations between the contractors and the engineer.

* * * * * * * *

Then there was a considerable item as to the inclines up the *Sierra*, but every statement in the bill, it seems to me, puts the plaintiffs completely out of court as to that. The bill says that the original specification was not sufficient to make a complete railway, and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the word extra works.

* * * * * * * *

The plaintiffs then, thirdly, say that they were not to lay out more than £60,000 on the stations, and I think it has been made out that they were not to do so, but if they did, there was to be compensation for it, and that was to be one of the things to be included in the final certificate to be made by the engineer settling everything on the full completion of the work, and the engineer has made his certificate finding an ultimate balance upon all the accounts which certificate is not, according to my views of the pleadings, in any way impeached on any grounds which this court can take cog-

(1) L. R. 8 Ch. 607.

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nizance of. It is not pretended that Mr. *Brunlees* did not come to a conclusion to the best of his belief, and according to the best of his judgment. He was to determine the sums to be paid, and was not like an arbitrator dealing with evidence, or like a judge dealing with a law suit. The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances. That was the agreement between the parties. The contractors relied upon Mr. *Brunlees* and the railway company relied upon Mr. *Brunlees*. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties and just to all parties ; I myself should be very loath to interfere with any such stipulation upon any grounds except default or breach of duty on the part of the engineer.

In *Roberts* v. *The Bury Improvement Commissioners* (1), *Willes*, J., says :

The question arising in this case is simply whether the Bury Improvement Commissioners, having employed the plaintiff to do certain work according to a specification, and the architect having decided that he was not proceeding with due diligence, the commissioners were justified under the 27 clause of the agreement, in interfering and taking the works out of his hands. That question depends on the construction of the agreement, and mainly on the 27th clause, which must of course be construed with due regard to the remainder of the agreement, but the cardinal rule, that the court should be guided more by the words of the clause dealing specifically with the matter than by any general inference from the whole contract, ought to be applied. Taking first, then, the 27th clause, it provides 'that it shall be lawful for the said burial board, in case the said contractors shall fail in the due performance of any part of this undertaking ; these words are very stringent, because they deal generally with any breach of contract, and show that the contractor was willing to trust himself to the good conduct of the board, because one can hardly conceive a case in which no small breach of contract should occur, of which a captious person might take advantage. The clause goes on 'or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his creditors for the settlement of their debts, or shall carry on, or propose to carry

(1) L. R. 4 C. P. 55.

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on, his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy. Here are a number of specific acts mentioned in respect of which no case of hardship could be pleaded as a reason why the penalty imposed by the clause should not, be exacted. Then follows the proviso, on which the present case turns; and it is put on a footing of equality with the specific acts previously referred to. Now, what is it which is to produce the same effect as any of those previously described? It is, 'or shall not in the opinion, and, according to the determination of the said architect, exercise due diligence, and make such due progress as would enable the works to be effectually and efficiently completed at the time, and in the manner aforesaid,' that is the time provided for by the parties. It does not seem necessary to refer to any distinction between the time originally provided by the contract, and that which might be settled by the architect; it must be taken that before the time originally specified had arrived, and before any extension of time had been given, the board put in force the stringent powers given them by the contract, and on a certificate by the architect, that due dilligence had not been exercised took possession of the works, and of the plant and tools of the contractors. What, then, is the effect of the words "shall not, in the opinion, and according to the determination of the architect, exercise due diligence, and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid." It is not only a proviso for an additional or alternative event in which the powers of the board might be put in force, but a judge is appointed by the parties to decide whether that event has happened. The right, therefore, is made dependent, not on the event, but on the determination of the judge that it has occurred. Now, the plea founded in the 27th clause states that such a default did take place, which is superfluous, and need not have been averred, and that the plaintiff did not, according to the opinion and determination of the architect, exercise due diligence. Up to this point, the case seems to raise much the same question as was raised in the cases where there was a proviso in a lease that it should terminate if the tenant became bankrupt, and the tenant having been adjudicated bankrupt, the question arose whether it was necessary that he should have been so adjudicated on sufficient grounds in order to terminate the lease, and it was held by the majority of the court that he need not. That opinion is clearly the one to be acted on here, for it has been often decided on such contracts as the present one, that the decision of the architect means merely his decision in fact and not his decision on reasonable grounds; the plea therefore, is good and sufficient.

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Is it answered by any of the replications? By the first, the contractor sets up against the decision of the architect, that the delay arose from acts and defaults of the defendants in not delivering the plans and laying out the ground in due time. We must look, then, to see what powers are given to the architect. And two clauses are material, the 4th and 24th. The 4th, in terms, gives the architect the power and discretion to give what further drawings and plans he thinks right; but assuming that that were not so, and that the delay in giving the plans was unjustifiable, what would be the consequence of such delay? That appears to be provided for by the 24th clause, which gives power to the architect, under those circumstances, to extend the time for the completion of the works. It would seem, therefore, that all the matters relied on in the first replication are, in truth, matters which the architect ought to have taken into his consideration in determining whether there should be an extension of time, and, therefore, also, in determining whether the plaintiff used due diligence; and the replication only, in fact, sets up reasons why the architect should not have given the certificate he did. It is, therefore, in fact, an appeal from the architect, and not something paramount to his judgment, and not intended to be decided by him. Upon these grounds it would seem that the replication is not sustainable.

* * * *

There is an apparent equity introduced into the replication by the averment that it was the opinion of the architect that the plaintiff was entitled to extra time, but unless this is to be taken as implying bad faith on the part of the architect, it really means nothing, because people may act *bonâ fide* on other persons' opinions instead of their own, or may feel bound by authority to act in a particular way contrary to their own views.

* * * *

If the second replication is bad, the third one is bad also, for similar reasons. Referring now to the authorities relied upon by the plaintiff, the broad distinction is that in them the penalty was to accrue on a given event, viz., the failure of the contractor to fulfil his contract, and it was held in them that the failure must not have been caused by the other party; but in this case the penalty was not to accrue on the failure of the plaintiff to perform his contract, nor on any want of diligence on his part, but upon the judgment of the architect that there was such failure and want of diligence; the parties have made the architect the judge of the facts, and when he has given his judgment the penalty accrues whatever the real facts may be.

Montague Smith, J., says:

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Now, the architect has determined that the plaintiff did not exercise such due diligence. It was not denied, in the first replication, that he has come to that opinion and determination, for the answer given in it is that the want of due diligence was a consequence of the acts of the defendants. That is an issue which cannot, I think, be left to a jury, because, looking at the whole contract, I think the parties intended to make the architect the judge, and that his judgment should not be reviewed. I think they meant to leave to him the question whether there was a want of due diligence, and that he was bound to take into his consideration all the matters now relied on by the plaintiff. It seems to me that this case is distinguishable from *Wood* v. *Secretary of State for India* (1), because there was nothing in the contract relied on in that case equivalent to the 27th clause in this. Every case of this kind must turn on the construction of the particular contract, and if on the true construction an arbitrator is appointed to decide the question without appeal, his decision cannot be reviewed.

In *Stadhard* v. *Lee* (1), *Cockburn*, C. J., delivering the judgment of the Court, says:—

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

(1) 7 L. T. N. S. 736.

(1) 3 B. & S. 364.

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the defendants, if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute and unqualified power to put on additional hands and get the work done, and deduct the cost from the contract price payable to the plaintiff, and therefore, if these terms had been ever so unreasonable, we should have felt bound to give effect to them and to hold that, so long as the defendants were acting *bonâ fide*, under an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded and unreasonable, they were entitled to insist on the condition, and, consequently, that the replication, which only alleges that their dissatisfaction was unreasonable and capricious, but which stops short of alleging *mala fides* in the defendants in acting as is stated in the plea, is insufficient. We feel, however, bound, in justice to the defendants, to add that we do not consider the stipulation in question unreasonable. It amounts only to this, that the defendants who are the principal contractors for a great public work, and who are themselves probably under stringent terms to complete the undertaking with despatch, insist in employing the plaintiff to do a subordinate portion of the work, that if such work should not progress as rapidly as they may desire, they shall be at liberty to put on more hands and deduct the cost of them from the contract price, still leaving to the plaintiff the benefit of the contract.

In *Jones* v. *St. John's College* (1), *Mellor*, J., says :—

Mr. *Manisty* concedes that in general, where the works are specific and the contractor can form his estimate upon them, however absurd his contract may be, for instance, if he undertook to build some great work within a year, which it is utterly impossible he could do, still as he had the power of measuring and knowing the nature of the work, and understanding and forming a judgment upon his capacity to do it, he cannot excuse himself by saying it was impossible to do it in the time. But then Mr. *Manisty* contends when a contract provides for alterations to be prescribed by the other party, that it is impossible for a man so to bind himself as to exclude him from the benefit of the implied condition, that the order should be such as could be completed within the time. But as I have said, I do not think we can imply this. * * *

In *Roberts* v. *Bury Commissioners* (2) it is undoubtedly shown by the judgment of my brother *Blackburn* and myself, that if people will bind themselves to absurd regulations or to matters that appear impossible to be performed within the time, they must take the con-

(1) L. R. 6 Q. B. 115. (2) Ubi supra.

sequences of it, and therefore, if you make such a bargain it is clear you cannot imply a condition which appears inconsistent with it. Therefore, so far as the authority of the case goes they do not support Mr. *Manisty's* argument. Impossibilities may be of various sorts.

It is remarkable in how many of these contracts, which certainly seem one sided, one party puts himself in the power of another, but people are content to enter upon works and contracts of this description, because they rely that the person named will not give them orders that they cannot do.

Lush, J., says:

I am entirely of the same opinion; nothing can be more clear or explicit than the contract into which the plaintiffs chose to enter, and by that contract they must be bound. We cannot relieve them from it because it happens to operate hardly upon them; we have only to ascertain what the contract is.

No stipulation can be implied in any contract which is at variance with the express terms of the contract.

Hannen, J., says:

Undoubtedly it may be an unusual or an unwise contract to enter into, but there is no reason why a man should not enter into such a contract. Certainly, if he does in direct terms enter into a contract to perform an impossibility, subject to a penalty, he will not be excused because it is an impossibility, so if he does bind himself to perform an impossibility, if a certain named person shall require him so to do, there is nothing illegal in putting himself under such an obligation as that, and the question is whether or not the contract as set out in the rejoinder shows that the plaintiffs did in effect bind themselves. With regard to the language of that contract, I must say it seems to be impossible for the English language to supply words, by which a man can so bind himself if this contract does not. It is perfectly plain that the intention was to rely on the fairness, as well as the skill and judgment of the person who was the clerk of the works, checked as he would be by a responsible person, namely, the bursar of the college. It was intended to rely on their fairness and judgment, and I can see nothing unreasonable in men so agreeing to be bound by the fairness and judgment of others. Therefore, unless we are obliged to hold that a man could under no circumstances so bind himself, I should be compelled to come to the conclusion I have arrived at, that the contract does so bind the plain-

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tiffs, and for these reasons I agree in the judgment of the rest of the court.

In *Russell* v. *Da Bandeira* (1) *Erle*, C. J., says:

It almost invariably happens that, in the course of the construction of a house or a ship or other extensive work, the party for whom the work is done, from time to time, desires to have additions and alterations, and it is by no means an unusual thing to insert a clause, providing that the employer shall not be liable for extras or additions unless there be an order in writing fixing the price, or the certificate of an architect for the work so done. In many cases the court, though satisfied that the builder, acting upon the faith of an oral request, has fairly done the work for which he seeks to be paid, has felt itself to be fettered by the express terms of the bargain the parties have entered into. We cannot yield to suggestions of hardship on the one side or the other, though I must confess that, according to my experience, the hardship has most commonly been upon the side of the employer. By the terms of this contract the £10,400 is inclusive of all charges for the ship finished and fitted perfectly in every respect, and no charges are to be demanded for extras; but any addition or additions which may be made by an order in writing of Sir *George Sartorious*, as an extra or extras, are to be paid for at a price to be previously agreed upon in writing. No additions were ordered by the admiral in writing, but during the progress of the work orders were, from time to time, given by persons who represented the Portuguese Government for additions and alterations, for which, under ordinary circumstances, Mr. *Scott Russell* might well suppose he was to be at liberty to charge. He might have declined to comply with these requests unless they were made in writing. I feel bound to give effect to the terms of the contract, and to hold that the extras and additions supplied not under written orders during the performance of the contract, form part of the contract for the construction of the ship, and are not to be paid for by the defendant.

Byles, J. (2), says:

I must own I felt very much disposed to escape, if possible, from Mr. *Collier's* argument, with respect to the articles supplied and work done without orders in writing, but I think the cases he has referred to are too strong to be got over; especially that of *Scott* v. *The Corporation of Liverpool* (3), which is substantially the same as

(1) 13 C. B. N. S. 200. (2) P. 205.
(3) 28 L. J. (Ch.) 230.

this case. It is a salutary rule, and ought not to be broken in upon. The contractor has no right to complain if he loses the the price of extras and additions, which, in disregard of the stipulation he has entered into, he furnishes without getting a written authority.

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In *Clarke* v. *Watson*, *Erle*, C. J., (1) said:

I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of *William Lambert*, or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make, and it is of the highest importance that every contract should be construed according to the intention of the contracting parties; and it is important in a case of this description that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done according to the contract and specification. Here the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (defendants') surveyor, and that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said, that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his satisfaction, and that the said surveyor had wrongfully and improperly 'neglected and refused so to do.' That, in my opinion, is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not indicate anything of that sort; if the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiffs to take from the defendants the protection of their surveyor and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not, in my judgment, such as to entitle them to succeed.

Williams, J., says:

I am of the same opinion; notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

(1) 18 C. B. N. S. 284.

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Willes, J., says:

I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor may have been guilty of may be an error in judgment, or he may have refused to exercise any judgment, in which case the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

In addition to these cases may be cited that of *Ranger* v. *Gt. West Rail. Co.* (1), a leading case too long to be stated in full, bearing strongly on the present, in which the propriety of having a proper referee in railway contracts, and making the payments dependent on his certificate, and as to imposing and enforcing penalties, is fully discussed, and in which case it was held, though the engineer appointed by the company was a stockholder in the company he was not, by reason thereof, incompetent to act as such referee. Some American cases I will not set out at length, but merely name. A contract for the construction of a railway, by the terms of which company's engineer is to be arbiter of all matters connected with the work, will, if fairly made, be enforced: *Phelan* v. *Albany & Susquehanna R R. Co.* (2); *Kidwell* v. *Baltimore & Ohio R. R. Co.* (3); *Alton, Mt. Carmel & New Albany R. R. Co.* v. *Northcote* (4); *Condon* v. *South Side R. R Co.* (5); *O'Reilly* v. *Kerns* (6); *Howard* v. *Alleghany Valley R.R. Co.* (7).

The provisions of a contract between a railway company and a contractor for building a portion of its road providing that "the engineer shall be the sole judge of the quality and quantity of all work herein specified, and from his decision there shall be no appeal," * * * constitute the engineer sole umpire, and if the company furnish a suitable engineer no recovery can be had for work done under such contract without or beyond his estimate, without the most irrefragible

(1) 5 H. L. 72.
(2) Lansing, N Y. 258, 1869.
(3) Grattan (Va.) 676, 1854.
(4) 5 Ill. 49, 1853.
(5) 14 Grattan (Va.) 302, 1858.
(6) 52 Penn. 214, 866.
(7) 69 ib. 489, 1871.

proof of mistake in fact, or corruption on the part of the engineer, or positive fraud in the opposite party in procuring the under estimate. See *Vanderwerker* v. *Vermont Central R. R. Co.* (1); *Herrick* v. *Same* (2).

In a contract for the construction of a railroad it was provided that the decision of the chief engineer should be final and conclusive in any dispute that might arise between the parties to the agreement relative to or touching the same: *Held*, that the individual who filled the office of chief engineer when the adjudication was called for, was the proper person to decide disputes between the parties; and that one, who had held the office at the time the contract was made, but who had resigned, was not empowered to adjudicate between them. See *North Lebanan R. R. Co.* v. *McGrann* (3).

Alterations.

The contract provided that alterations directed by the engineer should "be made as directed." Such alterations are within the jurisdiction of the engineer. Alterations directed did not abrogate the contract or substitute a new one: they were within the original contract. See *O'Reilly* v. *Kerns* (4).

Extra work.

B. contracted with defendant to build its road, and plaintiffs sub-contracted in writing with B. to build particular portions of it. By both contracts the work was to be done to the satisfaction and acceptance of company's engineer, and no claim was to be allowed for extra work unless it was performed under written contracts or orders signed by the engineer. Plaintiffs, in the execution of their contract with B, made an excavation for a bridge agreeably to the directions of the engineer, and had left it as finished; the engineer found it necessary to have the excavation enlarged and ordered it done; plaintiffs made the enlargement, but no contract was made between them and defendant with reference to it. Held: That there was no ground for implying or presuming a contract, and that plaintiffs could not recover of defendant therefor. See *Vanderwerker* v. *Vermont Central R. R. Co.* (5).

There could be no claim for extra work as the engineer had not ordered in writing. *Ibid.*

The rule is not varied by the fact that previous to doing the extra work the contractors were assured by the local or assistant engineer,

(1) 27 Vt. 130, 1854.
(2) Ibid 673.
(3) 33 Penn. 530, 1859.
(4) 52 Penn. St. 214, 1866.
(5) 27 Vt. 125, 1854.

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who communicated the order from his chief, that they should receive extra compensation therefor, it appearing that the assistant had no authority to make the promise for the company. See *Barker* v. *Troy and Rutland R.R. Co.* (1).

Certain detailed estimates of the cost of work were annexed to the contract for the construction of a railway. Shortly before the contract was made many persons, and among them *B. C. & Co.*, were assembled to make proposals to the railway company for the work. These estimates were exhibited to them by the engineer of the company, who stated they were made according to his best judgment, but were only approximate estimates, that they were given them that they might have the benefit of his judgment, and that they could go over the ground and examine for themselves. *B. C. & Co.* went over the ground, and were experienced and competent enough to judge for themselves, but did not make a thorough examination. The contract was made fairly without fraud or mistake, and was an entire contract to do the whole work for the sum of $200,000. A portion of the work proved to be much more expensive than was estimated, from a large excess of rock excavation above the quantity estimated. Held: that *B. C. & Co.*, understandingly took the risk of the work, and were not entitled to any allowance beyond the contract price.

By the contract certain depot buildings were to be erected by the contractors, "after such plans and of such dimensions as might be adopted by the engineer. The engineer required certain of them to be built of somewhat larger dimensions than he had stated at the time of the signing of the contract that he should require, and the expense of their erection was thereby increased above the sum named in the estimates. Held, that the contractors were not entitled to an allowance beyond the contract price for the increased expense. See *Cannon* v. *Wildman* (2).

The plaintiff, as a sub-contractor under *B.*, contracted to build a section of defendants' road, and the engineers of the company had authority to direct the removal of the earth from one section to another when needed; and by the contract between the company and *B.*, he, *B.*, was bound to move the earth from one section to another, but no engineer had power to bind the company by any contract for grading and removing earth, and if *B.* was required by the engineer to so move the earth, he could obtain compensation under this contract. The engineers required plaintiff to move earth from one section to another, assuring plaintiff that defendant would

(1) 27 Vt. 766. (2) 28 Conn. 472, 1859.

pay for the extra work. The work was beneficial to defendant, and plaintiff charged no more than it would have taken to procure the earth elsewhere, but it did not appear that defendant ever consented to have plaintiff do the work on its credit, and the plaintiff had no general contract with defendant. Held, that plaintiff could not recover from the railroad company; that there was nothing in the duties of an engineer authorizing him to bind the company for such work under such circumstances. See *Thayer* v. *Vt. Central R. R. Co.* (1.)

As to the forfeiture and liquidated damages claimed by the Crown to be set off against any amount that may be due the contractors, the contract provides that the works should be fully and entirely completed in every particular, and given up under final certificate and to the satisfaction of the commissioners and engineer on or before the first day of July, one thousand eight hundred and seventy-one, time being declared to be material and of the essence of the contract, and in default of such completion as aforesaid, on or before the last mentioned day, the contractors should forfeit all right, claim or demand to the sum of money or percentage thereinafter agreed to be retained by the commissioners, and every part thereof; and also to any moneys whatever which might be, at the time of the failure of the completion as aforesaid, due and owing to the contractors; and the contractors should also pay to Her Majesty, as liquidated damages, and not by way of fine or penalty, the sum of two thousand dollars ($2,000) for each and every week, and the proportionate fractional part of such sum, for every part of a week during which the works embraced in the contract, or any part thereof, shall remain incomplete, or for which the certificate of the engineer, approved by the commissioners, shall be withheld; and the commissioners may deduct and retain in their hands such sums as may become due as liquidated damages,

(1) 24 Vt. 440.

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from any sum of money then due or payable thereafter to the contractors.

There is no doubt the work was not completed within the time agreed on, and therefore the damages attached; the earliest period that could possibly be named as the time when the work was finally completed, would be the end of August, 1872—Mr *Schrieber* says not earlier than September, 1872. This sum of $2,000 a week I am bound to hold to be liquidated damages, which the Crown has a right to claim against, and deduct, by way of set-off from the suppliants, without proving any loss by delay. I can discover no grounds for saying this claim has been in any way waived or released by the Crown or the commissioners—assuming the commissioners had the power to do so after the right of the Crown vested.

The tender of $12,436.11 was, I infer, intended to be, if accepted by the contractors, in full settlement of all claims on both sides. In my judgment the contractors could not have legally claimed or enforced against the Crown the full amount recommended by the commissioners, the item of $1,773.34 for change of grade, being the only one for which any legal liability could attach; but as the Crown, by its answer, appears to admit the amount tendered as a claim to which suppliants are entitled, I should be prepared to award that sum to the suppliants, less the costs of the Crown in this suit, which in such case must be borne by the suppliants. If the Crown, however, insist on requiring a decree for the penalties incurred, the expediency of claiming which, under all the circumstances, I consider extremely doubtful, I know of no way that I can escape the duty of awarding it; but in that case, considering that no claim was ever put forward for the forfeiture while the work was going on that I can discover, that it was not urged

as a fair and proper off-set to the suppliant's claim for extras until litigation commenced, and the answer was put in, that the tender was, as I understand it, in full settlement of all claims on both sides, I think I ought not, in the exercise of a legitimate discretion, to award costs in addition to the forfeiture, in which latter case the petition will be simply dismissed. In the event of an intimation being given by the counsel on the part of the Crown that the forfeiture is not insisted on, the formal judgment will be in favor of the suppliants for the sum of $12,436.11, less the costs of the Crown in this case, to be taxed and deducted from the said sum, and the balance paid by the Crown to the suppliants in full.

The Crown not insisting on the forfeiture, a judgment was entered for amount tendered less costs of the Crown.

Solicitor for the suppliant: *William Miller.*

Solicitor for the Crown: *A. F. McIntyre.*

MARSHALL WOOD.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

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*Nov. 27,28.

Petition of right—Application for security for costs, when to be made.

Where, by a letter addressed to the suppliant, the Secretary of the Public Works Department stated, that he was desired by the Minister of Public Works to offer the sum of $3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security

*PRESENT:—Fournier, J.

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for costs, being a matter of discretion and not of absolute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application.

Application for security for costs in this court must be made within the time allowed for filing statement in defence, except under special circumstances.

THE petition of right was filed on the 1st September, 1876, by the suppliant, who described himself therein as "of the city of *London* and county of *Middlesex* in that part of *Great Britain* and *Ireland* called *England*."

On the 27th September, the day before the statement in defence was due, the counsel for the Crown asked the solicitors for the suppliant for further time to answer, and obtained one week. The statement in defence was not fyled at the expiration of the week, but on the 27th October the solicitors for the Crown wrote to the solicitors for the suppliant stating that the statement in defence was in the hands of the printer, and, for the first time, asking security for costs. On the 13th November, the agents of the solicitors for the Crown took out a summons calling upon the suppliant to show cause why security for costs should not be given, and for a stay of proceedings. This summons was enlarged until the 27th November.

Mr. *Cockburn*, Q.C., for suppliant:

There is some obscurity about the practice to be followed in this court on such an application—whether that of the Court of Chancery or that of the Common Law Courts. In chancery the application must be made before time for answering expires or is extended, when the residence of the plaintiff appears on the face of the bill. In this case the summons ought to be discharged on two grounds:—1. Because the application was not made within the time allowed to file the

statement of defence. See *Smith* v. *Day* (1); *Arthur* v. *Brown* (2). 2. Because the Government had sufficient security in their own hands, as they admit that they owe the suppliant the sum of $3,950. See *Re Carroll* (3); 2 *Archbold's* Q. B. Pract. (4).

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Mr. *A. F. McIntyre*, for the Attorney General :—

By the 15th sec. of the petition of Right Act, 1876, and 258th rule of the Exchequer Court Rules, the practice in use in Her Majesty's High Court of Justice in *England* is to be followed, where no other provision is made. Now by the English petition of Right Act, 23 and 24 *Vic.*, ch. 34, a party may intitule his petition in any one of the Supreme Courts of Common Law or Equity at *Westminster*, in which the subject-matter of such petition, or any material part thereof, would have been cognizable if the same had been a matter in dispute between subject and subject; and sec. 7 makes the practice and procedure of the Courts of Law and Equity, respectively, applicable to petitions of right. This petition is framed after the Common Law form, and would have been tried in a Common Law Court, and therefore, the Common Law Rules as to security for costs should be followed, which is that security can be applied for at any time before issue joined. As to the 2nd objection—the funds referred to are not such as would satisfy a demand for security for costs. *Kilkenny Rly. Co.* v. *Fielden* (5); *Higgins* v. *Manning* (6).

FOURNIER, J.:—

The application for security for costs in this case ought to have been made within the time allowed for filing the statement of defence. The Crown has asked

(1) 2 Ont. Chy. Ch. R. 456.
(2) 3 Ont. Chy. Ch. R. 396.
(3) 2 Ont. Chy. Ch. R. 305.
(4) 12th Ed. p. 1418.
(5) 6 Exch. 81.
(6) 6 Ont. Prtc. R. 147.

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for and obtained an extension of time to file a statement of defence, and has thereby waived its right to demand security for costs.

Application for security for costs in this Court must be made within the time allowed for filing a statement in defence, except under special circumstances. The power of ordering a party to give security for costs being a matter of discretion, and not one of absolute right, and it appearing that the Government offered by letter from the Secretary of the Public Works Department the sum of $3,950 to the suppliant in settlement of his claim—in the exercise of my discretion, I, on this ground also, refuse the application, as in my opinion, the doing so cannot subject the Crown to any inconvenience, whilst its allowance might cause great hardship to the suppliant.

The summons is therefore discharged. Costs to be costs in the cause to the suppliant.

Summons discharged.

Solicitors for suppliant: *Cockburn & Wright.*

Solicitors for respondent: *Mowat, Maclennan & Downey.*

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*April 16,23.

MARSHALL WOOD.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Executory contract—Recovery of value of work done if expenditure unauthorized by Parliament—31 Vic., c. 12, secs. 7, 15 and 20.

By his petition of right, *W.*, a sculptor, alleged that he was employed by the Dominion Government to prepare plans, models, specifications and designs, for the laying out, improvement and estab-

*PRESENT—Sir W. B. Richards, C.J.

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lishment of the Parliament square, at the city of *Ottawa;* that he had done so, and superintended the work and construction of said improvements for six months. He claimed $50,000 for the value of his work. 31 *Vic.*, ch. 12 by sec. 7 provides that, when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning to be binding; and by sec. 15 provides that before any expenditure is incurred there shall have been a previous sanction of Parliament, except for such repairs and alterations as the public service demands; and by sec. 20 requires that tenders shall be invited for all works, except in cases of pressing emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.

Held,—1. That the Crown in this Dominion cannot be held responsible under a petition of right on an executory contract entered into by the Department of Public Works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not made in conformity with the above 7th section of 31 *Vic.*, ch. 12.

2. That under sec. 15 of said Act, if Parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the Department of Public Works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

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

THIS was a petition of right by which the suppliant alleged:

"That on or about the first day of January, in the year of Our Lord one thousand eight hundred and seventy-five, the Government of the Dominion of *Canada* became, and were, and still are, indebted to your suppliant in a large sum of money, to wit, the sum of fifty thousand dollars; for that your suppliant, then being a sculptor, and engaged extensively in works of art at the city of *London*, aforesaid, was employed by

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the Government aforesaid to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the Parliament Square, at the city of *Ottawa*, aforesaid.

"That your suppliant did make and deliver to the said Government of *Canada*, and at their request, numerous plans, specifications, models and designs, for the purpose aforesaid, and did, at the request of the said Government, superintend the work and construction of said improvements, for a long time, to wit, for six months; and your suppliant also, at the request of the said Government, made numerous voyages and journeys to and from and between *London*, aforesaid, and *Ottawa*, aforesaid, in and about the said works, and in and about the obtaining of materials for the same; and also for that your suppliant was engaged by the said Government to superintend the completion of the said works in accordance with said drawings, specifications, models and designs, and your suppliant did accordingly commence, and in part perform the said work, and was always ready and willing to do and complete the whole of the said work, yet the Government aforesaid refused to permit your suppliant to proceed with or complete the said works, and wrongfully discharged and prevented your suppliant from so doing.

"Whereby your suppliant lost the price of the work so done, and the profits, which would otherwise have accrued to him from the completion of the said work.

"Also for that the Government aforesaid are indebted to your suppliant in a large sum of money paid out and expended in and about the said drawings, models and work and journeys by your suppliant, for them, the said Government, at their request.

"Your suppliant, therefore, humbly prays that relief

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be granted to him, and that right be done in the premises, agreeably to the provisions of "The Petition of Right Act of *Canada*, 1875."

In answer to the said petition *Edward Blake*, Her Majesty's Attorney General for *Canada*, on behalf of Her Majesty, made the following defence:

"1. I deny that the Government of *Canada* ever was indebted to the suppliant, as alleged in said petition.

"2. I deny that the suppliant ever was employed by the Government of *Canada*, to prepare plans, specifications or designs, for the laying out, improvement and establishment of Parliament Square in the city of *Ottawa* as alleged.

"3. I deny that the suppliant made or delivered to the Government of *Canada*, at their request, numerous plans, specifications, models and designs, for the purpose aforesaid, or that he did, at the request of the said government, superintend the work and construction of the said improvements for a long time, to wit, for six months, or that, at the request of the said government, he made numerous voyages and journeys, to and from and between *London* and *Ottawa*, in and about the said works, and in and about obtaining materials for the same, or that he was engaged by the government to superintend the completion of the said works in accordance with the said drawings, specifications, models and designs, or that he did commence and in part perform the said work, or that the government wrongfully discharged and prevented him from proceeding with or completing the said works.

"4. I deny that the Government of *Canada* is indebted to the suppliant for money paid out, and expended in and about the said drawings, models, works and journeys, at the request of the said government.

"5. I say that no lawful contract or agreement was ever

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made by or on behalf of the Government of *Canada* with the suppliant for any of the pretended services or matters in the said petition mentioned, or for the payment to the suppliant of any sum of money therefor, except as hereinafter stated, and there is no record in the Department of Public Works, or in any of the other Departments of the said Government, of any such contract or agreement.

"6. By the express terms of the 7th section of the Act, 31 *Vic.*, ch. 12, entitled "An Act respecting the Public Works of *Canada*," any such contract or agreement must have been signed and sealed by the Minister of Public Works and countersigned by the Secretary of the Public Works Department, and I charge that no such contract or agreement ever was in fact so signed, sealed, or countersigned.

"7. The employment alleged by the suppliant would have involved the expenditure of a large sum of money, and by the express terms of section 15, of the last mentioned Act, such expenditure would have required the previous sanction of parliament, and no such previous sanction had been given.

"8. I believe the suppliant did, in fact, some time in the year 1873, upon the strength of some informal communications with some officers of Government, commence the preparation of plans, models and specifications for laying out and ornamenting said Parliament square, in the expectation that such plans, models, and specifications would be adopted by the Government, and that he would be employed in executing the same, but I say that the same were not in fact adopted, and that they were found, for various reasons, not to be suitable, and were rejected, and the suppliant was then informed by the Department of Public Works that his services would not be required in connection with the said works.

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"9. The suppliant thereupon made a claim for payment for alleged services in preparing models and other matters, of a large sum exceeding $30,000, which the Department of Public Works refused to recognise.

"10. The department, nevertheless, having considered that, although the suppliant had no legal claim to any payment whatever, yet, as he had been at considerable expense in preparing plans and models in expectation of their being adopted, and of being employed in the execution of the work, proposed to the suppliant to make him some moderate reasonable compensation therefor, and offered to pay him the sum of $3,950, which the suppliant refused to receive.

"11. Her Majesty is still willing to pay the suppliant the said sum of $3,950 by way of compensation as aforesaid, but without admitting any legal right thereto on the part of the suppliant; and on behalf of Her Majesty, but without prejudice, I hereby offer and submit to pay him the said sum.

"12. On behalf of Her Majesty, I pray that the said petition may be dismissed with costs."

The suppliant joined issue on all allegations and statements contained in the answer of Her Majesty's Attorney General for *Canada*, filed in this cause.

And, besides taking issue thereon, the suppliant demurred to the statement contained in the sixth paragraph of the answer which, he said was bad in law on the grounds following:

"That it is no answer to the suppliant's claim, which is for work and labor, moneys expended and benefits conferred, to say that there was originally no sufficient contract, inasmuch as the case does not now rest on contract; but, on a *quantum meruit* for such work and services, &c., and that the seventh section of the said Act does not apply to executed contracts and works of the description mentioned in the petition.

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"And the suppliant also demurs to the seventh paragraph of said answer which, he says, is not sufficient in law on the following grounds:

"1st. That it is no answer to suppliant's claim, that parliament had not sanctioned the expenditure referred to. No contractor could be expected to enquire into such a preliminary condition;

"2nd. And, that the statement contained in said seventh paragraph is inconsistent with the tenth and eleventh paragraphs, which go to show that the Crown must have had authority for such expenditure;

"3rd. And, that the wrong-doing of Ministers of the Crown, in entering into contracts without such authority cannot be set up to avoid the contract itself."

Mr. *Cockburn*, Q.C., for demurrer:

Petition of Right will lie for unliquidated damages from breach of contract: *Thomas* v. *The Queen* (1).

In *Smith* v. *Upton* (2), the cases are collected in which petitions of right will lie against the Crown for simple contract debts. Actions against Municipal Corporations are analogous to the present case. *Pim* v. *Municipal Corporation of Ontario* (3), in appeal, settles the law in this province as to liability of corporation in executed contracts without corporation seal; and numerous cases since in the *Ontario* Courts follow it as the leading authority.

"The Crown can not only speak through an authentication under the great seal, but also by a written or parol direction from the Board of Admiralty:" see *Buron* v. *Denman* (4). In the same sense the Minister of Public Works, who has by Stat. 31 *Vic.*, ch. 12 the management and direction of the Public Works of the Dominion, and under whom (sec. 3) engineers, super-

(1) L. R. 10 Q. B.31.
(2) 6 M. & G. 251, Note A.
(3) 9 U. C. C. P. 304.
(4) 2 Ex. 189.

intendents and other officers are to be appointed for the construction, maintenance, use and repair of the public works and buildings, can order and direct by parol any works to be done for the public service, and when so done, the price or value thereof can be named.

Sec. 7 only provides, that when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning, to be binding. This section cannot be held to apply to executed contracts of which the Government have reaped the benefit.

Sect. 15, provides, that before any expenditure is incurred there shall have been a previous sanction of Parliament, except such repairs and alterations as the public service demands.

Sec. 20, requires that tenders shall be invited for all works, except cases of pressing emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.

Sec. 41, relating to arbitration, provides that upon claims arising out of contracts in writing, the written stipulations shall be observed, &c., the inference to be drawn is that in respect of unwritten contracts a different mode of estimating the damages shall be adopted.

In point of fact an appropriation was voted for the year 1873 (when these services were rendered) which though general—"Miscellaneous works not otherwise provided for"—might well be taken to cover the work done here; at all events this item shows that Parliament does not require that there shall be specific appropriations in all cases. We have a right to look at the practice of the department; we see by papers laid before Parliament, as shown in its journals and proceedings, that works involving much larger sums than is in question here, are being carried on without tenders,

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contracts or specific appropriations. In the case now before the court, the services were rendered by the suppliant under the orders of a minister of the Crown, who by statute has authority over all the public works, and under the windows of whose department the work was done It cannot be that the liability for services so rendered can be now repudiated by the Crown.

Mr. *Maclennan*, Q.C., for the Attorney-General:

The suppliant sues the Crown for work, labor and materials, and his claim may be divided into two parts, viz.: work, &c, of which the Government has had the benefit, and work, &c., which they refuse to accept, both having been done at the request, as is alleged, of the Department of Public Works.

The demurrer admits that no contract, such as is prescribed by the Public Works Act, was made with the suppliant, and the real question is, whether the Crown is liable for the services referred to, supposing them to have been ordered in an informal manner by an officer of the Department.

We contend it is clear the Crown is not liable;—the suppliant has argued that Petition of right lies for breach of contract, but that is not disputed. The real question is, whether or not there was any contract.

The suppliant has argued also that the cases establishing the liability of corporations on executed agreements are applicable, and govern this case, such as *Pim* v. *Ontario*, but he cited no authority for that position, and it is submitted that none can be found. None of the cases in the English courts on petition of right support that view.

In *England* there are certain well known modes in which the undertakings of the great departments of State are entered into, either prescribed by statute or so

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well established by long usage as to have acquired the force of law, and whenever contracts are made in any of these recognized modes they are binding on the Crown, and may be enforced by petition of right.

In this country the departments of State, and all their powers and acts, are conferred and regulated by statute. There is no such thing as usage, nor can the usage of the Imperial Departments govern here on any intelligible principle.

The Dominion Parliament has thought fit, doubtless for very good reasons, to regulate this whole matter very completely, even to the most minute particular.

The several sections of the Public Works Act provide for every kind of case (1). The combined effect of these three sections is: 1st. There must be previous authority from Parliament for the expenditure, before a contract is made which involves it. 2nd. All contracts must be in writing, and be signed and sealed by the Minister or his Deputy, and countersigned by the secretary. 3rd. All works are to be let by tender, except in cases of pressing emergency, or where it can be better executed by the officers and servants of the department. 4th. In cases of necessity the Minister may cause expenditure not previously sanctioned by Parliament, but he is not authorized to do this without a contract in the prescribed form.

So careful has the legislature been to prevent contracts being made in a loose, informal way, that by the Act 31 *Vic.*, ch. 35, they have regulated the mode of entering into all the small contracts connected with the departments.

The object of the Legislature was to maintain an efficient control over the public expenditure, and to

(1) Secs. 7, 15, 20 of 31 Vic., ch. 12.

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hold that a suit such as this can be maintained would defeat all their efforts.

Sir WM. B. RICHARDS, C. J.:

The questions arising under this demurrer are:—

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

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

The Public Works Department in this Dominion, being a department of state, presided over by a minister of the Crown, responsible to Parliament for the conduct of the business of his department, may, I have no doubt, as the agent of or representing the Crown in all matters under the charge of that department, make agreements and enter into contracts which would bind the Crown, unless there is some legislative enactment or, perhaps, Orders in Council, controlling and limiting such power. The language used by Chief Justice *Cockburn* in *Churchward* v. *The Queen* (1), and by Lord *Blackburn* in *Thomas* v. *The Queen* (2), indicates that in *England* the admiralty and the war department were understood to possess the power so to bind the Crown. But I am not aware that there are there any legislative restrictions limiting the right contended for. So that the matter here comes up for decision as to the effect of

(1) L. R. 1 Q. B. 173. (2) L. R. 10 Q. B. 31.

the 7th and 15th sections of the Dominion statute 31 *Vic.* ch. 12, respecting the public works of *Canada.*

The 7th section is as follows:

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

Though the words used are "to be binding on the department," that must mean binding on the Crown, for the department is not a corporation, but a department of state; and under the following section 8 all actions for the enforcement of any contract in respect of any work or property under the control of the department must be instituted in the name of Her Majesty's Attorney General for *Canada.*

I at first was inclined to think that the seventh section was merely directory, for the purpose of pointing out the proper means for verifying the contracts entered into by the department, but not essential to the validity of the contract itself. But the words "no contract shall be binding on the department unless signed and sealed by the minister or his deputy" seem to me to indicate the intention of the legislature in an unmistakable manner. In many of the cases where the question has been discussed whether the statutory provision is to be considered directory or imperative, it is said in argument, though the statute points out the manner of doing an act, yet it does not say if it is not so done it shall be void. But here the words are express—"it shall not be binding."

I am of opinion, that the contract set out in the suppliant's petition is not binding as such, and under it he would have no right to recover damages for not being allowed to complete the work referred to in his petition. I do not think, however, that the 7th section would pre-

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

But it is said, the 15th section of the statute prevents the suppliant's recovering, because it would be an expenditure not previously sanctioned by parliament, and not for such repairs and alterations as the necessities of the public service demanded. The words are: "The Minister shall direct the construction, maintenace and repair of all canals, harbors, roads, or parts of roads, bridges,

slides, or other public works, or buildings in progress, or constructed, or maintained at the expense of *Canada*, and which by this Act are, or shall hereafter be, placed under his management and control; but nothing in this Act shall give authority to the Minister *to cause expenditure* not previously sanctioned by parliament, except for such repairs and alterations as the necessities of the public service may demand."

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The history of the *Churchward* case is given at considerable length in Mr. *Todd's* book on parliamentary Government, commencing at page 498, and it appears that parliament refused to grant the money to carry out a contract entered into with the Government for carrying the mails, there being a provision in the contract that the paying of the money should be subject to a vote of parliament. The general doctrine of the necessity of an appropriation of money by parliament to justify an expenditure is discussed, and though it is laid down that Ministers often do expend money without a special appropriation, it is often done by taking monies from some other fund and applying afterwards to parliament to restore it. I am not aware that the rule in *England* arises from any specific enactment. It is laid down in resolutions of the House of Commons, and, I think, in Treasury Orders. It certainly seems derogatory to the office and position of a Minister of State to hold, that he could not cause an expenditure, however trifling, for public purposes without the same having been previously sanctioned by parliament, and that any person doing work for his department, however trifling in amount, by order of a Minister, must be compelled to enquire before he undertakes the work if the proper sanction for the expenditure has been obtained, or be placed in a position in which he cannot enforce

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his claim by a petition of right, if necessary, if he accepts the employment or does the work.

Very many people undoubtedly do undertake work for the different public departments without enquiring if the expenditure has been sanctioned, and they are generally paid for the work they do. Even if each person were told when undertaking any work (whether great or small), that he must depend on the approval of parliament of the expenditure before he could claim compensation, very few, if any, would hesitate to undertake the work. The question, however, is what are the legal rights of parties who undertake such work, the expenditure for which has not been previously sanctioned by parliament? Have they a right to claim compensation through a petition of right, or, having trusted to the Minister of the Crown that he had the right to incur the expense, though in truth he had it not, must they further trust to the faith of parliament to indemnify them, as was suggested by Lord *Mansfield* in *MacBeath* v. *Haldimand* (1).

It is no doubt of the greatest importance, that public works should not be undertaken which will cause the expenditure of money not previously sanctioned by parliament, and there is no doubt that sudden emergencies may arise when it would be the duty of a government to incur such expenditure for the public service and trust to parliament to indemnify them. That seems to be the rule in *England*, and it is probable that no contracts would be there entered into by any public department without a proviso being inserted, that the expenditure to be incurred should be first sanctioned by parliament; under such circumstances, until the money was voted, I doubt if a petition of right could be maintained, and if no such provision were made and an abso-

(1) 1 T. R. 172.

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lute agreement entered into, the authorities to which I have referred show, that the suppliant in a petition ought to succeed.

If the Minister of Public Works is to be considered the agent of the Crown, and his power is to be restricted by the Act of parliament, and the analogy of ordinary agency is to be applied to him, he could not bind the Crown by his acts which were contrary to the provisions of the statute, nor legally incur expenditure not previously authorized by parliament.

The practice in relation to matters of legislation and government in *England* is so much followed in this country, that it is proper to refer to the practice there in illustrating the intentions of our own legislature.

The rule which is laid down in *England* as to unauthorized expenditure of the public money was no doubt well known to the framers of the statute establishing the department of public works, and knowing that by far the largest expenditure of money would be made through that department, they may have thought it wise to prevent the expenditure of public money until an appropriation for such expenditure had been made by parliament. They at the same time excepted out of the prohibitory provision expenditure for such repairs and alterations as the necessities of the public service might demand. It seems to me, that the most effectual way to carry out the intention of the legislature in this respect is to hold, that persons claiming money, the expenditure of which has not been sanctioned by parliament, cannot recover the same through a petition of right until parliament has sanctioned the expenditure, and in this view I think the plea must be held good against the demurrrer.

It was assumed on the argument, and no doubt correctly so, that the services and works claimed for

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were rendered by the suppliant in relation to works and properties under the control and management of the minister of public works. The 20th section of the the statute refers to the advertising for tenders for the expenditure of all works, except in cases of pressing emergency, or when from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.

It may be, that the work and services done by the suppliant would come under the latter part of that section, which evidently contemplates works being done when laborers and overseers would be employed by the day or month, and as to which the contract referred to in the 7th section might not be considered as necessary to be made with that class of persons. Still the 15th section would equally apply if the expenditure had not been previously sanctioned by parliament.

I assume the parties desire the opinion of the court on the broad question whether the suppliant can recover, and in the view I take of the 15th section the suppliant can only recover if the work and services rendered come under the exception referred to in that section, and in which necessity would also justify the omitting to advertise for tenders under the 20th section.

The sixth paragraph of the answer is, in my view, a sufficient answer to that part of the suppliant's petition which complains of his wrongful discharge from the work and of the loss of profits, and taking the analogy of pleading at common law, I think it may be taken as distributive, and therefore is not wholly bad.

As to the demurrer to the 7th paragraph of the answer, I think the answer sufficient and the demurrer bad.

It was contended on the argument, that parliament has made appropriations for these works and so sanc-

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tioned the expenditure. If that be so, and the work done was of the kind that might properly be executed by the officers and servants of the department, then I apprehend no contract would be necessary to bind the department for work done, and so suppliant should recover for work so done; and in my view also for the work actually done if the expenditure was previously sanctioned by parliament.

That of course is a matter of fact, and must be proved as any other matter of fact.

Demurrer disallowed.

Solicitors for suppliant: *Cockburn & Wright.*

Solicitors for respondent: *Mowat, Maclennan & Downey.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1877

*Nov. 14.

EDWARD TYLEE *et al*.....SUPPLIANTS;

AND

THE QUEEN.....RESPONDENT.

Petition of Right Act 1876, *sec.* 7—*Statute of Limitations*—32 *Henry VIII., ch.* 9—*Buying pretended titles*—*Public Works*—*Rideau Canal Act*, 8 *Geo.* 4, *ch.* 1—6 *Wm. IV., ch.* 16—*Trustee, contract by*—*Compensation for lands taken for canal purposes*—2 *Vic., ch.* 19—7 *Vic., ch.* 11, *sec.* 29—9 *Vic., ch.* 42.

Under the provisions of 8 *Geo. IV.*, ch. 1, passed on the 17th Feb., 1827, by the Provincial Parliament of *Upper Canada*, and generally known as the *Rideau* Canal Act, Lt.-Colonel *By*, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one *Grace McQueen*, as

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necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. *Grace McQueen* died intestate, leaving *Alexander McQueen*, her husband, and *William McQueen*, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, *Alexander McQueen* released to *William McQueen* all his interest in the said lands, and on the 6th February, 1832, *William McQueen* granted to Col. *By* all the lands previously granted to his mother. Col. *By* died on the 1st February, 1836.

By 6 *William IV.*, ch. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 *Vic*, ch. 11, *Canada*, the *Rideau* canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in *Great Britain*, and by sec. 29 it was enacted : "Provided always, and be it enacted, that all lands taken from private owners at *Bytown* under the authority of the *Rideau* Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By the 9th *Vic.*, ch. 42, *Canada*, it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at *Bytown* set out and ascertained and taken from *Nicholas Sparks*, under 8 *Geo. IV.*, ch. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to *Sparks* for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19th and 20th *Vic*, ch. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of *Canada*, and by the *British North America* Act they became vested in Her Majesty for the use of the Dominion of *Canada*.

The suppliants, the legal representatives of Col. *By*, brought a petition of right, alleging the foregoing facts, and seeking to have Her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to

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them, and the rents and profits thereof paid, and as to any parts sold that the values thereof might be paid together with the rents and profits, prior to the selling thereof.

By his statement in defence, the Attorney General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Col. *By* passed to *William McQueen*, but the claim for compensation or damages for taking said lands was personal estate of *Grace McQueen*, and passed to her personal representative; that (par. 6, 7 and 8,) the deeds of the 31st of Jan. and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in His Majesty, but that such deeds were void under 32 *Hy. VIII.*, ch. 9; that (par. 9) Col. *By* was incapable, by reason of his position, from acquiring any beneficial interest in said lands as against His Majesty; that (par. 10, 11, 12 and 13,) Col. *By* took proceedings under 8 *Geo. IV.*, ch. 1, to obtain compensation for the lands in question, but the arbitrators and also a jury summoned under the Act decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliants claim; that (par. 14 and 15,) the proviso of 9 *Vic.*, ch. 42, was confined to *Nicholas Sparks* and did not extend to the lands in question; that (par. 16, 17, 18 and 19,) by virtue of 2nd *Vic.*, ch. 19 (*Upper Canada*) and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 *Geo. IV.*, ch. 1, by owners of lands taken for the canal, including claims of the said *Grace McQueen* or Col. *By*, or their respective representatives, were, on and after the 1st April, 1841, for ever barred; that (par. 26, 27 and 28,) the suppliants were barred by their own laches; and that (par. 27) they were barred by the Statute of Limitations.

On a special case stated on the pleadings for the opinion of the Court,

Held,—1. The Statute of Limitations was properly pleadable under sec. 7 of the Petition of Right Act of 1876.

2. *William McQueen* took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 *Geo. IV.*, ch. 1, secs. 1 and 3, and her right was converted into a claim for compensation under the 4th section.

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3. This right of compensation or damages, if asserted under the 4th sec. of *Geo. IV.*, ch. 11, would go to *Grace McQueen's* personal representatives, but if the land was obtained by surrender under the 2nd sec. of the statute, then the heir-at-law of *Grace McQueen* would be the person entitled to receive the damages and execute the surrender.

4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd sec. of the *Rideau* Canal Act.

5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition.

6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true.

7. The proviso of 9 *Vic.*, ch. 42, sec. 29, was confined in effect to the lands of *Nicholas Sparks* only.

8. If the claim is to be made by *Grace McQueen's* personal representatives under the 4th section of the *Rideau* Canal Act (and any claim by her could only be under that section) the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the *Rideau* Canal Act. As to the claims to be made by the heirs of Col. *By*, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested the 110 acres in question in the heirs of Col. *By*, the Court was not prepared to say that their claim had been barred by *laches* on the statement set out in the petition. But the statute had not that effect, nor had Col. *By* or his legal representatives ever had for his or their own use and benefit any title to these 110 acres.

THIS was a petition of right brought by the heirs of Col. *By's* estate for the purpose of obtaining restitution of certain lands appropriated by the Government of *Upper Canada* in the construction of the *Rideau* canal in 1823.

The petition set forth *inter alia* that:

"4. On the 17th day of February, 1827, was passed an Act of the Provincial Parliament of the said province of *Upper Canada*, (8 *Geo. IV.*, c. 1), commonly referred

to as the *Rideau* Canal Act, and intituled, 'An Act to confer upon His Majesty certain powers and authorities necessary to the making, maintaining, and using the canal intended to be completed under His Majesty's direction, for connecting the waters of lake *Ontario* with the river *Ottawa*, and for other purposes therein mentioned.'

"5. Lieut.-Col. *John By*, of the Royal Engineers, was the officer employed by His Majesty to superintend the work of making the said *Rideau* canal, and he set out and ascertained certain part of the said parcels or tracts of land comprised in the said two deeds of grant to one *Grace McQueen*, dated 20th May, 1801, and 10th June, 1801, respectively, amounting altogether to 110 acres or thereabouts, as necessary for making and completing the said canal and other purposes and conveniences mentioned in the before stated Act; and the land which he so set out and ascertained, as aforesaid, is described on a certain plan lodged by the said Lieut.-Col. *By* in the office of the Surveyor General of the said late province of *Upper Canada*, and signed by the said late Lieut.-Col. *By*, and now fyled in the office of Her Majesty's Crown Land Department for the Province of *Ontario*.

"6. Some time after the passing of the said Act, and before the date and execution of the deed poll next hereinafter stated, the said *Grace McQueen* died intestate, being at the time of her death possessed of the said parcels or tracts of land comprised in the said two several hereinbefore stated deeds poll respectively, or of so much thereof as had not been set out and ascertained for the purposes of the said canal as before mentioned; and she left *Alexander McQueen*, of *Edwardsburg*, in the district of *Johnstown* and Province of *Upper Canada* aforesaid, Esquire, her husband, and *William McQueen*, of the same place, Esquire, her eldest son and heir-at-law, respec-

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tively, her surviving. And on the 31st day of January, 1832, the said *Alexander McQueen* by a certain deed poll in writing of that date, under his hand and seal, and which was afterwards duly registered in the proper register office of the said province, for the consideration therein mentioned, released unto the said *William McQueen* all his right and interest to and in the said parcels or tracts of land, to hold the same unto and to the sole and proper use and behoof of the said *William McQueen*, his heirs and assigns forever.

"7. By an indenture dated 6th day of February, 1832, made at *Bytown*, in the township of *Nepean*, in the *Bathurst* district, in the said late Province of *Upper Canada*, between the said *William McQueen*, therein described as heir at law to the late *Grace McQueen*, of the one part, and the said Col. *By*, therein described as of the town, township, district and province aforesaid, of the other part, and which indenture was afterwards duly registered in the proper register office within the said province, the said *William McQueen*, for the consideration therein mentioned, granted, conveyed and confirmed unto Col. *By*, his heirs and assigns forever, all the said parcels or tracts of land comprised in the said two several hereinbefore stated deeds of grant respectively, as aforesaid, by the description of 'All and singular, those certain parcels or tracts of land and premises situate, lying and being in the township of *Nepean*, in the county of *Carleton*, in the district of *Johnstown*, containing by admeasurement 200 acres, be the same more or less, being lots D and E in the broken concession D on the *Rideau* river, which said 200 acres of land are butted and bounded, or may be otherwise known as follows, that is to say:' (Then follows a description of boundaries similar in all respects to that contained in the before-stated deed of grant of

the 10th day of June, 1801) 'And also all that other parcel or tract of land situate in the township of *Nepean*, in the county of *Carleton*, in the district of *Johnstown*, containing by admeasurement 400 acres, be the same more or less, being lots lettered E and D, in the concession called C, in the said township of *Nepean*, which said 400 acres of land are butted and bounded, or may be otherwise known as follows, that is to say: (Then follows a description of boundaries similar in all respects to that contained in the before stated deed of grant of the 20th day of May, 1801.) Together with the appurtenances and all the estate, right, title, interest, claim, property and demand whatsoever, either at law or in equity of him the said *William McQueen*, of or to or out of the same and every party thereof: to hold the same with the appurtenances freed and discharged from all incumbrances whatsoever, unto the said *John By*, his heirs and assigns, to the sole and proper use, benefit and behoof of the said *John By*, his heirs and assigns forever, under the reservations, limitation and conditions expressed in the original grant from the Crown.

"8. The said lastly stated indenture contains no exception or reservation to the said *William McQueen* of any part of the said parcels or tracts of land expressed to be thereby conveyed, or of any estate or interest therein, but, on the contrary, it was intended to pass, and actually did pass to Colonel *By* all the estate and interest whatsoever of the said *William McQueen* in the land therein described, including any right which he had or might have to a restoration of any part of that portion thereof taken for the uses of the said canal, which was not actually used for that purpose.

"9. The *Rideau* canal was completed and opened for traffic throughout its entire length some time in the month of May, 1832.

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"11. Colonel *By* died on the 1st day of February, 1836, and being at the time of his death possessed of or entitled to all the property conveyed to him by the before-stated indenture of the 6th day of February, 1832, and which is hereinafter referred to as 'Colonel *By's Canada* Estate,' subject only as to some part thereof, including portions of what was set out and ascertained as necessary for the purposes of the said *Rideau* canal, to certain leases thereof made by him to different persons, and which have since expired. And he left *Esther By*, his wife (who afterwards died in the year 1838) and two daughters his only children, namely, *Esther March By*, and *Harriet Martha By*, and his said two brothers, *George By* and *Henry By*, respectively him surviving; and his will was on the 15th day of March, 1836, duly proved by his said two brothers and the said *William Roper*, the executors therein named in the Prerogative Court of the Archbishop of *Canterbury*.

"12. On the 20th day of April, 1836, was passed an Act of the Provincial Parliament of the late Province of *Upper Canada* (6 *William IV.*, ch. 16) for the purpose of altering and amending the said *Rideau* Canal Act, and it was thereby amongst other things enacted in effect (section III) that persons claiming compensation for damages done to their lands on the *Rideau* canal should not be debarred from receiving such compensation by reason of their having acquired title, after the commencement of the works, under a purchase made before such commencement, provided such persons were the real owners of the property damaged, and had not acquired the same for the purpose of preferring such claim, and provided also that when the former owner had compromised or waived his claim, or been satisfied therefor, the assignee should not be entitled to compensation, and that in all cases of a sale

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of property after the commencement of the works the compensation should be made either to the former owner or to the assignee, as might appear just to the arbitrators under the facts proved.

"13. No payment or compensation was ever made to the said *Grace McQueen*, or to her son and heir the said *William McQueen*, or to Col. *By*, in respect of the land set out and ascertained as necessary for the purposes of the said *Rideau* canal, as before stated.

"14. On the 9th day of December, 1843, was passed an Act (7 *Vic.*, ch. 11) of the Provincial Parliament of *Canada* (constituted under the authority of an Act of *Great Britain* for re-uniting the Provinces of *Upper* and *Lower Canada*), which Act is commonly referred to as 'The Ordnance Vesting Act,' and is entitled, 'An Act for vesting in the principal officers of Her Majesty's Ordnance the estates and property therein described, for granting certain powers to the said officers, and for other purposes therein mentioned,' and thereby the lands and other real property therein mentioned or referred to, including the said *Rideau* canal and the lands and works belonging thereto, were vested in the principal officers of Her Majesty's ordnance in *Great Britain* and their successors in the said office, subject to the provisions of the said 'Ordnance Vesting Act,' and in trust for the service of the said department, and it is thereby provided and enacted (sec. 29) as follows (that is to say):

"'Provided always, and be it enacted, that all lands 'taken from private owners at *Bytown* under the 'authority of the *Rideau* Canal Act, for the uses of the 'canal which have not been used for that purpose, be 'restored to the party or parties from whom the same 'were taken.'

"15. The property adjoining to Col. *By's Canada* estate belongs, or formerly belonged, as before mentioned, to one

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Nicholas Sparks. A portion of this was set out and ascertained as necessary for the purposes of the said canal, and was accordingly taken from the said *Nicholas Sparks* under the authority of the said *Rideau* Canal Act. After the passing of the said Ordnance Vesting Act, the said *Nicholas Sparks* applied for a restoration of part of the land so taken from him, and thereupon was passed an Act of the Provincial Parliament of *Canada* (9th *Vic.*, ch. 42), intituled 'An Act to explain a certain provision of 'the Ordnance Vesting Act, and to remove certain diffi-'culties which have occurred in carrying the said pro-'vision into effect.'

"30. In the month of July, 1856, *Charles William By* representing the heirs of the late Col. *By*, presented to the Governor General of *British North America* in Council a memorial.

"31. The statements contained in the said memorial were true, and your suppliants refer to them for the purpose of showing how your suppliants make out their title to the relief which they now claim. No reply has been returned to the said memorial, and no part of the land has been restored to your suppliants or any of them.

"32. On the 19th day of June, 1856, was passed an Act of the Provincial Parliament of the Province of *Canada* (19 and 20 *Vic.*, ch. 45,) intituled 'An Act for transferring to one of Her Majesty's principal Secretaries of State the powers and estates and property therein described, now vested in the principal officers of Her Majesty's Ordnance, and for vesting other part of the ordnance estates and property therein described in Her Majesty the *Queen*, for the benefit, use and purposes of this province;' and thereby, after reciting the said 'Ordnance Vesting Act,' it is, amongst other things, enacted as follows:

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"'Sec. VI. Immediately on and from the passing of 'this Act, all and every the lands and other real property 'in this province comprised in the second schedule to 'this Act, annexed being a portion of the messuages, 'lands, tenements, estates and hereditaments comprised 'within the provisions and meaning of the said in part 'recited Act of the seventh year of the reign of her pre-'sent Majesty, which prior to the passing of this Act 'were by the said recited Act, or otherwise, vested in 'the said principal officers of Her Majesty's Ordnance 'and their successors in the said office, and which have 'been used and occupied for the service of the Ordnance 'Department, or for military defence, by whatever mode 'of conveyance the same shall have been so purchased 'or taken either in fee or for any life or lives, or for any 'term or terms of years, or any other or lesser interest, 'and all erections and buildings which now are, or 'which shall or may hereafter be erected and built 'thereon, together with the rights, members, easements 'and appurtenants to the same respectively belonging, 'shall by virtue of this Act be and become and remain 'and continue absolutely vested in Her Majesty the '*Queen* for the benefit, use and purposes of this pro-'vince, according to the respective nature and quality 'of the said lands and other real property, and shall be 'subject to the provisions of the Act passed by the 'Legislature of this province in the 16th year of the 'reign of her present Majesty, intituled, an Act to amend 'the law for the sale and settlement of the public lands, 'and any further provisions which the Legislature of 'this province may from time to time enact in respect 'thereof, and shall be held used, conveyed and dealt 'with accordingly, but subject nevertheless to all sales, 'agreements, lease or leases, agreement or agreements 'for lease, already entered into with or by the principal

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'officers of ordnance, or by any other person or persons 'authorized or empowered by the said principal officers 'to exercise the powers and authorities of the said in 'part recited Act of the seventh year of the reign of her 'present Majesty, of or in respect of any such lands and 'other real property.'

"'Sec. VII. Provided always and be it further enacted, 'that nothing herein contained shall be taken to affect 'the rights of any parties claiming any of the lands, 'buildings, or other property referred to in the next 'preceding section, and in the said second schedule, 'and that all actions now pending against the said 'principal officers in relation thereto may be proceeded 'with to final judgment, in the name of the said prin-'cipal officers, and as if the appointment of the said 'principal officers had not been revoked by Her Majesty, 'and it shall be lawful for Her Majesty's Attorney Gen-'eral to appear in any such case on behalf of the Crown, 'and the Crown and all other persons whatsoever shall 'be bound by the final judgment of the Court in which 'such suit may have been commenced.'

"39. The suppliants are now the only persons interested in Colonel *By's Canada* estate, and as such are entitled to have such part of the said tracts or parcels of land comprised in the said two several before stated deed of grant respectively as aforesaid, as was formerly taken for the use of the *Rideau* canal, but is not used for that purpose, restored to them. The quantity of land so taken was 110 acres or thereabouts, but the quantity of such land as is actually used for the purpose of the said canal does not exceed 20 acres or thereabouts; however your suppliants have never hitherto been able to obtain the restoration of any part of the said land, notwithstanding the before stated application for that purpose.

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"40. Your suppliants allege that it is doubtful whether or not the said 90 acres are not so taken or used for the uses of the said canal ever passed to or became vested in Her Majesty, and your suppliants submit that the estate therein never passed to Her Majesty, and that the same passed to and is vested in your suppliants, as if the said canal had never been made and the said Acts had never been passed, yet Her Majesty's Government in *Canada* has assumed that the same did vest in Her Majesty, and have acted accordingly, and have all along since the construction of the said canal taken and held possession of the said 90 acres, and still hold posssession thereof, and have taken the rents and profits thereof, and they have sold parts thereof, and made conveyance thereof to purchasers thereof, and given possession to such purchasers, and have received the purchase money thereof, and your suppliants submit that Her Majesty should deliver possession of the said land unsold to your suppliants, and should pay the rents and profits thereof to your suppliants, and as to the portions of the said lands so sold should pay the value thereof, but if it should be held that the said land did become vested in Her Majesty, then your suppliants in addition to the foregoing submit that they should have a reconveyance of all such lands as have not been sold as aforesaid.

"41. Under and by virtue of an Act of the Parliament of the United Kingdom of *Great Britain* and *Ireland*, known as "the *British North America Act*, 1867," the said lands and hereditaments became the property of the Dominion of *Canada*, or purported to convey the same to the said Dominion of *Canada*.

"42. In any case Her Majesty was and is a trustee for your suppliants of all of the said lands that were actually used for the purposes of the said canal, and it should be so declared.

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"Your suppliants therefore humbly pray that all such parts of the said two several parcels or tracts of land comprised in the said two several hereinbefore stated deeds of grant dated respectively the 20th day of May and the 10th day of June 1801, as aforesaid, as were supposed to be taken for the use of the said *Rideau* canal, but not used for that purpose, may be restored to, and if necessary be revested in your suppliants, according to their respective rights and interests to and in the same; and that possession thereof may be delivered to your suppliants; and that an account of the rents and profits thereof may be taken, and, together with the costs of this petition, be paid to your suppliants; and as to such portions thereof as have been sold, that the values thereof may be paid to your suppliants, and also the rents and profits thereof prior to the selling thereof by Her Majesty, as aforesaid, and for the purposes aforesaid, that all necessary orders and decrees may be made and accounts taken."

In answer and for defence to the said petition, the Honourable *Edward Blake*, Her Majesty's Attorney-General for the Dominion of *Canada*, on behalf of Her Majesty, said:

"1. I admit the letters patent bearing date respectively the 20th day of May, 1801, and the 10th day of June, 1801, mentioned in the 1st and 2nd paragraphs of the said petition, whereby certain lands were granted to *Grace McQueen*, in the said petition mentioned, but I crave leave for greater certainty to refer thereto, when the same shall be produced to this honourable court.

"2. I admit the passing of the Act of Parliament of the late Province of *Upper Canada* (being the Act 8, *Geo. IV.*, chap. 1,) referred to in the fourth paragraph

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of the said petition, to which I also crave leave for greater certainty to refer.

"3. I admit that Col. *By*, in the 15th paragraph of the said petition named, was the officer employed by His late Majesty to superintend the work of making the said canal, and that he set out and ascertained certain parts of the said parcels of land comprised in the said letters patent, comprising altogether 110 acres or thereabouts, as necessary for making and completing said canal, and other purposes and conveniences mentioned in the said Act; and that the land which he so set out and ascertained as aforesaid is described in a plan lodged by Col. *By*, in the office of the Surveyor-General of the late Province of *Upper Canada*, and signed by him, and I crave leave for greater certainty to refer to the said description and plan.

"4. I admit that the said *Grace McQueen* died intestate some time before the 31st day of January, 1832, and after the passing of the said Act, but I deny that she died seized or possessed of the whole of the said parcels of land; and I charge that the parts thereof set out and ascertained by Col. *By*, as required for the uses and purposes of the said canal, were at the time of her death vested in His Majesty, and His Majesty was then in possession thereof for the purposes of the said canal.

"5. I admit that the said *Grace McQueen* left her husband, *Alexander McQueen*, her surviving, and also *William McQueen* her eldest son and heir-at-law, but I deny that any estate or interest in the said lands set out and ascertained by Col. *By* as aforesaid descended to the said *William McQueen*; and I submit that the claim against the Crown for compensation or damages by reason of the taking of the said lands was personal estate of the said *Grace McQueen*, and passed at her death to her personal representative and not to her heir-at-law.

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"6. I admit the execution of the deeds of the 31st day of January, and the 6th day of February, 1832, and I crave leave for greater certainty to refer thereto respectively when produced to this honourable court; but I charge that no estate or interest in the lands now in question passed thereby, or by either of them, the title and possession thereof being then as the fact was in His Majesty.

"7. I charge that at the respective times of the making and execution of the said respective deeds none of the parties thereto were, or was, in possession of the last-mentioned lands, or of any part thereof, or in the receipt of the rents and profits thereof, nor had they or any or either of them, or any of their respective ancestors, been in such possession or in such receipt of the rents and profits for one whole year next before the said respective times, and I charge that the said transactions, so far as they related to the lands in question in this suit, were respectively a selling of pretended titles, and that the same were to that extent respectively void as in contravention of the statute passed in the 32nd year of the reign of His Majesty King *Henry VIII*, ch. 9, and other statutes against maintenance and bracery, and the buying of pretended titles.

"8. I deny, for the reasons aforesaid, that the indenture of the 16th day of February passed to Col. *By* any estate or interest in the land in question, or any right to compensation or damages for the taking of the said lands, or any right to a restoration of any portion thereof taken as aforesaid which was not used for that purpose.

"9. I submit and charge that Col. *By*, having been as he was at the date of the said indenture of the 6th day of February, 1832, an officer in the service of His Majesty, and having in charge for His Majesty the said canal and

the works connected therewith, and the lands set apart and taken therefor, including the lands in question, he was incapable of acquiring any beneficial interest therein, as against His Majesty, and the pretended purchase of the said lands by him was a breach of duty, and could not and did not constitute any valid claim against His Majesty.

"10. I am informed and charge the fact to be that some time after obtaining the conveyance of the 6th day of February, 1832, Col. *By* took proceedings under the said Act of 8 *Geo. IV.*, ch. 1, to obtain by arbitration, compensation, or damages from His Majesty in respect of the lands comprised in the said conveyance of the 6th day of February, 1832, and that therein he claimed compensation or damages for the lands now in question.

"11. I am informed and charge that an award was duly made in writing in the course of the said arbitration proceedings, whereby it was awarded and determined that by reason of the enhancement of the value of his other land, and of other benefits and advantages accrued to him from the construction of the canal, as provided in the 9th section of the said Act, Col. *By* was not entitled to any sum from His Majesty in respect of his said claims for compensation and damages under the said Act.

"12. I am informed and charge that afterwards Col. *By*, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said Act, to assess the said damages and compensation claimed by him, and that the jury duly delivered their verdict to the same effect as the said award, to wit, that Col. *By* had sustained no damage and was not entitled to any compensation in respect of the said claims.

"13. I charge that the said award and verdict have ever since remained, and now are in full force and virtue,

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and were and are binding on Col. *By* and his heirs and other representatives, and are a bar to the claim of the suppliants in the said petition.

"14. I admit the Act of the Provincial Parliament of *Canada*, passed in the year 1843, (7 *Vic*, ch. 11,) and the proviso contained in section 29 thereof, as stated in the 14th paragraph of the petition; and I also admit the Act passed in the year 1846, (9 *Vic*, ch. 42,) to explain the said proviso, and I crave leave for greater certainty to refer to the said Acts.

"15. I submit and charge that upon the true construction of the said proviso, and of the Act explaining the same, the benefit of the said proviso was and is confined to *Nicholas Sparks*, therein mentioned and that the same did not extend to the lands in question.

"16. By an Act of the parliament of the late Province of *Upper Canada*, passed on the 11th day of May, 1839, (2 *Vic.*, ch. 19,) it was expressly enacted that from and after the 1st day of April, 1841, all and every, the powers, provisions and remedies in the said Act of the 8th year of King *George IV.*, ch. 1, in relation to claims for damages already sustained by owners of lands in consequence of the said then intended canal, locks and other constructions being cut and constructed in and upon the same, should in respect of claims brought forward after that period, cease and determine.

"17. It was further by the last-mentioned Act enacted that claims made before the said 1st day of April, but not duly prosecuted as required by the said Act, should thenceforward be barred as if they had never been made.

"18. It was further by the last-mentioned Act enacted, that it might be lawful for the Lieut-Gov. to issue Her Majesty's Royal Proclamation requiring all

persons to prosecute their claims within the time so limited, or that such claims should thereafter be barred.

"19. Afterwards, and on the 9th day of September, in the last-mentioned year, such proclamation was duly made by the Lieut.-Gov. in Her Majesty's name, and the same was published in the Official Gazette on the 10th day of October following; and I claim, on behalf of Her Majesty, the benefit of the said Act and Proclamation, and I submit that thereby all claims of every kind against Her Majesty, in respect of the said lands, by the said *Grace McQueen* or her personal representatives, or by Col. *By* or any persons claiming through or under them or either of them, including the suppliants, became, and were and are forever barred on and after the 1st day of April, A.D. 1841.

"20. I admit that in pursuance of the Acts of 1844 and 1846, some part of the lands taken from *Nicholas Sparks* for the said canal was restored to him, and that no part of the land in question was ever restored to Col. *By* or his heirs or assigns; and I charge that neither was any land taken for the canal from any other person restored to the owners under the said proviso and Acts.

"21. I have been informed by Col. *Coffin*, an officer of the Government, that he has some recollection of some such memorial as mentioned in the 30th paragraph of the petition having been handed to him by *Sir Edmund Head*, when he was Gov.-Gen. of *British North America*, with a request to report thereon, and that he, the said Col. *Coffin*, did report against the claim therein preferred, but I am informed and charged that there is no trace of the said memorial or report among the public records, or of the same ever having been submitted to the Gov.-Gen. in Council.

"22. I admit the passing of the Act of the 19th of

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June, 1856 (19 and 20 *Vic.*, ch. 45), and I crave leave for greater certainty to refer to its provisions, and I admit that by virtue thereof the lands in question became vested in Her Majesty for the uses of the late Province of *Canada*.

"22. I admit that by the *B. N. A. Act* the same lands, or so much thereof as had not previously been sold or disposed of, are now vested in Her Majesty for the use of the Dominion of *Canada*.

"24. I deny that Her Majesty is a trustee for the suppliants of the said lands or any part thereof.

"25. I have no knowledge of the several Acts, occurrences, and instruments alleged in said petitions, constituting the claim of the suppliant's title under Col. *By*, and I deny the same respectively, and put the petitioners to such proof thereof as they may be advised.

"26. From the original setting apart and taking of the said lands, until the year 1843, the said lands were vested in Her Majesty in right of Her Imperial Crown, during all which time Col. *By* and his representatives might have proceeded against Her Majesty by petition of right or otherwise, in Her Majesty's Courts in *England*, but they never did so.

"27. From the year 1843 to the year 1856 the lands in question were vested in the principal officers of Her Majesty's Ordnance, and the said principal officers of Her Majesty's Ordnance were also during all the times last mentioned in possession thereof, and the suppliants or those under whom they claim title might, during all the last-mentioned time, have sued and impleaded the said principal officers in the courts of the late Province of *Canada* for the recovery or restoration of the said lands, but they neglected so to do.

"28. I charge that the suppliants, and those under

whom they claim, have been guilty of such laches and delay in respect of their said claims as preclude them in equity from now prosecuting the same.

"29. By virtue of the 7th section of the Petition of Right Act, 1876, I claim, on behalf of Her Majesty, the benefit of the statutes of the Province of *Ontario*, commonly known as the Statutes of Limitations, and I submit that the suppliants, and those under whom they claim, having been, as the fact is, out of possession of the said lands for upwards of 40 years, next before the commencement of the suit, their claims are barred by lapse of time and the provisions of the said statute.

"30. On behalf of Her Majesty I submit that the said petition shows no grounds for relief against Her Majesty, in respect of any of the matters contained therein, and shows no legal or equitable title in the suppliants, or any or either of them, to the said lands or any part thereof, and I crave the same benefit of this objection as if I had demurred to the said petition.

"31. I submit that under no circumstances is Her Majesty, as representing the Dominion of *Canada*, answerable or responsible to the suppliants or any of them, for or in respect of any of the said lands heretofore sold or disposed of, or in respect of the rents and profits of any of the said lands; and I deny that the petitioners are entitled to any such account as prayed for in the said petition.

"32. I pray that the said petition may be dismissed with costs."

The following case was then submitted for the opinion of the court under General Order III:—

"1. Is the Statute of Limitations at all pleadable under section 7 of the Petition of Right Act of 1876?

"2. Did *William McQueen* take the lands in question or any of them by descent by the facts set out in the

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petition: (1) if his mother died before the lands were set out and ascertained for the purpose of the canal; (2) if she died afterwards?

"3. If *Grace McQueen* had at the time of her death any right or interest in the lands taken or any right to compensation or damages by reason of the taking thereof, did such right descend to her heir-at-law or to her personal representative?

"4. Are the deeds dated 31st January, 1832, and 6th February, 1832, respectively named in the petition, valid or void as regards the lands in question under the statutes and facts set out in the 7th paragraph of the statement of defence?

"5. Is the 9th paragraph of the statement of defence a sufficient answer in law to the petition?

"6. Would the defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement of the Attorney-General be sufficient in law supposing that the statements therein were true?

"7. Whether the effect of the acts set out in the 14th paragraph of the statement of defence is as stated in the 15th paragraph of the statement of defence?

"8. Whether the acts referred to in paragraphs 16, 17, 18 and 19 have any application to this case, and if so whether they would not constitute a bar to the plaintiffs' claim, regard being had to the statements in the petition and in paragraph 19 of statement of defence?

"9. Are the petitioners barred by laches on the statement set out in the petition?

"(*a*) It is agreed that the statements herein above referred to and set out in the petition and statement of defence as being admitted for the purpose of this special case are not finally binding on either party, but are to be used for the purpose of enabling the court to decide the questions of law raised hereby.

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"(*b*) It is also agreed that either party may appeal from the judgment to be pronounced in the above case as upon a demurrer.

"(*c*) It is also agreed that upon the decision being given, (whether in the first instance or on appeal), if against the petitioners that they may amend their petition and proceed as they may be advised, or, if against Her Majesty that she may be at liberty to file a supplemental statement of defence as the Honorable Attorney General may advise.

M. C. Cameron, Q.C., *E. Fitzgerald*, Q.C., and *A. J. Christie* for the suppliants.

The learned counsel cited *Rustomjee* v. *The Queen* (1); *King* v. *The Co. of Witham Navigation* (2); *McKenzie et. al.* v. *Fairman* (3); *Reiner* v. *The Marquis of Salisbury* (4); *Mutlow* v. *Bigg* (5); *Burdick* v. *Garrick* (6).

Mr. *Maclennan*, Q.C., for the Crown.

The learned counsel cited *Banning* on Limitations (7); *Richards* v. *Atty. Gen. of Jamaica* (8); *Frewen* v. *Frewen* (9).

Keech v. *Sandford* (10); *Cooper Phibbs* (11).

See *Maxwell* on Statutes (12).

Sir W. B. RICHARDS, C. J.:—

The case submitted for the opinion of the Court in this petition of right, was argued Monday, 15th March, 1878. *M. C. Cameron*, Q.C., and *Fitzgerald*, Q.C., of

(1) 1 Q. B. D. 487.
(2) 3 B. & Ald. 454.
(3) 7 U. C. Q. B. 411.
(4) 2 Ch. Div. 382.
(5) L. R. 18 Eq. 246.
(6) L. R. 5 Ch. Ap. 243.
(7) P. 252.
(8) 6 Moo. P. C. C. 381.
(9) L. R. 10, Ch. 610.
(10) White & Tudor's L.C. 5th ed. 46.
(11) L. R. 2 H. L. 149.
(12) P. 2, 6, 13, 15 and 27.

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the *Ontario* bar, for the suppliants, and *J. Maclennan*, Q C., of the same bar for the Crown.

The first question is, can the Statute of Limitations be pleaded on behalf of the Crown in a proceeding on a petition of right under section 7 of the Petition of Right Act of 1876 ?

The section is different from that contained in the Imperial Statute, 23 and 24 *Vic.*, ch. 34, and the Dominion Act, 38 *Vic.*, ch. 12, which last Act was repealed by the statute of 1876. The 7th section of the Imperial statute makes the law and statutes in force in certain matters in actions between subject and subject applicable and extend to the petition of right, amongst others enumerated, those as to costs, set off, special cases, etc.

In *Rustomjee* v. *The Queen* (1) it was urged in argument that the Crown, though not mentioned, might take advantage of the statute of limitations, and *Chitty* on the Prerogatives of the Crown (2); *Tobin* v. *The Queen* (3); *Story's* Conflict on Laws (4); *Huber* v. *Steiner* (5); *Harris* v. *The Queen* (6); were cited. At p. 49 *Blackburn*, J., said, the Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it. *Lush*, J , said, "and sec. 7 of 23 and 24 *Vic.*, ch. 34 (which has been referred to) extends to a petition of right, set off *inter alia* but not the Statute of Limitations." *Cockburn*, C.J., said at p. 492: "as to the statute of limitations that was disposed of in the course of the argument. The observations of my brother *Blackburn* were quite sufficient to dispose of that, namely: that the Crown cannot be bound by acts of parliament which have relation only to the course of procedure between subject and subject."

(1) 1 Q. B. Div. 487.
(2) P. 382, 11 C. 686.
(3) 14 C. B. N. S. 505.
(4) S. 576.
(5) 2 Bing N. C. 202.
(6) L. R. 4 Q. B. 653.

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At page 496 *Blackburn*, J., said: With regard to the statute of limitations I do not think it necessary to say any more. There seems to be no pretence for saying that the statute applies at all to the Crown It would no doubt, be very proper and right and judicious for the Legislature to pass an Act to say that in future some statute of limitation shall apply but it has not been done yet."

The seventh section of the Petition of Right Act of 1876 reads as follows: "The statement in defence or "demurrer may raise beside any legal or equitable "defences in fact or in law available under this Act any "legal or equitable defence which would have been "available, had the proceeding been a suit or action in a "competent court between a subject and subject; and "any grounds of defence which would be sufficient on "behalf of Her Majesty may be alleged on behalf of any "such person as aforesaid." There is no doubt that in a suit between subject and subject in a competent court in relation to these matters, the statute of limitations might be set up by the defendant. I see no reason why the Crown may not invoke the aid of such a statute. It is suggested it would be beneath the dignity of the Crown to do so. But the reasons which apply to the quieting of titles by individuals apply with equal force to the title of the Crown. In fact, as a general rule in this country, the rights and interests of the Crown are quite as likely to suffer from want of attention as the rights of individuals. Lord *Plunkett's* celebrated reference to time destroying the evidence of titles applies to cases like the one before us as far as the rights of the Crown are concerned, as it would between party and party. Can any one doubt if Col. *By* were now living, or evidence could be procured as to the circumstances under which he took the conveyance from *McQueen*, that the right of the Crown to this land would be put in a different light from what it is now presented by his heirs. His death and the lapse of time

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since the event took place prevents the fact from being ascertained whether in purchasing the 600 acres Col. *By* intended to obtain the 110 acres taken for the use of the canal in the same way that he obtained the land referred to in the Act of 9 *Vic.*, ch. 42, from *Nicholas Sparks* "for the purposes of the canal."

I think the words of the 7th section give the right to the Crown to set up the statute, and I see no reason why it should not be set up. Mr. Justice *Blackburn* in the case referred to expressed his opinion that it would be proper, right and judicious for the Legislature to give such a right. I think they have given it here. As to the first question submitted in the special case the answer is, that the statute of limitations can be pleaded under the 7th section of the Petition of Right Act of 1876.

As to the second question, the first part of it I suppose admits of no discussion; that *William McQueen* would take the land by descent from his mother if she died before the land were ascertained and set out for the purposes of the canal. The latter part of the second question is covered by the third question. If *Grace McQueen* had at the time of her death any right or interest in the land or any right to compensation or damages, by reason of the taking thereof, did such right descend to her heir-at-law or to her personal representative?"

The *Rideau* Canal Act of *Upper Canada*, 8 *Geo.* IV., ch. 1, gives the necessary powers to the officer employed by His Majesty amongst other things, to enter into and upon the land of any person or persons, and to survey and set out and ascertain such parts thereof as he shall think necessary and proper for making the said canal, locks, aqueducts, tunnels and all such other improvements, matters and conveniences as he shall think

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proper and necessary for making, effecting, preserving, improving, completing, and using in, the said navigation; and also to make, build, erect, &c., on the said canal or on the lands adjoining to or near the same so many bridges, &c., reservoirs, drains, wharves, quays, landing places and other works, ways, roads and conveniences as the officer aforesaid shall think requisite and convenient for the purposes of the said navigation; and also from time to time to alter the route of the canal and to amend, repair, widen or enlarge the same * * * and also to construct, make, and do all other matters and things which he shall think necessary and convenient for the making, effecting, preserving, improving, completing and using the said canal in pursuance and within the true meaning of this Act, doing as little damage as may be in the execution of the several powers to him hereby granted.

"Section 2. After any lands shall be set out and ascertained to be necessary for making and completing the said canal and other purposes and conveniences hereinbefore mentioned, the officer is empowered to contract and agree with all persons who shall occupy, be possessed of or interested in any lands or grounds which shall be set out or ascertained as aforesaid for the absolute surrender to His Majesty, his heirs and successors of so much of the said land as shall be required or for the damages which they may reasonably claim in consequence of the said intended canal, locks and other constructions and erections being out and constructed in and upon his, her or their respective lands, and all such contracts, agreements, surrenders shall be valid and effectual in law to all intents and purposes whatever, any law, statute or usage to the contrary notwithstanding."

"Section 3 enacts that, "such parts and portions of

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land, or lands covered with water as may be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts and portions as may upon any alteration or deviation from the line originally laid out for the said canal be ascertained and set out as necessary for the purposes thereof, shall be for ever thereafter vested in His Majesty, his heirs and successors."

The statute of *Upper Canada*, 6 *Wm. IV.*, ch. 16, provides that if in the construction, keeping up and repairing, &c, of the canal, any stone, earth, wood, timber or other materials shall have been or may be thereinafter taken under the authority of the Act of 8 *Geo. IV.*, ch. 1, the owners thereof or of the land from which the same shall have been taken, shall receive compensation for all damages by means thereof, the same as with respect to any other damage done by making, completing or repairing of the said navigation, to be settled, adjusted, ascertained and determined in the same manner as provided by the Act with respect to damage done by the making, completing or repairing of the said navigation.

Section 2 gives damages to owners of mill sites for injury from penning back or diverting water, &c.

Section 3. Purchasers purchasing land before the commencement of the work not debarred from receiving compensation through acquiring title after the commencement: Provided the persons claiming are the real owners of the property damaged and have not acquired the same for the purpose of preferring such claim. Further proviso: when former owner has either compromised or waived his claim or has been satisfied therefor, the assignee shall not be entitled to compensation under the Act. And in all cases of a sale of

property made after the commencement of the works, the compensation shall be made either to the former owner or to the assignee as it may appear just to the arbitrators under the facts proved to them.

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Under the first and third sections of the *Rideau* Canal Act, the portions of land ascertained and set out by Col. *By* (the officer employed by His Majesty) as necessary for the purposes of the canal seem to me to have been vested in His Majesty King *George* the Fourth. The words are express that the portions of the land so set out "shall be for ever thereafter vested in His Majesty, his heirs and successors." I see nothing in the statute to induce me to give a different interpretation to it in this respect from what the words plainly impart. It might perhaps be, if the officer employed to superintend the work, before agreeing with the owner of the land for the surrender thereof, under the second section of the statute, had become satisfied that a smaller quantity of land than what had been originally set out was required for the purposes of the canal and should take the surrender of the lesser quantity, that might be considered as having relation back to the original setting apart, and so the surplus would not be considered as vesting in the Crown. But if nothing occurred after the original setting apart of the officer in charge to shew any intention to change or alter his original determination, and the land so set apart was actually taken possession of and such possession maintained by him on behalf of the Crown, as I understand was the case with regard to the land in question, then it seems to me the land must be considered as vesting in the Crown and the right of the former owner was converted into a claim for compensation under the fourth section of the statute.

With regard to claims for compensation the statute

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of *Upper Canada* 2 *Vic.*, ch. 19, provides that from and after the 1st day of April, 1841, all the powers and provisions of the statute (8 *Geo. IV*, ch. 1,) in relation to claims for damages then sustained by the owners of lands in consequence of the canal and the remedies therein contained, in so far as respects any such claims for damages as should be advanced or brought forward after that period, should cease and determine.

The effect then of the statute of *George the Fourth* authorizing the construction of the canal was that the lands set out and ascertained by the officer employed by His Majesty to superintend the work as necessary to be occupied for the purposes of the canal were forever vested in His Majesty, his heirs and successors. And after the lands were so set out and ascertained, the officer employed to superintend the work under sec. 2, was authorized to contract and agree with the owners of such land for the absolute surrender to His Majesty, his heirs and successors of so much of said land as should be required, or for the damages they may reasonably claim in consequence of the intended canal being constructed on their land, and all such contracts, agreements and surrenders should be valid and effectual in law.

Though the lands were vested in the Crown by being ascertained and set out as necessary to be occupied for the purposes of the canal, yet Col. *By* was under the 2nd section of the statute authorized to contract and agree with Mrs. *McQueen* for the absolute surrender of so much of such land as should be required, and a surrender by her would under that section be valid and effectual. It may be that a surrender by her heir-at-law would be equally effectual, for the statute seems to contemplate something more than the mere disharge

of the Crown from the damages in consequence of the canal being constructed on the land.

It speaks of the absolute surrender to the Crown of the lands themselves and this could only be by the person who, but for the right of the Crown, would be the owner of the land, and that was *William McQueen.*

I therefore think that Col. *By* on behalf of the Crown could contract for the absolute surrender of the land with *William McQueen*

Suppose then he had entered into a contract with *William McQueen* for the absolute surrender to the Crown of the 110 acres in dispute, as set apart for the use of the canal by him as the officer employed to superintend the work, can there be any doubt that he would be held in equity to have contracted on behalf of the Crown? And if the instrument had been a mere conveyance to himself absolutely he ought to be declared a trustee on behalf of the Crown; and certainly would have been declared such trustee, if the money of the Crown at the rate of £2 an acre had been paid to *McQueen* for it. Now look at the circumstances of the case here. Some 600 acres of wild land owned by *McQueen*, of which 110 had been set out and ascertained as necessary for the purposes of the canal. If he had not agreed as to the amount of compensation to be paid him for his damages after the completion of the canal, the question of compensation for property taken would have been referred to arbitration, and in assessing the damages the arbitrators would take into consideration the benefit likely to accrue to him from the construction of the canal by its enhancing the value of his property. No one acquainted with this part of the country at that time can for a moment doubt that the 500 acres left of the six hundred were increased very

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much in value beyond the worth of the 100 acres taken by the construction of the canal. The matter must have been presented in this light to *McQueen*. I assume it was so presented because it would have been Col. *By's* duty so to have presented it.

Assuming this to be so and that Col. *By* contemplated purchasing the remainder of the six hundred acres as an investment for his personal advantage, he would estimate its value independent of that of the 110 acres and would pay *McQueen* for it on that basis. If he did this he in fact paid *McQueen* for the 110 acres by the increased value which was paid on the remainder of the land, and this increased value was given to it by the money expended by the Crown in building the canal.

It cannot be assumed that Col. *By*, in ascertaining and setting out these 110 acres as necessary for the purposes of the canal, did not act in good faith, and those claiming under him cannot properly be allowed to set up that he was not acting in good faith. If that be so, in taking the conveyance of these 110 acres from *McQueen*, he must have done it for the benefit of the Crown. Otherwise it would appear that he was guilty of a fraud on *McQueen* in setting apart more land than was needed for the purpose of enabling himself to purchase this land from *McQueen* under pretence that these 110 acres were needed for the canal.

I think we must assume that Col. *By* was acting in good faith throughout the whole transaction. That he believed the whole 110 acres were necessary for the purposes of the canal, and that in acquiring the title to these 110 acres, though the deed was taken in his own name, he was doing so for the benefit of the Crown and was performing the duty cast upon him by the second section of the statute to obtain the surrender of the land

required for the purposes of the canal. That we are bound to assume Col. *By's* "honesty and integrity of purpose" throughout this transaction is sustained by the language used by Lord *Westbury* in *Cooper* v. *Phibbs* referred to on the argument (1).

The rule in equity that when persons acting in the fiduciary capacity acquire renewals of leases, it will be decided that such renewals shall enure to the benefit of *cestui que trust*, is one of public policy to prevent persons in such situations from acting so as to take a benefit to themselves. Many of the cases are referred to in the notes to *Keech* v. *Sandford* (1). The same principle applies to Col. *By* in the position in which he was placed as the officer employed by His Majesty to superintend the work of constructing the *Rideau* canal.

The same rule of equity obtains in the *United States* and is referred to *Keech* v. *Sandford* in the American edition of *White* and *Tudor's* equity cases. I make a short quotation from the American notes No. 62 :—

> It is a principle firmly maintained in the equity jurisprudence of this country that a trustee is not at liberty to act or contract for his own benefit in regard to the subject of the trust, and that the advantage of all that he does about the trust prosperty shall accrue to the *cestui que trust* if the latter desire it. * * * Wherever confidence is permitted a duty is assumed, and a trust is the medium by which chancery enforces mere duties in respect to property. Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.

The same doctrine is in effect enunciated in another form of words: "That no man shall be allowed to put "himself in the position where his duty and his interest

(1) L. R. 2 H. L. 149.

(2) White and Tudor's L. Cas., vol. 1, p. 44.

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"may conflict." Here it was the duty of Col. *By* under the statute to obtain the absolute surrender from *McQueen* to the Crown of the 110 acres of land that he had set out as necessary to be occupied for the purposes of the canal, it was his interest to purchase it for his own speculative purposes. This on principle he could not be permitted to do and the title nominally obtained in his name must really be for the Crown.

At the time of the conveyance by *McQueen* to Col. *By* the land had been set out for the purposes of the canal, and as I understand it was then in the actual possession of the Crown and was by the statute vested in the Crown. It was suggested it was in Col. *By's* possession, but that was only as the officer employed to construct the work, and such possession must have been the possession of the Crown. This conveyance was void as to the 110 acres under the statute 32 *Henry VIII*, ch. 9. That principle was established in numerous cases in *Upper Canada*, both before and since the date of the deed from *McQueen* to Col. *By*, and was the well settled law of the land until the passing of the statute in 1849, legalizing the conveyance of a mere right of entry into or upon lands whether immediate or future, vested or contingent. The cases referred to in *Robinson* and *Joseph's* Digest under the head of Champerty settle the law as above stated. The *Bishop of Toronto* v. *Cantwell* (1), and *Smith et al* v. *Hall* (2), are amongst the latter cases there referred to where many of the decided cases were cited.

I do not think 3rd section of the *Upper Canada* statute, 6 *William IV*, ch. 18, which allows purchasers to claim compensation who acquire title after the commencement of the works can make any difference; that section applies to such purchasers having acquired the title under

(1) 12 U. C. C. P. 607. (2) 25 U. C. Q. B. 554.

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a purchase and before the commencement of the works. In fact it seems only to have provided that the equitable owner of the land should receive the compensation, but it deprives him of such compensation where the former owner had compromised, or waived his claim, or had been satisfied therefor.

In addition to this, after the 110 acres had been ascertained as necessary for the canal, they were under the 3rd section of the Act of *Geo. IV*, as I have already mentioned, vested in His Majesty, and all that remained in *Grace McQueen*, except the right under the second section of the statute of absolute surrender of the same to His Majesty, was the right to compensation under the statute, and this right was a right to receive money, which on her death vested in her executor and not in her heir-at-law.

As already intimated, the special power to surrender under the second section of the statute might have been exercised by Mrs. *McQueen* after the land had been set out for the canal, and I am inclined to think by *William McQueen* as her heir-at-law, at any time before the completion of the canal.

The general doctrine that land sold by the owner of an estate before his death, but which has not been paid for or conveyed, is considered converted into personalty seems well established. Many cases are referred to in *Williams* on Executors as sustaining that doctrine. I merely refer to one *Farrer* v. *The Earl of Winterton* (1).

Whether compensation for lands taken under the compulsory power given to railways and commissioners is impressed with the character of realty depends much on the terms of the statutes authorizing the taking.

I think the view taken by the Privy Council in *Richards* v. *The Attorney General of Jamaica* (2) correct

(1) 5 Beav. 1.

(2) 6 Moo. P. C. C. 381.

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and applies to the compensation for lands taken under the *Rideau* Canal Act, when the compensation is enforced under the 4th section of the statute. By the laws in force in *Jamaica* slaves were considered real estate, and could only pass under a will as such. The testator, by a will not properly executed to pass real estate, bequeathed his title and claim to compensation for his share of the compensation fund for the emancipation of such of his slaves as might be living on 1st August, 1834, to the appellants. The Privy Council held, that treating the slaves as real estate, the Legislature became purchasers, under the Imperial Statute 3 and 4 *William IV.*, from the time of its passing, and the money to be received under the compulsory sale of the slaves was converted into personal estate and passed to appellants as specific legatees under the will which was properly executed to pass the personal estate.

In *re Lincolnshire* Railway Act *ex parte Flamank* (1) before Lord *Cranworth*, then Vice Chancellor, where lands were taken under the compulsory clauses of the Railway Act, he held the compensation for the lands of a lunatic was not impressed with the character of realty.

Whether the compensation money for these 110 acres was impressed with the character of realty or not, in the view I take, is not of much consequence, for I think the land was vested in the Crown whoever was entitled to compensation, and the right to recover the compensation, after the 1st of April, 1841, was to cease and determine under *Upper Canada* statute 2 *Vic.*, ch. 19.

Up to the time of the passing of the Ordnance Vesting Act of 1843 as to these 110 acres of land I think then the following the proper view to take:

(1) 1 Sim. N. R. 260.

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By being ascertained and set out by Col. *By* as necessary for the purposes of the canal, and being taken possession of and retained for that purpose, they became forever vested in His Majesty, his heirs and successors.

That without the authority to absolutely surrender these 110 acres to His Majesty, a conveyance of the same by Mrs. *McQueen*, or by her heir-at-law, was void under the statute of *Henry* the Eighth, if made to any one but the Crown.

That the conveyance by *William McQueen* to Col. *By* of the 5th February, 1832, as to the 110 acres was void unless made for the benefit of the Crown, and I think I am bound to hold it was made for the benefit of the Crown, and so, that any right acquired under it was for the Crown. If not, then, it was void, and Col. *By* acquired no title to these 110 acres, and his heirs cannot claim them now either under the deed or the statute.

We now come to the consideration of the question arising under the Ordnance Vesting Act of 1843, Statutes of *Canada*, 7 *Vic.*, ch. 11. It purports to have been passed for vesting in the principal officers of Her Majesty's Ordnance certain lands and other real property used and occupied for the purpose of the Defence of the Province and vested in Her Majesty, and also certain lands in *Bytown* purchased with funds belonging to the military chest, and the *Rideau* canal and for other purposes. The 29th section of that Act is as follows: "And be it enacted that it shall be lawful for the said principal officers to grant to any *censitaire* holding lands or other real property within the censive of any seigniory vested in them under the provisions of this Act a commutation of all seigniorial rights, burdens and charges on such lands or real property, on the same terms and conditions on which such commutation might be granted by Her Majesty without this Act;

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but the lands or real property with regard to which such commutation shall be granted, shall thereafter be held in *franc aleu roturier*, as shall also any lands or real property which being within the boundaries of any seigniory vested in the said principal officers under the provisions of this Act, shall be granted or conveyed by them to be holden otherwise than *en censive;* provided always that nothing herein contained shall prevent the said principal officers from granting any lands or real property within any such seigniory to be held *en censive* if they and the grantee shall so agree." "Provided always and be it enacted that all lands taken from private owners at *Bytown* under the authority of the *Rideau* Canal Act for the uses of the canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken."

This last proviso of the 29th section seems to have no connection whatever with the rest of the section which refers to land situate where the seigniorial tenure prevailed, and that tenure never prevailed in *Bytown.* Taken as it stands literally and giving it its full effect, without in any way referring to matters outside of the special case before us, it seems to me it can in no way aid the claims of the petitioners, for the land was not taken from Col. *By* or his heirs, and the statute directs the land to be restored to the party or parties from whom the same was taken. The reference is to land taken from private owners. If this land had been taken from Col. *By*, who was then a public officer, whose duty it was to obtain the property for the Crown, would he be a person who would come within the description of private owner?

I think no person who knew anything of the difficulties as to land in *Bytown* taken under the authority of the *Rideau* Canal Act would imagine that this proviso

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was passed by the Legislature with intention of restoring land to Col. *By* or his heirs.

The proviso is so bald and disconnected that it is not a matter of surprise that it caused difficulty and litigation, and an explanatory Act was necessary to interpret it.

We find on referring to the statute of the Province of *Canada*, 9 *Vic.*, ch. 42, that an Act was passed in the very next session of the legislature for explaining and amending the Act, but that statute was reserved for the Royal assent, which was not given, and in the next following session the statute of 9 *Vic.*, ch. 42, was passed. It contains a very long preamble, recites and quotes the last proviso to the 29th section of the Act of 1843 and states that doubts had arisen as to the true intent and meaning of the same and as to the land to which it was intended to apply, and further recites the passing of the Act reserved for the Royal assent for the purpose of explaining and amending the said Act as far as regards the effect of the proviso and of setting such doubts at rest, and that it had not received the Royal assent. It further recited that as well the principal officers of Her Majesty's ordnance as the private parties interested, were desirous that the doubts should be removed and all matters of difference between them should be fairly and amicably settled. The statute then proceeded to enact that the proviso in the preamble should be construed to apply to all the land at *Bytown* set out and ascertained and taken from *Nicholas Sparks* of the said town, Esquire, under the provisions of the statute 8 *Geo. IV*, except so much thereof as was actually occupied as the site of the *Rideau* canal as originally excavated at the Sappers' Bridge and of the basin and By-wash as they stood at the passing of the Ordnance Vesting Act, and excepting also a tract of 200 feet in

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breadth on each side of the said canal, the portion of the said land so excepted having been freely granted by the said *Nicholas Sparks* to the late Col. *By* of the Royal Engineers for the purposes of the said canal, and excepting also a tract of sixty feet round the said basin and By-wash which is freely granted by the said *Nicholas Sparks* to the said principal officers for the purposes of the said canal, provided no buildings be erected thereon. And that notwithstanding any thing in the last cited Act [8 *Geo. IV*,] or the statute of 2 *Vic.*, or any decision of any court of law or equity, all the land to which the proviso was applicable should, if retained by the principal officers of the ordnance under the provisions of that Act, be paid for by them in the manner provided by that Act, and any parts thereof not so retained and paid for, should be and were thereby declared to be absolutely revested in the said *Nicholas Sparks* or the parties respectively to whom the same may have been conveyed by him before the 10th day of May, 1846, to his or their own proper use forever, and such conveyances should not be invalidated by any want of possession in the said *Nicholas Sparks*, or adverse possession by the said principal officers at the time they were respectively made.

The second section provides that the principal officers should within a month obtain a certificate from the Commander of the Forces in the provinces setting forth what parts of the land to which the proviso was applicable it was necessary to retain for the service of the Ordnance Department for military or canal purposes, and such parts now to be retained by and remain vested in the said principal officers in trust for Her Majesty, and the remainder, if any, should be immediately thereafter absolutely revested in the said *Nicholas Sparks* or the parties claiming under him to his and their proper use forever.

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The Act provided for the appointment of arbitrators to determine the compensation to be paid for the land retained, whose award was to be final.

All the legislation on the subject from the passing of the *Rideau* Canal Act to and including 9 *Vic.*, ch. 42, I think shews that the lands set out by Col. *By* as necessary for the canal were considered as vested in the Crown. The statute 6 *William IV.* seems to have been considered necessary to enable persons who acquired title to the lands after the commencement of the works, though purchased before such commencement, to claim compensation. Then the Ordnance Vesting Act speaks of the land that has not been used for the canal being restored to the party or parties from whom the same was taken.

Then the statute of 9 *Vic.* refers to the land to be retained by the principal officers of the ordnance and any parts not retained should be absolutely revested in the said *Nicholas Sparks*, or the parties to whom the same may have been conveyed by him before the 10th May, 1846; then follows these words (clearly indicating that the legislature considered that such conveyances would be void under the statute of *Henry VIII*, unless made good by legislative enactment,) and "such conveyance shall not then be invalidated by any want of possession in the said *Nicholas Sparks*, or adverse possession by the said principal officers at the time they were respectively made."

If, after the execution of the deed from *McQueen* to Col. *By* and before the passing of the Ordnance Vesting Act of 1843, a claim for compensation on the part of Col. *By* or the trustees of his estate for damages for the land taken for the canal had been referred to arbitration, and the arbitrators had decided that no compensation should be paid in consequence of the

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increased value of the rest of the land, that would be a good reason why he should not be entitled to the land not used for the canal, but rather that it should go to the person from whom the land had been taken, all the more so if this conveyance as to the 110 acres was void under the statute of *Henry VIII.*

But the fact that *McQueen* was paid by Col. *By* the full value of all the land at the time of the execution of the conveyance—which I think may be assumed as an historical fact—would be some reason for inferring that the Legislature did not intend to restore land to parties who had been paid their full value, but rather to persons, like *Sparks* and those claiming under him, who had never received any compensation for any of the land taken from him for the purposes of the canal.

Though not necessary in the view I take of the case to decide more than that the second proviso of the 29th section of the Ordnance Vesting Act does not under the facts and law applicable to the case as to the 110 acres in dispute give any title to the suppliants as representing the estate of Col. *By;* yet, as at present advised as to the proviso referred to, interpreted by the admitted facts of the case and the subsequent statute explaining it, I think it was only intended to apply to the lands of *Nicholas Sparks* at *Bytown* that had been set out and ascertained and taken under the *Rideau* Canal Act.

Perhaps in interpreting these statutes I am going too far as to the external and historical facts which it is permitted to call in aid in interpreting statutes. But in a country which advances with such rapidity as *Canada* has for the last 50 years, where the value of property and the supposed object of parties in relation to the purchase or sale of it is to be considered, we must endeavour to place ourselves in the position the parties were at the time the transactions took place;

and in interpreting the Acts of the Legislature, we must endeavour to understand the circumstances to which they had relation and the sense with which the expressions were used. If we do not do this we shall fall short of doing justice between parties litigant.

Having some historical knowledge of the difficulties arising between the Ordnance Department and persons residing at *Bytown* in relation to property taken for the purposes of the canal, having been retained as counsel in some of the suits arising out of those difficulties, I have no recollection of any dispute as to property there taken except what related to property that had belonged to *Nicholas Sparks*.

I am not aware that Col. *By* before his death, or that those claiming under him, until several years after his death, asserted any right to lands in *Bytown* set apart by him for the purposes of the canal, nor that Mrs. *McQueen* or her heirs had in any way asserted an interest in the 110 acres until long after the passing of the Ordnance Vesting Act and the Act explanatory thereof.

Referring to the statutes themselves and the facts appearing on the case, I think, as I have already stated, the proviso in the Ordnance Vesting Act was only intended to apply to the lands in *Bytown* taken for the uses of the canal which had belonged to *Nicholas Sparks;* any historical knowledge I have on this subject leads me to accord with this view.

I say nothing as to the propriety of Col. *By* acquiring for speculative purposes a property in the vicinity of a great public work constructed under his superintendence, which was likely to be increased in value by the money which was expended under his direction. Assuming this to be all correct and proper, there can be no doubt of this fact, that the 500 acres of land pur-

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chased by Col. *By* from *William McQueen* for, it is said, £1,200, have enormously increased in value, and that this increase has been greatly contributed to by the expenditure in one way and another in *Bytown*, or *Ottawa* as it is now called, and its vicinity of very large sums of the public money, and the value of these 500 acres is estimated at hundreds of thousands of dollars. Those who inherit this property from and through Col. *By*, which has become valuable not by his or their labors, but chiefly through the expenditure of the public money and the energy and enterprise of the residents of the country, claim, in addition to what in this country may be called an enormous fortune, the 110 acres which it was Col. *By's* duty to have acquired for the Crown, whose servant he was and which he could only have, at the time it was conveyed to him, acquired the title to for his own benefit by a breach of his duty or by a fraud on the heirs of the former owner of the property. I do not believe he ever intended to perpetrate a fraud on the former owners of the property, or to acquire the title to the 110 acres for himself as against the Crown.

I think what I have written disposes of the questions suggested in the case submitted, but I will refer to them by their number:

1. I am of opinion the Statute of Limitations is properly pleadable under section 7 of the Petition of Right Act of 1876.
2. *William McQueen* did take the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, I think he did not, as they were vested in the Crown by statute when they were set out and ascertained for the purposes of the canal.
3. The right of compensation or damages, if asserted

under the fourth section of the *Rideau* Canal Act, would go to her personal representatives. But if the land was obtained by surrender under the second section of the statute then I think the heir-at-law of *Grace McQueen* was the person who would be entitled to receive the damages and execute the surrender. The distinction between money paid into court under different sections of the same statute is referred to in the judgment of *Kinderley*, V. C. in *Re Harrop's* estate (1).

4. The deeds of the 31st of January, 1832, and 6th February, 1832, are void as against the Crown so far as relate to the 110 acres in dispute, except so far as the same may be considered as a surrender to the Crown under the second section of the *Rideau* Canal Act.
5. The 9th paragraph of the statement of defence is a sufficient answer in law to the petition.
6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement of the Attorney General would be sufficient in law, supposing the statements therein were true.
7. The effect of the Acts set out in the 14th paragraph of the statement of defence is as stated in the 15th paragraph of the same statement.
8. If the claim is to be made by *Grace McQueen's* personal representatives under the 4th section of the *Rideau* Canal Act—and if any claim could have been made by her after the completion of the canal it could only be made under that section—I am of opinion that the Acts referred to in the 16th, 17th, 18th and 19th paragraphs have an application to this case and would constitute a bar against all claims to be made under the *Rideau* Canal Act.

(1) 3 Drew. 726.

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As to the claims to be made by the heirs of Col. *By*, I have already expressed my opinion, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested these 110 acres of land in the heirs of Col. *By*, I am not prepared to say that their claim has been barred by laches on the statement set out in the petition. But I do not think the statute had that effect, or that Col. *By* or his legal representatives ever had for his or their own use and benefit any title to these 110 acres.

I am therefore of opinion, on the case submitted to me, that the suppliants fail, and that the Crown is entitled to judgment againt them with costs.

Petition dismissed with costs.

Solicitors for suppliant: *Pinhey, Christie & Hill.*

Solicitors for respondent: *Mowat, Maclennan & Downey.*

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*Nov. 12.

*Dec. 3.

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*Dec. 23.

IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES ISBESTER.....SUPPLIANT;

AND

THE QUEEN.....RESPONDENT.

Petition of Right—Tender for work on Intercolonial Railway—Acceptance by Commissioners—Contract, Liability of Crown for breach of—Extra work, claim for—Damages—31 Vic., ch. 13—37 Vic., ch. 15, Effect of—Works completed after 1st June, 1874—Certificate of engineer—Condition precedent, Waiver of—Demurrer.

In January, 1872, the Commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders

* PRESENT.—Fournier, J.

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for the erection *inter alia* of certain engine houses according to plans and specifications deposited at the office of the chief engineer at *Ottawa*. *J. I.* tendered for the erection of an engine house at *Matepediac*, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being $21,989. The work was completed and delivered to the Government in Oct., 1874. The specification provided as follows: "The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, *J. I.* was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work, *J. I.* was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications.

By his petition of right, *J. I.* claimed $3,795.75 damages in consequence of the delay on the part of the commissioners to provide the cast-iron columns, &c., and $8,505.10 for extra works.

The Crown demurred and also traversed the allegation of negligence and delay, and admitted extra work to the amount of $5,056.60, and set up the 18th sec. of 31 *Vic.*, ch. 13, which required the certificate of the engineer-in-chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial railway. By 37 *Vic.*, ch. 15, on the 1st June, 1874, the Intercolonial railway was declared to be a public work vested in Her Majesty and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and sec. 3 of 31 *Vic.*, ch. 13, was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 *Vic*, ch. 15.

Held—That the tender and its acceptance by the commissioners constituted a valid contract between the Crown and *J. I*, and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach.

2. That the extra work claimed for, being for a sum less than $10,000,

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the commissioners had power to order the same under the statute 31 *Vic.* ch. 13 sec. 16, and *J. I.* could recover by petition of right, for such part of the extra work claimed as he had been directed to perform.

3. That the 18th sec. of 31 *Vic.*, ch. 13, not having been embodied in the agreement with *J I.* as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted and received by the Government.

4. That the effect of 37 *Vic.*, ch. 15, was to abolish the office of chief engineer of the Intercolonial railway, and for work performed and received on or after the 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said engineer-in-chief, in accordance with sec. 18 of 31 *Vic*, ch. 13.

THIS was a petition of right by which suppliant claimed from the Government of *Canada* the sum of $8,060 17 for extra work and damages in connection with the erection of an engine house at *Métapédiac Road*, on the Intercolonial Railway. The petition alleged *inter alia :*

"That in or about the month of January, one thousand eight hundred and seventy-two, the Intercolonial Railway Commissioners advertised for tenders for the erection of station buildings at *Cacouna*, *Isle Verte*, *Trois Pistoles*, *St. Simon*, *St. Fabien*, *Bic*, *Rimouski*, *Ste. Luce* and *Métapédiac Road*, and also for tank houses and wood sheds at *Isle Verte*, *Trois Pistoles*, *Bic*, *Rimouski* and *Métapédiac Road*, and also for the erection of engine houses at *Riviere du Loup*, *Rimouski* and *Métapédiac Road*, on the line of the said Intercolonial Railway, the said advertisement being as follows, to wit:

"INTERCOLONIAL RAILWAY."

"The Commissioners appointed for the construction of the Intercolonial Railway give public notice that they are prepared to receive tenders for the erection of station buildings at *Cacouna*, *Isle Verte*, *Trois Pistoles*, *St. Simon*, *St. Fabien*, *Bic*, *Rimouski*, *Ste. Luce* and

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Métapédiac Road; and also for tank houses and wood sheds at *Isle Verte, Trois Pistoles, Bic, Rimouski* and *Métapédiac Road*; also, for engine house at *Rivière du Loup, Rimouski* and *Métapédiac Road.*

"Plans, specifications and forms of tender may be seen on and after 20th February, at the office of the Chief Engineer, *Ottawa*, at *Rivière du Loup* and *Rimouski.*

"Tenders may be for the whole or any less number of these buildings, and will be received, marked "Tenders for Buildings," at the Commissioner's Office, *Ottawa*, up to 12 o'clock noon, of the 20th day of March next.

"(Signed) . "*A. WALSH*,
"*ED. B. CHANDLER*,
"*C. J. BRYDGES*,
"*A. W. McLELLAN.*

"Commissioner's Office, *Ottawa*,
"January 12th, 1872."

"That according to the said advertisement, plans and specifications, your suppliant, in or about the month of March, eighteen hundred and seventy-two, tendered for the erection of the engine house at *Métapédiac Road*; that his said tender was on a form furnished by the said Intercolonial Railway Commissioners, was signed by the said suppliant, then carrying on business as '*James Isbester & Co*,' and by his two sureties, *Alexander Macdonnell* and *Martin Lynch*, and was for the sum and price completed of twenty-one thousand nine hundred and eighty-nine dollars, current money of *Canada.*

"That subsequently, to wit, in or about the month of September, eighteen hundred and seventy-two, your suppliant was duly notified by the said Intercolonial Railway Commissioners that his said tender had been

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accepted, to wit, his tender for the erection and completion of an engine house at *Métapédiac Road*, according to the plans, specifications and conditions exhibited as aforesaid, for the said sum or price of twenty-one thousand nine hundred and eighty-nine dollars, current money of *Canada*.

"That subsequently, to wit, in or about the month of October, one thousand eight hundred and seventy-two, your suppliant was instructed by the said Intercolonial Railway Commissioners to proceed to the execution of the said work, according to his said accepted tender, although no other written contract or document had been prepared, or ever has been prepared, up to the present time, for the signature of your suppliant.

"That your suppliant has always been willing to sign a contract according to his said accepted tender and to the specification aforesaid, but was never requested to do so by the said Commissioners.

"That upon being duly advised of the acceptance of his said tender, and being notified as aforesaid to proceed to the erection of the said engine house, your suppliant did immediately proceed to the execution of the said work according to his said accepted contract and in strict accordance with the plans and specifications furnished to your suppliant by the said Intercolonial Railway Commissioners.

"That by the said specifications, it is provided as follows:—'The commissioners will provide and lay railway iron, and will also provide and fix cast iron columns, iron girders and other iron work required for supporting roof.'

"That on or about the thirtieth day of August, 1873, your suppliant notified the said commissioners through *Samuel Hazlewood*, Esquire, their district engineer, that the said engine house was then so far completed

as to be provided with the cast iron columns, iron girders and other iron work required for supporting the roof, and that he, the said suppliant, could not proceed further with the execution of his said work until the said cast iron columns, iron girders and other iron work required for supporting the roof were so provided and fixed.

"That nevertheless the said commissioners and their duly authorized agents and engineers neglected and refused to comply with your suppliant's request, and that the said cast iron columns, iron girders and other iron work required for supporting the roof were only provided and fixed on or about the first day of March, one thousand eight hundred and seventy-four, in consequence of which delay and detention your suppliant was caused great inconvenience, expense, delay and loss of time and labor, and other consequent loss and damages, as detailed in the following statement, to wit:—

The demolishing and re-building three engine pits left exposed and entirely destroyed by ice and frost for want of roof, 70 cubic yards, at $16.00.....	$1,120	00
To 43 days of bricklayers' repairing damaged parts throughout rest of buildings at $4.00.....	172	00
To 43 days of laborer attending, at $1.25	53	75
To brick and mortar used at repairing, &c.	50	00
To 6 months' salary paid to foreman to retain his services till following spring, to complete the work, at $100 per month	600	00
To 6 months' keep of horses and man attending for same reasons, at $50.00 per month.....	300	00
To 6 months' time of suppliant, at $250..	1,500	00

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Amounting in all to the sum of three thousand seven hundred and ninety-five dollars and seventy-five cents.

"And your suppliant further alleges that your suppliant also, during the execution of the said work, was put to great expense and obliged to perform a large quantity of extra work and provide labor and materials not included in the said accepted tender, and not according to the plans, drawings and specifications furnished to him at the time of the letting out of the said works by the said commissioners, but which, in consequence of alterations and modifications made in the drawings and plans of the building by the said commissioners or their engineers, and in consequence also of orders specially given to your suppliant by the said commissioners or their engineers and agents, your said suppliant was instructed and directed to perform and provide and did perform and provide.

"That the extra work, labor and materials performed and provided, as above stated by your suppliant, by order of said commissioners or their engineers and agents, duly authorized and duly accepted by them, and for the value of which he claims payment from the Government of *Canada*, are as follows, to wit:

To fencing removed and put up (654 lineal feet) at 5 cts.....$	32 70
To clearing and grubbing site of engine house.....	50 00
To digging test pits.....	10 00
To 8,150 lineal feet of cedar, at 10 cts., as culvert off-take drain, 600 feet long.....	815 00
To 766 cubic yards excavation for do. handled twice, at 40 cts.....	306 40
To 75 cubic yards excavations in sinking well in engine house, at $2.....	150 00
To pumping.....	20 00

To 1,260 cubic yards excavation in engine house, hauled and placed on bank, at 25 cts	315	00
To 47 cubic yards of masonry in curb of well, at $8	376	00
To 56 cubic yards brick work in extension of engine wall pits under track stringers, at $12	672	00
To carriage of roof of engine house from *Rimouski* to *Ste. Flavie*	400	00
To 26 cubic yards brick work in extra thickness of engine pits wall, caused by allowing for narrow gauge, at $16.	416	00
To 24 cubic yards cut stone for base of columns, got out 15 in. square; new ones substituted 21 in. square, at $2	48	00
To more work for the support of bricks on the outside of lintels over 4 windows, at $6	24	00
	$3,635	10
To 33 cubic yards rubble masonry to foundations of walls forming shops in engine house, at $8	264	00
To 33 cubic yards of additional brick work in engine pits, at $16	528	00
To 131 cubic yards of brick work in walls forming shops, at $16	2,096	00
To 6 four-pannel doors, complete to shops, at $12	72	00
To enlarging two main doors, viz.: demolishing brick work and re-building same, lengthening frames, making two new doors, and additional work to roof in consequence of said alterations	800	00

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To changing track stringers from broad to narrow gauge.....	100 00
To extra cost of stone and dressing to 24 window sills, in consequence of their being the full thickness of the walls, at $12.....	288 00
To putting stove-pipe rings on 11 smoke stacks, at $4	44 00
To reducing height of 11 smoke stacks so as to give sufficient height to engine, at $2	22 00
To 180 squares furring to ceiling for plastering, at $2.50	450 00
To 8 cubic yards of brick to beam filling, at $16	128 00
To 13 squares of double partitions with large sliding doors, at $6.....	78 00
	$8,505 10

"Amounting in all, for the said extra work, labor and materials, performed and provided as aforesaid by your suppliant, to the sum of eight thousand five hundred and five dollars and ten cents.

"That the prices claimed for the said extra work, labor and materials are according to the true value thereof, and are based on the estimates made by and certified to from time to time by the engineer of the said commissioners in charge of the said work (a copy of one of said estimates, including prices, being hereunto annexed, and marked Exhibit B), and are, moreover, in proportion to the sum or price completed, asked by your suppliant in his said accepted tender.

"That in or about the month of October, one thousand eight hundred and seventy-four, the erection of the said engine house, together with the said extra works

and materials, were completed by your suppliant, and that the said engine house and all extra works and extra materials performed and provided as aforesaid, were then and there delivered to and accepted by the Minister of Public Works of *Canada*, or his duly authorized agents and engineers, in the name of Her Majesty, the said Minister then acting in virtue of the statute passed in the thirty-seventh year of Her Majesty's reign, by the Parliament of *Canada* (37 *Vic.*, ch. 15,) intituled: 'An Act to amend the Act respecting the construction of the Intercolonial Railway,' by which statute the powers of the said Intercolonial Railway Commissioners were transferred to and vested in the said Minister of Public Works of *Canada*, from and after the first day of June, one thousand eight hundred and seventy-four.

That all orders given to your suppliant relating to the erection of said engine house and extra works and materials thereon, after the said first day of June, one thousand eight hundred and seventy-four, were so given by and under the authority of the said Minister of Public Works, acting under the said statute, or by his duly authorized engineers and agents, and all estimates prepared and certified to after the said date were so prepared and certified to under the said statute and under the authority of the said Minister.

"That the accepted tender of your suppliant having been for the sum of... ..$21,989 00	
"His aforesaid claim for damages, expense, loss of time and labor, and other consequent loss and damages as detailed above, being for the sum of.....	3,795 75
"And his claim for extra work and labor and extra materials, as detailed above, being for the sum of.....	8,505 10
	$34,289 85

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"The total is thirty-four thousand two hundred and eight-nine dollars and eighty-five cents, from which, deducting the sum of twenty-six thousand two hundred and twenty-nine dollars and sixty-eight cents, received by your suppliant at different dates, there remains due to your suppliant by the Government of *Canada* a balance of eight thousand and sixty dollars and seventeen cents ($8,060.17)."

To this petition Her Majesty's Attorney General for the Dominion of *Canada* filed the following demurrer and statement of defence:—

"I, the honourable *Tousaint Rudolph Laflamme*, Her Majesty's Attorney-General for the Dominion of *Canada*, on behalf of Her Majesty, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, do demur thereto and to the several paragraphs thereof; and for causes of demurrer state:—

"1. That no sufficient case is shown in said petition, or in any of the several paragraphs thereof, for any relief against Her Majesty.

"2. That it does not appear in and by the said petition that the contract under which the suppliant claims the amounts mentioned and set out in his said petition from Her Majesty was ever sanctioned by the Governor in Council, as required by section sixteen of the Act of the parliament of *Canada*, entitled "An Act respecting the construction of the Intercolonial Railway," passed in the thirty-first year of Her Majesty's reign.

"3. That it does not appear in and by the said petition that the Chief Engineer of the Intercolonial Railway has certified that the work for or on account of which the suppliant claims to recover in his said petition, or any part thereof, has been duly executed, or that the

suppliant is entitled to be paid therefor or any part thereof, nor that such certificate has been approved of by the commissioners of said railway, as required by section twelve of the said "Act respecting the Intercolonial Railway," or by the Minister of Public Works of the Dominion of *Canada*, to whom the duties and powers of the said Commissioners were transferred by an Act of the parliament of *Canada*, passed in the thirty-seventh year of Her Majesty's reign, intituled "An Act to amend the Act respecting the construction of the Intercolonial Railway."

"4. That Her Majesty is not responsible in a proceeding by way of petition of right for the damages or injuries mentioned in the said petition, or any part thereof.

"5. That if the said Commissioners, or their engineers or agents, or any of them, exacted or required the suppliant to perform any or different work, or to supply any more or different material than that included in the suppliant's tender, or not according to the plans, drawings, and specifications furnished to him at the time of letting, the performance or supply thereof by the suppliant was voluntary, and Her Majesty is not responsible therefor.

"And I, the said *Tousaint Rudolph Laflamme*, on behalf of Her Majesty, not waiving any of my said several causes of demurrer, but wholly relying and insisting thereon,—for defence to so much of the said petition as I am advised it is material or necessary for me to make answer, say as follows:

"1. I admit, on behalf of Her Majesty, paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the suppliant's petition.

"2. I deny that on the thirtieth day of August, one thousand eight hundred and seventy-three the said engine house was then so far complete as to be ready

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for the cast iron columns, iron girders, and other iron-work required for supporting the roof, and that the said suppliant could not proceed further with the execution of the said work until the said cast iron columns, iron girders, and other ironwork required for supporting the roof were so provided and fixed; but, on the contrary, I say that the said building was not ready for the iron work until much later in the year.

"3. I deny that the said Commissioners, or their agents or engineers, neglected or refused to comply with the suppliant's request to supply the said cast iron columns, iron girders, and other iron work for supporting the roof, alleged in paragraph eleven of the suppliant's petition, or that the suppliant was occasioned the loss or damage alleged in said paragraph, or any loss or damage, in consequence of any delay upon the part of the commissioners, their agents or engineers, in providing or fixing the said columns, girders and other iron work; but, on the contrary, I say that if the suppliant suffered any loss or damage in consequence of the said columns not being fixed until about the first day of March, A. D. 1874, it was entirely because of the fact that he had not the building ready to enable the fixing of the said columns, girders, and the other iron work in connection with the said roof to be proceeded with by the agents or workmen of the said commissioners, earlier than the day last mentioned.

"4. I admit that the suppliant performed some extra work and provided some labour and material not embraced in the plans, drawings, and specifications, with respect to which he entered into his said contract with the commissioners, but I say the commissioners took account of all such work, labour and materials, and recommended payment for so much thereof as was not

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within the said contract, at fair and reasonable and proper prices.

"5. The amount recommended and fixed by the said commissioners to be paid to the suppliant in respect of the said extra work, labor and materials so performed and supplied by him as aforesaid, was the sum of $5,056.60, and I say, save the work, labour and materials so allowed for by the said commsssioners, there was not any other work, labor or materials performed or supplied by the suppliant, not embraced in his said contract, and I say that the sum of $5,056.60 was, and is, a fair, reasonable, and proper sum or allowance for the said work, labor and materials.

"6. I deny that the extra work, labor and materials performed and provided by the suppliant, at the request of the commissioners, is as is set out and described in paragraph thirteen of the suppliant's petition, or that the prices claimed by the suppliant for the extra work so set out and mentioned, as set forth in said paragraph are according to the true value of the extra work, labor and materials done and provided by the suppliant, or that they are based on the estimates made and certified to from time to time by the engineer of said commissioners, as stated in paragraph fourteen of the suppliant's petition; but, even if they be so based, I say the said estimates made and certified by the said engineer were merely progress estimates, and were not binding upon the said commissioners, or upon Her Majesty.

"7. The said suppliant was paid, from time to time, various sums of money, amounting in the whole to the sum of $26,228.70, including a sum of four hundred dollars which it was agreed between the suppliant and the commissioners should be deducted from the amount coming to the said suppliant in respect of his said con-

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tract and works, for transportation of material by the said commissioners for the said suppliant.

"8. In and by section twelve of the Act of the Parliament of Canada entitled "An Act respecting the construction of the Intercolonial Railway of Canada" under the provisions of which the said contract was entered into and the said work, labor and materials done and supplied, it is provided "that no money shall be paid to any contractor until the chief engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed, nor until such certificate shall have been approved of by the commissioners—and I say the chief engineer of the said railway has not certified, save to the extent of $792.05 as hereinbefore mentioned, that the work for on account of which the sums sought to be recovered by the suppliant in his petition are claimed has been duly executed, nor has any such certificate been approved of by the said commissioners or the Minister of Public Works of the Dominion of *Canada*.

"9. I deny that there is remaining due to the suppliant for and in respect of the work, labor and material performed under his contract or otherwise as in his said petition is alleged, the sum of $8,060.17, but on the contrary I say there is only due to the said suppliant the said sum of $792.05, which Her Majesty offered to pay but which the suppliant refused.

"10. I charge and submit on behalf of Her Majesty, having regard to the terms of the said Act of Parliament and of the said contract and to the facts and circumstances of the case, there is nothing due from Her Majesty to the suppliant save the aforesaid sum of $792.05, which,on behalf of Her Majesty, I hereby tender him and that save as to that sum he has no just claim in

the premises and that the said petition ought to be dismissed with costs."

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Mr. *H. T. Taschereau*, Q.C., appeared for the suppliant, and Mr. *A. F. McIntyre* for the Crown.

Fournier, J. over-ruled the demurrer for the following reasons :

"Considérant que la défense au fonds en droit (demurrer) produite par l'hon. Procureur Général au nom de Sa Majesté, défenderesse en cette cause, est dérigée contre toutes et chacunes des allégations de la petition en cette cause dont le renvoi en entier est demandé par la dite défense au fonds en droit ;

"Considérant qu'il est formellement admis de la part de Sa Majesté que la somme de $792.05 est due au pétitionnaire pour la balance de sa réclamation, et que le paiement d'icelle somme lui a été offert par la défense en cette cause ;

"Considérant que l'offre de payer la dite somme est en réalité, quant à cette partie de la demande, une rénonciation aux moyens invoqués par la défense au fonds en droit ; que partant la conclusion d'icelle est trop générale en ce qu'elle s'attaque également à cette partie de la demande admise comme susdit, pour laquelle dans tous les cas, jugement devrait intervenir conformément à la dite admission, en faveur du pétitionnaire ;

La cour renvoie la dite défense au fonds en droit (demurrer) avec dépens."

And on the 23rd December, 1878, judgment was delivered on the merits.

FOURNIER, J. :—

In the month of January, 1872, the commissioners appointed for the construction of the Intercolonial rail-

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way gave public notice that they were prepared to receive tenders for the erection of certain railway stations and engine houses according to plans and specifications deposited at the office of the chief engineer, *Ottawa*, and at other places mentioned in the public notice.

In the month of March following, the suppliant tendered for the erection of the engine house at *Metapediac Road* on the required form, and it was only in the month of September following that his tender was accepted.

In the month of October following the suppliant was duly instructed by the said Intercolonial railway commissioners to proceed to the execution of the said work according to his accepted tender. The contract price was $21,989. This contract was entered into simply by the commissioners' acceptance of the suppliant's tender to execute the works according to the plans and specifications which had been made. The works under contract, the details of which appear in the plans and specifications, were completely executed and delivered to the Government, who took possession of them in the month of October, 1874. The specifications contain a clause that the works were to be completed on the 15th September, 1873, but the tender having only been accepted in September of that year, and instructions to proceed with the work only in October following, it is evident that the condition was waived as being impossible to be carried out.

The suppliant's claim is as follows:—[The learned judge then read the items of the claim as stated in the petition.] (1).

On the execution of the contract thus entered into, the only question which arises is that which has refer-

(1) Ubi supra, 703.

ence to the suppliant's claim for damages in consequence of the commissioners' delay to proceed with a part of the works which they had contracted to provide and execute themselves. These works are thus enumerated in the specifications:

The commissioners will provide and lay railway, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof. The commissioners will also furnish the tank and its fittings.

About the thirtieth day of August, 1873, the suppliant notified the commissioners through *Samuel Hazlewood*, Esquire, their district engineer, that the said engine house was then so far completed as to be provided with the cast-iron columns, iron girders and other iron work required for supporting the roof, and that he the suppliant could not proceed further with the execution of his work unless the cast-iron columns, iron girders and other iron work required for supporting the roof were provided and fixed in accordance with the specification. The commissioners and their agents neglected to comply with this request, and it was only about the first of March, 1874, that the iron works were provided. This delay caused great damage to the suppliant, and his claim for the same is alleged as follows in the petition of right:

In consequence of which delay and detention your suppliant was caused great expense, delay and loss of time, and labor and damages as detailed in the following statement (1):

The Crown answered the petition by a demurrer which has been adjudicated upon.

The Crown also pleaded to the merits, admitting paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, and denying the remaining paragraphs, and specially the allegation that the building was ready on the 30th of

(1) Ubi supra. 703.

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August, 1873, to receive the iron columns and iron girders which were necessary to support the roof, but, on the contrary, that the building was not ready till a long time afterwards.

The defence also avers that there was no delay or negligence on the part of the commissioners to comply with the suppliant's request to provide the necessary iron work, and denies that the suppliant suffered any damage; the Crown, on the contrary, asserts that if the iron columns and iron girders were only fixed on the 3rd of March, 1874, it was solely because the building was not ready before that time.

The 4th and 5th paragraphs of the defence admit that extra works were performed by order of the commissioners and by the engineer, but the amount to be paid for them had been fixed and determined by them at the sum of $5,056.60.

By the 8th paragraph the Crown pleads that by the Intercolonial Railway Act of *Canada*, in virtue of which the present contract had been entered into, it is enacted in the 12th section (this is an error, it ought to be the 18th section):—

> That no money shall be paid to any contractor until the chief engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed, nor until such certificate shall have been approved of by the commissioners.

That in this case the chief engineer's certificate was only given for the sum of $792.05, which amount the Government has tendered to the suppliant, who refused it.

In this case the following questions are to be determined:

1st. Was there on the part of the commissioners in providing the iron works, which were by the specifications to be provided and fixed by them, such delay and

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neglect as to cause damages to the suppliant? and to what amount should be fixed the damages?

2nd. Is the Crown responsible for damages resulting like these from breaches of the contract?

3. Were the extra works claimed by the suppliant duly ordered, and has the suppliant the right to claim their value? What extra works were performed and what value was proved?

The contract having been completely executed, no question can now arise as to its legality. It is not for the Crown now to aver that it is not a valid contract, because it was not passed in conformity with all the provisions contained in the Intercolonial Railway Act of *Canada*. The Government by accepting the work thereby waived all irregularities which may have taken place in making the contract, and has also lost any right to attack its validity. Considering, therefore, the contract as unimpeachable, it only remains for me to ascertain if the suppliant has established by the evidence that the commissioners have really been guilty of the delays and negligence with which they are charged.

After the most careful consideration of all the evidence of this part of the case, I have come to the conclusion that the suppliant has clearly established his contention on this point. In support of my view of the case, I will give the following extracts of the evidence of the principal witnesses :—

EVIDENCE AS TO DELAY.

J. Young, foreman employed by the suppliant, says:

We were ready for the roof in September, and, in fact, in August we were ready to commence, so that the winter was just lost. Bad weather came on then, and when they got their iron up we could not do anything outside of the woodwork until the coming Spring. The whole winter was lost. * * * The roof was up in January, 1874, but the work was all stopped. We were delayed before that time. When the roof was completed, we could not commence to

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do work outside then in the bad weather. The walls were all ice, and were destroyed by the frost on the top. They had to be all fixed over. That work could not be done before spring on account of frost. If we had had the roof there in September we would have had the building finished by the time we commenced in the spring. Supposing the building of the roof had been gone on with when we were ready, we would have been ready to complete the building in the winter. We would have had a roof over us during the winter. It was possible to complete the roof before the bad weather came on. It would take from three weeks to a month to put up the roof. It took me that time to put up one at Thunder Bay, Fort William.

John Lindsay, C. E.:

Present to a conversation between *Hazlewood* (district engineer in charge of the work) and *Isbester* about the detention and delay caused to him by the Government. This was about September, 1873, The iron girders were not ready when required to proceed with the building. Visited the building with *Hazlewood*, and found the work stopped. I heard *Hazlewood* say it was a very unfair thing that Mr. *Isbester* should be delayed in his work, he was ready for it, and he should certainly be remunerated for the time he was delayed and detained. This conversation took place in July or August before my visit on September. The work was then stopped, and it was on account of that.

Henry J. Cambie, C. E., employed by the Department of Public Works:—

Was in charge of the work in question in this case, under *Hazlewood*. Went on the spot twice or three times a month. He is aware that the building was ready for the iron work before the iron work was commenced. He gives a detailed description of the advanced state of the work, and says that the brickwork of all the walls was a considerable height up. To the question:

If the iron girders and other iron work had been ready then would the iron work have been proceeded with?

He answers:

It would have taken a very short time to have finished any particular piece that was wanted.

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Shortly afterwards, on the 17th September, 1873, he laid out the pillars and gave him (*Isbester*) centres on them. Judging from his memoranda, part was not ready in the beginning of September, but it might have been at any time it was wished. He (*Isbester*) could have got ready any part that was wanting ready in less than a week.

Do not these witnesses prove positively that early in September the work was sufficiently advanced to receive the iron work? This fact was known by the commissioners, as stated by *Cambie*, the engineer put in charge of the works by them. On the 17th September, *Cambie* directed where the iron columns were to be placed, but the iron work provided by the commissioners was not put on the spot till it was too late for the contractor to avail himself of the end of the season in order to complete his work before the bad weather of the fall. At the time the roof was fixed, in January, 1874, it was impossible to finish the work still necessary to do outside. He was obliged to wait till spring, and the entire winter was lost for the work which he could have proceeded with had the roof been put on earlier; and when it was put on, the walls were then covered with ice and damaged by the frost. The evidence clearly shows that the roof could have been put on in three weeks, so that the commissioners had, before the bad weather of the autumn could set in, all September and October to execute the part of the work which they had contracted to perform. By not proceeding with the work at the proper time they not only prevented the contractor from going on with his works without interruption, but they obliged him to suspend his works in September, and to spend the whole winter idle. That on account of this negligence and delay the suppliant suffered damages there can be no doubt, and

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the evidence on this point is conclusive, and in support of this fact I will cite the following extracts:—

William Henry Stevenson, contractor:

In the spring of 1874 I was in the building and I saw that they were engaged in repairing the damage caused by frost during the winter. The bricks appeared to be all burst by the frost. The damage was certainly caused by frost and exposure to the weather. If the roof had been on the building that damage would not have occurred.

James Worthington, contractor:

When I first saw the building, I think I am correct in saying in the winter of 1873-4, just as the spring was opening, there had been a great deal of damage done. The walls had not been covered and there was no roof on, and there was a great deal of damage done to the whole work.

The suppliant's claim for these damages are detailed in items 27, 28, 29, 30, 31, 32 and 33 of the petition. I will further on state the amounts which have been established by the evidence.

2. I have thus far shown that the suppliant has suffered damages in consequence of a breach of contract on the part of the commissioners, acting for the Crown, in not providing in time the necessary iron work; it now remains for me to consider whether contrary to the respondent's contention, the Crown can be made responsible for such damages. This all important question, fortunately for me, is not a new one. It has before been contended that a petition of right will not lie for a breach of contract claiming unliquidated damages. In the case of *Thomas* v. *The Queen* (1), the question was decided affirmatively by the Court of Queen's Bench in *England*. In that case the suppliant who was an inventor of a system of heavy rifled artillery, had entered into an agreement with the Secretary of State for War to refer his invention to the Ordnance Select

(1) L. R. 10 Q. B. 31.

Committee at *Woolwich*, and to furnish the committee with such descriptions and drawings or models as might be necessary to enable the committee to give an opinion on the subject, and also attend the committee in order to give his personal explanation. The consideration of the agreement was that in the event of the invention being approved of and being adopted by Her Majesty's service, a reward in that behalf should be given to the suppliant and the amount of the award should be determined by Her Majesty's Master General and Board of Ordnance. He averred also having incurred heavy expenses in perfecting the invention, that Her Majesty's government promised that in event of certain trials, then about to be made, being successful, his expenses should be reimbursed to him by the government. He also averred that although all conditions precedent had been fulfilled, yet the amount of the reward had not been determined, not had the same nor any part thereof been paid to the suppliant. There was a demurrer to the petition and the Attorney General on the argument having declined to press any objection which could be covered by an amendment, the question argued before the court was stated as follows: That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for breach of contract nor to recover money claimed either by way of debt or damages.

Mr. Justice *Blackburn* delivered a most elaborate judgment on these questions, but I will only refer to such parts of his judgment which are applicable to the point under consideration, viz., whether a petition of right will lie for a breach of contract resulting in unliquidated damages (1); he says:

Contracts can be made on behalf of Her Majesty with subjects,

(1) At page 33.

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and the Attorney General, sueing on her behalf, can enforce those contracts against the subject; and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases. But it is quite settled that on account of her dignity no action can be brought against the Queen; the redress, if any, must be petition of right, which is now regulated by 23 & 24 *Vic.*, ch. 34. If the suppliant ultimately recovers, he obtains, under section 9, a judgment of the court that he is entitled to such relief as the court shall think fit, and this form of judgment would be applicable to the case in which it appeared to the court that the plaintiff was entitled to be paid damages for the non-fulfilment of a contract. It appears that at the time of the passing of the Act there was a general impression that a petition of right was maintainable for a debt due or a breach of contract by the Crown; the opinion to that effect, expressed in Lord *Somer's* argument in the *Banker's* case (1) has been adopted by Chief Baron *Comyns* (1 Com. Dig Prerogative, D. 68) and by Sergeant *Manning* in his treatise on the Practice of the Court of Exchequer, where he says, (2) that "chattels, personal debts or unliquidated damages may be recorded under it * * *." Indeed, the framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various Public Departments of the Government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right, in respect of specific lands or chattels, must for the future be exceedingly rare.

But, as the 7th section of the Act just cited expressly provided that "nothing in the statute shall be construed to give the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of the Act," it became necessary to determine the correctness of the general impression referred to, and whether, before the passing of that statute, a petition of right lay in respect of the non-fulfilment of a contract made by an authorized agent of the sovereign.

The decision on this point is of the greatest importance here as by our Act (39 *Vic.*, ch. 27) making further

(1) 14 How. St. T. p. 39. (2) Page 84.

provision for the institution of suits against the Crown by petition of right, it is enacted (1) that "the Act shall give to the subject here only such remedy against the Crown as he would have been entitled to in *England* under 23 and 24 *Vic.*, ch. 34.

This last statute only gave a remedy in a case in which the subject would have been entitled to such remedy by the laws in force there prior to its passing. It necessarily follows that, if prior to the passing of the 23 and 24 *Vic.*, ch. 34, the subject in *England* had no right to petition for the non-fulfilment of a contract, the subject in *Canada* would be in the same position, as our Act declares that the rights of the subjects are the same.

Mr. Justice *Blackburn*, after a most full and elaborate review of all the arguments and authorities on this question, decides it in the affirmative. I will only cite his concluding remarks (2):

In *Comyns'* Digest, Prerogative, D. 78, it is said that petition lies if the King does not pay a debt, wages, &c.; citing Lord *Somers'* argument 85; and Chief Baron *Comyns* expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth* v. *Haldeman* (3) that Lord *Thurlow* and *Buller*, J. (both obiter, it is true), expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the Barons of the Exchequer, in *Oldham* v. *Lords of the Treasury* (4), and in *Baron de Bode's* case (5), in which the point was raised, though not decided. Lord *Denman* declares "an unconquerable repugnance to the suggestion that the doors ought to be closed against all redress and remedy," a doctrine much resembling what Lord *Somers* calls Lord *Holt's* "popular opinion," that if there be a right there must be a remedy. In *Viscount Canterbury* v. *Attorney General* (6), it was decided that the sovereign could not be sued in petition of right for negligence; and in *Tobin* v. *The Queen* (7),

(1) Sec. 19, p. 3.
(2) P. 43.
(3) 1 T. R. 178.
(4) 6 Sim. 220.
(5) 8 Q. B. 274.
(6) 1 Phill. 306.
(7) 16 C. B. N. S. 310.

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that the Queen could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract, *Erle, C. J.*, expressly saying that " claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs ;" and in *Feather* v. *Reg.* (1), it is assumed in the judgment that it does lie " where the claim arises out of a contract, as for goods supplied to the Crown on the public service.

We think, therefore, that we are bound by the *Banker's* case (2) to hold that the judgment on this demurrer should be for the suppliant.

In accordance with this decision and the authorities there cited, I hold that in the case of the non-fulfilment of a contract the Crown is responsible for the damages resulting to the other contracting party.

The damages claimed by the suppliant in this case are enumerated in the petition under items 27, 28, 29, 30, 31, 32 and 33, and amount in all to the sum of $3,792, but the suppliant has failed to prove several of these items. As to item 27 for work demolished and rebuilt in consequence of damages caused as above stated, it is proved by the evidence of *James Young*, foreman, *Lindsay, Smitlee & Worthington*, viz. : $1,120.

Item 28, taking *Young's* evidence, should be reduced to 36 days at $3 per day, viz., instead of $172, $108 ; also item 29 to be reduced to $36. As to item 30, there is no evidence as to the quantity of mortar, &c., used, and having nothing to base an estimation I cannot allow anything.

Item 31, for six months' wages paid to *Young*, foreman, during the stoppage of the work, I think I must refuse the amount, although there is evidence that it has been paid. The suppliant, wishing to secure *Young's* services, engaged him at $100 per month until the contract would be completed, without stipulating, in case the works for some reason or other might be

(1) 6 B. & S. 294. (2) 14 How. St. Tr. 1.

stopped, that he might dispense with his services. It is more on account of the bargain made than on account of the delays caused by the Commissioners in executing the work they were obliged to make, that the suppliant paid the amount.

As to item 32, I will not allow anything for the keep of the horses, but as there is evidence that it was necessary to have a watchman to look after the suppliant's property during the stoppage of the works, I will allow $1.25 per day during the six months to the watchman, viz., $227.

There is no evidence as to item 33.

The total amount of damage, according to the evidence, to which the suppliant is entitled amounts to $1,491.

Now, as to the extra work claimed. The evidence is conclusive, especially that of Mr. *Schrieber*, assistant engineer-in-chief, that orders to execute these extra works were duly given, with the exception of a few items to which I will refer later on, and which Mr. *Schrieber* says formed part of the contract, the total amount of the extra work claimed amounting in all to $8,305. The Commissioners had power to order it without being bound by the provisions of the Intercolonial Railway Act which have reference to contracts over $10,000. On this point of the case there can be no legal difficulty, the only one which exists is as to the value of the extra work executed, as there is a wide difference of opinion between certain witnesses. In order to justify the conclusion, at which I have arrived, to adopt the prices charged by the suppliant in most cases, I will cite certain parts of the evidence.

As to the brickwork, *Robert White* says, the brick was worth at *Ottawa* in the fall of 1872 $14 per 1000,

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paid that price himself. Would have charged at *Ottawa* $12 per cubic yard.

James Young says the brick cost from $12 to $14 per thousand at *Rimouski*. That was the current price. It was an awfully high rate to haul brick from *Rimouski* to *Ste. Claire*, either $14 or $16 per thousand. I think it was more than the value of the brick. To lay it when on the spot cost $3 or $4.

James Isbester, suppliant, examined by the crown, says: Manufactured brick at *Ste. Claire*, which cost various prices, some as high as $16 per thousand. The first batch was burnt 4,000 in one kiln. The last batch cost him from $10.50 to $11 per thousand. Manufactured a very little quantity, all told not over 80,000, and there are about 300,000 in the building. Bought 40,000 in *Rimouski* which was brought down there (at *Ste. Claire*). There were no bricks manufactured there until he manufactured some, and the reason they cost so much was that there was no skilled labour. Had to train all the men, and wages were very high. Purchased at different times from 60 to 80,000 at $9.00 a thousand at *Rimouski*. They cost him $10 a thousand for teaming them, that is what he paid *Michel Lepage* for hauling the bricks.

To this evidence I shall add that of Mr. *Samuel Hazlewood*, engineer in charge of the said works, who in all his progress estimates puts down the price of the brick at $16 per cubic yard. Although generally speaking progress estimates are not made to establish the exact value of the materials and the labor, but more properly for the purpose of determining the amount of advances to be made, it is neverthelss certain that they are evidence of the approximate value of the same. No person was in a better position than Mr. *Hazlewood* to know the special difficulties the contractor had to overcome

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in order to procure brick, stone and other materials, and his opinion on this point is consequently of great weight. The only contradictory evidence put in by the crown is that of Mr. *Schrieber*, who, without allowing anything for the peculiar circumstances in which the contractor was placed, reduces by one-half the amount claimed, and determines the price to be allowed for these extra to be that currently given for brick in ordinary circumstances. This would be an injustice to the suppliant, as I have shown by the evidence that the suppliant was situate under exceptional circumstances. Considering, therefore, that the value of the brickwork has been proved, and as it has been put down in Mr. *Snmuel Hazlewood's* progress estimates as being a reasonable charge under the peculiar circumstances, I am of opinion that for brickwork—the quantity being admitted by the Crown—the following items should be allowed at the prices claimed in the petition, viz.:

Items 2	$528 00	
3	2,096 00	
11	128 00	
22	672 00	
24	416 00	
27	1,120 00	
		$4,960 00
Item No. 15 as to masonry put down as $8 per cubic yard is reduced to $7, in accordance with *Schrieber's* evidence, as the suppliant did not examine any witness to corroborate the price fixed by *S. Hazlewood* in his estimates, making instead of $264		231 00

Items 18 and 19.—The weight of evidence as to these items is in favor of the suppliant's prices. *Robert White*, contrac-

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tor, and *James Worthington*, contractor, both established the value claimed, whilst *Schrieber's* valuation is not supported by any other witness, viz.:

Item 18		72 00
" 19		800 00
		$6,063 00

Item 20—Two witnesses were examined. Mr. *Schrieber* puts the value of the work down at $40, whilst *James Young* valuates it at $100. I have adopted the mean between the two amounts, and will allow 70 00

$6,133 00

The following items are admitted in full by Mr. *Schrieber* as to quantity and as to price, viz.:

Items 26	$78 00	
1	£2 70	
2	50 00	
3	10 00	
4	815 00	
5	306 00	
6	150 00	
7	20 00	
8	315 00	
		$1776 70
		$7909 70
Also items 9	$376 00	
11	400 00	
13	48 00	
14	24 00	
		$848 00
		$8,757 70
Off item 27 already allowed		1,120 00
		$7,637 70

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The following items, viz.: 21, 22, 23, 24 and 25, making a total sum of $932, are those which Mr. *Schrieber* states are comprised in the "contract," viz., in the specifications which detail the work to be executed. In his evidence as to these items, he gives the uniform and laconic answer "covered by contract." But on reading carefully the specification, it is impossible to find any mention of these items as forming part of the works detailed. Mr. *Lindsay*, C.E., contrary to his opinion declares items 21 and 22 to be extras. Speaking of the "belt course," which by *Hazlewood's* order was made the same width as the wall, he says:

> It was not intended to be built as it was afterwards built. According to that specification the belt course was not required to be carried through the building, but it was afterwards insisted upon by Mr. *Hazlewood* in my presence * * *."

I see nothing in the specification or the plans that would call for that work, though the inside of the wall. It is to be bricked up with brick. The words in the specification are: "the inner face being lined with brick." There is no mention that the sills should be of the width of the wall. It is also proved that of the different engine houses built on the road, this is the only one which had the window sills of the full thickness of the walls. The omission in the specification and Mr. *Lindsay's* evidence must consequently have more weight than Mr. *Schrieber's* opinion gives without explanation. This item will, therefore, be allowed, with a reduction as to price, viz., $8 instead of $12, making $192. The same reasoning also applies to items 22 and 23, viz., $14, $22. Item 24, according to Mr. *Schrieber's* opinion, is also covered by the contract, but there is nothing said as to this item in the specification: as to "plastering" I find that "the whole of the roof to be lathed and plastered two coats." Furring is an important work and the omission to specify it

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must have struck the suppliant when he tendered for the work, and in consequence of this omission he fixed his price. Both Mr. *Worthington* and Mr. *White*, the first a contractor and the latter a builder, contrary to Mr. *Schrieber's* view of the case, declare furring in this work is extra. I adopt this opinion, and will allow this item as it has been proved to be worth the amount claimed, viz, $450. The specification is also silent as to item 25; all that can be found in it concerning this item is as follows: "The walls and pillars above formation level to be of the dimensions shown on the plan, and to consist of good sound bricks laid in best common lime mortar."

The witness *Worthington* says that he cannot form an opinion on this point, and concludes thus:

It is at least ambiguous at any rate.

It seems to me, however, that by looking at the plan on which there is no "beam filling" traced, and that being in accordance with the specification, that it was forgotten. There is no witness that states that according to usage the work done is considered necessary to complete the building of a wall like the one in question.

James Young, examined as to this, declares it to be contrary to usage. He says:

I know it does not show on the plan (beam filling) and in any buildings I ever had any thing to do with, it was considered an *extra* when it was done.

If there was any doubt in the matter, it should be interpreted against the parties who were stipulating for themselves, that is to say, the commissioners, according to the rule of law: "In doubt the contract is interpreted against the party who makes the condition and in favor of the party who contracts the obligation." For these reasons I allow this item, viz., $128.00.

The whole amount allowed for these *extra* works

make a total sum of $8,470.70, out of which must be deducted the sums already paid by the government on account of these works.

4. Having determined the amount which the suppliant has a right to claim, it now remains for me to decide the question, whether this claim, though legitimately due, should not be dismissed for the sole reason that the certificate of the engineer-in-chief has not been produced. In 31 *Vic.*, ch. 13, "An Act respecting the construction of the Intercolonial Railway," by section 4, it is enacted that:

The Governor shall and may appoint a chief engineer to hold office during pleasure, who, under instructions he may receive from the commissioners, shall have the general superintendance of the works to be constructed under this Act.

This Act was amended and repealed in part by 37 *Vic.*, ch. 15, in the following manner:

Section three of the Act passed in the thirty-first year of Her Majesty's reign, intituled "An Act respecting the construction of the Intercolonial Railway," with so much of any other part of the said Act as authorizes the appointment of any commissioner or commissioners for the construction and management of the said railway or the continuance of such commissioner in office, *or as may be in any way inconsistent with* this Act, shall be repealed from and after the first day of June, 1874; and from and after the said day the said Intercolonial Railway shall be a public work vested in Her Majesty, and under the control and management of the Minister of Public Works, and all works and property, real or personal, thereunto appertaining or constructed, or required by the commissioners under the said Act, shall be vested as aforesaid and under the control and management of the said minister.

The second section transfers to the Minister of Public Works all the powers and duties of the Commissioners, and declares that all contracts, agreements, obligations and bonds lawfully entered into shall be for the benefit of Her Majesty, and

may be enforced and carried out under the authority of the Minister

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of Public Works as if they had been entered with Her Majesty, under the authority of the Act passed in the thirty-first year of Her Majesty's reign, intituled, "An Act respecting Public Works of *Canada*."

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By the 5th section, the powers transferred by the previous section are declared to be additional to those already vested in the Minister under the Act last cited, and in that section we read the following:

> And the Minister may in any case relating to the said railway and works, exercise any powers given him by either of the Acts hereinbefore cited and applicable to such case.

From what I have just cited it is evident that the intention of the Act was to subject the construction and management of the Intercolonial Railway to the provisions contained in the Act respecting the Public Works of *Canada*. The control and management of the road is transferred to the Minister of Public Works It is quite true that all the powers vested in the Commissioners are vested in him, but these are only given to him as additional powers to those he had already as the head of the Department of Public Works, and obviously with the view of surmounting any difficulty which might arise in executing agreements entered into under the provisions of the said Act. It is clear that it is for that reason that he was given the option of exercising any power under either of the Acts. But as there necessarily would be provisions in one Act inconsistent with provisions in the other, if only the sections relating to the Commissioners powers and duties had been repealed, the Legislature wisely enacted that all provisions in the Act amended which might be in any way inconsistent with the Act amending were also repealed.

Amongst other provisions which should be considered as repealed by this Act, is the one having reference to the appointment of a Chief Engineer for

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the construction of the Intercolonial as well as the defining his power and duties. One of the most important of his powers was that which makes his certificate a necessary and precedent condition to the payment of any money under the Act, and which is evidently inconsistent with the control and management of the road transferred to the Minister of Public Works. If this power was still vested in the engineer-in-chief, it would create a conflict of authority between the head of the department and his subordinate. The first could enter into agreements and engagements, the execution of which might be stayed on account of the latter refusing to grant his certificate for some reason or other. But this conflict of authority cannot exist, for in order to continue to the engineer-in-chief his powers, it would have been necessary to add a provision (which does not exist) transferring him from the control of the commissioners to that of the Minister of Public Works. This provision was not inserted, no doubt, because the 37 *Vic.*, ch. 15, in abolishing the commissioners and all employees substituted for them the officers of the Department of Public Works. The provisions relating to the commissioners are not therefore the only provisions repealed, those also referring to the engineer-in-chief and to the secretary of the commissioners must also be declared as inconsistent with the dispositions of the Act respecting the Public Works of *Canada*. The second section of this last Act provides for the appointment of a chief engineer whose duties under section 6 consist in preparing maps, plans and estimates for all public works, which are about to be constructed, altered or repaired by the department; in reporting for the information of the minister on any question relating to the public works which may be submitted to him, to examine and revise the plans

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estimates, and recommendations of other engineers and officers, and *generally to advise* the department on all engineering questions affecting the Public Works of the Dominion. The office of engineer-in-chief of the Intercolonial having ceased to exist, it is to the engineer-in-chief of the department and to the other engineers of the department that the Minister of Public Works must apply for advice when required. There being no provision in law requiring the certificate of the Chief Engineer of the Public Works to effect a valid payment, the suppliant who completed his works and delivered them to the Minister of Public Works after the 1st of June, 1874, cannot therefore be said to have been obliged to produce such certificate, or one from the engineer-in-chief of the Intercolonial whose office had been abolished.

But even admitting that 37 *Vic.*, ch. 15, would not have the effect of abolishing the office, the suppliant could not, in this case, be obliged to produce such a certificate, for this condition was not embodied in his contract as a condition precedent. We have before seen that the Commissioners entered into this contract by accepting the suppliant's tender to execute the works according to the plans and specifications referred to in the above notice. In none of these divers documents which constitute the contract do we find the condition precedent that no payment shall be made to him unless certified to by the engineer-in-chief. The 18th section of 31 *Vic.*, ch. 13, which necessitates this certificate, was not embodied, as in other contracts, in the agreement with the suppliant as a condition precedent imposed on the contractor. Had the suppliant signed an agreement in which this provision was inserted, as it was generally in all the contracts passed by the Commissioners, he would no doubt have been bound by it.

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But the Commissioners have not thought fit and proper to impose this condition, and have also dispensed with many other provisions of the statute in making their contract, and in my opinion it is now too late to exact that the suppliant should be subjected to such a condition. It would be changing the contract, making it more onerous without the consent of one of the contracting parties, which the Crown, any more than any other party, has no right to do.

For these reasons I have arrived at the conclusion that it was not necessary for the suppliant to produce a certificate from the Engineer-in-Chief of the Intercolonial Railway as a condition precedent to the payment of the amount he claims. Appreciating the evidence as I do, I am of opinion that the suppliant is entitled to the following amounts:

That the accepted tender of the suppliant having been for the sum of	$21,989 90
Damages, expenses and labor resulting from breach of contract made on the part of the commissioners as to the iron work.....	1,491 00
Value of extra works	3,470 00
Making a total of.....	31,950 70

From which deducting the sum of $26,229.68, received by the suppliant at different dates, leaves the sum of $5,721 02 as the amount to which the suppliant is entitled to with costs.

Judgment for $5,721.02 *with costs.*

Solicitor for suppliant: *Henry T. Taschereau.*

Solicitor for respondent: *A. F. McIntyre.*

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executed, and $10,354.24 for under drain taken off contractors' hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused. The contractors thereupon, by petition of right, claimed $124,663.33 as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the Chief Engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bill of works exhibited at time of letting. On the profile plan it was stated that the best information in possession of the Chief Engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the Commissioners and Chief Engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate." The contract provided *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of $557.750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said Act, intituled, "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or engineer, by the said contract or by-law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretention, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of the Act first cited in the said contract, intituled, "An Act respecting the construction of the Intercolonial Railway," 31 *Vic.*, ch. 13, and also, in as far as they might be applicable, to the provisions of "The Railway

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Act of 1868." The 18th sec. of 32 *Vic.*, ch. 13, enacts "that no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners. No certificate was given by the Chief Engineer of the execution of the work. *Held* by the Exchequer Court of *Canada* (*Ritchie*, J.): That the contract requiring that *any* work done on the road must be certified to by the Chief Engineer, until he so certified and such certificate was approved of by the Commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the Commissioners as would give the contractors any legal claim against the Crown; the Commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants. —In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2.000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872. *Held:* That if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages. The Crown subsequently waiving the forfeiture, judgment was rendered in favor of the suppliants for the sum of $12,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. JONES *v.* THE QUEEN 570

2——*Petition of Right—Tender for work on Intercolonial Railway—Acceptance by Commissioners—Contract, liability of Crown for breach of—Extra work, claim for—Damages—31 Vic., ch. 13—37 Vic., ch. 15, effect of—Works completed 1st June, 1874—Certificate of Engineer—Condition precedent, waiver of—Demurrer.*] In January, 1872, the Commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection

ELECTION PETITION — *Ballots — Scrutiny*—37 *Vic., ch.* 9, *secs.* 43, 45, 55 *and* 80; 41 *Vic., ch.* 6, *secs.* 5, 6 *and* 10. *Effect of neglect of duty by a deputy returning officer.* 37 *Vic., ch.* 10, *secs* 64 *and* 66—*Recriminatory case.*] In ballot papers containing the names of four candidates, the following ballots were held valid: 1. Ballots containing two crosses, one on the line above the first name and one on the line above the second name, valid for the two first named candidates; 2. Ballots containing two crosses, one on the line above the first name and one on the line dividing the second and third compartments, valid for the first named candidate; 3. Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment; 4. Ballots marked in the proper compartments thus ×. The following ballots were held invalid: 1. Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side; 2. Ballots marked with an *x* instead of a cross. On a recount before the County Court Judge, *J.*, the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, and all the ballots cast at three polling districts, in which the appellant had polled only 331 votes and the respondent, *B.*, 365, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot. On appeal to the Supreme Court of *P. E. Island*, it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice *Peters* held that the ballots of the said three polls ought to be counted, and did count them. Thereupon *J.* appealed to the Supreme Court of *Canada*, and it was *Held*, affirming the judgment of Mr. Justice *Peters*, that in the present case, the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters; and the neglect of the deputy returning officers to put their initials on the back of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election. (The decision in the *Monck* Election Case commented on and approved of.) In this case *J.*, the appellant, claimed under sec. 66 of 37 *Vic.*, ch. 10, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, but fyled no counter petition, and did not otherwise comply with the provisions of 37 *Vic.*, ch. 10, The Dominion Controverted Elections Act *Held:* That sec. 66 of 37 *Vic.*, ch. 10, only applies to cases of recriminatory charges, and not to a case where neither of the parties or their agents are charged with doing any wrongful act. *Quœre:* Whether the County Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of sec. 56, 37 *Vic.*, ch. 10, at the time of the counting of the votes by the deputy returning officer. Jenkins *v.* Brecken — — 247

EVIDENCE—"*Débats de Comptes*" — *Sale of stock-in-trade by a father to his son—Onus probandi—Affidavit of a person since deceased not evidence.*] In a "*débats de comptes*" between *A. G.* (appellant), in his quality of tutor to *M. L. H. C. R.*, a minor, and Dame *H. P.* (respondent), universal legatee of her late husband *L. R.*, who had had possession of the minor's property (his grandchild) as tutor, the following items, viz :—$5,466.63 (for stock of goods sold by *L. R.* to his son) and $451.07 and $30.76 for "cash received at the counter," charged by the respondent in her account, were contested. In 1871, *L. L. R.*, the minor's father, married one *M. C. G.*, and by contract of marriage obtained from his father, *L. R.*, two immovable properties, *en avancement d'hoirie*. At the same time *L. R.*, the father, retired from business and left to *L. L. R.*, his son, the whole of his stock-in-trade, which was valued at $5,466.63, making an inventory thereof. *L. L. R.* died in 1872, leaving one child, said *M. L. H. C. R.*, and *L. R.*, her grandfather, was appointed her tutor. There was no evidence that the stock-in-trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when *L. R.*, in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of $5,466.63. *Held* (reversing the judgment of the court below), that it was for the respondent to prove that there had been a sale of the stock-in-trade by *L. R.* to his son *L. L. R.*, the minor's father, and that there being no evidence of such a sale, the respondent could not legally charge the minor with that amount. As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they had been entered as cash received