REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

GEORGE DUVAL Q. C.

ASSISTANT REPORTER

C. H. MASTERS, BARRISTER AT LAW.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. REGISTRAR OF THE COURT.

VOL. 23.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.
1895.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honourable Sir Henry Strong, Knight, C. J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Robert Sedgewick J.

" " George Edwin King J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Right Honourable Sir John S. D. Thompson, P. C., K. C. M. G., Q. C., &c.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA.

The Honourable John Joseph Curran, Q. C., LL. D.

ERRATA.

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

Page 21. Line 9 from bottom. For "51 Vic. ch. 6 sec. 5" read "50 & 51 Vic. ch. 56 sec. 5."

Page 144. Line 3 from bottom. For "appeals dismissed with costs" read "appeals allowed with costs."

Page 534. Note 2 should read "8 vol. pp. 64, 65 and 66."

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OF THE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE CORPORATION OF THE CITY OF VANCOUVER (DEFENDANTS)... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS).. } RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

44 *Vic. c.* 1, *sec.* 18—*Power of Canadian Pacific Railway Company to take and use foreshore*—49 *Vic. c.* 32, *(B.C.)*—*City of Vancouver*—*Right to extend streets to deep water*—*Crossing of railway*—*Jus publicum*—*Implied extinction by statute*—*Injunction.*

By 44 Vic. c. 1, section 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown, and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

By 50 & 51 Vic. c. 56, sec. 5 the location of the company's line of railway between Port Moody and the City of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore Avenue, Vancouver City, was ratified and confirmed.

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

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The act of incorporation of the City of Vancouver, 49 Vic. c. 32, sec. 213 (B.C.) vests in the city all streets, highways, &c., and in 1892 the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level and obtain access to the harbour at deep water.

On an application by the Railway Company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:

Held, affirming the judgment of the court below, that as the foreshore forms part of the land required by the railway company, as shown on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railroad company by the statute (44 Vic. c. 1, sec. 18 *a*) on the said foreshore, and therefore the injunction was properly granted.

APPEAL from a judgment of the Supreme Court of British Columbia (1), overruling the judgment of McCreight J. which had dissolved an injunction and dismissed the plaintiffs' action.

This was an action brought by the plaintiffs praying that the defendants should be ordered to remove an embankment that had been erected by them on the foreshore of Burrard Inlet, the said embankment having been erected to enable the defendants to have access to the waters of Burrard Inlet from a street of the city known as Gore Avenue, and further to restrain the defendants, their servants, agents or employees, from repeating the said offence, and that the defendants, the city, should pay damages for having erected the said embankment.

This action came on to be heard before His Lordship Mr. Justice McCreight, at the city of New Westminster, on the 6th and 12th days of July, 1892, and judgment was given by the said Mr. Justice McCreight on the 19th day of July, 1892, in favour of the defendants. From this judgment the plaintiffs appealed to the full court of British Columbia, which pronounced judg-

(1) 2 B.C.R. 306.

ment on the 12th day of December, 1892, allowing the appeal, with costs of both courts, and granting a mandatory injunction ordering that the defendants be restrained from permitting the said embankment to remain and to remove the same, and perpetually restraining the defendants from committing any trespass upon the said portion of the foreshore of the beach of Burrard Inlet, described in the pleadings in the said action, and that the defendants pay the plaintiffs one dollar as nominal damages.

The material facts and pleadings are fully stated in the report of the case in the second volume of the British Columbia Reports, p. 306, and in the judgments hereinafter given.

Dalton McCarthy Q.C., and *Hammersley*, for the appellants.

The language of section 18a of the schedule A. 42 Vic. cap. 14, Stat. of Canada, does not warrant the construction the plaintiffs seek to place upon it that it grants a title in fee simple or an exclusive right to use the foreshore, but on the other hand the section, as the defendants contend, only gives a right of way or right to use the foreshore to such an extent as may be absolutely required by the Railway Company and "in so far as the same is vested in the crown," that is subject always to the *jus publicum* of navigation and access to the water of the sea, and the proper use of the foreshore at the ends of the streets of the defendant city, otherwise it would be *ultra vires*.

The true meaning of an act of the legislature is to be found not only from the words of the act, but from the cause and necessity of its being made, from a comparison of the several parts and from extraneous circumstances.

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Maxwell on Statutes (1); *Walsh* v. *Trevanion* (2); *Holliday* v. *Overton* (3).

We would also call attention to the fact that where specific grants by way of aid are made to the plaintiffs in other clauses of the act provision is made for the granting of title deeds to the plaintiffs therefor, but there is no such provision here, which goes to prove that the intention of the legislature was merely to grant to the plaintiffs a right of way over the foreshore for their line of railway, not a fee simple or exclusive right.

The test of the plaintiffs' ownership lies in the question whether they have the right to convey or alienate any portion of the foreshore if they should so desire, and it is submitted that the said subsection 18a of their act has not granted them such property in the said lands, for on the authority of *Hewlins* v. *Shippam* (4), a freehold interest cannot be created or passed other than by deed, and there is no language in the act which can justify any interference with the *jus publicum*.

By the act of 1881 incorporating the Canadian Pacific Railway Company and authorizing the construction thereof and of which act the schedule A, clause 18, is a part under which the plaintiffs base their claim in this action, authority was only given to the company to construct their line as far as Port Moody in the province of British Columbia and not further. The company took the foreshore of Burrard Inlet as shewn by the plaintiffs under the powers of the said 18th section, but as to any portion of the line of railway authorized to be constructed by the act containing said section it is submitted that the powers contained

(1) 2 ed. pp. 28, 95, 230, 346, 359 and cases there cited.
(2) 19 L. J. (Q. B.) 458.
(3) 15 Beav. 480.
(4) 5 B. & C. 221.

in the 18th section must be limited, at all events, to the line of railway authorized by that act to be constructed and not to any branch line or lines that might be constructed by the company at any subsequent period and not contemplated by the legislature when the act was passed and the powers conferred.

Clause 5 of the Canadian Pacific Railway company Act, 1887, does not grant the company any further powers beyond confirming the location of the branch line from Port Moody to the City of Vancouver.

We also contend that the map deposited by the company under section 18 subsection A of the company's incorporation act, shewing the foreshore of Burrard Inlet as taken by the company, was deposited in 1886 and was not contemplated or sanctioned by the legislature when the said act became law.

The wording of the subsection A itself shows that the right granted to the Railway Company is not an exclusive right, but only to such an extent as shall be required by the company for its railways and the evidence shows that is now held by the Railway Company to the extent it is required and the user by the defendants would not interfere with the use by the Railway Company.

Moreover the defendants by erecting the embankment in no way interfered with the using of the foreshore by the Railway Company, and the use of the foreshore over the embankment by the defendants was quite consistent with the use of the foreshore by the Railway Company under the act in the same manner as the use by the defendants of any street crossing the railway is consistent with the use by the plaintiffs of the railway crossing the street.

If it is held that the Dominion Government granted the Canadian Pacific Railway Co. such an exclusive right, as held by the full court of British Columbia in

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the judgment of the chief justice, is it such a grant as the Dominion Government could make and is it a valid exercise of legislative power consistent with the trust to the public upon which the foreshore is held by the Government ?

See *Illinois Central Railway Co.* v. *State of Illinois* (1); Moore's Law of Foreshore (2).

If the crown had intended to grant to the company the exclusive right to use the foreshore and hold it as against all other rights that might exist at common law the language of the section granting that right would have been more explicit. See judgment in *Arthur* v. *Bokenham* (3).

The general rule is, that in all doubtful matters and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law.

See Hardcastle on Statutes (4); *The Queen* v. *Scott* (5); *The Queen* v. *Morris* (6); *Galloway* v. *Mayor of London* (7).

The rights of the public to approach and use the foreshore by the street so established is clearly sustained by the following authorities: *Pion* v. *The North Shore Railway* (8); *The Queen* v. *Buffalo & Lake Huron Railway Co.* (9); *Lyon* v. *Fishmonger's Co.* (10); and the authorities collected and discussed in these cases.

See also *Wood* v. *Esson* (11); *Warin* v. *London & Canadian Loan Co.* (12)

The rights of the public were vested in the appellant corporation and could be enforced by them;

(1) 13 S. Ct. 110; 146 U. S. R. 387.
(2) 3 ed., pp. 444-445.
(3) 11 Mod. 150.
(4) 2 ed. pp. 292, 294, 322.
(5) 25 L. J. (M. C.) 133.
(6) L. R. 1 C. C. R. 90, 95.
(7) L. R. 1 H. L. 34.
(8) 14 Can. S. C. R. 677, affirmed 14 App. Cas. 612.
(9) 23 U. C. Q. B. 208.
(10) 1 App. Cas. 662.
(11) 9 Can. S. R. C. 239.
(12) 7 O. R. 706.

Fenelon Falls v. *Victoria Railway Co.* (1); but as they are not here as plaintiffs the absence of the Attorney General to the record cannot be set up by the respondents.

The learned counsel also cited and referred to *Standly* v. *Perry*. (2); *Yarmouth* v. *Simmons* (3); *Orr Ewing* v. *Colquhoun* (4); *Badger* v. *The South Yorkshire Railway, &c., Navigation Co.* (5); *Gann* v. *Freefishers of Whitestable* (6); *St. Mary, Newington* v. *Jacobs* (7); and Moore's Law of Foreshore (8).

See also argument of counsel in court below as to dedication of the land to appellants (9).

Christopher Robinson Q.C. for respondents:

The respondents contend that the judgment of the full court is right and should be supported.

The respondents under their charter had the right to extend their line from Port Moody to English Bay. *Canadian Pacific Railway Company* v. *Major* (10).

The location of the branch lines of the respondents between Port Moody and the city of New Westminster and between Port Moody and the city of Vancouver was ratified and confirmed by the Parliament of Canada. (50 & 51 Vic., ch. 56, sec. 55.).

The foreshore of the harbour was, previous to 1881, vested in the Dominion Government. *Holman* v. *Green* (11); *The Queddy River Driving Boom Co.*, v. *Davidson* (12); followed on the 10th day of November, 1891, by Hon. Mr. Justice Drake in *Canadian Pacific Railway Company* v. *Vernon*.

See *Sydney & Louisburg Coal & Railway Company* v. *Sword* (13).

(1) 29 Grant 4.
(2) 3 Can. S. C. R. 356.
(3) 10 Ch. D. 518.
(4) 2 App. Cas. 839.
(5) 28 L. J. (Q. B.) 118.
(6) 35 L. J. (C. P.) 29.
(7) L. R. 7 Q. B. 47.
(8) Pp. 669, 770.
(9) 2 B. C. R. 315.
(10) 13 Can. S. C. R. 233.
(11) 6 Can. S. C. R. 707.
(12) 10 Can. S. C. R. 222.
(13) 21 Can. S. C. R. 152.

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By subsection (*a*) of section 18 of the act of incorporation (44 Vic. ch 1 Dominion Statutes) "The company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

Under this clause the respondents submit they are entitled to the exclusive right to the foreshore of the whole of Coal Harbour including that portion in front of Gore Avenue.

"'Take' may mean actual taking, that is taking possession of, or it may mean acquiring a title. In the Land Clauses act it is generally used in the latter sense of acquiring title, that is a complete title, though it is occasionally there used in the former sense;" per Jessel M. R., in *Spencer* v. *Metropolitan Board of Works* (1) and also remarks of Lord Justice Bowen (2).

Coal Harbour was a public harbour within the meaning of the words "public harbour" in the third schedule of the British North America Act.

The land in question is not required by the crown. The assent of the crown is presumed from user. *Attorney-General* v. *Midland Railway Company* (3).

Registration of a plan does not constitute a dedication of the lands thereon to the public. In *re Morton and the Corporation of the City of St. Thomas* (4).

The learned judge at the trial was in error in assuming that the deposit of the railway plan without any

(1) 22 Ch. D. 163.
(2) Pp. 172 173.
(3) 3 O. R. 511.
(4) 6 Ont. App. R. 323.

evidence as to the act of dedication operated as a dedication.

Dedication is a question of fact, and in order to dedicate the fee must be vested in the owner of the soil. See *Dovaston* v. *Payne*, (1); Woolrych on Waters (2); *Wood* v. *Veal* (3); Angell on Highways (4); *Harrison* v. *Duke of Rutland* (5); *Moubray Rowan & Hicks* v. *Drew* (6); *Poole* v. *Huskinson* (7); *Spedding* v. *Fitzpatrick* (8).

The respondents have no power to alienate the foreshore inasmuch as they have the right to take, use and hold the beach and land to such extent as shall be required by the company for its proposed railway and other works, and for no other purpose.

A railway cannot grant a right of way over land required by the company. *Mulliner* v. *Midland Railway Company* (9); *Pratt* v. *Grand Trunk Railway* (10); *Corporation of Welland* v. *Buffalo & Lake Huron Railway Company* (11).

The common law right of the inhabitants of the city of Vancouver to pass over the foreshore was of a very limited nature. *Blundell* v. *Catterall* (12).

Under any circumstances the respondents submit that the appellants have no right to place an embankment on the foreshore, which is a superstructure. Per Bayley, J. in *Blundell* v. *Catterall* (12).

Places where the public can go on the beach can only be established by the crown; per Abbott, C.J., in *Blundell* v. *Catterall* (12).

No right to cross the railway with a street can be obtained without application to the Railway Committee

(1) 2 Sm. L. C. 9 ed. 154.
(2) 2 ed. p. 15.
(3) 5 B. & Ald. 454.
(4) 2 ed. ss. 132-134.
(5) 9 Times L. R. 115.
(6) [1893] A. C. 301.
(7) 11 M. & W. 827.
(8) 38 Ch. D. 410.
(9) 11 Ch. D. 611.
(10) 8 O. R. 499.
(11) 31 U. C. Q. B. 539.
(12) 5 B. & Ald. 268.

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of the Privy Council of Canada; 51 Vic. cap. 29, sec. 11 (Dom). By sec. 14 the company have the option of making the street authorized by the committee.

The appellants have not applied to the Minister of Public Works nor obtained the approval of the Governor General in Council under Dominion Act, cap. 92, R.S.C. sec. 5, to construct their works in the harbour. See also sec. 57.

McCarthy Q.C. in reply referred to *Mulliner* v. *Midland Railway Co.*(1); *Rankin* v. *Great Western Railway Co.*(2).

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

FOURNIER J.—I am of opinion that the appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice King.

TASCHEREAU J.—I think that Chief Justice Sir M. Begbie's reasoning in the court below is unanswerable. I would dismiss the appeal.

GWYNNE J.—The question in controversy in this appeal is whether or not the appellants have the right of extending a street in the city of Vancouver over a portion of the sea beach lying between the extreme limit of the said street and the Canadian Pacific Railway which has been constructed on the beach below high water mark opposite to the said street, and so of obtaining access to the waters of the harbour of Vancouver in Burrard's inlet, a portion of the sea there, which access between the said street and Burrard's inlet has been cut off by the Canadian Pacific Railway as there constructed. The appellants' contention is that

(1) 11 Ch. D. 611. (2) 4 U.C.C.P. 463.

the railway as constructed there is a public nuisance, and that being so the appellants, as being seized of the soil and freehold of the said street, have, in the interest of the public, a right to abate such nuisance by constructing an embankment from the terminus of the street to and over the railway and to construct a way from the other side of the railway down to the waters of Burrard's inlet and to construct a landing stage there. This contention raises two questions. 1st. Is the railway as constructed a public nuisance? And 2nd. Assuming it to be so, have the appellants the right contended for by them, and which they have asserted by proceeding to make as and for a public highway the structure necessary to provide access from the street across the railway to the sea, and so to extend the said street?

By sec. 17 of the Canadian Pacific Railway Act, 44 Vic. ch. 1, it is enacted that:—

17. The Consolidated Railway Act of 1879 in so far as the provisions of the same are applicable to the undertaking authorized by the charter, in so far as they are not inconsistent with, or contrary to, the provisions hereof, and save and except as hereinafter provided is hereby incorporated herewith.

And by sec. 18 it is among other things enacted that:—

18. As respects the said railway the seventh section of the Consolidated Railway Act 1879 relating to powers and the eighth section thereof relating to plans and surveys shall be subject to the following provisions:—

a. The company shall have the right to take, use and hold the beach and land below high water mark in any stream, lake, navigable water gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for the railway and other works and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways; but the provisions of this section shall not apply to any beach or land lying east of Lake Nipissing except with the approval of the Governor in Council.

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The object of this section plainly was, as it appears to me, to give to the company incorporated for the construction of this great public national work extending over the continent, and which for nine-tenths of the length of the proposed work was as yet wholly unsettled, much greater powers and privileges than were given to the railway companies of purely commercial character constructed under the provisions of the Railway Act of 1879, which, enlarged as it was by the provisions of 44 Vic. ch. 1, was made applicable to the Canadian Pacific Railway.

By the Railway Act of 1879, sec. 7, subsec. 3, railway companies with whose act of incorporation the said act was incorporated were only empowered, with the consent of the Governor in Council, but not without such consent, to take, use and appropriate for the use of their railway and works so much of the public beach, or of land covered with the waters of any lake, river, stream or canal, or of their respective beds, as might be necessary for completing and using their railway, subject to certain exceptions therein contained. And by sec. 9, subsec. 2, they were restrained from taking any greater extent of any public beach or of land covered with the waters of any lake, etc., etc., than thirty-three yards in width, except in places where the railway is raised more than five feet higher, or cut more than five feet deeper, than the surface of the line, or where offsets are established, or where stations, depots or fixtures are intended to be erected, or goods to be delivered, and there not more than two hundred and fifty yards in length by one hundred and fifty yards in breadth. Whereas, as we have seen, the Canadian Pacific Railway Company are empowered, without the consent of the Governor in Council, to take, use and hold any beach or land below high water mark in any stream, lake, navigable water, gulf or sea west of Lake Nipis-

sing, in so far as the same is vested in, and not required by, the crown, to such extent as shall be required by the company for their railway and other works, and as shall be exhibited on a map or plan thereof deposited in the office of the Minister of Railways. By these words in sec. 18 of 44 Vic., ch. 1, "in so far as the same shall be vested in the crown, and shall not be required by the crown," it has been argued on behalf of the appellants that all which the statute effected was to vest in the railway company only such estate and interest in the public beach or land covered with the waters of the sea as the crown could grant to a subject, that is to say, subject to the public right of navigation on the sea, and to free access to the public from the land to the sea for that purpose, and that therefore it was incumbent upon the railway company so to construct their railway on the beach in front of the street in question as to leave free access to the public from the street to the sea, under the railway. Such a construction would make the powers conferred on the Canadian Pacific Railway Company more restricted instead of more extensive than those conferred on other railway companies by the act of 1879, which, when the consent of the Governor in Council is obtained to the companies acquiring the public property required by them, reserves no right of the public therein; moreover, such a construction would not only be more restricted than is the act of 1879, as affects the public beach, but would render the Canadian Pacific Railway act almost wholly inoperative in so far as relates to the construction of the railway upon any beach or land below high water mark in any stream, lake, navigable water, gulf or sea, for if the railway could only be so constructed as not to interfere with the free access for the public from the street in question, under the railway, to the sea it must needs be

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so constructed in like manner opposite all lands fronting on the beach or sea shore. The true construction, however, of the section appears to me to be that the railway company may take, use and hold to such extent as may be required by them, and as shall be exhibited on a map or plan by them deposited in the office of the Minister of Railways, any beach and any land below highwater mark in any stream, lake, navigable water, gulf or sea, west of Lake Nipissing, which is vested in and not required by the crown, the object of the section being to provide for the company's acquiring to their own absolute use so much of such lands as should be required by the company for their railway and other works as are still vested in, and not required by, the crown, excluding in this manner from the operation of the section all such land of the description stated as having been vested in the crown had been granted already by the crown, and leaving the company as to such land or land covered with water, &c, to deal with the grantees thereof, as to their property therein, under the provisions of the act as to the taking possession of, and holding to their own use, property vested in others than the crown.

Now, in or prior to the year 1885, the Canadian Pacific Railway Company acquired a large tract of land consisting of parts of lots nos. 181 and 196 in group no. one of the Westminster District of the Province of British Columbia, with a view of laying out a town site thereon which should form the terminus of their railway on the coast of the Pacific Ocean, and in 1885 they caused the site of a town to be surveyed and laid down thereon, which they designed to call Vancouver, and upon the 30th day of November, in that year, they deposited pursuant to the provisions of a statute of British Columbia a map and plan of the said town site, in the district land Registry Office, upon which map

and plan was delineated a certain street called Gore avenue, terminating on the edge of the beach or sea shore, at or above the highwater mark of the Harbour of Vancouver, in Burrard's Inlet, an arm of the Pacific Ocean. Upon the 6th of April, 1886, an act was passed by the legislature of British Columbia, intituled: "An Act to incorporate the City of Vancouver", whereby the inhabitants of the land therein described as the City of Vancouver were incorporated as a municipal corporation. The land so described as and for the City of Vancouver included within its boundaries the land surveyed, laid out and registered by the Railway Company as the said town site. By the 213th section of the above act it is enacted that every public street, road, square, lane, bridge or other highway in the city should be vested in the city (that is in the city corporation), subject to any right in the soil which the individuals who laid out such road, street, bridge or highway should reserve, and that such road, street, bridge or highway should not be interfered with in any manner whatever by excavation or otherwise by any company or by any person whomsoever, except upon application to, and permission given by, the city engineer in writing.

No right was reserved by the railway company over Gore avenue or in the soil thereof or over or in any other of the streets laid down on the town site, the map and plan of which was so registered as aforesaid, and so it is contended by the appellants and not disputed by the company that the municipal corporation of the city of Vancouver are seized in fee of the soil of the said street called Gore avenue subject to the trust of using and suffering to be used and maintaining the same as and for a public street in the said city of Vancouver.

Upon the 12th of May, 1886, the company deposited in the office of the Minister of Railways, as required by

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the said 18th section of their act of incorporation, a plan which showed the location of their railway as proposed to be constructed by them on the beach and foreshore of Burrard's inlet in front of the said city of Vancouver, and they subsequently constructed their railway upon the said beach and foreshore by a continuous solid embankment of about 50 feet in width at the base and about 20 feet in width on the top, which is about 12 or 14 feet in perpendicular height above the beach. Between this embankment and the extreme limit of Gore avenue there is a space of 41 feet and 6 inches. This space the company have ever since the construction of their railway there kept enclosed by a fence running along the extreme limit of Gore avenue and for some distance on either side of Gore avenue, and such space was so enclosed as part of the beach and foreshore taken and required by the company for their railway there.

After the construction of their said railway in manner aforesaid and after the establishment of their terminus upon the coast of the Pacific Ocean at the said city of Vancouver, an act was passed by the Canadian Parliament on the 23rd of June, 1887, intituled "An act further to amend the act respecting the Canadian Pacific Railway Company" whereby, after reciting that the Canadian Pacific Railway Company had by petition represented among other things :—

> That under the powers already possessed by the company it has constructed branch lines to the city of Vancouver and to the city of New Westminster, and desires to have the location thereof confirmed, and that it is expedient to grant the prayer of the said petition

it was among other things enacted that :—

> The location of the branch lines of the company between Port Moody and the city of New Westminster and between Port Moody and the city of Vancouver is hereby ratified and confirmed, and the lien and charge created by the mortgage bonds of the company and by the deed of mortgage securing the same under the provisions of the

act passed in the session held in the forty-eighth and forty-ninth years of Her Majesty's reign ch. 57 shall extend to and attach upon the said last mentioned branch of the company's railway.

It was contended for the appellants that the object of this enactment was merely to make the said branch railway subject, like the main railway, to the recited mortgage bonds and mortgage; but, granting that this may have been the motive for enacting the clause in question, it cannot be doubted that the location of the railway, so made subject to the mortgage, is expressly ratified and confirmed as constructed, so that if there had been any doubt as to the legality of the mode of construction on the beach opposite Gore Avenue such doubt is effectually removed. It is admitted that the appellants are not entitled, in virtue of their seisin of the soil of the street, to claim compensation as for lands injuriously affected by the construction of the railway; doubtless they are not. The cases of *Rose* v. *Groves* (1); *Eastern Counties Railway Co.* v. *Dorling* (2); *Attorney-General* v. *Conservators of the Thames* (3); *Lyon* v. *Fishmongers' Co.* (4); *Attorney-General of Straits Settlements* v. *Wemyss* (5); and *North Shore Railway Co.* v. *Pion* (6); conclusively show such a right to be a private right of the proprietors of land abutting on tidal or navigable rivers and the sea shore, and as the corporation of the city of Vancouver only claim to be seised of the soil of the street upon trust to use it, and to permit it to be used, by the public as a street or highway, which right is unaffected by the construction of the railway on the beach, they have no private right affected which can give them any claim for compensation as for lands injuriously affected, and if they had, such claim could only be asserted in the manner provided by the statute. The corporation of the city of Vancouver, that is to say, the

(1) 5 M. & G. 613.
(2) 5 C.B.N.S. 821.
(3) 1 H. & M. 1.
(4) 1 App. Cas. 662.
(5) 13 App. Cas. 192.
(6) 14 App. Cas. 612.

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inhabitants of the city, have no more right to complain of their access with the sea from Gore Avenue having been cut off by the railway as constructed on the beach there, than any other member of the public desirous of having such access.

It was further contended for the appellants that an act of parliament could not take away a public right of access from the shore to the sea unless by suitable express words. This point was raised in *Corporation of Yarmouth* v. *Simmons* (1) and was held not to be maintainable.

It was likewise contended that the public had a right of access from Gore Avenue across the beach to the sea; that point was also raised in the same case, where it was contended on the one side, and denied on the other, that the right of the public to get from the end of a street on to the shingle on the sea shore was a right appertaining to Her Majesty in right of her crown, and that the crown could not deprive the public of such right. The point, however, was not decided in that case, because it was agreed that another question should be first argued and determined, and it having been determined concluded the case. However, it may be here observed that in *Blundell* v. *Catterall* (2), Holroyd J. says:—

> The public common law rights with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore when covered with water; and though, as incident thereto, the public must have the means of getting to the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea shore or the land adjoining thereto except in case of peril or necessity.

And Abbott C. J. at p. 311, says:—

(1) 10 Ch. D. 518.

(2) 5 B. & Ald. 301.

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As the waters of the sea are open to the use of all persons for all lawful purposes it has been contended, as a general proposition, that there must be an equally universal right of access to them for all such purposes over land like the present. If this could be established the defendant must undoubtedly prevail. But in my opinion there is no sufficient ground either in authority or in reason to support this general proposition.

And then he proceeds to give his reason for his conclusion that such proposition cannot be maintained. It cannot, however, be disputed that Parliament can extinguish such right of the public, if any such existed, and that Parliament has done so in the present case cannot in my opinion admit of a doubt. But assuming the public to have the right contended for, no authority has been cited which warrants the corporation of the city of Vancouver in assuming to represent the public and to redress the public injury complained of by erecting the structure at the beach and across the railway which the corporation have proceeded to construct; the case of *Fenelon Falls* v. *Victoria Railway Company* (1) was cited for the purpose, but that was a wholly different case from the present, and is not at all an authority in support of the contention of the appellants; it was a case of wrongful acts committed by a railway company upon the soil of a street vested in the corporation, in short the common case of trespass upon the soil of the street of which the corporation were seised.

For the above reasons I am of opinion that the appeal must be dismissed with costs.

SEDGEWICK J.—Concurred.

KING J.—This is an appeal from a judgment of the Supreme Court of British Columbia restraining the city of Vancouver from interfering with land held by the Canadian Pacific Railway Company.

(1) 29 Gr. 4.

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The line of the Canadian Pacific Railway runs east and west along the foreshore in front of the city of Vancouver at or near the foot of Gore Avenue. The track is carried upon a solid embankment about 12 feet in height, and the site of it is about half way between high and low water mark.

The city corporation began the construction of a stone and earth embankment extending in a line from the foot of Gore Avenue across the intervening piece of foreshore to the railroad track, the outer end of such embankment resting upon the slope of the railroad embankment. The avowed object of the city corporation was to cross the railroad track at a level and obtain access to the harbour at deep water, and with this view they proposed to raise the embankment to the level of the railroad track and then continue it down the foreshore to low water mark.

The waters in front of Vancouver were part of Burrard Inlet, and the part directly in front was known as Coal Harbour. This harbour was accustomed to be frequented by vessels before the incorporation of the railroad company or of the city of Vancouver. Being a public harbour the foreshore vested in the Queen in right of the Dominion. *Holman* v. *Green* (1).

The Canadian Pacific Railway Company was incorporated by 44 Vic. ch. 1, 1881. By section 18*a* it was enacted that the company should have the right to take, use and hold the beach and land below highwater mark in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways.

(1) 6 Can. S. C. R. 707.

The act of incorporation provided for the construction of the line to Port Moody, B. C., as a terminus, but it also, as was held in *Canadian Pacific Railway Co.* v. *Major*, (1) empowered the company to extend their line from Port Moody to Coal Harbour and English Bay.

In March, 1886, the company deposited in the office of the Minister of Railways a map or plan certified as showing the "lands required for right of way, Burrard Inlet, B. C." On this was exhibited the mainland and the foreshore at the foot of Gore Avenue and for some distance east and west of it. A portion of the mainland fronting on the water, both to the east and west of Gore Avenue (but not including Gore Avenue itself), was tinted yellow on the plan, as indicating that it was vested in the Canadian Pacific Railway Company. A tract coloured pink was shown extending along the harbour front and including all the foreshore out to deep water, but this is not now material. A red line running along and upon the foreshore indicated the centre of the railroad track. Although there is no note explanatory of it the part coloured pink evidently represents lands held by the crown, which the company proposed to take, use and hold for the purposes of its railroad and other works, and covers the land in question.

By 51 Vic. ch. 6 sec. 5 the location of the branch between Port Moody and Vancouver was ratified and confirmed; this, at least, went to confirm to the company the right to take, use and hold the land then in fact taken, held and used, in the sense in which subsection *a* of section 18 of the act of incorporation authorized a taking, using and holding.

What then is the meaning of such subsection? The appellant contends that the words "in so far as the

(1) 13 Can. S. C. R. 233.

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same shall be vested in the crown" excludes the right of interference with the *jus publicum*; that the crown having no right, of itself, to grant to a subject the foreshore freed from the public right of navigation there is a saving of such right. I think, however, that these words refer to the title of the crown in the lands as such. The term "vested" denotes title. If the lands remained in the crown and were not required by the crown the company were empowered to take them "to such extent as shall be required by the company for its railway and other work," the company exhibiting the extent of their requirements by a map or plan thereof deposited in the office of the Minister of Railways and Canals. If the contention of the appellant as to this is correct the company could not build on the foreshore at all, because this would necessarily take away public rights of fishing there.

At the same time I think that whether or not the public right is extinguished is a matter of construction, even though it may not be intended to be saved by the clause already referred to.

The public right is not to be taken away to a greater extent than is rendered necessary by what the act authorizes. In *Yarmouth* v. *Simmons* (1), and *Standly* v. *Perry* (2), it was held that a public right of way may be extinguished by statute by implication if the implication is a necessary one. These were both cases of the interruption of travel from the foot of a public highway to the shore of navigable waters through the construction of a pier. In the latter case the present Chief Justice of Canada says:—

> It is argued that the act did not confer power to erect the harbour works so as to intercept the passage from the end of a public highway to the waters of the lake. The answer to this is to be found in the original statute which authorizes the selection of any site at

(1) 10 Ch. D. 518. (2) 3 Can. S. C. R. 356.

Cobourg, without exception of streets, for works which are to be the private property of the company.

In the former case Fry J. says (1):

> The result of the construction of the pier was this, that, whereas persons had been in the habit of getting from the sea-wall at the end of Bank Street on to the shingle, there was now to be placed, on the very space through which every person so doing had to pass, a permanent structure of planks through which persons could not pass. There was a physical impossibility in persons who had exercised the alleged right continuing to exercise it in the manner in which they had previously done. The exercise of the right and the existence of the pier were absolutely inconsistent.

There was a clause in the General Harbours Act that nothing in the act should abrogate or prejudice any estate, right, title, interest, prerogative, royalty, jurisdiction or authority of or pertaining to Her Majesty in right of her crown. Assuming the statute to be applicable it was held that the rights referred to in that section were rights of property, or rights in the nature of property, belonging to the crown as crown property. It is true that the act authorized the pier owners to take toll from every one, but this was relied on only to rebut the contention that the act had given a substituted right of way.

The principle of the judgment (as also the principle of *Standly* v. *Perry*) (2) is that:

> Where the legislature clearly and distinctly authorizes the doing of a thing which is physically inconsistent with the continuance of an existing right the right is gone, because the thing cannot be done without abrogating the right.

And that is the principle that I conceive is to be applied here. The *jus publicum* is to be subordinated to the rights given to the railroad company by statute, so far, and only so far, as there is a physical inconsistency between the maintenance of the *jus publicum* and the doing of the thing which the legislature has authorized to be done. Now, what was being authorized

(1) P. 526. (2) 3 Can. S. C. R. 356.

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was the construction of a line of railway with its incidental works. A line of railway upon low level (as the sea shore) is ordinarily built by solid embankment. The company was authorized to take and hold the foreshore, for the purpose of making their railway, and the natural and ordinary result of this would be to interfere with, and to some extent to extinguish, the public right of navigation. How could navigation be carried on where a line of railway was authorized to be constructed and operated? If it be said that the road might be built on trestles this would not save the right of navigation; and, besides, in a grant of power to be exercised over such great areas it is not reasonable to conclude that the company were to be bound to unusual modes of building. The contention of the appellant requires that no rod of foreshore shall be taken without the company being subject to the same obligation.

In saying this much I do not mean to say that the public rights of navigation are destroyed entirely. The public right of navigation involves the right to land and ship goods at places which law or usage points out for such purpose. This is a right which I think need not by necessary implication be deemed inconsistent with the rights given by statute to the railway company. It would, indeed, be wholly impracticable for the company usefully and beneficially to exercise their statutory privileges if the right of every riparian owner to get access to and from the water at his land is to be preserved. This would not be properly the exercise of public right of navigation as such, but rather something incidental to the exercise of the property right to get access to and from the property.

But the public right involved in the right of navigation of loading and unloading at recognized public places is a different matter, and I wish to guard against

saying anything against the right of the public to protect such right even in the face of the powers given by this act. That, however, is not the right attempted to be set up here. It does not sufficiently appear, that this was a public or necessary place of lading and unlading waterborne goods or of the embarking or disembarking of persons, and of thus carrying on navigation through or by means of it.

From the evidence it would appear as though it were proposed to make a new landing for the benefit of the city of Vancouver, and not to maintain the right to an accustomed public landing place established as such before the railroad company built their line. As expressed by the learned Chief Justice of British Columbia, the claim of the city of Vancouver involves the equal right of every owner on the foreshore to cross the line of the railroad at will and place embankments and other structures upon the soil which the legislature has authorized the railroad company to take, use and hold for the purpose of the railroad and its works. I think also that, except in cases of necessity, the public right is to be maintained and defended and protected by the Attorney-General for the crown. Therefore I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *A. St. G. Hamersley.*

Solicitor for respondents: *R. E. Jackson.*

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*Nov. 21.
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*Feb. 20.

SAMUEL NIXON (PLAINTIFF).....APPELLANT;

AND

THE QUEEN INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Condition in policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of and found the loss to be between $3,000 and $4,000.

An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc. (as in the conditions) were not answered. The trial judge gave judgment in favour of N. which the court *en banc* reversed and ordered judgment to be entered for the company.

Held, affirming the decision of the court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost the condition was not complied with.

Held further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N. a new trial was unnecessary and judgment was properly entered for the company.

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

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NIXON v. THE QUEEN INSURANCE COMPANY.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering judgment to be entered in favour of the defendants.

The following statement of the material facts of the case is taken from the judgment of the court delivered by Mr. Justice Sedgewick :—

On the 10th December, 1889, the defendant company issued to the appellant a policy of insurance upon his stock of general merchandise contained in his store at Middleton, Annapolis County, Nova Scotia. The goods insured were burned on the 29th of May, 1891, and this action is brought to recover the amount of the insurance. One of the conditions indorsed upon the policy was the following :—

XII. Persons insured sustaining any loss or damage by fire are forthwith to give notice thereof to the Company, or to the agent through whom the insurance was effected, and within fourteen days thereafter deliver in as particular an account of their loss or damage, and of the value of the property destroyed or damaged immediately before the happening of the fire, as the nature and circumstances of the case will admit of, and make proof of the same by declaration or affirmation, and by their books of accounts, or such other reasonable evidence as the Company or its agent may require ; and until such evidence is produced the amount of such loss, or any part thereof, shall not be payable or recoverable ; and if there appear any fraud or false statement, or that the fire shall have happened by the procurement, wilful act, or means or connivance of the insured or claimants, he, she, or they shall be excluded from all benefit under this policy. No profit of any kind is to be included in such claim. And in the event of no claim being made within three calendar months after the occurrence of the fire the insured shall forfeit and be barred of every right to restitution or payment by virtue of this policy, and time shall be the essence of the contract.

It was proved at the trial that the assured did not within fourteen days after the fire or subsequently deliver to the company any particular account of his loss. The only document delivered was an affidavit of w hch the following is a copy :—

(1) 25 N. S. Rep 317.

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I, SAMUEL NIXON, of Nictaux Falls, make oath and say as follows :—

1. That I am the party who was owner of property which was destroyed by fire, which occurred at Nictaux Falls, in the county of Annapolis, on the morning of May 29th, 1891.

2. A part of the said property consisted of general merchandise, and said merchandise consisted principally of dry goods, boots, shoes, and groceries and hardware, contained in a 1½ storey wooden building, said building being situate on the south side of the road leading to Bridgewater, at the said Nictaux Falls.

3. Said property was, at the time the fire occurred, insured in the Queen Insurance Company, under policy no. 1253409, which policy I hold.

4. That my invoice book was burned in said fire and I therefore have no adequate means of estimating the exact value of the property covered by said insurance policy at the time or immediately before the fire occurred.

5. That I have made as careful an estimate of the value of property covered by said insurance and destroyed by said fire as the nature and circumstances of the case will admit of, and find the same to be between three thousand and four thousand (3,000 and 4,000) dollars.

6. The day after the fire occurred I mailed a notice of said fire to W. P. King, General Insurance Agent, Truro.

7. I have no knowledge as to how the said fire originated.

8. That I make this affidavit in pursuance of the directions referred to in said policy and endorsed thereon Section XII.

Sworn to at Bridgetown, in the County of Annapolis, this 10th day of June, A.D., 1891, before me,
(Sgd.) JOHN L. COX,
A Justice of the Peace for the County of Annapolis.

(Sgd.) SAMUEL NIXON.

The defendants set up as a defence the plaintiff's failure in this regard. The case was brought on for trial before the learned Chief Justice and a jury who, in answer to the questions submitted by the presiding judge, found that the plaintiff's loss was an honest one; that he was guilty of no fraud; that the value of the goods at the time of the fire was about $3,000; and that he gave notice of his loss pursuant to the conditions of the policy. They declined, however, to answer the following questions submitted to them by counsel for the plaintiff and defendant respectively :—

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Could the plaintiff immediately after the fire, with the assistance of his clerk, Miss Robinson, or otherwise, have made up a tolerably complete list of the contents of his store immediately before the fire?

Did the plaintiff deliver to the defendant company as particular an account of his loss or damage by the said fire, and of the value of the property destroyed immediately before the happening of the fire, as the nature and circumstances of the case would admit of?

Upon these findings and want of findings the learned judge gave judgment in favour of the plaintiff for the amount claimed with costs.

Upon appeal to the Supreme Court of Nova Scotia this judgment was unanimously reversed and judgment was ordered to be entered for the defendant company with costs.

The plaintiff then appealed to the Supreme Court of Canada.

Borden Q.C. for the appellant. The books of the plaintiff having been burnt his affidavit was sufficient compliance with the condition. *Norton* v. *Rensselaer & Saratoga Ins. Co.* (1); *McLaughlin* v. *Washington County Ins. Co.* (2). And see also *Pim* v. *Reid* (3).

Harrington Q.C. and *Mellish* for the respondents. The insured was bound to comply strictly with the condition in the policy. *Roper* v. *Lendon* (4); *Ripley* v. *Ætna Ins. Co.* (5).

As there is no evidence on which the jury could find for plaintiff a new trial will not be ordered for their refusal to answer certain questions submitted to them. *Bobbett* v. *South Eastern Railway Co.* (6).

The judgment of the court was delivered by:

SEDGEWICK J.—(His Lordship recited the facts of the case as stated above and proceeded as follows.)

(1) 7 Cowen (N.Y.) 645.
(2) 23 Wend. 525.
(3) 6 M. & G. 1.
(4) 1 E. & E. 825.
(5) 30 N. Y. 136; 86 Am. Dec. 362.
(6) 9 Q. B. D. 430.

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Sedgewick J.

I entirely concur in the judgment of the court below. The plaintiff did not deliver as particular an account of his loss as the nature and circumstances of the case admitted of; the evidence is conclusive on this point. Although the plaintiff may not himself have been personally aware in detail of the goods destroyed by fire yet his clerk and book-keeper, one Ella Robinson, who was in charge of the store at the time of the fire, stated that she could, with plenty of time immediately after the fire, have made up a tolerably correct list, and the plaintiff himself tendered in evidence an affidavit made by her on the 24th June which describes with the most minute particularity the goods in the store at the time of the fire. The plaintiff himself, in his evidence, describes with much greater particularity than in the affidavit which he submitted immediately after the fire the goods in the store, and it is absolutely out of the question for him to say, in fact he never has said, that it was impossible for him to have given a more full or particular statement than he did. The only question in the case, it appears to me, is not as to whether the judgment of the learned judge below was erroneous, but whether, under the circumstances, a new trial should not have been ordered. We are of opinion that the court was right in the present case in ordering judgment for the defendant.

It would seem that the court, under the judicature rules, cannot enter a judgment inconsistent with the findings of the jury. In this case there is no finding; the jury expressly declined to find upon the sole question now in controversy. It was, I think, a question of fact whether the plaintiff delivered as particular an account of his loss as the nature of the case admitted of. I can conceive of cases in which it might be absolutely impossible for a claimant upon an insurance company to deliver any account whatever, but the

existence of that impossibility would be a question for the jury, but in the present case it is clear that if the jury had answered this question in the affirmative the finding would have been set aside, not only as against the weight of evidence but because the evidence is conclusively the other way.

It being apparent from the evidence that under the facts in this case it is impossible for the plaintiff to recover, and there being no findings of a jury to prevent the court from exercising its powers in this respect it was a proper exercise of the court's jurisdiction to dismiss the plaintiff's action as they did.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *J. J. Ritchie.*

Solicitor for respondents: *T. F. Tobin.*

1893 JAMES W. SALTERIO (PLAINTIFF).....APPELLANT;

*Nov. 28.

AND

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*Feb. 20. THE CITY OF LONDON FIRE INSURANCE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Condition against assigning policy—Breach of condition.

A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with or in any way encumbered the insurance should be absolutely void unless the consent of the company thereto was obtained and indorsed on the policy. S. the insured under said policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S. without such consent made it void and he could not recover the amount insured in case of loss.

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

The action in this case was on a policy of insurance against fire on plaintiff's stock, dated April 1st, 1890. One of the conditions of the policy was as follows :—

"Condition no. 5.—If, during this assurance, any change takes place in the title to or possession of the property described in the policy, or in the event of any change affecting the interest of the assured therein, whether by sale, legal process, judicial decree, voluntary transfer or conveyance of any kind, or if the assured

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

is not the sole and unconditional owner of the property insured, or of the premises in or upon which the same may be situate, or has not such more limited interest in the property insured or in the premises in or upon which the same may be situate, as may be described in the application for the policy and approved by the company, or if the policy or any interest therein be assigned, parted with, or in any way encumbered, or if possession of the premises becomes vacant by removal of the owner or occupants, then and in every such case this insurance shall be absolutely void, unless the consent thereto of the company in writing shall have been obtained and indorsed hereon."

On September 6, 1890, the plaintiff executed a chattel mortgage of all his said stock so insured "and all policies of insurance on the said stock and premises and all renewals thereof" to Gault, Bros. & Co., of Montreal. At the time the said mortgage was given plaintiff held policies of insurance on said stock in other companies which contained no such condition as the one set out above.

Plaintiff's stock having been destroyed by fire the solicitors of Gault, Bros. & Co. notified the local agent of the defendant company that their clients held the policies and were the persons entitled to the insurance. The company having refused payment an action was brought on the policy which resulted in favour of the company. The decision of the trial judgment having been affirmed by the Supreme Court of Nova Scotia, sitting in banc the plaintiff appealed to this court.

Harrington Q.C. for the appellant. The mortgage of policies must be held to apply to those which Salterio could assign and not to this as to which an assignment is prohibited. *Lazarus* v. *Commonwealth Insurance Co.* (1)

(1) 19 Pick. 81.

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King J.

Newcombe Q.C. for the respondents referred to *Credland* v. *Potter*. (1)

The judgment of the court was delivered by:

KING J.—The condition relied upon by defendant as a defence to the action declares (*inter alia*) that if the assured shall assign, part with, or in any way encumber the policy or any interest therein, without the consent of the company indorsed on the policy, the policy shall be void. Prior to the loss the assured made a chattel mortgage to Messrs. Gault Bros. assigning and transferring all his stock in trade (the property covered by the insurance in question) and "also all policies of insurance on the said stock and premises." He held at the time several policies of insurance in one or more of which there was no condition against assigning or encumbering such policy or policies.

Mr. Harrington argued, upon the authority of *Lazarus* v. *Commonwealth Ins. Co.* (2), that the assignment should be limited to such of the policies as contained no restraint upon assignment, upon the ground that it would be insensible for the mortgagor to destroy his security under the policy, as neither he nor the mortgagee could derive any advantage from it. He also contended that the assured could not be said to have assigned or encumbered the policy when the policy did not admit of such assignment or encumbrance being made effectual except upon a condition that was not performed. But I conceive that what is meant by the condition is that the policy shall be voidable by the insurance company upon breach of the condition, and the Messrs. Gault had, by the assignment and encumbrance, the legal possibility of advantage through the chance of the company's consent being given. The encumbrance was effectual so far as Salterio was con-

(1) 10 Ch. App. 8. (2) 19 Pick 81.

cerned, and might be entirely an effectual security by the company electing not to avoid the policy. Unless the clause of the policy operates to render voidable what but for it would be a valid assignment or encumbrance it is difficult to see what it can mean. Here there was the transfer of the insured property by way of mortgage, and the transfer by way of mortgage of the assured's interest in the policy and the policy itself, and this seems to me to be an encumbrance of the policy or of an interest therein within the meaning of the condition.

The assigning or encumbering clause "also all policies of insurance on the said stock and premises," in its natural meaning embraces this policy, and there is nothing to show that the intent was otherwise; on the contrary the attorneys of Messrs. Gault, the virtual plaintiffs, a few days after the loss wrote the following letter to the agent of the company, clearly implying that, in Messrs. Gault's view at least, this policy had been transferred under the chattel mortgage and requesting that consent be then given.

January 2nd, 1891.

DEAR SIR,—We beg to inform you that all policies of insurance which James W. Salterio holds on the stock-in-trade owned by him and consumed by fire in the Globe Hotel building on Wednesday night, were assigned by him to Gault Bros. & Company of Montreal, by chattel mortgage dated 18th day of October, 1890. The mortgage contained a covenant to insure the goods for our client's benefit. It is true that we did not get the policies assigned by indorsement thereon made with your assent, but if that is necessary it can be done now after the loss. At present we simply wish to notify you of our client's rights and that they are the persons entitled to the insurance, their interest being upwards of nine thousand dollars.

Yours truly,

(Sgd. HARRINGTON & CHISHOLM,
Attorneys of Gault Bros. & Co.

To ALFRED SHORTT, Esq.,
Agent of City of London Insurance Company.

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King J.

In May on Insurance (1), it is said that:—

An assignment of a policy as collateral security avoids a policy which stipulates against an assignment in whole or of any interest in it under penalty of forfeiture.

In such case the words "or of any interest in it" have been held in the courts of the United States to extend to the transfer of the policy by way of security. The words of this policy go further and extend in terms to encumbrances. There are the following general observations of the experienced writer just quoted with reference to the reason for the insertion of such clause:—

Incumbrances are objectionable, and are usually inquired after; for, as they increase, the interest of the owner of the property in its preservation diminishes * * * If the privilege of transferring the policy as collateral security for goods purchased or money borrowed tends to the increase of incumbrances the Company has a motive to prohibit it. That it does so tend is a matter of common experience.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Harrington & Chisholm.*

Solicitors for the respondents: *Drysdale & McInnes.*

(1) 2 ed. sec. 380.

ALEXANDER BAPTIST.....APPELLANT; 1893

AND *Oct. 7.

DAME MARGARET BAPTIST.....RESPONDENT. 1894

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *Feb. 20.

Will—Testamentary capacity--Art. 831, C. C.--Weakness of mind--Undue influence.

In 1889 an action was brought by G. H. H., in capacity of curator to Mrs. B., an interdict, against A., in order to have a certain deed of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial the respondent M. B. presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885, (the same date as that of the transfer attacked by the original action), whereby the late Mrs. B. bequeathed the residue of all of her property, &c., to her two sons. Upon the merits of the contestation as to the validity of the will of the 17th January, 1885.

Held, affirming the judgment of the court below, that art. 831, C. C. which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform.

Held further, that upon the facts and evidence in the case, the will of the 17th January, 1885, was obtained by A. at a time when Mrs. B. was suffering from senile *dementia* and weakness of mind, and was under the undue influence of A. B., and should be set aside.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) rendered on the 5th day of May, 1892, reversing a judgment render-

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

(1) Q. R. 1. Q. B. 447.

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ed by the Superior Court in the District of Three Rivers, (Bourgeois J.), on the 16th January, 1891.

The proceedings in this case arose as follows:—

The original action was taken by G. B. Houliston, in his quality of curator, to Dame Isabella Cockburn, an interdict, widow of the late George Baptist, against Alexander Baptist, John Baptist and various banks and corporations, to set aside a deed of transfer executed by Mrs. Baptist on the 17th January, 1885, of all her property to her son Alexander Baptist, in consideration of a life rent of $3,000 and on the further condition that, on the death of Mrs. Baptist, Alexander Baptist should be bound to pay her brother John an annual rent of two thousand dollars, alleging that Mrs. Baptist was then in a state of senile *dementia*, and under the undue influence of Alexander Baptist.

This action was only contested by the defendant Alexander Baptist. The pleas, *inter alia*, denied the existence of the family arrangement alleged by the plaintiff, and asserted that Mrs. Baptist was in the full enjoyment of her mental powers until the end of the year 1887, and also denied the use of any undue influence, constraint, pressure or corrupt practices on the part of the defendant to induce his mother to sign the transfer in question.

The answer and replication were general.

On the 28th of September, 1889, before the case was brought on to trial, Mrs. Baptist died and thereupon the respondent, Dame Margaret Baptist, widow of the late William C. Pentland, presented a petition for continuance of the suit on her behalf, as one of the legatees of her mother under the will of 1869.

This petition was contested by the present appellant, Alexander Baptist, who based his contestation on a will dated the 17th of January 1885, (the same date as that of the transfer attacked by the original action), whereby

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the late Mrs. Baptist bequeathed the residue of all property movable and immovable to her two sons John and Alexander Baptist.

The petitioner for continuance of suit (now respondent) answered this contestation by alleging that the will invoked by the contestant (now appellant) was invalid and should be set aside for the same reasons as those urged in support of the principal action, viz., that Mrs. Baptist was, at the time of the making of this will, incapable of executing such a document by reason of the decline of her mental powers, and that this will, like the transfer, had been obtained from her by her son Alexander Baptist by suggestion, captation and corrupt practices.

The reply to this answer was general, and thereupon the parties went to enquête, and examined witnesses in support of their respective pretensions.

When the enquête was closed the case was argued before his Honour Mr. Justice Bourgeois, who, on the 16th of January, 1891, rendered judgment dismissing the petition for continuance of suit with costs, holding that the will of the 17th January, 1885, in favour of John and Alexander Baptist, should be maintained.

The petitioner for continuance of suit then appealed to the Court of Queen's Bench, appeal side, in Quebec, and on the 5th day of May, 1892, that court reversed the judgment of the court below, set aside the will of Mrs. Baptist, executed on the 17th day of January, 1885, and allowed the present respondent to continue the suit from the last proceedings taken before the death of the original plaintiff (1).

The question which arose on this appeal turns solely upon the validity of the will of the 17th January, 1885.

Stuart Q.C., and *Olivier* Q.C., for appellant.

The *onus probandi* that the testator was at the time of the execution of the will in a state of *imbecility* or

(1) See also 21 Can. S. C. R. 425.

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dementia, was upon the party contesting the will. Art. 831, C. C., Demolombe (1); Dalloz: Supplément au Repertoire (2), and the evidence clearly establishes that she had her full intelligence when she made her will.

As to whether the will of the 17th January, 1885, was the result of undue influence on the part of Alexander Baptist, there is no evidence to support such a contention on the part of the respondent. As to what amounts to suggestion and captation I refer to Marcadé (3); Demolombe (4); Merlin, Repert, (5); Grenier, Donat. and Test. (6); Coin-Delisle, Donat. and Test. (7); Troplong, Don. and Test. (8); *Wingrove* v. *Wingrove* (9); Dalloz (10).

Laflamme Q. C., and Lafleur, for respondent.

The Privy Council laid down the rule in the case of *Harwood* v. *Baker* (11) that "a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others whom by his will he is excluding from all participation in that property." Now, in the case under consideration the evidence establishes that Mrs. Baptist was in utter ignorance as to the real amount of her fortune, being under the delusion (encouraged or at least uncontradicted by her sons) that the boys had been ill-used and that the daughters had divided the whole of the estate upon the death of their father. We find the old lady making these declarations a very short time after the passing of the deeds, and Alexander

(1) 16 vol. No. 33.
(2) Vo. Dispositions entre vifs, No. 74.
(3) 3 vol. No. 490.
(4) 18 vol. No. 385, 397.
(5) Vo. Suggestion.
(6) 1er No. 145.
(7) No. 16.
(8) 2 No. 489.
(9) 11 P. D. 81.
(10) 68, 1, 389.
(11) 3 Moo. P. C. 282.

Baptist admits his mother's delusion about the supposed unfairness in the previous division of the property as having existed anterior to the making of the last will. Then we find the old lady making a declaration on the very day on which the deeds were passed to the effect that she did not know what she had been doing, and similar declarations were made a few weeks after to various witnesses. At another time shortly after the passing of the deeds she declared that she understood indeed that she had transferred everything to Alexander, but she thought it was merely some notes in circulation. At other times again she would declare that she had done it all to protect John, and we have evidence both from Alexander himself and from the notary that this was the purpose of the transfer as explained to her. It is needless to insist upon the fact that John's interests could have been secured without such a transfer and that the transfer has not helped his insolvent estate one whit. Under these circumstances can it be pretended that Mrs. Baptist was capable of understanding the respective claims of her relatives upon her regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share in her property?

The burden of proof in a case of this kind may be shifted from one party to the other according to the presumptions created by circumstances. The leading case of *Waring* v. *Waring*, (1) decided by the Privy Council, is closely analogous to the case now under consideration. In that case, as in this, the testatrix had undoubtedly died insane, her mental incapacity having been established by an inquisition held shortly before her death. Delusions had also been proved to have existed at an early date and to have gone on increasing after the will was made. Under these circumstances the

(1) 6 Moo. P. C. 341.

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Privy Council held that the burden of proof was wholly on the party defending the will to prove very satisfactorily the sanity of the testatrix at the time of the factum. Has the appellant in this case satisfactorily proved the existence of a lucid interval between the aberrations proved by Mrs. Bucknell, by Kate Gahan and by Sarah Armstrong in 1882, and by Miss Kiddy and Mary Ann Simmons in 1883 and 1884? We have (1) also seen that this return to reason, in the words of Chardon, is not sufficiently established by proving that at the time of the factum the testatrix was in a calmer and more satisfactory condition than before, but there must be clear proof of absolute lucidity of mind at the time of the factum when the burden of proof is thus shifted from the impugner of the will to the person propounding it. Now, so far from having been able to establish such a lucid interval, the defendant has been unable to rebut the very positive and uncontradicted testimony of the witnesses who established that on the very day on which the deeds were passed, and on various occasions shortly thereafter, the testatrix was in a condition of mind clearly showing that she did not comprehend the meaning and purport of the deeds in question, and the testimony of a medical man further establishes that in June, 1885, a very short time after the factum, she was in a state of second childhood.

It seems also superfluous to discuss the vexed question of the effects of partial insanity upon the mind of a testator when, as in the present case, most of the delusions referred precisely to the extent of the means and property of the testatrix and the claims of those entitled to her bounty. Whatever may have been the effect of such delusions as have been noticed above, when the old lady imagined herself to be away from home or to be sailing in a boat, there can be no possible

(1) Dol et Fraude vol. 1 no. 159.

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doubt as to the effect of her persistent delusion that she had no property, that the girls had divided everything at the time of their father's death and that the boys had been ill-used. No delusions could go more clearly to the very root of the subject, and exercise a more disturbing influence upon the old lady's mind, so as to prevent her from forming an intelligent or deliberate purpose with regard to the disposition of her property.

The learned counsel also cited and relied on as being applicable to the evidence the following authorities *inter alia.* Marcadé and Pont, sur. art 901, section 485; Laurent (1); *Russell* v. *Lefrançois* (2); Demolombe (3); *Banks* v. *Goodfellow* (4); *Smee* v. *Smee* (5); Chardon, Dol et Fraude (6); Rousseau de Lacombe (7); *Ayotte* v. *Boucher* (8).

The CHIEF JUSTICE—I am of opinion that this appeal should be dismissed with costs.

FOURNIER J.—L'action en cette cause a été intentée le 28 mai 1889, par G. B. Houliston, curateur à Margaret Baptist, pour démence sénile, contre l'appelant, Alexandre Baptist et contre John Baptist, son frère, pour faire déclarer nul un transport fait par Mde Baptist à l'appelant en considération d'une rente viagère de $3,000, et à la charge d'une rente constituée de $2,000, payable à John Baptist, son fils, après la mort de la défunte.

L'action allègue qu'à l'époque de ce transport, la testatrice n'était pas saine d'esprit et que son consentement à cet acte n'a été obtenu que par la suggestion et la captation, et aussi par le dol et la fraude pratiqués

(1) 11 vol. p. 133.
(2) 8 Can. S. C. R. 335.
(3) Vol. 18 no. 336.
(4) L. R. 5 Q. B. 549.
(5) 5 P. D. 84.
(6) 1 vol. no. 159.
(7) Vo. Testament no. 4.
(8) 9 Can. S. C. R. 460.

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par le dit Alexandre Baptist pour amener sa mère à consentir à cet acte.

Alexandre Baptist a seul contesté l'action. Mde Baptist est morte pendant l'instance. Sa fille Dame Margaret Baptist a produit, le 7 décembre 1889, une demande en reprise d'instance, comme l'une des légataires universelles de sa mère qui l'avait ainsi nommée par son testament du 17 novembre 1869.

L'appelant a répondu que le testament de 1869 a été révoqué et annulé par un autre testament du 17 janvier 1885, fait, par conséquent, le même jour que le transport.

L'intimée a répliqué en demandant la nullité du testament de 1885 et a invoqué contre ce dernier testament les mêmes moyens que contre le transport.

Le transport comprend l'universalité des biens de la testatrice, moins la moitié d'une maison et le ménage. Le testament donne cette moitié de maison à John et nomme les deux fils légataires universels. L'appelant dit dans son témoignage: "the will was made to cover everything she owned" et qui n'avait pas été transporté.

Les mêmes moyens étant invoqués contre ces deux actes, il n'est guère possible de les séparer l'un de l'autre dans l'examen de cette cause. Ces deux actes faits dans le même moment, dans les mêmes circonstances, ne forment qu'un seul et même règlement concernant la fortune de Mde Baptist, le testament n'est que le complément du transport.

Si Mde Baptist n'était pas dans un état mental lui permettant de faire le transport, elle n'était pas non plus dans un état à pouvoir faire le testament; et si le testament est le résultat de la suggestion et de la captation, on ne peut en conclure qu'il soit la libre expression de la volonté de la testatrice.

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Dans sa contestation du testament de 1885, l'intimée allègue en substance que par un arrangement de famille fait en 1869, Mr et Mme Baptist ont réglé la part de chacun de leurs enfants dans leur fortune, que M. Baptist a pris ses fils en société et a donné à chacun d'eux un quart de son entreprise qui comprenait pour ainsi dire tous ses biens et qui étaient évalués à $400,000, ce qui faisait pour chacun d'eux $100,000 ; que le père et la mère, qui étaient en communauté, ont fait en même temps leur testament en faveur de leurs filles, donnant à chacune d'elles envîron une somme de $40,000. L'intimée allègue encore que George Baptist est mort en 1875, que l'intelligence de Mme Baptist est allée en déclinant depuis le décès de son mari et surtout depuis 1883 ; qu'en 1884 son état mental s'est aggravé par la faiblesse physique et la cécité, et qu'elle devint complètement incapable d'administrer ses affaires, que depuis le décès de son père, l'appelant avait acquis une grande influence sur sa mère, surtout à raison de sa cécité et de sa faiblesse d'esprit, qu'il avait contrôlé les affaires, collecté ses revenus, et que profitant de son ascendant, il lui avait fait consentir le transport et le testament du 17 janvier 1885 ; que la testatrice ne pouvait pas alors comprendre la portée de ses actes et qu'elle ne connaissait pas l'état et l'étendue de sa fortune ; que l'appelant a caché à la famille l'existence de ces actes, que l'intimée et ses sœurs ayant appris l'existence du transport ne purent obtenir de leur mère des renseignements satisfaisants, qu'alors elles s'adressèrent à l'appelant qui refusa de parler, qu'ensuite elles demandèrent au notaire une copie de l'acte de transport que ce dernier refusa d'après les instructions de de l'appelant, qu'elles requirent un compulsoire, que l'appelant est intervenu, a contesté leur demande, et que même il réussit en Cour Supérieure, mais perdit en la Cour de Révision, que le testament n'a été connu que par sa production en cour.

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L'appelant a répliqué généralement.

Il est clairement prouvé que l'appelant avait fait tous ses efforts pour cacher l'existence du transport à ses sœurs. Il savait que Mde Macdougall, qui lui demandait des renseignements, avait une réclamation personnelle contre la faillite de John, et qu'elle était intéressée à connaître la position de ses affaires. Le transport n'ayant été enregistré que par extrait, il n'était guère possible d'en connaître la nature. Toutes les précautions avaient été prises pour tenir ces actes secrets.

Il donne des raisons futiles pour expliquer son refus de répondre à une lettre de Mde Macdougall. Il dit d'abord qu'il était malade, et dans un autre endroit, il attribue à son entêtement le refus de donner des renseignements, et aussi parce qu'on lui avait envoyé un avocat au lieu de s'adresser à lui comme à un parent. Il prétend que sa mère lui avait demandé le secret, et pour dernière excuse il prétend que la connaissance du transport aurait nui au règlement de la faillite de John.

L'excuse de sa maladie ne pouvait durer toujours, et il devait avoir quelqu'un pendant ce temps chargé du soin de ses affaires.

Puis comment concilier la demande de secret faite par la testatrice, quand elle-même, aussitôt que les actes ont été faits, en a parlé à sa dame de compagnie, Mlle Kiddy, et plus tard à sa fille Mde Macdougall ? Cachait-il l'existence du transport pour obtenir de ses sœurs, une meilleure composition, surtout de Mde Macdougall, en laissant croire que leur mère était encore intéressée dans la faillite. Ce motif, peu honorable, fait voir le manque de sincérité de toutes ses excuses, et démontre qu'il n'agissait ainsi que par la crainte d'une contestation du transport et dans le but de retarder autant que possible les procédures que ses sœurs entendaient prendre. C'est ce qui explique sa contesta-

tion vexatoire faite à la demande d'un compulsoire. Ces incidents sont de nature à prouver les intentions de fraude qu'animaient l'appelant dans ses démarches pour obtenir l'acte de transport et le testament.

Les moyens de contestation sont l'insanité d'esprit chez la testatrice, suggestion et captation de la part de l'appelant.

La démence sénile a certainement existé chez la testatrice, puisqu'elle a été interdite pour cette cause en 1889 ; mais le point important qu'il faut constater, c'est de savoir si la faiblesse d'esprit de la testatrice était de nature, au 17 janvier 1885, à rendre la testatrice incapable de faire valablement son testament à cette époque.

Comme l'observe avec tant de raison, Sir Alexandre Lacoste :

> " Cette maladie ne vient pas subitement, son progrès est parfois rapide, mais elle prend souvent des années à se développer, au fur et à mesure que les forces physiques s'en vont, la mémoire s'affaiblit et la volonté s'émousse. Les efforts intellectuels deviennent pénibles, puis impossibles. Pendant longtemps l'âme contrôle les actes ordinaires et simples de la vie sans qu'elle puisse cependant saisir et comprendre les actes complexes qui exigent de la mémoire et du raisonnement. Le caractère de cette maladie c'est d'être sans merci, elle peut s'arrêter dans sa marche, mais la guérison n'est pas possible. Il est toujours difficile de déterminer le commencement de la folie proprement dite. Heureusement nous ne sommes pas appelés à déterminer ce point."

L'art. 831 du code civil exige que le testateur soit sain d'esprit. Cette disposition ne s'applique pas seulement à celui qui est frappé de folie, mais aussi à tous ceux dont la faiblesse d'esprit les rend incapables d'apprécier la portée et les conséquences de leurs actes.

Les circonstances dans lesquelles se trouvait Mde Baptist, sont correctement énoncées par l'honorable juge en chef. Mde Baptist, dit-il, "a subi dans sa vieillesse des épreuves dures et cruelles." En 1875, elle a perdu son mari. En 1882, elle a eu l'opération de la cataracte,

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puis elle a souffert du glaucome et enfin, en 1884, elle est devenue complètement aveugle, en 1885, lors de l'exécution des actes de transport et du testament, elle était âgée de 78 ans. Il est incontestable que durant cette période de temps de 1875 à 1885, l'âge, l'affliction, la douleur et la cécité ont considérablement diminué ses forces physiques et intellectuelles, mais il est toujours difficile de constater l'état mental d'une personne par des témoignages cinq ans après les événements alors que les faits ne sont plus frais dans la mémoire.

En lisant la preuve apparemment contradictoire, qui a été apportée dans la cause par des témoins parents, alliés et amis, on serait tenté de croire à un grand nombre de parjures. D'aucuns font remonter la perte de la mémoire et les symptômes précurseurs de la démence à 1882, les autres ne constatent les premiers signes de l'affaiblissement mental qu'à la fin de 1886 ou même en 1887. Est-ce à dire que aucun de ces témoins ait voulu tromper? Je ne le crois pas, chacun a dit ce qu'il a constaté. Sa mémoire a pu lui faire défaut dans les détails, mais l'ensemble de son témoignage doit être conforme aux faits, j'en suis convaincu. Dans cette appréciation des témoignages, je laisse évidemment de côté le témoignage de l'appelant et celui de son frère, tous deux intéressés et défendeurs dans la cause. La loi m'avertit de n'accepter qu'avec réserves les dires des parties.

Les témoins de l'appelant, ses trois filles, Houliston, et son épouse, le Dr Blair, son beau-frère et son épouse qui ne voyait la testatrice que de temps à autre, Joseph Reynar, qui la voyait une fois par semaine, Denis Aubuchon, homme de cour chez la testatrice, qui n'a jamais eu de conversation avec elle, Alex. McKelvie, qui la voyait tous les dimanches et qui causait avec elle du bon vieux temps, semblent n'avoir constaté chez

elle que la faiblesse due au vieil âge avant 1886-7. Mais aucun d'eux n'a vécu dans son intimité.

Le rév. Ameron, qui a demeuré plusieurs années, de 1879 à 1884, à Trois-Rivières, comme ministre de l'Eglise de la testatrice, et qui l'a revu en 1885-6-7, dit qu'elle a eu sa raison jusqu'en 1887, cependant, il dit qu'il a trouvé sa raison affaiblie; son opinion est résumée dans la réponse à la question suivante :—

"Q. From your knowledge, do you believe that she could at any time that you were acquainted with her comprehend the effect or bearing of a transaction transferring the largest portion of her estate and fixing the condition thereof?

"R. If I had been interested in the matter, I should not have wished to have entrusted anything of the kind to her."

Le rév. Currie, successeur du rév. Ameron, dit qu'il la croyait saine d'esprit en 1887. Mr McDougall, son gendre, qui la voyait une fois ou deux par année, ne peut dire qu'elle était *insane* avant 1886; mais il ajoute qu'elle était trop faible d'esprit pour pouvoir accomplir aucun acte sérieux d'affaire, qu'elle ne connaissait ni la nature ni la valeur de ses biens.

Lorsqu'il est allé la voir en 1886, elle avait oublié qu'il était marié à sa fille.

L'opinion de ces personnes qui ne vivaient pas avec elle s'explique assez facilement. Avant qu'elle fut complètement en démence, elle pouvait faire les actes ordinaires de la vie. La visite de ces personnes produisait, momentanément sur la testatrice, un effet qui réveillait son intelligence assoupie, et elle pouvait alors tenir une conversation banale sur les choses ordinaires de la vie. Les symptômes graves n'apparaissaient qu'à certains moments et devant les intimes, de sorte que plusieurs ont pu de bonne foi la croire dans son bon sens. C'est ainsi que le Dr Gervais qui l'a

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visité deux fois en 1882, dit l'avoir trouvé avec sa pleine intelligence, cependant, les trois servantes qui étaient là dans ce temps, ou vers ce temps, Emma Collins, Mary Ann Simmons, Kate Gahan, ont remarqué chez elle une conduite étrange, une humeur maussade, et beaucoup d'irritabilité. Elle donnait des ordres contradictoires, sa conduite leur faisait croire que son esprit déclinait et elles se disaient entre elles que la testatrice n'était pas " all there."

Une amie intime, Mde Bucknall, qui la connaissait depuis longtemps, est allée la voir pour la dernière fois en 1882. Parfois la testatrice ne la reconnaissait pas, et même ne reconnaissait pas toujours sa fille Mde Macdougall, qui était alors chez elle.

Plusieurs témoins disent qu'ils n'ont trouvé rien d'étrange chez la testatrice, avant 1887. Cependant son fils, John Baptist, dont le témoignage ne saurait être suspecté rapporte un écart de raison bien caractérisé, arrivé au printemps de 1886. La testatrice s'imaginait alors qu'elle n'était pas chez elle, et qu'elle semait des patates. Son fils lui fit remarquer qu'elle aurait beaucoup de peine à les semer dans la neige, et il ajoute : " On some subjects she conversed as rationally as possible."

Ces faits expliquent pourquoi un si grand nombre de témoins ont pu jurer qu'elle était saine d'esprit à une époque tandis que d'autres, qui ont été présents lors de ses excentricités, ont pu constater sa faiblesse d'esprit à une époque même antérieure.

Comme le dit l'honorable juge en chef, la personne la plus en état de nous renseigner sur l'état mental de la testatrice " est Mlle Kiddy, sa dame de compagnie, qui a vécu chez la testatrice de 1871 jusqu'à son décès, qui en a eu continuellement soin, particulièrement la nuit. Cette Mlle Kiddy, est parfaitement désintéressée. Il lui a été légué une rente viagère de $200 par le testa-

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ment attaqué, et l'annulation de ce testament la priverait de sa rente, elle a vu la mémoire de la testatrice s'affaiblir de 1882 à 1884. Durant l'été de cette dernière année, la testatrice fit une chute grave dans laquelle elle se blessa à la tête. Cette chute aurait aggravé son état mental et dès lors les hallucinations seraient devenues plus marquées. La testatrice se figurait, parfois, qu'on avait changé son lit de place, elle se disait pauvre, voulait entreprendre de la couture, garder des pensionnaires, s'imaginait être ailleurs que chez elle, et allait jusqu'à croire son mari vivant. Toutes ces hallucinations ne sont pas venues à la fois, elles ont été remarquées, d'après le témoin, de 1884 à 1887. L'opinion de Mlle Kiddy est, qu'en 1885, la testatrice n'était pas dans un état d'esprit qui lui permettait de consentir un transport ou de faire un testament."

Ce témoignage est corroboré par celui des deux servantes, Bridget Purtell et Ellen O'Shaughnessy, qui se trouvaient au service de la testatrice dans ce temps-là. Ces trois témoins étaient parfaitement désintéressés ; leur caractère n'est nullement attaqué et aucune circonstance ne fait voir qu'elles se sont concertées pour ne pas dire la vérité.

John reconnaît qu'il a essayé d'influencer sa mère pour lui faire faire un testament en sa faveur. Dans une circonstance, dit-il, sa mère lui aurait offert tout ce qu'elle avait, dans une autre elle aurait resisté à sa demande, en lui disant que ses deux fils John et Alex. étaient " both alike to her." Elle lui avait dit que ses filles " had got plenty."

Il est certain qu'en 1884-86, la testatrice était sous l'impression que ses filles avaient eu plus que leur part, et avaient été favorisées au détriment des garçons ; mais cette idée était fausse et injuste. Il est vrai qu'elles avaient été nommées ses légataires universelles à l'exclusion de ses fils, mais ce testament avait été fait

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en 1869, après qu'il eut associé ses fils dans son commerce qui comprenait toute sa fortune évaluée à $400,000, et il donnait un quart à chacun de ses fils, soit $100,000. L'appelant a vendu sa part à John, $150,000. Il n'était que juste que la balance, $200,000, fut distribuée entre ses filles, au nombre de cinq. C'est sans doute la raison pour laquelle le père et la mère ont fait leur testament en faveur de leurs filles. Les garçons ont donc reçu chacun une somme de $100,000, et les filles n'auraient reçu, si elles eussent herité de leur mère comme de leur père, chacune, une somme d'environ $40,000. Mais elles n'ont réellement hérité à la mort de leur père que d'une somme de $20,000. A l'époque de ce testament ils étaient tous deux en bonne santé, jouissant de toutes leurs facultés, et sans doute qu'ils avaient fait une distribution juste et équitable de leur fortune entre leurs enfants. Dans leur intention ce partage devait être final et n'a été changé qu'en conséquence de la faiblesse mentale de la testatrice, survenue plus de seize ans après.

La raison donnée par les garçons est que cette somme de $100,000 n'était pas un don, mais la reconnaissance des services rendus à leur père en travaillant avec lui. Il n'y a aucune preuve constatant la longueur et la valeur des services rendus, et de plus pendant, tout ce temps, leur père a toujours pourvu à leurs besoins et à ceux de leur famille. Ils se seraient montrés plus justes et plus reconnaissants, en disant ce qui, d'ailleurs, est la vérité, que dans la distribution des biens de leur père, ils ont reçu leur juste part, sinon plus.

Dans un autre testament fait en 1879, la testatrice n'a pas eu l'idée d'exclure ses filles de sa succession. Sa mémoire était cependant à cette époque plus fraîche qu'en 1884, et elle devait mieux se rappeler les circonstances du testament de 1869, n'ayant pas encore

ressenti les atteintes de la faiblesse mentale dont elle a souffert plus tard.

Sans doute l'interprétation erronée qu'elle donnait au testament de son mari, en ce qui concernait les filles, venait de ce qu'elle avait oublié et de ce qu'elle ignorait l'état de ses affaires actuelles. Mlle Kiddy dit qu'elle ne connaissait pas ce qu'elle avait et lorsqu'elle lui mentionnait le stock de la Banque de Montréal, elle niait qu'elle en eut et disait: "No, the girls got it all when their father died." Dans le même temps elle disait par une contradiction, que la perte de la mémoire peut seule expliquer, que son mari avait laissé à chacune de ses filles $100,000 et toutes les propriétés à son fils, John.

S'il n'est pas prouvé que les fils aient donné à leur mère l'idée que leurs sœurs avaient été injustement préférées, il est bien clair que l'opinion de la mère n'était que le reflet de celle de John, telle qu'il l'a exprimée dans son témoignage. John a avoué avoir sollicité un testament de sa mère, et l'appelant a laissé sa mère sous l'impression de cette prétendue injustice, et en a profité pour obtenir un testament.

Ils sont tous deux d'accord que leurs sœurs ne devaient pas hériter, mais entre eux ils ne s'entendaient pas. John prétend tout avoir, et l'appelant veut aussi avoir sa part. La testatrice qui avait été affectée par la faillite de John, désirait le protéger, d'un autre côté elle se croyait pauvre. L'appelant profite de ces deux circonstances pour se faire consentir un transport au détriment de John, dans lequel ses sœurs ne sont pas comprises. L'appelant admet avoir suggéré le transport à sa mère et il en donne les motifs suivants:

The transfer was made with the intention to settle up the old estate that was in bankruptcy.....I wanted these means to be able to put value in the estate.....It put me in a position of being able to make a better offer to the creditors outside than I could have done otherwise.

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Ces motifs pouvaient être une des raisons de demander un transport à titre de garantie collatérale pour faciliter le règlement de la faillite de John, mais ils ne sont donnés que comme des faux prétextes pour se faire un transport à lui personnellement en pleine propriété, qu'il a le soin de faire accompagner d'un testament. Ce sont ces motifs frauduleux et mensongers qui ont amené la testatrice à faire ces deux actes.

L'appelant qui gérait les affaires de la testatrice, admet lui avoir dit que ses revenus qui ne rapportaient que $1,800 étaient insuffisants, et lui avoir offert en retour une rente viagère de $3,000. Cette offre a sans doute décidé sa mère à accepter. Il dit dans son témoignage qu'il ne croyait pas que sa mère put dépenser cette rente.

C'était apparemment pour protéger John et sa mère que l'appelant semblait agir, mais en réalité c'était à son seul profit. Sa mère est restée tellement impressionnée des motifs désintéressés de l'appelant qu'elle dit à sa fille Mde McDougall qu'elle a tout donné à l'appelant, pensant lui avoir très peu donné, pour qu'il la fit vivre toute sa vie ; à Mlle Kiddy et à d'autres, elle déclare qu'elle avait tout fait " For Jack's sake." Evidemment, elle n'avait pas compris ce qu'elle avait fait. C'est ce qui ressort clairement du témoinage du notaire Hubert, qui a passé le transport et fait le testament. Voici, ce qu'il en dit :

R. Monsieur Baptist lorsqu'il m'a fait demander, sept (7) ou huit (8) jours avant, m'a dit que Madame Baptist voulait faire quelques changements à son testament et qu'elle désirait faire le transport de certains droits, que ça faisait plusieurs fois qu'elle lui en parlait, qu'il avait toujours différé, mais qu'elle insistait. De sorte qu'il m'a donné les notes, de faire le transport de telles et telles parts de banque données en détail dans l'acte. Ensuite, son testament, si je me rappelle bien, il avait une copie du testament il m'a dit qu'elle désirait faire tels et tels changements que j'ai fait, et après avoir préparé les actes...

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Lors de la passation des actes, c'est l'appelant, d'après le notaire Hubert, qui a fait toute la conversation avec sa mère bien qu'il ait dit le contraire et prétendu au contraire que c'était le notaire. C'est pour cacher l'exercice de son influence jusqu'au dernier moment qu'il parle ainsi contre la vérité. Je crois devoir citer à ce propos les observations suivantes de l'honorable juge en chef:—

Ajoutons à cela que c'est l'intimé qui a donné les instructions et a tout fait préparer, qui a reçu les actes des mains du notaire plusieurs jours avant qu'ils eussent été signés, qui a accompagné le notaire chez la testatrice qui a discuté avec elle les différentes clauses de l'acte. Le juge en première instance commet une erreur de fait, quand il dit que la testatrice avertit Mlle Kiddy, le jeudi précédent, que le notaire viendrait le samedi. C'est l'intimé qui a dit cela à la testatrice en la présence de Mlle Kiddy.

N'est-ce pas étrange que l'intimé ait pu discuter avec sa mère, et donner d'aussi longues explications puisque d'après lui, c'était une affaire entendue? c'est le notaire Hubert qui nous fait part de la discussion qu'il y a eue, et des longues explications données par le fils, car l'intimé, dans son témoignage, prétend qu'il n'a pas parlé et que c'est le notaire qui a fait tout l'ouvrage.

Les paroles que le notaire met dans la bouche de la testatrice "qu'elle était contente qu'il y avait beaucoup trop de monde qui paraissait vouloir vivre au même tas," me paraissent inexplicables d'après la preuve faite. Evidemment elle faisait allusion à ses filles; cependant, il n'appert pas qu'aucune d'elles ait sollicité des secours de sa mère ou ait manifesté le désir de partager la succession, en un mot qu'elles aient voulu vivre "au même tas."

Ajoutons à cela que toute cette affaire a été faite dans l'ombre. La mère avoue à Mme. Macdougall que son fils lui a recommandé le secret. Le fils dit que la mère lui a recommandé le secret. L'acte était fait pour protéger John et cependant on le cache à John. La raison que l'intimé donne pour justifier le secret c'est que sa mère ne voulait pas être importunée. Cependant, c'est elle-même qui divulgue la transaction à sa dame de compagnie d'abord et ensuite à Mme Macdougall, sa fille.

En résumé dit l'honorable juge en chef:—

Le résultat de toute cette affaire, c'est que les filles n'ont reçu tout au plus qu'une somme de $20,000 chacune et les fils une part du vivant de leur père, valant $100,000. L'intimé a retiré de sa part

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$150,000, John, plus malheureux, a continué les affaires et est arrivé à la banqueroute. En outre, l'intimé s'est trouvé à recevoir par le transport, en actions de banque, de $32,000 a $36,000, en débentures de la ville de Trois-Rivières, $2,000, par remise de son reliquat de compte de son administration, $6,000. De plus une réclamation contre la faillite de son frère de $143,000 que lui-même évalue à $40,000, soit en tout $80,000 et si l'on ajoute les $100,000 de 1869, $180,000. Sur cela il faut déduire le constitut de $2,000 payable à son frère, soit $33,000, il lui reste une balance de $14,500 qu'il se trouve avoir retirée des successions de ses père et mère.

John a retiré en 1869 la somme de $100,000, plus un constitut de $2,000, soit $133,000 et la moitié d'une maison dont je ne connais pas la valeur, et les filles n'ont reçu au plus que la somme de $20,000. Voilà une injustice que rien ne justifie. Si Mme Baptist avait eu conscience de ses actes, elle n'aurait pas agi ainsi. Elle a été entretenue dans des idées fausses et, dans mon opinion, on a profité de ces erreurs pour lui faire consentir et le transport et le testament. Comme je l'ai dit, en 1885, Mme Baptist n'était pas en démence complète ; elle pouvait tenir une conversation avec bon sens. Elle a pu comprendre son fils John, lorsqu'il lui a demandé de faire un testament en sa faveur. Elle devait se rendre compte jusqu'à un certain point de la faillite et concevoir le désir legitime de protéger John. Elle était susceptible de concevoir une donation ou transport afin d'assurer sa vie, mais elle était trop faible d'esprit pour connaître l'étendue de sa fortune, apprécier la nécessité d'une telle donation, se rappeler les avantages respectifs que ces enfants avaient reçus dans le passé et se rendre compte de la position relative de chacun d'eux vis-à-vis de sa succession et de celle de son mari.

"Dans toute cette affaire elle a subi l'influence indue de ses fils, et particulièrement celle de l'intimé. Elle n'a pas compris la portée de ce qu'elle a fait et ses déclarations l'attestent."

Elle a pu paraître comprendre, comme l'a dit le notaire Hubert; cependant, quelques minutes après le départ du notaire, et de l'intimé, elle alla trouver Mlle Kiddy, sa dame de compagnie, et lui a demandé pourquoi elle s'était absentée : "You might have been in the room, and you would have known as much as I do, for it was all in French." Le notaire affirme que tout a été dit en anglais, les actes son redigés en anglais. Elle était sérieuse lorsqu'elle parlait ainsi. Elle a bien pu repondre machinalement aux questions du notaire, lui

laisser croire qu'elle comprenait, en présence de son fils, en qui elle avait une grande confiance, et qui l'avait préparée pour la circonstance. Mais dégagée de l'influence de la présence de son fils, elle a exprimé ses véritables impressions. Elle parlait le broad Scotch, peu le francais, et le notaire peu l'anglais, et il est fort possible qu'elle ait pris son langage pour du français, comme elle l'a dit.

La testatrice est revenue sur le sujet quelque temps après. Sa conscience la tourmentait, bien qu'elle ne put se rendre compte de ce qui s'était passé. Comme elle disait qu'il avait eu tout, Mlle Kiddy, lui demanda "What have you done?" et elle repondit "I do not know myself." Une autre fois, elle dit: "I cannot tell you what it is for, I do not know myself, but I did it for Jack's sake." Mlle Kiddy ajoute que dans chaque circonstance la testatrice lui a exprimé le regret de ce qu'elle avait fait. On voit par cette persistance à dire qu'elle avait agi "for Jack's sake" que son intention n'avait été que de secourir John, et cependant le transport et le testament étaient tout au bénéfice de l'appelant, au lieu de celui de John, comme elle le désirait. Cela fait bien voir que ces actes ne sont que le résultat des faux prétextes employés par l'appelant pour obtenir le transport et le testament en sa faveur.

Quelque temps après, en janvier 1885, Mlle Kiddy a mentionné le fait du transport et du testament à Mde Macdougall qui lui dit qu'elle en avait été informée par sa mère. Que celle-ci parlait de sa pauvreté et disait "I am afraid I did something wrong; Alex. asked me to give all I had and said he would keep me all the time I was living," Mde Macdougall lui ayant répondu: "Why mother, you have enough of Montreal Bank stock to keep you all your life," sa mère reprit. "No, I have no bank stock." Mde Macdougall ayant fait la remarque qu'il n'était pas nécessaire d'avoir fait cela, sa

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mère lui répondit: "I was afraid I was going to be left without anything at all and the best thing was to do this." Mde Macdougall lui ayant demandé: "Did Alex. ask you to do this?" elle répondit "Yes;" lui ayant de plus demandé "Was there any notary there?" Elle répondit "There was no notary in the house since your father died," en ajoutant que Alex. lui avait recommandé le secret.

Ce récit se trouve en quelque sorte confirmé par Mde Macdougall, car dans sa conversation avec Mlle Kiddy, elle fit la remarque qu'il n'y avait pas eu de notaire présent; mais elle fut informée par Mlle Kiddy que les notaires étaient venus lors du transport.

Une autre conversation analysée par l'honorable juge en chef fait voir jusqu'à quel point la testatrice ignorait la question de sa fortune et la manière dont elle en avait disposé.

Quelques mois après cette conversation de Mde Macdougall avec sa mère, la testatrice eut une autre conversation avec sa fille en présence du rév. M. Currie. Voici comment ce monsieur rapporte cette conversation. Mme Macdougall s'adressant à lui, lui aurait dit: "Did you think it strange that mother should have disinherited the girls?" puis se tournant du côté de Mme Baptist: "Now mother, tell Mr. Currie what happened between you and Alex." M. Currie reprit de suite. "No, Madame Baptist, I don't want to hear anything about the matter, I don't want to be involved in it at all." Et Mme Baptist de lui faire remarquer: "I don't want to get M. Currie into trouble in regard to this affair" mais elle ajouta. "Alex. did very wrong I think, it was a great hardship to me." M. Currie lui demandé: "Did you know that you gave everything to Alex. when you signed that document?" "Yes," répondit la testatrice "but I did not think there was so much, I thought it was some notes or papers in

circulation" et le témoin ajoute: "I am not sure of the words but it was notes or bank shares, it struck me as being insignificant." Le témoin croit se rappeler que Mme Macdougall a mentionné à sa mère: "How unkindly her mother treated her," ajoutant qu'elle ne savait pas ce qu'elle avait fait et que si elle croyait que sa mère le sut, qu'elle ne retournerait plus la voir. Le témoin ne se rappelle pas ce qu'a répondu Madame Baptist, mais il ajoute qu'elle était "in full sympathy with that sentiment." Mme Macdougall faisant sans doute allusion à cette conversation affirme qu'elle s'adressa à sa mère et lui dit: "If I thought that you would disinherit your daughters I do not see what reason I would have to come near your house again." Et la testatrice lui aurait répondu: "I have no intention to do that."

Un autre jour la testatrice s'adressant à une des servantes lui dit John n'est pas content de l'arrangement mais que tout avait été fait pour lui. "I don't remember, but it was all for his good."

Toutes ces déclarations prouvent que la testatrice n'avait rien compris aux actes qu'elle avait fait. On voit seulement que les faux motifs donnés par l'appelant pour obtenir son consentement sont restés dans sa mémoire; l'idée de protéger John qui lui avait été inculquée par l'appelant, et éviter la misère pour elle-même; tandis qu'elle a tout donné à l'appelant et croit n'avoir cependant pas donné grand'chose.

Les filles de la testatrice ayant fait, sans succès, auprès de leur mère et de leur frère des démarches pour obtenir des renseignements, s'adressèrent au notaire Hubert pour avoir des copies des actes qu'il avait faits, mais celui-ci les leur refusa d'après l'ordre qu'il en avait reçu de l'appelant. Elles furent obligées de demander un compulsoire pour obliger le notaire à leur fournir des copies. L'appelant a produit au soutien de sa contestation de leur demande un affidavit

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dans lequel la testatrice se déclare satisfaite de ce qu'elle a fait. Cet affidavit a été donné le 5 novembre 1886, peu de temps avant qu'elle ait dit à John qu'elle voulait semer des patates sur la neige et plusieurs mois après la chute qui a été le commencement d'écarts fréquents de sa raison. Au sujet de cet affidavit l'honorable juge en chef, fait la remarque suivante:

Aussi je préfère comme l'expression de sa pensée la déclaration spontanée qu'elle a faite aux personnes de son entourage, à cet affidavit préparé d'avance et consenti peut-être par un signe de tête en présence de l'appelant.

En 1886 Mde John Baptist lui ayant reproché d'avoir oublié son mari dans le transport, elle lui répond qu'elle lui a laissé la maison et la moitié de ce qu'elle avait. La réponse manque de sincérité, parce que si la testatrice se rappelait les faits, elle n'a pu dire honnêtement qu'elle donnait à John la moitié de sa fortune. Elle ne pouvait dire, étant questionnée sur le transport, que la maison était donnée par cet acte qui n'en fait aucune mention. Mais comme le dit l'honorable juge en chef:—

La réponse est pleine d'astuce parce qu'elle est faite de manière à calmer les inquiétudes de Mme John Baptist. Dans mon opinion elle n'est pas de la testatrice. Si elle l'a faite elle a dû lui avoir été suggérée comme celle faite à John dans une circonstance arrivée à peu près dans le même temps. Vers le milieu de l'année 1886 John se plaignait du transport. Sa mère lui dit que tout avait été fait pour le protéger. Sur cela John lui fit remarquer que ce n'était pas le meilleur moyen de le protéger. La testatrice ne lui répondit pas, mais le lendemain elle lui dit qu'elle avait consulté l'intimé: "That it was all right, as she wanted it." N'était-ce pas là la réponse de l'intimé même?

L'analyse de la preuve si complète et si judicieuse faite par l'honorable juge en chef, établit clairement par l'ensemble de la conduite de la testatrice et les nombreuses déclarations qu'elle a faites, qu'elle n'a pas eu une conscience suffisante des actes qu'elle a fait et qu'elle était lors de ces actes dans une état mental qui la rendait incapable de donner un consentement légal.

En conséquence l'appel est renvoyé avec dépens.

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TASCHEREAU J.—The statement of this case appears in the 21st volume of the reports of this court, p. 425, where our judgment upon a motion to quash the appeal is reported.

We have now to adjudicate upon the merit of the controversy between the parties, that is to say, to determine whether or not the late Isabella Cockburn was, on the 17th January, 1885, of sound intellect so as to be capable to make a will; or, to put the case in another shape, whether, under the facts in evidence, the will made by her on that date is to be set aside as obtained by Alexander Baptist by captation and undue influence, when the testatrix was suffering from senile *dementia* or weakness of mind? The case raises a pure question of fact, or rather, of inferences from facts which I would uselessly detail here. After full consideration of the evidence in the record I have unhesitatingly come to the conclusion, notwithstanding the elaborate judgments to the contrary of Mr. Justice Bourgeois, in the Superior Court, and of Mr. Justice Blanchet, in the Court of Queen's Bench, that the reasoning of the Chief Justice of the Queen's Bench is unanswerable, and that the will in question of January, 1885, must be set aside. I have nothing to add to the remarks of the learned judge, whose commentaries on the evidence are so full that any attempt on my part to go over the same ground would be mere repetition. I would dismiss the appeal with costs, *distraits* to E. Lafleur, Esq.

SEDGEWICK and KING JJ.—concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur Olivier.*

Solicitor for the respondent: *E. Lafleur.*

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*Oct. 3.

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

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*Mar. 13.

AND

S. X. CIMON et al (SUPPLIANTS).....(RESPONDENTS).

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

Petition of Right—46 Vic. c. 27 (P.Q.)—Contract—Final certificate of engineer—Extras—Practice as to plea in bar not set up.

A contract entered into between Her Majesty the Queen in right of the province of Quebec and S. X. Cimon, for the construction of three of the departmental buildings at Quebec, contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered, showing the total amount of work done, and materials furnished, and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of $31.36 was due upon the contract price and $42.84 on extras.

The suppliants by their petition of right claimed *inter alia* $70,000 due on extras. The crown pleaded general denial and payment.

The Superior Court granted the suppliants $74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Court of Queen's Bench for Lower Canada (Appeal side) increased the amount to $13,198.77, interest and costs.

Held, reversing the judgment of the court below, and restoring the judgment of the Superior Court, that the suppliants were bound by the final certificate given by the engineer under the terms of the contract.

Per Fournier and Taschereau JJ., dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action,

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

and there was an admission of record by the crown that the contractor was entitled to 20 per cent commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent was still due and unpaid on $65,837.09 of said extra work.

APPEAL AND CROSS APPEAL from a judgment rendered by the Court of Queen's Bench for Lower Canada, adjudging the respondents to be entitled to $13,198.77 with interest from the 1st May, 1884.

The proceedings originated by a petition of right (46 Vic. c. 27, P.Q.), filed by the respondents, the heirs of the late Simon X. Cimon, claiming from the Government of the province of Quebec, the sum of $76,170, and interest.

The respondents are the heirs and successors in title of the firm of Piton & Cimon, contractors for the departmental buildings, at Quebec.

The respondents claim payment by their petition of right: the balance of the contract price amounting to $8,000 and $1,000 for interest paid upon letters of credit given by the Government in lieu of cash, to which the contractors were, according to their contention, entitled under the contract.

$40,000 amount paid to the workmen in additional wages at an increase of 20 cents per diem after a strike and a riot, upon the alleged express undertaking by the Government to repay such amount.

$70,000 balance of price of extras and amount payable as compensation for the labour and responsibility of the contractors, being 20 per cent. profit upon the cost of such extras, which amounted to a sum exceeding $150,000.

$25,000 damages suffered by reason of the Government having signified a protest to the contractors annulling the contract.

The crown met this demand by a plea of payment and the general issue. There was also an incidental demand for $50,000.

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Some witnesses were examined and an immense mass of accounts, reports and papers of all kinds were put into the record.

The defendant, towards the closing of the *enquête* filed a final report of Mr. Gauvreau the engineer in charge of the works about the main contract. An objection was taken to the filing of that document, and the objection was reserved.

The Superior Court adopting the final certificate given by the architect under the terms of the contract adjudged the suppliant to be entitled to the amount shown by such certificate as to balance of contract price, viz.: $31.36 and the amount thereon by this certificate to be due for extras—$42.84, making a total of $74.20 for which judgment was given.

In the Court of Queen's Bench for Lower Canada (appeal side) the case was decided upon the claim for 20 per cent. commission upon the cost of the extras, and after discussion of accounts.

Stuart Q.C., for appellant and respondent on cross-appeal.

As a preliminary question we contend that the appeal to the Court of Queen's Bench was too late and that the judgment of the Superior Court had become final and conclusive by lapse of time. The final certificate of the engineer in charge is dated August, 1882, and establishes a balance in their favour of $31.36, upon the contract price and a balance upon the extra work of $42.84. This certificate was the basis of the judgment of the Superior Court and we are at a loss to understand why the Court of Queen's Bench disregarded it. That this certificate is conclusive upon the points in dispute appears to us to be an almost incontrovertible proposition. The petition of right does not in any way attack the engineer, nor impute to him incompetency, error or fraud; it simply overlooks the

certificate, overlooking at the same time that the certificate was a condition precedent to the right of action, and that the parties were bound by its terms, unless it were set aside by the courts for a lawful reason.

This point has been so often decided by this court that it is almost futile to again recite the authorities: *Peters* v. *The Quebec Harbour Commissioners* (1); *Jones* v. *The Queen* (2); *Goodyear* v. *The Mayor of Weymouth* (3); *Sharpe* v. *The San Paulo Railway Co.* (4); *O'Brien* v. *The Queen* (5); *Guilbault* v. *McGreevy* (6).

The contract further provided by the 8th clause that in the events of dispute upon the taking over or settling for the works, etc., the commissioner should alone decide all matters in dispute. The whole matter which forms the subject of the present cause having been referred to the commissioner he, on the 10th January, 1885, wrote to the late S. X. Cimon, communicating his decision and that of the Executive Council of the province, and refusing to entertain any of Mr. Cimon's claims.

We submit that we have in the final certificate, and in the decision of the Commissioner of Public Works, the answers contemplated by the contract to the suppliants' claim This also applies to the cross appeal.

Now, as to the merits of the claim for the commission alleged not to have been paid. A reference to the accounts for labour, at pages 349 and following, will show the court that the contractors were charging not the real cost of the work, the actual wages paid and the true cost price of the material, but were supplying accounts in which they charged a large profit upon their outlay, amounting, according to the recorded

(1) 19 Can. S. C. R. 685.
(2) 7 Can. S. C. R. 570.
(3) 35 L. J. (C. P.) 12.
(4) 8 Ch. App. 597.
(5) 4 Can. S. C. R. 529.
(6) 18 Can. S. C. R. 609.

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opinion of the engineer to 100 or 200 per cent. Yet the court is now asked to give to the representatives of these same people 20 per cent additional upon the face value of these already exaggerated accounts.

Amyot Q. C. for respondent, and appellant on cross appeal:

The following admission by the crown at page 39 of the case, viz.: That the amount of the extra works given by Mr. Lesage in his evidence represents the costs of the same, and cost price (*valeur brute*) as accepted and reduced by Her Majesty, the defendant, viz.: $74,015.65, conclusively proves that the extras were made for and accepted by the Government, and the only question which remains is: What was the remuneration or price to which the suppliants are entitled on these extras? Upon this I rely also upon the admission of record, page 38 "The parties in this cause admit..... that the price agreed to between Her Majesty and the said Piton & Cimon for the execution of the extra works, not included in the contract, was to be twenty per cent over and above the value of those works, making, materials and cost, which twenty per cent the government had promised to pay them so as to indemnify them for their time, work and responsibility."

This, with the calculation made by the appeal court which has relied on Mr. Lesage's evidence and on the vouchers of the crown, should settle the point and put an end to the litigation, unless the defendant wants this Honourable Court of Appeal and Error to act as a jury, accountant and tribunal of first instance.

The only ground of defence is that the final report of the engineer in charge which was put in at the end of trial settles the case. I submit that the crown should have pleaded the same specially so as to allow the suppliants to controvert. How could we allege and prove

fraud or gross injustice when that was not referred to in the written pleadings? Moreover it is not a final report; even Mr. Lesage admits this in his evidence when he says:—

There is no final settlement between the contractors and the Government. The Department, it is true, has prepared a statement of what it pretended to be the accounts between the parties, but the contractors have never assented to it as the balance accruing to them, and the account is still there (est encore là).

The cases relied on by the appellant have no application to this part of the case as there is a special admission by the crown that a fixed sum was to be paid and the evidence clearly shows that the engineer did not include it in his report or even had anything to do with it.

As to the preliminary objection relied on by appellant in this appeal, it was not taken in the Court of Queen's Bench and it is too late now. Sirez. Table Gen. Vo. appel. nos. 149-154. On the cross appeal we contend that the contract specially provides that we are not bound by the certificate of the engineer but by the decision of the "commissioner alone", and therefore, I contend that the contract as admitted, must be held to have been completely executed, and there being no special plea in bar, the crown is not entitled to any reduction.

THE CHIEF JUSTICE: I am of opinion that this appeal should be allowed and judgment of Superior Court restored with costs to the crown.

FOURNIER J.—Cette cause a commencé par une pétition de droit adressée à la Cour Supérieure, à Québec, en vertu de la province de Québec, qui a étendu la juridiction de cette Cour à ces matières.

Le gouvernement de Québec avait fait un contrat en forme authentique avec Piton et Cimon, pour la con-

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struction de trois des quatre bâtisses départementales, dans la cité de Québec. Le contrat contient des conditions pourvoyant au cas d'ouvrages extras. Le prix total était de $325,000. Piton et Cimon exécutèrent leur contrat; pendant la construction des ouvrages, Piton transporta à Cimon ses intérêts dans le contrat.

Après l'exécution des travaux, en 1885, Cimon fit application pour une pétition de droit réclamant la balance qui lui était due. Il mourut avant d'avoir obtenu le fiat, et sa veuve comme légataire universelle, renouvela la demande d'une pétition de droit; elle mourut aussi, avant d'avoir obtenu la permission de procéder. Enfin ses héritiers présentèrent la pétition en cette cause qui fut allouée par le Lieut.-Gouverneur le 28 Janvier 1888.

Les qualités des parties sont admises.

La gouvernement plaida paiement et une défense au fonds en fait.

Les différents items de la demande sont au nombre de cinq, mais la Cour du Banc de la Reine, ayant rejeté tous les items, à l'exception du 4me, le présent appel repose entièrement sur cet item; il est tout à fait inutile de s'occuper des autres. Il s'agit dans cet item de la commission de 20 p.c. réclamée sur les travaux extras.

La première chose à considérer est de savoir s'il y a preuve que des ouvrages extras ont été faits, et qu'une commission de 20 p. c. sur ces ouvrages devait être accordée au contracteur. M. Lesage, deputé ministre des Travaux Publics, dit que tous les ouvrages extras dont il parle dans son témoignage ont été régulièrement ordonnés par le commissaire des Travaux Publics, ou faits sous sa responsabilité. Il ajoute que dans tous les cas le Département admet que tous les ouvrages extras ont été régulièrement ordonnés, faits et acceptés. Après rectification d'une erreur qu'il avait

commise dans son premier témoignage, dans lequel il avait attribué au contracteur, comme extras, des ouvrages faits par d'autres contracteurs, en vertu de contrats spéciaux, après l'étude des faits par les officiers du Département, par M. Lesage, M. Berlinguet, architecte et expert, et comptable, il a été constaté d'une manière positive qu'il a été fait des ouvrages extras pour la somme de $74,015.65. Ce fait est parfaitement prouvé, et la Cour du Banc de la Reine l'a admis comme la base de son jugement.

La preuve du montant de la commission est non moins positive et parfaite. A l'interrogatoire, 12me, article des articulations de faits:—

Is it not true that the defendant has promised to pay (20 p.c.) twenty per cent upon the cost and value of the said (extra) works to indemnify them as alleged in the action?

La Reine, par son procureur, duement autorisé, a répondu affirmativement. Il y a en outre, à la page 38, 1er Vol. du dossier, l'admission suivante:

Que le prix convenu entre Sa Majesté et les dits Piton et Cimon, pour la confection des ouvrages extras et autres, à part du contrat, par eux faits, était à part le coût des matériaux et de la main-d'œuvre de vingt par cent en sus de la valeur de ces ouvrages, main-d'œuvre, matériaux et leur coût, lesquels le gouvernement susdit avait promis leur payer pour les indemniser de leur temps, travail et responsabilité.

Cette admission forme une preuve complète du montant de la commission. Elle est signée non pas seulement par le procureur de record, mais par "Chs. Langelier dûment autorisé." La force probante de cette pièce n'aurait pu être anéantie que dans le cas où le procureur qui l'a signé, n'aurait pas été autorisé à le faire. Mais il y était évidemment autorisé puisque la pièce le comporte et qu'il n'a pas été désavoué. D'après le code de procédure, pour détruire la preuve faite par cette admission, il n'y avait d'autre moyen que celui du désaveu; comme la défense n'y a pas eu recours, la preuve faite par cette admission conserve toute sa force

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légale. Aussi la Cour du Banc de la Reine l'a-t-elle admise et prise comme bâse de la commission qu'elle a accordé (20 p.c.) vingt par cent sur les comptes d'ouvrages extras dans lesquels cette commission n'avait pas été chargée. Ce n'était plus alors qu'une affaire de calcul pour en arriver au montant qu'elle a fixé de $13,198.77, intérêt du 1er mai, 1884, et le montant n'a été déterminé par l'hon. Juge Bossé qu'après une étude spéciale des nombreuses pièces du dossier qu'il a compulsées à cet effet. Je me suis aussi convaincu par l'examen des preuves, qu'il a fait une juste estimation du montant de la commission. Ce jugement, sur la contestation telle que liée entre les parties, étant correcte, le litige aurait dû être terminé par cette décision. Mais les procès ne sont pas faits pour durer si peu, et à mesure qu'ils se prolongent, les parties découvrent de nouveaux moyens pour les faire durer davantage. C'est ce qui a lieu dans le présent appel, où l'appelante invoque pour la première fois des moyens qu'elle n'a ni plaidé ni fait valoir en cour de première instance, non plus qu'en appel devant la Cour du Banc de la Reine. C'est devant cette cour seulement que l'appelante oppose à l'intimé une fin de non recevoir fondée sur ce que l'appelante n'a pas produit un certificat final de l'ingénieur en charge des travaux, constatant que les dits ouvrages sont bien et duement exécutés et certifiés. Voilà la première objection soulevée par l'appelante. La seconde est que l'appel a été pris à la Cour du Banc de la Reine après le délai fixé pour l'appel.

L'appelante peut-elle être admise à faire valoir ces moyens pour la première fois devant une cour d'appel, pour ainsi dire de dernier ressort? En cour de première instance il n'a été nullement question de ce certificat qui aurait pu être préliminairement opposé comme fin de non recevoir à l'action. Au lieu d'exiger par une défense spéciale la production de ce certificat pour

prouver l'exécution des travaux, l'appelante a plaidé paiement de tous les item de la demande, accompagné, il est vrai, d'une défense au fond en fait dont les effets sont limités par l'admission que comporte le plaidoyer de paiement. A la preuve en cour Supérieure toute la contestation et les preuvés se sont faites sur l'exécution des ouvrages. Ce n'est qu'à la fin de l'enquête que la défense a produit, malgré l'opposition du demandeur, un prétendu certificat final de M. P. Gauvreau, l'architecte en charge des travaux. C'était un fait spécial qui aurait dû être plaidé préliminairement, afin de fournir au demandeur l'occasion soit de l'attaquer, soit de l'admettre. Il a même fait motion pour le faire rejeter hors du dossier, et bien que cette motion n'ait pas été spécialement décidée, elle se trouve l'avoir été de fait, parce que les deux cours n'ont attaché aucune importance à ce certificat. Quelle valeur d'ailleurs pouvaient-elles donner à un prétendu certificat final, fait en 1882, pour des ouvrages livrés en 1884? Ce certificat est, de plus, contredit par l'admission de l'appelante contenue à la page 34, l. 33, savoir que :

Si aucun montant est dû aux pétitionnaires, ce n'est que depuis le premier mai 1884.

M. Lesage, dans son témoignage, ne prétend pas qu'il y a eu un certificat final. A la page 85, il dit :—

Il n'y a pas eu de règlement final entre les contracteurs et le gouvernement. Le département a bien préparé un état de ce qu'il prétendait être les comptes entre les parties, mais les contracteurs n'ont jamais voulu l'accepter comme la balance qui leur revenait et le compte est encore là.

Il est évident que c'est une admission qu'il n'y a pas eu de certificat final et que puisque les parties étaient en difficulté sur le règlement, ce n'était pas la clause du contrat au sujet du certificat qui devait s'appliquer, mais la clause 8me, qui dit :—

Que le commissaire aura seul le droit de décider au cas qu'il s'élève quelque difficulté entre les parties au sujet de la réception, ou du

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règlement des travaux ou sur l'interprétation à donner au présent marché, aux dits plans et devis ; et que les dits entrepreneurs se sont tenus de s'en rapporter à la décision du dit commissaire qui sera final et obligatoire pour toutes les parties.

Puisque les parties ne pouvaient s'entendre, le seul moyen d'en finir était d'en référer à la décision du commissaire ; mais il n'y a pas eu plus de décision du commissaire que de certificat final. Mais quoi qu'il en soit, ni l'un ni l'autre de ces faits n'ayant été plaidé, l'appelante ne peut maintenant les invoquer, et l'intimé a droit d'opposer avec succès le défaut de les avoir plaidés ou d'avoir amender ses plaidoyers.

L'appelante a cité dans son factum à peu près toutes les causes où il a été décidé que le certificat final de l'ingénieur était indispensable au contracteur, pour lui permettre de poursuivre le recouvrement de ce qui lui était dû ; mais aucune de ces décisions ne s'applique à la cause actuelle. En y référant, on voit que dans toutes ces causes l'absence d'un tel certificat a été mise en contestation dans le début de la procédure ; tandis que dans celle-ci, ce défaut de certificat n'a été nullement plaidé. Il est évident par toute la procédure que ce n'était pas l'intention de l'appelante de s'en prévaloir, puisque ce certificat n'a été produit qu'à la fin de l'enquête ; et d'ailleurs ce certificat ne couvre nullement la question de la commission de 20 p.c. qui a été omise et est restée pendante, attendant la décision du commissaire, pendant plus de deux ans. Mais il est inutile de s'occuper davantage de ce certificat et d'entrer dans le détail de toutes les erreurs et omissions qui s'y trouvent. Elles ont été exposées par l'intimé dans son factum ; il n'y a qu'une réponse péremptoire à faire, c'est qu'il n'a pas été plaidé, et que la cour ne doit pas s'en occuper.

La deuxième des objections soulevées seulement devant cette cour est celle que l'appel n'a pas été pris

dans le délai fixé par le statut. L'appelante dit dans son factum :—

The fact that the right of appeal had been lost by lapse of time does not seem to have been argued before the Court of Appeals.

Le jugement de la cour Supérieure a été rendu le 4 juin 1890, et l'appel a été pris le 23 avril 1891, par conséquent longtemps après le délai fixé.

Est-il encore temps d'opposer cette objection à l'appelante? N'aurait-elle pas dû être faite devant la cour du Banc de la Reine *in limine*? Toute la procédure a eu lieu sans qu'on y ait songé, et ce n'est que longtemps après le jugement final et devant cette cour que l'on a songé à en prendre avantage.

D'après les décisions de nos cours, les objections fondées sur des irrégularités de procédure, lorsqu'elles n'ont été ni alléguées ni invoquées au procès ne peuvent être en appel. *Bain* v. *The City of Montreal* (1), au même vol. p. 361, l'objection du défaut de mise en cause d'une des parties doit être prise *in limine;* la même question a été décidée dans la cause de *L'Union de St. Joseph* v. *Lapierre* (2), que le défaut d'avis de poursuite n'ayant pas été plaidé, ni opposé dans la cour inférieure, ne pouvait être invoqué en appel. Décidé aussi qu'un document produit au procès, mais invoqué pour la première fois devant la cour du Banc de la Reine ne peut faire partie du dossier en appel devant cette cour (3). Il est de principe dans le droit anglais, comme dans le droit francais, que les irrégularités de procédures, dans le cours du procès, sont couvertes par l'acquiescement résultant des procédés subséquents à moins qu'il n'en ait été pris avantage avant de passer à d'autres procédés. Dans la cause de *Jones* v. *Van Patten* (4) citée dans la note sur Graham and Waterman on New Trials (5), le juge Perkins déclara que :—

(1) 8 Can. S. C. R. 252.
(2) 4 Can. S. C. R. 164.
(3) See *Exchange Bank* v. *Gilman*, 17 Can. S. C. R. 108.
(4) 3 Ind. 107.
(5) 2 Vol. p. 662.

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It is a well established rule that erroneous steps in the progress of a cause are waived, unless excepted to before additional steps are taken.

Dans le droit français les nullités de procédure doivent être opposées à une certaine époque de l'instance. L'intimé dans son factum a cité un grand nombre d'autorités sur cette question. Voir entre autres : Carré et Chauveau (1).

Table générale, Journal du Palais, Vo. Cassation, nos 350, 998-9, 1001-2-3-4-5-6-7-8-9, 1065-6, 1134.

Devilleneuve et Gilbert, Table de 1851-1860, Vo. Cassation, par. 40 :—

Un moyen qui n'a pas été proposé devant les juges au fond ne peut être proposé comme moyen de cassation.

Cass. 2 juillet 1850 (Bouilland) S.V. 51, 1, 54. P. 50, 2-649.

Id. Cass. 16 nov. 1853 (Couderc.) S.V. 54, 1, 771. P. 55, 2-260.

Id. Cass. 30 juillet 1856 (Rigal) S.V. 57, 1, 193. P. 58, 93.

Id. Cass. 1er juillet 1857 (Delsaux) S.V. 58, 1, 206. P. 58, 951.

Id. Cass. 29 juin 1859 (Daulchez) S.V. 59, 1, 851. T. G.N. 252.

Do. 49 :—

L'exception de la chose jugée ne peut non plus être posée pour la première fois devant la cour de Cassation.

Do. 53 :—

Ainsi on ne peut proposer pour la première fois devant la Cour de Cassation le moyen tiré de la déchéance d'un appel après l'expiration du délai légal.

La cour avait juridiction. C'est la loi en force lorsque la procédure a commencé qui règle le droit d'appel et non celle en force lorsque le jugement a été prononcé.

La Cie. du Chemin de Fer de l'Atlantique au Nord-Ouest v. *Pominville* (2) ; *Hurtubise* v. *Desmarteau* (3).

(1) 5 ed. 2 Vol. Q. 739, bis. art. 173.

(2) 34 L. C. Jur. 241.

(3) 19 Can. S. C. R. 562.

Le même principe a été adopté quant à la juridiction de la cour Suprême, voir *Taylor* v. *La Reine* (1).

Le délai pour opposer la déchéance du droit d'appel est fixé par le Code de Procédure, art. 1128 (maintenant 1130).

La réponse générale aux griefs d'appel ne constitue pas un plaidoyer de déchéance. Code Procédure Art. 140. Treizième règle de pratique de la cour d'Appel. Règle de pratique de la cour d'Appel du 21 juin 1879. 1ère règle :—

The case in appeal shall contain a summary statement of the pleadings and of the questions of fact and of law on which the party filing it relies.

Le procureur *ad litem* est le *Dominus litis*. Ses procédés judiciaires ne peuvent être attaqués que par la voie solennelle d'un désaveu formel par la partie intéressée, entraînant une grande responsabilité.

On a vu par les autorités citées plus haut, que la déchéance d'appel est couverte par la défense au fond. Dans cette cause l'appelante n'en a nullement pris avantage; elle a conduit sa contestation absolument comme si l'appel avait été pris dans les délais ordinaires. Cependant, elle va même jusqu'à prétendre que les juges doivent prononcer cette déchéance d'office, lors même qu'elle n'est pas opposée. Mais l'autorité de Carré repousse cette doctrine ; c'est, dit-il, dans l'intérêt de celui qui a gagné son procès que cette déchéance est prononcée, c'est un fin de non-recevoir qu'il peut opposer comme la prescription ; ne l'ayant pas invoquée et la cour ayant juridiction dans la matière du procès elle a pu valablement procéder à jugement. Il est certainemont trop tard sur un deuxième appel pour en prendre avantage, et l'on doit ici faire application du principe suivi par la cour de Cassation qui

(1) 1 Can. S. C. R. 65.

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ne permet pas d'invoquer, pour la première fois, la déchéance d'appel devant cette cour. C'est en vain que l'appelante invoque la chose jugée pour maintenir sa prétention de déchéance, car on a vu par les arrêts de 1827 et 1834, cités plus haut, que la jurisprudence tend à ne pas donner à l'exception de la chose jugée le caractère d'une exception d'ordre public.

Pour les raisons ci-dessus données, les deux principales objections de l'appelante fondées sur le défaut de certificat, et la déchéance de l'appel, doivent être renvoyées, et le jugement de la cour du Banc de la Reine confirmé avec depens.

Le contre-appel de l'intimé doit aussi être renvoyé.

TASCHEREAU J.—If this case was to be concluded by the rule that on a contract of this nature and under the conditions to be found therein, no action lies without the final certificate of the engineer, or other officer named, except in cases of fraud or sometimes error, the appellant would have not much to fight against. The cases to that effect in this court itself are numerous. In England, a recent case of *De Morgan* and *Rio de Janeiro Flour Mills, in re* (1), supports that view which when applicable cannot, I take it, be controverted. But does the rule apply here, or can it be given effect to? I think it does not apply, for the simple reason that the only amount granted to the respondents by the judgment appealed from is for the balance due them, not on the contract, nor any part thereof, but on a subsequent promise made by the Government to them to pay them 20 p. c. over the extras. That promise is admitted in aspecial admission of fact, page 38, and by the answer to the respondent's articulation of facts, page 501, "Is it not true that the Government has promised to pay to the contractors 20 p. c. over the cost and value of the

(1) 8 Times L. R. 292.

said works (extras) to indemnify them as alleged in the action?" To which the defendant answers "Yes." See also evidence, Ex. 5, No. 279 of plaintiff's, that this promise was made on the 5th December, 1879. And the contention that this 20 p. c. is included in the engineer's certificate is in plain contradiction to the appellant's admission, page 39, that Lesage's, the crown's own officer's, estimates cover only the actual cost of these extras, without this 20 p. c. St. Michel, their own witness (page 142) also proves the same thing. Now, I do not see how the engineer could include in his certificate anything of this 20 p. c., so as to bind any one. And I do not see that he did; in fact it is admitted that he did not.

Mr. Justice Bossé's careful review of the evidence on this point seems to me unanswerable. If he erred, it is against the respondents, not against the appellant.

I also agree with my brother Fournier that it would be most unjust to allow the appellants in this court to rely upon the want of a final certificate, even if it was necessary or if it covered this 20 p. c., when they have not pleaded it. Had they pleaded it the respondents might have attacked it for fraud or error, or have invoked waiver by the crown, or estoppel. The late case of *Connecticut Fire Insurance Co.* v. *Kavanagh* in the Privy Council (1), is an authority against the appellants' right to now avail themselves of a point of this nature which they have not put in issue on the record. In this case by the admissions on record it is conceded that this 20 per cent ought to have been allowed by the engineer.

The other cases I may refer to on this point are *Gray* v. *Richford* (2); *L'Union St. Joseph* v. *Lapierre* (3); *Fuller* v. *Ames* (4); *Bain* v. *The City of Montreal* (5);

(1) [1892] A. C. 473.
(2) 2 Can. S. C. R. 431.
(3) 4 Can. S. C. R. 164.
(4) Cassels's Dig. 2 ed. 140.
(5) 8 Can. S. C. R. 252.

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Oakes v. *The City of Halifax* (1); *Russell* v. *Lefrancois* (2), and cases there cited; *Lash* v. *Meriden Britannia Co.* (3); *The Tasmania* (4); *Bank of Bengal* v. *Macleod* (5); *Scott* v. *The Phœnix Assurance Co.* (6); *Redfield* v. *Wickham* (7); *Cooper* v. *Cooper* (8); *Luke* v. *Magistrates of Edinburgh* (9); *Heyneman* v. *Smith* (10); *Kay* v. *Marshall* (11); *Livingstone* v. *Rawyards Coal Co.* (12); *Lyall* v. *Jardine* (13); *Martin* v. *Mackonochie* (14); *Head* v. *Sanders* (15); *The Council of the Borough of Randwick* v. *The Australian &c. Coporation* (16).

The judgment for interest from 1st May, 1884, is correct. There is an admission that any sum due was due from that date. This admission also renders the appellants' contention as to prescription unfounded. These admissions are by the Attorney-General for the crown, and bind the crown. I am surprised to see the contrary urged on behalf of the crown without a formal disavowal according to the Code of Procedure.

As to the cross-appeal, the majority of the court being of opinion that the crown's appeal should be allowed the cross-appeal must stand dismissed.

SEDGEWICK and KING JJ. concurred with THE CHIEF JUSTICE.

Appeal allowed with costs.

Solicitors for appellant: *Caron, Pentland & Stuart.*

Solicitor for respondent: *G. Amyot.*

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(1) 4 Can. S. C. R. 640.
(2) 8 Can. S. C. R. 335.
(3) 8 Ont. App. R. 680.
(4) 15 App. Cas. 223.
(5) 7 Moo. P. C. 35.
(6) Stuart's L.C.R. 354.
(7) 13 App. Cas. 467.
(8) 13 App. Cas. 88.
(9) 6 W. & S. Sc. 241.
(10) 21 L. C. Jur. 298.
(11) 8 Cl. & F. 245.
(12) 5 App. Cas. 25.
(13) L. R. 3 P. C. 318.
(14) 7 P. D. 94.
(15) 4 Moo. P. C. 186.
(16) [1893] A. C. 322. See also 1 Vol. Pigeau p. 501 et seq.

CHARLES F. FRASER (THIRD PARTY)..APPELLANT; 1893

AND *Nov. 27.28.

LEWIS P. FAIRBANKS (DEFENDANT)....RESPONDENT; 1894

AND Feb. 20.

WILLIAMS G. COOMBS.. .....PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.

L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property C. F. was brought in as third party to indemnify L. F., his vendor, against a judgment in said action.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King JJ. dissenting, that the evidence showed that the sale was not to C. F. as a purchaser on his own behalf but for the company and the company and not C. F. was liable to indemnify the vendor.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of defendant against the third party.

The material facts of the case are stated by Mr. Justice Sedgewick in his judgment as follows:

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

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On the 1st December, 1882, the defendant L. P. Fairbanks mortgaged certain property known as the Shubenacadie Canal property to the plaintiff William G. Coombs for the sum of four thousand dollars ($4,000) and on the 30th March, 1892, the mortgagee commenced an action in the Supreme Court of Nova Scotia to recover the interest then due. After the mortgagor was served with a writ he gave notice under the Judicature Act to Messrs. C. F. Fraser (the appellant), B. F. Pearson and A. M. Fraser, claiming that as they were then the owners of the equity of redemption, and the lands in question were conveyed to them subject to the mortgage, they were under obligation to indemnify the defendant against all claims under the mortgage. This liability was disputed and the claim came on for hearing before Mr Justice Ritchie who gave judgment in favour of the defendant Fairbanks against C. F. Fraser (the appellant) for the amount of interest claimed, but dismissed the claim as against A. M. Fraser and B. F. Pearson—the formal judgment as respects Fraser being as follows :—

"It is ordered that judgment be entered herein for the said Lewis P. Fairbanks against the said Charles F. Fraser for the amount of the judgment debt and costs recovered in this suit against said Fairbanks by said John M. Chisholm, together with his costs of defence herein against the plaintiff, John M. Chisholm, and of the proceedings against said third parties."

The circumstances under which the appellant Fraser's liability has arisen would appear to be as follows :—On the 17th April, 1889, an act of the Nova Scotia Legislature was passed incorporating R. L. Borden, B. F. Pearson and Alfred Whitman, and their associates, a body corporate under the name of the Halifax Land Improvement Company for the purpose generally of dealing in real estate, the capital to be one

hundred thousand dollars ($100,000), the company being at liberty to issue paid-up stock in exchange for or in payment of the price of any property, real or personal, which it might acquire or hold, and having the right to commence active operations whenever twenty-five per cent of the capital stock was subscribed and twenty per cent paid up.

The company was organized and a general meeting held in August following. Previous, however, to the organization of the company, and before the 26th of July, the appellant, C. F. Fraser, and L. P. Fairbanks had several conversations relating to the transfer of the Shubenacadie Canal property to the company Fairbanks having first made himself acquainted with the provisions of the charter, the company not then being organized. The following agreement was thereafter entered into between Fairbanks and the third parties sought to be made liable in the case.

"Memorandum of agreement made and entered into this twenty-sixth day of July, A.D. 1889, between Lewis P. Fairbanks, of Dartmouth, in the county of Halifax, and province of Nova Scotia, merchant, the party hereto of the first part, and C. F. Fraser, of Halifax, in the county of Halifax, publisher, B. F. Pearson, of Halifax aforesaid, barrister-at-law, and A. Milne Fraser, of Halifax aforesaid, publisher, the parties hereto of the second part."

"Witnesseth, that the party hereto of the first part, for and in consideration of the sum of one dollar paid to him, and divers other consideration, agrees to give a good and sufficient deed with the usual full covenants of the canal property, waters, water-courses and privileges appertaining thereto, from himself and his son within thirty days to C. F. Fraser aforesaid, subject to mortgages amounting to not more than $15,000."

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"2. He agrees to assign all options and interests in the said property held by him from W. J. Fraser and others to said property or any part thereof; also, all interest of himself or son or the canal company in all claims for damages, or for use of water privilege, or for mines and mining rights against any and all persons whomsoever, unto C. F. Fraser."

"3. Parties of the second part agree to pay $2,500 in 3, 6 and 9 months, to be secured by joint notes in three equal instalments—proceeds of notes to go towards payment of certain judgments against property to be conveyed—and all taxes thereon, as far as necessary to pay the same."

"4. C. F. Fraser agrees to hold said property in trust in the following proportions: One-half of all proceeds of property and damages to be paid to L. P. Fairbanks, and one-half to A. M. Fraser, C. F. Fraser and B. F. Pearson in equal proportions, after payment of all encumbrances on said property."

"In witness whereof the said parties hereto have hereunto set and subscribed their seals and hands this 26th day of July, A. D. 1889."

"(Signed), LEWIS P. FAIRBANKS, [L.S.]
C. F. FRASER, [L.S.]
B. F. PEARSON, [L.S.]
A. MILNE FRASER, [L.S.]

Signed, sealed and delivered in the presence of
(Signed), F. G. FORBES."

B. F. Pearson, one of the parties to this agreement, was one of the corporators named in the company's act of incorporation, and the appellant A. M. Fraser had in the meantime also become interested in the company. In accordance with and in part performance of this agreement the notes for two thousand five hundred dollars were given to Fairbanks and were paid at maturity, and on the 26th of August following Fairbanks

conveyed to C. F. Fraser the lands and rights referred to in the agreement by an absolute deed in fee simple, subject, however, to the mortgage sued on in this case. By this time the company had been organized and on the 23rd of November, the appellant, Fraser, executed and registered a declaration of trust declaring in effect that he held the lands conveyed to him by Fairbanks, in trust for and on behalf of the company. On November 21st, the defendant, Fairbanks, gave the following order to the company:—

"HALIFAX, November 21, 1889.

To the Halifax Land Improvement Company, Limited.

SIRS,—Please pay and deliver to C. F. Fraser or order $25,000 cash and 1,500 fully paid up and non-assessable shares and stock of a par value of ten dollars each of the capital stock in the said Halifax Land Improvement Company, Limited, which said sum of $25,000 and said shares are payable to me as the consideration or purchase price of the lands and privileges known as the "Shubenacadie Canal Company," sold by me to the said Halifax Land Improvement Company, Limited, by deeds to C. F. Fraser as the president and trustee of the said company for that purpose.

Yours truly,

(Sgd) LEWIS P. FAIRBANKS.

Witness,

L. FAIRBANKS."

The stock in this order referred to was transferred and the following receipts were taken from Fraser and Fairbanks:

"HALIFAX, N.S., November 21, 1889.

Received of the Halifax Land Improvement Company, (Limited), the sum of twenty-five thousand dollars cash, and fifteen hundred shares, fully paid up and non-assessable, of the capital stock of said company,

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payable to me under an order of this date from Lew i P. Fairbanks, Esq., to said Halifax Land Improvement Company, (Limited) in satisfaction of said order.

Yours truly,

(Sgd) C. F. FRASER.

Witness,

C. FAIRBANKS."

"HALIFAX, N.S., November 21st, 1889.

Received of C. F. Fraser, Esq., the sum of twenty-five thousand dollars cash, and also fifteen hundred shares of fully paid-up and non-assessable stock of the Halifax Land Improvement Company, Limited, in full consideration, satisfaction and payment of the sale by me to the said Halifax Land Improvement Company, per C. F. Fraser, trustee, of all the property, real and personal, waters, water-courses, rights, privileges and easements, of the property known as the "Shubenacadie Canal Company," and in full satisfaction and discharge of all demands and claims against said C. F. Fraser and the Halifax Land Improvement Company, Limited, to date.

Yours truly,

(Sgd) LEWIS P. FAIRBANKS.

Witness,

(Sgd.) C. FAIRBANKS."

Fairbanks at the same time gave another receipt for the moneys referred to in the agreement of the 26th July, as follows :—

" HALIFAX, N.S., November 21, 1889.

Received of C. F. Fraser, B. F. Pearson and A. Milne Fraser, all of Halifax, the sum of two thousand five hundred dollars in full satisfaction of the transfer and sale by me to them of the lands and privileges mentioned in the memorandum of agreement between said parties and myself, and dated the 26th day of July,

A.D. 1889, and I acknowledge full satisfaction of the conditions named in said agreement on their part to be performed. And I do hereby covenant and agree on my part to fully carry out and execute all conditions in said agreement to be by me performed when and wherever required so to do by said parties or by the Halifax Land Improvement (Limited), or its assigns, and to execute all documents, deeds and assurances at my own cost, in accordance with the terms of said agreement of the 26th day of July, A.D. 1889.

Yours truly,

(Sgd.) LEWIS P. FAIRBANKS.

To C. F. FRASER, Esq., Halifax, N.S.

Witness:

(Sgd.) C. FAIRBANKS."

Upon the foregoing facts the trial judge found that under the agreement of the 26th July, C. F. Fraser was legally liable to indemnify Fairbanks against the mortgage upon the property.

His judgment was affirmed by the full court, from whose decision the defendant, Fraser, appealed.

Borden Q.C. for the appellant, cited *Wolveridge* v. *Steward* (1).

Harris Q.C. for the respondent, referred on the merits to *Jones* v. *Kearney* (2); *Re Cozier* (3); and claimed that a new trial should be ordered if the judgment was not sustained, citing *British Canadian Loan Co.* v. *Tear* (4).

Borden Q.C. in reply, argued that a new trial could not be granted, not having been asked for in the court below and being inconsistent with the relief claimed by the action.

(1) 1 C. & M. 644.
(2) 1 Dr. & War. 134.
(3) 24 Gr. 537.
(4) 23 O.R. 664.

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

TASCHEREAU J.—I would dismiss this appeal. I adopt the findings of Ritchie J. at the trial, and the reasoning of Meagher J. in the court below.

GWYNNE J.—The plain conclusion from the evidence is that the intention of all the parties to the agreement of the 26th of July, 1883, was that the appellant C. F. Fraser should hold the lands and premises mentioned therein when conveyed by Fairbanks to him subject to the mortgages for $15,000 which was the only estate Fairbanks had it in his power to convey, upon trust for sale and upon sale upon trust to pay to Fairbanks himself one-half of the money to accrue from such sale over and above all incumbrances, and the other half in three equal proportions to himself and to A. M. Fraser and B. F. Pearson respectively.

Upon the transfer by Fairbanks to the appellant under that agreement the latter became no more liable to pay off the mortgage or to indemnify Fairbanks therefrom than did A. M. Fraser or Pearson or Fairbanks himself. The appellant was not an actual vendor of the property at a price agreed upon of which the mortgage itself constituted a part so as to subject him to the equitable obligation to pay off the mortgage and to indemnify his vendor therefrom. He held the property so transferred to him solely as a trustee to sell and upon effecting a sale to divide the purchase money as above stated. There was no sale of the property whatever until the sale to the Halifax Land Improvement Company which sale, and the consideration therefor given by the company for the property, Fairbanks himself most unequivocally concurred in by becoming, as part of the terms of the sale, a member of the com-

pany and the owner of paid up shares therein as constituting part of the purchase money agreed upon. Until that sale was effected there was no person who could have been called upon by Fairbanks to indemnify him against the mortgage and the only persons who could be so called upon were the company who were the actual *bonâ fide* vendors of the property subject to the $15,000 mortgages. The fact that the transfer of the property was effected by C. F. Fraser executing a declaration of trust to hold the land for the company who paid the consideration could not have the effect of imposing upon Fraser personally an equitable obligation incurred only by the company as the actual vendees of the property and sole beneficiaries therein. The appeal must, therefore, be allowed with costs.

SEDGEWICK J.—It may, I suppose, be taken for granted upon the authority of *Waring* v. *Ward* (1), *Joice* v. *Duffy* (2), and *Williston* v. *Lawson* (3), that in the ordinary case of a sale of an equity of redemption, or in other words, a sale of land in mortgage upon the promise that the purchaser is to take a conveyance of the mere equity of redemption paying the vendor the specified price for that, a court of equity assumes, unless there is some agreement to the contrary, that the purchaser is to indemnify the vendor against the mortgage if there is any personal liability on his part in respect of it. This liability, however, does not arise from any contractual relationship between the original mortgagee and the purchaser, or between the vendor and the purchaser. Independently of an agreement between himself and the purchaser the mortgagee cannot recover at law or in equity against the purchaser. The right of indemnity which the vendor of the

(1) 7 Ves. 332.

(2) 5 U. C. L. J. (O.S.) 141.

(3) 19 Can. S. C. R. 673.

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equity of redemption has is a mere equity against the purchaser arising in his favour when he has paid or has been called upon to pay the amount of the mortgage debt for which he is responsible under his original covenant. The question now is: How far is this principle applicable to the present case? I have come to the conclusion that it does not apply at all as against the appellant, Fraser, much less does it apply to the full extent stated in the judgment of the trial judge and of the majority of the court below. Fairbanks being the owner of the property in question, subject to the mortgages, entered into the agreement of the 26th of July above set out. As regards the parties now before the court the effect of that agreement, coupled with the conveyance following upon it, viewed apart from the general intention of all the parties, was to transfer to the appellant, Fraser, one-half only of Fairbanks' interest, and to create Fraser in respect to the remaining half interest a trustee for Fairbanks, or in other words, Fraser became the owner of a moiety of the property and the agent of Fairbanks for the purpose of selling the other moiety. I do not understand upon what principle Fraser has been found liable to indemnify Fairbanks in respect of that moiety. It is not pretended that he violated the conditions under which he held the property or that he in any way acted in excess of his authority as Fairbanks' agent and trustee. There is nothing whatever in the agreement to justify the contention that Fraser was precluded from selling the property until he had first paid off the mortgage. It was agreed that any profits derived from the disposal of the property after the incumbrances were paid off were to be divided equally between Fairbanks and the other parties to the agreement, but that stipulation in no way necessitated the getting in of the incumbrances before the sale. The order upon

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the Improvement Company given by Fairbanks and his receipt for the stock and his share of the purchase money show an absolute acquiescence and ratification on his part of Fraser's conduct in dealing with the property. The trial judge seeks to destroy altogether the effect of these documents upon the ground that they were signed by Fairbanks at the request of Fraser. I am not aware of any principle by which a person may seek to relieve himself from the effect of instruments which he has signed by stating merely that they were signed at the request of other parties interested in them. The whole evidence which these documents confirm points, I think unmistakably, to the conclusion that the dealings between Fairbanks on the one part, and Fraser and his associates on the other, in reference to the mortgaged premises had relation to an eventual transfer to the Land Improvement Company, and that the appellant, Fraser, was a mere conduit pipe by which that end was to be attained. It was not, I think, ever contemplated that Fraser should assume any obligation whatever beyond that expressly stated in the agreement, nor was it contemplated, even at the commencement of the negotiations, that Fraser himself, either on his own behalf or on behalf of himself and those associated with him, should be the actual purchaser of the property. He undoubtedly was desirous of securing the property, just as Fairbanks was desirous of transferring it to him, the lands, as Fairbanks himself says, being of no use to him as he could not operate them. At the time of the agreement the company, though incorporated, had not been organized; it had no officers to make contracts or take titles on its behalf. All transactions, therefore, the benefit of which was to be for the eventual interest of the company, had necessarily to be entered into in the name of the promoters, corporators or other persons controlling it;

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besides, it was evidently necessary that the corporators should have control of this very land in order that the company might organize, having reference to the special provision in the charter in relation to the purchase of property in exchange for an issue of paid-up stock. It was not explained to us at the argument why the appellant Fraser did not make an absolute conveyance to the company of the lands in question but simply declared himself a trustee for the property in respect of them. This fact, however, does not, I think, make any difference either in regard to Fraser's liability or to that of the company. The right to indemnify, which as a general rule a mortgagor who has sold his equity of redemption has against the purchaser, is an equity only; it is in no sense a legal liability; if enforceable at all it cannot be enforced except against one who in equity is a real purchaser. Fraser, in my view, never was, and Fairbanks knew he never intended to be, a purchaser on his own behalf; he was dealing from first to last on behalf of the company, and his declaration of trust in favour of the company, accepted as it was by the company through its recognized officers, created the company in equity its absolute owner he being a bare trustee only. In my judgment, under the special circumstances of this case, the company, and the company alone, can be called upon by Fairbanks to indemnify him in respect of this mortgage; the land is still there; it is under the control of the company; they receive all rents and profits from it; besides, Fairbanks knew from the very first that the company held it; in his letter to the company of the 21st November, 1891, he refers to the property "as property sold by him to the said Halifax Land Improvement Company (Limited), by deeds to C. F. Fraser as president and trustee of said company, for that purpose;" he therefore cannot set up that the transfers in

question were behind his back or that he had no knowledge of them. 1894

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For these reasons I am of opinion that the appeal should be allowed, and that all proceedings in this suit against the appellant should be dismissed, and that he is entitled to his costs of all proceedings in the court below and of this appeal.

Sedgewick J.

KING J.—I am of opinion that this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellant: *F. G. Forbes.*

Solicitor for respondent: *W. A. Henry.*

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*Nov. 30
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*Feb. 20.

ALLAN PARKS (DEFENDANT).....APPELLANT ;

AND

WAITY CAHOON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Disseisin—Adverse possession—Paper title—Joint possession —Statute of limitations.

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N.S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg Co., which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land and in 1866 he conveyed the whole to a son of C., then about 24 years old who had resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly after married and went to live on the Queen's Co. portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's Co. P. worked on the Lunenburg land with C. for a few years when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg Co. to his wife.

On one occasion P. sent a cow upon the land in Lunenburg Co. which was driven off and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry the title to the land was not traced back beyond the deed executed in 1856.

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him ; that neither he nor his successors in title ever had actual possession of the land in Lunenburg Co. ; that the possession of C. was never interfered with by the deeds executed ; and having continued in possession for more than twenty years C. had a title to the land in Lunenburg Co. by prescription.

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

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

The material facts of the case are stated by the trial judge as follows :—

"This action is brought to recover damages for trespasses committed on a lot of about five acres in the occupation of the plaintiff, which lot is in the county of Lunenburg and to the north-east of and adjoining the county line between that county and Queen's County."

"It was proved that one John Ryan occupied the locus and also the property adjoining in Queen's County about forty years ago. Between thirty-five and forty years ago Benjamin Cahoon moved into the house and lived there and occupied the locus until his death in 1888, and the plaintiff, who was his second wife, has occupied it ever since."

"When Benjamin Cahoon moved on to the locus his son Leander, who was then a boy, went with him and continued to live with him, and worked with him on the place until his marriage in 1868. Before his marriage he commenced a new house on the Queen's County side of the line, and when it was finished he and his wife, who up to that time had lived with his father and mother, went to the new house and continued to live there until his death in 1872."

"His wife who, before her marriage, had lived with Benjamin Cahoon and his wife, returned to this house on the locus, and lived there with them until she married the defendant about 1875, when she and her husband returned to the house in Queen's County, which her first husband had built, and have lived there ever since."

(1) 25 N. S. Rep. 1.

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"Benjamin Cahoon and the defendant, after his marriage, worked on the property together until about eight years ago, when they had some dispute, and Benjamin after that worked on the locus and the defendant on the property in Queen's County."

"On the 14th October, 1856, John Ryan gave a deed of all his interest in the property at East Port Medway, containing a hundred and twenty-six acres, to Stephen Mack. It was contended that this deed did not cover the locus but only the property in Queen's County, but I am of opinion that it was intended to cover and did cover the locus. In January, 1866, when Benjamin Cahoon was in possession of the locus, Stephen Mack, who is not proved to have been in possession at any time, conveyed all his interest in the property to Leander Cahoon, son of Benjamin, using the same description as in the deed from John Ryan to him, excepting a part sold to Edward Ryan."

"And in April, 1871, Leander Cahoon conveyed to Jerusha Cahoon an undivided right in two-thirds of the lot conveyed to him by Stephen Mack, reserving the new house he had built and then lived in. Jerusha Cahoon was his mother, Benjamin's first wife; she left four children surviving her, one of whom died without issue before his father. Leander Cahoon left two children who are still living, and defendant and his wife, their mother, are their guardians duly appointed. None of the deeds above mentioned are recorded in the county in which the locus is situated, but in the county of Queen's only."

"On the 7th October, 1881, Benjamin Cahoon conveyed the locus by deed to William Smith (the father of the plaintiff), who by deed dated the 29th September, 1882, conveyed the same to the plaintiff, the consideration being natural love and affection, and $50, which amount the plaintiff proves that she paid in cash out

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of her own money. These deeds were recorded shortly after their respective dates in the county of Lunenburg, in which the land in question is situated. The trespass of cutting and removing the hay is admitted, the defendant alleging that he did it in exercise of his authority as guardian of Leander's children, who are under age and who are entitled to an undivided interest in the property, as tenants in common with other owners."

Upon these facts judgment was given at the trial in favour of the plaintiff and was affirmed by the court *en banc*. The defendant appealed.

McInnes for the appellant. Leander Cahoon, having the documentary title, and being on the *locus* while living with his father, the latter could not acquire title by possession. *Doe d Thomson* v. *Barnes* (1); *Dettrick* v. *Dettrick* (2); Washburn on Real Property (3).

Borden Q.C. for the respondent, referred to *Philipps* v. *Halliday* (4); *Boston, etc., Railroad Co.* v. *Sparhawk* (5); *Bradstreet* v. *Huntington* (6).

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—The only question for argument in this case is whether the respondent and her late husband, Benjamin Cahoon, had been in exclusive possession of the property described in respondent's statement of claim for upwards of twenty years at the time when the acts of the appellant, which respondent claims to be trespasses, were committed.

On this question of fact Mr. Justice Ritchie, who tried the case, has found in favour of respondent, and

(1) Stockton's Bert. [N.B.] Rep. 633.
(2) 2 U.C.Q.B. 153.
(3) 4 ed. vol. 3 p. 128.
(4) [1891] A.C. 228.
(5) 5 Met. 469.
(6) 5 Peters 402.

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his decision was supported on appeal by the Supreme Court of Nova Scotia *in banco*.

Mr. Justice Ritchie says:—

Between 35 and 40 years ago Benjamin Cahoon moved into the house, and lived there and occupied the locus until his death in 1888, and the plaintiff, who was his second wife, has occupied it ever since.

This is not a case in which we should disturb the findings of the trial judge.

McCall v. *McDonald* (1); *Arpin* v. *The Queen* (2); *Warner* v. *Murray* (3); *Schwersenski* v. *Vineberg* (4); *Lambkin* v. *South Eastern Railway Co.* (5); *Kershaw* v. *Kirkpatrick* (6); *North German Steamship Co.* v. *Elder* (7); *Ghoolam Moortoozah Khan Bahadoor* v. *The Government* (8).

GWYNNE and SEDGEWICK JJ. concurred in the dismissal of the appeal.

KING J.—This is an action of trespass to land brought by the respondent. The land in question consists of about five acres in the county of Lunenburg, N.S., and is part of a larger tract lying principally in the county of Queen's. The facts are succinctly stated by Ritchie J., the trial judge.

It appears that one John Ryan was in occupation of the entire lot in or about 1850, living in a house then and now on the *locus in quo*. He occupied it for some years, and when he moved out of the house Benjamin Cahoon, the now deceased husband of the plaintiff, moved in. The exact time of this does not appear but it was found by the learned judge to have been between 35 and 40 years before, *i.e.*, between 1851 and 1856.

(1) 13 Can. S.C.R. 247 pp. 256-7.
(2) 14 Can. S.C.R. 736.
(3) 16 Can. S.C.R. 720.
(4) 19 Can. S.C.R. 243.
(5) 5 App. Cas. 352.
(6) 3 App. Cas. 345.
(7) 14 Moo. P.C. 241.
(8) 9 Moo. Ind. App. 456.

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Benjamin Cahoon continued to live in the house with his family and to do work upon the land in question until his death in 1888, and the plaintiff (who was his second wife) continued the occupation afterwards.

At the time that Benjamin Cahoon went into occupation his son Leander (through whom appellant claims) was a young child, and was brought up by and continued to live with his father, working with him upon the place until his marriage in 1868, when he and his wife, who up to that time had also lived with Benjamin Cahoon, moved into a new house which he, Leander, had built on the Queen's county part of the lot, and continued to live there until his loss at sea in 1872 or 1873. After that the widow went back to live with her father-in-law, and remained there until she married Parks, the appellant, when they went to the house on the Queen's county part and have lived there since, Cahoon and Parks working on the property together until about 1882 or 1883, when a dispute arose, and Cahoon afterwards worked upon that part of the lot in Lunenburg county (the land in question), and Parks on the part in Queen's county.

In 1882 Parks put a cow upon the land in question and Cahoon turned it off, and Parks did not further interfere until the act of trespass complained of which was entering, cutting hay and carrying it away. This was in 1890, after Cahoon's death.

The claim of Parks (as guardian of the infant children of Leander) is based upon an alleged possession under the conveyances to be now referred to. I again follow substantially the statement of Mr. Justice Ritchie.

On the 14th October, 1856, John Ryan gave a deed of the entire lot to one Stephen Mack. It is not clear whether Ryan was then in possession or not, but Mack

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never went into nor had possession. This deed was recorded in Queen's County, but not in Lunenburg County.

Ten years afterwards, viz.: In January, 1866, Cahoon being still in possession, Mack conveyed all his interest in the property to Leander Cahoon, then, as before stated, living with his father. This deed also was recorded in Queen's County but not in Lunenburg.

In April, 1871, Leander conveyed to his mother Jerusha Cahoon what is expressed by the learned judge to be "an undivided right in two thirds of the lot conveyed to him by Mack, reserving the new house he had built and then lived in."

(Was it this or an undivided two thirds interest ?)

This deed, like the others, was recorded in Queen's County only.

On 7th October, 1881, Benjamin Cahoon conveyed the *locus in quo* by deed to the plaintiff, his second wife, through an intermediate conveyance. These deeds were registered in the County of Lunenburg.

There are well reasoned judgments of the learned judges, Townshend, Graham and Meagher JJ., (the latter dissenting) resulting in affirmance of a judgment given by Ritchie J. for plaintiff.

All the parties to the above conveyances are dead and it is not possible to be very positive as to the real facts.

If one might surmise it might be supposed that the conveyance from Ryan to Mack, which was, I should judge, about contemporaneous with Cahoon's first possession, was made in Cahoon's interest, and that Mack's conveyance after the lapse of nearly ten years to Cahoon's son Leander, then living with his father, was in pursuance of a desire to avoid holding the legal title.

But the matter has to be determined apart from surmises.

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If Leander had had a clear documentary title there could be no question that he would, under the circumstances, have been in constructive possession of the whole lot included in his deed, but, not having clear documentary title, his possession is limited to such part as is proved to be in his actual possession (by himself or others) and in that of those succeeding to him.

Benjamin Cahoon was in undoubted possession of the whole lot from the time he went upon the land, until 1886. The value of possession is stated anew by Lord Herschell, in *Philipps* v. *Halliday* (1).

Then how was his possession affected by what afterwards took place?

There may be much reasonableness in the conclusion of Meagher J. that Cahoon knew in 1866 of the deed from Mack to his son, and of the deed in 1871 from the son to his mother, but it is only an inference, and to affect Cahoon's possession it requires another inference, viz., that Benjamin Cahoon recognized these conveyances as passing title and subordinated his own possession to them, holding thereafter under his son. All the circumstances are to be regarded in determining whether the character of Cahoon's possession changed. The deeds referred to did not of themselves give right of possession; and the actual possession under them, what was really done under them, has to be regarded, for looking at them as explanatory of the facts of possession it is not immaterial that all the parties receiving these conveyances treated them as applying to the land in the county of Queen's and not to that in the county of Lunenburg for they were recorded in the former but not in the latter county. Then, Leander's house was built in Queen's. I fail to see upon the whole evidence that it sufficiently appears that Benja-

(1) [1891] A.C. 231, 234.

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min Cahoon's possession of the *locus in quo* was interfered with or intended to be interfered with; I do not see that the son manifested any intention of taking possession of the whole lot, or that the father manifested any intention to treat his own possession as a possession under his son. In 1882 Parks put his cow in upon the land in question and Benjamin Cahoon turned it off, and the possession of Benjamin Cahoon was not again disturbed during his life, nor (after his death) until 1890. Leander's possession, if such it was, had begun only in 1866, and therefore, in 1882, his heirs had acquired no title by possession, and their possession of the *locus in quo* was terminated by the above act of Benjamin Cahoon, who thereafter continued in exclusive possession (in right of his wife) until his death. The separate possession of Benjamin Cahoon was apparently recognized by Parks himself after 1882.

In my opinion the proper conclusion is that Cahoon's possession of the *locus in quo* was never otherwise than in him in his own right (or that of his present wife since the transfer to her) and on his own and her account, and that, at any rate, he had an exclusive possession thereof after 1882 and up to the time of the trespass complained of.

I agree, therefore, with the learned judges Townshend and Graham JJ. and think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *F. B. Wade.*

Solicitor for respondent: *Arthur Roberts.*

THE RIGHT REVEREND ALEXANDER MACDONELL AND OTHERS (DEFENDANTS)..... APPELLANTS;

AND

MICHAEL PURCELL AND OTHERS (PLAINTIFFS AND DEFENDANTS)..... RESPONDENTS.

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*Feb. 20.

THE RIGHT REVEREND JAMES VINCENT CLEARY AND OTHERS (DEFENDANTS)..... APPELLANTS;

AND

MICHAEL PURCELL AND OTHERS (PLAINTIFFS AND DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Revocation—Revival—Codicil—Intention to revive—Reference to date—Removal of Executor—Statute of Mortmain—Will executed under mistake—Ontario Wills Act R. S. O. (1887) *c.* 109—9 *Geo.* 2 *c.* 36 (*Imp.*)

A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109) be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question. A reference in the codicil to a date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it.

Held, per King J. dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will more especially when the several instruments are executed under circumstances showing such intention.

Held, per Gwynne and Sedgewick JJ., that the Imperial Statute, 9 Geo. 2 c. 36 (the Mortmain Act) is in force in the province of

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

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Ontario, the courts of that province having so held (*Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82 ; *Corporation of Whitby* v. *Liscombe* 23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands.

Held, per Gwynne J., that a will is not invalid because it was executed in pursuance of a solicitor's opinion on a matter of law which proved to be unsound.

APPEAL and cross-appeal from a decision of the Court of Appeal for Ontario (1) affirming, but varying, the judgment at the trial which held the will of Patrick Purcell made in May, 1890, and revoked by another will in January, 1891, to be revived by a subsequent codicil.

In May, 1890, Purcell made a will by which he devised a large portion of his property to religious corporations to be used for charitable purposes. Some time afterwards he consulted a solicitor who advised him that the Imperial statute 9 Geo. 2, ch. 36, the statute of mortmain, was in force in Ontario and by reason of its provisions these bequests might fail and a great deal of his property be left undevised. After receiving this advice Purcell executed a new will disposing of his property in a different manner and after doing so he took other advice as to the statute of mortmain being in force and its effect upon the first will, which was expressly revoked by the later instrument, and in March, 1891, he executed the following codicil prepared by another solicitor who knew nothing of the will of January, 1891, or the revocation of that of May, 1890.

I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D.:

I hereby revoke the appointment of Jas. A. Stuart, my late bookkeeper, to be one of the executors of this my will, and in his place and stead I appoint John Bergin, of the town of Cornwall, barrister-at-law, with all the powers and duties heretofore conferred upon the said Jas. A. Stuart, as in my said will declared.

(1) 20 Ont. App. R. 536 sub. nom. *Purcell* v. *Bergin*.

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In witness whereof, I have hereunto set my hand this 16th day of March, 1891, A.D.

P. PURCELL.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament, who in his presence, at his request, and in the presence of each other, have hereunto affixed our names as witnesses.

GEORGE MILDEN,
R. FLANNIGAN,

Not long after executing this codicil Purcell died and proceedings were taken to have it declared that the will of May, 1890, was revived by said codicil and was the last will of the testator. The court of first instance held that it was so revived and should take effect from its date. On appeal to the Court of Appeal, that court affirmed the decision but varied it by declaring that the revived will only took effect from the date of the codicil. From that decision an appeal was taken to this court by the religious corporations affected by the decision as to the date from which the revived will would operate, such date being less than six months before the testator's death which would cause the devises to lapse under the Mortmain Act. The next of kin took a cross appeal from that part of the decision which held the will of May, 1890, revived.

The facts of the case are set out more fully in the judgments of Mr. Justice Gwynne and Mr. Justice Sedgewick in this court.

The argument proceeded as if there had been but one appeal before the court.

S. H. Blake Q.C. and *Anglin* for the appellants on the main appeal, the religious corporations affected by the date as to which the revived will took effect. The argument on that point is omitted as it was not dealt with by the court in giving judgment. The learned

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counsel then argued the question raised by the cross-appeal.

The codicil sufficiently indicated the intention of the testator to revive the will of May, 1890. *In the Goods of Turner* (1); *In the Goods of Reynolds* (2); *McLeod* v. *McNab* (3).

A will may be revived by implication; *Newton* v. *Newton* (4); *In the Goods of Atkinson* (5).

The statute of Mortmain is not in force in Ontario; *Ray* v. *Annual Conference of New Brunswick* (6); *In re Robson* (7). The doctrine of *stare decisis* will not prevent this court from holding it not in force, notwithstanding the decisions of the Ontario courts to the contrary. *Hart* v. *Frame* (8); *In re Nathan* (9).

Latchford for the respondent, the St. Patrick's Orphan Asylum, and *MacTavish* Q.C. for the respondents, the Good Shepherd Nuns, argued that the will of May, 1890, was revived by the codicil.

Robinson Q.C. and *Moss* Q.C. for the testator's next of kin, respondents in the main appeal and appellants in the cross-appeal. It cannot be well contended that the will of January, 1891, was void for having been executed on erroneous advice on matters of law. To effect such a result the error must appear on the face of the will. Jarman on Wills (10); *Newton* v. *Newton* (4); *Attorney General* v. *Lloyd* (11).

Since the passing of The Wills Act a revoked will cannot be revived by a codicil in this form. *In the Goods of Steele* (12); *McLeod* v. *McNab* (3); *Marsh* v. *Marsh* (13).

(1) 64 L. T. 805.
(2) 3 P. & D. 35.
(3) [1891] A. C. 471.
(4) 12 Ir. Ch. 127.
(5) 8 P.D. 165.
(6) 6 Can. S.C.R. 303.
(7) 19 Ch. D. 156.
(8) 6 Cl. & F. 199.
(9) 12 Q.B.D. 475.
(10) 5 ed. vol. 1 p. 147.
(11) 3 Atk. 551.
(12) 1 P. & D. 578.
(13) 1 Sw. & Tr. 533.

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Leitch Q.C. for the executors of John Purcell one of the next of kin, referred to *Dudley* v. *Champion* (1); *Brown* v. *McNab* (2).

Blake Q.C. and *Anglin* were heard in reply.

FOURNIER J.—I am of opinion that the appeal should be dismissed and the cross-appeal allowed.

TASCHEREAU J.—I would allow cross-appeal and dismiss principal appeal. I adopt Chief Justice Hagarty's view, and the reasons given by his lordship, that the will of January, 1891, is Purcell's last will, and that the will of 1890 was not revived by the codicil.

GWYNNE J.—The question before us is, which of two instruments, the one bearing date the 14th day of May, 1890, and the other the 10th day of January, 1891, was the true last will and testament of Patrick Purcell, deceased, and as such entitled to be admitted to probate. In determining this question the rule to be applied is, that the court should proceed upon such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words used in a codicil bearing date the 16th day of March, 1891, and to determine whether the testator has upon it shown his intention to be to revoke the instrument of January, 1891, and to revive that of May, 1890, which had been absolutely and expressly revoked by that of January, 1891; accordingly evidence of these surrounding circumstances was largely entered into and some evidence was also received by the court below which, as I think, was not admissible.

Upon the 14th May, 1890, Patrick Purcell, since deceased, made his last will and testament in writing

(1) [1893] 1 Ch. 101. (2) 20 Gr. 179.

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and thereby appointed Alexander Leclair, Angus McDonald and James Stuart the executors of the said will. To them he devised all his property, real and personal, of every nature and kind whatsoever and wherever of which he should die possessed or entitled unto upon certain trusts therein declared. It may be here said that the personalty consisted of about one-tenth in value of the realty, the whole consisting in round numbers of about $600,000. He then, in clauses numbered from 1 to 39 inclusive, made devises in favour of his family and near relations and friends. To a few only is it necessary to refer. The first three clauses contained devises in favour of his wife. By the fourth he also devised to her five thousand dollars in cash. By the tenth he devised to his niece, Catherine Forrestal, wife of Alexander Leclair, two thousand dollars, if alive at his death, and if not the same to go to her children then alive, share and share alike. By the eleventh to his niece Isabella Forrestal, five thousand dollars. By the thirteenth to his sister Bridget McDonald, two thousand dollars. By the fourteenth to Miss Ada Fisette, two thousand dollars. By the eighteenth he devised that his executors should have power, should they deem it advisable, to expend the sum of one thousand dollars in ornamenting his family burying ground at Flanagan Point, and also the sum of one thousand dollars for a monument over his grave unless he should have done so himself before his death.

By the twenty-first clause he devised to Emily Nash, wife of Donald A. Cameron, of the township of Charlottenburgh, for her own separate use and benefit, the mortgage money which her husband might owe the testator at the time of his death.

By the twenty-eighth clause he devised to his niece, Mary Forrestal, the sum of one thousand dollars.

By the thirty-second clause he devised to his adopted child, A. P. Tully, the sum of two hundred dollars.

By the thirty-eighth clause he devised to Miss Victoria McVicar, of Port Arthur, the sum of two hundred dollars.

He then devised to his executors, for their travelling expenses and in lieu of all commissions for administering his estate, the sum of five hundred dollars each.

He then devised and directed that all the residue of all his property, of every nature and kind whatsoever, should be divided by his executors into twenty-seven parts, which they should dispose of as follows:—

By the forty-first clause he devised and directed that six of the said twenty-seven parts of the said residue should be paid to the Roman Catholic Bishop of the diocese of Alexandria, in the province of Ontario, at the time of his death, for distribution among the deserving poor of all denominations in the county of Glengarry, and the education of boys belonging to the said county as he might decide, according to his own discretion, and not otherwise; and in the event of there being no bishop of the diocese at the time of his death, then that the said six parts should be paid to the next bishop of the said diocese appointed after his death.

By the forty-second clause he devised three other parts of the said residue to be paid in equal shares to the superioresses of the convents in the said county of Glengarry, to be expended by them in the education, support and clothing of poor children, and the support and clothing of indigent men and women in the said county of Glengarry.

By the forty-third clause he devised to the said Roman Catholic Bishop of the diocese of Alexandria four other parts of the said residue for distribution amongst the deserving poor of the town of Cornwall and county of

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Stormont, and for the education and clothing of boys belonging to the said town and county, as he might decide and according to his own discretion, and not otherwise; and in the event of there being no bishop of the said diocese alive at the time of his death, then that the said four parts should be paid to the next bishop of the said diocese appointed after his death.

By the forty-fourth clause he devised two other parts of the said residue to be paid in equal shares to the superioresses of the convents in the town of Cornwall and county of Stormont, to be expended by them in the education, support and clothing of indigent men and women in the said town of Cornwall and county of Stormont as they might respectively decide.

By the forty-fifth clause he devised that four other parts of the said residue should be paid to the Roman Catholic Archbishop of the archdiocese of Kingston, in the province of Ontario, at the time of his death, for distribution amongst the deserving poor of the said archdiocese, and the education and clothing of boys belonging to the said archdiocese, as he might decide according to his own discretion; and in the event of there being no archbishop of the said archdiocese alive at the time of his death, then that the said four parts should be paid to the next archbishop of the said archdiocese, to be expended as aforesaid.

By the forty-sixth clause he devised two other parts of the residue to be paid in equal shares amongst the superioresses of the convents in the said archdiocese of Kingston to be expended by them in the education, support and clothing of poor children and the support and clothing of indigent men and women in the said diocese as they might respectively decide.

By the forty-seventh clause he devised four other parts of the said residue to be paid to the Roman Catholic Archbishop of the archdiocese of Ottawa at the time of

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his death for distribution among the deserving poor of the said archdiocese as he might decide according to his own discretion, and in the event of there being no archbishop of the said archdiocese alive at the time of his death, then that the said four parts should be paid to the next archbishop to be appointed for the said archdiocese to be expended as aforesaid.

By the forty-eighth clause he devised one other part of the said residue to the trustees of St. Patrick's Orphan Asylum at Ottawa for the benefit of that institution, and he devised one other part of the said residue to be paid to the Good Shepherd Nuns of the city of Ottawa.

He then revoked all former wills by him theretofore made.

Upon this will being executed the testator deposited it for safe keeping in the surrogate court in the town of Cornwall and he kept a copy of it in his own possession.

Prior to and in the month of November, 1890, he evidently contemplated making considerable alterations in the bequests devised by the will, for he had in his own handwriting entered upon the copy retained by him certain alterations, as follows:—

1. Instead of the five thousand dollars in cash devised to his wife by clause four he inserted two thousand.

2. Instead of the two thousand dollars devised to his niece Catherine Forrestal by clause ten he inserted one thousand.

3. Instead of the five thousand dollars devised to his niece Isabella Forrestal by clause eleven he inserted one thousand.

4. Instead of the two thousand dollars devised to his sister Bridget McDonald by clause thirteen he inserted one thousand.

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5. He erased from clause eighteen the devise of one thousand dollars which his executors were empowered to expend in ornamenting his family burying ground at Flannigan Point.

6. Instead of the devise to Emily Nash in the twenty-first clause of the mortgage monies which might be due to testator at the time of his death by her husband, he inserted the sum of five hundred dollars.

7. Instead of the devise in the twenty-eighth clause to his niece Mary Forrestal of one thousand dollars he inserted five hundred.

8. Instead of the devise of two hundred dollars to A. P. Tully in the thirty-second clause he inserted "his choice of the horses;" this was inserted in the handwriting of Weldon the testator's clerk by the testator's directions and was the only alteration not made in testator's own handwriting.

9. Instead of the six of the twenty-seven parts of residue devised to the Roman Catholic bishop of the diocese of Alexandria for distribution amongst the deserving poor of all denominations, he inserted the words "two thousand for deserving poor of all denominations."

10. Instead of the devise of three parts of said residue to the superioresses of the convents in the county of Glengarry he inserted the words one thousand. And instead of the devise of other four parts of the said residue to the Roman Catholic bishop of the diocese of Alexandria he inserted the figures "1,500." Here he appears by the evidence to have stopped; although crosses in red pencil are drawn across the subsequent clauses of the will it does not appear when they were so drawn.

Sometime in the month of November, 1890, the testator went into the office of Mr. D. B. Maclennan, a solicitor of thirty years, standing practising in Cornwall, and asked him if he would have any objection to

act as executor under his will to which Mr. Maclennan having assented he left the office. Then we find that the testator gave to his confidential clerk the copy of the will in which he had made the alterations aforesaid, and directed him to copy it out clean as altered up to the end of the thirty-ninth clause. In the copy so handed to the clerk to copy the name of James Stuart was erased and in his stead were inserted the words D. B. Maclennan, Barrister, Cornwall; and at the end of the clauses devising five hundred dollars to each of his executors, were added the words "and to D. B. Maclennan in full for his professional and law expenses $1,000 extra," and this additional clause which was not in the will of May, 1890.

"I devise to James Meagher the most southerly house and lot situate in Gladstone, East Cornwall, lately owned by D. H. McKenzie, and on his death to my adopted son A. P. Tully, absolutely forever should he be alive at the time of his death." The testator's clerk having copied out clean the copy of will as so altered, the copy so prepared up to the devise of the residence, that is to say, to the end of the thirty-ninth clause, remained in the testator's possession until the 10th day of January, 1891, when the testator having been ill for some days caused the following letter to be written by his clerk and sent to Mr. Maclennan.

"SUMMERSTOWN, JANUARY 10, 1891.

"D. B. MACLENNAN, Esq., Cornwall.

"DEAR SIR,—I wish you to come here immediately and bring my will, now in the Probate Court in Cornwall, with you. This will be your authority for getting said instrument.

"P. PURCELL.

"Wire me if they do not give you my will.

"P. P."

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Upon receipt of this letter Mr. Maclennan went to the Surrogate Court, got the will he was directed to get and taking it with him went to Mr. Purcell's house. He there, in Mr. Purcell's presence and at his request, opened the sealed packet in which the will was and read it. After having read it Mr. Purcell asked him what he thought of the provisions made in it for the bishops and other charitable bequests; thereupon Mr. Maclennan informed him that in his opinion the bequests would fail or prevail according to the proportion which his personal estate should bear to his lands and mortgages, and that under a will, drawn as it was, if he was correct in his opinion about the charitable bequests, a large portion of his estate would pass as undevised to his widow and next of kin. About this time the clean copy made by Mr. Purcell himself up to clause forty of the will of 1890 was produced, and Mr. Purcell asked Mr. Maclennan to write down what he wished to be done in regard to the charitable bequests in order to have the will so begun completed. Mr. Maclennan accordingly took down Mr. Purcell's instructions and therefrom made a draft will from clause forty to the last clause inclusive which is as follows:—

> I direct that the bequests made in the five next preceding paragraphs of this my will be paid out of my personal estate, other than such as may be secured by mortgage on real estate, and I hereby revoke and annul all former wills made by me.

He thereupon procured the clauses so drafted to be added by Mr. Purcell's clerk to that which had already been written over by him up to clause forty, which being done the will so prepared was on the same 10th day of January duly executed by Mr. Purcell as and for his last will and testament. When Mr. Maclennan, in taking instructions for drafting the clauses from clause forty inclusive, had reached the end of the charitable bequests he asked the testator what he wished

to do with the residue, to which he replied, "I will do nothing with it."

I have dealt at large with this evidence for the purpose of showing that this will was executed after the greatest deliberation on the part of the testator, and that the will of May, 1890, was in the most express terms revoked and annulled by it. A couple of days afterwards, viz., on the 12th January, 1891, Mr. Purcell's clerk by Mr. Purcell's direction addressed and sent to Mr. Maclennan a letter saying:

> Mr. Purcell wishes you to change the bequest to Bishop Macdonell of Alexandria from ten thousand to five thousand dollars and to insert a clause that upon his demise his will shall be inserted in the leading local newspapers. You know how to act in regard to this clause.
>
> Yours truly,
>
> GEORGE MELDEN,
>
> For P. P.

Upon receipt of this letter Mr. Maclennan had a new will written out with this alteration made in it and sent it enclosed addressed to Mr. Purcell. It does not however appear to have been ever executed by Mr. Purcell.

Now here we have been asked to say, first, that the will of May, 1890, was only revoked in consequence of the advice of Mr. Maclennan (and indeed of others also) which was to the effect that the provisions of the Imperial statute, 9 Geo. 2, c. 36, were in force in Ontario; secondly, that such advice was erroneous; thirdly, that being erroneous the will of the 10th January, 1891, should be held to have been executed under mistake; and fourthly, that it should therefore be regarded as never having had any effect. For this contention there does not seem to be any foundation in law or in fact. In answer to it however, it may be said: first, the suggestion that the testator proceeded solely upon the advice given him as to the provisions of the statute of Geo. 2 being in force in Ontario, is altogether an assumption

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which we are not warranted in making; secondly, that the testator acted upon the belief that the advice given him was sound may be admitted, but there is no authority for holding that the advice upon which the testator proceeded turning out to be unsound would avoid the will executed upon that advice.

Thirdly, the judgment in *Doe Anderson* v. *Todd* (1), delivered in 1845, which held that the provisions of the statute of 9 Geo. 2 were in force in Upper Canada, was followed by several decisions in the courts of Upper Canada and Ontario until 1875, when *Ferguson* v. *Gibson* (2), and *Whitby* v. *Liscombe* (3), were decided. This latter case having been carried to the Court of Appeal the law as laid down in *Doe Anderson* v. *Todd* (1) was there affirmed. That judgment has ever since been not only undoubtingly followed by the courts of Ontario, but may be said to have been recognized by the legislature as sound law by the insertion, in acts authorizing corporations to hold lands, of the *non-obstante* clause used in 3 & 4 Wm. 4 ch. 78, referred to in *Doe Anderson* v. *Todd* (1), and *Whitby* v. *Liscombe* (3):—

> The acts of Parliament commonly called the statutes of mortmain or other acts, laws or usages to the contrary notwithstanding.

The act of the Ontario Legislature, 55 Vic. ch. 20, although passed after the decease of the testator, shows clearly that the provisions of 9 Geo. 2, ch. 36 were regarded by the legislature as having been always in force in that province as they had been held by the courts to be. That act is entitled, "An Act to amend the law relating to mortmain and charitable uses,' and by the 8th section it is enacted that:—

> Money charged or secured on land or other personal estate arising from or in connection with land, shall not be deemed to be subject to the provisions of the statutes known as "the statutes of mortmain or

(1) 2 U. C. Q. B. 82. (2) 22 Gr. 36.
(3) 22 Gr. 203.

charitable uses," as respects the will of a person dying after the passing of this act.

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If, therefore, it had been relevant to the question before us, and I think it is not, to inquire whether the advice given by Mr. Maclennan was sound or not, it could not, I think, be doubted that it was quite sound.

Then evidence was given of a conversation which his medical attendant, Dr. Bergin, had with the testator on the 12th January, 1891, and the following day, and of what Dr. Bergin had done in consequence of such conversations, under which John Bergin, Dr. Bergin's brother, came to be employed to draw the codicil of the 16th March, 1891. This evidence was tendered with the view of establishing that from the 12th or 13th January, 1891, the testator entertained the intention of appointing Mr. John Bergin, who drew the codicil, to be an executor of his will.

All that that evidence appears to me to show, and this it shows very clearly, is that for some reason or other the testator kept Dr. Bergin in ignorance of the fact of his having executed the will of January, 1891. Except in so far as showing the circumstances attending the preparation of the codicil by John Bergin the evidence has no bearing upon the question before us, which is, simply: Does or does not the codicil so prepared, and which was executed by the testator, show by its terms that the testator's intention was to revoke the will of January, 1891, and to revive in its place that of May, 1890? In so far as a case like the present, wherein a question arises the determination of which must be arrived at by the light of the surrounding circumstances, can be governed by a judgment in a case where a like question arises to be determined also by the light of its surrounding circumstances, I think that the judgments in the cases of *In the Goods of Steele*

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(1), and *In the Goods of Turner* (2), the latter being decided in 1891, are the nearest to the present case, and which we should follow.

Placing ourselves then in the position in which the testator was when he executed the codicil in question it is to my mind inconceivable that the testator could have contemplated by that codicil and the language used therein that he was expressing an intention to revoke the will of Jan. 7th 1891, which he had had prepared with so much deliberation, and revive in the stead that of May 1890, which with like deliberation he had expressly revoked and annulled; utterly inconceivable, if his intention had been to revoke the one and revive the other, that no words expressing such intention should have been inserted. John Bergin who drew the codicil had no knowledge of the existence of the will of January 1891, or of any will but that of May 1890. He had no instructions to prepare a codicil which should have the effect of revoking the will of Jan. 7th 1891, and of reviving that of May 1890. When he drew the codicil he believed, although erroneously, the will of May, 1890, to be in full force and effect as the testator's last will and testament and that Stuart was still one of the executors of such will. He, therefore, when preparing the codicil never intended to prepare one which should have the effect of reviving a will which he believed to be in full force and effect in law and in fact. The language which he used in the codicil is, therefore, naturally quite in accord with his belief as to then continuing and existing validity in law and in fact of the will to which he was preparing a codicil. The only thing which the language used by him in the codicil professes to do is to revoke what he believed to be an existing valid appointment then n force of Stuart as one of the executors of an instru-

(1) 1 P. & D. 575. (2) 64 L. T. 805.

ment then existing in full force and effect as the last will and testament of the testator, and if that belief had been well founded the codicil would have had its intended and expressed effect. The language used is: "I hereby revoke the appointment of James A. Stuart, "&c., to be one of the executors of this my will and in "his place and stead I appoint John Bergin, &c., &c."

Now the appointment of Stuart as an executor of that will had already been revoked and annulled by the will of January 1891, so that the codicil so worded could have no effect as it could not revoke an appointment which had already been revoked; failing to have the effect intended, namely, of revoking a valid instrument in full force and effect as the testator's will, I cannot see upon what principle the language so used, which was perfectly applicable if the will of May 1890, had then been in full force and effect as the person using the language believed it to be, can be construed as showing an intention to revoke the will of January, 1891, by which Stuart's appointment as an executor should be annulled and that of John Bergin substituted in his place; it would be necessary to construe it as first revoking the will of January 1891, which is not expressed in it and thereby of reviving in its integrity the will of 1890, including the appointment of Stuart and then revoking the appointment of Stuart as an executor of such revived will. In other words the will of May, 1890, must be revived before the codicil revoking the appointment thereof can take effect.

In the judgment of Sir J. P. Wilde, in *In the Goods of Steele* (1), he says:—

I therefore infer that the legislature meant that the intention of which it speaks should appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same or by a disposition of the testator's property inconsistent with any other intention or by some other expressions convey-

(1) 1 P. & D. 575.

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ing to the mind of the court with reasonable certainty the existence of the intention in question. In other words I conceive that it was designed by the statute to do away with the revival of wills by mere implication.

And he refers to the judgment of Sir C. Creswell, in *Marsh* v. *Marsh* (1), wherein that learned judge expresses himself of opinion that the intention of the legislature was to put an end equally to implied revocations and implied revivals.

Placing myself, therefore, in view of the surrounding circumstances, as well as I can in the position of the testator when, upon the 16th March, 1891, he executed the codicil of that date, it fails by its language to convey to my mind with any degree of certainty, or indeed I may say at all, that there existed in the mind of the testator the intention of revoking thereby the will of January, 1891, which he had executed after the utmost apparent deliberation, or of reviving the will of May, 1890, which with like deliberation he had revoked and annulled by the will of January, 1891. The only intention shown by the codicil is an intention to revoke an appointment assumed to be still valid and subsisting in a will also assumed to be then in full force as the last will of the testator, and as the will to which the codicil is professed to be made a codicil and the appointment professed to be revoked had then no such existence the codicil fails to have any effect. I am of opinion, therefore, that the will of January, 1891, was not revoked thereby, and that upon the decease of the testator that instrument constituted his sole last will and as such is entitled to be admitted to probate. It would serve no useful purpose to attempt to offer any affirmative explanation of what the testator's real object in executing that codicil may have been any more than of his object in designedly, as it would seem, keeping

(1) 1 Sw. and Tr. 534 ; 6 Jur. N. S. 380.

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his medical attendant, Dr. Bergin, in ignorance of the fact of his having executed the will of January, 1891.

It is sufficient to say that the codicil does not upon its face show an intention to revoke the will of January, 1891, and to revive that of May, 1890.

The appeal of the plaintiff below will be allowed and that of all the other parties disallowed and an order will go to the effect that the will of January, 1891, is alone entitled to be admitted to probate. The costs of the plaintiffs' appeal to be allowed to them out of the estate. The other appeals to be dismissed without costs.

SEDGEWICK J.—In this appeal there are three testamentary instruments to be considered, the will of the 14th May, 1890 (the O'Gara will), the will of the 10th of January, 1891 (the Maclennan will), and the codicil of the 16th of March, 1891; and the main question is whether that codicil, purporting to be a codicil to the O'Gara will, revives that will, and, as a consequence, revokes the Maclennan will. The answer to this question depends largely upon the effect that is to be given to the 24th section of the act respecting Wills (1), which is as follows:—

> No will or codicil, or any part thereof, which has been in any measure revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same, etc.

this section being an exact transcript of the corresponding section in the Imperial Wills Act (2). The Maclennan will had revoked the O'Gara will, and the subsequent codicil is in the words following:—

> I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D:—
>
> I hereby revoke the appointment of Jas. A. Stuart, my late bookkeeper, to be one of the executors of this my will, and in his place and stead I appoint John Bergin, of the town of Cornwall, barrister-at-law,

(1) R.S.O. ch. 109. (2) 1 Vic. c. 26, s. 22.

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with all the powers and duties heretofore conferred upon the said Jas. A. Stuart, as in my said will declared.

In witness whereof, I have hereunto set my hand this 16th day of March, 1891, A.D.

P. PURCELL.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament, in the presence of us who in his presence, at his request, and in the presence of each other, have hereunto affixed our names as witnesses.

GEORGE MILDEN,
R. FLANNAGAN.

The Ontario Court of Appeal has held (Hagarty C.J. dissenting) that the effect of this codicil, read in connection with the surrounding circumstances, is to revive the revoked will to which it expressly refers, and also to revoke the Maclennan will, the revival to take effect, however, only from the date of the codicil.

Prior to the passing of the English Wills Act, above referred to, the law was that if a testator made a codicil to a revoked will (it being perfectly clear that the codicil related to that will), the revoked will was thereby revived, and the revoking instrument thereby revoked.

The object of the statute was to do away with the revival of wills by mere implication, and to make it clear that in the codicil itself there must be some unequivocal expression of an intent on the testator's part to restore to life the revoked instrument.

It has been decided, over and over again (1), that a reference in a codicil to a revoked will, by its date only, is not of itself a sufficient indication of an intent to revive that will, and these decisions have been, in effect, approved of by the Privy Council in *McLeod* v. *McNab* (2).

All we have in the present case is a codicil referring to a revoked will by its date, and changing one of the

(1) *In re Steele* 1 P. & D. 575, (2) [1891] A.C. 471. and cases there cited.

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three executors and trustees therein named, nothing more. And the question comes down to this: Does such a codicil, within the meaning of the statute, show an intention to revive the will to which it purports to relate? Or, in other words, does a codicil which merely changes the name of one of three executors named in a revoked will revive it?

Now a codicil to a will whether in force or revoked must make some change in its dispositions It must do something. Leave out of the present codicil the appointment of Mr. Bergin in place of Stuart and it would be a mere piece of useless paper. The law is, as I have said, that the reference by date to the O'Gara will does not, of itself, show an intention to revive it. Does the substitution of one executor for another, and nothing more, show that intention? If it does, then I can conceive of no codicil to a revoked will which would not show that intention. A codicil must make some alteration in the testament to which it relates. If that alteration, by reason of its being an alteration, shows the reviving intention then the statute is meaningless. No change in the old law has been effected by it.

It seems to me (I say it with deference) that in the courts below the distinction has been lost sight of between an intention to make a codicil to a revoked will and an intention to revive a revoked will. I think it probably clear from the evidence that in the present case there was an intention to make a codicil to the revoked will. The document on its face so purports. The evidence does not lead to the conclusion that the testator made a mistake as to the particular will he was dealing with, but if he intended to revive that will and to revoke the later instrument the statute required that he should say so, either in express terms, or in words that would convey to ordinary minds with

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reasonable certainty the existence of both intentions, the one as well as the other. The expression of the reviving intention, as distinguished from the other intention, was as necessary as the performance of any other statutory requirement; its execution in the presence of two witnesses, for example, and the absence of such expression, it seems to me, brings the codicil within the statute and prevents it from having the effect contended for.

To return, however, to the particular terms of the codicil. One cannot well pass judgment upon the relative importance of the different provisions which a testator may make by his will, but it seems to me that in ordinary cases the change by codicil of one of three executors named in a will is a matter of little account. At law an executor takes nothing beneficially under a will. He is a mere machine. His duty, his sole duty, is to realize the estate and distribute it as by the will provided. Apart from recent statutes as executor he received no pay. He is an officer of the court only, strictly accountable for the discharge of duty but entitled to no emoluments; even if he is sole executor it is a barren honour, but when he is but one of three it amounts to less. I should say that, in ordinary cases, a bequest or devise is a matter of much more importance than the appointment to an executorship. A beneficiary gets something. And suppose that in the present case the only provision was that out of the residue of the estate one John Smith was to be paid by the executors ten shillings. Would that indicate an intention to revive the will? Observe how far reaching is the bequest. It is a recognition of the executors as named in the will. It is a direction to them to alter the original distribution of the estate. It is a taking away from the residuary beneficiaries of perhaps to them a large sum of money, and it might with equal

force, it seems to me, be contended that such codicil showed upon its face an intention to revive. If that be so then any codicil must show a like intention, and the statute is words and nothing more.

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In this view, so far, I understand that three of the four learned judges of the appeal court agree with me; but Mr. Justice Maclennan, (and with him Mr. Justice Osler,) have come to a different conclusion, having reference to "the surrounding circumstances." Let us look at these "circumstances." The O'Gara will had been executed on the 14th of May, 1890, and had been deposited on file with the registrar of the Surrogate Court at Cornwall. It was a most elaborate document containing more than forty gifts and devises of different kinds, and purported to dispose of all the property of the testator, about nine tenths (speaking roughly) being set apart for what may be called charitable purposes. Out of the three executors therein named was one James Stuart. During the year 1890 the testator for some reason (not clear from the evidence) had lost confidence in Stuart, and in the month of November he called upon Mr. D. B. Maclennan, a solicitor practising in Cornwall, and one of the leading members of the Ontario bar, and obtained his consent to act as one of the executors of his will. In the mean time he (the testator) had before him a copy of the O'Gara will. There was a question in his mind as to the possible legality of the charitable dispositions therein contained, the money for the purpose of satisfying them having to be raised from the proceeds of the sale of impure personalty as well as real estate, and we find that he went carefully over all the provisions of this will with his own hand, striking out this provision and changing that, with a view of executing a new will based upon his changed intentions. On the 10th of January following his man of business by his directions, and in his

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name, wrote to Mr. Maclennan requesting him to get the O'Gara will from the court and come to him. Mr. Maclennan on the same day went to him with the O'Gara will and under his instructions prepared and had executed another will substantially of the purport which the testator had in his own hand made out upon the copy of the O'Gara will, previously in his possession. By this will the O'Gara will was revoked. Mr. Maclennan was substituted as an executor instead of Stuart, the charitable bequests were enormously reduced and the residue was intentionally left undisposed of. It is admitted on all sides that this will was perfectly valid as a testamentary instrument, it being claimed however that having been executed as alleged under mistaken advice as to the effect of the mortmain acts (to which I will refer hereafter), the O'Gara will which it purported to revoke was not in law revoked and that they both should be admitted to probate.

This will (the Maclennan will) was taken by the solicitor to Cornwall to be placed on file and the revoked O'Gara will was left with Mr. Purcell.

All this happened on the 10th of January. On the following day,(the 11th), Dr. Bergin visited the testator. Dr. Bergin,who is member of Parliament for the County of Stormont and a man of eminence in his profession, had for years been Purcell's medical adviser. Purcell had likewise been in the habit of conversing with him on business matters and he (Dr. Bergin) was more or less conversant with his affairs, knowing of the existence and contents of the O'Gara will. In fact, shortly prior to the execution of the Maclennan will a conversation had taken place between them respecting the validity of the charitable bequests in the first will. At this visit on the 11th Dr. Bergin saw the O'Gara will left the day before by Mr. Maclennan, and Purcell and he began conversing about it. Several

things are certain in regard to what happened at this conversation. First Purcell asked the Doctor to take this will to his brother Mr. John Bergin, a practising barrister and solicitor at Cornwall, and get a written opinion from him as to the validity of the charitable bequests therein made. Secondly, Dr. Bergin called the testator's attention to the fact that Stuart was one of the executors and suggested a change to which he agreed. There was a suggestion (it is not absolutely certain that it was the Dr.'s suggestion) that John Bergin should be appointed in his place and (according to Dr. Bergin's account of Purcell's statement) he, Dr. Bergin, was instructed to get his brother, John Bergin, to draw up a codicil appointing John Bergin executor in lieu of Stuart. Thirdly, Purcell concealed from the Doctor the facts that the day before he had executed the Maclennan will, that Stuart was no longer an executor and that the O'Gara will had been revoked. There is, I think, only one explanation for this concealment, for it is impossible that on this matter Purcell's memory was in fault. He was then in a very weak state physically, trying to recover from an illness brought on by excess in the matter of stimulants to the inordinate use of which he was addicted. He was afraid to tell the Doctor of the contents of the Maclennan will and particularly of the fact that Mr. Maclennan had been made an executor. He foolishly imagined that his Doctor, the medical man on whose skill and attention he relied for the prolongation of his life, would be annoyed were he to know that his own brother had been overlooked and another solicitor in the same town appointed, and he deliberately resolved to deceive him as to the exact condition of affairs, which resolve he kept, for neither the Doctor nor his brother ever knew of the existence of the Maclennan will until after Purcell's death, several months afterwards. He

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knew too that the O'Gara will then before them had been revoked, that it was a mere piece of waste paper, and he thought that the appointment of John Bergin as an executor of that instrument would have no valid effect, the will of the day before being the only testament then in force.

It seems to me absolutely out of the question to suppose that, by this time at least, his request as to the drafting of a codicil for the simple purpose of changing an executor indicated an intention to absolutely revoke and nullify the solemn instrument of the previous day and to restore all the numerous bequests in the O'Gara will which the later instrument had either reduced or eliminated altogether.

It was perfectly reasonable and natural that he should be concerned about his charities and should be anxious for legal certitude as to the extent to which he might go in that direction, for the Maclennan will, as stated, had not disposed of the residue. There was perhaps half a million of dollars to be dealt with and it is extremely probable that he did contemplate either the making of a fresh testamentary disposition in respect to that or the spending of it in his life time in the erection and endowment of a hospital at Cornwall. At all events he is still uncertain. He is seeking light. There is no manifestation of any wish in the meantime to undo the work of yesterday.

We come now to the following day, the 12th of January. Purcell is still thinking over his affairs. The Maclennan will had given $10,000 to the Bishop of Alexandria, and the O'Gara will had contained a clause that it should be published in the local newspapers, which clause had been left out of the later will. Purcell now desires to reduce this bequest to $5,000 and to restore the provision as to publication, and his man of business, upon his instructions, writes to Mr. Maclennan the following letter:—

SUMMERSTOWN, January 12th 1891.

D. B. MACLENNAN, Esq., Cornwall.

In *re* will.

DEAR SIR,—Mr. Purcell wishes you to change the bequest to bishop Macdonell of Alexandria from ten thousand to five thousand dollars, and to insert a clause that upon his demise his will shall be inserted in the leading newspapers. You know how to act in regard to this clause.

Your truly,

GEO. MILDEN,

for P. P.

This codicil was prepared and sent to Purcell but it would seem that he died without his attention being again called to it.

Does not this letter, however, afford conclusive evidence that up to this time at least he had no intention of revoking the existing will, his instructions of the previous day in respect to Stuart and John Bergin, to the contrary, notwithstanding?

It does not seem clear that when Dr. Bergin returned home from his visit of the 11th that he asked his brother to draw the codicil then referred to. He did, however, leave with him the O'Gara will and obtained from him a few days afterwards a written opinion as to the validity of the charitable bequests. This opinion the doctor handed to Purcell at the same time giving him a message that he should get the best legal advice that he could get in the province. Finally it was arranged that Dr. Bergin should take the will with him to Toronto with a view of obtaining the opinion of S. H. Blake Q.C. upon it. Dr. Bergin had a consultation with Mr. Blake on the 7th of March and on the 9th and 10th of March he communicated the advice then given to Purcell.

The following is the evidence of Dr. Bergin as to what then followed. The same Mr. Blake is examining him:—

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Q. What passed between you and Purcell at that meeting?—A. I told Mr. Purcell that you had said to me that you could not look into the cases at such short notice and give an opinion, but that you would look into it, and your opinion was that he ought to do what he proposed to do or as much of it as he could at once in regard to these charitable bequests; I think I told you that his intention was, so far as this part of the country was concerned, to build a hospital and home for aged and indigent men and women, and I urged upon him to do that, and that was his idea I believe, and as I think there can be no doubt about it, but he had important interests in Nova Scotia connected with a contract, and very much against my will he went there.

Q. He went to Nova Scotia, and at what date was it he went to Nova Scotia?—A. He went to Nova Scotia about the 12th or 13th of April.

Q. What had taken place in the meantime between this 8th or 9th March, when you returned from Toronto, in regard to will or codicil?—A. He sent for me. He was taken ill with a sore hand. He had injured his hand, been upset, and we were very much alarmed about blood poisoning, and this was why I did not wish him to go away. On one of these visits, the 14th or 15th, he said to me: "You have not brought the codicil yet which I instructed you to have prepared long ago."

Q. That was the 14th or 15th March he said to you, you haven't brought me the codicil which he had instructed you to get?—A. Yes.

Q. What did you say to him, doctor, upon that?—A. Yes, it must have been the 15th, because I said I would bring it down to-morrow morning when I came.

Q. What was this codicil he referred to as being the codicil he had spoken to you about?—A. It was the codicil to this will of May, 1890, that was made in Ottawa, the O'Gara will it was called.

Q. And when was it he had spoken to you about the codicil to this will?—A. After I came back from Toronto and told him you thought, under the circumstances, that he ought to provide for keeping that will alive.

Q. Then how long after that did you see Mr. John Bergin and instruct him about the codicil?—A. That same day.

Q. And was the codicil prepared?—A. He gave it to me that night.

Q. And you, having gotten it, what did you do with it?—A. Well, I kept possession of it till I went down there.

The doctor went down on the 16th, on which day the codicil was signed in his presence. At this time the original O'Gara will was in John Bergin's posses-

sion, and upon the execution of the codicil the testator requested the doctor to give it to his brother and to instruct him to attach it to his will (the O'Gara will), which he subsequently did.

The testator died on the 1st of May following.

It is as well to insert here the further evidence of Dr. Bergin as to the drawing of the codicil.

MR. BLAKE.—Q. Was there, or was there not, anything said subsequent to the 16th March, anything in the way of recalling that codicil of that date or interfering with it in these conversations you had?—A. Yes; he asked me whether my brother had sent the will and codicil to me again, and whether you had approved of it, and I told him I didn't know; I felt satisfied.

Q. That is not what I am asking you. I am asking whether anything was said as to recalling this codicil of the 16th March, 1891, anything that expressed dissatisfaction with it, or the desire to have it cancelled, or any matter of that kind? A. No. The only conversations I had with him afterwards were more professional than any other, but they were on almost every occasion coupled with his views as to the hospital, and the kind of hospital he would build when he returned from Nova Scotia.

Q. Then there is this allegation that I want you to speak to his lordship upon in the plaintiff's statement of claim. "The plaintiff charges that the codicil of the 16th March, 1890, (this is clause 8), was executed at the instance of the testator's legal adviser, etc." (reads clause). Is that a fact, did you suggest, or did your brother John suggest, the execution of this codicil?—A. The first my brother knew of it was the instructions I brought him from Mr. Purcell, and the first conversation that occurred between Mr. Purcell and me on the question of this codicil was on the 12th January, 1890, after having read the will and finding that Stuart's name was still on it. I asked Mr. Purcell when I went down there the next day whether it was wise for him to retain Stuart as one of his executors, and he said, "No, I intended to relieve him"; and he said, "Who am I to put in his place?" I said, "You ought to have a good man, a business man, a man who knows something of managing estates, a prudent man and a man who will see that his brother executors do not fritter away the estate and divert it from the purposes for which you intend it."

Q. And so it came from Patrick Purcell?—A. Whether he suggested or I suggested that John Bergin should be the executor, I am not positive, because he repeated it over and over again, he is a proper man, and afterwards when I told him that John would accept it he said that

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he was delighted. Then no further conversation occurred between us after that in regard to the codicil until he gave me the instructions, I think on the 15th or 14th to have that codicil prepared; he said to me, "You haven't brought that codicil as I instructed."

Now I do not gather from all or any of these facts as detailed by Dr. Bergin the slightest evidence of an actual intention to revive the O'Gara will or revoke the Maclennan will. It was on the 14th or 15th March that Purcell said to the Doctor "You have not brought the codicil yet which I instructed you to prepare long ago." And these instructions must have been given on the 11th or 12th of January, long before he had been advised by Mr. Blake that the O'Gara will should be "kept alive." Besides there is no evidence that after that advice Purcell ever asked or suggested that a codicil should be drawn of that character or having that effect. "It may, I think, be doubted," said Lord Penzance in *Re Steele*, "whether any testator, who bore in mind that he had revoked his will and substituted another for it, ever really sat down with the purpose of revoking his last will and reviving the former one and set about the execution of that purpose by simply making a codicil referring by date to the first will, without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading idea of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for that object" (1).

And so I say in the present case that if Purcell wanted to revoke the second and revive the first will he would have said so. He would have used some form of words having that effect. The fact is that instead of intending to give effect to the charitable dis-

(1) 1 P. & D. 575.

positions of the first will his intentions had altogether changed. He proposed to reduce still further his bounty to the Bishop of Alexandria, and "to build a hospital and home for aged and indigent men and women" at Cornwall. How, in view of all these facts, can it be contended that the surrounding circumstances show the intention claimed? There may have been, and I think there was, an idea in his mind of making, at some future time, some further testamentary disposition of the undisposed residue of his estate. There was, however, no idea that, by the mere execution of the codicil, he was restoring the first will and destroying the second. In referring to the acts and words of the testator subsequent to the execution of the Maclennan will I am not to be considered as holding that all such evidence was admissible—that these were such surrounding circumstances as might be considered in construing the different instruments. The evidence was brought out, however, by those supporting the O'Gara will and on that ground I have referred to it.

I had intended dealing with Mr. Blake's argument as to the alleged mistake of the testator to which I have referred, but I find that so ably dealt with in Mr. Justice Gwynne's judgment that I find it unnecessary to add anything in respect to it.

If my view be correct it ends the case, and it should be declared that the will of the 10th January, 1891, is the only instrument entitled to probate.

KING J.—I agree with the learned judges of the Ontario Court of Appeal who have found that the will of May, 1890, was revived by the codicil of May, 1891, while appreciating the weight of the judgment to the contrary of the learned Chief Justice of Ontario.

If express words of revivor are required to revive a revoked will by a codicil the codicil in question here

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fails of that effect. But no particular form of words is necessary. All that is required is that the codicil upon its face, and giving to the words the sense in which the testator is to be taken to have used them, shall show the intention to revive. This may be shown "either by express words referring to a will as revoked, and imputing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by expressions conveying to the mind of the court with reasonable certainty the existence of the intention in question" (1). In so construing the language of the codicil "the court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used" (1). One can see how a codicil referring to a previously revoked will by date might contain in its substantive provisions nothing that would be any more consistent with the revival of that will than with the confirmation of the revoking will. In such case it might well be a question whether the testator had not mistaken the dates, and really had in mind the real last will. An instance of this might be where the codicil referring to a will of the date of the revoked will simply made a bequest to a person not named in either will, or of an additional sum to a person named in both, as, for instance, if the testator here had by the codicil given a further sum to his wife. Such a provision would not add anything to the weight to be given to the mere date as indicative of an intention to revive the revoked will, for it would be as consistent with one view as the other. But the codicil here goes beyond that. First it purports to be a codicil to the will of May 14, 1890; it then makes a testamentary provision for the more effectual carrying out

(1) *In re* goods of Steele, 1 P. & D. 575.

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of that will by the revoking of so much of it as appointed Stuart as executor, and by the appointment in his place of Bergin, conferring upon him in terms all the powers and duties conferred and imposed upon Stuart as in the said will declared; and, as pointed out by Mr. Justice Maclennan, declares that the will in which he is making this change is "this, my will." There can be no question as to which will is meant. Upon the face of the codicil it is rendered certain by the reference to the date of the first will, and by the reference to a person who was an executor of the first will and not of the second. "Among pertinent circumstances that may be looked to" [as Lord Hannen says in *McLeod* v. *McNab* (1),] in order to get the true sense of the words the testator has used, must be included the known contents of the revoking will of January 10, 1891. Similar circumstances as to the change of an executor named in the first instrument, but not in the second, were there held to lead inevitably to the conclusion that the first instrument was the one referred to. Here independent surrounding circumstances, not necessary to be detailed, justify the like conclusion.

The will of May 14th, 1890, being indisputably intended and being known to be a revoked will (unless the revocation were per incuriam) what is the proper conclusion to be drawn from a codicil calling it "this my will" and cancelling the appointment of one of the executors named in it and appointing another in his place, with the powers and duties conferred by it? How could Bergin become an executor of such revoked will unless it were intended thereby to be revived? How could he have the same powers and duties as were conferred upon Stuart by that will unless it were to be a living will? I think that some sensible mean-

(1) [1891] A. C. 473.

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ing is to be given to a deliberate and authentic act, and agree with the learned judges Burton, Osler, Maclennan and Robertson, that the expressions used in the codicil show with reasonable certainty the existence of an intention to revive. It is said that no unskilled testator would imagine he could thus revive a will; but, before the present act, testators, skilled and unskilled, were accustomed to do it by much less—by simply making it plain that the codicil referred to the previously revoked will.

It is not possible to explain all of Purcell's conduct. It presents difficulties to any view, the least, perhaps, if we could think that the revocatory clause was executed per incuriam. I think, however, that he ought to be credited with some sense and some honesty. The making of a will was a serious thing with him, and his main concern lay in making provision out of his large means for various charities. By his first will the great bulk of his property was so devoted. It was only upon his being told that these charitable gifts might largely fail that he conceived the idea of recasting certain devises and bequests, and making such provision for charity as might be conveniently made out of his personal estate, other than such as might be secured by mortgage on real estate. This latter scheme he gave effect to by his will of January 10th, 1891, upon an off-hand opinion received from Mr. Maclennan in a brief interview. This will dealt with only about one-tenth of his property. If Mr. Maclennan's opinion had been otherwise there is no reason for supposing that the charitable bequests, and indeed the whole will, would not have substantially remained as they were. The day after making the second will he continued the inquiry into the validity of the charitable bequests, introducing the subject to Dr. Bergin (whom he had telegraphed to two days before, desiring to see him on

business), showing to Dr. Bergin the first will, and asking him to get the opinion of his brother (a solicitor) upon it. The next day he suggested to Mr. Maclennan alterations in the second will, a fact which shows, perhaps, merely that he was still acting on the advice that he had received from Mr. Maclennan.

He did not tell Dr. Bergin of the tentative will that he had made following upon Mr. Maclennan's advice. Seeking further advice he perhaps concluded to keep to himself the fact of having asked other advice. But whatever the reason he did not tell Dr. Bergin. Dr. Bergin advised the taking of the opinion of Mr. S. Blake Q.C., formerly a vice-chancellor of Ontario, and Dr. Bergin was authorized to consult Mr. Blake. Dr. Bergin says that Purcell said to him: "Take that to Mr. Blake and if he thinks it requires a new will let him make it, or do whatever he thinks necessary, and after that bring it back." Purcell was informed that Mr. Blake said that the will ought to be kept alive, which, as explained, meant that in Purcell's then state of health a new will might not turn out to be executed long enough before the testator's death to make good charitable devises or bequests payable out of moneys charged on lands. Purcell then requested that a codicil providing for the appointment of Mr. John Bergin as executor instead of Stuart, which had been spoken of before, should be sent to him for execution and it was so sent and is the codicil in question. Stuart had been book-keeper for Purcell, but in the autumn previous differences had arisen between them and Stuart then ceased to be Purcell's book-keeper and went to the United States. John Bergin was substituted for him as an executor of the original will and was clothed with all the powers and duties by such will conferred on Stuart.

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I cannot believe that (as suggested) this was all a contrivance to mislead the Bergins. There is no assignable motive for such a piece of duplicity. The reasonable view is that his mind had got back to its first state and that he desired to revive the first will as his will, and to provide effectually for the carrying of it out.

Having the misfortune to differ upon this point from my learned brethren it is not at all useful to express an opinion upon the numerous and weighty matters that have been so very ably discussed by the several learned counsel.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for appellant: *J. A. Macdonell, Anglin & Minty.*

Solicitors for appellants Archishop of Kingston and others: *O'Sullivan & Anglin.*

Solicitors for respondents, next of kin: *Maclennan, Liddell & Cline.*

Solicitors for respondents Bergin and others: *Leitch, Pringle & Hackness.*

Solicitors for respondents, St. Patrick's Asylum: *Latchford & Murphy.*

Solicitors for respondents, Good Shepherd Nuns: *O'Gara, MacTavish & Gemmill.*

Solicitor for respondent, Tully: *John Bergin.*

Solicitors for respondents McVicar: *Creasor, Smith & Notter.*

Solicitor for respondent Isabella Stuart: *R. Smith.*

Guardian of Infant defendants: *John Hoskin.*

THE NOVA SCOTIA MARINE INSURANCE COMPANY, (LIMITED), (DEFENDANTS)..... APPELLANTS;

AND

ROBERT STEVENSON, (Plaintiff).....RESPONDENT.

1893
*Nov. 27.
1894
*Mar. 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Misrepresentation—Vessel "when built"—Repairs to old vessel—Change of name—Register.

Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made.

Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect.

Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired and given a new name and register but containing the original engine, boiler and machinery with some of the old material, is a misrepresentation and avoids the policy whether made with intent to deceive or not. Taschereau J. dissenting.

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

The plaintiff bought the steamer "Effort," built in 1868, and repaired her extensively, almost rebuilding but using some of the old materials and the engine, boiler and machinery that had been in the "Effort." She was then given the name of "The Clansman" and received a new register. The plaintiff effected insurance of "The Clansman" and in answer to the question "when built," in the application replied "in 1890" the year in which the repairs were effected. A

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

(1) 25 N. S. R. 210.

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loss having occurred payment was resisted on the ground that this answer was a misrepresentation. Plaintiff obtained a verdict on the trial which was affirmed by the Supreme Court of Nova Scotia from whose decision the defendant company appealed.

Harris Q.C. for the appellant referred to *Ionides* v. *Pacific Insurance Company* (1); and *Rickards* v. *Murdoch* (2); in support of the contention that plaintiff had concealed a material fact.

Borden Q.C. for the respondent. The appeal depends on a question of fact, and the finding at the trial affirmed by the full court, will not be interfered with. *Allen* v. *Quebec Warehouse Company* (3); *Arpin* v. *The Queen* (4).

On the merits the learned Counsel cited *Lyon* v. *Stadacona Insurance Co.* (5); *Connecticut Insurance Co.* v. *Luchs* (6); *DeWolf* v. *New York Firemen Insurance Co.* (7); *Gandy* v. *Adelaide Marine Insurance Co.* (8).

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

KING J.—This is an appeal by defendants in an action on a policy of marine insurance upon the steamer "Clansman." The policy was a time policy and contained an express warranty of seaworthiness. The defence relied upon was misrepresentation as to the age of the vessel. Application for insurance was on forms used by the insurers, requiring answers to certain questions. Two of the questions were: When built?" and "present condition?" To the first the answer was "1890." The second was not answered. It appeared upon the trial that in the fall of 1889 a

(1) L. R. 6 Q. B. 674.
(2) 10 B. & C. 527.
(3) 12 App. Cas. 101.
(4) 14 Can. S. C. R. 736.
(5) 44 U. C. Q. B. 472.
(6) 108 U. S. R. 498.
(7) 20 Johns (N.Y.) 214.
(8) 25 L. T. N. S. 742.

steamer called the "Effort" that had been built in 1868, was put on the marine slip at Port Hawkesbury, in order to be retopped. Finding that she needed large repairs the planks were taken off, new floor timbers put in where necessary, also new top timbers, stanchions, rails, deck beams and deck, new ceiling to the extent of a half or two-thirds, and she was newly planked. The shape of stern and bow above water were altered. The work cost about $600 or $700, and was completed in the spring of 1890. The engine and boiler were not disturbed during the progress of the work. A new register was somehow obtained for the vessel under the name of the "Clansman"; and soon afterwards she was sold to the plaintiff who knew of the facts above stated.

It was found by Mr. Justice Ritchie that the representation that the vessel was built in 1890 was correct in point of fact, and this was upheld by the Supreme Court, McDonald C. J. and Weatherbe J., dissenting.

Where payment of a risk is resisted on the ground of misrepresentation it ought indeed to be made very clear that there has been such a misrepresentation. *Davies* v. *National Insurance Company of New Zealand* (1). With unfeigned respect for the opinion of the learned judges forming the majority, it is difficult to resist the reasoning and conclusions of the learned Chief Justice and Mr. Justice Weatherbe, that in this case there was such misrepresentation.

A representation is to be construed according to the fair and obvious import of words, and is equivalent to an express statement of all the inferences naturally and necessarily arising from it (2). It comprehends whatever would reasonably and necessarily be inferred by mercantile men from the language under the circum-

(1) [1891] A. C. 485.

(2) 1 Phillips on Insurance sec. 550.

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THE NOVA SCOTIA MARINE INSURANCE COMPANY v. STEVENSON.

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stances in which it was employed (1). What was proposed to be insured and what was being inquired about was a thing and not a name, the thing or vessel called the "Clansman." It was immaterial that she did not become the "Clansman" until 1890. The question was as to when she was built. Now vessels are ordinarily deemed to be built but once, and the question and answer in their fair and obvious import relate to the time when the vessel in question was first completed as a vessel; and the representation that she was built in 1890 is equivalent to an express statement that she was then a new vessel.

When the work on the "Effort" was begun she was a vessel, and there was no time in the progressive substitution of new for old when she ceased to be a vessel in course of repair and alteration. This follows upon a consideration both of what was made new and of what was left in place, and is further evidenced by the fact that the work was carried on with the engine and boiler in position. The result was something very different from a new vessel. Most important and vital parts of the structure were old, both in material and construction. Such were the keel, keelson stringers, waterways, stem, stern post and aprons. These were not only weakened in material and fastening by time, wear and working, but were also less fit to receive the new fastening that the new work would call for. Manifestly, too, portions of the new work could not be as effectually fastened as if the like work were done in the ordinary course of building. Doubtless the owner did the best he could, but he could not turn a twenty year old vessel into a new one. Repairing or restoration with minor alteration is the proper term to express what was done.

(1) Arnould on Marine Insurance p. 539.

One of the learned judges gave much weight to the statement of the new register that the "Clansman" was built in 1890, but that learned judge would probably be among the first to admit that the age of the vessel is to be decided upon the evidence at large, and that the opinion of those who were concerned in affecting such registration cannot avail against the proved facts.

The proper conclusion upon the facts is that the "Clansman" was not a new vessel in the ordinary or indeed in any sense, nor a vessel built in 1890 in the ordinary or in any sense, but an old vessel with a new name, extensively repaired with minor alterations, and carrying about with her most considerable and essential portions of old material and construction. If the old name had been retained it would scarcely have occurred to any one to claim that it was anything else but the old vessel in a repaired state, and equally whether he knew or not, the underwriters were entitled to the facts in answer to their question.

Then as to the effect of the misrepresentation. If made with intent to deceive the misrepresentation vitiates the policy however trivial or immaterial to the nature of the risk. If honestly made it vitiates only if material and if substantially incorrect. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

The age of a vessel is a point material to the risk. *Ionides* v. *Pacific Ins. Co.* (1). And although many particulars respecting the age, condition or structure of the vessel which might reasonably affect the mind of the underwriter need not be disclosed unless asked

(1) L.R. 6 Q.B. 683.

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THE NOVA SCOTIA MARINE INSURANCE COMPANY v. STEVENSON.

King J.

about, at least where they are included in a warranty of seaworthiness express or implied, if the underwriter asks questions about them the answers must be substantially true or the effect is to avoid the policy.

A question respecting the age of a vessel would *primâ facie* be taken to imply that the underwriter considers the answer material, and in such case the answer may be presumed to have influenced his mind.

In the case before us there is nothing to rebut this *primâ facie* presumption, and the representation is to be taken as material to the nature of the risk.

It is, however, a representation and not a warranty and, in the absence of intent to deceive, is satisfied by substantial compliance with fact. But a difference of twenty years is a very substantial difference in the age of a vessel and with the *primâ facie* presumption against him arising from the asking of the question, and the absence of anything tending (as in *Alexander* v. *Campbell* (1),) to rebut the presumption, the reasonable conclusion upon the facts in evidence is that had the truth been known the underwriter would not have underwritten the policy upon the same terms.

It is further the opinion of the majority of the court that the representation was made with intent to deceive.

The result is that the appeal is to be allowed and judgment to be entered for the defendants below.

TASCHEREAU J.—I would dismiss this appeal. The trial judge found, as a matter of fact, that the answer "1890" to the question "when built," was substantially correct. That finding is concurred in by the court *en banc*. Under these circumstances we cannot, in my opinion, entertain this appeal. I would go further and say that, as I read the evidence, coupled with the registry of the ship, the respondent would not have

(1) 41 L.J. (Ch.) 478.

given a true answer if he had said that the ship was built in 1868. It was not all new; old materials were certainly used, but she was nevertheless built, and came to life as "The Clansman" in 1890. I adopt the reasoning of Ritchie, Graham and Meagher JJ. in the court below.

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THE NOVA SCOTIA MARINE INSURANCE COMPANY v. STEVENSON.

Taschereau J.

Appeal allowed with costs.

Solicitors for the appellants: *Harris & Henry.*

Solicitors for the respondent: *Borden, Ritchie, Parker & Chisholm.*

MERCHANTS BANK OF CANADA *v.* McLACHLAN.

MERCHANTS BANK OF CANADA *v.* McLAREN.

1893

*Oct. 10, 11.

1894

*April 2.

Partnership—Dissolution—Married Woman—Benefit conferred on wife during marriage—Contestation—Priority of claims.

APPEALS from the decisions of the Court of Queen's Bench for Lower Canada (Q. R. 2 Q. B. 431) reversing the judgments of the Superior Court which had maintained the contestations of the respondent's claims in each action.

On the 10th April, 1886, John S. McLachlan, a retired partner from the firm of McLachlan & Bros., composed of the said John S. McLachlan and William McLachlan, his brother, agreed to leave his capital, for which he was to be paid interest, in a new firm to be constituted by the said William McLachlan and one William Radford, an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm

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

1894

MERCHANTS BANK OF CANADA v. MCLACHLAN

MERCHANTS BANK OF CANADA v. MCLAREN.

undertook to carry on business under the same firms name up to 31st December, 1889. John S. McLachlan died on the 18th November, 1886. Mrs. Annie McLaren, the wife, separate as to property of John S. McLachlan, had an account in the books of both firms. On the 16th April, 1890, an agreement was entered into between the new firm of McLachlan Bros. and the estate of John S. McLachlan and Mrs. McLachlan, by which a large balance was admitted to be due by them to the estate of John S. McLachlan and to Mrs. John S. McLachlan. The new firm was declared insolvent in January, 1891. Claims having been filed respectively by Mrs. John S. McLachlan and the executors of the estate of John S. McLachlan against the insolvent firm, the Merchants Bank of Canada contested the claims on the following grounds, *inter alia*: 1st, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886; 2nd, that Mrs. John S. McLachlan's moneys formed part of John S. McLachlan's capital, and 3rd, that the dissolution was simulated. (See also report Q. R. 2 Q. B. 431).

The Supreme Court reversed the judgment of the Court of Queen's Bench for Lower Canada (appeal side) restoring the judgment of the Superior Court, Fournier and King, JJ., dissenting, and held, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to Mrs. John S. McLachlan after having credited her with her own separate moneys were in reality moneys deposited by her husband, in order to confer upon her during marriage, benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors.

Appeals dismissed with costs.

Laflamme Q.C. and *Greenshields* Q.C., for the appellants.

Hall Q.C. and *Geoffrion* Q.C., for the respondent.

S. S. "SANTANDARINO" *v.* "VANVERT."

1893

*Nov. 20. 21.
*Mar. 13.

Collision at sea—Negligence—Defective steering gear—Question of fact—Interference with decision on.

APPEAL from a decision of the local judge in Admiralty for the District of Nova Scotia, (1) finding the Santandarino to blame for a collision with respondent's ship.

In an action against the owners of the "Santandarino" for damages incurred by a collision with the respondent's barque, the "Juno," through the breaking down of the steering apparatus, the local judge in Admiralty, who was assisted on the trial by a nautical assessor, found that the steering gear was constructed on an approved patent and was in good order when the "Santandarino" started on her voyage but that the collision was due to want of prompt action by the master and officers when the wheel refused to work.

On appeal from that decision the Supreme Court held, Sedgewick and King JJ. dissenting, that only a question of fact was involved and though it was doubtful if the evidence was sufficient to warrant the finding the decision was not so clearly wrong as to justify an appellate court in reversing it.

Appeal dismissed with costs.

Newcombe and McInnes for the appellants.

Borden Q.C. for the respondent.

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

(1) 3 Ex. C. R. 378.

1893

MACK *v.* MACK.

*Nov. 29,30. *Trustee—Administrator of Estate—Release to, by next of kin—Rescission of release—Laches.*

1894

*Mar. 13. APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial for the defendants.

Edward Mack died in 1871, and his brother and partner, Henry Mack, obtained from his widow and his father, as next of kin, a release of their respective interests in all real and personal property of the deceased. In getting this release he represented that the estate would be sacrificed if sold at auction, and the most could be made of it by letting him have full control of the property. He then took out letters of administration to Edward Mack's estate, but took no further proceedings in the Probate Court and managed the property as his own until he died in 1888. During that time he wrote several letters to the widow of Edward Mack, in most of which he stated that he was dealing with the property for her benefit, and would see that she lost nothing by giving him control of it. After his death the widow brought an action against his executors, asking for an account of the partnership between her husband and Henry Mack, and of his dealings with the property since her husband's death and payment of her share; she also asked to have the release set aside. The defendants relied on the release as valid, and also pleaded that plaintiff by delay in pressing her claims was precluded from maintaining her action.

The Supreme Court held, Gwynne J. dissenting, that the release should be set aside; that it was given in ignorance of the state of the partnership business and Edward Mack's affairs, and the plaintiff was dominated by the stronger will of Henry Mack; that

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

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the latter had divested himself of his legal title by admitting in his letters a liability to the plaintiff, and must be treated as a trustee; that as a trustee lapse of time would not bar plaintiff from proceeding against him for breach of trust; and that the delay in pressing plaintiff's claim was due to Henry Mack himself, who postponed from time to time the giving of a statement of the business when demanded by the plaintiff.

Appeal dismissed with costs.

Borden Q.C. for appellant.

Newcome and McInnes for respondent.

ARCHIBALD *v.* THE QUEEN.

1893

*Dec. 2.

1894

*Mar. 13.

Crown—Construction of public work—Interference with public rights—Injury to private owner.

APPEAL from a decision of the Exchequer Court (1), refusing compensation to the suppliant for injury to his property by the construction of a public work.

The suppliant owns a saw-mill in Cape Breton, and claims that he was prevented from rafting his lumber to a shipping point as formerly by the construction of a bridge across a pond some distance from the mill, in connection with the building of the Cape Breton Railway. The Exchequer Court held that the right alleged to be interfered with was a right common to the public, and that an individual affected by the interference was not entitled to compensation.

The Supreme Court dismissed with costs an appeal from this decision.

Appeal dismissed with costs.

Code for appellant.

Borden Q.C. for respondent.

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

(1) 3 Ex. C. R. 251.

1893

*Mar. 29.

EMMA JANE McGEACHIE (PLAINTIFF) APPELLANT;

AND

THE NORTH AMERICAN LIFE INSURANCE COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.

A condition in a policy of life insurance provided that if any premium, or note, etc., given therefor, was not paid when due the policy should be void.

Held, affirming the decision of the Court of Appeal, that where a note given for a premium under said policy was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void.

Held further, that a demand for payment after the maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) and restoring that of Street J. at the trial by which the plaintiff's action was dismissed.

The plaintiff was the widow of one Robert McGeachie who was insured with the defendant company in the sum of $1000. The action was brought to recover that amount and interest.

The facts of the case are not in dispute. The policy of insurance upon the life of Robert McGeachie was issued by the defendants on the 6th day of December, 1889, and he died on the 6th day of November following (1890). The amount of the insurance premium

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

(1) 20 Ont. App. R. 187. (2) 22 O. R. 151.

was $31.10 annually. This amount was not paid to the defendants in cash upon the issuing of their policy but by agreement with the plaintiff the defendants accepted instead the promissory note of Robert McGeachie, at six months, for $31.10, with interest thereon at seven per cent per annum. This note became due on the 7th day of June, 1890. It was not then paid by the maker, but by agreement between him and the defendants a renewal note was taken instead, at thirty days, for the amount of the first note with interest added, $32.20, the second note itself bearing interest also at the rate of seven per cent per annum.

At the maturity of the second note (10th July 1890), $10 cash was paid by Robert McGeachie upon account and a third note at two months given for the balance ($22.40), this third note also bearing interest at seven per cent per annum.

The third note fell due on the 13th September, 1890, when it was renewed at one month by a fourth note, in which the interest was added to the previous amount thus making $22.80.

This fourth note became due on the 16th October, 1890, and remained in defendants' possession overdue and unpaid up to the death of Robert McGeachie, three weeks after the maturity of the note. Upon the death taking place defendants refused to receive payment of the note.

The acceptance of the note in the first place, and of the different renewal notes, was in each case a matter of arrangement and agreement between the parties. During the currency of the second note Robert McGeachie wrote (2nd July, 1890,) to the defendants, asking to have the policy cancelled, but was answered that such a request was unreasonable and could not be entertained.

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After maturity of the last note defendants, on 5th November, 1890, wrote the maker demanding payment of it.

This letter reached St. Catharines on the day on which Robert McGeachie died and was delivered to his brother on the same day. The local agent of the company was at once communicated with and asked if he would accept the money, but refused to do so. On the following Monday, four days later, the amount was formally tendered to the defendants at their head office but was refused.

At the trial of the action at St. Catharines in May, 1891, before the Honourable Mr. Justice Street without a jury, judgment was reserved, and afterwards judgment was given in the defendants' favour. From this decision the plaintiff appealed to the Queen's Bench Divisional Court, and by the judgment of that court, pronounced on the 27th February, 1892, the plaintiff recovered the amount of her claim in this action. Thereupon the defendants appealed to the Court of Appeal for Ontario, and by the judgment of that court pronounced on the 17th January, 1893, the action was dismissed. The plaintiff appealed from that decision to the Supreme Court of Canada.

The defendant company relied on the following condition in the policy.

"If any premium, note, cheque, or other obligation given on account of a premium be not paid when due * * * * this policy shall be void, and all payments made upon it shall be forfeited to the Company."

Aylesworth Q.C. for the appellant. Credit was intended to be given for the premium and under the circumstances the non-payment of the note did not avoid the policy. *Miller* v. *Brooklyn Life Insurance Company* (1)

(1) 12 Wall. 285

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The condition is one of which performance could be waived and waiver will be inferred by the court. *Universal Fire Insurance Company* v. *Block*. (1)

The policy, at all events, was only voidable and the company never elected to avoid it. *McCrae* v. *Waterloo County Mutual Insurance Company*. (2) *Mutual Benefit Life Insurance Company* v. *French*. (3)

Kerr Q.C. for the respondents was not called on.

FOURNIER J.—I am of opinion that it is not necessary to hear counsel for respondents, and that the appeal should be dismissed.

TASCHEREAU J.—I am of the same opinion. After hearing the able argument advanced on behalf of the appellant I am not convinced that the policy existed at the death of the assured, if it ever existed. The appeal should be dismissed.

GWYNNE J.—The first condition of the policy was quite sufficient to entitle the company to claim that the policy was void for non-payment of the premium. It was paid by a promissory note which enabled the policy to issue, but it was agreed that if the note was not paid the policy was to be void, or, if not void, voidable and I do not think it would aid the appellant to hold that it was only voidable. I agree with the judgment of the Chief Justice of the Court of Appeal and would dismiss this appeal with costs.

SEDGEWICK J.—I am also of opinion that the appeal should be dismissed.

KING J.—The note was taken as conditional payment of the premium and until it matured the policy was

(1) 109 Penn. 535 (2) 1 Ont. App. R. 218.
(3) 2 Cinn. (S.C.) 321.

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valid, but when it matured and was not paid it came within the first condition and made the policy void. I think the term void in that condition means voidable. The stipulation was for the benefit of the company who had a right to elect whether it should be void or not. Then, was anything done to show an intention on the part of the company that the policy should continue notwithstanding the breach of the condition? I cannot see that what was done was equivalent to an expression of any such intention. The insured had had eleven months of protection under the policy and I cannot see that the request for payment of the note would operate as a waiver of the forfeiture.

I agree in the appeal being dismissed.

*Appeal dismissed with costs.**

Solicitors for appellant: *Rykert & Marquis.*

Solicitors for respondents: *Kerr, Macdonald, Davidson & Paterson.*

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*On May 22d, 1894, an appeal in the case of *Frank* v. *The Sun Life Assurance Company* was argued before the Supreme Court. In that case the policy contained no provision that it was to be void if the premiums were not paid. The first premium was paid by two agreements in the form of promissory notes maturing at different dates and each providing that the policy was to be void if it was not paid at maturity, when the assured died the first agreement was overdue and unpaid and the second had not matured. The court, without reserving judgment, dismissed an appeal from the decision of the Court of Appeal [20 Ont. App. R. 564] holding the policy void.

GEORGE W. STUART.....(PLAINTIFF).....APPELLANT; 1893

AND *Dec. 1, 2,

CHARLES F. MOTT.....(DEFENDANT)....RESPONDENT. 1894

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *May 1.

Res judicata—Different causes of action.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s interest in a gold mine but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. swore that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and after the sale S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau JJ. dissenting, that S. was not estopped by the first judgment against him from bringing another action.

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

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

Osler Q.C. and *Newcombe* for the appellant.

Borden Q.C. and *Mellish* for the respondent.

THE CHIEF JUSTICE.—The majority of the court are of opinion that the appeal should be allowed and the judgment of Mr. Justice Townshend restored.

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

TASCHEREAU J.—I think that the plaintiff's action was rightly dismissed. He is estopped from taking

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

(1) 24 N. S. Rep. 526.

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the position he would now take. I would dismiss the appeal.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs and that the judgment of the court of first instance in favour of the plaintiff should be restored. The only real defence to the action urged before us was that the plaintiff's cause of action was estopped and barred by a judgment rendered in favour of the defendant in a former action at suit of the plaintiff which, as was contended, operated as *res judicata* upon the matter of the present action; but concurring herein with the learned judge of first instance, I am of opinion that there is nothing in the former action which operates as a bar or estoppel in the present.

KING J.—I concur in the allowance of this appeal

Appeal allowed with cost

Solicitors for appellant: *Henry, Harris & Henry.*

Solicitors for respondent: *Lyons & Lyons.*

THE CITIZENS' INSURANCE COMPANY OF CANADA, (DEFENDANTS). } APPELLANTS;

AND

JAMES W. SALTERIO (PLAINTIFF).....RESPONDENT.

1894
*Feb. 20.
*May 1.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Condition in policy—Change of title in property insured—Chattel mortgage.

A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; and that the policy should not be assignable without the consent of the company indorsed thereon, and all incumbrances effected by the assured must be notified within fifteen days therefrom.

Held, reversing the decision of the Supreme Court of Nova Scotia, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. *Sovereign Ins. Co.* v. *Peters* (12 Can. S. C. R. 33) distinguished.

Held further, that it was an incumbrance even if the condition meant an incumbrance on the policy.

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

The action in this case was on a policy of insurance against fire on plaintiff's stock in trade, which policy contained, among others, the following condition:

"*Condition no.* 2.—Title. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the property insured stands on leased or borrowed ground, it must be so represented to the company, and so expressed in

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

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the written part of this policy, otherwise the policy shall be void. Property or goods of any kind held as collateral on commission in trust or on storage, or sold, delivered or not delivered, or any other interest than absolute, are not insured hereunder, as well as leaseholds, rents, improvements, unless so designated and so specifically insured."

"This policy or any interest in it, shall not be assignable without the consent of the company expressed by indorsement made hereon, and all encumbrances effected by the assured must be notified within fifteen days therefrom, otherwise this policy shall be void. In event of any sale, transfer or change of title in the property insured the liability of the company shall thenceforth cease."

The insured, during the currency of this policy, gave to Gault Bros. & Co., of Montreal, to whom he was indebted, a chattel mortgage on all the property so insured, and also "all policies of insurance on the said stock and all renewals thereof," without first obtaining the consent of the company to be indorsed on the policy. The defendants claimed that this chattel mortgage was a breach of the above condition and rendered the policy void.

As to the contention of the company that the assignment of the policy was a breach of the condition see *London Ins. Co.* v. *Salterio* at page 33 of this volume.

Newcombe Q.C. for the appellant was stopped by the court.

Chisholm for the respondent. A chattel mortgage is not a transfer of the property within the condition. *Sovereign Ins. Co.* v. *Peters* (1).

At all events it cannot affect the policy until default. *Hanover Ins. Co.* v. *Connor* (2).

(1) 12 Can. S. C. R. 33. (2) 20 Ill. App. R. 297.

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Newcombe Q.C. in reply referred to *Burlinson* v. *Hall* (1); *Tancred* v. *Delagoa Bay &c. Railway Co.* (2).

The judgment of the court was delivered by

GWYNNE J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia, in favour of the plaintiff, in an action against the appellants, as defendants, upon two several policies of fire insurance executed by the appellants, the one for $1,000, and the other for $2,000 upon certain stock in trade of the plaintiff mentioned and described in the policies. The policies are indentical in every respect except in the amounts by them respectively insured. Each policy was subject to the following, among other conditions :—

Condition no. 2.—Title. If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or &c., &c., it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void. This policy or any interest in it shall not be assignable without the consent of the company expressed by indorsement made hereon and all incumbrances effected by the assured must be notified within fifteen days therefrom, otherwise this policy shall be void. In the event of any sale, transfer or change of title, in the property, the liability of the company shall thenceforth cease.

By an indenture bearing date the 18th October, 1890, and while these policies were in force, the plaintiff granted, bargained, sold, assigned, transferred and set over all the stock in trade whereon the said insurances were by the said policies effected, and also all policies of insurance on the said stock and all renewals thereof, to Gault Brothers and Company, of Montreal, by way of security for payment to them of the sum of nine thousand and seventy-two dollars, to have and to hold, to them and their assigns upon trust upon breach

(1) 12 Q. B. D. 347. (2) 23 Q. B. D. 239.

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of any of the covenants, provisoes and agreements in the said indenture contained to sell the same either by private sale or public auction, and out of the proceeds arising from such sale to pay all the expenses connected with the said indenture and the said sale, and then to retain and reimburse themselves the said sum of nine thousand and seventy-two dollars with interest thereon at and after the rate of five per centum per annum, or any balance that may then be due to them, rendering the balance, if any there be, to the said plaintiff, his executors, administrators, or assigns, provided always that if the plaintiff should well and truly pay or cause to be paid unto the said Gault Brothers and Company or their assigns the said sum of $9,072 with interest thereon at the rate aforesaid, the whole to be paid within eighteen months from the first day of November, 1890, in instalments made payable at certain days and hours in the said indenture mentioned, then that the said indenture should become void, but otherwise should remain in full force and effect; and it was by the said indenture agreed, that until default in payment or other default, it should be lawful for the plaintiff to retain possession and use of the said goods, chattels and premises thereby conveyed or intended so to be, and to sell and dispose of the same in the ordinary and usual course of trade. Provided always and it was thereby agreed, by and between the parties thereto, that if any legal proceedings should be taken or any judgment entered against the said plaintiff by any person or persons, or execution issued against him or attempted to be levied on said property thereby conveyed or intended so to be, or any part thereof be seized, attached or distrained upon, or in case of any other default in the provisions of the said indenture, then that it should be lawful for the said Gault Brothers and Company, &c., &c., to

take immediate possession of and sell the said property as thereinbefore provided, before the expiration of the said period of eighteen months.

Some time in the month of December, 1890, prior to the 18th, certain creditors of the plaintiff entered suit against him and thereby, in the terms of the said indenture, the goods, stock in trade, &c., assured by the said policies became absolutely vested in Gault Bros., upon trust to sell for the purpose in the said indenture of the 11th October, 1890, mentioned. Gault Bros. never gave notice to the appellants of the execution of that indenture, nor of the assignment therein contained of the said stock and policies, until some time after the destruction of the said goods, &c., by fire on the 31st December, 1890. Upon the 2nd January, 1891, they, by their solicitors, Messrs. Harrington & Chisholm, gave such notice in a letter of that date addressed to Wm. Duffus Esq., agent of the appellants, which is as follows:—

HALIFAX, January 2nd, 1891.

DEAR SIR,—We beg to inform you that all policies of insurance which James W. Salterio holds on the stock in trade owned by him, and consumed by fire in the Globe Hotel building on Wednesday night, were assigned by him to Gault Bros. & Co., of Montreal, by chattel mortgage dated the 18th day of October, 1890. The mortgage contained a covenant to insure the goods for our client's benefit. It is true we did not get the policies assigned by indorsement thereon made with your assent, but if that is necessary it can be done now after the loss. At present we wish simply to notify you of our client's rights and that they are the persons entitled to the insurance, their interests being upwards of nine thousand dollars.

Yours truly,
Sgd. HARRINGTON & CHISHOLM.
Attorneys of Gault Bros. & Co.

The actions were resisted upon the contention that the policies were avoided by the execution of the deed of October 18th, 1890, and the assignment therein contained of the policies without the assent of the appel-

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lants, but the learned trial judge held that as the condition indorsed on the policies declared that these policies could not be assigned without the consent of the appellants indorsed thereon, and as no such assent had been obtained, they were not in fact assigned and that no breach of the condition which had the effect of avoiding the policies had taken place and he therefore rendered judgment for the plaintiff.

The Supreme Court of Nova Scotia maintained this judgment upon the authority of the judgment of the Supreme Court of Massachusetts, in the case of *Lazarus* v. *Commonwealth Insurance Co.* (1.) But that case, even if it were a binding authority, was very different from the present. The policy of insurance under consideration there was effected upon the 21st October, 1824, upon a ship of the plaintiff by Smith & Stewardson, creditors of the plaintiff, for their own security, they paying the premium, and to them the money, in case of loss, was made payable, although the policy was effected in the name of the plaintiff. The policy contained a clause whereby it was agreed that the policy should be void in case of its being assigned, transferred or pledged without the previous consent in writing of the assurers, and on the 23rd December, 1824, the plaintiff executed an indenture whereby he assigned to one Street all his interest in certain vessels, &c., &c., all goods and stock in trade and bonds, &c., &c., policies of insurance, debentures, &c, &c,, belonging to the said Michael Lazarus, or in which he has any right, title or interest, property, lien or claim whatever, in trust for sale, and to apply the proceeds in payment of the plaintiff's creditors and to pay and apply any surplus balance to the plaintiff. At the time this instrument was executed Smith & Stewardson were in possession of the policy and held it as

(1) 19 Pick. 81.

security for their claims. That claim was paid off subsequently to the execution of the indenture to Street. The jury found that after payment of all the plaintiff's debts and a release executed to him by his creditors there was a surplus of the assigned property reverting to the plaintiff, including the policy in question. The vessel upon which it had been effected was lost by peril insured against. Upon this state of facts the court said:

> At the time when the indenture to Street was made the policy was in the hands of Smith & Stewardson who were then in advance to the plaintiff. They procured it to be made and the defendants agreed to pay the money to them in case of loss. They might have maintained an action upon this policy in their own names against the defendants. Now it would seem that the plaintiff could not have deprived them of the benefits secured to them by this contract without their consent. It is true that the plaintiff afterwards paid his debt to them, but that circumstance does not show that the defendants might not have been liable to them for any loss upon this policy which might have happened after the assignment and before they received their payment from the plaintiff. If the policy was made void it was avoided by the act of assignment; and if it were so avoided, it would follow that Smith & Stewardson's rights, which were secured by the policy, would have been destroyed, without their consent.

In this state of facts, and upon this reasoning, the court came to the conclusion that the parties to the indenture to Street had no intention whatever to assign thereby the policy in question, of which Smith and Stewardson were so in possession as beneficial owners, and that as there was no intention that the policy should pass by that indenture it did not pass, and was not affected thereby.

Now in the present case there was the clearest intention that the policies in question here should pass to Gault Bros. & Co., under the indenture of the 18th October, 1890. There is clear evidence of the express intention of the parties that they should pass, and by the above letter of the solicitors of Gault Bros. & Co.,

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to the appellants, notifying them of the assignment, it is apparent that they relied upon obtaining afterwards the assent of the appellants to such assignment, and the intention of the plaintiff is further placed beyond question by the power of attorney bearing date the 19th day of January 1891, executed by him to Mr. Chisholm as the agent and attorney of Gault Bros., wherein he recites the execution of the indenture of the 18th October, 1890, and that his claim against the appellants, which claim only existed under the said policies, had been equitably assigned by him to Gault Bros. as further collateral security for the payment of the debt secured by the said indenture of October, 1890. There is no suggestion that this equitable assignment took place otherwise than by the indenture of 18th October, 1890.

It, then, being the clear intention of the parties to the indenture of the 18th October, 1890, that the policies under consideration should pass, this case is quite distinguishable from *Lazarus* v. *The Commonwealth Insurance Company* (1); and the language of the indenture being sufficient to include these policies we must hold the policies to have been avoided.

Then, again, it appears by the same condition no. 2 that the policies were effected upon the assurance and faith that the assured had the entire, unconditional and sole ownership of the property insured for the use and benefit of the insured, and it was provided by the last clause of that condition that " in the event of any sale, transfer or *change of title* in the property insured, the liability of the company should thenceforth cease." Now although the case of *Sovereign Insurance Co.* v. *Peters* (2), which has also been relied upon in the courts below, may well be an authority for holding that the words " sale " and " transfer " in

(1) 19 Pick. 81.

(2) 12 Can. S. C. R. 33.

this sentence must, as the word "assign" in *The Sovereign Ins. Co.* v. *Peters* (1), be construed as meaning an absolute assignment, sale or transfer, and so that such words would not include a mortgage, still, to the words "change of title," a more extended meaning must be attached. They must be construed to comprehend any "change" from the entire, unconditional and sole ownership of the insured in the property insured; and that a chattel mortgage is such a change of title cannot, I think, be doubted. So likewise does it, as appears to me, come within the words of the condition which provides that all "encumbrances effected by the assured must be notified within fifteen days therefrom, otherwise the policy shall be void." This word "encumbrances" here used refers more naturally to the property insured than to the policy, but if it is to be understood as meaning an "encumbrance" or charge upon the policy itself, the assignment in the indenture of the policies contained in the indenture of 18th October, 1890, intending to operate as collateral security to Gault Bros. & Co. for the debt secured by the indenture, is, I think, such an "encumbrance," which, by the means of the transfer not being assented to by the appellants as required by the condition in the policies, avoids the policies.

The appeal, therefore, must be allowed with costs and judgment be ordered to be entered in the court below for the defendants, with costs.

Appeal allowed with costs.

Solicitor for appellants: *Hector McInnes.*

Solicitor for respondent: *John M. Chisholm.*

(1) 12 Can. S.C.R. 33.

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*Feb. 21.
*May 1.

THE SAINT JOHN GAS LIGHT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JAMES P. HATFIELD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW-BRUNSWICK.

Master and servant—Common employment—Negligence—Questions of fact—Finding of jury on.

A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work and while engaged thereon H. was injured by the negligence of the servants of the company. In an action for damages for such injury:

Held, affirming the decision of the Supreme Court of New Brunswick, that by the evidence at the trial negligence against the company was sufficiently proved.

Held further, that whether or not there was a common employment between H. and the servant of the company was a question of fact and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate court would not interfere.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the verdict at the trial for the plaintiff.

The facts of the case were as follows—

In 1890 the defendant company was engaged in laying down a new main in Dock Street, in St. John, and connecting the service pipes to the houses and shops along the streets. Finding that its own men were unable to make the connections as fast as was desired, Davenport, the defendants' manager who was in charge of the work, applied to one Freeman Wisdom, in whose employ the plaintiff was, for a man to assist the com-

*PRESENT:—Fournier, Taschereau, Gwynne and Sedgewick JJ.

pany's own men in making these connections, and Wisdom sent the plaintiff for the purpose. He worked one whole day, and in the early part of the second day some gas which had been allowed to escape through the main became ignited from fire from a salamander being used in carrying on the work; an explosion took place and the plaintiff was injured. The valve by which the gas was shut off from the main was some six or eight hundred feet from the point where the men were working when the accident took place. When work was discontinued each evening the end of the new main was closed so that the gas could be turned on for the use of those whose houses or shops had already been connected. It was turned off again in the morning before the work was resumed, and as the service pipes were connected by the plaintiff and others engaged in doing that part of the work, the connections would be tested for leakage by the gas being turned on the main and a light applied at the connection to see if there was any escape. It would then be shut off again. It seems that the man whose duty it was to shut off the main did not, on the morning of the accident, altogether close the valve, which allowed some pressure and caused an escape of gas through the main and led, as is alleged, to the explosion which took place, and by which the plaintiff was injured. On the trial certain questions were submitted to the jury which, with their answers thereto, were as follows:—

1. Was the plaintiff injured by the negligent act or omission of defendants or their servants? A. Yes.

2. If so, could the plaintiff by the exercise of ordinary care have avoided the consequence of such negligence? A. No.

3. Was the plaintiff at the time of the accident acting as a servant of the defendants, and under their

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direction and control? A. He, the plaintiff, was acting under the direction of the defendants as a servant of F. W. Wisdom, and under his, Wisdom's, control.

4. Was the plaintiff at the time of the accident acting as the servant of defendants? A. No.

5. Was the plaintiff at the time of the accident acting under the control of defendants? A. No.

6. Did the plaintiff impliedly undertake to become the servant of defendants? No.

7. Was the plaintiff at the time of the accident acting under independent employment or was he acting for the defendants and as their servant and under their control in and about their work? A. He was acting under independent employment.

The Court—You mean by that, Mr. Wisdom, of course? Foreman—Yes.

8. If the injury was caused by the negligence of the defendants' servants was the plaintiff a fellow servant of the company with such servant, and engaged with him in a common employment? A. No.

On these findings the judge ordered a verdict to be entered for the plaintiff, the defendants having leave to move to enter it for them. A motion for that purpose having been made a rule was refused. The defendants then appealed to this court.

Hazen for the appellants. There is no evidence of a contract between the company and Wisdom by which the latter was to be paid for the plaintiff's services. Therefore plaintiff was not Wisdom's servant when he was working for the company. See *Donovan* v. *Laing, &c., Construction Syndicate* (1), judgment of Bowen L. J.

The plaintiff and the person whose act caused the injury complained of were working for the same master and were in a common employment for the company.

(1) [1893] 1 Q. B. 629.

Rourke v. *White Moss Colliery Co.* (1); *Johnson* v. *Lindsay* (2)

Currey for the respondent referred to *Swainson* v. *North Eastern Railway Co.* (3); *Warburton* v. *The Great Western Railway Co.* (4); *Vose* v. *The Lancashire and Yorkshire Railway Co.* (5)

FOURNIER J—I am of the opinion that this appeal should be dismissed.

TASCHEREAU J.—I would dismiss this appeal. I think Mr. Justice King's reasoning in the court below unanswerable, and the answer of the jury to question 8, for which there is evidence, concludes the case.

GWYNNE J.—This action was brought for injuries alleged to have been caused by the negligence of the defendants to the plaintiff when employed as the servant of one Wisdom, a steamfitter, in connecting a main gas pipe of the defendants laid by them in a street called Dock Street in the city of St. John, in New Brunswick, with certain small pipes leading into the houses and to the lamps on said street, for the purpose of lighting the said houses and street lamps with gas. The defence pleaded is, that at the time of the plaintiff's suffering the injury complained of he was a servant of the defendants, and acting as such together with other servants of the defendant, in one common employment, and doing one common work for the defendants, and that the said servants so employed were reasonably fit and competent to be so employed in such work, and that the grievance of which the plaintiff complains was occasioned by the carelessness, negli-

(1) 2 C. P. D. 205.
(2) [1891] A. C. 371.
(3) 3 Ex. D. 341.
(4) L. R. 2 Ex. 30.
(5) 2 H. & N. 728.

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gence and improper conduct of said servants of the defendants, so engaged in one common employment with the plaintiff, doing the common work of the defendants and not from any personal negligence, carelessness or improper conduct of the defendants. The issue joined upon this defence involved mere questions of fact, and the jury who tried the issue found as matters of fact, in answer to certain questions put to them by the learned judge, before whom such issue was tried.

1st. That the plaintiff was injured by the negligent act or omission of the defendants or their servants.

2nd. That the plaintiff could not, by the exercise of ordinary care, have avoided the consequence of such negligence.

3rd. That the plaintiff, at the time of the injury happening, was acting under the directions of the defendants, as a servant of F. W. Wisdom and under his, Wisdom's, control.

4th. That the plaintiff was not acting as the servant of the defendants.

5th. Nor under the control of the defendants.

6th. Nor had the plaintiff impliedly undertaken to be the servant of the defendants.

7th. But was acting under independent employment, namely, the employment of Wisdom.

And they rendered a verdict in favour of the plaintiff for $1,250.

Upon a motion to set aside a judgment for the plaintiff and enter judgment for the defendants pursuant to leave reserved, or for a new trial, the Supreme Court of New Brunswick after argument refused a rule, and maintained the verdict. From that judgment this appeal is taken. If the findings of the jury, upon the matters of fact so found by them, are well found, there can be no question that the plaintiff is entitled to maintain

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the verdict so rendered in his favour; and the well established rule of this court is, that upon such pure matters of fact the court cannot interfere unless it be conclusively established that the findings of the jury are so entirely wrong, and so unwarranted by the evidence, as to justify the conclusion, either that the jury did not appreciate their duty or acted wilfully in violation of it. In the present case the findings of the jury are open to no such imputation; indeed they are, in my judgment, in perfect accord with the evidence. The plaintiff was a servant of Wisdom, employed by him in his business of a steamfitter at $7 per week. The defendants were desirous of employing a competent mechanic to make connections between the new main pipe they were laying in the street with the pipes from the houses and the lamps upon the street in which the main pipe was being laid by the defendants, and for this purpose they applied to Wisdom who undertook to make the connections, and sent his servant for that purpose. For the services rendered by the plaintiff Wisdom charged the defendants what he considered a reasonable price as upon a *quantum meruit*, and was paid his demand by the defendants. The plaintiff in doing the work which he did acted as the servant of Wisdom, and was paid by him as his hired servant at $7.00 per week. The defendants not only never hired plaintiff, or agreed to pay him for his services, but he was in no sense under the control of the defendants, nor under their directions, save in so far that they pointed out the places where the connections were to be made.

All the cases relating to the principle of a defendant's exemption from liability for injuries occasioned to one servant from the negligence of another servant, or other servants, of the defendant, employed together with the plaintiff in one common employment, and

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in one common work for the same master, have been most thoroughly and exhaustively discussed in the court below, and not one of them countenances the conclusion that this plaintiff, under the circumstances in evidence, must be held to be a fellow worker with the other servants of the defendants whose negligence caused the injury which the plaintiff suffered. There is no countenance for the contention that the plaintiff was lent by Wisdom to the defendants so as to have become the servant of the defendants, and under their control, and so as to make applicable the principle which exempts a master from liability for an injury sustained by one of his servants from the negligence of another, when both are engaged in one common employment for their master. The persons who caused the injury to plaintiff were at least two, namely, the man whose duty it was nightly to turn on the power into the main in Dock Street, so as to light the houses and lamps in the street, and to turn it off in the morning, and who neglected to do so sufficiently on the morning that the plaintiff received his injury, and the person who left the salamander, or stoker, as it has been indifferently called, at the place where it was, quite close to the place where the plaintiff was working at an open hole in the main pipe, where he was making connection with a pipe from a neighbouring house. The man who neglected to turn off the power effectually spoke of his duty in that particular as being his ordinary duty for many years, namely, to turn on the power every evening and to turn it off every morning ; and he gave the only evidence that was given as to how the fire in the salamander or stoker came to be placed where it was, close to the hole in the main at which the plaintiff was working, where it was not at the time at all required. He says that it was removed from a place where he himself

had placed it not long before, and where, if it had been suffered to remain, the plaintiff could not have received the injury; that the accident which injured him could not have happened, and that it was removed from that place and placed where it was by the order of the defendants' manager. If this be so, and this was the only evidence upon this point, then the defendants themselves, through their manager, were a party to the injury which the plaintiff suffered.

But it is quite unnecessary to dwell upon this. It is sufficient to say that the question whether the plaintiff was the defendants' servant, and under their control, and a co-labourer employed in one common employment with the persons who, being servants of the defendants, negligently caused the plaintiff the injury of which he complains, was a mere question of fact, which it was the office of the jury to determine, and that their findings cannot be said to be so manimanifestly erroneous as to justify a court to set aside their findings, and either to assume their function, or to order a new trial.

SEDGEWICK, J.—I concur, but with the greatest hesitation, in the dismissal of this appeal.

*Appeal dismissed with costs.**

Solicitors for the appellants: *Barker & Belyea.*

Solicitor for the respondent: *C. N. Skinner.*

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* As to a servant being at the same time in the employ of two masters see *Union S.S. Co.* v. *Claridge* [1894] A.C. 185, the report of which was published after this case was decided.

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*Mar. 20, 21.
*May 1.

CARTER & COMPANY, LIMITED (PLAINTIFFS) ..... APPELLANTS;

AND

SAMUEL D. HAMILTON AND JOHN PHILLIPS (DEFENDANTS). RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Novelty—Infringement.

C. & Co. were assignees of a patent for a check book used by shopkeepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves half being bound together and the other half folded in as fly-leaves with a carbonized leaf bound in next the cover and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check book with a like device but instead of the tape the end of the carbonized leaf, for about half an inch, was left without carbon and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent:

Held, affirming the decision of the Exchequer Court, that the evidence at the trial showed the device for turning over the black leaf without soiling the fingers to have been used before the patent of C. & Co., was issued and it was therefore not new; that the only novelty in the said patent was in the use of the tape; and that using the margin of the paper instead of the tape was not an infringement.

APPEAL from a decision of the Exchequer Court of Canada (1) dismissing the plaintiffs' action for infringement of their patent.

The facts of the case are sufficiently set out in the judgment of the court.

W. Cassels Q.C., and *Edgar* for the appellants. The tape was a sufficient novelty to entitle us to a patent. *Harrison* v. *Anderston Foundry Co.* (2); *Gould* v. *Rees* (3).

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

(1) 3 Ex. C. R. 351. (2) 1 App. Cas. 574.
(3) 15 Wall. 187.

The defendants used a colourable variation from our patent and infringed the combination; *Proctor* v. *Bennis.* (1); *Machine Co.* v. *Murphy* (2).

Johnston Q. C., and *Heighington* for the respondents referred to *Murray* v. *Clayton* (3); *Harris* v. *Rothwell* (4) in support of their argument that defendant's book was merely an improvement on that of the plaintiffs and not an infringement.

The judgment of the court was delivered by—

KING J.—This action was brought to restrain defendants from making, using or selling counter check books alleged by the plaintiffs to be an infringement of a patent of which they were the assignees granted February 15th, 1882, to one Carter. Upon the trial, before Mr. Justice Burbidge, the action was dismissed.

The subject of plaintiffs patent is called "The Paragon Black leaf check book," and was before the Court in *The Grip Printing and Publishing Co.* v. *Butterfield* (5) It is a book for use in shops for the making of duplicate entries by means of carbonized paper. In his specification the patentee said:

I am aware that black leaves are used in other forms of books used in transferring writing from one page to another, but they are either loose in the book and are therefore easily lost, and are dirty to handle, or are placed in the centre of the book and the leaf numbered on either side of it, which latter arrangement is faulty from the fact that the space left on each side of the black leaf when the leaves are torn out causes the black leaf to curl up and become unsatisfactory in its operation.

As a matter of fact the Muma & MacKay book, which was prior to the Carter patent, had the black leaf, with the composition on but one side, bound into the book next to the cover; and it had these in combination with the perforated fly-leaf which is also an element in the Carter combination.

(1) 36 Ch. D. 740.
(2) 97 U. S. R. 120.
(3) 7 Ch. App. 570.
(4) 35 Ch. D. 416.
(5) 11 Can. S. C. R. 291.

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The object of the Carter invention is thus stated in the specifications:

The object of the invention is to provide a check book in which the black leaf used in transferring writing from one page to another need not be handled and will not have a tendency to curl up after a number of leaves have been torn out, and it consists essentially of a black leaf check book composed of double leaves, one half of which are bound together, while the other half are folded in as fly leaves, both being perforated across so that they can readily be torn out, the black leaf being bound into the book next to the cover and provided with a tape bound across its end, the said black leaf having the transferring composition on one of its sides only. What I claim as my invention is: In a black leaf check book composed of double leaves one-half of which are bound together, while the other half folds in as fly leaves both being perforated across so that they can readily be torn out, the combination of the black leaf bound into the book next the cover and provided with the tape bound across its end, the said black leaf having the transferring composition on one of its sides only.

When the book is opened for use the black leaf is found lying on top of the double folded leaf. The first thing to be done is to disengage the free, or fly leaf, part of the double leaf and place it on the top of the black leaf; this done the black leaf lies between the two parts of the folded double leaf, and is ready for use. The purpose of the tape was to enable the salesman to throw back or raise the black leaf, and so disengage the fly leaf without soiling the fingers, and also to raise it again when tearing out the under leaf from the stub without soiling the fingers, a matter of some importance when certain goods were to be handled. It appears, however, to have been very soon found in practice that there was no practical advantage in the use of the tape, and at an early period the patentee and his assignees discarded it and manufactured and put upon the market as the patented article, "The Paragon Black leaf Counter Check book" without the tape, discontinuing the manufacture of the patented article. The books so manufactured and put upon the market are found by the learned judge to be substan-

tially similar to the Muma & MacKay book of 1871, which was in use in Canada from that time down to the granting of the plaintiffs' patent. In neither of these books is there tape, but in either of them the black leaf may be raised for the several purposes for which it is required to be raised without touching the carbon and therefore without soiling the fingers. This may be effected either by bending back the flexible book at the point of binding, and so causing the free ends of the leaves to fall apart, or by making use of the upper or clean side of the black leaf to move it away from the margin sufficiently to get at the leaf lying under it, or, as stated in the evidence, by the aid of the fly leaf if it is extended. A very slight use of the book would accustom one to these movements. In the cross examination of Mr. Ridout, a patent solicitor called by the appellant, he said in reply to the learned judge that if the patentee had had the experience when he patented it that he had subsequently he need not have put in the tape at all as he would have seen that the fly leaf accomplished the same result. This witness also stated that the tape was unnecessary and that the combination was essentially one of only two elements viz.: the carbon leaf bound in next to the cover and the perforated fly leaf, one of which (*i.e.*, the perforated fly leaf) performs a double function.

The effect of this might be to show that the patent, in that which was distinctive of it as a combination or otherwise, had no utility beyond what was found in the anterior combination, and so was without consideration. Mr. Cassels as to this says, first that the fly-leaf answers the purpose of the tape only under certain conditions; and secondly, that the defendants upon the trial admitted the utility of the plaintiffs' patent. Such an admission was indeed formally

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made, and is referred to by the learned judge in giving judgment.

Apart, however, from any question of utility, the fact of the practical discarding of the tape, and of its apparently superfluous character, are not without importance in another point of view presently to be adverted to.

The plaintiffs' combination is therefore to be taken as useful and (so far as these books are concerned) the method of raising the carbon leaf by a tape attached to it may be taken to be a new method. Then the question is: Have the defendants infringed the plaintiffs' patent? It is claimed that they have; that they have made substantially the same combination and have varied from it only colourably. In the defendants' book there is a contrivance for turning the carbonized leaf (which in their book forms part of the flexible cover) without soiling the fingers. Their method consists in leaving a margin of about half an inch free from carbon.

The question on this is: Has the plaintiffs' combination in substance been taken? In *Proctor* v. *Bennis*, (1), Cotton L. J. stated the question thus:

> Has the defendant, though not exactly taking the whole combination which has been patented, taken, by slight variations or by mechanical equivalents, the substance of it so as to produce the same result by practically the same means?

The answer to that depends to some extent on the nature and object of the invention.

In *Curtis* v. *Platt* (2), Wood V. C. says:

> Where the thing is wholly novel and one which has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object to see whether or not they are merely colourable contrivances for evading that which has been done before. When the

(1) 36 Ch. D. 740. (2) 3 Ch. D. 136, note.

object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before has a right to extend very largely the interpretation of those means which he has adopted for carrying it into effect.

This was affirmed by Lord Westbury L.C., on appeal (1).

In *Proctor* v. *Bennis*, (2) the Court of Appeal commented upon *Curtis* v. *Platt* (1) and dwelt upon the distinction between cases of combination for an old object and cases of combination for a new object.

Cotton L. J. says :

> In applying the words used by the judges in that case (*Curtis* v. *Platt* (1)) we must consider the nature of the case before them, (viz. : "an improvement in a machine which had been long in use for producing a certain result," and I come to the conclusion that what they meant was that where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out for effecting the improvement.

And see also per Bowen L. J., p. 764, and Fry L. J., at pp. 767, 768.

Now the case before us is that of a combination for an old object rather than for a new object. In substance, although not in terms, it is for an improvement in a known contrivance for producing an old result. Check books with carbon leaf carbonized on but one side and bound in next to the cover and with double perforated leaves were known contrivances with a known object prior to plaintiffs' patent. In the use of such book by salesmen they would know that, without the exercise of care, the fingers might become soiled, and any one whose business might lead to the handling of delicate fabrics at the same time would naturally use the books in a way to avoid soiling the fingers,

(1) 3 Ch. D. 138, note.

(2) 36 Ch. D. 740.

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and in doing so would make use of the mechanical aids which the book afforded. The Muma & MacKay book did afford fairly adequate means of doing this by the carbon leaf being free of carbon on one side and by the perforated fly leaf, and what is of some importance is that the practical discarding by the plaintiffs of the tape (their special device for avoiding the soiling of the fingers) and their putting upon the market "The Paragon Black leaf Counter Check book", without the tape as their patented article, with no substantial variation from the prior book of Muma & MacKay, in preference to, and in substitution for, their patented combination, goes to show that the results they sought to attain by their patented article were adequately attained by the old means, and that their patent was, in reality, not the case of a combination productive of entirely new result but a supposed improvement in the means of affecting an old object. This is also the proper conclusion upon the evidence at large. It is clear that all the results attained by the patented book are attainable (although perhaps not with equal facility) by the book which plaintiffs are manufacturing and putting on the market; and that the same results could have been effected and no doubt in practice must have been frequently effected (although perhaps with still less facility) by the persons who, prior to plaintiffs' patent, had occasion to use the Muma & MacKay book, the fly leaf (as expressed by Ridout and as found by the learned judge) performing a double function. The case therefore is not like that of *Proctor* v. *Bennis* (1) where the combination was a new invention with a novel result; but rather comes within the class of cases dealt with in *Curtis* v. *Platt* (2) where there was no novelty in the results, but where the only novelty which could be claimed was that of improvement in the application and use of certain mechanical means in order to produce in a known article the same

(1) 36 Ch. D. 740.

(2) 3 Ch. D. 136 note.

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result which in it had been produced by other mechanical means. The turning over of a carbon leaf in these books without touching the carbon cannot be considered novel. The novelty introduced by plaintiffs lies in turning it over by means of an attached tape.

We are not therefore to extend very largely the interpretation of those means which the plaintiffs have adopted for carrying their object into effect, although they are to be protected against merely colourable variations. There must necessarily be considerable similarity in the different ways of turning a leaf, and where one seeks to establish a right in respect of a mode of doing such a simple thing and for a well known purpose it seems only reasonable to confine him with some strictness to the particular means or methods which he adopts. The two ways of turning back a leaf as shown in the two check books are as diverse as one could expect considering the nature of the thing to be done. The one is not a mere colourable variation from the other, but an essentially different means for producing what appears to have been the common and well-known object.

It would be an extraordinary result if the plaintiffs could hold the field with their disused device and prevent others from trying other, and perhaps less sterile, means of effecting the same far from novel object or result. The conclusion therefore is that there has been no infringement of the plaintiffs' patent, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Edgar & Malone.*

Solicitors for respondents: *Heighington, Reade & Johnston.*

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*April 2.

*May 1.

ALEXANDER McINTOSH.....APPELLANT ;

VS.

THE QUEEN.....RESPONDENT ;

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

Criminal appeal—Criminal Code 1892, *sec.* 742—*Undivided property of co-heirs—Fraudulent misappropriation—Unlawfully receiving—R.S.C. ch.* 164, *secs.* 85, 83, 65.

Where on a criminal trial, a motion for a reserved case made on two grounds is refused and on appeal to the Court of Queen's Bench (appeal side) that court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was a dissent.

A conviction under sec. 85 of the Larceny Act, R. S. C. ch. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under sec. 65.

A fraudulent appropriation by the principal, and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under secs. 85 and 83 of the Larceny Act.

By the first count each was charged with having unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same.

The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under sec. 85, ch. 164 R. S. C. at the time when he so received the money. A. who was the executor of C.'s estate, and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

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

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On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste C.J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of the money, took it to B.'s store, and handed it to him saying : " Here is the boodle ; take good care of it." On the same evening, he absconded to New York.

On appeal to the Supreme Court of Canada :

Held, affirming the judgment of the court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under sec. 85 ch. 164, R. S. C. of receiving it, knowing it to have been unlawfully obtained. Gwynne J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) on an appeal from the decision of the trial judge refusing a motion for a " reserved case" after verdict (1).

The " Reserved case" submitted to the Court of Queen's Bench by Mr. Justice Wurtele, the trial judge, was as follows :

" The prisoner Alexander McIntosh was tried before me on two counts ; by the first, for having unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs Dalrymple, so as to deprive them of their beneficiary interest in such sum ; and, by the second, for having received such sum from one James Dalrymple, who had so unlawfully and with intent to defraud the heirs Dalrymple, taken and appropriated the same to his own use, so as to deprive them of their beneficiary interest therein, knowing the same to have been so unlawfully taken ; and on the 14th September last (1893) he was acquitted on the first count and was found guilty on the second.

(1) Q. R. 2 Q. B. 357.

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After the rendering of the verdict, on the 20th September, 1893, Mr. St. Pierre Q. C., of counsel for the prisoner, moved:

"That inasmuch as, according to the evidence adduced on behalf of the crown, the money referred to was appropriated by one James Dalrymple, who was the proper keeper of that money, in his capacity of testamentary executor of the late James Dalrymple, and inasmuch as the act of appropriation by the said James Dalrymple only took place at the time when the money was handed over to the accused McIntosh, which act, to wit, that of handing over by Dalrymple and that of receiving by McIntosh formed but one single undivided act:"

"the following point be therefore reserved for the decision of the Court of Queen's Bench, appeal side;"

"whether McIntosh could be rightfully convicted of the crime of feloniously receiving a certain sum of money, knowing it to have been stolen."

"And that inasmuch as according to the same evidence the money referred to is alleged to be the undivided property of several heirs, who have never apportioned their respective shares;"

"the following point be reserved for the said Court of Queen's Bench, appeal side;"

"whether the accused could be found guilty of feloniously receiving money, of which he was part owner, for an undivided and indefinite share."

"In my opinion, the evidence showed that one Arthur Brennan owed $5,375.00 to the heirs Dalrymple; that James Dalrymple, and the prisoner as the legatee of his wife, had each a certain share of this money; that all the interested parties gave Mr. Brennan an acquittance, and agreed that James Dalrymple should receive the money from Mr. Brennan and divide it among them; that he did receive the amount on the

the 19th November, 1887, but that instead of dividing it, he handed it over to the prisoner on the evening of the day on which he had received it, together with other moneys coming fron payments of interest belonging to the heirs, which he had previously received as executor, and which formed together a total sum of $7,000.00; that after receiving the $5,375.00 from Mr. Brennan the prisoner went to the Windsor Hotel and bought a railway ticket for New York, taking for that purpose some of the money which he had received from Mr. Brennan and thereby breaking its bulk; that the prisoner had previously, on the 10th November, 1887, drawn from the Savings Bank, where he had deposited the moneys coming from interest, the sum which he added to the money received from Mr. Brennan and which formed with it the sum of $7,000.00; that it had been previously agreed between James Dalrymple and the prisoner that the former would fraudulently appropriate the money due by Mr. Brennan when it should be paid to him, and that he would abscond immediately afterwards, and that he drew the money from the Savings Bank with the intention of appropriating it and of absconding; that when he handed the money over to the prisoner he told him that it was the "boodle" and that, on the evening of the 19th November, 1887, James Dalrymple fled to the United States, and the prisoner went to the railway station to see him off."

"I was of opinion, as James Dalrymple, when he received the money from Mr. Brennan, as a bailee, intended to misappropriate it and to defraud his co-heirs of their shares and had carried out that intent with the previous knowledge and connivance of the prisoner, that he had appropriated it to his own use, so as to deprive them of their beneficiary interest in it, before he had handed it to the prisoner; that the

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fact of breaking the bulk and taking some of the money to buy the railway ticket constituted a fraudulent appropriation of the money and ended his relation to his co-heirs of bailee; that moreover the fact of drawing the money of the heirs which he had deposited in the Savings Bank, with the intention of appropriating it to himself and fleeing to the United States, also ended his relation to his co-heirs of bailee of that money and rendered him guilty of fraudulent appropriation; and that the prisoner knew, when the $7,000.00 were received by him, that they had been previously fraudulently taken and misappropriated; and I therefore declared that the first point was not well taken."

"I was also of opinion that under section 85 of the Larceny Act (ch. 164 of the Revised Statutes of Canada) James Dalrymple was rightfully indicted and convicted of having unlawfully taken the $7,000.00 as under that section any one, being one of several beneficiary owners of any money, who steals or unlawfully converts the same to his own use or to that of any other person, is liable to be dealt with as if he had not been one of such beneficiary owners, and that as a consequence the prisoner was rightfully indicted and found guilty under section 83 of the same act for having received this money knowing it to have been unlawfully taken and misappropriated; and I therefore also declared that the second point was wrongly taken."

"I had no doubts on the two points, and on the 23rd September last, (1893), I consequently refused to reserve the two questions which the prisoner's counsel asked me to submit for the opinion of the Court of Appeal. The prisoner thereupon applied for leave to appeal from my ruling or decision, and on the 25th November last, (1893,) leave to appeal was granted."

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" In conformity with paragraph 3 of section 744 of the Criminal Code, 1892, the present case is now stated by me; and I now submit for the opinion of the Court of Appeal, the two following questions, viz.:"

" 1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of $7,000.00 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated, inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed to him."

" 2nd. Whether the prisoner could be found guilty of unlawfully receiving money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple, of whom he represented one."

H. Saint Pierre Q. C. for appellant relied on and cited: *The Queen* v. *Warner* (1); *The Queen* v. *Perkins* (2); *The Queen* v. *Smith* (3); Russell on Crimes, by Greaves (4); Roscoe's Criminal Evidence (5); *The Queen* v. *Berthiaume* (6); *The Queen* v. *St. Louis* (7); *Mooney* v. *The Queen* (8).

M. J. F. Quinn Q. C., for the respondent: *Queen* v. *Ashwell* (9); *Queen* v. *Craddock* (10); *The People* v. *Smith* (11). Crankshaw on The Criminal Code, art. 742.

The judgment of the majority of the court was delivered by

TASCHEREAU J.—Two questions were submitted to the Court of Appeal in Montreal in this case.

1st. " Whether the accused could be found guilty of feloniously receiving money from a person who had a

(1) 7 Rev. Leg. 116.
(2) 2 Den. C. C. 459.
(3) 11 Cox C. C. 511.
(4) 4 ed. 2 vol. p. 236.
(5) 4 ed. 1874, p. 638.
(6) M. L. R. 3 Q. B. 143.
(7) 10 L. C. R. 34.
(8) Stephen's Dig. vol 3 p. 423.
(9) 16 Q. B. D. 190.
(10) 20 L. J. M. C. 31.
(11) 23 Cal. Rep. 280; R. S. C. ch. 164, secs. 85, 65.

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legal right to the custody of that money but who had a felonious intent to the knowledge of the accused in intrusting the latter with said money;"

2nd "Whether the accused could be found guilty of feloniously receiving money of which he was part owner for an undivided and indefinite share."

Upon the second question, the learned judges were unanimous in the opinion that under sec. 85 of the Larceny Act, applicable to this case, there was no doubt that the objection taken by the accused on the point therein mentioned was unfounded, and consequently, there being no dissent on that question, no appeal thereon lies to this court, and it has been abandoned at the hearing. Sec. 742 Criminal Code of 1892; *Reg.* v. *Cunningham* (1) The first question, therefore, one of the learned judges having dissented from the judgment against the accused, is the only one before us. It is loosely drawn; the terms "feloniously and felonious intent" are not felicitous expressions in relation to a misdemeanour. However, we understand what the question means.

The facts of the case are as follows:

During the November term of the year 1892, two bills of indictment were presented by the Grand Jury one against James Dalrymple and the other against McIntosh, both under sections 85 and 83 of the Larceny Act, then in force. Both bills were drafted in exactly the same terms. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use, seven thousand dollars belonging to the heirs Dalrymple, *so as to deprive them of their beneficiary interest in the same.*

The second count was worded as follows: "And the Jurors aforesaid, upon their oath aforesaid, do further present: that the said Alexander McIntosh, o he

(1) Cassels's Dig. 2 ed 107.

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nineteenth day of November, in the year of Our Lord, one thousand eight hundred and eighty-seven, at the City of Montreal in the District of Montreal, *unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple* which said sum of money, *to wit, said sum of seven thousand dollars had before then been unlawfully obtained and taken and appropriated by one James Dalrymple*, the obtaining and the taking of which sum of money, to wit, of said sum of seven thousand dollars, by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by a virtue of section eighty-five, chapter one hundred and sixty-four of the Revised Statute of Canada, *he (said Alexander McIntosh) at the time when he so received the said sum of money to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid.*"

James Dalrymple pleaded guilty to the charge on the first count, and McIntosh was acquitted of the charge contained in the first count of the indictment, but was found guilty on the second, to wit, on the charge of receiving.

The prisoner's counsel thereupon moved for a er-ved case, which subsequently was heard before the Court of Appeal on the two question above mentioned.

Mr. Justice Wurtele who presided at the trial, stated the case as follows: (His Lordship then read from the reserved case as already published and proceeded as follows) :—

The fact that Dalrymple bought his railway ticket out of that money, were it material, cannot be denied by the appellant here as he has attempted to do. The facts must be taken as stated by the learned judge

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who presided at the trial and cannot in any way be contradicted.

The majority of the judges of the Court of Appeal held that Dalrymple was not a bailee but a trustee; that as a trustee he was properly indicted under sec. 85; that Dalrymple's appropriation took place before he handed the money to appellant; that appellant was properly convicted of receiving; and that there was a fraudulent appropriation.

The learned Chief Justice, in a dissenting opinion, agrees that Dalrymple was guilty of fraudulent appropriation as a trustee, but that he ought to have been indicted under section 65; that he was not liable under section 85; that because he was not liable under section 85 the appellant could not be found guilty of the offence described in the indictment i. e. receiving money previously unlawfully obtained, taken and appropriated by the said James Dalrymple under circumstances which made such taking a misdemeanour under section 85; that consequently the offence has not been proved as charged.

Section 85 of ch. 164 R. S. C. is in the following terms:

Every one who unlawfully and with intent to defraud *by taking*, by embezzling, by obtaining by false pretenses, *or in any other manner whatsoever, appropriates to his own use, or to the use of any other person*, any property whatsoever, *so as to deprive any other person temporarily or absolutely, of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person has therein*, is guilty of a misdemeanour and liable to be punished as in the case of simple larceny, and if the value of such property exceeds two hundred dollars, the offender shall be liable to fourteen years imprisonment.

Section 83 of the same act provides that:

Any one who receives any money, valuable security, or other property whatsoever, the stealing, *taking*, obtaining, converting, *or disposing whereof*, is made a misdemeanour, by this act, if he knows the same to have been unlawfully stolen, *taken*, obtained, *converted* and disposed of, is guilty of a misdemeanour, and liable to seven years imprisonment.

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Were it not for the dissent of the learned Chief Justice of the Court of Queen's Bench, and of my brother Gwynne in this court, I would say that the appellant's contestations are altogether unfounded. He would argue, I understand, that because Dalrymple might have been indicted under sec. 65 of the statute he could not be indicted under sec. 85. But why not, if the facts proved constitute an offence under the latter section?

We have an express statutory enactment that if any one is punishable under two or more statutes, or two or more sections of the same statute, he may be indicted under any of them. Sec. 933 Code (a re-enactment). The question arises then, whether under the facts proved in the case, Dalrymple was guilty of the misdemeanour created by sec 85.

There is no doubt but that McIntosh was not precluded by Dalrymple's conviction from proving that Dalrymple was not guilty under sec. 85.

When the principal has been previously convicted then the conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet it is competent to the receiver to controvert the guilt of the principal. (1) But the fraudulent appropriation by Dalrymple is clearly established, and the facts proved fully support the finding of the jury against McIntosh. Whether Dalrymple was a bailee, or a trustee, or neither one nor the other is immaterial. Every one, says this clause, never mind who he is, whether he has a right to the possession or not, or to legally hold or not, who unlawfully and with intent to defraud, etc. Now, here, the intent to defraud cannot be questioned; therefore, the possession of this money by McIntosh, however lawful it might have been, became unlawful by this preconceived plan of

(1) 2 Russell on Crimes 4 ed. 571.

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criminally appropriating it. And whether he might be said to have taken it, or embezzled it, or stolen it, or obtained it by false pretenses, is immaterial. All of these fraudulent conversions are covered by this sec. 85 with the addition of "in any other manner whatsoever." The fraudulent appropriation of the money so as to deprive the heirs Dalrymple of their beneficiary interest in it, cannot be, and is not denied by the appellant, but he bases on the facts proved a second objection to the conviction. He argues that even if Dalrymple were guilty of fraudulent appropriation, it was only when he handed the $7,000 to the appellant that he was guilty of any crime; that consequently the appellant, if guilty at all, was also guilty of fraudulent appropriation and cannot be indicted as a receiver; that he ought to have been found guilty of the fraudulent appropriation, or acquitted, and that the jury had no right to bring a verdict of guilty on the second count of the indictment for receiving. On that point the judges in the court below were unanimous in holding the appellant's contention unfounded.

The facts that bear on this point, though appearing in the reserved case, may perhaps be recapitulated here.

Dalrymple was appointed trustee or executor of two estates; one his father's the other his mother's.

As such trustee he had in his possession a sum of $1,812.82 which up to the month of November, 1887, was deposited in one of the banks in his own name. On 10th November, 1887, he drew this money out of the bank. On 15th November, 1887, having collected a certain sum due the estate by one Magnan, the heirs were called together and each received his portion of this sum. Dalrymple did not divide the $1,812.82 which he had drawn from the bank. There was a sum of $5,375.00 falling due, by one Brennan to

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the heirs, a few days after the division of the Magnan money, and the heirs granted a notarial discharge to Brennan and Dalrymple for this sum and gave a verbal authorization to Brennan to pay the money to Dalrymple, and to Dalrymple to receive the money from Brennan. At the time of the division of the Magnan money, some of the heirs objected to the appellant receiving as large a share as he did. A disagreement arose and the appellant and Dalrymple walked home from the notary's office together. They then agreed to a scheme by which Dalrymple should appropriate the money to be paid by Brennan and defraud the other heirs. Several interviews took place, between the date of the division of the Magnan money and the receipt of the Brennan money by Dalrymple, and it was agreed between them, that when Dalrymple should receive this money he would hand it to appellant for safe keeping and abscond to the United States, This arrangement was fully carried out. Brennan paid Dalrymple $5,465.00 by check on 19th November, 1887. Dalrymple cashed the check; handed the difference between the amount due by Brennan, $5,375.00, and the amount of the check back to Brennan; went to the Windsor Hotel; purchased a ticket for New York; went home, took the $1,812.82 and made up a parcel of $7,000.00 out of this and the balance of $5,375.00; took this parcel to appellant's store, as previously arranged, and handed it to him saying: "Here is the boodle, take good care of it." On the same evening he absconded to New York.

Upon this evidence, I am of opinion, with the court below, that there was a fraudulent appropriation by Dalrymple previous to his handing over the money to McIntosh.

Whether the appropriation took place only at the very last second before he handed the boodle, as he

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termed it, to McIntosh, or by any of his previous acts, it is immaterial. If it was then and there boodle the fraudulent appropriation had preceded. But, even if it could be said that the appropriation took place only by the handing over the money, that would be sufficient. The same act then constituted a fraudulent appropriation by Dalrymple, and a fraudulent receiving by McIntosh. The case of *Reg.* v. *Roberts* (1) would appear to be an authority for the proposition that there was no fraudulent conversion by Dalrymple on the facts proved till he handed over the money to McIntosh so as to constitute larceny, if the relation between them had been that of master and servant. But that case is based on the peculiar requisites of the conversion necessary at common law to constitute larceny, the doctrine whereof cannot be extended to the statutory offence provided for by sec. 85 of the Larceny Act.

I think the conviction was right.

After verdict the court is bound to resort to any possible construction which would uphold an indictment against a purely technical objection as was held in *Reg.* v. *Craddock* (2) on a verdict for receiving when the accused had, as here, been found not guilty on two first counts for stealing. It is legal by an express statutory enactment to charge a stealing and a receiving in the same indictment. There is consequently no such repugnancy in the present case as was contended for by the appellant. *Reg.* v. *Huntley* (3.) Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. *Reg.* v. *Hilton* (4).

(1) 3 Cox 74.
(2) 2 Den. 31.
(3) Bell C. C. 238.
(4) Bell C. C. 20.

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An indictment may charge the prisoner, in two counts, with being an accessory before the fact and accessory after the fact. *Rex.* v. *Blackson* (1).

A person having a joint possession with the thief may be convicted as a receiver. *Reg.* v. *Smith* (2); *Reg.* v. *Wiley* (3.) And in the same case, a conviction for a receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found.

Dalrymple might have been acquitted and yet McIntosh found guilty. And an accessory before the fact may also be a receiver. *Reg.* v. *Hughes* (4); *Reg.* v. *Pulham* (5); *Reg.* v. *Burton* (6); though a principal cannot be. *Reg.* v. *Coggins* (7); except under the circumstances mentioned in Greave's note to *Reg.* v. *Perkins* (8) in 1st Russ. 53. And here, McIntosh, though not a principal in the ordinary sense of the word, was an accessory before the fact, for it is settled law that, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence was committed, are not principals but accessories before the fact. *Reg.* v. *Soares* (9); *Reg.* v. *Davis* (10); *Reg.* v. *Else* (11); *Reg.* v. *Tuckwell* (12). But as accessory before the fact he was liable to be indicted and punished as a principal. *Reg.* v. *James* (13).

In a note to *Reg.* v. *Langmead* (14), where the prisoner was found guilty of receiving only, though also charged with the larceny, Greaves says:

(1) 8 C. & P. 43.
(2) Dears. 494.
(3) 2 Den. 37; sec. 317, Crim. Code.
(4) Bell C. C. 242.
(5) 9 C. & P. 280.
(6) 13 Cox. 71.
(7) 12 Cox. 517.
(8) 2 Den. 459.
(9) R. & R. 25.
(10) R. & R. 113.
(11) R. & R. 142.
(12) Car. & M. 215.
(13) 17 Cox. 24; sec. 61 Code.
(14) L. & C. 427.

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A clearer case of this there never was ; the sheep were proved to have been in possession of the son, and the prisoner received them ; and there was abundant evidence of guilty knowledge, and it was perfectly immaterial whether the prisoner had previously stolen them, for a man may be a thief and a receiver as well. There was also evidence that he either stole, or was an accessory before the fact to the stealing.

Now, here also, there is evidence that McIntosh was an accessory before the fact to the fraudulent appropriation, and therefore a principal, as in misdemeanours all are principals, and he was rightly charged as such in the first count of the indictment. But why was a verdict of guilty on the count for receiving not legal because the jury found him not guilty on the first count, as it was in Langmead's case, or Hughes' case, or the other cases above cited ?

He cannot argue that he became a principal only when he received the money ; he was, in law, a principal before that.

I would dismiss the appeal.

GWYNNE J.—In the month of September, 1893, the appellant was convicted in the District of Montreal upon a count in an indictment which charged him as follows :

" And the Jurors aforesaid, upon their oath aforesaid do further present : that the said Alexander McIntosh on the nineteenth day of November in the year of our Lord one thousand eight hundred and eighty seven at the City of Montreal in the District of Montreal, unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple, which said sum of money, to wit, said sum of seven thousand dollars had before then been unlawfully obtained and taken and appropriated by one James Dalrymple, the obtaining and the taking

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of which sum of money, to wit, of said sum of seven thousand dollars by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by virtue of section eighty five chapter one hundred and sixty four, of the Revised Statutes of Canada, he (said Alexander McIntosh) at the time when he so received the said sum of money, to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid."

Upon the verdict of guilty upon the charge contained in this count being rendered, counsel for appellant applied for a reserved case upon certain points stated by him. His application was refused by the learned judge who tried the case, and thereupon application was made to the Attorney General, under sec. 744 of 55 & 56 Vic. ch. 29, for leave to appeal, which having been granted, a case was stated to the Court of Queen's Bench, appeal side, Montreal, under the provisions of the third subsection of said sec. 744. The case so stated had appended thereto as part thereof the evidence upon which the verdict was rendered, and submitted for the opinion of the Court of Appeal the two following questions:

"1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of $7,000 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated, inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed it to him.

2. Whether the prisoner could be found guilty of unlawfully receiving money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple of whom he represented one."

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The majority of the Court of Queen's Bench in appeal, the Chief Justice dissenting, were of opinion that the conviction was good, and therefore affirmed it and dismissed the appeal. From that judgment the present appeal is taken.

The count upon which the appellant has been found guilty is plainly framed under sec. 83 of the Dominion act 49 Vic. ch. 164, namely, that he had received from James Dalrymple the sum of, to wit, $7,000 which at the time of receiving it the appellant well knew that the said James Dalrymple had, previously to the appellant receiving the money from him, unlawfully appropriated, taken and obtained. Now the moneys handed by Dalrymple to the appellant were received by James Dalrymple in his character of testamentary executor of an estate in which the said James Dalrymple and the appellant and others were jointly interested as part owners. The money was therefore lawfully obtained by James Dalrymple and so long as it remained in his possession was there lawfully, whatever intention he may have entertained in virtue of a conspiracy with the appellant or otherwise to misappropriate it, for what the law makes criminal is the act done in pursuance of the criminal intention, not the mere intention not followed by an act to carry such intention into effect.

Until, therefore, James Dalrymple parted in some manner with the money of which he was lawfully in possession the appellant could not be guilty of the offence with which he is charged of having received from Dalrymple money which at the time of his receiving it he well knew that Dalrymple had previously unlawfully obtained or appropriated. If the handing of the money to the appellant constituted the appropriation which made Dalrymple guilty of the offence which he is alleged in the count against the

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appellant to have committed, then the count against the appellant cannot be maintained for the offence committed by Dalrymple, with the knowledge of the previous committal of which the appellant is charged in the count, must be one which had been committed before ever Dalrymple handed the money to the appellant. However guilty the appellant may be under the evidence of some offence against the criminal law in the matter, it is plainly not that charged in the count upon which he has been found guilty for there is no evidence of any misappropriation of the money handed by Dalrymple to the appellant until the money was so handed. Neither the pre-arranged agreement between Dalrymple and the appellant as to the appropriation of the money to which Dalrymple has testified, nor his misappropriation, if any there was, of other money belonging to the estate of which he was such testamentary executor, can be of any consequence upon a count which charges that the appellant received the money which he did receive from Dalrymple well knowing that Dalrymple had previously unlawfully appropriated, obtained or taken it.

I am of opinion, that the evidence fails wholly to establish such charge, and therefore that this appeal must be allowed and that the conviction must be quashed.

Appeal dismissed with costs.

Solicitor for appellant: *H. C. St. Pierre.*

Solicitor for respondent: *The Attorney General of Quebec.*

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*Mar. 19, 20.

*May 1.

THE CORPORATION OF THE CITY OF TORONTO (PLAINTIFFS) } APPELLANTS;

AND

THE TORONTO STREET RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of contract—Street railway—Permanent pavements—Arbitration and award.

The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the City corporation could assume the ownership of the railway and property of the company on payment of the value thereof to be determined by arbitration. The company was to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamised and in good repair using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard.

The City corporation laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years on the ground that the cedar block pavement had proved to be by no means permanent but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the Company was only liable to pay for permanent roadways and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with but an agreement was entered into by which all matters in dispute to the end of the year 1888 were

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ

settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends."

This agreement was ratified by an act of the legislature passed in 1890, which also provided for the holding of the said arbitration which having been entered upon the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim an action was brought by the city to recover the said amount.

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration. etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.

Held further, that by an act passed in 1877, and a by-law made in pursuance thereof, the company was only assessed as for local improvements which, by the Municipal Act constitute a lien upon the property assessed but not a personal liability upon owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division, the judgment at the trial for the defendants.

The facts of the case are stated in the judgment of the court delivered by Mr. Justice Gwynne, as follows:—

Upon the 26th of March, 1861, the plaintiffs entered into an agreement with one Alexander Easton, for the

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construction of street railways in the City of Toronto, and for the maintenance and operation thereof for the period of thirty years from the said 26th March, 1861, upon certain terms and conditions therein mentioned, the only ones of which necessary to be set out here are the 3rd, 17th, 18th and 20th.

It was provided by the 3rd that the roadway between, and within at least one foot six inches on each side of the rails should be paved or macadamised and kept constantly in good repair by the said Easton, who should also be bound to construct and keep in good repair crossings of a similar character to those adopted by the corporation at the intersection of every railway track and cross streets. By the 17th, that should the proprietors neglect to keep the track or the roadway, or the crossings between and on each side of the rails, in good condition, or to have the necessary repairs made thereon, the city surveyor or other proper officer should give notice thereof requiring such repairs to be made forthwith, and if not made within a reasonable time the said surveyor or other officer as aforesaid should cause the repairs to be made, and the amount so expended might be recovered in any court of competent jurisdiction.

By the 18th—That the privilege granted by the agreement should extend over the period of 30 years from the date of the agreement, but that at the expiration thereof the corporation might, after giving six months notice prior to the expiration of the said term of their intention, assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration, and that in case the Corporation should fail in exercising the right of assuming the ownership of the said railway at the ex-

piration of 30 years as aforesaid, they might at the expiration of every five years to elapse after the first 30 years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereunto appertaining, after one year's notice to be given within the twelve months immediately preceding every fifth year as aforesaid, and payment of their value to be determined by arbitration. By the 20th—that the agreement should only have effect after the legislation necessary for legalizing the same should have been obtained.

By an act of the legislature of the late province of Canada passed on the 18th May, 1861, 24 Vic. ch. 83, the said Alexander Easton and others were incorporated as "The Toronto Street Railway Company," and thereby the said agreement of the 26th March, 1861, was ratified and confirmed and held to be valid and binding upon the said city of Toronto and the Toronto Street Railway Company. The company having become insolvent a new company by the same name and subject to all the obligations imposed upon the former company by the said agreement with the city and by the said act, 24 Vic. ch. 83, was incorporated in the place and stead of the former company by a statute of the Ontario legislature, 36 Vic. ch. 101, passed on the 29th March, 1873. By another act of the same legislature passed on the 2nd March, 1877, 40 Vic. ch. 85, it was enacted as follows, among other things:

1. That the said Toronto Street Railway Company should be bound to construct, renew, maintain and keep in good order and repair, the roadway between the rails, and one foot and six inches outside of each rail, using for that purpose the same material and mode of construction as that which should from time to time be adopted and used for the remaining portion of the street by the corporation. Provided, that where

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the corporation of the city of Toronto should adopt and use in any street or portion of street traversed by the railway a permanent pavement of wood, stone, asphalt or other material of the like permanent character, the said Street Railway Company should not in such case be bound to construct the same or to pay more than the cost price of such pavement over the space between their rails and for one foot six inches outside of each rail, and as against the said company, that such price should not, in any case, exceed the sum of two dollars and fifty cents per square yard.

4. That in every case of construction or renewal of any kind of permanent pavement upon any of the streets occupied by the said Street Railway Company, the said company should have the option of constructing their portion of any such pavement, or at their request the said corporation of the city of Toronto should construct the same and that in every such case the corporation should assess an annual rate, (covering interest and sinking fund extending over the like period as that upon which the assessment upon the adjacent ratepayers is adjusted) upon the said company for the cost thereof not exceeding the sum of two dollars and fifty cents per square yard with full power to the said corporation to raise such sum by an issue of debentures and to collect the same in the manner provided under the Municipal Act for the construction of local improvements.

5. That if the corporation should at any time elect to assume the said street under the provisions of the agreement and by-law in that behalf, the arbitrators appointed to determine the value of the real and personal property of the said company should also estimate, as an asset of the Company, the value to the said company of *any permanent* pavement thereafter *constructed*

or paid for by *the said company* for the balance of the life of the said pavement.

In the year 1882, and subsequent years up to and inclusive of 1888, the corporation constructed upon some of the streets of the city which were traversed by the company's railway cedar block pavements or roadways as and for *permanent pavements* and, at the request of the company, constructed their part under the provisions of the above statute, and they issued debentures to cover the cost of the whole of the said respective works, and passed by-laws whereby they charged to the company, under the provisions of the said statute, that portion of such respective works, payable by annual instalments or assessments, covering cost, interest and sinking fund in the same manner and for the like period as adjacent ratepayers were charged, rated and assessed for the said respective works under the provisions of the Municipal Act for the construction of local improvements; the rates charged for their several works were spread over periods varying from eight to twenty years. In the year 1884, the City of Toronto procured another act to be passed upon their petition by the Ontario Legislature, 47 Vic. ch. 59, whereby it was, among other things, enacted that;

"In the case of the Toronto Street Railway Company or any other body corporate, who may be assessable under any general or special act for the payment of the cost of any portion of any work, improvement or service otherwise than in respect of real property fronting or abutting on any street benefitted by such improvement, work or service the said company or body corporate, as the case may be, shall be assessable respectively at their head office, either in one sum for their share of the costs of the work or improvement, or in case the cost of the work is payable in instalments, then for such per annum, for the term of years within

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which the other portions of *such debt* are made payable as will be sufficient to pay off the amount of the *debt created* on the security of their assessment, together with interest at the same rate per annum as is chargeable and payable in respect of the other portions of the debt, and such assessment shall constitute a lien and charge upon any real estate owned by or belonging to the said company or body corporate."

On the 7th June, 1886, the corporation of the city passed a by-law entitled:

"A by-law to provide for an issue of five per cent ten year local improvement debentures, being the proportion to be borne by the Toronto Street Railway Company of the cost of construction of cedar block roads on certain streets herein named, and for rating the said Toronto Street Railway Company therefor."

The by-law then recites six several by-laws passed by the city during 1885, for raising by the issue of local improvement debentures, payable at the expiration of ten years from the date of issue of the same, the amount for which the railway company is said to be liable amounting in the whole to $24,258.07; it then recites the above provisions extracted from 40 Vic. ch. 85, and 47 Vic. ch. 59. It then recites that the corporation of the city had at the request of the Toronto Street Railway Company constructed their portion of the said pavements on the several streets mentioned in the by-law, the aggregate cost of the same amounting to the sum of $24,258.07, and that it was necessary, pursuant to the said recited acts in that behalf, to make provision for the issue of debentures, and for the raising annually, by a rate to be levied on the Toronto Street Railway Company, the sum required to be provided for the payment of the interest on said debentures during their currency, and for their payment at maturity. The by-law then enacts:

1st. That the sum of twenty-four thousand two hundred and fifty-three dollars and seven cents be raised by loan by this corporation at the security of the special rate hereby imposed and that the debt so to be created is further guaranteed by the Municipality at large and that the debentures amounting to the said sum be issued by the corporation therefor.

2nd. That during ten years the currency of the debentures to be issued under the authority of this by-law the sum of $1,212.05 shall be raised annually for the payment of interest and the said debentures and also the sum of $1,940.25, shall be raised annually for the payment of the debt making in all the sum of $3,152.90 to be raised annually as aforesaid, and that an annual rate and assessments therefor is hereby imposed on the Toronto Street Railway Company over and above all other rates and assessments which sum shall be annually inserted on the collectors local improvements tax rolls for, and be collected at the head office of, the said Toronto Street Railway Company in the ward of St. James or any other ward in which said office may be from time to time located, in each year for the next succeeding ten years *and shall be payable to and collected by them in the same* way as other rates on the said rolls.

This by-law was produced for the purpose of showing the manner in which the Railway Company were charged, assessed and rated by the City for the several works constructed by the City and charged to the Railway Company as the party chargeable therefor under the above statutes. The first of the rates charged by such by-laws or any of them became due under the by-laws in that behalf in the year 1883 ; the company paid the City the amount of rate imposed as payable in that year, so did they likewise the rates imposed as payable respectively in the years 1884-5 and 6.

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Upon the ground that, as they contended, as early in the said year 1886 the cedar block roadway adopted by the corporation proved itself to be wholly defective and by no means permanent and wholly inapplicable to and insufficient for the purposes of streets upon which the company were operating their lines of street railway tracks, and that in addition to such defect in the material of the roadway the corporation were guilty of gross negligence in the manner in which they laid the cedar blocks and constructed the roadways upon which the company operated the railways, they contended that they were not only relieved from all liability purported to be imposed upon them by the said by-law but that the corporation were liable to them for damages sustained by reason of the insufficiency of such cedar blocks as a roadway and the alleged negligent manner in which they were laid, and the company refused to pay any further sums so charged and rated against them or for any repairs the necessity for which was occasioned by such insufficiency of the roadway.—In consequence of such refusal the corporation of the City brought an action against the company in the month of December, 1886, and in their statement of claim in such action filed in the month of January, 1887, they claimed the sum of $6,000 for monies alleged to have been expended by them in the years 1882-83-84-85 and 86 in making repairs on streets traversed by the company's lines of railway between the rails and for eighteen inches outside of each rail in consequence of the alleged neglect of the company to make such repairs after notice contrary, as was contended, to the provisions of the statutes in that behalf, also for damages alleged to have been paid by the city to persons alleged to have suffered injury by reason of such alleged neglect of the company. To this statement of claim the company pleaded

by way of defence that for the reasons above stated they were not at all liable to be charged for the construction and repair of roadways which, as they insisted, were not permanent roadways, but on the contrary were wholly defective and inadequate for the purpose for which they were constructed not only by the insufficiency and defect of the material used but also by the negligent mode of construction; and they denied all liability under the statutes to the City for the damages alleged to have been sustained by them by reason of the alleged neglect of the company or otherwise, and on the contrary they claimed by way of counter claim $10,000 as damages sustained by them by reason of the wholly defective character of the roadway as adopted and constructed by the City. Judgment was rendered in this action by the High Court of Justice for Ontario on the 20th day of December 1888, whereby the court did declare and adjudge as follows:—

"1. That the defendant company is bound to keep in repair such *permanent* pavements as the plaintiff corporation may have laid upon the streets used by the defendants for the purpose of its traffic, over the space between the tracks, and for eighteen inches outside the same."

"2. That the defendant company is liable to pay to the plaintiff such damages as it may have suffered or paid by reason of the non-repair by the defendant of *such permanent* pavements aforesaid over the space aforesaid."

"3. That the plaintiffs were and are bound to use reasonable care, skill and diligence *in selecting pavements to be laid as permanent pavements* over the space aforesaid, and over the remainder of the said streets, so far only as the pavements upon the said space has been or is affected thereby; and *if negligent in such selection, the defendant is not liable to pay for such construction or*

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to repair as for a *permanent* pavement; and if such reasonable care, skill and diligence in such selection was not exercised by the plaintiff corporation, it is liable to the defendant for any losses caused by such negligence."

"4. That the plaintiff was and is bound to use reasonable care and skill in the construction of such permanent pavements on the streets aforesaid, and on the remainder of the said streets, so far only as the pavement on the space aforsaid has been, or is affected thereby; AND *if such pavements were so negligently constructed as not to be permanent, the defendant is not liable to pay for such construction or to repair, and the plaintiff was and is liable in such case to the defendant for any losses caused by such negligence.*"

"5. And this court doth further order and direct that it be referred to Edmund John Senkler, Esquire, of the City of St. Catharines, under subsection one of sec. 101 of the Judicature Act to inquire and report."

"(1). Whether the plaintiff corporation has laid permanent pavements upon the streets occupied by the defendant company, due regard being had to the occupation of the streets by the company and otherwise, and to all and every other matter or cause affecting the said pavements, and entering into the consideration of the question of their permanence."

"(2). As to the cost of the repairs made by the plaintiffs to *permanent pavements* on the streets occupied by the defendant company."

"(3). The loss or damage which has been suffered or paid by the plaintiff for or by reason of the neglect of the defendants to repair such portions of said streets."

"(4). Whether the plaintiff has been negligent in selecting pavements as permanent on streets occupied by the defendants, and if so, the loss or damage, if

any, sustained by the defendants from such negligence."

" (5). Whether the plaintiff has been negligent in constructing the aforesaid pavements, and if so the loss or damage, if any, sustained by the defendants from such negligence."

" (6). And this court doth further order that on this motion for judgment, all questions of law or fact arising upon the pleadings or report of the said referee, and not determined by the court on the 1st, 2nd, 3rd and 4th findings of the court as aforesaid, shall be open for argument, and that this declaration shall not be construed as restricting or taking away from the parties any rights reserved or given to them by subsection one of section 101, or the practice thereunder, but shall be construed as adding to or enlarging such rights, if those given by this order are not reserved or given by said subsection."

The plaintiffs neither appealed from this order nor did they take steps to procure the inquires and report by the said order directed to be taken and made; but instead thereof negotiations for a settlement of the differences between the parties were entered into for the purpose of settling by arbitration or mutual agreement the several matters of difference in the said action and in other actions which appear also to have been pending between the parties, which negotiations terminated in an agreement by way of compromise being executed by and between the parties under their respective common seals upon and bearing date the 19th day of January, 1889, by which it was among other things mutually covenanted as follows:

" All matters in issue *in the several actions* which were pending between the city and the company on Dec. 31st, 1888, and all claims made therein by the company upon the city and *vice versâ* up to said date are hereby settled upon the following basis:"

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"1. The company is to pay the city forthwith the amount of the company's debenture account for 1887 ($17,095.36) with interest at five per cent from December 31st, 1887 and for 1888 ($22,378.56) with interest at five per cent from September 10th, 1888, to date of payment."

"2. From December 31st, 1888, the company is to pay the city, *in lieu of all claims on account of debentures maturing after that date*, and *in lieu of the company's liability for construction—renewal—maintenance—and repair in respect of all the portions of streets occupied by the company's tracks* at the rate of $600.00 per mile of single track (or $1,200 per mile of double track), per annum, so long as the franchise of the company to use the said streets or any of them *now* extends, such sum to be paid quarterly on January 1st, April 1st, July 1st, and October 1st in each year, in respect of the three months immediately preceding the said dates respectively, the first of such quarterly payments to be made on the first of April, 1889, and if there be a broken quarter, then at the same rate for such broken quarter on the last day thereof."

"(4). The said *payments shall be accepted by the city in full satisfaction and discharge of all claims* upon *the company in respect of the construction*—renewal—maintenance—and repair, *of all the aforesaid portions of said streets*; and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city by reason of the non-construction or non-repair thereof by the company; and hereafter the city shall undertake the construction—renewal—maintenance and repair of all the aforesaid portions of said streets, but not of the company's tracks, ties and stringers."

"(5). As between the company and the city, the city shall have the sole right in every case from time to time to determine the kind of road bed or beds,

pavement or pavements, if any, to be laid down, constructed or maintained upon the said streets or upon the portions thereof occupied or used by the company, and the manner in which the same shall be constructed; and the liability of the city to the company in respect of the renewal, repair and maintenance of roads shall be as defined by sec. 531 of the Municipal Act save that *the city shall* be bound to indemnify the company against any damages or costs which the company may have to pay to third parties by reason exclusively of neglect on the part of the city to repair or to keep in repair the portions of the streets aforesaid."

Section 10 makes provision for the case of the city authorizing the construction of new lines of track upon any of the streets already traversed by the railway of the company. Then:

"(11). This agreement is not to affect the rights of either party in respect of any of the matters referred to in the 18th resolution set out in by-law 353 of the city of Toronto or of any question arising out of the same nor in respect of any matter not herein specifically dealt with, nor shall this agreement have any operation beyond the period over which the aforesaid franchise now extends."

"(12). In consideration of the foregoing it is further agreed that all claims by the city against the company in *respect of construction*,—or renewal of roadways—repairs of roadways—and damages by reason of non-repair thereof, up to the date of this agreement shall be abandoned and that all actions pending on the 31st December, 1888, between the city and company shall be forthwith dismissed by the *respective plaintiffs*."

This agreement was ratified and confirmed by an act of the Ontario Legislature passed on the 7th April, 1890, 53 Vic. ch. 105, and all acts and parts of acts of

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the legislature inconsistent therewith were thereby repealed. By that act it was further enacted that:

"The corporation of the city of Toronto may at once proceed to arbitrate under the 18th resolution recited in the agreement of the 26th March, 1861, printed as Schedule "A" hereto and the said city of Toronto and the Toronto Street Railway Company shall in every reasonable way facilitate such arbitration. The arbitrator or arbitrators to be named shall proceed, so as if possible to make the award not later than the 13th March, 1891. If from any cause the award shall not be made by such time, or if either party be dissatisfied with such award, the said corporation of the city of Toronto shall nevertheless be at liberty to take possession of the said Toronto Street Railway and all the property and effects thereof real and personal on paying into court either the amount of such award if the award be made, or if not upon paying into court or to the company such sum of money as upon notice given to the said Toronto Street Railway Company a divisional Court of the Chancery Division of the High Court of Justice may order, and upon and subject and according to such terms stipulations and conditions as the said Divisional Court shall in every such order direct or prescribe; provided always that this section shall not be construed to affect the rights of the parties in any way under the said agreement save as herein provided."

The arbitration was subsequently entered into under the terms and provisions of the said 18th resolution of the agreement of the 26th March, 1861. Upon the arbitration, the city corporation presented a claim by way of reduction of the amount to be allowed to the company as and for the value of their real and personal property being arbitrated upon the sum of $146,000 as the cash value of the several annual instalments to become pay-

able in the years ensuing the termination of the company's franchise, as declared and enacted by the said several by-laws of the City Council charging, rating, and assessing the company with their proportion of the cost of the construction of roadways, for which the corporation had issued debentures as aforesaid. Against this claim of the city the company produced the said agreement of the 19th January, 1889, confirmed by the act of the legislature above recited, insisting that it operated as a release of all right and claim, if any, the corporation had to enforce payment of such instalments. The arbitrators were of opinion that the agreement did operate as such release. They rejected the claim of the city, and made their award, whereby they awarded, adjudged and determined the value of the railways of the said Toronto Street Railway Company, and of all real and personal property in connection with the working thereof, to be the sum of one million four hundred and fifty-three thousand seven hundred and eighty-eight dollars, subject however to the following incumbrances, amounting in the whole to the principal sum of six hundred and forty thousand two hundred dollars, that is to say: Debentures issued by the Toronto Street Railway Company under the authority of the act of the Ontario legislature, 47 Vic. ch. 77, for the principal sum of six hundred thousand dollars, payable on the 1st of July, 1914, bearing interest at six per cent per annum, also mortgages set out in the award for the principal sum of forty thousand two hundred dollars with interest thereon.

In the month of September, 1891, the city corporation instituted the present action against the defendants for the purpose of asserting their right to recover, independently of the said award, and notwithstanding the refusal of the said arbitrators to enter-

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tain the said claim of the plaintiffs to be allowed the said sum of $146,000, the several rates by the said by-law of the city imposed upon and declared to be payable by the defendants in the several years subsequent to the termination of the franchise, until the payment of the debentures issued to cover the amounts so charged upon the defendants should be fully paid, and in their statement of claim they allege that although the defendants had duly paid or accounted to the plaintiff for the rates which so became due and payable to the plaintiffs, prior to the year 1891, they refused to pay the sum of $22,266.30, which they allege had since became due in respect of the said rates, and they pray for a declaration that the defendants are liable to pay the said rates so declared to be, and made, payable subsequently to the termination of the defendant's franchise, and an order for payment of the said sum of $22,260.30, and interest from the 26th day of August, 1891. To this action the defendants have pleaded by way of defence the said agreement of the 19th January, 1889, and the judgment rendered in December, 1888, in the action then pending between the city and the company, and insisted that the said agreement operated as a release of all liability of the defendants in respect of all rates which by the said by-laws were declared to be and and were made payable subsequently to the 26th March, 1891. They also pleaded the said arbitration and the claim thereby of the plaintiffs of the said sum of $146,000, and the disallowance thereof by the arbitrators and their award, and insisted that the award operated as a bar of the plaintiffs' claim in this action. By way of alternative defence they pleaded like matters to the matters of fact alleged by them in their defence to the action instituted by the plaintiffs against them, which was pending when the said

agreement of the 19th Jan., 1889, was entered into, upon which they relied in case they should fail upon their other grounds of defence above stated. Upon the trial before Mr. Justice Falconbridge, that learned judge was of opinion that the said agreement of the 19th January, 1889, did operate as such release as was contended for by the defendants and accordingly the said action was, by his judgment affirmed by the judgment of the High Court of Justice for Ontario, dismissed with costs. Upon appeal from this judgment to the Court of Appeal for Ontario the court was divided, and the appeal was therefore dismissed. The Chief Justice of the court entirely concurred with the judgment of Mr. Justice Falconbridge, declaring himself to be of opinion that the agreement of 19th January, 1889, was a final settlement of all matters between the parties as to pavements, roadway, costs of construction and repairs, and of everything in dispute relating thereto, or to money claims for or against each party, past, present or future, and he proceeded to give his reasons for entertaining this opinion.

Mr. Justice Osler also concurred in the judgment of Mr. Justice Falconbrige, and was also of opinion that the plaintiffs having acquired the ownership of the defendants' railway, and of all their real and personal property in connection with the working thereof, in respect of which ownership alone the local improvement assessments in question were imposed, the defendants' liability in respect of such assessments then came to an end, and the plaintiffs were not entitled to recover in respect of any assessments falling due under the terms of the by-laws after such roadway and property were so acquired by them.

Mr. Justice Burton and Mr. Justice Maclennan were of a contrary opinion. Hence the appeal to this court.

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Robinson Q.C., and *S. H. Blake* Q.C. for the appellants.

McCarthy Q.C. for the respondents.

The judgment of the court was delivered by:—

GWYNNE J.—(His Lordship stated the facts as above set out and proceeded as follows:—

In the judgment of the Chief Justice of the Court of Appeal for Ontario and of Mr. Justice Osler I entirely concur. It cannot be doubted that the judgment of Mr. Justice Rose in the action instituted in 1887 by the city against the company was favourable to the contention of the company as set out in their statement of defence to that action in so far that, if the matters of fact directed to be inquired into should have been found in favour of the company, would they not only have been freed from liability for the rates imposed, (and not paid), or to be imposed for the construction of the streets as constructed by the city, or for their maintenance and repair as constructed, but would possibly have recovered the amounts then already paid by them for such rates, and other damages which they alleged they had suffered by what they insisted was the default and neglect of the city corporation. Instead of the plaintiffs in that action proceeding with the reference and inquiries directed for the purpose of determining the facts necessary for the final adjudication in the action the parties agreed upon terms which can be regarded in no other light than that of a compromise of their respective contentions, but if the contention of the plaintiffs in the present action should prevail the defendants, instead of agreeing with the plaintiff upon a compromise of their respective contentions, must be held to have, in substance and effect, surrendered every point for which they had contended, and to have submitted to the plaintiffs' contention as if every fact had been concluded against the defendants

upon the reference and inquiries directed. Now the agreement of January, 1889, provides that:

All matters in difference between the city and the company on December 31st, 1888, and all claims made therein *by the company* on the city and *vice versâ*, up to said date, are hereby settled upon the following basis:—

1. The company is to pay the city forthwith the amount of the company's debenture account for 1887, ($17,095.96), with interest at five per cent. from December, 31st, 1887, and for 1888, ($22,373.56), with interest at five per cent from September 10th, 1888, to date of payment.

2. From December 31st, 1888, the company is to pay the city, *in lieu of all claims on account of debentures maturing after that date, and in lieu* of the company's *liability for construction*—renewal—maintenance and repair in respect of all the portions of streets occupied by the company's tracks at the rate of $600 per mile, single track, or $1200 per mile, double track, per annum, so long as the franchise of the company to use the said streets or any of them extends.

4 The said payments shall be accepted by the city in full satisfaction and discharge of all claims upon the company *in respect of construction, renewal, maintenance and repair* of all the aforesaid portions of the said streets; and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city *by reason of the non-construction* or non-repair thereof by the company, *and hereafter the city* shall undertake the *construction, renewal,* maintenance and repairs of the aforesaid portions of the said streets, but not of the company's tracks, ties and stringers.

Now the *company's debenture accounts*, above referred to, the instalment claimed in respect of which by the city for the years 1887 and 1888 the company agreed to pay, were the aggregate amounts of the principal sums and interest declared to be charged upon the company by the city by-laws in that behalf for which the city had issued debentures to raise the money expended in construction of the cedar block roadways, which the company insisted were by no means permanent roadways and that therefore they were not at all liable therefor. By payment of the instalments of such debenture accounts made payable in the years 1883, '84, '85, '86, '87 and '88, the company satisfied and

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discharged all the liability, if any, there was imposed upon them in respect of the said "debenture accounts" up to the 31st December 1888. Then the 2nd paragraph of the agreement provides that the company shall, after the said 31st December 1888, so long as their franchise to use the said streets *now extends* (in the very words of this paragraph), pay to the city the annual sums therein mentioned *in lieu* of all claims of the city *on account of debentures* maturing after the 31st December 1888 *and in lieu of the company's liability for construction, renewal*, maintenance and repair, and by the 4th paragraph the city covenants, and their covenant is ratified by act of Parliament, to accept such annual sums in full satisfaction and discharge of all claims upon the company in respect *of the construction*— renewal, maintenance and repair of all the aforesaid portion of the said streets, &c., &c.

Now the words in the 2nd paragraph "*in lieu* of all claims on account of debentures maturing after that date" (the 31st December 1888) and the words "*in lieu* of the company's liability for *construction*" &c., &c., plainly relate to the liability of the company in respect of all debentures then already issued for streets upon which the cedar block pavements had been constructed, and in fact the language according to its natural and ordinary meaning covers the whole of the company's liability for *construction* of cedar block roadways then already constructed or thereafter to be constructed by the city. So the acceptance in the 4th paragraph by the city of the said sums by the said 1st and 2nd paragraphs agreed to be paid, when paid, in full satisfaction and discharge of all claims upon the company *in respect of construction* &c., plainly relates to the same liability spoken of in the 2nd paragraph, of the defendants to pay *for the construction* of the cedar block pavements then constructed, that is to say the total debt charged by

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the by-law upon the company for the construction of such streets and by such by-law made to be a *debitum in presenti* although payable *in futuro* by annual instalments and charged as a lien upon the company's railway and other property. The plain and natural construction of these paragraphs, taking them together unaffected by any other paragraphs in the agreement, is that the company are discharged from all liability in respect of any debentures maturing after the 31st December 1888 at any time on account of *construction, renewals*, &c., of the roadways in streets traversed by the company's railway tracks, and from all liability in respect of such construction in the past, and the city expressly covenants to undertake and bear in the future the whole cost of construction—renewal—maintenance and repair of all the portions of the streets which as they had contended the company were liable for, *except the company's tracks, ties and stringers*, which alone the company are themselves to construct, maintain and repair. So construed the compromise of the contentions of the respectives parties and the reasonableness of it in the state of the facts as existing when the agreement was entered into is apparent, namely, the company abandon their claim of exemption from liability for cost of *construction* by reason of the defect of the cedar block pavement adopted by the city, and of its want of permanency and of the negligence of the city in the manner of "construction;" and they agree to pay and bear the instalments remaining unpaid for the first six years imposed by the terms of the by-law in that behalf, and to pay the annual sums mentioned in paragraph 2, *in lieu* of all further liability whatever as to construction, renewal &c., and the city in consideration of such payments agree to accept them in full satisfaction and discharge of all claims against the company for *construction* &c., of cedar block pave-

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ments on the streets wherein they had then already been constructed and they undertake for the future to take upon themselves the burthen of construction renewal &c., &c., which they up to then contended that the company were liable for. Upon these terms of mutual concession the parties respectively agree to abandon their respective claims as theretofore asserted. The plaintiffs however contend that the 2nd paragraph is to be read as if the words.

"so long as the franchise of the company to use the said streets or any of them now extend," should be read as if inserted after the words *maturing after that date*, thus : "From December 31st, 1818, the company is to pay the city, in lieu of all claims, on account of debentures after that date, so long as the franchise of the company to use the said streets or any of them now extends, &c., &c."

The paragraphs 2 and 4 read together, apart from all other paragraphs, leave no room in my opinion for such a construction, but it is argued upon behalf of the city, that read in connection with paragraph 11 that is the true construction, but in this contention I cannot concur. The necessity for the insertion of paragraph 11 is not very apparent, it seems to have been unnecessarily introduced, *ex majori cautelâ* of an over cautious draftsman. It's first sentence appears to provide against the agreement being construed to affect the rights of either party under the 18th paragraph of the agreement of March, 1861, entitling the city to terminate the company's franchise at the expiration of 30 years from date, and providing in such case for an arbitration ; but there does not seem to be anything in the agreement which could have been construed to affect such rights if the 11th paragraph had not been inserted.

The second sentence provides that the agreement shall not be construed to affect the rights of either party in respect of any matter not therein specially

dealt with. How it could if the 11th clause had not been inserted it is difficult to say; moreover upon the question whether or not a particular matter has been specifically dealt with must be determined apart from the 11th paragraph, in other words that paragraph cannot unsettle a matter specifically dealt with apart from that paragraph. The question here is whether the liability of the defendants for instalments charged by the by laws to mature after the expiration of the company's franchise has been specifically dealt with apart from the 11th paragraph; that paragraph therefore cannot be appealed to upon that question, and that such liability has been specifically dealt with and satisfied, and discharged by the provisions contained in paragraphs 2 and 4 appears to me to be clear; then the last sentence of the paragraph appears to have been inserted for the purpose of placing beyond all doubt, that the agreement as to the annual payments by the company, and the undertaking of the company to bear the burthen of future *construction, renewal, &c., &c.*, should not extend beyond the 26th March, 1891, in case the company should not then terminate the franchise of the company, but should suffer it to continue for a longer period under the terms of the agreement of March, 1861; that provision could not possibly have the effect any more than the previous sentence to unsettle a matter specifically settled apart from the 11th paragraph.

Then again, as to the question involved in the judgment of Mr. Justice Osler, upon what principle can the contention of the plaintiffs be entertained apart from the agreement of January, 1889? By the act of 1877, in virtue of which the several by-laws were passed charging the company with a share of the cost of construction of the cedar block pavements under which by-laws the present claim is asserted, the corporation

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is made liable only in the same manner as is provided under the Municipal Act for the construction of local improvements; now the cost of the construction of local improvements is charged as a lien upon the real property benefited by or charged by the by-laws for the construction thereof for a portion of the construction of such improvement and the annual instalments to cover principal, interest and sinking fund to redeem the debentures issued for such works as are made chargeable upon, and payable by the owner and occupant of the property upon which the cost of construction is charged as a lien, but, after the persons or person who were or was owners or owner of the real property charged with such lien, have or has ceased to be owners or occupants, owner or occupant, such persons or person never have been held to be or supposed to be personally liable for instalments maturing after they ceased to be such owners or occupants although the lien upon the property still remains, and the subsequent owners and occupants for the time being become liable therefor. Now in the present case the company are no longer owners or occupants of the railways in question; they were transferred by them to the city after the city terminated their franchise, and the debentures issued for construction of the roadways became, in so far as the amount chargeable and charged upon the company as for their portion of the cost of the construction, a lien upon the property so transferred to the company. If then the company after ceasing to be owners or occupants of the railway and real property which the company had while its franchise lasted, should be held liable for the instalments accruing under the by-laws in respect of such cost of construction after the company's franchise had determined, and after they had ceased to be owners or occupants of the said railways and real property, they would be liable upon a princi-

ple not provided by the Municipal Act in respect of the liability of persons charged, rated and assessed in respect of local improvements. Then it was argued that it must be held, that upon the arbitration the defendants were allowed for the value of the roadways to them, to the full amount of the proportion of the cost of construction which by the by-laws were charged, rated and assessed upon them by the city, and that, therefore, they must be liable for the rates maturing as payable after the termination of their franchise. But in making such an allowance, if any such was made to the defendants by the arbitrators, they would have erred, in my opinion, and such error, if committed, could not now be rectified by holding the present action to be maintainable. By the act 40 Vic. ch. 85, the arbitrators were bound to estimate as an asset of the company *any permanent pavements* or roadways *thereafter constructed by the company* only *to the value of such permanent roadways to the company and for the balance only* of the life *of such pavement*. In the settlement of January, 1889, the contention of the company was, that the roadways as they were constructed by the city were *not permanent*, and were of no value to the company, and that, therefore, they were not liable for any part of the cost of construction thereof, although charged therewith by the by-laws in that behalf. It was upon this contention that the company entered into the compromise contained in the agreement of January, 1889, which the arbitrators construed to be, as it was contended by the defendants to be, a release and discharge of the company, by the city, from all future liability under those by-laws, for construction, &c. Upon the compromise having been executed and payment by the company of the instalments made payable by the by-laws in the first six years, the company might possibly have been regarded on the arbitration as

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entitled to an allowance for any value to the company of such roadways, so far as such outlay was concerned, but the compromise having been entered into by the company, upon the contention that the roadways as constructed by the city were of no value to the company, it is not likely that the arbitrators, construing the agreement of January, 1889, as they did, would have allowed anything even for such outlay, but however that may be, the question raised now by the plaintiffs is not, whether they did or did not make any allowance in respect of such outlay, but whether they allowed anything to the company for the value to them of roads which the company never did construct, but which were constructed by the city, and the company's liability to pay any portion of the construction of which the company had disputed upon the ground that they were not permanent, and were of no value to them, and in support of their contention of exemption from which liability accruing subsequently to the date of the compromise agreement they produced and relied upon that agreement. I can see no ground for the contention that the arbitrators did make any such allowance. If they did it could not now make any difference, nor in any manner alter the construction which in this action we are bound to put upon the agreement of January, 1889.

The appeal must therefore be dismissed with costs in all the courts, and the judgment of Mr. Justice Falconbridge affirmed.

Appeal dismissed with costs.

Solicitor for appellants: *C. R. W. Biggar.*

Solicitors for respondents: *Maclaren, Macdonald, Merritt & Shepley.*

THE BELL'S ASBESTOS COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THE JOHNSON'S CO., (PLAINTIFFS)...RESPONDENTS;

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*Feb. 27, 28

*May 1.

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

Action en bornage—R. S. Q. arts. 4153, 4154, 4155—*Straight line.*

Where there is a dispute as to the boundary line between two lots granted by patents from the crown, and it has been found impossible to identify the original line but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points. R. S. Q. art. 4155.

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

This was an action *en bornage* taken in the Superior Court for the District of Arthabaska, on the 9th day of February, 1889, to establish the boundary between that part of the lot 27 in the sixth range in the Township of Thetford, which joins the south-east half of the lot number 27 in the fifth range of the same township, the defendants, appellants, being the proprietors of the latter lot, and the plaintiffs, respondents, of the former.

The defendants pleaded the general issue.

The material facts of the case are fully stated in the judgment of the court.

During the trial surveyor experts were appointed by the parties in the case to visit the locality, but they did not agree as to the line of the original survey.

On the 30th November, 1891, the court at Arthabaska ordered the *bornage* to be made according to

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the pretensions of the respondents, that is to say: by following the direct line between the two nearest points recognized by both parties, and condemned the appellants to pay the costs of the action, and the costs of the *bornage* to be borne in common by the two parties.

The surveyor, Ashe, was appointed by the court to carry out this judgment and to draw a line of division between the two lots. This was done, and on the 9th February, 1892, the court homologated the report of the surveyor, and condemned the defendants to pay $7,145 in damages for the value of the asbestos which they had taken from that part of the property which the court decided to belong to the respondents.

Stuart Q.C. and A. Hurd for appellants.

Irvine Q.C. and J. Lavergne for respondents.

The judgment of the court was delivered by :

TASCHEREAU J.—The litigation in this case originated by an ordinary action *en bornage*, with a claim for damages. The parties are proprietors of contiguous lots in the township of Thetford, which are divided by the concession line between the fifth and sixth ranges of the said township, and the controversy is as to the situs of that line. The respondents contend that the said line should be a straight one from the corner of lots 25 and 26 in the fifth range of Thetford, to the corner of Coleraine, Thetford and Ireland; this is the line marked "DB" on the plans in the record. This contention has prevailed in the two courts below. The appellants contend that the straight line "DB" is not correct, but that a line called the Legendre line should be the boundary between their property and the respondents'; that whether this Legendre line, as traced in 1878, was then erroneous or not cannot affect this

case, as the respondents got their title after that, and that title is based on that line, whether straight or angular.

The line in question, which is in the range or concession line between the fifth and sixth ranges of Thetford, was originally run in the year 1800 by one Jeremiah McCarthy. His report and field notes have been produced in this case which show the bearings on which the line was run, and also show it to be a straight line. After a lapse of a number of years, during which time no settlements were made in this part of the township, the property began to become valuable for the asbestos mines which were then being discovered. It became necessary then to arrange the lines in some satisfactory way. In the particular neighbourhood where the lots belonging to the parties are situated fires had passed over the line and destroyed pickets and other marks indicating the original survey. In 1878 Mr. J. B. O. Legendre, surveyor, was instructed to retrace this line. By his report he claims to have passed over the original line run by McCarthy, and in consequence the result was a straight line. Upon this last survey grants were made of lot no. 27 in the sixth range, and 27 in the fifth range, to the persons from whom the parties in the case hold title.

In 1882 judgment was rendered ordering a side line to be run between lots 26 and 27 in the fifth range. The suit was in the case of *King* v. *Hayden*, Hayden then being proprietor of the lot now belonging to the appellants. This survey, made under order of the court, was done by Legendre, the same above mentioned, and one Towle. The respondents had no interest whatever in this line and had no notice that a survey was to be made. In making this survey the surveyors, being unable to find the post dividing the lots 26 and 27 of the fifth range, professed to retrace the

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survey made by Legendre four years before. On the day following one of the shareholders of the Johnson's Co., being on the ground, noticed this retraced line and perceived that it was not what he considered the original line and called the attention of Legendre to it, and he re-measured the line and retraced it, marking the place with iron bolts. This second operation, he says, indicates, as nearly as he could show it, the line run by him in 1878. He says that it is the exact line or very near it.

It is this operation of Towle and Legendre which has give rise to all the trouble the parties have had in this case.

A very large amount of evidence has been given tending to show where the original Legendre line was run. It has been shown by a number of people that Legendre has given conflicting statements as to where this line was and all the evidence which has been taken on one side or the other has been to show whether or not the line run by Legendre can now be found with certainty.

The law regulating these matters is to be found in the Revised Statutes of Quebec, articles 4153, 4154, 4155 as follows:—

4153. Whenever it happens that the posts or boundary marks between any lot or range of lots have been effaced, removed or lost, the Land Surveyor is hereby authorized to administer the oath to witnesses and to examine them for the purpose of ascertaining the former boundaries. 45 V. c. 16, s. 71.

4154. If such former boundaries cannot be ascertained such Land Surveyor shall measure the true distance between the nearest undisputed posts, limits or boundaries, and divide such distance into such number of lots as the same space contained in the original survey, giving to each a breadth proportionate to that intended in the original survey as shown on the plan and field notes thereof of record in the office of the Commissioner of Crown Lands. 45 V. c. 16, s. 71.

4155. If any part of any outside line, central line, concession or range line intended in the original survey to be straight has been obliterated or lost the Land Surveyor then runs a straight line between the two

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nearest points or places where such line can be clearly and satisfactorily ascertained and plants such intermediate posts or boundaries as he may be required to plant in the line so ascertained, and the limits of each lot so found are the true limits thereof. 45 V. c. 16, s. 72.

The contention of the appellants is that there are three certain points established on the line drawn by Legendre in 1878; one is a birch tree between lots 25 and 26, the other is the point "K" were a bolt was planted at the time of the survey made by Towle and Legendre, and the third is the post marking the division between the townships of Ireland, Thetford and Coleraine.

This would make a deviation from a straight line and an angle at the point "K."

The plaintiffs, respondents, contend that "K" has not been identified as being a point on Legendre's line and that the only two certain points are the birch tree and the Ireland post, and that a straight line should be run between these two points, which is the view of the case adopted by the courts below.

It is clearly explained that the idea of placing the bolt at "K" arose from the fact that there was a tree near that place upon which there was a blaze. Legendre in the most positive way swears that the blaze on this tree was not made by him and in no way indicated his line.

The witness O'Neil explained that this blaze on the tree near the point "K" was made whilst he was going over the line for the purpose of identification previous to its being patented to Robert G. Ward, and it was not made by him and was on the line as he located it.

The whole case as to the exact position of the line made by Legendre is extremely uncertain and the attempt to identify it with the line claimed by the appellants has entirely failed. The only course to adopt was to follow the straight line between the two certain

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points as originally drawn by McCarthy in 1800, as was done by both judgments of the courts below.

Again, the patents of both parties were granted on what was supposed to be a straight line and which was recorded as such in the Crown Lands Department, in the reports and field notes of the surveyors, McCarthy and Legendre.

This gives the respondents a right to have a straight line, and even if Legendre on his survey through error deviated from the straight line, they are, nevertheless, entitled to have one. The point "K" which forms the corner or angle and is the point in the line claimed by the appellants which extends furthest into the property of the respondents is eighteen feet from the straight line.

Now, whilst there is, it is true, no such law as that a division line between two properties should be a straight one, yet, under the circumstances in this case, the *onus probandi* was, it seems to me, clearly on the appellants to establish such an anomaly as they contend for. And were I to pass on the case, in first instance, I would say that they have failed to do so. The Superior Court appointed two surveyors to report on the contentions of the parties. These gentlemen could not agree and filed separate reports. The Superior Court adopted that one of them which supports the straight line and the respondents' views, Ashe's report. The Court of Queen's Bench confirmed that judgment. The appellants would now have us set aside those judgments and Ashe's report, and adopt the other expert's conclusions. He has failed to convince me on what ground we could do this. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Hurd & Fraser.*

Solicitors for respondents: *Laurier, Lavergne & Coté.*

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY..... } APPELLANTS;

AND

FREDERICK THOMAS JUDAH.....RESPONDENT.

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*Feb. 28.
*Mar. 1.
*May 1.

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

Railway Expropriation—Award—Additional interest—Confirmation of title—Diligence—The Railway Act, 1888, *secs.* 162, 170, 172.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent on the amount of an award previously deposited in court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title with a view to the distribution of the money, the company pleaded that the court had no power to grant such an order and that the delays in proceeding to confirmation of title had been caused by the petitioner who had unsuccessfully appealed to the higher courts for an increased amount.

Held, reversing the judgment of the court below, that by the terms of sec. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held, further, that assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. Railway Act, sec. 172. Fournier J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court, ordering the appellants to pay into court $6,420.75, as interest on a sum of $30,575.00 deposited by the appellants on the 24th July, 1888, under section 170 of the Railway Act, 1888.

The material facts in question are as follows :—

The appellants expropriated a piece of property belonging to the respondent and by award rendered

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

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on the 17th July, 1888, the arbitrators appointed under the act awarded to the respondent the sum of $30,575 as compensation for the land taken and damages. On the 24th July, 1888, appellants tendered this amount, together with a deed of sale of the property, to the respondent, who refused the tender on the ground that he intended to appeal from the award of the arbitrators. Thereupon, on the same day, the appellants applied to the Superior Court, under section 162 of the Railway Act, for a warrant of possession, depositing the amount of the award together with six months' interest thereon, as required by section 170, in all the sum of $31,492. The respondent appealed from the award, and the litigation consequent thereon continued until a judgment was rendered by the Court of Queen's Bench, at Montreal, on the 24th January, 1891, which confirmed the award of the arbitrators. The respondent appealed to this court where his appeal was quashed for want of jurisdiction; he, however, obtained leave to appeal to Her Majesty in her Privy Council, but finally discontinued this appeal on the 16th November, 1891. On the 14th December, 1891, the respondent by petition to the Superior Court, prayed that the appellants be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent on the capital amount of $30,575, from the 17th January, 1889, until such time as the capital and interest should have been fully distributed, and, further, that they should be enjoined and ordered to proceed to confirmation of title, in order to the distribution of the money. The court by judgment of the 28th January, 1892, ordered the payment of the sum of $6,420.75, being interest from the 24th January 1889, up to six months from the 24th January. 1892, reserving to the respondent the right to apply for a further deposit should the moneys not be distributed within such delay; and further ordered

appellants to proceed forthwith to the confirmation of title and distribution of the moneys, but at the cost and charges of the respondent, and in default authorized the respondent to do so at his own expense.

H. Abbott Q.C. for appellants contended, 1st, that the court of first instance had jurisdiction to render the judgment complained of; that the question of additional interest ould only be dealt with when the judgment of confirmation was obtained under sec. 172 of the Railway Act, and

2nd. That it was through no error, fault or neglect of the appellants that a judgment of confirmation of title was not obtained within the six months, but it was entirely due to the acts of the respondent in refusing to accept and appealing from the award of the arbitrators, the amount of which was tendered to them. The learned counsel referred to secs. 162, 170 and 172 of The Railway Act.

Branchaud Q.C. for respondent: As to the question of jurisdiction, there is nothing in the statute regulating this matter that prevents the Superior Court from granting such an order as the one that has been made in the present case. The petition also concluded that the appellants be ordered to proceed to the confirmation of title in order to effect the distribution *à qui de droit* of the moneys deposited; and that, in their default to do so within the delay fixed by the court, the respondent be authorized to take the means indicated by the statute for the distribution of these moneys.

By adopting the mode of payment indicated in section 170 of the Railway Act, the appellants became bound to follow all the requirements of the section, in order to free themselves from the payment of any further interest. The money as thus deposited became locked up entirely under the control of the appellants, the respondent being left powerless to take possession

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of this amount awarded to him, while he was dispossessed of his property. The taking possession of the expropriated land subjected the appellants to payment of interest on the amount of the award until the same should have been fully paid, just as the purchaser of a property susceptible of producing civil fruits is bound to pay interest on the unpaid price from the time of entering into possession of it.

This section 170 clearly shows that the appellants were bound to proceed forthwith in the *confirmation of title*, in order that the award be paid *à qui de droit*. Though it is not stated in the section 170 by whom the proceedings in *confirmation of title* should be taken, yet under the common law a proprietor alone can exercise that right. The appellants were, in consequence of the deposit of the amount of compensation and of the award itself in the hands of the prothonotary, proprietors of the land expropriated, the award taking the place of the title; but more than that, section 172 of the same Railway Act imposes beyond doubt upon the appellants the obligation of taking the necessary proceedings to obtain the *confirmation of title* required by section 170.

H. Abbott Q.C., in reply, cited art. 1162 C.C., and *Ex parte Hart.* (1)

FOURNIER J.—The respondent was expropriated by the appellants under the provisions of the Railway Act of 1888.

On the 17th July, 1888, the majority of the arbitrators awarded to the respondent, as compensation for the damages sustained by him in consequence of such expropriation, the sum of $30,575.

On the 20th July, 1888, the appellants tendered to the respondent the amount of the award, but it was

(1) 3 L.C. Jur. 40.

not acted upon as they never renewed it, nor deposited the money in court so as to enable the respondent to get it when he wished to do so. Art. 1162, C.C.

In order to avail themselves of this tender the appellants should, with their petition for a warrant of possession, have deposited the amount. They, on the contrary, preferred to adopt the mode indicated in sec. 170 which concerns matters in expropriation for the province of Quebec, under the Railway Act. On the 24th July, 1888, they deposited with the prothonotary the sum of $30,575, the amount of the award, together with the sum of $917.25 for six months' interest in advance, as required by this section, and obtained a writ of possession to enable them to take possession of the expropriated land.

By adopting the mode of payment indicated by this section the appellants were obliged to conform to all its requirements, in order to free themselves from the payment of any interest in the future. The money so deposited remained entirely under the control of the appellants, and the respondent was powerless to get possession of the amount awarded to him, while he was dispossessed of his property.

Under sec. 170 the appellant company by taking proceedings in confirmation of title, were the *Dominus litis*, and it was upon them to proceed to judgment with the least possible delay. Moreover they alone, as proprietors, had the right to take those proceedings. And it is upon the party who makes the deposit that the obligation rests of taking the proceedings in confirmation of title. After regulating the manner in which the deposit is to be made, the section goes on "and proceedings shall thereupon be had for the confirmation of title." It is not, therefore, upon the respondent, the ex-proprietor, that this obligation is laid, but upon the party making the deposit "and proceedings shall there-

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upon be had &c., &c." Moreover, sec. 172 declares that if the judgment of confirmation is obtained in less than six months from the date of the payment of the compensation to the prothonotary, the court shall direct a proportionate part of the interest to be returned to the company. And if, by the fault, negligence or error of the company, the judgment is not obtained until after the expiration of the six months, the court shall order the company to deposit the interest for such further period as is right. It is also clear from that section that it is the party demanding the judgment in confirmation of title who must take proceedings to obtain it. If he obtains it within the six months it is to him that the difference in interest will revert, but if, on the other hand, by his fault or neglect, it is not obtained until after the six months have expired then he will have to pay the surplus interest.

Sec. 172 is as follows :—

That if the judgment of confirmation is obtained in less than six months from the payment of the compensation to the prothonotary, the court shall direct a proportionate part of the interest to be returned to the company, and if, from any error, fault or neglect of the company it is not obtained until after the six months have expired, the court shall order the company to pay the prothonotary the interest for such further period as is right.

The respondent could not take proceedings for confirmation of title. The only parties who can be accused of neglect are the appellants, because upon them rested the obligation to proceed. They have taken no such proceedings, and the money which they deposited is still in the hands of the prothonotary, and the appellants have been ever since in possession of the property expropriated.

True, the appellants contend the contrary, and say that there was neither fault, error nor neglect on their part to justify the order to make a second deposit, and that, if they have not taken proceedings to obtain a judgment in confirmation of title it was the fault of

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the respondent, who refused the offer made to him of the amount of the award. Now, the respondent did refuse this offer, but gives as a reason that he wished to appeal from that award, the amount of which he considered quite insufficient. In consequence he appealed to the Superior Court, and obtained a judgment increasing the award to $52,000. On a further appeal to the Court of Queen's Bench by the present appellants, the amount of that judgment was reduced again to $30,575. The appellants now contend that they were again prevented from proceeding by the respondent's appeal to this court and to the Privy Council. They contend that during all these proceedings, and up to the time of the presentation of the petition for an order to have a further sum deposited, they were prevented from proceeding for the confirmation of title, and could not be considered guilty of negligence.

The question is, therefore, reduced to this: Which of the two parties was to blame for not proceeding to the confirmation of title during the proceedings above mentioned? I have already said that the obligation rests upon the prosecuting party. The appellants, therefore, and not the respondent, must be declared in fault. Was the respondent to renounce his right of appeal in order to allow the appellants to proceed? His action was sufficiently important that he succeeded in getting the amount of the award increased from $30,575 to $52,000. The judgment of the Court of Queen's Bench subsequently reduced the award to the original amount. But is he then to blame if he sought to have this judgment annulled by the Supreme Court? Certainly not; he had an indisputable right which he ought not to sacrifice.

It is to be observed that the confirmation of title mentioned in sec. 170 was not added in order to give a greater right to the property expropriated, because

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the deposit of the award and of the amount of compensation made by the appellants gave them a perfect title to the property. This confirmation of title is only for the purpose of purging the hypothecs which might affect the property.

The appellants have taken no proceedings for the confirmation of their title. The money is still in the hands of the prothonotary, and the property is in the possession of the appellants, and has been so ever since they first took possession. They have always had control over both the price and the property.

Then, again, the appellants seek to excuse their negligence on the ground that the appeal to the Superior Court taken by the respondent against the award prevented their so proceeding. But this ground is futile, inasmuch as that appeal was entirely independent of, and distinct from, the proceedings taken by the appellants for the deposit of the amount of the compensation and interest to enable them to take possession of the expropriated lands. These proceedings form separate and distinct issues, bearing different numbers in the records of the court.

The appellants having a perfect title under the award at no time could have had less to pay than the amount fixed by it.

Then, being in possession of the property the respondent's appeal could not prevent their proceeding to the distribution of the money under sec. 170. By adopting this course the appellants (even if the respondent had succeeded in having the amount increased to $52,000) would have been discharged in proportion to the amount of the award. In that case the appellants would only have had to pay the difference between the amount distributed and the amount ordered by the Court of Queen's Bench if the appeal were maintained.

They have contended that the Superior Court in the present action had no jurisdiction to order a second deposit of interest if the first was exhausted before the termination of the proceedings in confirmation of title but that the Court which heard the case in confirmation of title alone had such jurisdiction. But the Railway Act does not make this distinction, and the jurisdiction is not defined or limited by the incidents which may be submitted. It is a court specially created by the Railway Act for the purpose of deciding any actions which may be brought under that act, and this is made very clear by sections 170, 172 and several others, as well as by the definition of the word "Court" given in the 2nd section of the act. "The expression 'the Court' means a Superior Court of the province or district"; therefore the Superior Court of the Province of Quebec is clearly designated as the court having jurisdiction by virtue of this act.

The respondent's appeal to the Superior Court could not hinder the appellants proceeding in confirmation of title, as required by section 170, any more than the procedure on the appeal could delay or prevent a judgment of confirmation. The two actions were distinct and separate, and had each a special object in view. There was no incompatibility between them, nor any reason which could prevent the two actions from being brought to judgment.

At the most, the appellants would have been caused some slight inconvenience; should the judgment of confirmation be obtained before judgment was given on the appeal, and the judgment of the Superior Court, which had increased the award to $52,000, had then been confirmed, it would only have been necessary to deposit the amount of the original award and then proceed to a second distribution. But the appellants could easily have avoided this inconvenience by

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obtaining an order from the Superior Court suspending the proceedings in confirmation until judgment on the appeal should have been rendered. The court would probably have granted them a short delay, while, as it is, several years have passed and no proceedings have been taken. As I have already said, the company could easily have proceeded to the confirmation of their title and to the distribution of the amount deposited. Their position could only have been affected by an obligation to deposit the amount adjudged in excess of the award. It is not a rare occurrence in the Superior Court that several distributions are made of the monies arising out of a sale of immoveables sold by the sheriff; often the distribution is only partly made by the court, and the party to whom the surplus belongs may appeal. An order of the court is sufficient to give to a party what is not contested, and admitted to be due, whilst the party who is forced into a contestation retains the right to have the judgment on appeal reversed. That might have been done in this case without the least inconvenience.

For all these reasons, I am of opinion that the judgment of the Court of Queen's Bench should be maintained, and the appeal dismissed with costs.

TASCHEREAU J.—In my view of this case there is error in the judgment appealed from by which the appellants were ordered to pay into court over $6,000 as interest on the amount of an award deposited by them into court under sec. 170 of the Railway Act of 1888.

The facts of the case are not in dispute and are not complicated. The arbitrators appointed under the act on an expropriation by the company of the respondent's land, awarded him $30,575. Upon tender, the respondent refused that sum, and appealed to the Superior Court, where he succeeded in getting the award

increased to $52,000, but on appeal by the company to the Court of Queen's Bench, the arbitrators' award was restored. Thereupon the respondent took proceedings for a further appeal, but abandoned them on the 16th November, 1891.

Previously, immediately upon the refusal by the respondent of the amount tendered, the company had obtained possession, upon depositing the said amount with six months' interest, under secs. 162 and 170 of the act. Two months after the end of the proceedings on the appeals above mentioned, the respondent petitioned the Superior Court for an order upon the appellant to deposit the interest upon the amount in court accrued since the expiration of the six months after the deposit. The Superior Court granted the prayer of that petition, the Court of Queen's Bench confirmed that judgment, and the appellants now complain of that condemnation.

I fail to see that the Superior Court had jurisdiction to at all entertain that petition. It seems to me by the terms of sec. 172 of the act that it is only by the judgment of confirmation that this question of interest can be adjudicated upon.

But, assuming that the respondent's petition was before the proper tribunal, where is the error, fault or neglect of the company that caused this confirmation of title not to be obtained? I cannot see any. It may be that strictly speaking, they might have initiated the necessary proceedings for that purpose, notwithstanding the respondent's appeal from the award. But the court would then certainly have ordered a suspension of those proceedings till a final determination of the controversy as to the amount of that award. The judgment appealed from says that the company should have proceeded to the distribution of the money deposited. I cannot see that such a course could have been pursued before the

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amount to be distributed was determined, and that could not be determined before the appeals on the award had themselves been completely determined. The respondent says that the company has the possession of this property, and consequently should pay this interest which represents the revenues of the property. But that is forgetting that the company has duly paid for that property all what it had to pay. If the respondent loses the interest on that payment it is his own fault, and not through any error, fault or neglect of the company that I can see. He must now be taken to have been wrong in not accepting the tender made to him, and is the cause, the only cause, of his loss in the matter. According to his contentions, his moneys were safely deposited at six per cent interest during all the time he felt inclined to exercise his litigious inclinations, unfounded though they have been held to have been. He is in error. He cannot get interest when it is because he refused the amount tendered to him that he did not touch his capital. His refusal lasted during all his proceedings on appeal. It was a persistent daily refusal of the sum tendered to him till he dropped his appeal to the Privy Council; and yet he would now contend that it is through the neglect of the company that he was all that time deprived of his moneys.

I would allow the appeal with costs and dismiss his petition with costs.

As to the judgment of the Court of Queen's Bench, of January, 1891, we have here nothing to do with it.

GWYNNE, SEDGEWICK and KING JJ. concurred with TASCHEREAU J.

Appeal allowed with costs.

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

Solicitors for respondent: *Judah, Branchaud & Kavanagh.*

J. B. PARÉ & AL, (DEFENDANTS).....APPPELLANTS ; 1894

AND *Mar. 1.
*May 1.

JOSEPH PARÉ, (PLAINTIFF).....RESPONDENT ;

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

Accounts—Action—Promissory note—Acknowledgment and security by notarial deed—Novation—Arts. 1169 *and* 1171 *C. C.—Onus probandi—Art.* 1213 *C. C.—Prescription—Arts.* 2227, 2260, *C. C.*

A prescription of thirty years is substituted for that of five years only where the admission of the debt from the debtor results from a new title which changes the commercial obligation to a civil one.

In an action of account instituted in 1887, the plaintiff claimed *inter alia* the sum of $2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendants pleaded that the deed did not affect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the deed did not effect a novation. Arts. 1169 and 1171 C. C. At most, it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue. Art. 2264 C. C. And as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. Art. 2260 C. C.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) by which the appellants in their quality of heirs under benefit of inventory of the late Louis Paré were condemned

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

(1) Q. R. 2 Q. B. 489.

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to pay to the respondent nine-twelfths of $3,987.38, with interest from 2nd May, 1887, and costs.

Louis Paré died on 19th December, 1886, intestate, leaving the parties in the cause as his heirs and legal representatives.

By his action, the respondent claimed: 1st, the sum of $2,361.10 under a deed of mortgage executed in his favour by the late Louis Paré on 9th February, 1866, which contained the following clause:

"Lequel, par ces présentes, dit et déclare que par et en vertu d'un certain billet sous seing privé, en date du quatre novembre, mil huit cent soixante-trois, qu'il a consenti à Joseph Paré et à défunt Pierre Paré, ses frères, alors marchands, du même lieu aux droits duquel Pierre Paré, le dit Joseph Paré, marchand de St. Vincent de Paul, susdit, se trouve subrogé: il doit au dit Joseph Paré, la somme de cinq cent quatre-vingt-dix livres, cinq chelins et six deniers du cours actuel, avec l'intérêt sur le taux de sept par cent par an, le tout payable comme et de la manière expliquée au dit billet."

2nd. He claimed $1,532.68, balance of an account for goods and merchandise sold to, work done for, money loaned to, board furnished to and rent of tools and vehicles leased by Louis Paré and due to respondent, and 3rd, he claimed the sum of $327.15 for expenses of last illness and funeral of Louis Paré, board and lodging for him and care of his horses after his death.

The appellants pleaded.

1. The deed of mortgage conferred no right of action on respondent as it was given solely as collateral security for a promissory note of a like amount. That the deed of mortgage did not effect novation, and that the original debt was prescribed by the lapse of five years.

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2. The respondent never advanced any money to Louis Paré. Louis Paré always paid for any goods he may have purchased from respondent. No agreement existed between Louis Paré and respondent, whereby he undertook to pay for tools and vehicles, or for board and lodging. These were furnished, if at all, gratuitously. Any payment of debts of the succession were paid by respondent with moneys of the succession The respondent cannot claim for the care of the horses after Louis Paré's death, because he made use of them for his own purposes, and diminished their value by bad treatment.

For the three years preceding his death, Louis Paré had a contract with the Federal Government to furnish stone to the penitentiary at St. Vincent de Paul. From this contract he received about $5,000 per annum, or a total for the three years of $15,000.

Geoffrion Q.C., for appellant, cited and referred to arts. 1171, 1169, 2247, 2264 and 2227 C. C. *Larocque* v. *Andrés* (1).

Ouimet Q. C., for respondent cited and relied on—Guyot Repertoire, (2); Aubry & Rau (3); *Séguin* v. *Bergevin* (4); *Pigeon* v. *Dagenais* (5); arts. 2184, 2185 C. C. Pothier Obligations (6).

The judgment of the court was delivered by:

TASCHEREAU J.—The parties in this cause are the legal representatives of one Louis Paré, who died intestate, in 1886.

Joseph, the respondent, plaintiff in the cause, by his action instituted shortly after Louis' death, claims from the appellants their shares, amounting to $3,869, of a claim, amounting to $4,220.93, which he, the respond-

(1) 2 L. C. R. 335.
(2) Vo. Novation p. 227.
(3) P. 365.
(4) 15 L. C. R. 438.
(5) 17 L. C. Jur. 21.
(6) Bugnet ed. no. 179.

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ent, alleges he had against Louis at his death, composed of three different sums, as follows:—

1. $2,361.10, due by the deceased as per a notarial deed of obligation and *constitution d'hypothèque* consented by him to plaintiff, respondent, on the 9th February, 1866, twenty years before his death.

2. $1,532.68, balance of an account between plaintiff, respondent, and the deceased, for moneys advanced, goods sold and delivered, board, rent of tools, etc.

3. $327.15, for last illness and funeral expenses paid by plaintiff, respondent.

To the first item the appellants have pleaded, besides the general issue, an exception as follows: They first deny that the plaintiff has any action on the notarial deed of 1866, alleged in the declaration, because this deed, as appears on its face, was only passed to give him a security for an antecedent unpaid promissory note of 1863, that Louis had made in his favour; that the said deed constituted no novation and no new debt, and can at most, be considered as having interrupted the prescription of five years against the said promissory note of 1863, by which interruption, according to (Art, 2264 C.C.) a new five years' prescription began to run from that date, if the note was then due: that the said promissory note, dated twenty-four years before this action was brought, was due and payable more than five years before the institution of the present action, and that consequently it is extinguished by prescription. By a special replication (there is no general one) the plaintiff answers that plea of prescription, not by denying at all that five years had elapsed since this debt was due, as alleged by the defendant, and consequently admitting it, (art. 144 C. P. C.) but by saying that the deed of 1866 constituted a new debt, which said new debt was prescribed only by thirty years: that the old debt on the promissory note of 1863, was

extinguished by that deed of 1866, and replaced by a new one, one based on a notarial deed; that any prescription that might have accrued was interrupted at various times by admissions and payments by Louis himself in his life time.

On the issue so joined between the parties on this part of the action, I am of opinion that the plaintiff's action as to this first item entirely fails. This deed of 1866 is certainly not a novation of the promissory note of 1863; it does not purport to be so on its face. It is a mere security given for it. It reads thus:—

"Lequel par ces présentes, dit et déclare que par et en vertu d'un certain billet sous seing privé, en date du quatre novembre, mil huit cent soixante-trois, qu'il a consenti à Joseph Paré et à défunt Pierre Paré ses frères, alors marchands, du même lieu, aux droits duquels Pierre Paré, le dit Joseph Paré, marchand de St. Vincent de Paul, susdit, se trouve subrogé: il doit au dit Joseph Paré, la somme de cinq cent quatre vingt-dix livres, cinq chelins et six deniers du cours actuel, avec l'intérêt sur le taux de sept par cent par an; *le tout payable comme et de la manière expliquée au dit billet.*

"Et pour assurer au dit Joseph Paré ici présent et acceptant le payement de la dite somme de cinq cent quatre-vingt-dix livres, cinq chelins et six deniers du dit cours avec les intérêts, le dit Louis Paré a soumis, affecté, obligé et hypothéqué, un emplacement de forme triangulaire." etc.

That is all that this deed contains. The promissory note of 1863, was evidently not thereby paid or extinguished. So much so that Joseph, the respondent, kept it, and has it to the present day in his possession, or what is the same thing, in the possession of his attorney *ad litem* in this case, to whom it was handed for the purposes of this litigation. If, as he now con-

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tends, this note had become extinguished by that deed, it would then and there have been given over to Louis. That deed, it is true, contains an implied promise to pay, but to pay what? Clearly, the debt on the promissory note of 1863, not a new debt at all, not a new obligation, and purports to merely give security for a pre-existing debt which was to remain unaltered and payable on the same terms and conditions. It contains no express promise to pay, but refers to the note as a subsisting instrument for the terms and conditions of payment. It simply admits the debt of 1863, and gives security for it. There is in it no intention to novate that I can see, in fact, novation is incompatible with its terms taken in connection with the all important fact that the respondent retained the note. The subrogation of the respondent alone as payee to himself and Pierre jointly, if that could affect at all the question, is not done by the deed, but is treated as having previously taken place.

And did not the respondent have a right of action on the note, notwithstanding this deed? The affirmative is not doubtful, it seems to me. Then if the first debt was not extinguished, there was no novation. Art. 1169, 1171 C.C.; and if there was no novation, art. 2264 C.C. decrees in express terms that a deed in such a case is nothing else but an interruption of the prescription, and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years more, if the note was then overdue.

This article 2264 of the Quebec Code is not happily worded. In fact the necessity for it is doubtful, and it might have been better not to enact it, as has been done in the French Code; any act, deed or document which operates as a novation of a debt, evidently annot be called an interruption of prescription. It extinguishes the debt altogether, and thereafter, the only

prescription that can apply is necessarily the prescription provided by law for the new debt. But if there has been no novation, any act, (*fait*) deed or document by which the prescription is voluntarily interrupted is nothing but a renunciation of the benefit of the time till then elapsed by which the prescription had begun to run: arts. 2184, 2222, 2227, C.C.; but the debt remains altogether the same and of the same character and consequently subject to the same prescription as before, which prescription then begins to run afresh from the date of the interruption; the same debt, the same prescription, except that the time thus far elapsed does not count. That is what art. 2264 of the Quebec Code purports to decree, and that is the law in France without such an express article. The contrary doctrine that a prescription of a debt say of five years should be extended to thirty years by an acknowledgment of it could not and did not prevail, though seemingly at various times it found a few supporters. The Court of Cassation in 1878, in a case of *Bourgade* v. *Bourgade* (1) and the Court of Appeal at Rouen in a recent case of *Duquesnay* in 1891, held that a short prescription when interrupted recommences for the same term, not for thirty years. A case of *Augier* (2) and one of *Spréafico*, (3) follows the same doctrine. I refer also to Dalloz (4) and to a case of *Carpentier*, (5) where one of the considérants of the Court of Cassation says on the question of prescription of promissory notes: "attendu que la reconnaissance par un acte séparé (required in France by art. 189 of the Code du commerce) devant avoir pour effet de substituer à la prescription quinquennale la prescription de trente ans ne peut résulter que d'un titre nouveau émanant du débiteur et *opérant novation*."

(1) S. V. 78. 1 469.
(2) S. V. 59. 2. 302.
(3) S. V. 59. 2. 357.
(4) Rep. Vo. *Effets de commerce.*
(5) S. V. 57. 1. 527.

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In 1855, the Court of Paris had held in the same sense, "qu'il faut un acte ayant *pour but* de faire novation à l'obligation primitive pour substituer la presciption de trente ans à la prescription quinquennale. *Re Philippon* (1). A note by Villeneuve to the case *re Cabrié* (2) fully resumes the discussion on that point. The Dict. du droit contentieux, par Devilleneuve et Massé (3) et seq. and the recent work of Bravard-Veyrières as annotated by Demangeat Droit Commun (4), may also be usefully referred to on the subject.

If there is no novation the interruption of prescription of a promissory note" says Bédarride (2 dr. Comm. No. 749) has no other effect but to render the debt subject to prescription by five years from the date of the interruption. I refer also to Alauzet; Comment. Code Commerce, (5); Demolombe (6); Leroux (7). If this note became due only after that deed of 1866, then the five years began to run only from its maturity, which is admitted to have been more than five years before the institution of the action. If it was due before the deed of 1866 was passed, then, there the prescription runs from the date of that deed. The interruption has changed the *point de depart.*

The respondent has cited Troplong (8), in support of his contention that an interruption under such circumstances prolonged the period of prescription, but if he had read on to the very next article of the same book, no. 698, he would have seenthat the author admits that doctrine "qu'autant qu'il y a un contrat exprès, explicite, séparé, opérant novation dans l'état des choses." And the Court of Cassation held in that sense in another case reported in Sirey (9), (in a case of *Baillet*

(1) S. V. 56, 2, 145.
(2) S. V. 53, 2, p. 540.
(3) Vo. Lettre de change nos. 525.
(4) Vol. 13, 2 ed, p. 551.
(5) Vol. 4 nos. 1555, 1560.
(6) Vol. 28 nos. 275 à 282.
(7) Nos. 77, 454, 456, 466, 519.
(8) Prescription no. 697.
(9) 38, 1, 708.

v. *Lefebvre*), though art. 2264 of the Quebec Code is not to be found in express terms in the Code Napoléon, that the prescription of thirty years is substituted to that of five years, on promissory notes, only when the admission of the debt by the debtor results from a new title which changes the commercial obligation to a civil one. The respondent also cited Aubry & Rau, (1) but that passage does not support his case. It simply says that the acknowledgment of a debt subject to a short prescription puts off the term to thirty years when it is accompanied by a new engagement on the part of the debtor, and when the acknowledgment constitutes a title distinct from the primitive one and effective by itself. That is what I cannot see in the deed of 1866, a title distinct from the promissory note of 1863, and effective by itself. It leaves the note in full force and vigour. It refers to it for the terms of payment; therefore it was not effective by itself. There was thereafter, not two debts due by Louis Paré, but the very same debt contracted in 1863, payable on the same terms, and that is why the respondent kept the note, as proof thereof.

The Court of Review, though admitting that there is no novation of the debt, says that there is novation of title. It seems to me that this is a distinction without a difference, and the respondent has not succeeded to support it by authorities. On the contrary, I find in addition to the authorities I have already quoted, that the Court de Cassation held in 1826, (2) *in re Cardon* that: "Une dette originairement commerciale ne perd pas ce caractère par cela seul qu'elle est ulterieurement reconnue par un acte notarié et garantie par une hypothèque." In that case, a hypothec by notarial deed had been given as surety

(1) vol. 2 par. 215. (2) S. V. 27, 1, 6.

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for previous promissory notes. And though these notes had been given up to the debtor at the time of the passing of the deed, the court held that the debt still remained a commercial debt. How clearer is the present case, where the note was retained by the respondent.

La dation de billets négociables en paiement d'une dette civile n'opère pas novation dans la créance, à moins que de la manière dont les billets sont motivés, résulte clairement l'intention de nover ;" say Championnière et Rigaud (1), "réciproquement, la connaissance par acte notarié d'une créance consistant en billets n'opère pas nécessairement novation, et n'enlève pas à l'obligation son caractère commercial. La forme des actes n'influe pas en général sur la nature des obligations qu'ils contiennent, ainsi rien ne s'oppose à ce qu'un engagement contracté par acte notarié soit commercial ; dès lors le renouvellement d'une dette de cette nature, constaté par bes billets négociables, peut avoir lieu par acte notarié sans qu'il y ait novation."

In a case cited by the same authors, (2) of July, 1829, the maker of four promissory notes had by a notarial deed given a hypothec for the amount. It was contended that by this deed a novation of the debt had taken place. But, said the Castel Naudary Court, in terms that are so applicable to the present case, that I cite them *ipsissimis verbis :*

Considérant que ce système (c'est-à-dire la prétension qu'il y avait novation) est erroné . . . . que le titre qui constitue la dette est toujours la lettre de change ; que le contract d'affectation d'hypothèque n'a fait autre chose qu'assurer le paiement comme on le voit dans le contract lui-même, ce qui prouve bien qu'il n'a pas été dans l'intention des parties de faire novation puisque le contract est fait pour assurer de plus fort le paiement de ces lettres de change ; qu'il est si vrai que c'est toujours dans les lettres de change que se trouve le titre constitutif de la dette que c'est en vertu des lettres de change seules que le créancier pourra obtenir le paiement de sa créance, tandis que le contract d'affectation d'hypothèque ne lui suffirait pas ; que de tout ce qui procède il résulte que l'acte notarié n'a pas opéré de novation, qu'il a seulement ajouté une garantie de plus à un acte qui a conservé toute sa force.

(1) Dr. d'enregistrement, vol. 2, nos. 1011, 1019.

(2) Dr. d'enr. vol. 2, no. 1013.

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That judgment, it is true, was set aside by the Court of Cassation, August 5th, 1833, but that court has since returned to the doctrine that it had adopted by its *arrêt* of 1826, above quoted, and which, in Championnière & Rigaud, loc. cit., is clearly demonstrated to be based on sound principles.

In a case for instance, of *Crédit Agricole* v. *Goddard* (1), a hypothec by notarial deed had been given as surety of promissory notes. It was contended that the deed operated novation of the notes. But it was held by the Court of Cassation that

la novation ne se présumant pas, il ne suffit pas pour l'opérer d'augmenter ou de diminuer la dette, de fixer un terme plus long ou plus court, et *d'ajouter ou de retrancher une hypothèque, ni même de changer l'espèce d'obligation*, à moins que les parties n'expriment une intention contraire ou que le second engagement ne soit nécessairement incompatible avec le premier.

In a previous case of *Costé* v. *Quiquandon* (2) the same court had held in 1857, that

ne peuvent être considérés comme emportant novation la stipulation de nouvelles garanties, telles qu'une hypothèque, pour sûreté de billets promissoires.

See in same sense Larombière (3), and in the Court of Grenoble in a case of *Duverney* v. *Baudet*, (4) it was held that

une dette originairement commerciale ne perd pas ce caractère par cela seul qu'elle est ensuite reconnue par un acte notarié et garantie par une hypothèque.

Lorsque le titre primitif est expressément conservé, says Pardessus (5), (and here the fact of retaining the promissory note amounts to an express reservation by the respondent of all rights upon it) "et que sans renoncer aux droits qu'il lui attribuait, le créancier a voulu une nouvelle sûreté, il acquiert tous les droits de l'acte nouveau, sans perdre aucun de ceux que lui donnait le premier."

And at page 262 the same author says, what would not seem to me questionable, that to stipulate a hy-

(1) Dalloz 76, 1-438 ; S. V. 76, 1, 162.
(2) S. V. 58, 2-90.
(3) Vol. 5 p. 13.
(4) Vol. 5 p. 13.
(5) Dr. Comm. Vol. 1, p. 266.

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pothec for a pre-existing debt does not extinguish the primordial title. And

A plus forte raison, la passation d'un acte authentique destiné à remplacer un acte sous seing privé n'emporte-t-elle pas novation, encore que le débiteur ait par cet acte fourni de nouvelles sûretés, say Aubry & Rau (1).

Massé, Droit Commercial. Page 266, says 286. "Ainsi, une dette originairement commerciale ne devient pas purement civile par cela seul qu'elle est ensuite reconnue dans un acte notarié et garantie par une hypothèque. Il n'y a pas là substitution d'une obligation ou d'une dette à une autre : l'obligation change de forme, mais au fond elle reste la même malgré les garanties nouvelles dont elle est entourée et les voies d'exécution qui lui sont ouvertes. L'acte notarié n'opère pas novation de la dette qu'il constate, et dès lors le payement doit en être poursuivi devant le tribunal de commerce, et non devant le tribunal civil.

By article 189 of the Code de commerce, promissory notes are prescribed by five years, *if the debt has not been admitted by a separate deed.* In a case of *Roux* v. *Sompayrac*, (2) the Paris Court of Appeal held that a deed giving a hyphothec for surety of a note did not constitute the separate deed required by this article.

As to the importance in this case of the fact that the respondent retained the promissory note see *Sriber* v. *Hebenstreet* (3).

The fact that a hypothec has been given does not affect the prescription, as the respondent seems to contend by his replication to the appellants' plea. If the debt is extinguished by five years' prescription, the hypothec given for that debt is also extinguished by five years. Art. 2081, part 5 ; Art. 2247 C. C. Troplong, Hypoth. Nos. 875, 878.

The Superior Court and the Court of Review rely on art. 1213 of the Code for the purpose of establishing the proposition that the plaintiff was not bound to

(1) Vol. 4, par. 218 ; Laurent, vol. 32, nos. 168, 170, 171, 480 ; Leroux, no. 1363.

(2) Dalloz 51, 2, 180.

(3) S. V. 48, 2, 518.

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base his action on the promissory note or even to produce it. With great deference, I cannot adopt that view. Why did he not produce that note? It must be assumed against him by uncontroverted principles of the rules of evidence that it is because it would have told against his case. I do not think that this art. 1213 of the Code can so be taken advantage of by any one, to allow him to conceal from the tribunal that the subsisting primordial title which is in his possession, is prescribed or has lapsed for any cause whatever (1).

The doctrine that an act of recognition makes proof of the primordial title has no application where the primordial title exists, and is available to the parties. And the act of recognition in such case has no other effect but to interrupt the prescription.

The learned judge who gave the judgment for the Court of Appeal, bases his reasoning on the ground that the appellants have not proved that the note was due more than five years before the institution of the action.

Here is a note twenty-four years old when the action is brought; the respondent has it in his possession, but does not produce it; the appellants say that it is overdue more than five years. The Court of Appeals hold that the *onus probandi* to prove that it was so overdue, was on the appellants. I would be disposed to think that the respondent, under these circumstances had to produce the note, if he desired to show that it was not overdue as contended by the appellants. The best evidence of the controverted fact is in the document itself; and that document is in his hands. Was it not incumbent on him to produce it? However, assuming that the Court of Appeal was right in holding that the proof of this fact

(1) Demolombe vol. 29, nos. 707 to 713.

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was on the appellants, under the circumstances of this case, that ground cannot militate against them here, as the fact that it was so overdue for more than five years is not denied, and so is not in issue, and consequently is to be taken as admitted by the respondent's replication to the appellants's plea as I have already remarked, a fact which has undoubtedly escaped the attention of the learned judges. I would come to the conclusion that on this first item the plaintiffs' action fails, on the general issue because the deed of 1866 cannot alone give him a right of action, when the other one is subsisting, and because he should have based his action on the promissory note of 1863. The appellants would then, of course. have opposed him the prescription of five years, to which he would have replied the interruption of prescription by the deed 1866, if the note was due when that deed was passed. The same question would then have presented itself, whether, by this interruption, the debt was prolonged for thirty years or for only five years ; the answer, it seems clear to me, would have been that the debt was prolonged only for five years ; a contrary doctrine would read art. 2264 out of the Code. It is only as I have attempted to demonstrate if there had been novation that the prescription of thirty years would have been the one applicable against the plaintiff's claim. And, it seems to me unquestionable upon the authorities, that there was no novation. Moreover, it must not be forgotten that in such a case, if it were at all doubtful whether the parties intended to novate or not, the primordial title must prevail. Boileux (1) ; Larombière (2). However, assuming that the action could be brought on the deed of 1866 alone, as it has been, it must be dismissed on the plea of prescription.

(1) Vol. 4 p. 514.

(2) Vol. 5, p. 12.

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There is another view of this part of the case upon which, if the respondent had been successful on the other question, he would have met with a serious difficulty. He simply alleges in his declaration, this deed of 1866, without alleging when the debt became due, and produces the deed. The deed refers to the note for the terms of payment. He does not produce the note, or otherwise show that it was due when he brought his action. He contends that it was not necessary for him to do so, because the appellants pleaded payment and prescription. But is that a sound contention? The appellants, it is true, pleaded payment and prescription but "without admitting any of the allegations of the declaration, but on the contrary, dênying them all formally," and pleaded, besides, the general issue. Now, had not the plaintiff to prove his case, before the defendants had to enter upon their defence? Did he prove that anything was due to him, when he sued? *Thayer* v. *Wilscam* (1); *Sarault* v. *Ellice* (2); *Leclerc* v. *Girard* (3).

Then, if the note is not prescribed as he would contend, he should by his action, or, at least, before he could obtain judgment against the appellants, have tendered it back to them, or deposited it in court to be handed back to them.

As to the other items of the respondent's claim, I adopt the Court of Review's reasoning and conclusions, and without entering into any other details, but those necessary to make the ground of my judgment intelligible to the parties themselves, I reach the result that the respondent's action must be dismissed in toto, upon the following statement:—

The respondent's claim on these items amounts to.....$5,004 29

(1) 9 L. C. Jur. 1. (2) 3 L. C. Jur. 137.
(3) 1 Q. L. R. 382.

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I deduct from it:

Care during last illness..	$ 66 00	
Board of horses.	125 00	
Taking care of effects.....	25 00	
Pension for 12 months...	144 00	
28 months at blacksmith's shop.....,...	336 00	
38 months rent of derricks	380 00	
38 months' rent of tools..	76 00	
38 months' rent of wagons, &c.....	76 00	
38 months rent of harnesses	44 00	
For oats, hay, meal	60 53	
" " " from farmers.....	632 90	
Timber, Miller & Prevost	59 84	
Timber by plaintiff.....	62 00	
	$2,087 27	$2,087 27
		$2,917 02

$2,917.02, which is more than paid by the $3,144.45 to appellant's credit, so that it is unnecessary to consider the other deductions made by the Court of Review.

The result is that the appeal must be allowed, and the action dismissed, with costs, in the four courts against respondent, *distraits* to Messrs. Geoffrion, Dorion & Allan, appellants' attorneys.

Appeal allowed with costs.

Solicitors for the appellant: *Geoffrion, Dorion & Allan.*

Solicitors for the respondent: *Ouimet & Emard.*

THE MONTREAL STREET RAILWAY COMPANY (PLAINTIFFS).... } APPELLANTS;

AND

THE CITY OF MONTREAL (DEFENDANT)..... } RESPONDENT;

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*Feb. 28.

*May 1.

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

Street Railway contract with municipal corporation—Taxes.

By a by-law of the City of Montreal, a tax of $2.50 was imposed upon each working horse in the city. By sec. 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car."

Held, affirming the judgment of the court below, that the company are liable for the tax of $2.50 on each and every one of its horses.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) affirming the judgment of the Superior Court which dismissed the appellants' action with costs.

This was an action *en répétition de l'indû* by which the plaintiffs claim to be refunded the sum of $6,739 paid by them under coercion, to the defendant, for the annual tax imposed at the rate of $2.50 for each horse, on the horses employed by the plaintiffs for the service of their cars in the City of Montreal, during the years 1887, 1888 and 1889.

A clause in the contract entered into between the City of Montreal and the Montreal Street Railway Company in 1886, reads as follows :

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

(1) Q. R. 2 Q. B. 391.

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The company shall not use their cars, unless they shall have obtained a license and number for which the said company shall pay, *over and above all other taxes*, the sum of twenty dollars ($20) for each two-horse car, and ten dollars ($10) for each one-horse car."

On the 21st of April, 1876, the corporation passed by-law no. 94, intituled : " *By-law concerning taxes and assessments*" enacting, in section 26 thereof, that : " *An annual tax is imposed and shall be levied upon all owners of horses in the said city as follows, viz. : for every "working-horse," at the rate of* $2.50," which was in force at the time the action was instituted.

The question which arose on this appeal was : Whether the city can claim from the company, over and above the tax imposed by the contract, another tax on each of its horses used exclusively to drive the cars, as is payable by the owners of working horses under by-law 14.

Branchaud Q.C. and Geoffrion Q.C., for appellants.

Ethier Q.C. for respondent.

FOURNIER J.—Le présent jugement porté en appel à cette cour a été rendu par la Cour du Banc de la Reine à Montréal, confirmant le jugement de la Cour Supérieure qui avait renvoyé l'action avec dépens.

La compagnie demanderesse réclamait le remboursement de $6,739 qu'elle avait été contrainte de payer à la cité défenderesse pour taxe annuelle imposée à la dite demanderesse à raison de $2.50 pour chaque cheval de travail, sur le nombre de chevaux employés par la dite compagnie comme pouvoir moteur pour ses chars dans les rues de Montréal, pendant les années 1887, 1888, 1889.

La défenderesse résista à cette demande sur le principe qu'elle ne doit à la cité que les taxes qui lui sont imposées par son contrat avec la dite cité; que la dite

taxe de $2.50 payée par l'appelante n'était pas comprise dans le dit contrat, et que la dite compagnie n'est pas sujette à l'application des règlements municipaux imposant des taxes et licences sur les *working horses ;* que les taxes qu'ils doivent sont déterminées et fixées par leur contrat ; que les chevaux employés ne le sont que comme pouvoir moteur des chars et ne sont pas cotisables en conséquence du privilège accordé à la compagnie par son contrat.

La seule question soulevée dans cette instance est au sujet des différentes clauses de l'arrangement entre l'appellante et la corporation de Montréal, accordant à la dite compagnie le privilège d'exploiter une ligne de chemin de fer pour le transport des passagers en dedans des limites de la cité, et l'application des règlements municipaux imposant des taxes et licences sur les chevaux de travail appartenant à la compagnie ou à tout autre contribuable.

Le 21 avril 1876, ayant adopté le règlement No. 94, intitulé : " By-law concerning taxes and assessments," il est déclaré par la section 26 de ce règlement " qu'une taxe annuelle est imposée et sera prélevée sur tous propriétaires de chevaux dans la dite cité comme suit, savoir : pour chaque cheval de travail, à raison de $2.50."

Ce règlement est devenu en force le jour même de sa sanction et n'a jamais été depuis révoqué ni amendé en ce qui concerne la section 26. Les termes de ce règlement sont généraux et atteignent la compagnie demanderesse aussi bien que les particuliers ou autres contribuables, du moment qu'ils sont propriétaires de chevaux de travail.

Depuis la mise en force de ce règlement à venir jusqu'à 1887, l'appelante n'a fait aucune objection et a payé sans protêt la taxe qu'elle devait pour chaque cheval de travail qu'elle avait. Mais la compagnie s'est ravisée, elle a cru qu'en payant sans protêt, elle

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pourrait ensuite au moyen d'une action en répétition de l'indû se faire rembourser et se soustraire à cette taxe. Ils ont ainsi payé au trésor municipal une somme de $6,739 qu'elle essaie de se faire rembourser. Il n'y a aucune contestation au sujet du mandat.

En payant le montant ci-dessus, même sans protêt, la compagnie n'a fait que s'acquitter d'une dette légitime et n'a payé ni par erreur de fait, ni par erreur de droit. Elle était et est encore actuellement une compagnie, faisant des affaires dans les limite de la cité et contribuable, soumise à l'effet de tous les règlements municipaux à moins d'en avoir été exemptée par une autorité compétente. Une telle exemption ne se présume pas et ne peut pas être induite de termes plus ou moins explicites ou ambigus mais doit être clairement enoncée; telle est la question que nous avons à décider.

En décembre 1885, la cité passa un règlement en vertu duquel elle accorda pour vingt-cinq ans à l'appelante le privilège d'exploiter un chemin de fer urbain; ce règlement contient toutes les conditions auxquelles ce privilège a été accordé. Un acte notarié fondé sur ce règlement et contenant toutes les conditions a été ensuite passé.

Si c'eût été l'intention de la corporation d'exempter l'appel de toute taxe non-mentionnée dans ce *by-law*, les parties intéressées en auraient fait certainement une disposition spéciale de ce règlement; tandis qu'au contraire la section 16 dit expressément : "The Company shall not use their cars, unless they shall have obtained a license and number for which the company shall pay over and above all other taxes, the sum of twenty dollars for each two-horse car, and ten dollars for each one-horse car." Les taxes ne sont payées que pour les chars et ne comprennent pas les chevaux. La distinction de *two-horse* et de *one-horse car* n'avait pas d'autre but que de créer deux classes de

chars, l'une plus grande que l'autre et devant payer une taxe plus élevée.

Les mots *over and above all other taxes* comprennent nécessairement les taxes que l'appelante avait payées comme tous les autres contribuables et en paiement desquelles elle ne peut se soustraire à moins d'en avoir été exemptée.

L'appelante ne peut se plaindre d'avoir été prise par surprise, ni accuser la cité de vouloir changer l'état de chose existant depuis bien des années puisqu'elle a agi en pleine connaissance des dispositions du règlement. Le privilège qu'elle possède actuellement pour vingt cinq ans n'est que le renouvellement de celui expiré il y a quelques années.

Pendant les vingt-cinq ans de la durée de la première concession de ce privilège l'appelante a toujours payé les taxes et les licences, sans objection. Si elle voulait éviter ces taxes, elle aurait certainement dû en faire une condition spéciale lors du renouvellement de son contrat.

Ne l'ayant point fait, elle est sujette aux paiements mentionnés dans les dits règlements et son contrat qu'elle a interprété pendant plus de vingt-cinq ans comme lui imposant cette obligation. En conséquence je suis d'avis que l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—There is nothing in this appeal. In 1886, this railway company obtained from the City of Montreal, a charter for twenty-five years. By sec. 16 thereof it is stipulated that " each car employed by the company shall be licensed and numbered, and none shall be used unless the company shall have obtained such license and number for which the company shall pay, over and above all other taxes, the sum of twenty dollars for each two-horse car, and ten dollars for each one-horse car; the said license shall be renewed every year on the first day of May, on pay-

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ment of the said rates and such license and number shall be posted inside the car for which the same are issued."

By a by-law of the city then in force, a tax of $2..50 was imposed upon each working horse in the city. Now, the company contend that they are not liable for that tax of $2.50 on each and every one of its horses. The two courts below have held that the words "over and above all other taxes" in their charter cannot so be read out of it, and that their contention is untenable. I am of the same opinion.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Judah, Branchaud & Kavanagh.*

Solicitors for respondent: *Roy & Ethier.*

JOSEPH B. PORTER (PLAINTIFF).....APPELLANT; 1894

AND *May 5, 7.
*May 31.

FREDERIC H. HALE AND OTHERS (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Evidence—Foundation for secondary evidence—Execution of agreement—Laches—Right to relief inconsistent with claim.

On the hearing of an equity suit, secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking for it, and to his sister and other persons connected with him, inquiring as to his whereabouts, but information was not obtained.

Held, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; that the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commission appointed by that court to procure the attendance of the custodian and his examination as a witness.

The suit was for specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among her children, to sell lands of the estate in New Brunswick to the plaintiff P.; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence and the case made out by the bill.

Held, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by

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

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both the trustees, could convey no estate, legal or equitable, to C.; and that the proof of its contents was not satisfactory.

At the hearing P. claimed to be entitled to a decree, in the event of the case made by his bill falling, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate.

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing.

The agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval.

Held, that as the evidence clearly showed that P. was only in possession as agent of the trustees and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit.

APPEAL from a decision of the Supreme Court of New Brunswick reversing the judgment of the Judge in Equity in favour of the plaintiff.

The facts of the case are sufficiently stated in the judgment of the court.

McLeod Q.C. and *Palmer* Q.C. for the appellant. That the secondary evidence was properly admitted, see *Slasser* v. *Gloyop* (1).

The plaintiff is entitled to a decree for any interest that Angus Campbell may be shown to have had in the estate *Graham* v. *Olliver* (2).

The defence of laches was not pleaded and cannot be set up by the defendant, as the delay was caused by Angus Campbell, one of their grantors. See *Morse* v. *Merest* (3).

Weldon Q.C. *Currey* and *Vince* for the respondents, referred to *Doe d. Richards* v. *Lewis* (4) and *Boyle* v. *Wiseman* (5).

(1) 2 Ex. 409.
(2) 3 Beav. 128.
(3) 6 Mad. 26.
(4) 11 C. B. 1035.
(5) 10 Ex. 647.

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The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Supreme Court of New Brunswick sitting in appeal from the Judge in Equity, whereby the court, (Mr. Justice Hanington dissenting), reversed a decree in a suit for specific performance and for an injunction to restrain proceedings in an action of trespass brought by certain of the defendants. The plaintiff in the suit has appealed to this court against the latter judgment which was concurred in by the Chief Justice and by King and Fraser JJ.

By articles of agreement dated the 7th of August, 1884, signed and sealed by the parties thereto and made between Angus W. Campbell, a defendant to the suit, of the first part, and the appellant Joseph B. Porter, of the other part, Angus W. Campbell, who was a son of Lady Campbell the testatrix hereafter mentioned, and one of the beneficiaries under her will, contracted to sell to the appellant certain lands in New Brunswick, comprising in all about 3,389 acres, for the price of $3,000 payable as follows, namely:—$1,000 when the vendor Angus Campbell should have prepared and ready to be delivered to the appellant a good and sufficient deed in fee simple of these lands, which conveyance Angus W. Campbell agreed to make or cause to be made within three months from the date of the agreement. And it was further agreed that the residue of the price should be paid in two annual instalments of $1,000 each. Further, it was stipulated that time should be of the essence of the agreement. The articles also contained a recital that the lands agreed to be sold were, by the last will and testament of Sir John Campbell, devised to Helen Lady Campbell, his wife, and were then held in trust for her, as the said Angus W. Campbell supposed.

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The appellant besides stating the before mentioned agreement by his bill alleged in substance as follows:—Helen Lady Campbell, the widow of Major General Sir John Campbell, being under her husband's will seised in fee of the lands in question, made her will whereby she devised the same lands to four trustees upon certain trusts, the ultimate trusts as regards these New Brunswick lands being that the trustees should divide and apportion the same amongst her surviving children, except Sir Archibald Campbell the eldest son of the testatrix, and power was given to the trustees in their discretion to sell and turn into cash the lands in New Brunswick. The testatrix died on the 3rd May, 1883. The bill further alleged as follows:—That only two of the trustees, John Myles and James Ogilvie Holdane, accepted the trusts of the will, and that these trustees appointed the defendant Angus W. Campbell their attorney and agent in the Province of New Brunswick to look after, sell and dispose of the lands in question; that the agreement referred to was registered in the proper registry office in New Brunswick on the 24th November, 1884; that by an agreement of sale made between the trustees before named and Helen Elizabeth Barbara Campbell (who was a daughter of the testatrix and one of the beneficiaries under her will) and Angus W. Campbell, the lands mentioned in the agreement were bargained and sold by the first mentioned parties to Angus W. Campbell. That after this sale and on or about the 24th November, 1886, the trustees made a deed bearing date the day and year last mentioned whereby they purported to convey the same lands to the defendant Helen Elizabeth Barbara Campbell for the consideration of $2,338.67.

The bill further stated that on or about the 18th March, 1887, Helen Elizabeth Barbara Campbell sold and conveyed the same lands for the consideration of $3,400

to the defendants Irvine and Hale, who afterwards for valuable consideration sold and conveyed a part interest therein to the defendant Donald Fraser; that all the last named defendants had full notice of the appellant's claim to the lands and of the agreement between the appellant and the defendant Angus W. Campbell before and at the time they accepted their deed. The appellant further alleged and charged that the conveyances from the trustees to Miss Campbell, and from Miss Campbell to the defendants Irvine and Hale, were made and accepted for the sole and only purpose of defrauding the appellant and to defeat and annul the sale made to the appellant by Angus W. Campbell, and that the defendants Hale, Irvine and Fraser had brought an action of trespass against the appellant for alleged trespasses committed on the land comprised in the appellant's agreement with Angus W. Campbell.

The bill prayed for specific performance against the defendant Angus W. Campbell, and that it should be decreed that the defendant Angus W. Campbell was the agent and attorney of the trustees, the defendants Myles and Holdane, in making the agreement. That it should be decreed and declared that the defendants Myles and Holdane sold the lands to the defendant Angus W. Campbell and that he sold the same to the appellant, and that they might be decreed to convey the same to the appellant. Further, it was prayed that the deed from the trustees Myles and Holdane to Miss Campbell and from Miss Campbell to the defendants Hale and Irvine and any conveyance from the latter to the defendant Fraser might be declared fraudulent and void as against the appellant; that the defendants Irvine, Hale and Fraser might be restrained from cutting timber on the land in controversy; and that further proceedings in the action at law might be restrained.

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The bill was taken *pro confesso* against the defendants Myles and Holdane, and also against the defendants Miss Helen Elizabeth Barbara Campbell and Angus W. Campbell.

The defendants Irvine, Hale and Fraser answered denying the appellant's title and putting him to proof thereof, and insisting on the validity of their own title and denying all notice of any title in the appellant at the time of their respective purchases.

The cause coming on to be heard before the judge in equity, Mr. Justice Palmer, that learned judge made a decree in favour of the plaintiff for specific performance and an injunction as prayed. Upon appeal against this decree to the Supreme Court in banc that court pronounced judgment reversing the decree made by the court of first instance, and ordering that a decree be entered dismissing the bill with costs.

Full written judgments were delivered by Mr. Justice King and Mr. Justice Fraser, the Chief Justice concurring in the judgment delivered by Mr. Justice King. The judgment of the court as indicated by Mr. Justice King and Mr. Justice Fraser proceeded upon the following grounds: It was held that the alleged agreement with the trustees under which Angus W. Campbell claimed title was not sufficiently proved for the following reasons; the agreement itself not being produced it was considered by the court that a proper foundation for the admission of secondary evidence of that instrument had not been laid, and that even if secondary evidence was admissible the parol evidence was insufficient to establish it. Further, it was held that the delay in instituting the suit had been such that the defence of laches would by itself have been fatal to the appellant's claim for relief. Lastly, it was considered that in the state of the pleadings, and under the circumstances disclosed by the evidence, the appel-

lant was not entitled to specific performance to the extent of Angus W. Campbell's share as one of the coheirs of his mother, this relief having been claimed for the first time at the hearing in the event of the case made by the bill of a claim under the will failing, upon the principle that the will was void as against the appellant under the registry laws for want of registration within three years from the date of the death of the testator.

I am of opinion that in all these respects the conclusions arrived at by the Supreme Court of New Brunswick were correct and that its judgment should be affirmed. I do not feel called upon to refer to the evidence in detail as it has been stated with fulness and particularity in the judgments of Mr. Justice King and Mr. Justice Fraser, to which I refer. It appears to me that no sufficient foundation for the reception of the secondary evidence of the agreement or other written document, whatever it may have been, under which Angus W. Campbell claimed to have a title from the trustees and his sister, was laid and that therefore the parol evidence of the appellant and of Mr. Gallagher, the conveyancer who prepared the agreement of the 7th of August, 1884, ought to have been rejected. There can be no doubt that the discretion of the judge of first instance who admitted this evidence is subject to be reviewed on appeal. The proper custodian of the document in question was, of course, Angus W. Campbell. He had returned to Scotland in the latter part of 1884. He was undoubtedly without the jurisdiction of the New Brunswick courts, but that was no reason why proper inquiries should not have been made of him as to this document, inquiries which it was incumbent on the appellant to show he made before he could be in a position to give parol evidence of its contents. The appellant did, it is true, write letters

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addressed to Angus W. Campbell, but in none of these, nor in the letter written to Miss Campbell, does it appear that he ever inquired for this paper. Then in the letter written to Myles it does not appear, even from Porter's own evidence, that in his inquiry for Angus Campbell he made any reference to this agreement or document on the proof of which his case now depends, as Mr. Justice Fraser points out; what he did refer to was his own agreement with Angus, not to the agreement between the trustees and Angus. He did not intimate to Myles that he wanted to find Angus in order to procure from him this important paper or information as to it. Moreover, his letter of the 12th February, 1886, is not consistent with his making any inquiries of Myles in the character of a purchaser of these lands; it would rather appear to Myles that what the appellant wanted Angus for had reference to the accounts for he does not in this letter make any pretentions to an interest in the lands. It was natural, therefore, that Myles in his answer should tell him as he did that the accounts had to be settled, not with Angus but with the trustees.

What the appellant should have done was this; he should have stated in his letters to Angus and Miss Campbell that he wanted this specific paper, and in his letters to Myles he should have asked for information as to Angus stating that his object in making the inquiries was to obtain this document. Moreover he might, and I think he ought, to have had inquiries made in Scotland by some independent person, in order first to ascertain where Angus Campbell was to be found, and then if Angus should have been found he should have been asked for the paper in question. Nothing of this kind was done.

Further, a commission might have been issued addressed to the Court of Session, and under the

Imperial Statutes (22 Vict. cap. 20 and 48 & 49 Vict. cap. 74) that court would have appointed a commissioner to take evidence before whom the attendance of Angus W. Campbell and his examination as a witness might have been enforced by the appropriate process in use in Scotland to compel the attendance and examination of witnesses.

I must, therefore, concur with the court below in holding that no proper effort was made to enforce or procure the production of the written instrument, the contents of which it was sought under exceptional rules of evidence to prove by oral testimony.

Then, assuming the parol evidence to have been admissible, it was insufficient to establish that any document had ever been executed by the trustees vesting any title to these lands in Angus W. Campbell. Unless such an instrument as that described in the evidence of both Porter and Gallagher had been signed by both trustees it was worthless as an instrument conferring title, either legal or equitable, on Angus. Mr. Myles may have signed it but for want of the concurrence of his co-trustee, Mr. Holdane, it might have been wholly inoperative. Then neither Porter nor Gallagher pretend to say it was executed by Mr. Holdane. Further, the description of the contents of the paper produced by Angus as given by both Porter and Gallagher was not satisfactory. Porter's statement does not accord with that contained in his bill which he swore to. In his letter to Myles of 12th February, 1886, he does not assume the position of a purchaser but very plainly refers to himself as still the mere agent for the estate. He says, "I am paying taxes and having a good share of trouble and work looking after the lands and getting very little for my trouble." Surely such a statement as this is entirely inconsistent with a consciousness of the claim he now advances as

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a purchaser who had acquired a title under his agreement with Angus. Had Angus Campbell really produced to the appellant such a document as he pretends Angus then had in his possession, he must when he wrote this letter, have known that he had a title in equity. Gallagher, as I have said, does not say more than does Porter himself as to the parties to the paper which he saw in the possession of Angus.

Then, as Mr. Justice Fraser points out, Gallagher speaks of a sale by Angus W. Campbell as a person "authorized by some parties interested in the estate," which is quite inconsistent with the case made at the hearing and on the assumed proof of which the original decree was made.

On the whole I must agree with the court below that assuming the parol evidence to have been admissible it would have been insufficient to establish the plaintiff's case.

The probability is that the instrument which Gallagher saw was some agreement in anticipation of a title to be acquired by Angus Campbell from the trustees. The letter from Myles to Angus Campbell of the 1st August, 1884, which was produced and put in evidence by the appellant himself, does not refer to any completed contract or arrangement between the trustees and Angus but rather to some such transaction being in contemplation.

The appellant cannot have the relief which he asked for in the event of his case as made by his bill failing, namely, a decree for specific performance to the extent of the share of Angus W. Campbell as one of the coheirs of his mother, the testatrix Lady Campbell. The claim to this relief was based on the ground that the will had become fraudulent and void as against the appellant as a purchaser from one of the heirs under the registry law by reason of its not having been re-

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gistered within three years from the death of the testatrix, as required by the New Brunswick Registration Act. It is impossible that on this bill claiming title under Lady Campbell's will the appellant could have a decree founded on the proposition that the same will was fraudulent and void against him. Then no amendment could be permitted, consistently with the general and reasonable rules of equitable procedure, which would make a case not only at variance with but actually antagonistic to that stated by the bill, and that, too, an amendment not asked for until the cause had reached the stage of the hearing. Lastly, it is not an unreasonable inference, as Mr. Justice Fraser points out, that the appellant must have had notice of the will. Then the agreement of the 7th August, 1884, itself on its face refers inferentially to Lady Campbell's will when it refers to her trustees and this would establish notice.

Lastly, the delay alone is a sufficient answer to the suit. The agreement was entered into on the 7th August, 1884; the first payment of purchase money and the delivery of the deed was to be in three months thereafter. By the agreement time was to be of the essence of the contract. It is out of the question to say that the plaintiff was ever in possession otherwise than as a mere agent and caretaker in the face of his letter to Myles of the 12th February, 1886. Upon this point the case of *Mills* v. *Haywood* (1), cited in the judgment of my brother King, is an authority. Then the appellant did not file his bill until October, 1888, nearly four yeas after Angus Campbell had made default in not producing a title. This delay must on well established principles of the law governing relief by way of specific performance be fatal to the plaintiff even if the trustees were shown to have entered into some executory

(1) 6 Ch. D. 202.

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agreement with Angus preceding in point of time the conveyance to Miss Campbell.

I should have said that I consider the case of *Sugden* v. *Lord St. Leonards* (1), relied on by the judge in equity, to have no application to a case like the present. It establishes, no doubt, an important principle of the law of evidence applicable in testamentary causes but is no authority for extending the doctrine of presumption for the purpose of general application.

The result is that we dismiss the appeal. This will still leave the plaintiff's remedy at law intact, and it will be open to him to pursue it by action against Angus W. Campbell (or against his estate if he is dead) for damages for breach of contract.

The dismissal must of course be with costs.

Appeal allowed with costs.

Solicitor for appellant: *C. A. Palmer.*

Solicitors for respondents: *Weldon & McLean.*

(1) 1 P. D. 154.

ROBERT SCOTT (PLAINTIFF)..... .....APPELLANT; 1894

AND *May 8, 9. *May 31.

THE BANK OF NEW BRUNSWICK (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Debtor and creditor—Payment to pretended agent—False representations as to authority—Ratification by creditor—Indictable offence.

If payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.

The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the verdict at the trial for the defendant bank.

This case was first tried in 1891, and resulted in a verdict for the plaintiff, which was set aside and a new trial ordered (1). The plaintiff appealed from the order for a new trial to the Supreme Court of Canada, but his appeal was not entertained (2). The second trial resulted in a verdict for the defendant, which was affirmed by the full court, from whose decision the present appeal is taken.

The facts of the case are fully set down in the judgment of the court.

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

(1) 31 N.B. R. 21. (2) 21 Can. S.C.R. 30.

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McLeod Q.C. and *Palmer* Q.C. for the appellant, referred to *Williams* v. *The Colonial Bank* (1); *Barton* v. *London and North-western Railway Co.* (2); *Jones* v. *Broadhurst* (3).

Blair, Attorney General of New Brunswick, cited *McKenzie* v. *The British Linen Co.* (4); *Stone* v. *Marsh* (5); *Leather Manufacturing Bank* v. *Morland* (6); and *Viele* v. *Judson* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts of this case, which is an action to recover the sum of $1,000 and interest, may be stated as follows:—The appellant was the master of a vessel in which he and Charles E. Robinson, a merchant of St. John, were jointly interested. Robinson had managed the appellant's private business affairs at St. John. On the 29th September, 1883, the appellant deposited with the respondent $1,000, for which he received a receipt in the words and figures following, namely:—

BANK OF NEW BRUNSWICK,

St. John, N.B., 29th Sept., 1883.

Received from Robert Scott the sum of one thousand dollars, for which we are accountable, with interest at the rate of four per cent per annum, on receiving thirty day's notice; interest to cease at the expiration of the notice, and no interest to be allowed unless the money remain in the bank three months.

THOMAS GILBERT, *President.*
W. GIRVAN, *Cashier.*

The appellant being about to go to sea, and not wishing to take the receipt with him, handed it to

(1) 38 Ch. D. 298.
(2) 38 Ch. D. 144.
(3) 9 C. B. 173.
(4) 6 App. Cas. 82.
(5) 6 B. & C. 555.
(6) 117 U, S. R. 113.
(7) 82 N. Y. 32.

Robinson (as he alleges) to place in his "safe" for secure keeping.

The appellant says he gave the receipt to Robinson in the bank at the time he received it in the same condition it was in when he received it himself, without indorsing his name on it; that he never wrote his name on it, and that the name "Robert Scott" which now appears on it is a forgery. Robinson, in his evidence (taken in the United States under a commission), does not state clearly when he received the receipt, but he denies getting it from Scott in the bank, although he admits that when Scott received it he, (Robinson) was present in the bank. Robinson's account of the matter is that Scott gave it to him afterwards in an unsealed envelope, and when he looked at it some days subsequently the appellant's name was indorsed on it. The jury, in answer to a specific question, have found that the appellant's account as regards the indorsement is the true one, and that his name was indorsed without his authority after the delivery to Robinson. They have not, however, explicitly found that the name of the appellant was forged or even written by Robinson, although it may be inferred that such was their opinion.

Robinson subsequently deposited the receipt with the respondents as a security for an advance, and after it had remained in the respondents' hands for some time it was, at the suggestion of the respondents' manager, exchanged for a new receipt for the sum of $1,044 (being the $1,000 and interest), made directly in favour of Robinson, which receipt the bank retained, and Robinson making default in the payment of the advance to him the respondents subsequently charged the amount of the advance (a note which had been discounted) against the deposit.

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The appellant did not return to New Brunswick until some time in 1887, about July, when he came to St. John to endeavour to get a settlement with Robinson who was indebted to him on an open account, independently of this transaction connected with the receipt, to the amount of some $2,650. Being unable to obtain a satisfactory settlement he demanded the deposit receipt when, as the appellant swears, Robinson confessed to him that he had used the receipt in the way mentioned, and had applied the money obtained by means of it to his own use. The appellant says Robinson besought him not to prosecute him, and then gave him a draft on one George Bell, of Dublin, for £250 and agreed to give him and did subsequently give him a mortgage for $2,500 on some interest which, as Robinson stated, he had in his father's property. It does not appear from the evidence and has not been found by the jury that the appellant ever agreed not to prosecute Robinson. The jury have specifically found that this mortgage was taken by the appellant to secure the amount improperly withdrawn by Robinson from the bank. They have also found that the giving of this security by Robinson induced the appellant to leave St. John without notifying the bank of the fraud which had been practised upon him. The jury have further found that the appellant by accepting the mortgage did not intend to waive his claim against the bank. The appellant left St. John in 1887, on getting the mortgage and draft, and did not again go to that city until 1889, when he informed the bank of Robinson's fraud and demanded payment which the bank refused. Robinson had then left the country for some time. In addition to the findings already mentioned the jury found that the bank were not prejudiced by the delay to inform them of the fraud from 1887 to 1889. Further, that the bank when they originally took

the receipt, as well as when they changed the receipt, and also when they finally appropriated the deposit by charging against it the loan to Robinson, had reasonable grounds to suspect that Robinson was not the owner of the money and had not the right to control it. Lastly, the jury have found that the appellant purposely avoided informing the bank of the alleged forgery from July 1887 to 1889 on a promise by Robinson to pay.

At the trial before Mr. Justice Hanington the jury having found as before stated in answer to specific questions left to them by the learned judge a verdict was entered for the respondents, leave being reserved for the appellant to move to have the verdict entered for him. A motion having subsequently been made in term to enter the verdict for the appellant that motion was refused, against which decision the present appeal has been brought.

I am of opinion that the judgment of the court below was entirely correct and is sustained by the highest authority. I do not think the doctrine of estoppel has any application to the case, the decision of which must be governed by legal principles of a different order. The receipt was not a negotiable instrument and although the fabricated indorsement might be by statute a forgery yet, even if genuine, it would of itself have constituted no authority to the bank to pay the money to Robinson as being himself entitled to the money as the transferee of the appellant, but the receipt with the appellant's name written on the back was used by Robinson in such a way as to indicate to the bank that he had authority from the appellant to demand payment of the money specified in it; Robinson's conduct was therefore equivalent to a distinct verbal representation of his authority to receive the money and to deal with the receipt as he did. The case before us is therefore the case of a pretended agent

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obtaining the payment of money belonging to his assumed principal by false representations and pretenses as to his authority made to the debtor of the latter. Then I think the law is clear that if the payment of money is obtained from a debtor by one falsely representing to the debtor that he is the agent of his creditor, from whom he in fact has no authority, and thereby a fraud upon the debtor is committed, yet if the creditor afterwards ratifies and confirms the payment so made he thereby adopts the agency of the party who has received the money and it becomes equivalent to a payment made by the debtor to a person having proper authority to receive it. And it makes no difference in the application of this principle that by his false pretenses the party receiving the money has committed an indictable offence.

For the latter proposition I rely on the judgment of Lord Blackburn in the House of Lords, in the case of *McKenzie* v. *The British Linen Co.* (1), as a conclusive authority. The difference between the case put by Lord Blackburn and the present is this, that the present case is the ratification not of a feigned contract, which was in itself a forgery, but of an act, the receiving of money, the payment of which was evidenced by fraudulent representations, which amounted to the offence of obtaining money by false pretenses, whilst the case put by Lord Blackburn is the ratification of a pretended contract the fabrication of which constituted the crime of forgery. What Lord Blackburn says in the case cited, is this :—

> But even though it was not made out that the signatures were authorized originally, it still would be enough to make McKenzie liable if knowing that his name had been signed without his authority he ratified the unauthorized act. Then the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, would apply. I wish to

(1) 6 App. Cas. 99.

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guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person, whose name was without authority used, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.

This is *a fortiori* applicable to a case like the present, where the doctrine of ratification is invoked, not for the purpose of giving vitality to an assumed contract which was in truth non-existent and void *ab initio*, but for the purpose of fixing a party, by reason of his adoption of it, with the legal consequences of an act which, whatever may have been the circumstances which attended it and brought it about, had a *de facto* existence. Upon principle there does not seem to be any good reason, upon grounds of public policy or otherwise, why such an act should not be susceptible of confirmation by a party whose conduct is free from any taint of illegality in favour of another party equally blameless, provided the adoption does not involve any agreement or undertaking on the part of either to forbear from a criminal prosecution.

The judgment of the Court of Exchequer in the case of *Brook* v. *Hook* (1) does, no doubt, contain observations to the opposite effect, but that case, so far as it proceeds on reasons at variance with Lord Blackburn's deliverance in *McKenzie* v. *The British Linen Co.* (2), must be considered as overruled by the latter case, and the judgment of Martin B., who dissented in *Brook* v. *Hook*, (1), must now be taken to be an accurate statement of the law. The decision of *Brook* v. *Hook* (1) may, however, be ascribed to a ground which would take it out of the doctrine enunciated by Lord Blackburn in

(1) L. R. 6 Ex. 89. (2) 6 App. Cas. 99.

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McKenzie v. *The British Linen Co.* (1), and would also make it inapplicable as an authority to govern the present case. It was there determined that the agreement for ratification itself was based upon the condition that the party receiving the benefit of the ratification would not prosecute the forger, a consideration which rendered it illegal and void. Martin B., before whom the action had been tried, reported the evidence to have been as follows:—

> The plaintiff said it must be a forgery of Jones and that he would consult a lawyer with a view of taking criminal proceedings against him; that the defendant begged him not to do so and said he would rather pay the money than that he should do so; that the plaintiff then said he must have it in writing and that if the defendant would sign a memorandum to that effect he would take it; and that the defendant then signed the memorandum relied on as a ratification.

Upon this the Chief Baron says that the verdict could not be sustained:

> And this first upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and become liable upon it in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones; and that this agreement is against public policy and void as founded upon an illegal consideration.

And subsequently to this in the same judgment the Chief Baron adds:

> I am of opinion that the true effect of the paper taken together with the previous conversation is that the defendant declares to the plaintiff, "if you will forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission that the signature is mine." This therefore was not a statement by the defendant that the signature was his and which, being believed by the plaintiff, induced him to take the note or in any way alter his condition; but on the contrary it amounted to the corrupt and illegal contract before mentioned.

This places the decision in *Brook* v. *Hook* upon principles so obvious and plain (always assuming that

(1) 6 App. Cas. 99.

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the court took a correct view of the facts) that there is no need of resorting to the second ground advanced in its support.

That second ground is in the language of Chief Baron Kelly as follows :—

> The paper in question is no ratification inasmuch as the act done—that is the signature to the note—is illegal and void ; and that although a voidable act may be ratified by matter subsequent it is otherwise when an act is originally and in its inception void.

This last *ratio decidendi* is clearly inconsistent with Lord Blackburn's enunciation of the law in *McKenzie* v. *The British Linen Co.* (1), and can no longer be considered authority. Moreover the reasoning on which it proceeds would be inapplicable here, for granting that the payment of the money for which the receipt in the present case was given was obtained by Robinson by false and fraudulent pretenses, and that any agreement so brought about would be illegal and void, there would still remain the fact that the money was actually paid over to him by the bank, and it is to this payment that the respondents seek to have the ratification applied. A contract or a pretended contract, like a forged note, may be void in law *ab initio* or non-existent so that there may be nothing to ratify, but a fact like a payment cannot be got rid of in that way. The payment was therefore clearly a substantial act susceptible of ratification, and the passage last quoted from the judgment in *Brook* v. *Hook* (2) does not apply to the facts before us in this appeal. Further it appears from the authorities that the distinction between a void and voidable contract or act does not apply at all to the ratification of the act of a pretended agent.

I find American authorities emanating from courts of the highest authority, and anterior in date to the case of *McKenzie* v. *The British Linen Co.*, (1) in entire

(1) 6 App. Cas. 99. (2) L. R. 6 Ex. 89.

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accord with the law of ratification as laid down by Lord Blackburn in that case.

In the case of *Greenfield Bank* v. *Crafts* (1) the Supreme Court of Massachusetts says:

It is, however, urged that public policy forbids sanctioning a ratification of a forged note as it may have a tendency to stifle a prosecution for the criminal offence. It would seem, however, that this must stand upon the general principle applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offence.

Again in *Bartlett* v. *Tucker* (2) the same court says:

If either of those names was that of a real person, then, although no agency was expressed on the face of the note, and whether the signature was affixed under a mistaken belief of authority or fraudulently, or even if it was a forgery, it was, so far as regards the liability to a civil action upon the notes, a mere case of signing without authority, and the signature might be adopted or ratified by that person, and such adoption or ratification would render him liable to be sued as maker thereof.

In *Wellington* v. *Jackson* (3) Gray C. J. speaking for the court propounds the law in these terms.

Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature and intending to be bound by it, he acknowledged the signature and thus assumed the note as his own, it would bind him just as if it had been originally signed by his authority even if it did not amount to an estoppel in "pais."

From the judgment in *Merrifield* v. *Parritt* (4) I extract the following passage which has particular reference to the question whether an act or contract void for illegality is susceptible of adoption or ratification. The court there says:

It was argued that according to that doctrine the act of A was void and then it was said that a void act cannot be ratified. But if it be admitted that A exceeded his authority by writing P's name without more it would not follow that P could not adopt or ratify the act. Whatever may be the meaning and extent of the rule that a void act cannot be ratified the rule does not apply to the acts of persons assuming without authority to be agents, nor to the acts of acknowledged agents which exceed their authority.

(1) 4 Allen (Mass.) 447.
(2) 104 Mass. 341.
(3) 121 Mass. 159.
(4) 11 Cush. 590.

These authorities, selected from a great number of American cases to the same effect, coming as they do from a court of the highest authority on all questions falling to be decided by the common law of England, are entitled to great weight as regards a question upon which we find English courts at variance.

The law therefore appears to be clear that although the obtaining payment by Robinson from the bank was obtaining money by a false pretense it was, nevertheless, susceptible of ratification by the appellant in such a way as to bind him for all the purposes of civil justice and to debar him from recovering the money from the respondents.

As I said before our judgment proceeds upon the principle of ratification or adoption and not on the doctrine of estoppel. The distinction between ratification and estoppel is well pointed out by the Supreme Court of Maine in a case of *Forsyth* v. *Day* (1) where it is said:—

> The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he intended to be; in the latter he is bound, notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In one case the party is bound because the contract contains the necessary ingredients to bind him including a consideration. In the other he is not bound for these reasons but because he has permitted the other party to act to his prejudice under such circumstances that he must have known or be presumed to have known that such party was acting on the faith of his conduct and acts being what they purported to be without apprising him to the contrary.

Next arises the question: Did the appellant ratify the payment to Robinson when, according to the finding of the jury, he accepted the mortgage from Robinson as security, and on the strength of that security left the province and remained away two years without in any way notifying the bank of the fraud which had been practised? Granting that ratification is possible and

(1) 46 Me. 196.

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that no objection on the ground of public policy is sustainable, which I have already shown to be the result of the authorities, I am at a loss to conceive a stronger act of adoption than that here in evidence and established as a fact by the finding of the jury. Surely if a pretended agent, on being charged with the fraud by the creditor, pays over to him money to the same amount as that which he has received from the debtor in assumed discharge of the debt the creditor could not afterwards, whilst retaining this money, compel the debtor to pay a second time. In such a case the receipt of the money from the fraudulent agent would be such a recognition of the agency as to relate back and place the debtor in the same position as if the pretended agent had had authority at the time he received payment from the debtor. This is too clear to need further demonstration. Then what difference in principle can there be between actual receipt of money and accepting security for it as the appellant did here? The answer must be, none that can make any difference in the application of the principle. This is a ground entirely different from that of estoppel upon which I altogether disclaim placing any reliance.

Any little doubt I had was as to whether the defrauded debtor must not be privy to the ratification. But this doubt is also dispelled by the last paragraph in the quotation I have given from *McKenzie* v. *The British Linen Co.* (1). Lord Blackburn there says:—

> It is quite immaterial whether this ratification is made to the person who seeks to avail himself of it or to another.

This appears to me to be conclusive. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *C. A. Palmer.*

Solicitors for respondents: *Barker & Belyea.*

(1) 6 App. Cas. 99.

THE ROYAL ELECTRIC COMPANY (PLAINTIFFS)..... } APPELLANTS ; 1894 *Mar. 2. *May 1.

AND

THE CORPORATION OF THE CITY OF THREE RIVERS (DEFENDANTS) .... } RESPONDENTS ;

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

Contract—Electric Plant—Reference to Experts by Court—Adoption of report by two courts—Appeal on question of fact—Arbitration clause in contract—Right of action.

The Royal Electric Company having sued the City of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal affirmed the judgment of the Superior Court and on an appeal to the Supreme Court of Canada.

Held, affirming the judgments of the courts below, that it being found that the appellants had not fulfilled their contract within the delay specified, they could not recover.

Held also, That when a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære : Whether a right of action exists, although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration : *Quebec Street Railway Company* v. *City of Quebec* (1) referred to.

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

(1) 13 Q. L. R. 205.

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THE ROYAL ELECTRIC COMPANY v. THE CITY OF THREE RIVERS.

APPEAL from a judgment of the Court of Queen's Bench, for Lower Canada (appeal side), confirming a judgment of the Superior Court, District of Three Rivers, by which appellants' action was dismissed.

The action was brought by the Royal Electric Company against the Corporation of Three Rivers, in May, 1891, to recover the price stipulated in the contract made between the parties for the erection of all the material necessary for the electric light in the City of Three Rivers by the plaintiffs, and also, for extras. A further sum of $5,331.99, for goods sold and delivered, and work done, and freight paid by appellants, to and for respondents, as specified in the account furnished ; the whole amounting to $39,040.81.

This contract was entered into on the 17th May, 1890.

The clauses of the contract upon which the contestation in the case arose are the following :

"7th. The said city shall pay for said installation and plants as above the sum of $35,000, $33,000 whereof after the plant had been kept in satisfactory operation by the said company for the term of 30 days as above, and balance $2,000, after the said plant has been in satisfactory operation for a term of six months from the date of starting from the permanent station."

"8th. In case of dispute between the parties with reference to the present contract or the execution thereof, all question of differences between them shall be settled by arbitration to be appointed in the ordinary manner."

Arbitrators were appointed by the court to report upon certain questions, and among others the following :

3. Should said experts find that the plaintiff has failed to fulfil any part of said contract, as to said steam plant, they are directed to state specially what part,

how the defects they have found can be remedied, and at what costs."

To this question the arbitrators found certain defects in the steam plant, and stated that it would cost some $957 to remedy these defects.

The Superior Court after argument dismissed the action on the ground that the plant was not completed according to contract and that until it was no right of action accrued to the plaintiffs.

Beïque Q.C. and *Geoffrion* Q.C. for the appellants:

The question in this case is whether there has not been any delivery but an acceptance by the company? Although respondents may originally have been entitled to insist on minute performance, and to postpone payment till it was obtained, it does not necessarily follow that they could do so after using the plant, as they have done, both for the purposes connected and unconnected with the contract. By so using it, they plainly waived strict performance as a preliminary to payment; appropriated the plant to themselves; and made it a question not as to whether they were bound to pay, but merely as to the amount due.

The case of *Roëckt* v. *Deruttis* reported in Dalloz (1) is here in point. See also on arts. 1521 and 1527 C.C.

As to the claims for carbons which were furnished and used by the corporation, they do not form part of the contract and the corporation should pay for them.

Now as to the right of action notwithstanding the clause in the contract relating to arbitration.

It cannot seriously be pretended, that we are precluded from taking suit, by reason of this clause in the contract. The right of a citizen to seek redress from the courts, is a matter of public order, and he cannot deprive himself of this right, in advance, and with regard to disputes which have not yet arisen. An existing dispute may be legally submitted to arbitration

(1) 59, 2, 102-3.

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by a deed of submission which complies with the requirements of the law (art. 1341 Code of Civil Procedure), and the parties to such a deed, are no doubt bound to carry it out. But no such deed of submission, was ever passed between the parties. See article 1344, C. C. P. which says: "deeds of submission made out of court, must state *the names and addition of the parties and arbitrators, the object in dispute, and the time within which the amount of the arbitration must be given.*

We may add that appellants would have been willing to arbitrate, but as their *garants*, Leonard & Sons, refused to agree to this, and as an award of the arbitrators to which they did not consent, and were not parties, could not bind the latter, appellants had no other recourse but to sue in the ordinary way.

Irvine Q.C., for respondents. Up to the time of the bringing of the action the property was not in the possession of the respondents, but was run by and under the control of the appellants, and as the experts and two courts have found that the work was not then completed, the company could not claim payment. As to the claims for extras, while the proof of it would have been sufficient had it been the only transaction between the parties, it was insufficient to show it to be independent of the contract. The first question in the case, is: whether the plaintiffs, appellants, had a right to resort to the tribunals direct, as they did by bringing the present suit, or whether they were not bound first to offer to the defendant to submit the questions in dispute between them to arbitration. I contend that the contract contains a distinct agreement that in case of any dispute between the parties with reference to their contract or the execution thereof, all question of difference between them should be settled by arbitration to be appointed in the ordinary manner. This agreement is express and most distinct, and in this case

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is the law of the parties. It is a stipulation permitted by our laws, and the plaintiff had no power to override it without the consent of the defendants. See *Quebec Street Railway* v. *The Corporation of Quebec* (1).

The judgment of the court was delivered by:

FOURNIER, J.—By their action, the appellant company claim from the City of Three Rivers $33,000, being part of the price of the electric light plant, which they had agreed by the contract of the 17th May, 1890, to instal for the City of Three Rivers; and also a further sum of $5,000 for sundry materials, &c., and for extra work. Fournier J.

This contract, made *sous seing privé*, is given at length in the case. The contestation rests upon the two following paragraphs of the contract in question:

"7th. The said city shall pay for said installation and plants as above, the sum of $35,000, $33,000 whereof after the plant had been kept in satisfactory operation by the said company for the term of 30 days as above and balance $2,000 after the said plant has been in satisfactory operation for a term of six months from the date of starting from the permanent station.

"8th. In case of dispute between the parties with reference to the present contract or the execution thereof, all question of differences between them shall be settled by arbitration to be appointed in the ordinary manner."

By the present action the appellants allege that on the 8th December, 1890, they had fulfilled the greater part of their obligations in the contract; they offered to complete the works remaining to be done, upon payment of $33,000, the first instalment of the contract price, and upon payment of $5,000 for extras.

The respondents pleaded to this action, that the appellants had no right of action for the following reasons: 1st, because they had not fulfilled the conditions of the contract, and that their works had not

(1) 13 Q. L. R. 205.

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been put in operation for thirty days after their completion. 2nd, because, under the contract, the appellants were obliged, before taking any action against the city, to submit to arbitration any difficulties which might arise on the subject of the execution of the work.

The first question to be decided is, then, whether the appellants had the right to appeal directly to the tribunals as they have done by their action, before giving the respondent an opportunity of referring the questions in dispute between them, to arbitration.

Although this question is an important one, it is not my intention to discuss it. I shall content myself with citing a recent case in which the Court of Queen's Bench at Quebec, maintained the legality of a similar condition, viz., the case of *Quebec Street Railway Co.* v. *The Corporation of Quebec* (1), where it was decided "that the court has jurisdiction to appoint an arbitrator to act on behalf of a party refusing to appoint such arbitrator, where the parties have covenanted that the matter in dispute should be determined by arbitration" In that case, the Hon. Mr. Justice Tessier made the following remarks: "The second point is the arbitration. The parties desired and agreed to it; consequently one party cannot fail to comply with his obligations. Arbitration experts, are methods of determining litigious contestations, and can be utilised by our laws, and according to our rules of procedure. In demanding arbitration, the parties wished to follow the rules of ordinary arbitration, unless they have stipulated the contrary, or particular rules."

If then, one of the parties refuses to name the arbitrators, the court has jurisdiction to enforce it, or to appoint them itself, and to appoint a third arbitrator in case of a difference of opinion between the two others.

(1) See Vol. 13 L. R. Q. p. 205.

Courts of justice have this jurisdiction even in cases where the parties do not agree to it; why then, should they not have jurisdiction in a case, like the present, where the parties have themselves stipulated for it?

It is useless to discuss the question further, because its decision cannot in any way affect this case, the Superior Court having, in the first instance, ordered an arbitration, in which the arbitrators made a unanimous report which has been accepted by the two courts below, the Superior Court and the Court of Appeal.

The second question to be considered is whether the appellants had fulfilled all the conditions of the contract and put in satisfactory operation, for thirty days after their completion, the works contracted for.

The appellants do not contend they did. They merely allege that the delay of thirty days should begin to run on the 8th December, 1890, and that the greater part of their works were then finished, thus admitting thereby that they were not completely finished. The evidence on this part of the case showed that the work was incomplete and not properly executed, and the court with the consent of the parties, referred the matter to the arbitrators with instructions to report upon the following questions:—

1st. Whether the plaintiff had on the 8th day of December, one thousand eight hundred and ninety, or ever since, substantially fulfilled its part of said contract as to quality, capacity, installation and saving of fuel of said steam plant;

2nd. Whether the joints in the said electric plant on both incandescent and arc lights were on the 8th day of December, one thousand eight hundred and ninety, well made and soldered, or have ever since been well made and soldered by the said plaintiff;

3rd. Should said experts find that the plaintiff has failed to fulfil any part of said contract as to said steam plant, they are directed to state specially what part, how the defects they have found can be remedied and at what costs;

4th. Should said experts find that the plaintiffs have failed to make good joints in said electric plant, they are directed to say how many

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and in what they have so been found deficient, how the defects can be remedied and at what costs ;

The experts made a unanimous report, declaring as follows :

"We find that the contract was not satisfactorily completed on the eighth day of December, 1890, nor is it yet owing to certain defects existing which are hereinafter mentioned."

This is conclusive.

Independently of the first instalment of the contract price, the appellants, by their action, claim an additional sum of $5,331.99 for goods sold and delivered by the appellants to the respondents, for work done and freight and salaries paid by the appellants for the respondents, the whole upon the request and to the satisfaction of the latter, for their profit and advantage, in the City of Three Rivers, at the prices and times specified in the account produced in support of this claim, as exhibit No. 2 of the appellant.

The bill of particulars furnished by the appellants, comprises, first the amount of the contract, $35,00.. ; then follows a long series of items for articles which they had agreed to furnish under the contract, and which were used for the purpose of operating the plant, boilers, machines, tools, &c., forming part of the contract, which amount to $5,331.99. They claim the right to be paid this amount independently of the contract price. But these items being part of the contract, or being extras, this pretension cannot be admitted, on the principle that the plaintiff cannot claim any amount before the execution of the contract. These items, being only accessories of the contract, can not be made the basis of an action outside of such contract. Moreover there is not sufficient evidence to justify a judgment granting the value to the appellant. True it was proved that this account was rendered to the respondents, and in part examined at an irregular meeting of some of the members of the

council. In addition to this there is the evidence of some of the employees, who stated that the goods were delivered and the work done. This evidence, which is not contradicted, would perhaps be sufficient in a separate action based solely on an account, but when a contract exists between the parties under which the appellants contract to furnish to the respondents, for $35,000, certain materials and work, evidence of delivery and value alone is not sufficient. It must be proved that these items are not included in the contract, and are entirely outside of the contract. There is no such evidence of record. Moreover the bill of particulars comprising all these items as well as the contract price, show that the two form part of the same demand and the same contract, and cannot be considered separately, the items of the account being only accessories of the contract.

I concur entirely in the reasons given by the Hon. Mr. Justice Hall, in the appeal from the judgment of the Court of Queen's Bench.

The appellants have no right, therefore, to claim the amount of their account, inasmuch as the works were not completed when the action was brought. For these reasons I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Beïque, Lafontaine, Turgeon & Robertson.*

Solicitor for respondents: *L. D. Paquin.*

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*Mar. 2.

*May 1.

THE ROYAL ELECTRIC COMPANY (PLAINTIFFS IN WARRANTY) ..... } APPELLANTS;

AND

FRANK C. LEONARD *et al* (DEFENDANTS IN WARRANTY) ..... } RESPONDENTS.

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

Action en garantie—Contract—Sub-contract—Legal connection (Connexite).

The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgments of the courts below that there was no legal connexion (*connexité*) existing between the contract of the defendant and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple*, was properly dismissed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, confirming a judgment of the Superior Court for the district of Three Rivers, which dismissed an action in warranty by appellants against respondents, in connection with the preceding case of *The Royal Electric Company* v. *The City of Three Rivers.*

The plaintiffs by their declaration alleged that they had fulfilled all the greatest part of obligation of their

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

contract since the 8th December, 1890, and offered to complete those works which remained to be done concluded by praying for $33,000, the amount of the first instalment of payment under the contract.

The respondent pleaded that no right of action lay on behalf of the appellants until, 1st, they had fulfilled all the undertakings of their contract and had the works in satisfactory operation for thirty days, and 2nd, that with reference to any dispute under the contract the plaintiff was bound before instituting any action to submit the matter to arbitration.

After a long *enquête* the court, with the consent of the parties, referred the case to experts, who were to report, and did report *inter alia* :

1. Whether the plaintiff had on the 8th of December 1890, or ever since, substantially fulfilled its part of said contract as to quality, capacity, installation and saving of fuel of said steam plant;

Question 1st.—In answer to the first question submitted by the interlocutory judgment of the twenty-first day of May last past.

We find that the contract was not satisfactorily completed on the eighth day of December, one thousand eight hundred and ninety, nor is it yet, owing to certain defects existing which are hereinafter mentioned.

"*a*. Quality :—We find the quality of materials used throughout to be good and to fulfil contract, but the workmanship to be defective in some points.

"*b*. Capacity :—We find the capacity of steam plant to be up to guarantee and to fulfil contract, when existing defects as hereinafter mentioned are remedied.

"*c*. Installation :—(Setting up). We find the installation good and to fulfil contract. However, from evidence taken, we find that the engine foundations were defective on the eighth day of December, one thousand eight hundred and ninety, but have since been repaired and are now in good condition.

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"*d.* Saving of fuel:—We find that as regards saving of fuel, the steam plant fulfils the contract."

2nd. "Whether the joints in the said electric plant on both incandescent and arc lights, were on the eighth day of December, 1890, well made and soldered, or have ever since been well made and soldered by the plaintiff;"

"Question 2nd. To the second question submitted by said judgment:"

"Joints:—We find from evidence taken that on the eighth day of December, one thousand eight hundred and ninety, the joints in both incandescent and arc lights were not well made and soldered, but that they have since been and are now all well made and soldered."

Beïque Q.C. for appellant: The whole question at issue on this appeal, is as to whether there is any connection at all between the contract forming the basis of the main action and the contract forming the basis of the action in warranty. For if any such connection exists, to whatever small extent it may be, we respectfully submit that the judgments appealed from are clearly unfounded.

By their contract with the corporation of the city of Three Rivers, appellants undertook to supply them "with a steam and power plant consisting of two compound condensing engines of a total capacity of 250 indicated horse power," and "with four boilers of a total capacity not less than of 300 indicated horse-power," and to "set up said engines and boilers and properly connect the same."

Respondents admit and allege in their plea, "that defendants *en garantie* (to wit, respondents) by their contract with plaintiff *en garantie* (to wit appellants) agreed to furnish two Leonard Ball Automatic cut-off Tandem compound engines of a certain determinate

kind as therein set forth, and to be respectively of 100 and 150 horse-power, the material and workmanship to be of the very best throughout and the working parts of large and substantial proportions."

Respondents also undertook to furnish four boilers of the dimensions indicated in the specifications, which dimensions imply a capacity exceeding 300 indicated horse-power, and "to set up the said engines and boilers and connect the same with a steam pipe, furnishing the necessary pipe and fittings, and make an A1 plant in first-class running order."

Now, after respondents had furnished and made the installation of the engines, boilers and steam pipe connections, appellants having sued the town of Three Rivers for, amongst other things, the price of said engines, boilers and steam pipe connections, they are met with a plea on the part of the said town to the effect "that the engines, boilers and other material used and supplied by the plaintiff in the making of said plant are not of the power, quality and capacity required by the contract, and are badly connected together; that the shafts of said engines, are not of proper thickness, nor first-class in material or workmanship; that generally said engines, boilers and accessories composing said plant, are defective, badly made and of inferior quality.

How can the connection between the contracts be made more apparent? The obligation to furnish a first class steam plant being common to both contracts; and the respondents knowing at the time of the contract the purpose for which such plant was intended. If the principal defendants succeeded in proving the above allegations, appellants would suffer damage from the non-execution of respondents' undertaking, and would have a recourse against the latter. They therefore have an action in warranty. Respondents' whole

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argument is that the requirements of the two contracts are in some respects different, and that non-compliance with the one contract is quite consistent with compliance with the other. But the fact that respondents are not liable in warranty on the matters wherein the contracts differ, does not prevent such liability with respect to the matters wherein said contracts agree. So long as the principal defendants allege defects amounting to a breach of both contracts the action in warranty arises so far as such defects are concerned, and such right of action is not impaired by any additional allegations with regard to matters with which respondents have nothing to do. Appellants have recognized this distinction in their action in warranty, as they ask respondents to warrant them only against such allegations as refer to defects in material and workmanship on engines, boilers and steam connections.

J. A. Oughtred for respondents: The two contracts were perfectly separate and distinct. No communication was ever had by the respondents of appellants' contract with the city of Three Rivers, and it was not stipulated in any way that respondents should be responsible for the performance of any part of appellants' contract with the city of Three Rivers. A perfect compliance by respondents with the conditions of their contract with the appellants might be a very imperfect fulfilment of the requirements of the contract between appellants and the city of Three Rivers. Indeed, it would appear that the city of Three Rivers complains of the type of engines furnished, and considers it unfit for the performance of the work required by the contract with the appellants.

We urge that there is no such *connexité* between the principal action and the action in warranty as would justify a judgment granting the motion to unite them

for purposes of evidence. And further, that there is no such *connexité* between the two contracts as would justify the action in warranty at all.

The principle which has been laid down by the authors and confirmed by the courts in France, whence our law as to the actions in warranty is derived, clearly justifies the judgments which have been rendered in the Superior Court and in the Court of Queen's Bench in this cause. That principle is fully expressed in the following quotations:

Guyot, Répertoire (1); Delzers (2); Pothier (3); Dalloz (4).

The judgment of the court was delivered by:

FOURNIER J.—The appellants have appealed to this court from a judgment of the Court of Queen's Bench rendered at Quebec, confirming unanimously a judgment of the Superior Court which dismissed the appellants' action in warranty.

By a contract entered into between the appellants and the city of Three Rivers on the 17th May, 1890, the appellants undertook to supply to the said city the necessary plant for lighting the said city with electricity, the contract price being $35,000.

The respondents, who are manufacturers of engines and boilers were requested by the appellants to tender for two stationary engines and four boilers, with their connections, to be set up in the city of Three Rivers. On the 19th May, a tender was submitted by the respondents, accompanied by specifications of the engines and boilers and their connections, and was accepted by the appellants, after some modifications. This tender forms the contract between the parties.

The appellants, claiming to have completed their contract with the city of Three Rivers, brought an action

(1) Vo. Connexité 480.
(2) 2 Vol., Proc. Civ. p. 183.
(3) Proc. Civ. No. 89.
(4) 90, 2, 222.

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against the said city to enforce payment. To this action the city pleaded that the appellants had not fulfilled the conditions of the contract and it complained of the quality of the electric light plant, as well as of the engines and boilers supplied to the appellants by the respondents.

The appellants then brought an action in warranty against the respondents, citing the pleas of the city of Three Rivers, and alleging that by law the respondents were bound to warrant them against all portions of the defence of the city which urged the insufficiency and defects of the engines and boilers, with the exception of the warranty to effect a saving of 30 per cent of the consumption of fuel. They concluded by praying that the respondents be ordered to intervene in this action, and that they be condemned to guarantee the appellants against that portion of the pleas of the city of Three Rivers, which complained of the quality of the engines and boilers, which should be dismissed; and in default of so doing, that the respondents be condemned to indemnify the appellants against any condemnation which might be rendered against them.

The respondents filed a declinatory exception, which was dismissed and which is not now in issue.

They also pleaded that they were not parties to the contract between the appellants and the city of Three Rivers; they had nothing to do with the fulfilment or non-fulfilment of the obligations arising out of that contract, which formed the basis of the principal action, and that they were not in any way responsible for those works.

By their last plea the respondents alleged that by their contract with appellants, they agreed to supply two Leonard Ball Automatic Cut-off Tandem Compound Engines of a certain determinate kind, the size of the cylinder wheels and of the governor wheels, of

the main journals and crank pins was also specified and a list of the fixtures was attached to the tender.

They also agreed to furnish four stationary boilers for brick work of specified dimensions, and in conformity with the Montreal boiler by-law and in addition thereto the necessary steam pump, tubular pressure heater, smoke, flue and connections, for the price mentioned in their letter of 17th June, 1890, the condensers, however, were to be supplied by appellants.

They also alleged that they carried out their contract according to its terms, and according to the instructions of the appellants during the construction of the said works.

They endeavoured to show that the work done by them was well done, and had none of the defects alleged by the appellants. It is not necessary to follow this contention. The first question to be decided is whether there was a legal warranty. If the respondents are not warrantors by law there being no conventional warranty it is quite useless to discuss the manner in which the works were executed.

It is clear that the contracts in question have no connection with one another. They are two acts, entirely distinct and separate one from the other, containing no condition of warranty in favour of the appellants. As the Hon. Mr. Justice Burgeois said in his judgment "there is no connection between the contract entered into between the plaintiffs in warranty and the corporation of the city of Three Rivers, and the contract between the defendants in warranty and the said plaintiffs in warranty."

"Connexité c'est le rapport et la liaison qui se trouvent entre plusieurs affaires qui demandent à être décidées par un seul et même jugement (1)."

(1) Guyot Vo. connexité p. 480.

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"Il y aura connexité si les points à juger ressortent des mêmes faits, s'ils reposent sur l'interprétation des mêmes actes, s'ils dépendent des mêmes moyens, si la décision rendue sur les uns est de nature à influencer la décision des autres (1)."

Pothier, Procédure Civile, defines a warranty, simple or personal, as follows :

Celle qui a lieu dans les actions personnelles qui résultent de l'obligation qu'une personne a contractée d'acquitter quelqu'un en tout ou en partie d'une dette dont il est tenu envers un tiers et qui a lieu toutes les fois qu'il est poursuivi pour cette dette.

It follows from this definition that if the respondents are in any way responsible, it can only be as warrantors, then how could they be in a direct action of damages ?

See also the case of *Robert de la Marche* v. *Deveille*, Cours d'Appel-Orléans (2).

Qu'en effet, en matière de garantie simple, le garant est celui qui se trouve tenu vis-à-vis d'une personne de répondre des suites d'une action qui lui est intentée par un tiers ; qu'il faut donc pour pouvoir appeler en garantie, que la demande principale et la demande en garantie se rattachent l'une à l'autre par une relation nécessaire de dépendance et de subordination ; que la base des deux actions ne doit pas consister en deux obligations de nature différente ; que ce n'est qu'autant qu'il en est ainsi qu'on peut invoquer la connexité existant entre les deux causes et la contrariété possible des décisions.

See also *La Compagnie l'Industrie Nationale* v. *Lemaire* (3).

These authorities clearly show that the respondents are not warrantors of the appellants ; the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants : *Beïque, Lafontaine, Turgeon & Robertson.*

Solicitors for respondents : *Hutchinson & Oughtred.*

(1) 2 Delzers, Procédure Civile, p. 183.

(2) Dalloz 90, 2, 222.

(3) Dalloz 89, 2, 295.

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TWO CASES.

*Feb. 21, 22, 23.

*May 1.

New trial—Improper reception and rejection of evidence—Nominal damages.

APPEAL from decisions of the Supreme Court of New Brunswick (1) in favour of the respondent Clarke.

Clarke brought an action for the price of timber supplied to Scammell under a written agreement which was defended on the ground that the timber was not of the quality contracted for. The plaintiff having obtained a verdict a new trial was moved for on a great number of grounds only two of which were relied on in argument. The rule for a new trial was made absolute unless the plaintiff filed a consent to his verdict being reduced and such consent being filed the rule was discharged and the verdict stood for the reduced amount.

Another action was brought by Scammell against Clark for damages in not supplying timber up to the standard the contract required. In this action a verdict was given for the defendant and a new trial was moved for the main ground urged being that plaintiff was entitled to nominal damages at least. The court was of opinion that the plaintiff was entitled to nominal damages, but refused a new trial to enable him to have a verdict therefor. Scammell appealed from both decisions to the Supreme Court of Canada.

Both appeals were dismissed the Supreme Court being of opinion that the objections to the verdicts for

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*PRESENT:—Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 31 N. B. Rep. 250, 265.

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improper reception and rejection of evidence were properly overruled by the court below and the new trial to enable Scammell to recover nominal damages was properly refused.

Appeals dismissed with costs.

Palmer Q.C. for appellants.

W. B. Wallace for the respondent.

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*Mar. 17.
*May 1.

BROWN *v.* TOWN OF EDMONTON

Public street—Dedication—Obstruction—Right of owner or occupier to compensation.

APPEAL from a decision of the Supreme Court of the North-west Territories (1) affirming the verdict at the trial for the plaintiffs, the town of Edmonton.

The action was brought by the town of Edmonton to compel the defendant to remove a log-house alleged to be an obstruction to a public street and a nuisance. The defences set up were that the alleged obstruction was upon the street when it was dedicated to the public and the dedication should be held to have been accepted subject to such obstruction; also that the defendant, if the building had to be removed, was entitled to compensation as owner or occupier under the Municipal Act and the plaintiffs had not paid nor offered such compensation nor referred the matter to arbitration.

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

(1) 1 N. W. T. Rep. Pt. 4 p. 39.

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The Supreme Court of the North-west Territories affirmed the decision at the trial in favour of the town holding that the defendant was not entitled to compensation as the land had not been "entered upon, taken or used by the corporation in the exercise of its powers of appropriation" which forms the only ground for compensation provided by the Municipal Act. As to the dedication being accepted subject to the obstruction the court held that such ground had not been taken at the trial and could not be entertained by the full court.

The Supreme Court of Canada also affirmed the decision in favour of the town, holding that the right of the public to the free and unobstructed use of a street could not be taken away by the existence of an obstruction when the street was dedicated.

Appeal dismissed with costs.

Ferguson Q.C. for the appellant.

Latchford for the respondents.

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*May 9, 10.

JAMES McGREGOR GRANT AND RONALD CAMERON GRANT (DEFENDANTS) ..... } APPELLANTS;

AND

OLIVIA MARY MACLAREN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS;

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Executors and trustees—Accounts—Jurisdiction of probate court—Res judicata.

A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the probate court.

The Supreme Court of Canada, on appeal from a decision that the said charges were properly disallowed, will not re-consider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved.

A letter written by a trustee under a will to the *cestuis que trust* threatening in case proceedings are taken against him to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship.

APPEAL from a decision of the Supreme Court of New Brunswick, reversing the ruling of the judge in equity on exceptions to a referee's report.

The defendants, the Grants, were executors and trustees under the will of John W. Nicholson, who had been a wholesale liquor dealer in the City of St.

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

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John, N. B. The plaintiffs were children of said Nicholson, and beneficiaries under the will. Being dissatisfied with defendants' management of the estate plaintiffs had endeavoured to get R. C. Grant to resign his position as executor and trustee and have one of themselves appointed in his stead, and in answer to a letter proposing this change J. McGregor Grant wrote to the plaintiff, Mrs. MacLaren, a letter containing the following threats :

" If I chose to retaliate, as you richly deserve, I could put the Dominion Government in possession of information which would justify them, either now or at any time within fifty years, in seizing the books and property of the estate, and leaving you all simply paupers with the reputation of the family irretrievably ruined, and the public astonished with a revelation of over twenty years of the most successful fraud, not only on the Government but on themselves as customers. The question has often been put to me : How has Mr. Nicholson accumulated such a large fortune when other liquor dealers could not ? I and four others in St. John could answer that question, and could tell how night after night the shutters of the store would be put up, the door carefully locked and barred, all lights extinguished except on the lower story, all chinks in the windows covered over, the nuts cautiously taken off the copper hasps of the customs bonded warehouse, the doors opened, cask after cask rolled out, one-fourth of the contents transferred to empty casks ready in the duty paid warehouse, the quantity abstracted replaced with alcohol water and colouring mixture, the adulterated casks marked with chalk on the chine, rolled back into the bonded warehouse and afterwards sold to the public, and the Government defrauded of the duty on the quantity abstracted. Every cask that came into the store, whether

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of brandy, whisky, wine or gin, was treated in this manner, and the profit on every quarter cask averaged $25, and the invoice books in my possession will show that the estate is liable to the Dominion Government for nearly $300,000, or in other words, the duty on one fourth of every cask of liquor imported;"

"I am not desirous of attempting to injure you as you have attempted to injure me; fortunately none of my family were ever engaged in the liquor traffic, and therefore any exposure, although it might be intensely gratifying to the St. John public, would be harmless to myself and family, but you can see that your own selfishness and base ingratitude may at any time place you in an unfortunate position, and so serious is the offence in the eyes of the law that had the particulars been divulged in the lifetime of your father it would have cost him his liberty. I do not intend that either of you, or any of your sisters, shall become trustees."

After receiving this letter the plaintiffs instituted a suit in equity for the purpose of having the Grants removed from the trusteeship of the estate. At the hearing the judge in equity, without entering into the merits of the suit, ordered a reference to have the accounts of the defendants taken. When the case came before the referee defendants' counsel claimed that as the accounts had been passed every year before the Probate Court they could not be reviewed in the equity suit, but the referee proceeded to investigate them and disallowed a number of items as improper charges. On exception before the judge in equity to the referee's report that learned judge held that the passing of the accounts by the Probate Court was final, and not open to review in another proceeding. On appeal from this ruling it was reversed by the Supreme Court of New Brunswick, and the report

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of the referee was confirmed. The defendants then appealed to this court.

McLeod Q. C. and *Palmer* Q. C., for the appellants. The matter of the accounts was, by the action of the Probate Court, *res judicata*, and could not be attacked in a collateral proceeding. *Doe d. Sullivan* v. *Currey* (1); *Cummings* v. *Cummings* (2); *Harrison* v. *Morehouse* (3).

Hazen for the respondents was stopped by the court.

THE CHIEF JUSTICE.—(Oral judgment). We do not think it necessary to hear the learned counsel for the respondents any further as we all think the appeal must be dismissed.

I am of opinion that the Probate Court had no jurisdiction over the accounts in so far as the charges and disbursements of the defendants were incidental to their duties as trustees and not to their duties as executors. Therefore whatever the Probate Court may have determined with respect to the accounts of the trustees, as distinguished from those of the executors, was rightly held by the court below not to be binding on the equity court. The technical rule relied on by the appellant that a judgment cannot be attacked for want of jurisdiction in a collateral proceeding does not, it seems to me, apply to such a case. For this the case of *Atty. Gen.* v. *Hotham* (4) which was referred to by my brother Taschereau during the argument is a sufficient authority.

The exceptions to the referee's report were properly disallowed by the full court on the appeal to it from the equity judge who had allowed some of these exceptions. There being no *res judicata* binding on the referee it appears to me that we cannot now interfere so far as to reconsider the several items in

(1) 1 Pugs. 175.
(2) 123 Mass. 270.
(3) 2 Kerr 584.
(4) Turn. and Russ. 219.

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the accounts which have been made the subject of exceptions for the purpose of ascertaining if the exercise of discretion by the referee, confirmed as it has been by the court on appeal, should be altered by this court. Two tribunals have already pronounced upon them and exercised a judicial discretion in the allowances made and no question of principle is involved. Certainly this court as a second court of appeal ought not to review the items of the account in detail in such a case as this. It is laid down in two recent cases in the House of Lords (1) that where two courts have concurrently decided a question of fact that tribunal will not review their decisions, and this principle of adjudication seems to me to apply still more strongly where the subject matter of appeal is one in which the courts appealed from have exercised a discretion as to amounts, not involving any question of principle, in allowances made in taking trustee's accounts.

With reference to the conduct of the trustees which has been dwelt upon by Mr. Hazen, it appears to me that Major Grant acted most improperly in writing the letter which is set out in the bill. The judge in equity ought to have removed Major Grant from the trusteeship at once. A trustee who threatens to betray the interests of his *cestuis que trust* in the manner in which Major Grant did in the letter in question should not have been allowed to remain in control of the trust estate as that gentleman has been left up to the present time. I cannot understand how any court of equity, having regard to the relationship existing between trustees and *cestuis que trust*, especially where some of the latter were infants or married women (as in the present case), could allow a trustee who had so far

(1) *Owners of the "P. Caland" & Freight* v. *The Glamorgan S.S. Co.* [1893] A.C. 216 ; 1 Repts. 145 ; *McIntyre Bros.* v. *McGavin* [1893] A.C. 275 ; 1 Repts. 250.

forgotten his duties as to write such a letter still to continue in the administration of the trust funds and property. Therefore, so far as the conduct of the trustee ought to have any influence on the questions involved in the exceptions taken to the referee's report, it must be decidedly unfavourable to the appellants.

If I were called upon to take the accounts over again, scrutinizing each item and thus reviewing the discretion exercised by the referee and the Supreme Court of New Brunswick, I could come to no other conclusion than that arrived at by those tribunals.

The charges disallowed were excessive and improper. The payment of $1,500 a year as a salary to Ronald C. Grant for collecting rents, in addition to the allowance he was entitled to receive as a trustee under the will, was unjustifiable. The trustees were paid for performing the duties of their office and beyond that clerks were employed and a commission allowed to Charles Grant, another son of the appellant, for collecting the rents due to the estate. These charges indicate that there was generally extravagant expenditure.

My reason for making these observations is that the circumstances upon which I have remarked appear to me to afford good ground why we should not be astute in scrutinizing every item in the trustees' accounts which has been disallowed, and why we should adhere to the judgment of the court below as having been a reasonable and proper exercise of its discretion. Further, I think even if we were to take the accounts over again we ought to come to the same conclusion as the Supreme Court.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I concur in everything said by his Lordship. As to the letter written by Grant I can only

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say that, could I find words of condemnation stronger than those used by Mr. Justice Tuck I would employ them. I think what he said is exactly what these gentlemen deserve. It is this: "The man who could write such a letter to ladies, his relatives, of whose estate he had control is not fit to be a trustee, and had the hearing been before me I would have dismissed J. McGregor Grant at once, without hesitation, and have ordered an account to be afterwards taken. A more cruel, I was about to say diabolical, letter, under the circumstances, could not have been written. Young ladies, without father or mother, are asking from Mr. Grant only that which they believe to be their right, and they are answered with an implied threat to blast the reputation of their late father, or if not that, then to make him appear contemptible in their eyes. It is a heartless letter, and unworthy of a gentleman."

I think these men deserved fully what has been said and I concur with his Lordship that they should have been dismissed from their position as trustees, and disconnected from the estate, at the first opportunity given to the court. I can only say that I hope, for the sake of the administration of justice in New Brunswick, that these men will not be allowed to remain long as trustees of this estate.

SEDGEWICK J.—I also concur, and I think that, considering the circumstances under which the reference was ordered, the appellants here are not the persons to avail themselves of the objections made.

Appeal dismissed with costs.

Solicitors for appellant J. McG. Grant: *E. & R. McLeod & Ewing.*

Solicitor for appellant R. C. Grant: *C. A. Palmer.*

Solicitors for respondents: *Straton & Hazen.*

JAMES BAXTER (DEFENDANT).....APPELLANT; 1894

AND *Mar. 3, 4, 5.
*May 1.

DAME GEORGIANA A. PHILLIPS (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT SITTING IN REVIEW IN THE DISTRICT OF MONTREAL.

Rights of succession—Sale by co-heir—Sale by curator before partition—Retrait successoral—Art. 710 C. C.—Prescription.

When a co-heir has assigned his share in a succession before partition any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment and such claim is imprescriptible so long as the partition has not taken place. Art. 710 C. C.

A sale by a curator of the assets of an insolvent even though authorized by a judge which includes an undivided share of a succession of which there has been no partition does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.

The heir exercising the *retrait succcessoral* is only bound to reimburse the price paid by the original purchaser and not bound in his action to tender the moneys paid by the purchaser.

APPEAL from a judgment rendered by the Superior Court sitting in Review, confirming a judgment rendered by the Superior Court, Montreal, Gill, J., allowing respondent, as one of the heirs of the late William E. Phillips, to redeem from appellant, properties purchased by him from Henry S. Phillips and the curator of the estate of Charles W. Phillips.

This was an action *en retrait successoral*, based on art. 710 C. C., instituted on the 12th January, 1891.

The following is a brief abstract of the pleadings.

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

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The respondent by her declaration alleged that the late W. E. Phillips, by his will, constituted his five children, among whom are the respondent and Charles W. and Henry S. Phillips, his universal legatees, for equal shares.

By notarial deeds executed February 2nd, 1889, and February 26th, 1890, confirmed by other deeds and transfers *sous seing privé*, Henry S. Phillips assigned to appellant his share in his father's estate.

Charles W. Phillips having become insolvent and made an abandonment of his property, the curator sold to appellant all the insolvent's assets including his share in his father's succession.

Appellant not being a person entitled to succeed to the deceased, respondent was entitled to redeem the shares of her said brothers, acquired by appellant as aforesaid, and she offered to reimburse appellant whatever he might have given for such shares with all fair expenses (*loyaux coûts*), after estimation (*ventilation,*) and prayed that she be entitled to exercise such redemption; that the true amount paid by appellant for the hereditary rights of C. W. and H. S. Phillips, with all fair expenses (*loyaux coûts*) be established by a (*ventilation,*) and that defendant be condemned to execute, on being so reimbursed, a transfer to her of such hereditary rights, and in default of his doing so within the delay fixed that the judgment avail as such transfer.

The appellant pleaded that by deed no. 8062, he had acquired an undivided $\frac{1}{5}$ interest in a specific immovable; and the deed no. 8063, though on its face an actual sale of the hereditary rights of H. S. Phillips, was really in the nature of a collateral security that in the partition of the estate appellant should obtain $\frac{1}{5}$ of the Côte St. Antoine farm, or of the proceeds thereof. This was declared by deed no. 8064 executed by appellant and H. S. Phillips before the said notary February 2nd, 1889.

After having thus acquired this $\frac{1}{5}$ of said Côte St. Antoine farm appellant sold the same to Mrs. Beïque, by deed of August 5th 1890, registered August 21st, 1890.

By deed of cancellation of date July 15th, 1889, the deed of declaration, no. 8064, of February 2nd, 1889, was cancelled, and it was stipulated that the deed no. 8063 should be deemed an absolute sale of Phillips' hereditary rights. This, however, was not meant to effect a sale to appellant of said hereditary rights, but as security to appellant for money he was about to lend H. S. Phillips, and anything importing a different intention was inserted by error.

By deed of December 4th, 1889, appellant acquired from H. S. Phillips, for $2,250.00, $\frac{1}{5}$ of the rents to accrue from May 1st, 1890, to May 1st, 1894, under an emphyteutic lease of lot 1753, St. Anne's ward.

By deed February 26th, 1890, H. S. Phillips transferred to appellant his undivided rights in the continuation by the city of Montreal, of the emphyteutic lease of said lot 1753, after May 1st, 1894.

When appellant acquired the several above mentioned properties from H. S. Phillips, he offered respondent the benefit of such purchases, which she refused.

None of the above deeds constituted a sale of H. S. Phillips' hereditary rights or enabled appellant to take part in the partition of the W. E. Phillips estate. They were merely sales of the rights of H. S. Phillips in certain determinate immovables; the latter remaining owner of all his rights in his father's estate, *less those transferred as above.*

Appellant bought the assets of C. W. Phillips' estate to protect his rights as creditor of the latter, which he then was and still is—The sale was authorized by a judge on the advice of the inspectors of the estate, and

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being a judicial sale is not subject to the redemption sought for.

At the trial it was proved: That when appellant sold to Mrs. Béïque the $\frac{1}{5}$ interest in the Côte St. Antoine property, he was the registered owner thereof. The deed was passed on the 5th and registered on the 21st of August, 1890. The deed of sale and transfer no. 8063 never was registered against that property.

That when Charles W. Phillips became insolvent, and made a judicial abandonment of his property, the appellant who was one of the creditors made a tender for the assets; that the inspectors after having had the assets valued by Wm. Robb, respondent's attorney, recommended acceptance of the tender and a sale to appellant in accordance with its terms; that such sale was authorized by a judge and made by the curator in virtue of and agreeably to said authorization, and that after the settlement of the estate appellant still remained a creditor of C. W. Phillips.

Upon the pleadings and the evidence the Superior Court ordered that a *ventilation* be made to establish what had been paid by appellant to H. S. Phillips and the estate of C. W. Phillips, and appellant was condemned on being reimbursed what he had so paid, with *loyaux coûts* and interest, to give respondent a notarial transfer of the hereditary rights of C. W. & H. S. Phillips within 15 days of the homologation of the *ventilation*, and that on his default to do so the judgment would avail as such transfer. The Court of Review confirmed the judgment, Bélanger J. dissenting as to the Côte St. Antoine property.

Béïque Q. C. for the appellant.

Driscoll and D. G. Bowie for the respondent.

The arguments of counsel as well as the principal authorities relied on are fully reviewed in the judgment of the court hereinafter given by:

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TASCHEREAU J.—Appel direct par le défendeur d'un jugement de la Cour de Revision.

Action par l'intimée en retrait successoral de deux parts, d'un cinquième chacune, dans la succession encore non partagée de feu W. E. Phillips, vendues par deux de ses frères, co-héritiers, Charles et Henry, au défendeur présent appelant. De toutes les nombreuses questions de droit que peut soulever une action de cette nature, la présente cause n'en présente que peu, et, comme nous en sommes unanimement venus à la conclusion que le défendeur appelant n'a pas lieu de se plaindre du jugement qui ordonne le retrait demandé par l'intimée, adoptant en leur entier, les vues des savants juges qui ont opiné dans la cause tant en Cour de Revision qu'en Cour Supérieure, j'essaierai de dire aussi succinctement que possible le résultat de nos délibérations et les motifs qui, plus particulièrement, nous y ont amenés. Toutes brèves que seront mes remarques (elles sont plus longues cependant que je croyais d'abord pouvoir le faire), le nombre d'autorités que nous avons dû parcourir avant d'en venir à une solution définitive des différents points soumis par les parties à l'audience a été considérable. La nouveauté, dans notre jurisprudence, des questions soulevées, l'importance des intérêts en jeu, l'habilité avec laquelle la cause nous a été soumise de part et d'autre, le requéraient. Toutefois le travail ardû que les procureurs réciproques ont apporté à la cause, et leurs recherches approfondies, je suis heureux de le constater, ont pour beaucoup contribué à faciliter notre travail.

L'article 710 du Code Civil de Québec, reproduction textuelle de l'art. 841 du Code Napoléon, a continué comme loi dans la province ce qu'on est convenu d'appeler le retrait successoral qui n'est que, avec limitation exclusive à la famille et aux cohéritiers, ce qu'on appelait dans l'ancien droit français le retrait de

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bienséance. Ce retrait, en effet, consistait dans la faculté donnée par la loi à tous ceux généralement qui possédaient par indivis de retirer la part vendue par leur propriétaire conjoint en remboursant le prix à l'acquéreur (1).

Le principal motif de cette législation se trouve de nos jours, et en France et dans la province de Québec, dans le désir de protéger les familles contre l'intrusion des étrangers qui viendraient indiscrètement s'immiscer dans le secret de leurs affaires, et de les garantir contre la cupidité processive des acheteurs de droits successifs. Un partage à l'amiable d'ailleurs, est généralement possible, probable même, entre parents. Tandis que si un étranger a droit d'y être convoqué, il faudra presque toujours y procéder en justice et subir les conséquences d'une immixtion vexatoire, désagréable, et peut-être ultérieurement ruineuse pour toute la famille (2). Et dans le cas où deux cohéritiers seulement se présentent, le retrait successoral, s'il y a vente par l'un d'eux, met fin absolue à la nécessité d'un partage, opération toujours si hérissée de difficultés.

Il est admis, et par la doctrine et par la jurisprudence, et n'a pas été mis en doute par le défendeur, que le retrait peut être exercé aussi bien par voie d'action principale que par voie d'exception, et que l'action est imprescriptible et recevable tant que le partage n'est pas consommé entre les cohéritiers (3). C'est une annexe de l'action en partage, et elle est perpétuelle comme elle (4).

Celui qui voit son cohéritier vendre sa part n'est pas tenu d'intervenir dès lors pour protéger ce droit de retrait, et l'acheteur pourra lui-même revendre, et cette revente au vu et sçu de ses cohéritiers, suivie

(1) Loisel, Instit. Cout. 2 vol. p. 45.
(2) Huc. no. 319.
(3) D. 83, 1, 268.
(4) 3 Hureaux, no. 321.

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d'une ou plusieurs autres, sans que leur défaut d'agir leur fasse perdre à tous indivisément ou à chacun d'eux séparément leur droit de retrayer la part que la première vente, celle par leur cohéritier, a fait sortir de la famille. Tous les sous-cessionnaires sont censés comme le premier avoir connu les droits des cohéritiers de leur auteur et les risques de l'éviction. C'est un nuage sur le titre de chacun d'eux à cette propriété que le partage seul dissipera.

Il suit de ce que nous estimons le droit de retrait réel en partie, (dit Dunod, (1)) que le parent a le droit lorsque l'héritage a été aliéné par l'acheteur pendant l'année du retrait, de l'exercer contre l'acheteur ou contre le possesseur actuel, à son choix, (ce qui est décidé par notre coutume,) et cela quand même l'héritage aurait passé par plusieurs mains, et que le possesseur actuel le tiendrait à titre lucratif.

Ce que l'auteur limite ici à un an pour le retrait lignager s'applique pour le retrait successoral jusqu'à ce que le partage ait eu lieu.

Je citerai dans un instant d'autres autorités dans le même sens.

Que l'action dans l'espèce actuelle compète à la demanderesse, ne peut être mis en doute, et, de fait, ne l'a pas été. Que le défendeur, lui, ne soit pas successible, et que les deux frères de la demanderesse, Charles et Henry, qui lui ont vendu les parts indivises dans la succession de leur père, auxquelles la demanderesse demande d'être subrogée soient ses co-successibles, ne sont pas non plus des points contestés. Que la vente par Charles, ou son curateur, au défendeur fut et un contrat à titre onéreux et une cession de tous ses droits dans cette succession est aussi incontestable. Que la vente par Henry au défendeur fut de même une vente de tous ou d'une quotité de ses droits dans la dite succession qui puisse donner lieu au retrait, est un point

(1) Traité des retraits, p. 5.

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qui a été mis en question par le défendeur, mais nous ne croyons pas, après examen de la preuve et des documents produits, car c'est là une question de fait plutôt que de droit, qu'il y ait le moindre doute sur la justesse de la conclusion prise par la cour *à quo* sur ce point contre le défendeur. Je me contenterai de référer là-dessus aux autorités citées dans Sirey, Code ann. (1); Fuz. Herm. Code ann. (2); au Vol. 13 Rev. de législ. et de jurisp. art. par Dérome, où je trouve une savante dissertation sur la matière (3); à *Durocher* v. *Turgeon* (4); et à *Leclere* v. *Beaudry* (5); et Dutruc (6).

Une autre objection prise par le défendeur à l'action de la demanderesse dans son ensemble nous paraît entièrement non fondée. C'est celle par laquelle, invoquant la doctrine adoptée par la Cour d'appel à Montréal, in *re Demers* v. *Lynch* (7) qu'un vendeur *à réméré* ne peut exercer le rachat avant d'avoir offert le prix convenu, il en argumente qu'ici la demanderesse, n'ayant pas fait d'offres réelles avant d'instituer son action, doit s'en voir pour ce déboutée. Le défendeur ici, fait évidemment une fausse application de cette doctrine. Il n'y a pas de rachat demandé par l'action de la demanderesse; c'est une simple subrogation aux lieu et place du défendeur, comme acquéreur des deux parts en question, que la demanderesse réclame. Comme Hureaux (8) l'exprime en termes heureux tout ce que la demanderesse dit au défendeur dans une telle action, c'est: "Otes-toi de là, que je m'y mette." Or la doctrine et la jurisprudence sont unanimes à dire qu'elle n'était pas tenue de faire préalablement des offres réelles; il lui a été suffisant de se soumettre par ses conclusions à l'obligation de mettre le retrayé indemne, avant l'exécution du retrait, comme elle l'a fait.

(1) Sous art. 891, no. 4.
(2) Sous art. 841, nos. 21, 42, 57, 235.
(3) Page 532.
(4) 19 L. C. Jur. 178.
(5) 10 L. C. Jur. 20.
(6) No. 487.
(7) 1 Dor. Q. B. R. 341.
(8) 3 Vol. des Success. no. 301.

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Ceci dispose des objections prises par le défendeur contre l'action en son entier.

J'en viens maintenant aux points qui ne s'appliquent qu'à l'une ou l'autre des deux parts en question.

D'abord tant qu'à celle de Charles. La seule objection que fait le défendeur à l'encontre de la demande du retrait de cette part est basée sur ce qu'il l'a acquise du curateur, entre les mains de qui paraît-il, Charles comme commerçant, avait fait cession, en vertu des arts. 763 et seq. du Code de procédure, sur l'autorisation du juge, voulue par l'art. 772. Une telle vente, dit-il, équipolle à une vente par décret, et n'est pas sujette à retrait. Cette prétention a été rejetée par la Cour Supérieure, et par la Cour de Revision, et devait l'être. Nous n'avons pas ici à décider s'il y aurait lieu au retrait d'une vente faite sur une adjudication en justice ordinaire après annonces, mise à enchère, et refus tacite par le cohéritier de se porter acquéreur. C'est là une question peut-être un peu douteuse; quoi qu'il me semble qu'en France la jurisprudence et la grande majorité des auteurs, admettent le droit au retrait même après une telle vente. Il en était de même pour le retrait féodal, Pocquet de Liv. des fiefs (1). Il est vrai que Dalloz, Repert. V. Succ. (2); ainsi qu'un arrêt de la Cour de Paris (3); Hureaux, des Succ. (4) et Demolombe 4 des Succ. (5), sont d'opinion contraire. Mais un arrêt de la Cour de Lyon (6); Dutruc, Partage de succ. (7); Laurent (8); Fuz. Herm. Code ann. (9), admettent le retrait même contre une adjudication en justice. L'art 150 de la Coutume de Paris le décrétait formellement pour le retrait lignager; et malgré que cet article de la Coutume ait été abrogé par le Statut

(1) P. 427.
(2) No. 1917.
(3) S. V. 36, 2, 113.
(4) 3 No. 319.
(5) No. 110.
(6) S. V. 44, 1, 614.
(7) No. 496.
(8) Vol. 10, no. 370.
(9) Sous art. 841, no. 71.

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de 1855 c. 53 S. R. B. C. qui a mis fin au retrait lignager dans la Province de Québec, il nous est permis, comme on l'a toujours fait en France, et sous l'ancienne et sous la nouvelle jurisprudence de référer aux principes qui régissaient cette espèce de retrait, là ou, comme en matière du temps requis pour l'exercice du droit, par exemple, où les formalitiés à suivre pour l'obtenir, il n'y a pas divergence complète entre les deux. Pothier des Retraits (1); Bourjon, Dr. comm. (2); Bretonnier, sur Henrys (3) et Duplessis (4), admettent tous le retrait après vente en justice. Quoique le décret soit public, dit ce dernier, qu'il purge toutes les charges, et que les lignagers, aient la liberté d'y enchérir, néanmoins le retrait lignager y a lieu . . . quoique le retrayant ait été présent à l'adjudication." Sur le même principe, le Seigneur même lorsqu'il s'était porté opposant au décret pour la conservation de ses droits, n'était pas exclus du retrait féodal. Pocquet de Liv. des Fiefs (4). Mais, je l'ai dit, nous n'avons pas dans l'instance à prononcer sur cette question. Il n'y a pas eu ici une vente en justice où la demanderesse eut pu se porter adjudicataire. Le défendeur a acquis du curateur les droits de Charles ni plus, ni moins, avec toutes les charges, hypothèques, conditions dont ces droits étaient grevés ou auxquelles ils étaient assujétis. Or, une de ces charges ou conditions était que la vente de ces droits successifs indivis était sujette au retrait successoral en faveur de tous ou de chacun des cohéritiers de Charles, et cette condition que la loi attache à toute vente de droits successifs ne peut dans un tel cas être ignorée des acquéreurs de tels droits, tout comme si elle eut été expressement stipulée dans

(1) No. 76.
(2) 1 vol., p. 1021.
(3) 4 vol., p. 587, no. 12.
(4) 1 vol., p. 328.
(5) P. 429.

l'acte d'acquisition ; ou du moins, cette ignorance ne les peut excuser. Le défendeur aux yeux de la loi est dans la même position que s'il eût acheté de Charles directement et sans l'entremise du curateur.

Nous concluons donc, que cette objection du défendeur relativement à la part par lui acquise du curateur aux biens de Charles n'est pas fondée.

Je passe maintenant à la part des droits de Henry ; j'ai déjà dit que nous concourons entièrement avec la Cour *à quo* sur la conclusion de fait et de droit, que cette vente au défendeur constitue une vente donnant droit au retrait. Il ne reste à examiner qu'une seule objection prise par le défendeur contre la demande du retrait de cette part. Il a plaidé et prouvé que, dès avant l'institution de l'action, par acte dûment enregistré, il a revendu à Mde Béïque, la part de Henry dans un certain immeuble, situé à la Côte St. Antoine, près de Montréal ; et, de ce fait, il nous a demandé de conclure, comme il l'avait fait en Cour de Revision, que, tant qu'à cette part du moins, la demanderesse ne pouvait dans la présent instance, en l'absence de Mde Béïque, obtenir jugement de retrait. Mais cette objection, qui de prime abord peut paraître sérieuse, ne doit pas prévaloir contre la demande de la demanderesse. Le défendeur n'invoque ici, ailleurs, il est évident que les droits de Mde Béïque, or, de quel droit, défend-il Mde Béïque ? N'excipe-t-il pas par là du droit d'autrui ? N'invoque-t-il pas, uniquement, un *jus tertii* ? Inutile de nous dire comme il l'a fait, que tout ce qui sera décidé dans la présente cause restera avec Mde Béïque *res inter alios acta*, et ne peut en aucune manière illégalement préjudicier à ses droits. C'est là une raison de plus contre son objection, et rien autre chose. Si la loi veut que le jugement qui accorde le retrait à la demanderesse réagisse contre elle comme possesseur d'une partie de ses droits,

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il lui faudra s'y soumettre, mais le tribunal ne lui dira, à elle, que telle est la loi, que quand elle aura eu occasion de se défendre. Sans doute, il eût peut-être été mieux pour la demanderesse de mettre Mde Béïque en cause, sinon dès le début, du moins aussitôt la dénonciation en justice de cette vente par le défendeur. Il y a des auteurs qui paraissent dire que c'est au défendeur dans un cas semblable à dénoncer la demande au détenteur. Pothier, des Retraits, nos. 189, 190, est d'avis qu'il est plus équitable que, soit par l'une ou l'autre des parties, le détenteur soit appelé. Et les parties n'auraient certainement pu se plaindre, il me semble, si, sous les circonstances, la Cour Supérieure l'eût, *ex proprio motu*, ordonné à aucun étage de la cause. Mais puisque la Cour Supérieure n'a pas jugé à propos de le faire, puisque la Cour de Revision ne l'a pas non plus fait, devrions-nous maintenant le faire? Le défendeur, si je l'ai bien compris, a cru voir là une raison pour nous demander sinon le renvoi entier de l'action, du moins, d'en soustraire à son effet, par une disposition expresse, cette partie possédée par Mde Béïque. Mais la loi repousse cette demande. Je citerai quelques extraits d'auteurs pour démontrer quelles sont les considérations que nous ont plus particulièrement guidés sur cette partie de la cause.

Mais avant d'en venir là, je ferai remarquer qu'il est évident que la demanderesse devait nécessairement demander le retrait des deux parts acquises par le défendeur, tant de celle de Charles que de celle de Henry: en demander qu'une eût été une absurdité. Le but essentiel du retrait successoral, je l'ai dit, c'est d'écarter l'acheteur du partage, "banquet dont chacun des convives a de droit de chasser les intrus qui pourraient troubler la fête (1)." Or, il est évident que ce

(1) Hean Rev. prat. 18 vol., p. 329.

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but serait loin d'être atteint, si la demanderesse, n'avait pas dirigé son action, comme elle l'a fait, tant contre la vente de la part de Charles que contre la vente de la part de Henry (1).

D'après des principes, le retrayant prend la place du retrayé, *in omnibus et per omnia*, et la demanderesse a droit à une subrogation complète au lieu et place du défendeur tant qu'à ces deux parts. Le retrait a un effet rétroactif comme si, à la date même des acquisitions du défendeur, elle-même eut acheté les parts de ses deux cohéritiers, "*qui retrahit perinde est ac si emisset ab ipso venditore et primus emptor perinde habetur ac si non emisset.*" Et conséquemment, toutes ventes, aliénations, charges et hypothèques faites ou créées par le défendeur de ou sur ces parts, ou aucunes parties d'icelles s'évanouissent. Pothier, des Retraits (2); Bourjon (3); Hureaux (4); Demolombe (5); Aubry et Rau (6); Laurent (7); et la note du rapporteur, Royneau (8); Huc. Code Civil (9); Bretonnier sur Henrys (10).

Les acquisitions de ces parts par le défendeur sont résolues *ab initio*, et réduites *ad non actum*, *ad non causam* (11), ou plutôt, il n'y a ni résolution, ni annulation de ces acquisitions, non plus qu'une rétrocession, mais une pure subrogation (12), la simple substitution de la demanderesse à lui, le défendeur, *neque enim non contractus, sed legalis translatio de personâ in personam* (13); et le retrait peut être exercé même

(1) 4 Demol. des Succ., 119. Hureaux Dr. Succ., no. 332; S. V. 40, 2, 318.
(2) No. 314.
(3) 1 vol. 1070-1075.
(4) 3 vol. Nos. 337 et seq.
(5) 4 vol. Nos. 81 et seq, et 138 et seq, 146.
(6) 6 vol., par. 621.
(7) Vol. 10, No. 386.
(8) S. V. 92, 1, 113.
(9) 5 vol., No. 329.
(10) 4 vol., pp. 586 et seq.
(11) Prévot de la Jannès Jurisp. fr. Vol. 2, p. 246.
(12) Fuz. Herm. Code annot. Sous art. 841, Nos. 287, 290, et seq. 298. Cass. 17 janvier 1892 S. 93, 1, 17.
(13) D'Argentré Cout. de Bretagne.

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après la mort du co-héritier vendeur (1). Par le retrait, l'acheteur primitif est écarté, tout comme s'il était parfaitement étranger à l'opération. C'est une nécessité qu'il subit, et à laquelle *nolens volens* il lui faut se soumettre. Il en est comme s'il n'avait jamais acquis, dit Dunod, des Retraits, (2). Il ne peut guère s'en plaindre d'ailleurs Il n'est pas pris par surprise ; car, en achetant des droits successsifs, la loi a inscrit dans son acte d'achat une réserve non équivoque de ce droit en faveur des cohéritiers de son vendeur, collectivement et individuellement. Et dès que ce droit est exercé, il est censé n'avoir jamais lui-même eu de droits sur la chose, et n'a pu, conséquemment en conférer à d'autres (3) ; sa possession était entachée d'un vice d'organisme héréditaire, et le titre qu'il a pu transférer à un tiers souffre inévitablement de l'infirmité du sien.

Ce sont là les principes qui régissent la matière, et qu'il nous faut affirmer sur le litige entre la demanderesse et le défendeur. Si, par ricochet, pour me servir d'une expression de Demolombe, notre décision ré-agit contre Madame Béïque, c'est là une conséquence de la loi que nous ne pouvons pas empêcher.

Il nous est permis d'espérer d'ailleurs que ces remarques auront peut-être pour effet de mettre fin à tout litige sur cette succession, malgré que notre décision ne puisse être *res judicata* tant qu'à Mde Béïque. C'est là un des motifs qui nous a fait renoncer à remettre le dossier à la Cour Supérieure, afin de la mettre en cause, comme nous avions d'abord pensé le faire. Nous avons cru que, loin d'obtenir le résultat désiré, nous aurions peut-être par là prolongé le litige. C'eût été d'ailleurs refuser à la demanderesse un jugement contre le présent défendeur auquel elle a un droit indéniable. Si

(1) Dal. 79, 2, 201.
(2) P. 6.
(3) Dal. Rep. V. Succ. No. 1891-2001. 1 Berthelot Des Evict.

par la suite, ne fût-ce que par un retard prolongé ou les désagréments d'un nouveau procès, elle souffre de l'absence de Mde Béique dans la présente cause, elle ne devra s'en prendre qu'à elle-même.

Le défendeur a émis la proposition que, comme il n'a revendu à Mde Béique, qu'une partie déterminée, d'un des immeubles de la succession il n'y a pas lieu au retrait pour cette partie, et il nous a demandé de réformer pour ce motif, le jugement de la Cour de Revision qui lui a refusé d'exempter du retrait demandé cette partie de cet immeuble. Mais cette proposition est entièrement erronée et la demande sur laquelle elle est basée ne peut être accordée. Il lui suffirait donc, d'après lui, d'avoir revendu le tout des parts par lui acquises à soit cinq personnes différentes, chacune pour une part déterminée, pour enlever à la demanderesse son droit de retrayer le tout. Mais telle n'est pas la loi. Le droit au retrait serait bien illusoire s'il en était autrement, et si on pouvait si facilement déjouer les cohéritiers. Seulement, dans un cas semblable, il faudrait voir sur qui diriger la poursuite. En fait de retrait lignager lorsqu'un seul immeuble était en question, l'action, d'après certains auteurs, pouvait, ignorant complètement l'acquéreur primitif, être dirigée contre le détenteur seul, sous-cessionnaire. Mais pour le retrait successoral, lorsque, comme c'est le cas ici, l'acheteur primitif a revendu seulement une part déterminée d'une chose de la succession, et que le reste des droits successifs est encore entre ses mains la demanderesse doit nécessairement diriger sa demande contre lui, avec liberté d'y appeler le détenteur de la part revendue, si elle le juge à propos.

Maintenant, dans un cas pareil, c'est-à-dire, si entre l'achat et le retrait, l'acheteur a revendu à un sous-acquéreur, ce qu'il a pu, en loi, parfaitement faire, s'il y a une différence entre le prix de cette revente et

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celui de son propre achat, quel est le prix qu'aura à rembourser le retrayant?

Ce sera comme l'a déclaré le jugement dont est appel, le prix de la première vente, de celle faite par le cohéritier du retrayant (1); Il y a des autorités au contraire, entre autres Dutruc (2); Laurent (3); et un arrêt en 1857 de la Cour de Besançon *re Dautriche* (4); Mais le sentiment contraire a prévalu, et nous l'adoptons avec le jugement *à quo* (5). L'action en retrait, dit Le Caron, sur la Coutume de Péronne (6); "Doit être intentée contre le détenteur possesseur; toutes fois il ne faut payer que les deniers du premier achat." Et Loysel, dans ses Institutes Coutumières (7), dont les savants commentateurs Dupin et Laboulage (8) disent en parlant de ses œuvres "Ce n'est pas de la théorie, de la divination, de la conjecture, c'est le droit lui-même, tel que nos pères l'ont connu et pratiqué," Loysel, dis-je, s'exprime en termes bien clairs comme suit: "Le retrayant n'est tenu de payer que le prix, frais et loyaux coûts de la première vente, ores que la chose ait marché en beaucoup d'autres mains pendant l'an et jour du retrait." "Et, ajoutent ses commentateurs, s'il en était autrement, l'acquéreur pourrait en revendant à un autre empirer la condition du retrayant, ce qui serait injuste."

Et Dunod dit (9).

Mais si la seconde aliénation est à titre onéreux, de laquelle est-ce que le retrayant remboursera le prix? Il semble que ce doit être celui de la première, parce que c'est celle qui a donné lieu au retrait.

(1) Labbé Vol. 6 Rev. de Lég. et de Jurisp. 142.
(2) No. 515.
(3) 10 vol., 382.
(4) S. V. 58, 2, 292; Dalloz 58, 2, 111.
(5) Pothier, Retraits, No. 341; Merlin Quest. v. dr. succ. par. 2, No. 2; Aubry & Rau Vol. 6, p. 529; Demol. 4 des succ. No. 110; Benoit Dr. success. No. 135; Hureaux No. 330.
(6) Page 361.
(7) 2 vol., page 63.
(8) Ed. de 1846.
(9) Des retraits, p. 6.

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La question de savoir si une part dans une succession indivise peut être saisie et vendue en justice a été agitée à l'audience. La demanderesse a soutenu que non, et a appuyé ses prétentions sur la doctrine adoptée en France par l'art. 2205 du Code Napoléon (1); Le défendeur a répondn que cet article ne se trouvait nulle part dans les Codes de Québec, et que telle saisie et vente, était parfaitement légale dans la province. Il y a sans doute une contradiction apparente entre le principe du droit successoral et la saisie d'une part indivise d'une succession, mais je ne vois pas l'à-propos dans cette cause de cette discussion. Ici, il y a eu vente dûment autorisée, des droits successifs de Charles, par le curateur. Le défendeur s'y est porté acquéreur. Je ne vois là rien d'illégal. Y eut-il nullité, ce ne serait au plus qu'une nullité relative dont le défendeur ne pourrait certainement pas se prévaloir. Il ne pourrait lui être permis d'invoquer la nullité de son propre titre pour repousser la demande de la demanderesse. Et tant qu'à la demanderesse, loin de demander la nullité de cette vente, elle demande d'y être subrogée. Le défendeur a dit à l'audience et répété dans son factum, que si une vente par un curateur comme celle en question, est soumise au retrait successoral, les créanciers en souffriront, parce qu'il est évident que l'on trouvera rarement des acheteurs disposés à se soumettre à un tel risque. Mais il y a une réponse bien conclusive, il me semble, à cette objection. C'est que les créanciers, au lieu de procéder comme l'ont fait ceux de Charles Phillips, peuvent eux-mêmes provoquer le partage, pour ensuite faire vendre la part afférante à leur débiteur. Les autorités sont unanimes à leur reconnaître ce droit. Puis un acheteur de bonne foi d'une part indivise de droits

(1) Thomine-Desmazures C. P. Sirey Code Ann. sous art. 2205. No. 743;

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successifs est sûr que, si un retrayant se présente, il n'obtiendra la subrogation qu'à la charge de le rendre préalablement parfaitement indemne.

Deux autres questions d'importance secondaire ont été soulevées par les parties. La première vient du défendeur qui a prétendu, quoique faiblement, il m'a semblé, que la demanderesse avait perdu son droit au retrait demandé pour y avoir tacitement renoncé, ou avoir refusé sur offres à cet effet, de reprendre du défendeur la part par lui acquise de Henry. C'est là une question de fait, et nous disons sans hésiter, avec la cour dont est appel, qu'il n'y a pas au dossier de preuve suffisante pour soutenir cette objection.

La seconde vient de la demanderesse. Elle dit avoir à se plaindre du jugement de la cour inférieure sur une intervention produite dans la cause par Henry Phillips, son co-héritier vendeur, en ce que, tout en renvoyant cette intervention, la cour n'a pas condamné le défendeur aux frais. Il me suffira de dire que nous avons maintes et maintes fois décidé que nous n'interviendrions jamais sur une décision tant qu'aux frais en cours inférieures à moins de circonstances bien spéciales dont nulles se rencontrent ici.

J'ajoute maintenant aux autorités déjà citées celles applicables généralement que j'ai rencontrées dans l'étude de la cause. Elles sont principalement tirées, on le verra, des auteurs sur le droit lignager. Le mot de droit successoral est ignoré dans l'ancien droit Francais, même dans Bourjon, où un passage que je cite le décrit cependant en termes non équivoques. Mais les règles des retraits en général sont les mêmes. Et, comme le dit Labbé, loc. cit. :

> Nous trouvons souvent beaucoup à puiser dans des traités sur des institutions aujourd'hui supprimées. Par exemple, le retrait lignager est aboli, néanmoins, les solutions données par nos anciens auteurs sur les effets de ce retrait, peuvent nous servir à résoudre des questions semblables s'élevant de nos jours à propos du retrait successoral,

du retrait de droits litigieux, et du retrait d'indivision. Ce sont, en réalité des droits de même nature et produisant les même conséquences.

Et le savant professeur ajoute qu'il adopte pour son guide sur le droit successoral, le traité de Tirageau sur le retrait lignager.

Et Demolombe, (1) dit dans le même sens que l'on est fondé à invoquer en matière de retrait successoral, l'application des principes qui gouvernaient les retraits en général dans l'ancienne jurisprudence. Cette doctrine est d'ailleurs généralement admise.

Bourjon (2) :—

Lorsqu'un premier acquéreur a vendu à un second ..... le retrait quoique réfléchissant sur le second acquéreur, s'exerce néanmoins sur le premier contrat de vente et non sur le second. C'est ce contrat qui a fait ouverture au droit des lignagers."

Et à la page 1056 et seq:

Nonobstant, la vente faite par un premier acquéreur d'un propre . . . . (sujet au retrait) la demande en retrait doit toujours être intentée contre lui, premier acquéreur, parce que c'est par son contrat d'acquisition que l'héritage propre est sorti de la famille. On va voir par les propositions suivantes, les autres formalités d'un tel retrait et l'effet qu'il a contre le second acquéreur, ce qui est fondé sur ce que l'action en retrait est mixte, que cette action dérive du contrat fait avec le premier acquéreur contre lequel il y a une personnalité à laquelle il est toujours demeuré sujet . . . .

Mais ce premier acquéreur n'étant plus en possession de l'héritage pour lequel il est assigné en retrait, doit dénoncer la demande formée contre lui et s'il néglige de faire cette dénonciation, cette négligence ne nuit pas au retrayant qui peut ignorer cette vente, et qui n'est obligé d'agir que contre le premier acquéreur ; cependant, si le second acquéreur et son droit sont connus du retrayant, il peut pour accélérer le mettre en cause pour voir dire que la sentence qui interviendra contre le premier acquéreur sera déclaré commune avec lui ; mais, encore une fois, l'omission de sa part de la dénonciation de la demande en retrait par lui formée ne donnerait aucune atteinte à son droit qui milite contre le premier acquéreur et qu'il a pleinement conservé par la demande qu'il a formée contre lui. Il en serait de même s l'acquéreur pendant l'an du retrait (retrait lignager) avait été dépossédé

(1) 4 Succ. no. 8-8. (2) Vol 1, p. 1052.

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de l'héritage par un décret poursuivi sur lui à la requête de ses créanciers. La publicité de ce décret ne change point le droit du retrayant qui est toujours fondé à dire qu'il ne connaît que le premier acquéreur ; il peut donc encore dans ce cas, se pourvoir et agir contre lui nonobstant l'adjudication faite de l'objet du retrait. Dans l'un comme dans l'autre cas, le retrait adjugé, ne s'exécute que contre le premier acquéreur ; il est néanmoins prudent mais non de nécessité, de dénoncer cette exécution au second acquéreur, comme on l'a déjà dit, par rapport à la demande, ce qui influe sur l'exécution qu'on examine ici, n'ayant encore examiné que la demande, et s'il y a différence de prix, la garantie dépend des circonstances. L'exécution d'un tel retrait étant faite avec le premier acquéreur, et ce dans le cas qu'on examine, c-à-d. lorsqu'il y a eu de sa parte vente de l'héritage (pendant l'année du retrait lignager) cette exécution milite contre le second acquéreur contre lequel il suffit par la suite et sans autres formalités que celles des instances ordinaires, de demander qu' attendu l'exécution du retrait, la sentence d'adjudication d'icelui soit déclarée commune avec lui, ce qui étant jugé, la sentence d'adjudication s'exécute contre lui ; mais il faut cette forme pour l'exécution réelle, autrement ce ne serait plus agir par les voies de la justice, mais militairement.

Pothier, des Retraits, n° 17 :

L'action est personnelle réelle, car la loi en formant cette obligation en la personne de l'acheteur étranger, affecte en même temps l'héritage par lui acquis à l'accomplissement de cette obligation. La propriété de cet héritage ne lui est transférée que sous la charge du retrait, et il ne peut par conséquent le transférer à d'autres que sous cette charge. *Nemo plus juris in alium transferre potest quam ipse habet.* C'est pourquoi cette action tant que le temps du retrait dure peut être intentée par les lignagers non seulement contre celui qui a acheté de leur parent, mais contre ceux à qui l'héritage a pu passer depuis, et qui s'en trouvent en possession.

Et au n°. 26 : l'action est personnelle réelle, *in rem scripta*, et elle suit le possesseur.

No. 189 :

Lorsque cet acquéreur étranger avant que la demande en retrait ait été donnée contre lui, a aliéné l'héritage sujet au retrait, il est au choix du lignager de donner la demande en retrait contre cet acheteur ou contre le tiers. Cette action est une action personnelle réelle qui nait de l'obligation *ex quasi contractu* que l'acheteur étranger contracte en acquérant envers les lignagers de céder son marché à celui d'entre eux qui le voudra prendre, et de lui délaisser l'héritage ; c'est à l'ac-

complissement de cette obligation personnelle que la loi affecte l'héritage. Cette action, comme personnelle peut donc être intentée contre l'acheteur étranger, qui est le véritable débiteur, et qui n'a pas pu par son fait en aliénant l'héritage, se décharger de l'obligation qu'il a contracté de le délaisser au lignager qui voudra exercer le retrait. Cette action peut aussi comme réelle être intentée directement contre le tiers détenteur de l'héritage ; cet héritage étant affecté par la loi à l'accomplissement de l'obligation.

Et au paragraphe 190, Pothier dit que lorsque le défendeur assigné en retrait plaide qu'il a revendu à un tiers, il est équitable de renvoyer le demandeur à se pourvoir contre ce tiers (ceci dans le cas de retrait lignager où il ne s'agit que d'un immeuble particulier, et d'une revente de tout ce que comprenait la première vente.)

8. Pothier, Introd. 2 Cout. d'Orléans, p. 651 :

Mais, si l'un des enfants avait cédé sa portion à un étranger il est permis aux autres d'exclure l'étranger du partage en lui remboursant le prix de sa cession. (Bourjon, Vol. 1, page 1032). Et dans son chap. sur le retrait lignager, il dit, page 1032 : "dans le cas que le vendeur a des co-héritiers et que par conséquent la vente n'embrasse qu'une portion de la succession, chaque co-héritier a droit de retirer le tout lorsque la vente est faite à un étranger et tel retrait n'est sujet à aucunes formalités et est préférable au retrait lignager."

C'est bien là, le retrait successoral.

Ferrière, sous art. 129 de la Cout. de Paris, dit :

L'action (en retrait lignager) peut être intentée contre celui qui se trouve détenteur de l'héritage au temps de l'action, ou contre le premier acquéreur, suivant la disposition de la coutume de Reims et quelques autres ; mais dans celles qui n'en parlent pas, il semble que l'action doit plutôt être intentée contre le détenteur d'autant que les conclusions du retrait ne peuvent être formées contre celui qui ne possède plus.

L'auteur ici traite d'une action en retrait lignager contre un immeuble distinct et séparé.

Duplessis (1) :

Quand l'acquéreur a revendu l'héritage à un tiers . . . il faut distinguer s'il a fait la revente depuis l'assignation en retrait à lui

(1) Vol. 1, page 286.

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baillée ; en ce cas le retrayant se peut toujours adressser à lui parce qu'il ne l'a pu faire au préjudice du procès et du vice du litige. Mais s'il a fait cette revente avant qu'il y eut encore aucune demande en retrait, alors c'est au nouvel acquéreur et dernier possesseur de l'héritage que le retrayant doit en faire la demande, parce que c'est *actio in rem scripta*. Et en l'un et l'autre de ces cas, il ne doit pas rembourser davantage que le prix de la première acquisition, sauf en second acquéreur son recours contre le premier pour le plus qu'il lui a payé. Mais on demandera si dans le second cas, le retrayant est précisément contraint de s'adresser au dernier acquéreur seulement, sans avoir l'option de convenir le premier, car véritablement d'un côté on dira que l'action du retrait, étant *in rem scripta* ne peut être intentée que contre le possesseur ; et que pourrait-on prononcer contre le premier puisqu'il ne tient plus la chose, que s'il en a disposé il l'a pu n'y ayant point encore eu d'action intentée contre lui. D'autre part on répond que l'action de retrait étant mixte, et provenant d'un contrat fait avec le premier acquéreur il y a de la personnalité à laquelle il a toujours demeuré sujet . . . c'est pourquoi je tiens, qu'en ce cas, le retrayant a le choix de s'adresser au premier ou au second acquéreur, et ne sert de rien de dire que puisque le premier ne possède plus, on ne pourra rien prononcer contre lui car par l'action on fera résoudre son droit, par où celui de son acquéreur sera aussi résolu, et de fait, on demeure bien d'accord, qu'on y prononce au premier cas.

Grand Coutumier de France. Edit. Laboulaye (1) :

Usage, stil, coustume, est notoire et commune observance du royaume de France et mesmement de la prévosté et viconté de Paris sont tels et tous notoires, que quant aucune personne a propre héritaige à luy venu et descendu . . . . et telle personne le vent à aultre personne, tout estrange de luy, et du costé et ligne dont l'héritaige luy est escheu vient ung aultre dedens l'an et le jour à commencer du jour de la vendue ou dessaisine, et fait adjourner l'acheteur de la vente principalle pour l'avoir par retraict en luy rendant son argent . . . . telle demande est recevable.

Item, anno retractus pendente, emptor rei retrahibilis eam vendidit alteri, queritur contra quem illorum emptorum aget retrahere volens, aut contra primum, aut contra secundum. Respondetur : En supposant que action de héritaige se faict contre le détenteur d'iceluy, et pour ce je distingue, ou le premier acheteur l'a vendu avant l'adjournement du retraict, ou non. Si, primo, l'action se fera contre l'acheteur second par ladicte supposition. *Si autem post dictum adjornamentum*, action se fera contre l'acheteur premier . . . . Item le retraieur ne doubt pas eslire voie de saisine et de nouvelleté, se le premier acheteur a vendu à ung aultre la chose contentieuse ; mais doubt faire adjourner l'acheteur et le vendeur, pour ouyr une requeste qu'il entend

(1) Pages 326, 335.

faire à l'encontre d'eux tendant affin que le contract soit mis au néant . . .

L'art. 205 de la Coutume de Reims :

Il est au choix du demandeur en retrait lignager de s'adresser contre le premier acheteur qui depuis et dedans l'an et jour aurait vendu l'héritage sujet à retrait, ou bien contre le second acheteur et détenteur du dit héritage. Auquel il sera seulement tenu à payer ce que le dit premier acheteur aura déboursé, sauf au second acheteur son recours contre icelui premier acheteur.

C'est bien là le droit commun de la France.

Une remarque avant de terminer. Il est permis de se demander, dit Demolombe, si les avantages du retrait successoral compensent les inconvénients qui en résultent. Et, dit Laurent, le droit successoral est un droit purement arbitraire, et fondé sur de mauvaises raisons. C'est à juste titre, ajoute un auteur très récent (1893) Huc comm. dr. Code Civil (1), qu'il a été proscrit par le Code Civil Italien.

L'éminent jurisconsulte qui présidait en Cour d'Appel, à Montréal au jugement dans la cause de *Durocher* v. *Turgeon* (2) partageait évidemment ces opinions, en exprimant le regret que nos codificateurs aient conservé ce retrait. Sous ces circonstances, quoique ce soit là, il est vrai, une question qui ne tombe pas, strictement partant, dans les attributions d'une cour de justice il nous est permis cependant d'y attirer l'attention de la législature de la Province de Québec. L'on trouvera peut-être expédient de mettre fin à ce droit de retrait entièrement comme on l'a fait en 1855 pour le retrait lignager.

Appel débouté avec dépens distraits à M. Bowie, procureur de l'intimée.

Appeal dismissed with costs.

Solicitors for appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitor for respondent: *D. E. Bowie.*

(1) Vol. 5, p. 383.

(2) 19 L. C. Jur. 178.

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*May 4, 5.
*May 31.

THE CITY OF HALIFAX (PLAINTIFF)...APPELLANT;

AND

JAMES REEVES (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Public Street—Encroachment on—Building "upon" or "close to" the line—Charter of Halifax secs. 454, 455—Petition to remove obstruction—Judgment on—Variance.

By sec. 454 of the charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a judge thereof, may, on petition of the Recorder, cause it to be removed.

A petition was presented to a judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1884; while it stood the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved but the judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:

Held, that the evidence would have justified the judge in holding that the porch was upon the line but having held that it was close to the line while the petition only called for its removal as upon it, his order was properly reversed.

An objection was taken to the jurisdiction of the Supreme Court of Canada on the ground that the petition having been presented to a judge in chambers the matter did not originate in a superior court.

Held, Taschereau J. dissenting, that the court had jurisdiction. *Canadian Pacific Railway Co.* v. *Ste. Thérèse* (16 Can. S.C.R. 606) and *Virtue* v. *Hayes* (16 Can. S.C.R. 721) distinguished.

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

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THE CITY OF HALIFAX v. REEVES.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment of a judge on the hearing of a petition by the city council to remove an obstruction on a public street.

The facts of the case sufficiently appear from the above head-note.

A preliminary objection was taken by respondents counsel to the jurisdiction of the court to entertain the appeal the petition having been presented to a judge and thus, on the authority of *Canadian Pacific Railway Co.* v. *Ste. Thérèse* (1), and *Virtue* v. *Hayes* (2), not having originated in a superior court.

The majority of the court were of opinion that there was jurisdiction, and the case was heard on the merits.

MacCoy Q.C. for the appellants referred to *Spackman* v. *Plumstead Board of Works* (3); *The Queen* v. *Berger* (4).

Newcombe Q.C. for the respondent.

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

KING J.—A preliminary question as to the jurisdiction of the court to entertain the appeal was dealt with by His Lordship the Chief Justice upon the argument, and the cases of *Canadian Pacific Railway Co.* v. *Ste. Thérèse* (1) and *Virtue* v. *Hayes* (2) distinguished.

Then as to the merits: The complaint is for erecting a porch upon the street line without first obtaining the certificate of the city engineer as to its location. To support this charge it is not necessary to prove that the building is beyond the line. The act makes it the duty of persons intending to build upon or close to the

(1) 16 Can. S.C.R. 606.
(2) 16 Can. S.C.R. 721.
(3) 10 App. Cas. 229.
(4) 10 Times L.R. 380.

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THE CITY OF HALIFAX v. REEVES.

King J.

street line to apply to the city engineer to lay down the line. It is not to be taken that this refers to an intention to encroach. A building is upon the line of the street if the line of the building, in whole or in part, coincides with that of the street. A building encroaching on the street is likewise upon the line. The act extends also to buildings that are close to the street line, although not upon it. "Close to" is an approximate term and admits of more or less separation between the line of the building and the true line of the street. The object of the act is to provide that the street line may be authoritatively and conclusively settled by the city engineer, who in such matter acts as on a judicial inquiry. The defendant having been charged with building upon the line of the street without first making application for the engineer to lay out the line, it is for the city, as the plaintiff in the case, to prove that the building was upon, *i.e.*, coincident with, or beyond, the street line. In the case of a street that has no recorded boundaries the determination of its line may depend upon the extent and nature of the public use and of the adjacent occupations. Here the porch, the erection of which is complained of, occupies the site of a porch built in 1855, and removed in 1884, the foundation of which was found covered with three feet of earth. During the time that the old porch existed the space outside of it was a travelled portion of the street, and since its removal the place where it had been was used as part of the sidewalk. The defendant says that before he put up the present porch the place where he put it was "just like the rest of the sidewalk." Assuming that the defendant was entitled to the site of the old porch, the part outside of it was public street, and the line of the old porch coincided with the line of the street, and was therefore upon it, and upon the evidence the learned judge might very

well have found this, and also that the porch complained of was upon such line.

A difficulty, however, arises by reason of the finding that the porch was close to the line of the street, and that the exact line was not located. There may be implied in this an adjudication that the porch was not upon the line of the street, and as it is in respect of a wrongful building upon the line of the street, and not for a wrongful building close to the street, that the proceedings are instituted it would appear that the order complained of is open to objection, and that the judgment reversing it should be sustained. This appeal is therefore to be dismissed with costs.

TASCHEREAU J.—In my opinion the objection raised by the respondent to our jurisdiction on this appeal is well taken, and I would quash the appeal.

Appeal dismissed with costs.

Solicitor for appellant: *W. F. MacCoy.*

Solicitor for respondent: *C. Hudson Smith.*

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*May 9.

*May 31.

WILLIAM H. ROURKE AND RACHEL E. ROURKE, HIS WIFE (PLAINTIFFS) } APPELLANTS;

AND

THE UNION INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Trover—Conversion of vessel—Joint owners—Marine insurance—Abandonment—Salvage.

A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest.

A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of her interest by any action of the underwriters but by the decree of the court under which she was sold for salvage.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside the verdict for the plaintiffs at the trial and ordering a non-suit.

The facts of the case are set out in the judgment of the court delivered by Mr. Justice Sedgewick, as follows:—

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

This is an action on trover brought against the defendants for the alleged conversion of the plaintiff's interest in the schooner "James Rourke" a British vessel owned as follows :—

The plaintiff Rachel E. Rourke, twenty-four shares ; one E. V. Rourke, eight shares ; Charlotte Rourke, wife of James Rourke, twenty-four shares ; Phœbe Rourke, eight shares. James Rourke, Charlotte's husband, was ship's husband as well as the particular agent of his wife and Phœbe Rourke in the insurance of their respective interests. The plaintiff's share and that of E. V. Rourke were uninsured. Charlotte and Phœbe's interests were insured in the defendant company.

On the 11th February, 1891, the schooner while on a voyage from Boston to St. John, New Brunswick, laden with phosphate, became stranded on a reef at North Haven, on the coast of Maine, about ten miles distant from the port of Rockland. The vessel was badly damaged and a telegraph message was sent to James Rourke the ship's husband. He lived at St. Martins near the city of St. John where the owners lived William and Edward being his brothers and Phœbe his sister ; the plaintiff was at the time his clerk as well. James Rourke upon receiving the message left for St. John, saw the agent of the defendant company, informed him of the telegram received and that he believed the schooner was a wreck. On his arrival at Rockland, February 14th, he saw one Butler who was acting as the company's representative who had sent down a Mr. Bunker to look after the wreck. James Rourke on his arrival boarded the vessel and examined her condition. She had then been stripped of her rigging which had been brought on shore and placed in a building owned by one Ledbetter for safe keeping. Rourke remained near the scene until the 17th, three days, and then returned to New Bruns-

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wick and although ship's husband he left no directions as to the vessel, cargo or outfit nor did he take any means to save them. Upon his arrival at St. John on the 18th of February he saw the agent of the Insurance Company, told him about the position of the vessel and that in his opinion it was for the interest of all concerned better to leave her there, and afterwards, on behalf of his wife and sister, gave notice of abandonment and eventually was paid a large portion of his claim the question as to whether he was paid for a total loss being disputed by the appellants. After Mr. Rourke's departure the agent of the company appears to have advertised the sale of the vessel as she lay on the reef and her outfit, the outfit which was in Ledbetter's building being purchased by one Smith and the vessel by one Keene; the wreck and sails, however, seem to have come into Keene's possession, and subsequently the schooner was floated and brought to Rockland, a place of safety, where she could have been repaired, the sale in the mean time having apparently been abandoned although the evidence on this point is exceedingly obscure. Mr. Butler, the respondent's agent, on March 12th notified James Rourke, amongst other things, that she was not a total loss and requested him to come to Rockland, pay charges and take possession of the property. Neither the appellants nor James Rourke took any notice of this telegram nor did they do anything afterwards in the direction of taking the property or repairing the vessel. The vessel could not be kept afloat; she was put on the Marine Railway at Rockland and nothing being done Keene, who had succeeded in taking her off the rocks, commenced proceedings by way of libel in the United States District Court of Maine, setting out the facts above stated, and that he had incurred expense to the extent of $1,000 in salving the property;

and asked that this amount might be paid him and that the vessel should be condemned and sold to pay the same. No defence was ever made by any person interested in the vessel to these proceedings, and eventually a decree of condemnation was made and the vessel was sold thereunder, the proceeds being paid into court and subsequently disposed of as by the decree ordered.

Subsequently the plaintiffs brought this action against the defendant company to recover damages by reason of the company's action in selling the vessel and outfit while wrecked upon the reef at North Haven. The jury found a verdict in favour of the plaintiff which verdict was set aside by the Supreme Court of New Brunswick upon appeal, and a non-suit ordered to be entered pursuant to leave reserved at the trial.

McLeod Q.C. for the appellants referred to *Shepherd* v. *Henderson* (1); *Jacobs* v. *Seward* (2).

Weldon Q.C. and *Palmer* Q.C. for the respondents.

The judgment of the court was delivered by—

SEDGEWICK J.—(His Lordship stated the facts appearing above and proceeded as follows.)

I am of opinion that the judgment of the Supreme Court is right. The action of the defendant company, in so far as its dealing with the interests of the assured was concerned, was perfectly proper under the "sue and labour" clause of the policy; it was within their authority to do all that they did do in respect to that interest; it was equally within their power to act as they did by reason of the abandonment to them of the assured's interest. At all events it is absolutely out of the question for the plaintiffs to deny the authority of

(1) 7 App. Cas. 49. (2) L. R. 5 H. L. 464.

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the respondents to act as they did, whether as the agents of the assured or by virtue of their having a right to take possession of the wreck upon her abandonment by James Rourke on behalf of the assured. The position of the company then was that of a joint owner with the plaintiffs' of the vessel in question, and the only question upon this appeal is, whether the acts of the respondents' agents amounted to a conversion of the plaintiffs' interests I am strongly convinced that the conduct of James Rourke, who, as ship's husband, was the agent of the plaintiffs in respect of this vessel, precludes the plaintiffs from bringing this action. If, as they contend, the vessel was not a total wreck, and could with advantage to the owners have been repaired and brought safely to port, his relationship to the plaintiffs as ship's husband most certainly had not ceased. It was his duty in their interest to have done everything possible to protect them. The evidence convinces me that he was perfectly satisfied that there was a total loss, and that it would be for the benefit of all concerned to let the insurance company deal exclusively with the wreck. I do not, however, wish to place my judgment upon this ground. The defendant company were in the position of co-owners with the plaintiffs of the wreck, and the question as to whether the alleged sale amounted to a conversion depends altogether upon what the result of that sale was. If the effect of it was to deprive the plaintiffs of their interest in the property, or to amount to a destruction of the property, so that under no circumstances could they in the future have any benefit from it, then, according to the authorities, a conversion would have been complete; but no such result followed from the sale in question; the effect of the sale was the very reverse; the assured owners had abandoned the property; James Rourke, as agent of the plaintiffs, acted as if he had abandoned

the property, but the purchasers at the sale saved it and brought the wreck to a place of perfect safety, where the plaintiffs might have come in less than a day and taken possession of it. The plaintiffs were in fact subsequently deprived of their right of possession, but not by reason of any sale of the property, but by reason of the decree of the United States District Court, the court having unquestionable jurisdiction, as respects this vessel, to decree her forfeiture and sale. If the plaintiffs now find themselves deprived of their interest in the vessel it is not through any action of the respondents, it is solely in consequence of the action of Keene claiming for salvage services in respect to the vessel, and their own inaction in not making their defence in the United States court if he were not entitled to the decree he had obtained by reason of his not having rendered the salvage services upon whieh that decree was based. The authorities are numerous and the law is clear as to what constitutes a conversion by one joint owner against his co-owner. In *Mayhew* v. *Herrick* (1) it was decided that a mere sale of a property was not enough, though for such a disposition of a property as amounted to a destruction of it one tenant in common would be liable in trover to his co-tenant. In *Jacobs* v. *Seward* (2) the Lord Chancellor said:

So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action can lie against him by his co-tenant. Now, it is perfectly lawful for a tenant in common to make hay, for somebody must make it, just as it is lawful for a tenant in common of a whale to make the blubber into oil. That is a perfectly legitimate purpose. It does not signify whether one or other of the tenants in common made use of it, it being made use of in an ordinary and legitimate way. No trover would, therefore, lie against the co-tenant in respect of his having done what he did.

The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, he seeking to exercise his

(1) 7 C. B. 229. (2) L. R. 5 H. L. 464.

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rights therein, and being denied the exercise of such rights. There was the case of a ship being taken possession of by one tenant in common and sent to sea without the consent of his co-tenant. In that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share. But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed.

The case referred to by the Lord Chancellor was *Barnardiston* v. *Chapman* cited in *Heath* v. *Hubbard* (1). In that case the plaintiff was tenant in common of one moiety of a ship and the defendants tenants in common of another moiety. The defendants had forcibly taken the ship out of the plaintiffs' possession, secreted it from him, changed its name and afterwards handed it over to a third party who sent it on a voyage in the course of which it became a total loss. The jury having found that there had been a destruction of the vessel by the defendants' means the court refused to disturb the verdict. The law on the subject is well stated in Clerk & Lindsell on Torts (2).

If two or more people own a chattel either jointly or in common, one of them cannot bring an action against the others merely for an interference with his right of possession, since the possession of each is alike lawful, and the manner of its exercise is left by the law to be settled among the parties themselves. But if one co-owner has deprived the other of all possible use and enjoyment of the property, either in the present or the future, then he has been guilty of an act of conversion. It is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it. Short, therefore, of "destruction or something equivalent" one co-owner may exercise the full rights of property over a chattel in defiance of the wishes of the other co-owners, without being guilty of a tort. He may destroy its identity by the process of manufacture, he may create a lien on it, he may sell it, and this immunity extends to those who stand in his shoes. If a sheriff seizes partnership pro-

(1) 4 East 121. (2) P. 179.

perty under an execution against one of the firm he becomes part owner, and this part ownership protects him, even though he purports to sell the entire interest in the goods. If co-owners jointly pledge property, and one of them without the authority of the other afterwards demands the property back tendering the amount due, the pledgee is not guilty of a conversion by refusing to deliver.

In the present case the company had unquestionably the right for the protection of their own interests to take the cargo from the wreck, as well as her rigging and other appurtenances; they had equally the right, in their own interests, to restore the rigging and appurtenances to the vessel, with a view of saving her if possible. They had a right to employ parties, on their own account, to use all possible means to make such repairs on the vessel as would enable her to be brought to a place of safety. Whether there was a sale or not, all this was done by the company, or by persons acting with the authority of the company, and there was nothing done, so far as they were concerned, which at any time prevented the plaintiffs from taking possession and treating the vessel as if no disaster had ever overtaken her.

For these reasons I am of opinion that the judgment of the Supreme Court of New Brunswick is right, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *E. & R. McLeod & Ewing.*

Solicitors for respondents: *Weldon & McLean.*

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*Mar. 28.

*May 31.

THE CORPORATION OF THE TOWN OF WALKERTON (DEFENDANTS)..... ..... } APPELLANTS;

AND

ANNA ERDMAN, EXECUTRIX OF THE LATE JOHN B. ERDMAN, (PLAINTIFF) ..... } RESPONDENT;

AND

R. E. HEUGHAN, THIRD PARTY ADDED BY ORDER OF COURT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Action for personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Rights of third party.

Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect, claiming through the deceased. Therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine such evidence is admissible in a subsequent action taken after his death under the act. Taschereau and Gwynne JJ. dissenting.

The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant as the person who was really responsible for such excavation and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. Taschereau and Gwynne JJ. dissenting.

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

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APPEAL from a decision of the Court of Appeal for Ontario, (1) affirming the judgment of the Divisional Court (2) by which a new trial was ordered.

The action in this case was brought under Lord Campbell's Act in consequence of the death of John B. Erdman, from injuries received by falling into an excavation in one of the streets of the town. Erdman before his death had instituted an action for damages for such injuries in which by order of the court his evidence was taken *de bene esse* counsel for the town appearing at such examination and cross-examining. The sole question to be decided on this appeal is whether or not such evidence was admissible on the trial of the present action. The trial judge refused to receive it, and there being no other evidence of the manner in which deceased was injured the plaintiff was non-suited. The non-suit was set aside by the Divisional Court and a new trial ordered which was affirmed by the Court of Appeal from whose decision this appeal was brought.

The defendants had caused Heughan to be added as a defendant alleging that he was responsible for the excavation into which the deceased fell. Heughan was not served with notice of the examination of deceased and so had no opportunity to cross-examine him.

Aylesworth Q.C. for the appellants. Lord Campbell's Act gives a new cause of action and one entirely different from that which deceased had in his lifetime. *Morgan* v. *Nicholl* (3); *Canadian Pacific Railway Co.* v. *Robinson* (4).

As regards this action the plaintiff is in no way in privity with the deceased. *Leggott* v. *The Great Northern Railway Co.* (5); *Wood* v. *Gray* (6).

(1) 20 Ont. App. R. 444.
(2) 22 O.R. 693.
(3) L.R. 2 C.P. 117.
(4) 19 Can. S.C.R. 292; [1892] A.C. 481.
(5) 1 Q.B.D. 599.
(6) [1892] A.C. 576.

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The former action might have been revived when the evidence could have been used; *Mason* v. *Town of Peterborough* (1); but the plaintiff elected to proceed for her own benefit and lost the right to profit by the former proceedings.

Shaw Q.C. for the respondent. The issues in both actions are substantially the same, and the evidence comes within the rules laid down in the books. Greenleaf on Evidence (2); *Read* v. *Great Eastern Railway Co.* (3).

The plaintiff in this action is bound by any admissions made by deceased, which shows privity. *Griffiths* v. *Earl Dudley* (4).

O'Connor Q.C. for third party.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—I would allow this appeal. I concur in my brother Gwynne's opinion.

GWYNNE J.—This is an action brought by the plaintiff as widow and administratrix of the late John Erdman, to recover for her own benefit and the benefit of her children by the said John Erdman, damages sustained by them respectively by the death of the said John Erdman, pursuant to the provisions of the statute in that behalf, the death of the said John Erdman being, in the plaintiff's statement of claim, alleged to have been caused by falling into a deep hole, ditch or drain which had, by the Corporation of the town of Walkerton, their servants and agents, been negligently permitted to be dug, and was negligently left open, uncovered, unfenced and unprotected.

(1) 20 Ont. App. R. 683.
(2) 15 ed. sec. 164.
(3) L.R. 3 Q.B. 555.
(4) 9 Q.B.D. 357.

The defendants, the town of Walkerton, under the provisions of sec. 531 of ch. 184 R.S O. as amended by 54 Vict. ch. 42, sec. 24, caused one R. E. Heughan to be made a party defendant, or third party, as being the person who had dug the ditch or drain, and was responsible for all consequences arising from the matters alleged in the plaintiff's statement of claim, if proved as alleged, and among other defences they further pleaded as follows:

These defendants further say that the hole, or ditch or drain mentioned in the plaintiff's statement of claim was dug, made and left in the condition in which it was at the time of the said accident, not by these defendants but by the defendant Heughan, who was not a servant or agent of these defendants, and who so dug and made the said excavation without their consent or knowledge, and if any damages and costs are recovered in this action against the defendants they aver that such damages were sustained by reason of the said obstruction, excavation or opening in the said highway, and pursuant to the statute claim to recover over against said Heughan the amount of any such damages and costs together with the costs incurred by the said corporation in their defence of this action.

The defendant Heughan denied all the allegations in the plaintiff's statement of claim made, except those made in the first and second paragraphs thereof, and he further, among other things, pleaded as follows:

5. The defendant R. E. Heughan further says that the plaintiff's statement of claim does not show any cause of action as against the defendants, the Corporation of the town of Walkerton, and he claims the same benefit from this objection as if he had demurred to said statement of claim.

6. The said R. E. Heughan further says that he craves the benefit of any defence the said Corporation of the town of Walkerton may have to said action.

7. The said R. E. Heughan further says that if it be proved that the said John B. Erdman was wounded, damaged or injured in any way by falling into said trench, ditch or drain, that the said wounds, damages or injuries did not cause or occasion the death of the said John B. Erdman.

8. The said R. E. Heughan further says that the said John B. Erdman might and could, by the exercise of reasonable care and

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diligence, have seen the said hole, ditch or drain and avoided falling into it, or sustaining any injuries by reason thereof; and the said R. E. Heughan says as the fact is that the said alleged accident and the injuries alleged to have been sustained by said John B. Erdman thereby were caused by his own negligence and want of care.

Upon these pleading issue being joined the case went down for trial.

The law in virtue of which Heughan was made a party defendant in the present action, ch. 184, R. S.O., sec. 531, subsec. 4 enacts that:

> In case an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation or opening in a public highway, street or bridge placed, made, left or maintained by any other corporation, or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for, and any enforce payment accordingly of, the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation.
>
> Subsec. 5. The municipal corporation shall be entitled to such remedy over in the same action if the other corporation or person shall be made a party to the action, and if it shall be established in the action as against the other corporation or person, that the damages were sustained by reason of an obstruction, excavation or opening as aforesaid, placed, made, left or maintained by the other corporation or person, and the municipal corporation may in such case have the other corporation or person added as a party defendant or third party for the purposes hereof, if the same is not already a defendant in the action jointly with the municipal corporation, and the other corporation or person may defend such action as well against the plaintiff's claim as against the claim of the municipal corporation to a remedy over.

The effect of this statute, as it appears to me, is to make the third party so made defendant a principal defendant equally with his co-defendant, and where no question arises as to the fact of the obstruction alleged to have caused the injury complained of having been made by him (and in the present case no such question arises) as a principal defendant, and as the person ultimately liable, he has a right to insist

that the plaintiff's case shall be established by such evidence as would be necessary to bind him if he was sole defendant, and to assert such rights even by appeal, whether the appeal be in the name of his co-defendant or in his own name. The judgment to be recovered by the plaintiff in such an action being made by the statute conclusively binding upon him the plaintiff's cause of action must be proved by evidence which would be binding on him, and no proceeding in the action can be taken behind his back, or without notice to him so as to give him an opportunity of contesting the plaintiff's claim in every particular necessary to be established by him.

Now, in the present case the only evidence offered in support of the allegation that the deceased, John B. Erdman, received the injury alleged in the plaintiff's statement of claim as the cause of his death, was a deposition made in his lifetime by the said John B. Erdman, which the learned trial judge refused to receive and non-suited the plaintiff. That non-suit having been set aside and a new trial ordered this appeal is taken, and the sole question is whether the evidence was admissible. If it was not the non-suit must be restored, as it is admitted that no other evidence exists upon the point.

The deposition so rejected by the learned trial judge was procured and made in the manner following:

On the 9th March, 1892, the said John B. Erdman in his lifetime commenced by writ of summons an action against the Corporation of the town of Walkerton; immediately upon the service of that writ the corporation caused a notice of a motion for an order that the above defendant, R. E. Heughan, should be made a party defendant to the said action, to be served upon the said John B. Erdman and the said Heughan. By reason of the county or local judge at Walkerton

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being absent from home that motion could not be heard until the 25th day of March, 1892, when an order was made, the plaintiff not objecting, though represented (as alleged in the order) whereby it was ordered, among other things, that the said R. E. Heughan be, and he was thereby, made a defendant to the action.

And thereby it was further ordered that in case the said R. E. Heughan should enter an appearance that any of the parties might apply to the court or a judge for a direction as to having any question that might arise determined; and the order reserved to the said Heughan all rights that he might have to object to the examination of the plaintiff taken in the action prior to the date of the order, being read or used in evidence against him on the trial of the action.

The defendant, Heughan, appeared to the action in the Queen's Bench Division of the High Court at Walkerton, where the action was brought. After the service of notice of motion for the above order, and on the 12th March, 1892, the plaintiff caused an application to be made to the master in chambers at Toronto for, and obtained from him, an *ex parte* order whereby it was ordered that the plaintiff might be examined *vivâ voce* on his own behalf before Samuel Herbert McKay, and that the examination so taken might be given in evidence on the trial of the action, saving all just exceptions. The fact of the issue of this order at Toronto was telegraphed to the plaintiff's attorney at Walkerton on the said 12th March, who upon the same day served upon the Mayor of Walkerton and the solicitor of the corporation the notice following:

Take notice that the master in chambers has this day made an order for the making of the evidence of the plaintiff *de bene esse* before Samuel H. McKay of Walkerton, and that such evidence will be taken in the rooms of said John B. Erdman at the county jail at said town of Walkerton, on Monday, the 14th day of March instant, at seven

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o'clock in the evening, and that if you or your solicitor or agent desire to be present and to cross-examine said John B. Erdman upon the evidence so to be taken as aforesaid, you or he must then and there attend on such examination and cross-examine him.

Further take notice that the reason why such examination is required to be taken is that the said plaintiff is sick and seriously ill.

And take notice that if you object to the shortness of this notice, and do not attend to cross-examine said plaintiff at said time and place, the said John B. Erdman will be further examined at said place at the hour of ten o'clock in the forenoon on Wednesday, the 16th day of March inst., if then alive and able to give evidence.

Yours &c.,

SHAW & SHAW.

No notice of such intended examination appears to have been served upon Heughan. No one appeared for the corporation defendant, and the plaintiff was examined *ex parte*; again, the plaintiff's solicitor attended in the morning of the 16th March, but neither the corporation or their solicitor attended upon that occasion, and nothing further appears to have been then done.

But on the 17th March, 1892, the plaintiff's attorney, fearing that there might be some question as to the sufficiency of the notice of the 12th March, served upon the solicitor of the Corporation of Walkerton notice to the effect that on the 21st day of March a motion would be made before the master in chambers at Toronto for an order, that the evidence already taken of the plaintiff, under order dated 12th March, 1892, might be used subject to all just exceptions in the event of the plaintiff's death, in any action which the wife or children of the said plaintiff might bring against the defendant corporation under the Revised Statutes of Ontario, ch. 135, or in the alternative, that an order might be made for the examination of the said plaintiff *vivâ voce* on oath upon notice, giving six hours notice to the defendants of the time and place where such examination is to be held, and that the

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evidence when so taken might be filed in the cause with the deputy clerk of the crown at Walkerton, and used in any action which the said relatives of said plaintiff might bring after his death under said ch. 135, on the ground that said plaintiff was dying and that his testimony would be lost with his death.

The master in chambers, upon this motion coming before him on the 21st March, 1892, referred the first part of the motion to a judge in chambers and made an order upon the residue to the effect that without prejudice to the motion, the plaintiff should be examined once more upon oath, before Samuel Herbert McKay of the town of Walkerton, on Wednesday, the 23rd day of March, 1892, in the forenoon, in case his state of health permitted, upon notice to the defendants and the said third party, and it was thereby further ordered that notice served upon Tuesday the 22nd instant should be good and sufficient notice of such examination, and the time for giving notice was thereby shortened accordingly. And it was thereby further ordered that the examination when so taken be filed in the office of the deputy clerk of the crown for the County of Bruce, and that an office copy or copies thereof might be read in evidence on the trial of the action, saving all just exceptions, upon giving sufficient proof of the absence of the said plaintiff or of his inability to be present to testify on his own behalf at said trial.

And it was thereby further ordered that the costs of the application be reserved to be disposed of upon the pending motion. (*i.e.* on the motion reserved before the judge in chambers.)

Notice of the intended examination on the 23rd instant was, upon the 22nd March, served upon the solicitor of the defendant, the Corporation of Walkerton, but no notice appears to have been served upon

Heughan. Upon the 23rd the solicitor of the corporation attended, but abstained from cross-examining the plaintiff, upon the ground, as he alleges, that he was informed by the plaintiff's medical attendant that the plaintiff was sinking fast and could only live for a few days; and therefore, he did not in the plaintiff's state of health wish to worry him. Upon the 31st day of March Mr. Justice Street disposed, in chambers, of the motion before the master in chambers upon the notice of the 17th March so as aforesaid reserved by the master in chambers, and by an order dated the said 31st day of March, it was ordered that the said application of the plaintiff, made on the 21st day of March pursuant to the said notice of the 17th March, in so far as the same sought for an order in the nature of an order perpetuating testimony, should be and the same was thereby dismissed; and it was further ordered that the costs of the application should be costs to the defendants in any event of the action on the final taxation of costs therein.

Upon this same 31st day of March the plaintiff filed and served his statement of claim against the defendants the Corporation of Walkerton, and the defendant R. E. Heughan, therein alleged to have been made defendant by an order bearing date the 23rd day of March, 1892, and therein alleged that he had suffered injury from falling into a ditch in a street of the town of Walkerton, which the corporation of that town were alleged to have negligently suffered to remain open, uncovered, unprotected, &c. Before any pleas had been filed to this statement of claim, namely, on the following day, the plaintiff died, and that action thereby became abated.

Now the question is whether the depositions of the said John B. Erdman, so taken, are admissible as evidence for the plaintiff in the present action against

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the contention of the defendants, the Corporation and Heughan, that they are not; and I am of opinion that the learned trial judge's decision that they were not was correct and sound, and should be maintained upon the grounds following:

1. Upon the authority of the recent cases and especially since the judgment of the Privy Council in *Robinson* v. *Canadian Pacific Railway Co.* (1) it cannot be disputed in this court that the present action at the suit of the widow of the deceased, John B. Erdman, is a wholly different action in every particular from that instituted by Erdman in his lifetime. It is between wholly different parties and founded upon wholly different rights. Although the plaintiff is personal representative of the deceased she claims not in right of the deceased or of his estate, but being personal representative she is by statute authorized in that character to assert her own independent rights and those of her children.

2. The evidence is sought to be used in the present action not only against the Corporation of Walkerton but against the defendant Heughan also, and as no judgment in favour of the plaintiff can be rendered herein which is not conclusively binding upon Heughan as well as upon the corporation, he cannot be affected by depositions taken in an action to which he was not a party; *et ergo* depositions so taken cannot be used as evidence for the plaintiff in the present action.

3. The depositions of the 14th March, 1892, having been taken not only upon insufficient notice as affecting the defendants, the corporation, but behind the back of the defendant Heughan at a time when the plaintiff John B. Erdman knew of the pendency of a notice of motion that Heughan should be made a defendant, which motion was granted by the order of

(1) [1892] A. C. 481.

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the 31st March, 1892, and the depositions of the 21st March, 1892, having been taken while the said plaintiff, John B. Erdman, was aware of the still pending of such notice of motion, and without notice to the defendant Heughan of the intended taking of such depositions, although by the order of the 21st March, 1892, notice to him was made a condition precedent to the taking of such depositions, the depositions could not have been given in evidence in the former action if the statement of claim therein which was subsequently filed on the 31st March, 1892, had been pleaded to by the defendants therein and issues had been joined which had gone down for trial during the lifetime of the said John B. Erdman, if he had lived and from continuing illness had been unable to attend and be examined at the trial, because the effect of the action as stated in the statement of claim against both defendants, being by force of the statute under which Heughan was made defendant to affect him with liability, no evidence could be received to affect him which had been taken behind his back, and without notice to him. So neither could it be received to affect the corporation as, by force of the statute, judgment could not be against them without Heughan being conclusively condemned and affected thereby.

For these reasons I am of opinion that the learned trial judge was correct in his ruling at the trial and that therefore this appeal must be allowed with costs and that judgment of non-suit be ordered to be entered in the court below.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed. I think the evidence was properly admitted.

KING J.—This action was brought to recover damages in respect of the death of one John B. Erdman, occa-

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sioned, as alleged, by his falling into a ditch in a public street, negligently suffered by the town to remain open and unguarded.

Erdman had in his lifetime begun an action against the town for the recovery of damages, and his evidence was taken in that cause *de bene esse* upon notice to the town which attended by its solicitor and cross-examined Erdman.

The writ in that action was issued on 9th March, 1892. On 17th March Erdman's solicitors gave to the town notice that they would apply to a master on the 21st March for an order for his examination. Prior to the 21st March the town gave notice to Heughan of a motion to be made to the local High Court Judge that he should be made a co-defendant under the act of Ontario, 55 Vict. c. 42, sec. 531. Such order was duly made on the 25th March, 1892.

Upon the return of Erdman's summons on 21st March, 1892, the master ordered that the examination of Erdman *de bene esse* be made on the 23rd March upon notice to defendants, and to Heughan, who was stated in the order to have been served with a third party notice by defendants.

The examination of Erdman took place on 23rd March the solicitor for the town appearing and cross-examining, but, so far as appears, notice of the examination was not served on Heughan, he not having then in fact been made a party to the suit.

Erdman died on 1st April, 1892, and his widow, having proved his will, began this action on 6th June, 1892, for her own benefit as his widow, and for the benefit of four of his children.

Upon the trial, before Street J., the deposition of Erdman was tendered in evidence and rejected, and there being otherwise no proof of the cause of the injury the plaintiff was non-suited. The non-suit was

set aside and a new trial ordered by the Divisional Court, (Armour C.J. and Falconbridge J.) and such judgment has been affirmed by the unanimous judgment of the Court of Appeal.

Notwithstanding the able argument of Mr. Aylesworth I think that the judgment of the appeal court should be affirmed.

The rule of evidence is thus stated in Taylor on Evidence, sec. 464:

> Where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject or substantially involve the same material questions.

And thus, in another work on evidence (Stephen art. 32.)

> Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding..... when the witness is dead, provided (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; (2) that the questions in issue were substantially the same in the first as in the second proceeding; and (3) that the proceeding, if civil, was between the same parties, or their representatives in interest. (1).

The evidence of Erdman was testimony under oath in a judicial proceeding and (as Mr. Justice Osler points out) was not the less so because taken *de bene esse* and never actually used on the trial of the action in which it was taken.

Subject to the observations to be made respecting the position of the third party it also satisfies the rule that the party against whom it is offered in the present action, viz.: the Corporation of Walkerton, had the right and opportunity to cross-examine the declarant when he was examined as a witness, and in fact exercised the right.

(1) Stephen's Dig. Law of Evidence, p. 44.

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Then as to the second requirement of the rule, viz.: that the questions in issue shall be substantially the same, or (as stated in Taylor) that the evidence relate to the same subject, or substantially involve the same material question, this does not require that all the issues in the two actions shall correspond. It is satisfied if the evidence relates to any material issues that are substantially the same in both actions.

Now the question of fact whether the injury to Erdman (the alleged cause of his death) was occasioned by the negligent act or omission of the town was a material issue in the action brought by him, and it is equally a material issue in the present action, as the plaintiff is bound to show that the death was occasioned by an act or default of the town which gave to Erdman a right of action against the town at the time of his death. And the evidence in question was tendered in support of that issue.

If indeed the admissibility of the evidence were to depend upon the causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime (1).

In the last named case Lord Selborne says:

> Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim *actio personalis moritur cum persond*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the

(1) *Blake* v. *Midland Railway Co.* 18 Q.B. 92; *Pym* v. *Great Northern Railway Co.* 4 B. & S. 396; *Seward* v. *Vera Cruz* 10 App. Cas. 59.

action, an action which he never could have brought under circumstances which, if he had been living would have given him, for any injury short of death which he might have sustained, a right of action which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways.

Lord Blackburn also says:

I think that when that act (Lord Campbell's Act) is looked at, it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which, as is pointed out in *Pym* v. *Great Northern Railway Co.*, (1) is new in its species, new in its quality, new in its principles, in every way new and which can only be brought if there is any person answering to the description of the widow, parent or child who under such circumstances suffers pecuniary loss by the death.

But while the present cause of action is new and different from that brought in his lifetime by Erdman it is nowhere stated that the causes of action are to be identical in order to render admissible in a later action evidence given in an earlier one.

It is sufficient that material issues to which the evidence is relevant, and for the proof of which it is in each case adduced, are substantially the same in both proceedings. Here the second cause of action embraces what goes to constitute the first together with other things. I conclude therefore that the second requirement of the rule is met.

Then as to the third requirement, viz.: that the proceedings in the two actions shall be between the same parties, or those claiming under them. The plaintiff in this action, although suing as executrix, fills a mere nominal or formal position in the action. As expressed in more than one case the plaintiff so suing is a mere instrument acting on behalf of the person whether widow, child or parent claiming to have sustained

(1) 4 B. & S. 396.

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pecuniary loss through the death of the deceased (1). What has to be regarded, therefore, is the relation which the beneficial parties to the action bear in point of interest to the deceased. Can they be said to claim under him? The statutory right of action requires the concurrence of several things, viz.: a wrongful act of defendant which would in the lifetime of the deceased have entitled him to maintain an action for the injury; the death occasioned by such wrongful act; the existence of a personal relation of wife, parent or child in the person beneficially claiming; and a damage to such person through the death by the loss of some pecuniary benefit reasonably to have been anticipated from the continuance of the life.

In the interpretation of the provision of the statute that the wrongful act causing the death shall be such as would, but for the death, have entitled the person injured to maintain an action, it has been held that this means a right of action subsisting in him down to the time of his death; and that, if previously having a right of action, he released it, or discharged it by accord and satisfaction, the statutory cause of action could not arise upon the death. This is the result of decisions such as *Read* v. *Great Eastern Railway Co.* (2), and is supported by the before quoted observations of Lord Selborne in *Seward* v. *Vera Cruz* (3).

I think it follows upon this that the persons seeking the benefit of this action, the widow and children of Erdman, are in effect claiming through him. They are claiming the benefit of a breach of duty which the defendants owed to Erdman, and so in a substantial sense they ground their action, in an essential condition of it, upon rights which in his lifetime he

(1) *Leggott* v. *Great Northern Railway Co.* 1 Q. B. D. 599.

(2) L. R. 3 Q. B. 555.

(3) 10 App. Cas. 59.

possessed, viz: the right to the exercise towards him of due care, and upon his right of action in his lifetime for breach thereof. Erdman's executor could make no admission against the right of the persons beneficially entitled but Erdman's own acts and admissions in his lifetime would be relevant evidence against the present plaintiff's right of action. One cannot expect to find the analogies complete, and the case before us is new in instance, but in my opinion the effect of the cases as to the injured person's competency in his lifetime to extinguish the present action by release of his own right of action, as well as the consideration that the statute grounds the present right of action in part upon the breach of a duty owed to the deceased, point to the conclusion that the rule of evidence is reasonably and fairly to be extended by analogy to the new relation created by the statute.

I therefore think that the judgment below is correct.

I also agree that the case is not affected by the circumstance of the third party proceedings. The plaintiff may succeed against the town and fail as to Heughan. The town might have made an admission of liability, and this would be admissible evidence against the town but could not bind Heughan. In order to make the third party liable it must be established on the trial, as against him, that the damages were sustained by reason of an obstruction, excavation or opening placed, made, left or maintained by him.

This is not made out as against him by evidence admissible against the town but not against him, although such evidence may establish a case as against the original defendant.

As to the point that notice of the examination of Erdman was by the order of the master required to be served on Heughan as well as on the town, the latter

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was not at the time made a third party. Besides, this point, (as I understand it) is not made by the town. On the contrary, they contend that Heughan, not having been made a party, could not have had the right to cross-examine. Hence the point did not engage the attention of the appeal court, and is not to be given weight to here. But in any view I think it not maintainable.

For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs

Solicitor for appellant: *William A. McLean.*

Solicitors for respondent: *Shaw & Shaw.*

Solicitor for third party: *H. P. O'Connor.*

FRANÇOIS CHAMBERLAND (PLAINTIFF) ..... APPELLANT;

AND

FERDINAND FORTIER (DEFENDANT) RESPONDENT.

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*May 14, 16, 17,
*May 31.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA, SITTING IN REVIEW AT QUEBEC.

Appeal—Action negatoria servitutis—Amount in controversy—Future rights—R.S.C. ch. 135 *s.* 29 *(b)—*56 *Vic. c.* 29 *s.* 1*—Private Road—Right of passage—Government moneys in aid of—R.S.P.Q. arts.* 1716, 1717 *and* 1718*—Arts.* 407 *and* 1589 *C.C.*

In an *action négatoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages.

Held, that under 56 Vic. ch. 29 s. 1, amending R.S.C ch. 135, s. 29 (b), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. *Wineberg* v. *Hampson* (19 Can. S.C.R. 369) distinguished.

The plaintiff, proprietor of a piece of land in the parish of Charlesbourg, claimed to have himself declared proprietor of a heritage purged from a servitude being a right of passage claimed by his neighbour, the defendant. The road was partly built with the aid of Government and municipal moneys, but no indemnity was ever paid to the plaintiff and the privilege of passing on said private road was granted by notarial agreement by the plaintiff to certain parties other than the defendant.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) that the mere granting and spending of a sum of money by the Government and the municipality did not make such private road a colonization road within the meaning of art. 1718 R.S.P.Q.

APPEAL from a judgment of the Superior Court of Lower Canada sitting in review at Quebec confirming the judgment of the Superior Court.

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

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This was an action *negatoria servitutis* by which the appellant prayed that a certain lot of land in the Parish of Charlesbourg, of which he alleged to be the proprietor, be declared free from all servitude of right of way as well on foot as with vehicles in favor of the defendant and of any immoveable to him belonging; that it be declared that it is wrongfully and without any right that the defendant has passed and repassed and pretended having a right to a servitude upon the plaintiff's property, and that the defendant be condemned to pay him the sum of $30.00 for the said damages with costs.

The respondent pleaded a general denial, and by perpetual peremptory exception in the following terms:

1. That there is, between the lands of the parties, a colonization road in which the defendant has passed; but the defendant denies having passed upon any part of the plaintiff's property and does not pretend to have any right of servitude upon the same;

2. That the plaintiff has not had, during the last 30 years, a continuous, peaceable and public possession of that part of the land which the defendant considers to be a public road, which road goes alongside of the defendant's property;

3. That for over 30 years, the public has passed as well on foot as with carriage over the said road, with the plaintiff's knowledge and even in spite of him.

4. That the said road has been opened with the money of the Government of this Province at the demand of the mayor, of the rate-payers of the municipality and of the plaintiff who has received, from the said Government and municipality, good and valid consideration for the value of the land which he has so ceded for the said road, to wit, twenty dollars; the whole within the last five years.

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5. That all the interested parties in the said road, the defendant and the plaintiff himself, have worked (paid by the Government) to the construction of the said road and that the said road is ruled by section 1716 and following of the Consolidated Statutes of Quebec.

6. That the said road is a land belonging to the crown, and that the plaintiff has, as well as the defendant, no more right to use the same otherwise than as a public road.

The plaintiff replied specially that no road was ever opened by *procès-verbal* on any part of his property and that the crown and municipality did not acquire any right upon his land.

The courts below held that the said road having been opened with the aid of the municipal authority and of the Government, and with the plaintiff's consent was a colonisation road opened to the public and that the plaintiff can no more pretend that he remained proprietor of the same.

Upon motion to quash the appeal for want of jurisdiction, the following judgment was delivered by:

THE CHIEF JUSTICE.—This is an action *négatoire* in which the plaintiff the present appellant claims to have himself declared proprietor of a heritage purged from a servitude being a right of passage alleged to be claimed by the defendant. The action was dismissed by the Court of Review and this is an appeal from that judgment. The plaintiff claims damages to the amount of thirty dollars.

In a former cause of *Wineberg* v. *Hampson* (1) this court held that such an action was not the proper subject of an appeal to this court. Since that decision, however, the law has been amended. As the law

(1) 19 Can. S. C. R. 369.

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stood when *Wineberg* v. *Hampson* (1) was decided the jurisdiction of the court was held not to attach for the reason that subsection (*b*,) section 29 of the Supreme & Exchequer Courts Act, R. S. C. cap. 135 conferring jurisdiction in any case wherein the matter in controversy related to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound, did not apply to the case.

It was held in *Wineberg* v. *Hampson* (1) which was decided in December 1891, that a question as to a right of servitude was not a like matter to those specifically mentioned in the clause.

By 56 Vic. cap. 29, passed in April 1893, the above mentioned subsection (*b*,) of section 29, was amended by substituting the word "other" for the words "such like" thus bringing the clause into harmony with article 1178 of the Code of Civil Procedure of the Province of Quebec regulating the appeal to the Privy Council. Under this amendment this appeal is clearly admissible. The judgment sought by the plaintiff is one whereby future rights would be bound. The plaintiff seeks by his action to have the servitude claimed by the defendant declared non-existent and should he succeed the right to exercise that servitude in the future would be barred. On the other hand should the plaintiff fail in his action he would be bound to permit the exercise of the servitude in the future.

The motion to quash is therefore refused with costs.

Amyot Q.C. for the appellant then contended upon the merits that he had not been deprived by any act or consent of his of the ownership of the land in question, the formalities prescribed by law for the expropriation of his property not having been followed,

(1) 19 Can. S. C. R. 369.

citing and relying on arts. 407 and 1589 C.C., art. 1718 R.S.P.Q.; *Corporation of Nelson* v. *Lemieux* (1); *Dorchester* v. *Collet* (2); *Doyon* v. *Corporation of St. Joseph* (3); *Holton* v. *Callaghan* (4); *Neil* v. *Noonan* (5); art. 749 M.C. (P.Q.); *King* v. *Corporation of Ireland* (6).

Languedoc Q.C. for the respondent contended that the respondent claimed no right of servitude on the appellant's property, but that as there is a road on it, which has been in use by the public for over thirty years, which he himself had, for a pecuniary consideration, dedicated to such use and which, having been built by Government aid, such road is, under arts. 1715 *et seq.* of the Revised Statutes of Quebec, a public road.

The judgment of the court was delivered by

FOURNIER J.—Le demandeur, appelant, propriétaire d'une terre d'un arpent de front sur vingt de profondeur, a vendu par un acte notarié du 3 janvier 1890, à huit personnes désignées au dit acte, un droit de passage sur la dite terre, tant à pied qu'en voiture, à toujours, sur sa terre, située dans la paroisse de Charlesbourg, concession sud-ouest du domaine de Saint-Pierre.

Ce passage, ou chemin de sortie, devait être de quinze pieds de largeur sur toute la longueur de la dite terre, et du côté indiqué par le dit François Chamberland, qui ne serait tenu de travailler au dit chemin que pendant le temps seulement qu'il serait propriétaire des terres qu'il possédait dans la septième concession du fief d'Orsainville.

Les dites parties seraient de plus tenues de placer des barrières à chaque extrémité du dit chemin, de les maintenir, et d'en ériger de nouvelles chaque fois qu'il en serait besoin, de les fermer à chaque fois qu'ils y passeraient à peine de tous frais, dommages et intérêts.

(1) 2 Q.L. R. 225.
(2) 10 Q.L. R. 63.
(3) 17 L.C. Jur. 193.
(4) 9 Rev. Leg. 665.
(5) 19 Rev. Leg. 334.
(6) 16 Legal News 204

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En outre de ces obligations, le droit fut accordé pour et en considération de la somme de $30.00 que le dit Chamberland reconnut avoir reçue.

Cet acte est demeuré incomplet, n'ayant été signé que par le demandeur et deux des huit acheteurs.

La terre en question est bornée à une de ses extrémités, au fief d'Orsainville, où les parties ont des terres qu'ils ne peuvent atteindre par aucun chemin public. Leur but en achetant ce droit de passage était d'atteindre les terres de ce fief.

Ce chemin étant difficile et dispendieux à construire, les intéressés demandèrent et obtinrent de l'aide du conseil municipal qui contribua $20.00 et du gouvernement provincial qui accorda $50.00 pour le même objet.

Ces deux sommes furent payées et employées à faire une partie seulement du chemin en question qui n'a pas été terminé. L'année suivante, le défendeur, Fortier, dont la propriété est contiguë à celle du demandeur, appelant, demanda un bornage qui eut lieu le 27 octobre, du consentement des deux parties, des bornes furent posées, ainsi qu'il appert par le procès-verbal.

C'est en se fondant sur ces circonstances que le défendeur prétend avoir acquis une servitude de passage sur la propriété du demandeur, appelant. Sa prétention est que les contributions du gouvernement et de la municipalité ont eu l'effet de rendre le chemin public.

En conséquence, le demandeur, appelant, a pris contre le défendeur, une action *negatoria servitutis* pour faire déclarer sa propriété libre de toute servitude de passage en faveur du défendeur et pour le faire condamner à $30.00 de dommages et intérêts pour avoir passé et repassé sur sa propriété en prétendant y avoir un droit de servitude.

Le défendeur a plaidé à cette action par une défense au fonds en fait, et par une exception péremptoire, en

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droit, dans laquelle il allègue, 1. Qu'il y a entre les terres des parties un chemin de colonisation dans lequel il a passé; il nie avoir passé sur la propriété de l'appelant, et déclare qu'il ne réclame aucun droit de servitude sur la dite terre.

2. Que le demandeur, appelant, n'a pas eu pendant trente ans une possession paisible, continuelle de cette partie de sa terre, que le défendeur considère comme un chemin public qui passe sur la dite terre de l'appelant.

Que depuis plus de 30 ans le public y a passé tant à pied qu'en voiture à la connaissance de l'appelant et malgré lui.

Que ce chemin a été ouvert avec de l'argent de la province, à la demande du maire, et des contribuables de la municipalité, et de l'appelant qui a reçu du gouvernement et de la municipalité le prix du terrain qu'il a cédé pour le dit chemin, savoir: la somme de $20.00.

Que toutes les parties intéressées dans le dit chemin, le défendeur et l'appelant lui-même, ont travaillé à la construction du dit chemin (payés par le gouvernement) qui est réglé par la sec. 1716 des statuts consolidés de Québec. Ils ont été payés de leur travail avec l'argent souscrit par la municipalité et le gouvernement.

Que le chemin en question est la propriété de la Couronne et que le demandeur, aussi bien que le défendeur, n'y ont pas plus de droit que dans un chemin public.

L'appelant a repliqué spécialement niant tous les faits allégués par le défendeur et spécialement qu'il n'était pas une des parties à l'acte en vertu duquel le demandeur a accordé une servitude de passage à certaines personnes. Il admet avoir reçu de l'aide pour la construction du dit chemin, mais déclare en être

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toujours demeuré propriétaire; que ni la Couronne, ni la municipalité n'ont acquis aucun droit sur ce terrain. Il allègue aussi le protêt notarié et le bornage par un arpenteur.

Se basant sur les faits ci-dessus exposés, l'intimé prétend que la contribution par le gouvernement provincial ou la municipalité, à la construction d'un chemin sur une propriété privée, à la demande des parties intéressées, a l'effet de rendre tel chemin un chemin de colonisation, et de transférer à la Couronne la propriété du terrain sur lequel tel chemin est construit et d'en priver le propriétaire sans qu'il soit nécessaire de recourir aux procédés d'expropriation, voulus par la loi.

Cette prétention est évidement erronée et contraire au code civil art. 487, qui déclare:

Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité.

Dans le cas où des biens-fonds, dit l'art. 1589 C.C., sont requis pour un objet d'utilité publique, le propriétaire peut être contraint de les vendre, ou en être exproprié sous l'autorité de la loi, en la manière et suivant les règles prescrites par les lois spéciales.

Plusieurs lois spéciales ont établi le mode de procédure à suivre pour l'expropriation des propriétés requises, soit pour la construction des chemins de fer, ou des travaux publics; mais pour ce qui concerne la voirie en général, les chemins et autres travaux de colonisation et l'arbitrage en cas d'expropriation, c'est dans d'autres statuts codifiés par les C.S.P.Q. qu'il faut aller chercher les règles qui régissent cette matière. Ceux invoqués par le défendeur se trouvent dans les statuts consolidés P.Q. et plus particulièrement depuis les arts. 1704 à 1724 qui déclarent applicables depuis les arts. 1768 à 1785 et depuis 1889 à 1842, *mutatis mutandis*.

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Les principales dispositions au sujet des chemins de colonisation sont comme suit:

Art. 1704. Le lieutenant-gouverneur en conseil peut de temps en temps désigner comme chemins de colonisation, telle ligne de chemin ou projet de chemin qu'il jugera à propos d'ouvrir ou d'améliorer, en tout ou en partie, à la charge de la province.

Art. 1705. Tout tel chemin de colonisation est, par ordre en conseil, désigné comme de première, seconde ou troisième classe, suivant le cas.

Par l'art. 1710, une municipalité peut être déclarée par ordre en conseil intéressée dans un chemin de colonisation et appelée à y contribuer; et l'art. 1713 dit "que tels chemins de colonisation ou partie d'iceux, qui se trouvent dans les limites de la municipalité, ne seront pas considérés des travaux publics d'après le code municipal, à moins qu'ils ne soient déclarés tels par ordre du lieutenant-gouverneur en conseil.

Aucun ordre en conseil n'a été passé au sujet du chemin dont il s'agit en cette cause. Il est resté chemin privé. La paroisse de Charlesbourg dans laquelle il se trouve, est une municipalité (Edits et ordonnances 3 mars 1722, code municipal sec. 29). Sans un ordre en conseil, il n'est pas possible de faire au chemin en question, l'application des dispositions ci-dessus des statuts consolidés, et particulièrement des art. 1716, 1717 et 1718. Il est évident que ces dispositions de la loi, sur lesquelles l'intimé Fortier a basé sa défense, n'ont point d'application dans le cas actuel, parce que l'ordre en conseil pour les rendre applicables n'a pas été passé. Cette condition est indispensable.

L'art. 1715 donne le pouvoir à la Couronne ou ses agents de tracer et construire des chemins sur toute terre appartenant à qui que ce soit, et l'art. 1716 en met l'entretion à la charge de la municipalité et lui donne le pouvoir de régler tel chemin par procès-verbal. Et enfin, l'art. 1718 qui déclare que les terres à travers lesquelles sont tracés et construits tels chemins de colonisation, deviennent propriété de la Couronne, et lorsque ces terres sont situées dans un township, il n'est dû aucune indemnité pour le terrain.

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La terre de l'appelant n'étant pas située dans un township, mais dans une municipalité, il est évident que la valeur du terrain doit être payée au propriétaire, car il n'y a d'exception que pour celles qui sont situées dans un township.

Que ce soit dans un township ou dans une municipalité, la Couronne ne peut pas plus qu'un particulier prendre possession d'un terrain pour un ouvrage public à moins d'avoir observé toutes les formalités prescrites par la loi.

L'article 1724 établit ces formalités. Il déclare que les articles 1789 à 1842 s'appliquent, s'il y a lieu, *mutatis mutandis*, aux chemins de colonisation mentionnés dans cette section. Ces articles définissent les règles à suivre dans les cas d'expropriation et établissent un mode d'arbitrage. Des dispositions sont prises pour le paiement des hypothèques. Par l'art. 1790, la Couronne peut faire des offres réelles.

Dans le cas actuel rien de tout cela n'a été fait. Il n'y a pas eu d'expropriation, et il n'y a pas eu de référence à arbitre ni d'offres faites.

La couronne n'a pas même pris possession du terrain. Elle n'a donné qu'une contribution à la main-d'œuvre pour la construction d'un chemin particulier et n'a absolument rien payé pour le prix du sol occupé par le chemin.

On peut bien admettre l'à-propos de cette contribution, mais on ne peut pas remédier à l'omission de l'ordre en conseil et de l'arbitrage qui n'ont pas eu lieu et qui étaient cependant des formalités indispensables pour faire de ce chemin privé un chemin de colonisation.

Les formalités prescrites par nos statuts pour l'ouverture des chemins et l'expropriation des particuliers pour la construction de chemins, doivent être rigoureusement observées, sous peine de nullité, comme l'ont déci-

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dé nos cours (1). Il a été aussi décidé dans cette cause qu'une municipalité qui n'observe pas ces formalités sera condamnée à remettre le terrain exproprié, et à payer des dommages, bien que les formalités aient été remplies après l'émanation de l'action. Dans la cause de *Corporation de Dorchester* v. *Collet* (2) il a été aussi décidé :

1. That a municipal corporation has no right to expropriate an occupier of a portion of his land, in order to open a road, in virtue of the general reserve made by the Crown of the right of taking land, before having previously appointed valuators to value the land necessary for the road.

2. That, in spite of that reserve and of the article 906 of the Municipal Code, the occupier is entitled to an indemnity for the land of which he is expropriated.

Et dans la cause de *Doyon* v. *Corporation de St. Joseph* (3).

Held,—That the formalities prescribed by the statute for the opening of a road and for the expropriation of the individuals must be rigorously followed under pain of nullity.

Le même principe a été maintenu dans la cause de *Deal* v. *Corporation de Philipsburg*, par la Cour d'Appel en 1866 (4), et encore en 1871 par la Cour d'Appel dans la cause de *Hall* v. *Lévis* (5). Une décision semblable a été rendue dans la cause de *Holton* v. *Callaghan*, par la Cour d'Appel en 1879 (6). A la page 672 on trouve une autre décision du même genre.

Dans une cause de *Neil* v. *Noonan*, (7) il a été décidé par la cour de Revision et la cour d'Appel en 1888 " Qu'un chemin qui n'est pas clôturé de chaque côté et qui n'est fermé que par des barrières, n'est pas un chemin public, et que le propriétaire de la terre sur laquelle passe ce chemin, peut forcer son voisin de faire sa part de chemin le long de cette terre.

(1) Voir *Corporation, &c., of Nelson* v. *Lemieux* 2 Q.L.R. 225.
(2) 10 Q. L. R. 63.
(3) 17 L. C. Jur. 193.
(4) 2 L.C.L.J. 40.
(5) 3 Rev. Leg. 389.
(6) 9 Rev. Leg. 665.
(7) 19 Rev. Leg. 334.

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Cette décision est conforme à l'art. 749 du Code Municipal. Le chemin est demeuré un chemin privé. Il n'a que quinze pieds de largeur. Si c'était une route municipale, elle devait avoir vingt-six pieds de largeur d'après l'art. 750 C.M., et l'on pourrait contraindre l'appelant d'en augmenter la largeur. Art. 769 C.M.

L'appelant n'a reçu que $30.00 pour le droit de passage. C'est beaucoup moins que la valeur de sa terre qu'il a payée $30.00 de l'arpent. La superficie accordée pour le chemin forme à peu près deux arpents. Mais comme il est demeuré propriétaire du terrain sur lequel le chemin existe, il peut y couper le foin et s'en servir comme pâturage.

Pour ces raisons il pouvait recevoir moins, mais s'il était exproprié pour un chemin public, il faudrait prendre en considération l'inconvénient du public qui le fréquenterait, tandis que comme chemin privé, il y passe peu de monde, et il a l'avantage de ne pas être soumis aux inconvénients de l'art. 788 C.M. Il ne sera pas exposé à des pénalités et des dommages pour ce chemin.

Un autre moyen invoqué par l'intimé, c'est que l'appelant a donné son consentement à la construction du chemin en signant la pétition adressée au gouvernement pour lui demander de l'aide pour la construction de ce chemin. Tous les documents produits prouvent qu'il ne sait pas écrire, mais en admettant même qu'il aurait signé cette pétition, elle ne contient aucun engagement de sa part de donner le terrain nécessaire pour ce chemin. Elle représente seulement qu'une vingtaine de propriétaires seraient disposés à améliorer leurs propriétés, si le gouvernement les aidait à construire le chemin sur la propriété de l'appelant. Cette allégation n'a rapport qu'aux droits de passage qu'il a cédé aux personnes mentionnées dans son acte

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du 3 janvier 1890, et ce droit n'a été concédé qu'à la condition de poser des barrières à chaque extrémité du chemin, de les remplacer au besoin, et de les fermer chaque fois qu'on y passerait. Son consentement ne va pas au delà, et à moins d'un consentement formel pour la construction d'un chemin public, il fallait absolument avoir recours aux procédés en expropriation. Le jugement déclarant tout ce chemin qui n'est fait qu'en partie, comme devenu dans ces circonstances un chemin public est contraire au principe consacré par l'art. 407 C.C., qui déclare que nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité. Ici l'appelant n'a pas été indemnisé. Il n'a reçu que le prix d'une servitude accordé à quelques particuliers qui ne lui ont rien payé pour le sol, du moins, mais un prix inférieur seulement pour le droit de passage. S'il ne recevait pas toute la valeur entière du terrain dont on veut ainsi l'exproprier, ce serait encore une autre violation de l'art. C.C. 407 qui exige qu'il soit justement et préalablement indemnisé. En conséquence l'appel est alloué et les conclusions de l'action négatoire sont aussi accordées avec cinq dollars de dommages nominaux avec dépens dans toutes les cours.

Appeal allowed with costs.

Solicitor for appellant: *G. Amyot.*

Solicitor for respondent: *W.C. Languedoc*

1893 GEORGE W. STUART (PLAINTIFF).....APPELLANT;

*Dec. 1, 2,

AND

1894 CHARLES F. MOTT (DEFENDANT).....RESPONDENT.

*May. 1. ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Res judicata—Different causes of action—Statute of Frauds.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s, interest in a gold mine but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau JJ. dissenting, that S. was not estopped by the first judgment against him from bringing another action.

Held, also that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds.

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

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

Osler Q.C. and *Newcombe* for the appellant.

Borden Q.C. and *Mellish* for the respondent.

THE CHIEF JUSTICE.—I have come to the conclusion that the judgment of Mr. Justice Townshend who tried

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

NOTE.—A report of this case has already appeared at page 153 but is now re-published with the judgment of the Chief Justice.

(1) 24 N. S. Rep. 526.

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this action without a jury ought not to have been reversed, and that the appellant (the plaintiff below) was entitled to recover in respect of the contract upon which he sued.

The case is a peculiar one. It is a second action between the same parties relating to the same subject matter. In the former suit the plaintiff alleged that for certain valuable considerations, being the same which he now alleges and proves were the considerations for the promise in respect of which he now seeks to recover, the defendant agreed to give him a one-eighth share in an undivided fourth part of which the defendant was the owner in a gold mine in Nova Scotia. In that cause each party was a witness in his own behalf. The plaintiff there swore that the promise already stated was made by the defendant and that it was so made in consideration of the plaintiff putting in the mine certain useful and valuable machinery at less than it was worth; of the refusal by the plaintiff at the defendant's express request of an offer of a lucrative position in Mexico; the giving by the plaintiff, who was an experienced practical miner, of his time, skill and advice in the management and working of the mine, and in defending the title to the property which was at that time in litigation; and the lending to the defendant money to assist in carrying on the operations of the mine. The plaintiff further proved that he had performed all these valuable considerations. The defendant in his examination swore that he never promised to give the plaintiff any share in the mine itself or to account to him for any share of the profits, but he admitted that he did promise the plaintiff that if and when the mine was sold he would pay him the same share, (one-eighth of the defendant's fourth share) of the proceeds as the plaintiff claimed in the mine itself. The learned judge by whom the first cause,

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which was a suit in equity before the passage of the Nova Scotia Judicature Act, was heard considered that the Statute of Frauds was a defence so far as specific performance of the agreement to convey a share in the mine was concerned, but made a decree for an account of the profits adopting to this extent the plaintiff's account of the bargain. The decree was reversed on appeal by the court in banc upon the ground that the evidence was insufficient to establish a partnership and that judgment was affirmed by this court.

The trial of the present action took place before Mr. Justice Townshend, without a jury. The plaintiff gave evidence precisely to the same effect as that which he had given in the first suit. The defendant did not offer himself as a witness on his own behalf. The plaintiff also proved, as he had done in the former litigation, the performance of the considerations before mentioned, and this was confirmed by the evidence of disinterested witnesses in such a way as to leave no doubt that the defendant did get the benefit of everything that the plaintiff relies on as forming part of the considerations for the contract which he alleges. The evidence of the defendant in the former cause, in which he admitted having made a promise to give the plaintiff the one-eighth of the price obtained for his share in the case of a sale of the mine, was put in and proved. In this evidence, however, the defendant stated that his promise was entirely gratuitous. There can be no doubt on the evidence that the plaintiff did put up for the purposes of the mine machinery worth at least $1,000 and did render valuable service to the defendant such as he says was to be part of the consideration, and did also lend the defendant money for working the mine, all of which must have been mere spontaneous and gratuitous acts on his part if we are to believe the defendant's statement.

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Upon this evidence the learned judge thought that he was at liberty to infer a contract such as the plaintiff claimed the performance of and gave judgment accordingly for the plaintiff. This judgment the Supreme Court of Nova Scotia on appeal have reversed, and from their judgment the present appeal has been taken.

I see no difficulty in point of law in sustaining the judgment of Mr. Justice Townshend as regards the existence of such a contract as that learned judge considered to be established. The question is purely one of evidence. There was clear and undoubted proof that the plaintiff had furnished valuable machinery and rendered services to the defendant, all of which he must be deemed to have done gratuitously unless some contract to pay for it is to be inferred. It was not even suggested that there was any reason, arising from any relationship between the parties or otherwise, why the plaintiff should have done all which he undoubtedly did do as voluntary acts of beneficence towards the defendant. It was therefore perfectly reasonable and quite in accordance with what is done every day by juries to imply from this that the plaintiff was to be paid or in some way remunerated. The ordinary implication would of course be that payment upon the principle of a *quantum meruit* was what the plaintiff was entitled to. But then both the plaintiff and defendant agree in stating that there was an express promise, differing, however, as to whether it was a voluntary promise or mere announcement of an intention to make a present, or to pay for the machinery furnished and the services rendered by a share in the proceeds of the mine. Under these circumstances I do not see that a jury, if the action had been tried by such a tribunal, could have been held to have acted so unreasonably that their verdict must necessarily have been set aside if

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they had coupled the consideration, which is proved beyond doubt or question, with the promise which the defendant admits he made. This and no more is what Mr. Justice Townshend did. Why then should his finding be interfered with any more than the finding of a jury would have been? I can see no reason why it was not just as open for the judge as it would have been for the jury to infer a contract from the circumstances and admissions proved before him, and for that reason I am of opinion that his judgment ought to have been upheld.

Two points of law were raised. First, it was said that the judgment in the first suit was an estoppel. But one of several answers which suggest themselves is sufficient to dispose of this. We cannot say that there was *res judicata* inasmuch as the present demand did not arise until the sale of the mine had been completed, and this was not effected until after the final judgment in appeal by which the first suit was disposed of was pronounced. Then it was said that the Statute of Frauds was a defence. The answer to this is that the agreement which is now sought to be enforced was not, as in the former case, one conferring an interest in land but exclusively relating to an interest in money; it is true this money is to arise from the sale of land or of a mining interest, but that on authority can, I conceive, make no difference after the land or money interest has been actually sold. It is not sought to enforce any trust or contract to sell the land; that would have been a different case; here the sale has taken place and the only question is as to a share of the price received.

There are many American cases in point. *Trowbridge* v. *Wetherbee* (1) is an express authority showing that in a case like the present to enforce a pro-

(1) 11 Allen (Mass.) 361.

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mise to pay money out of the proceeds of the sale of land brought after the sale has taken place the Statute of Frauds has no application. The cases of *Graves* v. *Graves* (1); *Hall* v. *Hall* (2); and *Gwaltney* v. *Wheeler* (3); also apply strongly in the plaintiff's favour (4).

I am of opinion that the appeal must be allowed and the judgment of the trial judge restored with costs.

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

TASCHEREAU J.—I think that the plaintiff's action was rightly dismissed. He is estopped from taking the position he would now take. I would dismiss the appeal.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs and that the judgment of the court of first instance in favour of the plaintiff should be restored. The only real defence to the action urged before us was that the plaintiff's cause of action was estopped and barred by a judgment rendered in favour of the defendant in a former action at suit of the plaintiff which, as was contended, operated as *res judicata* upon the matter of the present action; but, concurring herein with the learned judge of first instance, I am of opinion that there is nothing in the former action which operates as a bar or estoppel in the present.

KING J.—I concur in the allowance of this appeal.

Appeal allowed with costs.

Solicitors for appellant: *Henry, Harris & Henry.*

Solicitors for respondent: *Lyons & Lyons.*

(1) 45 N.H. 323.
(2) 8 N.H. 129.
(3) 26 Ind. 415.
(4) See also *Smith* v. *Watson* 2 B. & C. 401.

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*May 16.
*May 31.

OSCAR GUYON DIT LEMOINE *et al.* APPELLANTS;

AND

THE MAYOR &c., OF THE CITY OF MONTREAL..... .... } RESPONDENTS;

ANDREW ALLAN *et al*.....APPELLANTS.

AND

THE MAYOR, &c., OF THE CITY OF MONTREAL..... } RESPONDENTS.

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

Expropriation—35 *Vic. ch.* 32, *sec.* 7 (*P.Q.*)—*Interference with award of arbitrators.*

In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal.

APPEAL from the judgments of the Court of Queen's Bench for Lower Canada (appeal side).

The facts and pleadings are fully stated in the judgment of Mr. Justice Taschereau hereinafter given.

The following is the 7th section of 35 Vic. ch. 32, P.Q., upon which the award of the arbitrators was sought to be increased:

"Subsect. 12 of clause 13 of the act 27 & 28 Vic. c. 60, is amended by adding at the end of the said clause the following words, to wit: 'for the purposes of the expropriation;' but in case of error upon the amount of the indemnity only on the part of the com-

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

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missioners, the party expropriated, his heirs and assigns, and the said corporation may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said commissioners, and if upon such action the plaintiffs succeed the corporation shall deposit in court the amount of the condemnation, to be paid to the party or parties entitled thereto."

Robertson Q.C. and *Geoffrion* Q.C. for appellants, cited and relied on, *inter alia*, art. 1346 C.C.; *Rolland* v. *Cassidy* (1); *Cowper Essex* v. *The Local Board of Acton* (2); *Mayor, &c., of Montreal* v. *Brown* (3); *The Queen* v. *Brown* (4); Cripps on Compensation (5) and cases there cited; and *Owners of P. Caland and Freight* v. *Glamorgan S. S. Co* (6).

Ethier Q.C. and *Greenshields* Q.C. for respondents, cited and relied on *Morrison* v. *Mayor, &c., of Montreal* (7); and *Canada Atlantic Railway Co.* v. *Norris* (8).

The judgment of the court was delivered by

TASCHEREAU J.—These two appeals were argued together.

In 1872 two actions were taken against the City of Montreal, one by Picault & Lamothe, now being represented by the appellants, Oscar Guyon dit Lemoine *et al.*, claiming $300,000, and the other by Sir Hugh Allan, now being represented by his testamentary executors, claiming $136,424. Both actions are based on sec. 7 of 35 Vic. ch. 32 (P.Q.), which allows proprietors of certain lands expropriated by the City of

(1) 13 App. Cas. 770.
(2) 14 App. Cas. 153.
(3) 2 App. Cas. 168.
(4) 36 L. J. Q. B. 322.
(5) Ed. (1892), pp. 127 and 128.
(6) [1893] A. C. 207.
(7) 3 App. Cas. 148.
(8) Q. R. 2 Q.B. 222.

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Montreal for the opening of the Mountain Park, to claim by direct action an additional amount over and above that awarded by the commissioners appointed to fix the compensation due on account of the expropriation.

The award made to Messrs. Picault & Lamothe was fixed at $27,500 by Messrs. Atwater & Bulmer, two of the commissioners, the third, Mr. Barsalou, being of opinion that $100,000 should be awarded. The award made to Sir Hugh Allan was unanimously fixed by three commissioners at $13,576. In both cases, the awards of the commissioners were maintained by the Court of Queen's Bench; in the case of Picault & Lamothe, the City of Montreal being the appellants, the judgment of the Superior Court which had increased the award to $100,000 was reversed, and in the case of Sir Hugh Allan, Sir Hugh Allan being the appellant, the judgment of the Superior Court which had dismissed the plaintiff's action was affirmed. Both plaintiffs then appealed to this court.

As we intimated at the conclusion of the argument these appeals must be dismissed. We clearly could not interfere with the judgment appealed from, more especially in the Allan case where the arbitrators were unanimous and the action has been dismissed in the two courts below, without departing from a well settled jurisprudence.

In cases of this nature the court, as in reviewing the verdict of a jury, or a report of referees, upon questions of fact cannot reverse unless there is such a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive. And that rule should perhaps be still more strictly adhered to on an arbitrators' award than on a verdict of a jury, as the arbitrators are generally chosen not only because of

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their well known integrity, but also because of their experience in such matters, and previous local knowledge. They also view and review the premises as often as they may think it necessary to enable them to form a correct estimate, and must surely be in a better position to determine the exact amount than any court can be, and than were any of the witnesses who gave their opinions in this case.

The diversity of opinions as to value to be met with in every such case is not wanting in this one; 36 out of the 37 witnesses of Lemoine fix the value of his property at prices ranging from $191,699 to $655,870; and for the city, 38 witnesses fix the same value at prices all the way from $8,000 to $53,000. As regards the Sir Hugh Allan property, 43 of his witnesses say that his land was worth from $132,480 up to $662,400, while for the city 37 witnesses reduce that value to an amount commencing at $8,400 and ending at $39,740, and no doubt each party could have found in the City of Montreal hundreds more of witnesses who would have valued this property either on the maximum or the minimum basis as required.

Now it is obvious to any mind that from the very circumstance that a fact is open to such difference of opinion we must conclude that the decision of arbitrators on such questions can rarely be bettered by a reversal founded on the partial and refracted light of an appellate tribunal, nay, of any court. See *In the matter of Pearl Street* (1); and *In the matter of John Street* (2).

This court has already held in *The Queen* v. *Paradis* (3) that to warrant an interference with an award of value necessarily largely speculative an appellate

(1) 19 Wend. 651. (2) 19 Wend. 659.
(3) 16 Can. S.C.R. 716.

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court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on, or something overlooked which ought to have been considered by the arbitrators.

On the same principle Chief Justice Hagarty, in an analogous case, *In re Macklem and The Niagara Falls Park*, (1) had previously said: "Fully granting the perfect integrity of the referees and their desire to act with fairness, we must at once admit that in arriving at an estimate of amount they possess enormous advantages over any to which we can lay claim."

"To warrant an interference, we must be satisfied beyond reasonable doubt that there has been this error, that an award of value necessarily largely speculative is either too much or too little. I cannot possibly see my way to naming any sum, on my own opinion of the evidence, which would be a more just and reasonable compensation than that awarded. If I ventured to do so I would have the very unpleasant idea in my mind that I was interfering, to the prejudice of justice, with the opinion of those who had far better opportunities of ascertaining the truth than I enjoy. I am unable therefore to see my way to interfere."

This was concurred in by Burton, Patterson and Osler JJ.

And Mr. Justice Patterson, in another case of the same nature, *re Bush* (2) said in the same sense: "An appeal lies, it is true, on questions of fact as well on questions of law. But when the fact for decision is a matter so peculiarly depending upon estimates and opinions of values, as it is in this case, and when the award represents the conclusions of the persons who have had means of forming an estimate of the reliance that ought to be placed on the testimony adduced which we do not possess, as well as of exercising their

(1) 14 Ont. App. R. 26. (2) 14 Ont. App. R. 81.

own judgment, which they have a perfect right to do, bringing to the task whatever knowledge they may have of the locality and the properties, and their general acquaintance with the subject, as to which we are not expected to deal as experts and are not likely to be better informed than they, or more capable of forming a correct judgment, it is obvious that we cannot interfere unless we find that some wrong principle has been acted on, or something overlooked that ought to have been considered."

The case of *Morrison* v. *Mayor, &c., of Montreal* (1) is precisely in point. The appeal there before their Lordships arose from the very same expropriation as the one in question here, and the fact that in the Lemoine case the arbitrators were not unanimous cannot by itself justify an increase of the award. The two cases of the owners of the *Caland & Freight* v. *The Glamorgan SS. Co.* (2); and *McIntyre & McGavin* (3); are recent authorities from the highest tribunal in the Empire against the appellant's contentions here. The case of *Mussen* v. *Canada Atlantic Railway Co.* determined a few weeks ago in the Privy Council (4), though not yet reported, is also, I understand, one where the award of the arbitrators, at first set aside by the judgment of the Superior Court, was restored to the original amount awarded.

Appeals dismissed with costs.

Solicitors for appellants: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Roy & Ethier.*

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(1) 3 App. Cas. 148.
(2) [1893] A.C. 207.
(3) [1893] A.C. 268.
(4) See 23 Canadian Gazette p. 111.

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THE SHIP "OSCAR AND HATTIE" (DEFENDANT) ..... } APPELLANT;

AND

HER MAJESTY THE QUEEN (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

54 & 55 *Vict. (Imp.)* c. 19 *sec.* 1 *subsec.* 5—*Presence of a British ship equipped for sealing in Behring Sea—Onus probandi—Lawful intention.*

On 30th August, 1891, the ship "Oscar and Hattie" a fully equipped sealer was seized in Gotzleb Harbour in Behring Sea while taking in a supply of water.

Held, affirming the judgment of the court below, that when a British ship is found in the prohibited waters of Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the *Seal Fishery (Behring's Sea) Act*, 1891, 54 & 55 Vic. (Imp.) c. 19, sec. 1, subsec. 5.

Held, also, reversing the judgment of the court below, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of 54 & 55 Vic., c. 19, sec. 1, subsec. 5.

APPEAL from the Exchequer Court of Canada (Admiralty District of British Columbia) (1).

This was an action *in rem* for the condemnation of a ship for a contravention of *The Seal Fishery (Behring's Sea) Act*, 1891 (2).

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

(1) 3 Ex. C. R. 241.

(2) Sec. 1, subsec. 5 enacts that: If a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this act.

The judgment appealed from was delivered by Sir Matthew B. Begbie C.J., Local Judge in Admiralty for the District of British Columbia.

The ship "Oscar and Hattie," Thomas Turtle, Master, a British ship registered at the Port of Victoria, sailed from Yaquina Bay, in the State of Oregon, the latter end of February, 1892, for the North Pacific Ocean on a sealing and fishing voyage.

In continuance of the object of the voyage the ship continued sealing and fishing in the North Pacific Ocean up to and until the latter end of August, when being short of water and prepared to give up sealing for the season, the ship put about with the object of returning to the Port of Victoria. British Columbia.

Owing to the shortness of water on board the ship it was found necessary by the captain to put into Gotzleb Harbour, in Attou Island, the western island of the Aleutian group. While engaged there in laying in a supply of water the ship was boarded and seized by an officer, ensign Harrison, and crew from the United States man-of-war "Mohican." The seizure occurred on the 30th day of August, in the evening, about 5 o'clock. Ensign Harrison of the "Mohican" overhauled all the papers of the "Oscar and Hattie" and took possession of the ship's official log book and the ship's log. The seizing officer and crew remained in charge of the "Oscar and Hattie" until the evening of the first day of September. The master of the "Oscar and Hattie" in the interim visited the Commander of the "Mohican" on board the "Mohican" and protested against the seizure.

No written communication passed from the officers of the "Mohican" or any of them to the master of the "Oscar and Hattie" of the reasons for the seizure, but various conversations occurred between them with

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reference to the same which will be referred to hereafter.

On the afternoon of the 1st day of September, in pursuance of orders received from the Commander of the "Mohican" and with an officer and prize crew on board from the "Mohican," the master of the "Oscar and Hattie" navigated her to the Port of Ounalaska, in the Territory of Alaska. Arriving at Ounalaska the "Oscar and Hattie" was taken in charge by the United States man-of-war "Yorktown," who in turn handed over the "Oscar and Hattie" to the officers of Her Majesty's Ship "Melpomene" some nine or ten days after the arrival of the "Oscar and Hattie" at Ounalaska.

At the end of such period in pursuance of instructions or orders received from Captain Parr, the officer in command of H. M. S. "Melpomene," the master of the "Oscar and Hattie" proceeded from Ounalaska to Victoria, and reported to the Collector of Customs at the Port of Victoria, and the ship was left in charge of the Collector of Customs.

Subsequently an action for condemnation of the ship "Oscar and Hattie" her equipment and everything on board of her, was instituted against the ship for contravention of the act known as the "*Seal Fishery (Behring's Sea) Act*, 1891," the writ in such action being issued on the 22nd day of October, 1892, and it was alleged in the petition in support of such action:

"That the ship 'Oscar and Hattie' was seized by an officer of the "Mohican" on the 31st day of August, 1892, at Gotzleb Harbour, Attou Island, being a place within the prohibited waters of Behring's Sea as defined by an Order in Council dated the 9th day of October, 1892, made by Her Majesty the Queen in

pursuance of an act of the Imperial Parliament, intituled the *Seal Fishery (Behring's Sea) Act*, 1891."

"That the said ship sailed from Victoria on the 26th day of January, 1892, fully manned and equipped for the purpose of seal-fishing, hunting, killing and taking seals."

"That the master of the 'Oscar and Hattie' was on the 17th day of June, 1892, duly warned by an officer of the United States ship 'Adams' not to enter the waters of Behring's Sea for the purpose of sealing, and at the same time had delivered to him from the said officer a copy of the Proclamation of the President of the United States, and a copy of the Convention between Great Britain and the United States and a copy of the *Seal Fishery (Behring's Sea) Act*, 1891."

"That the 'Oscar and Hattie' was at the time of the seizure as alleged, namely on the 31st day of August, 1892, fully manned and equipped for sealing purposes and was used and employed in killing, hunting, taking or attempting to kill and take seals within the prohibited waters of Behring's Sea."

In answer to the allegations in the petition the defendant, the owner of the "Oscar Hattie," admitted practically the whole of the allegations except so far as related to the purpose for which the ship was in Behring's Sea, and alleged that such ship was in Gotzleb Harbour, Attou Island, where she was seized, solely for the purpose of obtaining a supply of water and provisions in order to enable her to return to Victoria, and not for the purposes of sealing or attempting to seal as alleged or otherwise, and the said ship was never in prohibited waters for the purposes alleged or otherwise, and that the said ship put into the said harbour being at the time in distress and for the purpose of relieving such distress, and was not in such waters for the pur-

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pose prohibited by the Order in Council, Prohibitions and Conventions. Whereupon issue was joined and the trial of the issue had on Thursday the 27th day of January, 1892, and judgment was delivered on the 5th day of January, 1893, condemning the ship "Oscar and Hattie" and her equipment and everything on board of her as forfeited to Her Majesty in contravention of the act known as the "Seal Fishery (Behring's Sea) Act, 1891," and the owners of the "Oscar and Hattie" were condemned in costs.

The evidence taken at the trial on these issues is reviewed in the judgment of the court below (1), and in the judgments hereinafter given.

D'Alton McCarthy Q.C. and *D. M. Eberts* for the appellants contended upon the evidence that the "Oscar and Hattie" was not in Behring's Sea at any time during the season of 1892 for any prohibited purpose, and referred to *Walker* v. *Baird* (2).

Hogg Q.C. for the respondent contended that the onus was upon the appellant to show by clear evidence that the "Oscar and Hattie" was not in Behring's Sea and that the finding of fact of Chief Justice Sir M. Begbie upon the evidence should not be disturbed.

THE CHIEF JUSTICE:—This is an appeal from the judgment of the Chief Justice of British Columbia, sitting as local judge in Admiralty for the British Columbia Admiralty District, pronounced in a proceeding *in rem* against the ship "Oscar and Hattie," whereby that ship and her equipment and everything on board her were condemned as forfeited to Her Majesty for contravention of the act known as the Seal Fishery (Behring's Sea) Act, 1891.

The "Oscar and Hattie," a British ship registered at port of Victoria and commanded by Thomas Turtle, the

(1) 3 Ex. C.R. 242. (2) [1892] A.C. 491.

sailed from Yaquina Bay in the State of Oregon, on the 18th February, 1892, on a sealing and fishing voyage in the North Pacific Ocean fully equipped for that purpose. The ship continued sealing (as the owners allege) in the North Pacific Ocean and outside the limits of Behring's Sea until the latter end of August, 1892, when, being short of water and prepared to give up sealing for the season, the master put the ship about with the intention of returning to Victoria. Instead of sailing directly for Victoria, however, he put into Gotzleb Harbour, in Attou Island, the western island of the Aleutian group. This harbour is on the north side of the island and beyond all question within the limits of Behring's Sea. The master states that his sole purpose in going into this harbour was to procure a supply of water of which he was short, and he alleges that he was actually engaged in getting water when his ship was boarded and seized by an officer (Ensign Harrison) and a boat's crew from the United States ship "Mohican."

This seizure was made about 5 o'clock in the afternoon of the 30th August, 1892. Ensign Harrison took possession of the ship's papers, including the "official log-book and the ship's log." The seizing officer and crew remained on board the "Oscar and Hattie" until the afternoon of the 1st of September. The master of the "Oscar and Hattie" in the interval visited the commander of the "Mohican" and protested against the seizure. On the afternoon of the 1st of September, in pursuance of the orders of Captain Johnson of the "Mohican" the "Oscar and Hattie" sailed for Ounalaska with an officer and prize crew from the "Mohican" on board. On her arrival at Ounalaska the ship was taken in charge by the United States ship-of-war "Yorktown," by whose commanding officer she was subsequently handed over to the commander of Her Majesty's ship

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"Melpomene." By the orders of Captain Parr of the "Melpomene," the master of the "Oscar and Hattie" proceeded from Ounalaska to Victoria, and reported to the Collector of Customs at that port, to whom the ship was then delivered up.

Soon afterwards the present action for condemnation was commenced, it being contended on behalf of the Crown that the ship had incurred forfeiture for an infraction of the Behring Sea Act, 1891, in that she had been found in Behring's Sea within prohibited limits, with shooting implements and seal skins on board. The master of the "Oscar and Hattie," Captain Turtle, was examined on behalf of the claimants, the owners of the ship; his evidence was not however, taken in open court, but before an examiner. Captain Johnson of the "Mohican," and Ensign Harrison, the officer who made the original seizure, were called as witnesses for the Crown and examined before the Chief Justice, and one Joseph Brown, who had been on board the ship during the voyage as a hunter, was called as a witness for the claimants, and also examined before the Chief Justice at the trial. The learned Chief Justice after taking time for consideration pronounced judgment condemning the ship, her equipment, and everything found on board her as forfeited to the crown. From that judgment the present appeal has been brought.

Subsection 2 of section 1 of the act referred to is as follows:

(2). While an Order in Council under this act is in force.

(*a*) A person belonging to a British ship shall not kill, or take, or hunt, or attempt to kill or take, any seal within Behring's Sea during the period limited by the Order; and

(*b*) A British ship shall not, nor shall any of the equipment or crew thereof, be used or employed in such killing, hunting, or attempt.

Subsection 5 of section 1 reads as follows:

If a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins, or bodies of seals,

it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this act.

By an order of Her Majesty in Council passed on the 9th of May, 1892, under and pursuant to this act, the limits of Behring's Sea were defined and the catching of seals by British ships in Behring's Sea was prohibited. The offence charged against the ship was therefore that she or some of her equipment or crew had been employed in killing, taking, or hunting or in attempting to kill, or take seals within Behring's Sea as defined by the order in council.

Sufficient *primâ facie* proof of this was undoubtedly afforded by the fact that the ship was found within the boundaries of prohibited waters, with shooting implements and seal skins on board. The onus was thus cast on the owners to prove that the ship had not been employed in killing, taking or hunting seals or in attempting to do so within Behring's Sea.

The question thus becomes purely one of evidence. Have the claimants by their proofs displaced the presumption arising by force of the 5th subsection of sec. 1 of the act from the conditions under which the ship was found in Behring's Sea?

The burden of proof being thus on the claimants, the owners of the ship, it was for them to rebut the statutory inferences arising from the circumstances, and if they have failed in doing this the ship was properly condemned. Their explanation is that the "Oscar and Hattie" entered Behring's Sea for the purpose of getting a supply of water, of which she was short, and for no other purpose whatever; that she had been actually engaged in watering by means of her boats, immediately before being seized by the boat from the "Mohican"; and that no seals were taken by her, nor by any of her equipment or crew within Behring's Sea; nor was any attempt made to seal within the prescribed

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limits. Further, that the seal skins on board had been taken in the North Pacific Ocean, outside of Behring's Sea and off Copper Island, where the ship had been sealing during her whole cruise, prior to sailing on her return voyage to Victoria, in the course of which she entered Behring's Sea to get water. In order to establish this case the claimants called in the first place, Thomas Turtle, the master who had commanded the ship during her sealing voyage. Captain Turtle, as I have before said, was not examined in court, nor in the presence of the Chief Justice but before an examiner. If his evidence is not discredited it is, in my opinion amply sufficient to exonerate the vessel from any charge of contravention of the act arising from the legal presumption imposed by the statute. The witness swears that he went into Behring's Sea for the sole purpose of getting water, turning aside for that purpose from his true course on his return voyage to Victoria. He also says most emphatically, as I understand his deposition, that he did not take or attempt to take any seals in Behring's Sea; that he was actually getting water on board when the officer on the "Mohican" seized the vessel; he also states with sufficient clearness that the seal-skins he had on board had been taken off Copper Island, in the North Pacific, where he had been prior to sailing on his home voyage; and he deposes that he had not been in Behring's Sea during his whole voyage until he entered it for the purpose of getting water on the 30th of August, the day before his vessel was seized. Captain Turtle candidly admits that during the early part of the voyage he had been warned against Behring's Sea by the United States ship "Adams," for when he sailed from Victoria in January, the Order in Council had of course not been passed, and the exclusion from Behring's Sea under the *modus vivendi* could not have been known to him but for this

notice. He gives the state of the wind and weather as his reason for making the North coast of the Island instead of the South side, which was outside Behring's Sea. The witness further says that he saw no seals near Attou Island, and that there were none there. This evidence by itself, even if not corroborated by other evidence, given by a witness who cannot be discredited by reason of any peculiarity of his demeanour in the witness box since he was not observed under examination by the Chief Justice any more than by ourselves, would, in my judgment be amply sufficient to rebut the statutory presumption and ensure the acquittal of the vessel unless sufficiently countervailed by further proofs on the part of the crown. But this is not all. Another witness is called by the claimants, Joseph Brown, who had been on board the ship as a hunter during the whole voyage. He proves sufficiently that the ship had been engaged in sealing off Copper Island and that the seal-skins on board had been taken there; that she had been sealing there immediately before she sailed on her return voyage in the course of which she bore up for Attou Island to get water; that she did take in water there; that she was not engaged in sealing while in the Attou roadstead, where she had arrived the day she was seized. The Chief Justice puts aside this witness as having given immaterial evidence; but granting that he knew nothing of the navigation of the ship, he at least shows that there was no sealing at Attou; that the ship went in there for water; and that the seal-skins on board had been taken in a different part of the North Pacific from which the ship had sailed some days before reaching Attou; all of which i most material as confirmatory of the captain's evidence. The Chief Justice does not say that this witness was unworthy of credit, but merely that his evidence was not material, a conclusion in which I

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cannot agree. Then to rebut this testimony, two witnesses are called on behalf of the crown both of them no doubt entitled to the utmost credit; Captain Johnson, Commander of the United States Ship "Mohican" and Ensign Harrison, the boarding officer who seized the "Oscar and Hattie." Had these gentlemen, or either of them, contradicted the testimony of the master in any material point, it might have discredited him entirely; but so far from material contradiction I find in their depositions most material corroboration of Captain Turtle's account. They show that there were no seals within two hundred miles of Attou Island. They do not, either of them, even suggest that there was any circumstances leading to a suspicion that the "Oscar and Hattie" was intended to go further into Behring's Sea for the purpose of hunting seals; and Ensign Harrison, at least rather confirms the captain's story about water, and both say that he accounted for his whereabouts in Behring's Sea by attributing it to the failure of his supply of water. I am therefore unable to agree with the learned Chief Justice in his conclusion that this evidence for the crown affects the claimants' case in the least degree, save to confirm it.

Some observations were made by the Chief Justice about the non-production of the log-book in which the entries of the ship's course during the early part of the voyage were supposed to be contained, but the claimants were not responsible for that; the log-book together with all the other ship's books and papers were seized by Ensign Harrison and handed over to Captain Parr of the "Melpomene" at Ounalaska. It was for the crown to have produced this early log-book, or to have shown that no such document could be found amongst the ship's papers. This they failed to do. No inference unfavourable to the claimants can

therefore be drawn from this circumstance. The learned Chief Justice thinks that the entry in the log book which was produced, an entry made by the mate, as to the state of the wind when the ship made Attou is inconsistent with the captain's account. Captain Turtle says the wind was north-west: the mate's entry in the log-book alleges it to have been not north but "northerly." I apprehend that the learned Chief Justice was under the impression that the record of the mate was meant to indicate that the wind was due "north" but it does no such thing. The Chief Justice seems also to have drawn an inference unfavourable to the claimants from the absence of the mate, but considering the very reasonable and probable excuse offered for his non-production by the learned counsel for the claimants, namely, that it had been impossible to find him, I do not attach any weight to the circumstance. At all events it is quite insufficient to turn the scale against the claimants in whose favour there is such a great preponderance of testimony, as the evidence shows. The claimants have therefore succeeded in proving that the "Oscar and Hattie" was not used or employed in contravention of the statute.

The appeal must be allowed with costs and the action for condemnation in the Admiralty dismissed with costs.

FOURNIER J.—[Translated]. The ship "Oscar and Hattie," a British ship registered at the Port of Victoria, sailed from Yaquina Bay, in the State of Oregon, the latter end of February, 1892, for the North Pacific Ocean, on a sealing and fishing voyage. Towards the latter end of August when being short of water the master decided to give up sealing and the ship was

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put about with the object of returning to Victoria, British Columbia.

In order to lay in his supply of water Captain Thomas Turtle, who was the master of the ship, found it necessary to put into Gotzleb Harbour, in Attou Island, the western island of the Aleutian group. While engaged there in laying in a supply of water the ship was boarded and seized by an officer, Ensign Harrison, and crew from the United States man-of-war "Mohican," in the afternoon about 5 o'clock of the 30th day of August.

Ensign Harrison took possession of the ship and of the ship's official log-book and ship's log, and overhauled all the papers and kept them in his possession until the evening of the 1st of September. In the interim the master of the "Oscar and Hattie" visited the commander of the "Mohican" on board the "Mohican" and protested against the seizure. Several conversations took place between them at the time, but no written communication passed. Later on in pursuance of orders received from the commander of the "Mohican" the "Oscar and Hattie" with an officer and prize crew on board from the "Mohican" proceeded to Victoria Harbour and the master reported to the Collector of Customs, and the ship was left in charge of the Collector of Customs.

Then an action for condemnation of the ship "Oscar and Hattie," her equipment and everything on board of her, was instituted for having sailed into Gotzleb Harbour, Attou Island, being a place within the prohibited waters of Behring's Sea, as defined by an Order in Council, dated the 9th day of October, 1892, made by Her Majesty the Queen in pursuance of an Act of the Imperial Parliament intituled the Seal Fishery (Behring Sea) Act 1891.

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Captain Turtle had been warned on the 18th June, 1892, by an officer of the United States ship "Adams" not to enter the water of Behring's Sea for the purpose of sealing. This officer at the same time delivered to him a copy of the proclamation of the President of the United States and a copy of the convention between Great Britain and the United States, and a copy of the "Seal Fishery (Behring's Sea) Act, 1891."

In answer to the action, the defendant admitted practically the whole of the allegations, except so far as they related to the purpose for which the ship was in Behring's Sea, and to the contrary alleged that his ship had entered into Gotzleb Harbour solely for the purpose of obtaining a supply of water in order to enable her to return to Victoria, and not for the purpose of sealing, or attempting to seal, in contravention to the rules and regulations agreed upon between the two governments of Great Britain and the United States.

After issue joined and the evidence taken at the trial, a judgment was delivered on the 5th January, 1893, condemning the said ship "Oscar and Hattie," and everything on board of her, as forfeited to Her Majesty in contravention of the act known as the "Seal Fishery (Behring's Sea) Act, 1891," and the owners were also condemned in costs.

The only question raised on this appeal is, whether the "Oscar and Hattie," at the time of her seizure, was being used and employed in hunting seals in the prohibited waters of the Behring Sea.

On Her Majesty's behalf it is contended that under section 5 of the Seal Fisheries Act, 1891, the *onus probandi* is upon the owner or master of the ship found in the prohibited waters of Behring Sea to show that the ship was not used or employed in contravention of the act, viz., "was not used or employed in killing, taking, hunting, or attempting to kill, take or hunt seals."

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If it is true that the law imposes upon the owner of the ship in such a case the obligation to rebut the presumption of guilt which results from the position of the vessel at the time of the seizure, nevertheless it leaves intact the owner's right to rebut such a presumption by positive proof. The owners of the "Oscar and Hattie" in my opinion have clearly and positively proved the fact that they had not proceeded into the prohibited waters in view of contravening any of the provisions of the fishery act. Captain Turtle stated in his evidence of the 2nd December, 1892, that he had proceeded to Gotzleb Harbour for the sole purpose of renewing his supply of water in order to return to Victoria from his sealing expedition in the Northern Pacific. When he arrived at Gotzleb, the weather was stormy and there was a heavy sea. He went there because it was the only place where he could go. "The wind was very strong and it was impossible for me to get around to the south side of the island." Arriving about seven or eight o'clock in the morning he went ashore to see if he could find a suitable place to water at, and about one o'clock began to fill the tanks, and about 5 o'clock Ensign Harrison of the "Mohican" seized the vessel. Harrison does not in any way contradict Captain Turtle's statement. When he seized the ship he had a couple of boats tied to the stern of the vessel and one boat was coming from the island with three men. All the guns and other appliances were on the schooner in their ordinary position. In his cross-examination he says he does not think the boats were tied to the stern of the schooner for the purpose of sealing; he does not believe there are ever any seals around this island Attou. Several witnesses confirm the statement that it is not a fishing place, that you must proceed two to three hundred miles further to catch seals. Harrison states that he knows there is a suitable place on Attou Island

where a supply of water can be had. He adds: "there was a heavy swell coming in from the northward and westward." Captain Turtle told them that he had been sealing for a month around Copper Islands, but that he had not been sealing in Behring Sea, and that he had gone to Gotzleb Harbour for the sole purpose of obtaining water and that the fishing season for him was closed.

Commander Johnson of the "Mohican" admits that he almost knew immediately after the seizure that he knew that Captain Turtle had been lately sealing in the neighbourhood of Copper Island, but cannot say whether it was Harrison or Turtle who gave him the information. He also states that there are no seals within 200 miles of Attou. The evidence of Captain Turtle is also corroborated by the evidence of Joseph Brown, a hunter on board the "Oscar and Hattie," who says that a long time previous to going for water on Attou Island, the vessel had been employed around Copper Island.

Now, Sir Matthew Baillie Begbie, in his reasons for judgment in this case reproaches Captain Turtle, while trying to justify himself, of making use of ambiguous expressions, as follows :—

> I never lowered a boat in Behring Sea "is an expression which he again repeats, and a third time adopts when repeated to him by his counsel, excepting of course the boats in Gotzleb Harbour, on the 31st August. He uses no other expression of denial." He also adds "that all his words are to be carefully weighed, and it is impossible to carry them further than the dry meaning they express. It is evident that he does not in express terms contradict the charge that he was in Behring Sea attempting to hunt seals and that the schooner was employed for that purpose. All he says is that he, himself, never lowered a boat there."

But if such answers, which the learned Chief Justice qualifies as evasive, are in truth a denial of the complaint of being there for the purposes of sealing, there can be no reproach made to Captain Turtle for making

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nse of peculiar but very appropriate expressions, as the following extract of his evidence clearly shows and especially if we remember that the hunting of seals with large vessels can only be carried on by lowering the boats fully equipped in order to get at the seals, for it cannot be done from the high deck of a vessel such as the "Oscar and Hattie." The following are the answers I refer to :—

Q. Never mind what you got from him. Was anything said about seals ?—A. He said that he didn't believe I had been sealing at all ; he didn't believe I had come into the sea to seal there, he fully believed that I came in there for the sole and whole purpose of getting water.

Q. Well, had you been sealing in the Behring Sea ?—A. No, sir ; never lowered a boat in the Behring Sea.

Q. Well, you had some seals on board, had you, seal-skins ?—A. Yes, sir.

Q. Where had you been sealing ?—A. I took them off Copper Island in the North Pacific Ocean.

Q. How far off ?—A. Various distances ; from 100——

Objected to by petitioner's counsel.

A. I never lowered a boat inside the Behring Sea.

Q. You never lowered a boat in the Behring Sea ?—A. No, sir.

Q. Outside of going into Attou Island, as referred to.—A. No, sir.

Q. Had you shot any seals there, or killed any in any way, without lowering a boat ?—A. No, sir.

Q. Could not ?—A. No, sir.

And again at the close of his testimony in re-cross examination by counsel on behalf of the crown he answers as follows :—

Q. (Mr. Pooley) And you did not take any whilst in there ?—A. No, sir.

Q. (Mr. Pooley) You say you did not go in for the purpose of taking seals ?—A. No, sir.

Q. (Mr. Pooley) Into the Behring Sea ?—No, sir.

It is difficult for me to understand how after these several specific denials the learned Chief Justice still hesitated to believe that Capt. Turtle had proceeded to Behring Sea on an illegal errand. When it is known that seal hunting can only be carried on in small boats,

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the answer may be better appreciated. In my opinion, "I never lowered a boat in Behring Sea" is a categorical answer to the question: "Had you been sealing in Behring Sea." It is a complete and perfect denial of the charge of having sealed in Behring Sea. It is twice repeated. Moreover, we see by the answers to the questions above cited that seals are not killed generally except by lowering the boats. Lowering boats is for the purpose of sealing.

It is abundantly clear, in my opinion, that there are formal and positive denials of record by Capt. Turtle that he ever intended fishing for seals in Behring Sea contrary to law.

When leaving Copper Island on his home voyage Attou Island was almost on his way and where he might make a stop for the purpose of taking in a supply of water. It is also in evidence that as a matter of fact he did there obtain a supply of water and that it was owing to the strong winds and heavy sea that he was unable to get around to the south side of the island—Attou, which is situated outside of the prescribed waters. The stress of the weather forced him to go to the north side which happens to be within the prohibited waters. On the whole, I repeat it, the evidence seems to show that he had no intention of contravening any of the provisions of the Fishery Seal Act and that he has not in fact been guilty of any infraction of the provisions of the law.

I am therefore of opinion that the appeal should be allowed and the action for condemnation dismissed, the whole with costs.

TASCHEREAU J.—I take no part in this judgment.

GWYNNE J.—This appeal must, in my opinion, be allowed with costs. Granting that the ship having

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been taken within the Behring Sea cast upon the appellant the onus of proving that the vessel had not been used and employed in taking seals in the Behring Sea, that onus was completely discharged by the evidence of the officers in charge of the vessel, whose veracity was not assailed in the slightest particular. The evidence established beyond doubt that the vessel was taken almost immediately after she had entered the sea on the north side of one of the Aleutian islands, which constituted the extreme southern boundary of the sea where she had entered for water, and within two hundred miles of which, as was shown by independent testimony, seals had never been known to be taken or seen.

The naval officer of the United States who took the vessel and handed her over to the authorities for trial entertained no doubt of the truth of the statement made by the captain of the vessel when taken, as to the purpose for which she had gone to the north side of the island instead of to the south, and had so entered the Behring Sea, namely, the state of the wind at the time, and the wonder is that she should have been taken at all, or being taken, should have been put upon trial.

SEDGEWICK and KING JJ.—Concurred.

Appeal allowed with costs.

Solicitors for appellant: *Eberts & Taylor.*

Solicitors for respondent: *O'Connor & Hogg.*

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND (RESPONDENTS)..... APPELLANTS ;

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*May 14,
*May 31.

AND

F. X. JOANNETTE (PETITIONER)..... RESPONDENT

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

Game Laws—Arts. 1405–1409 *R. S. (P. Q.)—Seizure of furs killed out of season—Justice of the Peace—Jurisdiction—Prohibition, writ of.*

Under art. 1405 read in connection with art. 1409 R. S. (P. Q.), a game keeper is authorized to seize furs on view on board a schooner without a search warrant and to have them brought before a justice of the peace for examination.

2. That a writ of prohibition will not lie against a magistrate acting under secs 1405-1409 R. S. P. Q. in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing a judgment of the Superior Court and dismissing a writ of prohibition addressed to the judge of the Sessions of the Peace at Quebec and to F. X. Joannette, a game-keeper for the district of Quebec.

The facts which gave rise to the litigation are as follows :—

On the first day of July, 1893 the respondent F. X. Joannette, game-keeper for the City and County of Quebec, was notified that furs liable to confiscation were on board the schooner "Stadacona," in the boundaries of the city of Quebec. He went on board the aforesaid schooner, showed his commission and ascertained that the furs were there. Then he went to the office of the

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

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Judge of the Sessions of the Peace, and took out a search warrant, according to art. 1420 R. S. Q.

He went back on board the schooner "Stadacona" and seized, notwithstanding the opposition of the captain and sailors, sixteen boxes of furs, which were removed to a safe place in the police court at Quebec.

The following days the parties proceeded to the examination of the said furs. The petitioners were represented by Mr. Hunt, the local agent in Quebec, the chief factor of the appellant company Mr. Mackenzie, and an inspector sent by them. At the time of appointing a third inspector, for part of furs on which petitioners and respondent's inspector disagreed, a writ or prohibition was served on the respondent.

To this writ, whereby the legality of all the proceedings and the jurisdiction of the magistrate were called in question, the respondent pleaded the general issue; that he was a game-keeper for the district of Quebec; that he had a right to seize the furs; that the magistrate had jurisdiction; that the appellants had not pleaded to the jurisdiction before the magistrate; that the appellants had acknowledged the jurisdiction by proceeding to the examination of the furs and in naming an expert for that purpose; that at the time of the service of the writ of prohibition, the two experts had examined all the furs and there only remained to name a third expert.

To the 5th, 6th and 7th paragraphs, being allegations of acknowledgment of jurisdiction by not pleading and by naming an expert, the appellants demurred, and their demurrer was maintained and this part of the plea struck out by Mr. Justice Casault.

The magistrate did not appear or plead. Mr. Justice Andrews, in the Superior Court, made absolute the writ of prohibition upon the ground that there was no authority or jurisdiction to issue a search warrant for

skins or peltries on board a navigable vessel and that consequently all the proceedings were unlawful and without jurisdiction on the part of the defendants.

This judgment was reversed, Bossé and Blanchet JJ. dissenting, on two grounds. 1st. That the game-keeper had authority, irrespective of the search warrant which had been issued, to seize the furs and peltries on board the schooner; and 2nd. that even if the search warrant were illegal such fact would not render the seizure made under the authority of article 1405 of the revised statutes illegal.

The articles of the revised statutes which bear upon the case are the following:

1405. "Every game-keeper shall forthwith seize all animals or birds mentioned in the preceding articles, or any portion of such animals of birds (except the skin, when the animal has been killed during the time when hunting is allowed) found by him in possession or custody or in the care of any person during any close season, or which appear to him to have been taken or killed during such period or by any of the illegal means set forth in the preceding articles 1402, 1403 and 1404, and bring them before any justice of the peace who shall, if proved that the law has been broken, declare them confiscated either in whole or in part for the benefit of the province and condemn the party in whose possession, custody or care such animals or birds have been found to the penalty provided in article 1410."

1406. "Every game-keeper may cause to be opened or may himself open in case of refusal any bag, parcel, chest, bag, trunk or other receptacle outside the limits mentioned in the following article in which he had reason to believe that game, killed or taken during the close season, or peltries or skins out of season, are kept."

1407. "Every person found guilty of having had or having actually in his possession or keeping or under

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his care any articles so confiscated or liable to be so, shall in each case be condemned to a fine of not less than five dollars but no more than twenty dollars, and in default of immediate payment, to an imprisonment not exceeding three months in the common gaol of the District within the limits whereof the offence was committed or the seizure or confiscation was effected."

"Such fine shall be disposed of as provided by article 1410. 50 Vic., c. 16 s. 9."

1408. "Every game keeper, if he has reason to suspect and if he suspect that game, killed or taken during the close season, are contained or kept in any private house, store, shed or other buildings shall make a deposition before a justice of the peace in the form A. of this section and demand a search warrant to search such store, private house, shed or other building and thereupon such justice of the peace is bound to issue a warrant according to form B." 49 Vic. c. 25, 12; 50 Vic. c. 16, 10.

1409. "Every game keeper shall after each seizure and confiscation of peltries or skins, cause to be established as soon as possible by a competent person duly sworn, the condition of the peltries or skins so seized and confiscated, place them in a safe place, and then immediately report to the Department of Crown Lands."

G. Stuart Q.C. for appellant, contended that the judge had no authority to swear experts at the time he did and all the proceedings were irregular and the only remedy was the writ of prohibition. *Clarke* v. *Crowder* (1); *Martin* v. *Mackonochie* (2); *Jones* v. *Jones* (3); *Blake* v. *Beech* (4).

Sections 1405 and 1409 are contradictory in terms, and the only jurisdiction which he pretended to exer-

(1) L.R. 4 C.P. 638.
(2) 3 Q.B.D. 730.
(3) 17 L.J. Q.B. 170.
(4) 1 Ex. D. 320.

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cise was that given by section 1408. There is no authority in that section to issue a search warrant to seize furs or peltries on board a schooner.

Languedoc Q.C. for respondent, contended that without a search warrant under articles 1405-1409 R.S.P.Q. the game keeper has power to seize all furs killed out out of season, and that a schooner was within the words of art. 1408, R.S.P Q. As to the prohibition it does not lie when the justice of the peace has jurisdiction and even if it can be said that they were irregularities as to the proper time of the swearing of the experts this irregularity is not a matter of prohibition. *Piché* v. *Corporation of Quebec* (1); *Ex parte Gauthier* (2).

THE CHIEF JUSTICE:—I have no doubt the Judge of Sessions had jurisdiction, though it may be he was proceeding irregularly, but this is no ground for a prohibition. As regards the interpretation of the act, it is clear that section 1405 authorises the seizure and confiscation of skins and peltries; this interpretation is especially clear when read with section 1409. Then such peltries and skins may be seized wherever found. But a game-keeper cannot search a private house, store, shed or other building without a search warrant. He could not justify his entry into such places without a warrant, but if he found peltries and skins he might seize them, though if he had no warrant and found no skins he might be a trespasser. There is nothing in the statute exempting skins, furs or peltries aboard a ship or vessel from seizure, or requiring a search warrant to seize on board a vessel or to search a vessel. I repeat there was no want of jurisdiction. That the judge before confiscation swore experts who were proceeding to establish the condition of the furs which under section 1409 is a proceeding to be taken after

(1) 8 Q.L.R. 270. (2) 3 L.C.R. 498.

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confiscation, at the most amounted to an irregularity for which prohibition is not the appropriate remedy. The appeal should be dismissed with costs.

FOURNIER J. concurred.

Taschereau J.

TASCHEREAU J.—This litigation arises out of a seizure of skins and peltries belonging to the appellant company made by the respondent, as game-keeper, under the provisions of sections 1402 and following, of the Revised Statutes of Quebec, in virtue of a search warrant purported to have been issued under sec. 1408 thereof, by the police magistrate at Quebec, acting as a justice of the peace. The seizure having taken place on board of a navigable vessel the appellant caused a writ of prohibition to issue against the magistrate's proceedings on the ground, amongst others, that under that said section it is only in a private house, store, shed or other building, and not in a navigable vessel, that any such skins can be seized under a search warrant, and that consequently the seizure made in this case was void. That contention is altogether unfounded and the Court of Appeal rightly rejected it. A search warrant was altogether unnecessary to justify the seizure made by the respondent, and the fact that he issued one cannot vitiate proceedings which are otherwise perfectly legal. Another contention of the company, in support of their writ of prohibition, is that the magistrate was proceeding illegally to have the furs examined and confiscated under sec. 1409, without having first issued a summons to the company. That contention was also rejected by the judgment appealed from, and whilst we do not see any error in any of the reasons given in the Court of Appeal to dismiss the writ of prohibition, we more specially affirm that judgment upon the ground that the writ of prohibition did

not lie in this case, as the subject matter was clearly within the jurisdiction of the magistrate. I refer to the cases, in this court, of *Poulin* v. *Corporation of Quebec* (1); *Molson* v. *Lambe* (2); and *Pigeon* v. *The Recorder's Court* (3); as clear authorities against the appellant's right to a writ of prohibition in this case.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Cæron, Pentland & Stuart.*

Solicitor for respondent: *T. Lefebvre.*

(1) 9 Can. S.C.R. 185. (2) 15 Can. S.C.R. 253.
(3) 17 Can. S.C.R. 495.

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*Mar. 29, 30.
*May 31.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... .... } APPELLANTS;

AND

NELSON WEEGAR (PLAINTIFF)..... ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Injury to employee—Negligence—Finding of jury—Interference with on appeal.

W. was an employee of the G. T. R. Co., whose duty it was to couple cars in the Toronto yard of the Co'y. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions and W. obtained a verdict which was affirmed by the Div. Court and Court of Appeal.

Held, per Fournier, Taschereau and Sedgewick JJ., that though the findings of the jury were not satisfactory upon the evidence a second court of appeal could not interfere with them.

Held, per King J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode could save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which a verdict for the plaintiff at the trial was sustained.

The facts of the case and material evidence given at the trial are set out in the judgment of Mr. Justice King.

McCarthy Q. C., for the appellant, contended that there was no evidence of negligence chargeable against the defendant company and cited *Metropolitan Railway Co.* v. *Jackson* (3).

Smyth for the respondent referred to *Millward* v. *Midland Railway Co.*, (4); *Smith* v. *Baker* (5).

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

GWYNNE J.—In this case I concur in the judgment of Chief Justice Hagarty, namely, that we cannot interfere with, however difficult we find it to be to concur in, the finding of the jury upon the evidence. In other words, a successful appeal from the verdict of a jury in matters of this nature is a task so difficult of achievement as to be, practically, almost impossible.

SEDGEWICK J.—I am also of opinion that this appeal should be dismissed.

KING J.—This action is brought under the Workman's Compensation Act for injuries sustained by plaintiff, a servant in defendant's employ, through the alleged negligence of one Garland, a person in defendant's service, to whose orders the plaintiff was

(1) 20 Ont. App. R. 528.
(2) 23 O. R. 436.
(3) 3 App. Cas. 193.
(4) 14 Q.B.D. 68.
(5) [1891] A.C. 325.

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bound (as alleged) to conform, and to whose orders he was conforming when the injury was sustained.

The plaintiff was a yardman whose duty it was (among other things) to couple cars in the Toronto yard of the Grand Trunk Railway. One Garland was also employed in the yard, and had under his control and direction an engine with its driver, the plaintiff and another. On the day of the accident several uncoupled cars were standing upon the west elevator siding. The engine was on another set of rails, and Garland directed the driver of the engine to go on to the west elevator siding. After giving this order Garland crossed over from the one track to the other in company (as plaintiff says) with the plaintiff, and the two were at the cars on the west elevator siding before the engine backed through the switch. According to the plaintiff the two were standing nearly opposite the ends of the second and third cars when Garland told him to shift the link between these cars, and (according to him) gave precise directions as to the manner of doing this.

In the end of each car there is an iron projection for connecting the cars called a draw-bar, with an opening in the end for the admission of an iron link, and a hole above and below through which a pin is passed to hold the link in place. The link is of about one and a half inch iron and about twelve inches in length. When two cars are stationary upon a siding and it is intended to couple them, the link is ordinarily made fast in the draw-bar of the forward car. Then when this car is moved back the free end of the link enters the draw-bar of the rear car and is made fast thereto. If the draw-bars are of the same height and if the link is presented horizontally the entry is readily made, but otherwise it may need to be directed by hand. The pin is sometimes dropped in by the

yardman, but frequently he sets the pin beforehand at an angle in the hole of the draw-bar and the concussion causes it to fall into its place, or "make" as it is termed.

In the case before us the link was fastened in the forward draw-bar and the cars were standing so close that the free end of the link was entered into the other draw-bar, but in such a way that the pin could not enter. There was, moreover, a difference in the two pins. That in the forward car was of the more usual pattern and had a sharp or tapered point. The other, known as a "mogul pin" was blunt at the point, and according to plaintiff the chance was that the coupling could not readily be made unless the mogul pin was first put in. In order to do this it became necessary to shift the link, i.e., to make the link fast in the draw-bar of the rear car by use of the mogul pin, leaving the forward end of it free. The distance between the two draw-bars was but four inches, and the shifting of the link required that the pins be taken out and the link moved along further into the draw-bar of the rear car.

The plaintiff says that Garland and he, standing at the side of the cars, saw the condition of things, and that Garland gave him instructions to go in and shift the link from draw-bar to draw-bar.

He says "you go in and change that link from draw-bar to draw-bar, and after you change it, drop the big mogul pin in and place the little sharp pointed pin on top of the draw-bar from which you take the link, so that when the engine is coupled on it will make itself."

In answer to a question on cross-examination the plaintiff stated that the proper way was to have coupled the engine to the forward car, and move ahead slightly, when, the cars being further apart, the link could have been taken out of the forward and placed in the rear draw-bar, and the coupling then effected

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by backing the forward car down again; and he further stated that he supposed the particular direction was with the object of saving time. He admits that he was skilled in the work of coupling cars, and that he was not accustomed to get directions as to the mode of doing it, and that Garland had never before given him directions as to the way of doing his work. At the time that the directions were given he saw the engine backing up, and when he stepped between the cars the engine was not over eight or ten feet from the forward car, and moving so slow that she was just about at a stand still, and he says that he expected that Garland would stop the engine. As plaintiff stepped between the cars, Garland went off towards the engine.

The evidence of plaintiff was contradicted. Garland denied giving any directions whatever, and two other witnesses corroborated his statement that he was at the forward end of the front car instead of where plaintiff said he was. The jury has, however, in effect adopted plaintiff's account.

As to what took place when plaintiff went between the cars, he was asked:

> Having got these instructions what did you do? A. When I first entered between the two cars I pulled this little pin out and laid it on top of the draw-bar. Then I put my hand down between the two draw-bars, placed my hand straddle of the link, and commenced to work that link from one draw-bar into the other. Q. And it was while you were doing that that the two draw-bars came together and your hand was crushed? A. Yes.

The defendants sought to shew that plaintiff ought not to have used his fingers, but should have shifted the link by moving it along one of the pins. The plaintiff on the other hand says that

> The only thing you could do was to put your fingers down between the two draw-bars and shift it from one draw-bar to the other.

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One can see, however, that the mode to be adopted may depend upon whether or not the workman has reason to believe that the cars will not be struck by the engine during the operation. If he has reason to believe that the engine will not strike the cars, clearly he might well proceed in the simplest and most expeditious way, i.e., by the use of the fingers. Of course if plaintiff had known that the engine was to be backed up against the cars he should have kept his fingers away. But his case is that he had reason to suppose that Garland would have prevented the engine from striking the car. Garland clearly had the control of the movements of the engine. This abundantly appears from the evidence of the driver and others. The case, then, is in the same position as if Garland was in fact upon the engine moving it backwards. The first question is: Did Garland direct plaintiff to go in and shift the link as stated by plaintiff? There is evidence on both sides; and the jury having found that the direction was given the finding is to be accepted by us, as it has been by the courts below.

Next; was it impliedly involved in the direction that plaintiff might use his fingers? Mr. Justice Burton grounds his dissent upon this that Garland did not direct plaintiff to move the link with his fingers. I think, however, that in the absence of specific direction the general direction authorizes the doing of the thing in the way reasonably proper for the doing of it; and providing that the engine was not to be moved against the car who can say that it was not proper enough to use the fingers? The doing of the act by the use of a pin would be tedious and I would think almost impracticably so.

Next: Was Garland empowered to give such instructions? I think that it was within the scope of

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his authority. If (as stated by plaintiff) the coupling of the cars in a certain way would save time he clearly could direct it to be done in that way. All powers reasonably incidental to the exercise of the general power are to be implied. The case, then, is within *Wyld* v. *Waygood* (1) where it was held that liability under the similar provisions of "The Employers Act" is not limited to an injury resulting from an order which is negligent in itself. The injury here (as in that case) resulted from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go was guilty of negligence.

In my opinion the appeal should be dismissed and for the reasons given by the majority of the learned judges in the Court of Appeal.

Appeal dismissed with costs.

Solicitor for appellant: *John Bell.*

Solicitors for respondent: *Best & Smyth.*

(1) [1892] 1 Q. B. 783.

THE CORPORATION OF THE TOWNSHIP OF ELLICE (DEFENDANTS) ..... APPELLANTS;

AND

SAMUEL R. HILES (PLAINTIFF).....RESPONDENT.

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*Mar. 13, 14, 15, 16, 17.

*May. 31.

THE CORPORATION OF THE TOWNSHIP OF ELLICE (DEFENDANTS)..... APPELLANTS;

AND

GEORGE CROOKS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Drainage—Action for damages—Reference—Drainage Trial Act, 54 V. c. 51—Powers of referee—Negligence—Liability of municipality.

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 V. c. 51) whether under sec. 11, or sec. 19, the referee has full power to deal with the case as he thinks fit and to make of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said sec. 11 into a claim for damages arising under sec. 591 of the Municipal Act.

In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen* v. *McGillivray* (18 Ont. App. R. 516) ; and *Nissouri* v. *Dorchester* (14 O.R. 294.) distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the

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

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Drainage Trials Act that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as *tort feasors*, but are liable under sec. 591 Municipal Act for damage done in construction of the work or consequent thereon.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the report of a referee to whom the action was referred under The Drainage Trials Act, 1891.

The facts of the case are fully set out in the judgment of the court delivered by Mr. Justice Gwynne.

Wilson Q.C. and *Smith* Q.C. for the appellants. The referee was wrong in the opinion he expressed, on the authority of *Stephen* v. *McGillivray* (2), and *West Nissouri* v. *Dorchester* (3), that the by-law was invalid for want of a petition from ratepayers in Elma. In those cases the drains were not carried into adjoining townships to find an outlet but for other purposes and so sec. 576 of the Municipal Act did not apply. In the present case that section distinctly authorizes the proceedings. See *Chatham* v. *Dover* (4).

The Court of Revision confirmed the assessment for benefit on plaintiff's lands which precludes him from

(1) 20 Ont. App. R. 225.
(2) 18 Ont. App. R. 516.
(3) 14 O. R. 294.
(4) 12 Can. S. C. R. 321.

obtaining compensation. *Re Pryce and City of Toronto* (1); *James* v. *Ontario & Quebec Railway Co.* (2).

Hiles has been allowed compensation for damage to yearly crops to which he was not entitled. Injury is only to be estimated as on the date of the by-law. *Re Prittie and City of Toronto* (3).

If the work is constructed under a valid by-law there is no liability as for negligence. That is held by our courts and, we submit, by the Privy Council in *Williams* v. *Township of Raleigh* (4). See also *London, Brighton & South Coast Railway Co.* v. *Truman* (5).

The by-law must be quashed before an action can be brought and notice of action should be given. *Hill* v. *Middagh* (6).

If the work has been lawfully done the only liability of the corporation is to be compelled by *mandamus* to levy an assessment. *Quaintance* v. *Howard* (7); *Smart* v. *Guardians of West Ham Union* (8); *Frend* v. *Dennett* (9).

Plaintiffs have no right of action as it is not given by the statute. *Cowley* v. *Newmarket Local Board* (10); *Municipality of Pictou* v. *Geldert* (11).

Christopher Robinson Q.C. and *Mabee* for the respondents. The Drainage Trials Act deals only with matters of procedure and does not interfere with vested rights or matters of substance. It may therefore be retrospective in its operation. *Mayor, etc., of Montreal* v. *Drummond* (12).

The petition for the by-law was not properly signed which makes it invalid. Judgment of Mr. Justice Henry in *Dover* v. *Chatham* (13).

(1) 16 O. R. 726.
(2) 15 Ont. App. R. 1.
(3) 19 Ont. App. R. 503.
(4) 21 Can. S.C.R. 103; [1893] A. C. 540.
(5) 11 App. Cas. 45.
(6) 16 Ont. App. R. 356.
(7) 18 O. R. 95.
(8) 10 Ex. 867.
(9) 4 C. B. N. S. 576.
(10) [1892] A. C. 345.
(11) [1893] A. C. 524.
(12) 1 App. Cas. 384.
(13) 12 Can. S. C. R. 321.

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It is not necessary to have the by-law quashed before bringing an action if the defect appears on its face. *Connors* v. *Darling* (1); *Appleton* v. *Lepper* (2); *Cleland* v. *Robinson* (3).

As to the liability of the municipality for negligence see *Williams* v. *Raleigh* (4); *Sombra* v. *Chatham* (5).

Wilson Q.C. in reply. The whole matter should be settled by assessment. *Re County of Essex and Rochester* (6).

As to the petition for a by-law see *In re White and Township of Sandwich East* (7)

GWYNNE J.—These actions are founded almost wholly upon the same grounds, the former for injury to lot no. 21 in the 14th concession of the township of Ellice, of which the plaintiff Hiles is seised in fee, and the latter for injury to lot no. 20 in the same concession of the same township, of which the plaintiff, Crooks, at the time of the injuries complained of, was in possession as tenant. The statement of claim of the plaintiff Hiles, in short substance, is to the effect that: On the 18th May, 1885, the defendant passed a by-law, no. 198, for draining parts of the township of Ellice, under which, and the schedules thereto attached, they assumed to tax not only lands in the township of Ellice, but also lands in the townships of Elma and Logan; that professing to act under the said by-law they constructed a drain commencing in the township of Ellice, thence along the boundaries of the townships of Elma and Ellice, and of Logan and Elma, into Elma to within about 45 rods from the northerly limit of lots 25 and 26 in the 14th concession of Elma; that the defendants, though professing to construct the drain

(1) 23 U. C. Q. B. 541.
(2) 20 U. C. C. P. 138.
(3) 11 U. C. C. P. 416.
(4) [1893] A. C. 540.
(5) 18 Ont. App. R. 252.
(6) 42 U. C. Q. B. 523.
(7) 1 O. R. 530.

under the drainage clauses of the Municipal Act, did not observe the legal requirements necessary to give them jurisdiction, in that they did not require a petition to be presented to them signed by a majority of the owners of the lands to be taxed, or whose lands would be benefited by the said works; that the defendants did not carry the drain to a proper or any outlet, but brought in the water from Ellice and deposited it on land in Elma, from whence it spread over lots 25, 24, 23 and 22, in the said 14th concession, into plaintiff's land, where it remained to the damage of the plaintiff's lands and crops; that the defendants were guilty of negligence in the construction of the drain in that they provided no proper outlet for the water of the drain, and that they improperly brought large quantities of water from their natural flow into and upon the lands of the plaintiff; that after the said drain was alleged to be completed, and upon the 4th August, 1890, the defendants passed another by-law, no. 265, whereby, after reciting that it was found that the outlet provided by said by-law no. 198 was insufficient, they provided for the construction of a new drain as an outlet from the outlet as provided by by-law 198, across lots 25, 24, 23, 22 and 21 in the said 14th concession of Elma, into a river called the Maitland. That the defendants have assumed to proceed under such last-mentioned by-law and have entered upon plaintiff's land in lot 21, and have taken part of his land for excavating and constructing said drain therein; that said drain, when constructed, will prove a permanent injury to the land of the plaintiff, and will necessitate the construction and maintenance of many small bridges and crossings; that the said last-mentioned by-law is illegal in that the defendants did not comply with the legal formalities necessary to enable them to continue the said

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drain; that no petition was presented for the construction or continuation of the same, and the plaintiff further alleges that by reason of the said by-law, no. 198, being bad for the reasons aforesaid, the by-law no. 265 is of necessity void also; and lastly, that the outlet provided is insufficient and improper in that a much better outlet could have been obtained without injuring the plaintiff's land, and the plaintiff claims $400 damages by the flooding of his land, caused by the work done professedly under by-law no. 198, and $600 damages for injury to his land by the work done professedly under by-law no. 265.

To this statement of claim the defendants set up their defence, which it is unnecessary to set out at length, or further than to say that it insisted upon the sufficiency and validity of both by-laws, which the defendants rely upon as their sufficient defence and justification, to which the plaintiff replied by joining issue.

The plaintiff, Crooks, in his statement of claim based his action precisely upon the same grounds as the plaintiff Hiles had, in respect of the injuries alleged to have been suffered by him for what was done professedly under by-law no. 198.

The defendants relied upon the sufficiency of that by-law and the legality of the work done thereunder, and they insisted that the damages, if any were suffered by the plaintiff, were the proper subject of arbitration under the Municipal Act, and that no application was ever made for such arbitration; that the plaintiff accepted a lease of the land for injury to which the action is brought after the construction of the drain complained of, and with knowledge of all the risks he ran from the operations complained of, and they insisted that he was therefore estopped from making the claim asserted in the action, and finally

the defendants claimed the benefit of sec. 338 of ch. 184 R.S.O., 1887.

Upon the 18th October, 1891, upon motion made by the defendants in the action at the suit of Crooks, an order was made by the court in which it was pending that the said action should be and it was thereby referred to the referee appointed under The Drainage Trials Act, 54 Vic. ch. 51. Now this act appears to me to have been passed for the express purpose of removing obstructions to the administration of justice which sometimes occurred where parties, entitled to recover damages for injuries done to their property by drainage works, brought actions at law to recover such damages instead of proceeding under the arbitration clauses of the Municipal Institutions Act, as required by section 591 of the act of 1883, 46 Vic. ch. 18.

The act provides that the Lieut.-Governor of Ontario may appoint a referee for the purposes of the Drainage Acts, who shall be deemed to be an officer of the High Court and among other things (sec. 2, subsec. 4) shall have all the powers of an official referee under the Judicature Act; (subsec. 5) shall also have the powers of arbitrators under the said acts; and shall also have the power of arbitrators under the Municipal Act with respect to compensation for lands taken or injured, and shall likewise have the powers of other arbitrators generally; and (subsec. 6) shall also have as respects proceedings before him the powers of judges of the High Court, including the production of books and papers, the amendment of notices of appeal, and of notices for compensation or damages, and of all other notices and proceedings, the rectification of other errors or omissions, the time and place of hearing, examination and viewing, the assistance of engineers, surveyors or other experts, and as respects all matters whatsoever incident to the trial and decision of matters before him,

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or proper for doing complete justice therein between the parties.

By section 4 the referee is substituted for the arbitrators provided by the Drainage Acts aforesaid.

By section 5 claims, matters and disputes which the said enactments provide for referring to arbitration shall be instituted by serving a notice of appeal, or notice claiming damages or compensation, as the case may be, upon the other parties concerned; the notice shall state the grounds of the appeal or claim, &c., &c.

By sec. 11 any action for damages from the construction or operation of drainage works may at any time after the issue of the writ be referred to the said referee by the court or a judge thereof, and by section 19:

> Where a party brings an action for damages in a case in which, according to the opinion of the court in which the action is brought, or a judge thereof, the proper proceeding is under this act, the court or judge on the application of either party, or otherwise, may order the action to be transferred to the said referee at any stage of the action and on such terms as to costs or otherwise as the court or judge sees fit; and the referee shall thereupon give such directions as to the prosecution of the claim before him as may seem just or convenient, &c., &c.

I cannot doubt that under this act the referee has the fullest powers of amendment which are possessed by the High Court itself, and that upon the reference of an action to him by the court or a judge, whether it be referred under the 11th or the 19th section, he has full power to deal with the case as he thinks fit, and to make, without any application of any of the parties, all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case, and so if necessary to convert

the claim for damages as stated in the statement of claim, if that should be filed before the transfer or reference of the action to the referee, into a claim for damages under section 591 of the act of 1883, as consequential upon the construction of a work authorized by a by-law duly passed under the authority of the statutes in that behalf, and to cause his adjudication thereon to be entered of record for the plaintiff for his damages, if any awarded him, as damages recovered under that section.

On the 19th of October, 1891, an order was made by the Common Pleas Division of the High Court in the action of *Hiles* v. *The Township of Ellice* whereby it was ordered that that action and all questions arising therein be referred to the referee appointed under the Drainage Trials Act of 1891, pursuant to the provisions of the said act. Accordingly both cases were brought down for trial before the said referee, and evidence of a most exhaustive and much of an irrelevant character appears to have been entered into, for the plaintiffs were allowed to enter into evidence for the purpose of establishing a pretension which they respectively asserted, that it was competent for them to show, either as avoiding the by-law no. 198 altogether, or as establishing negligence making the defendants liable as wrong-doers even if the by-law should be held to be valid, that the route adopted for the drain as constructed was much inferior to another route which if selected the lots 20 and 21 in the 14th concession of Elma would not have suffered damage; this evidence was apparently offered for that sole purpose, but was wholly irrelevant, for assuming the fact to have been established, it could neither have the effect of avoiding the by-law nor of fixing the defendants with liability as for negligence in construction of the work authorized by the by-law. The

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petition which was the foundation of the by-law could not be produced, having been lost, but the evidence established beyond doubt, that the work petitioned for was simply the drainage of certain lands in the township of Ellice, and that the petition was signed by a majority of the owners of the lands the draining of which was petitioned for. By the surveyor's report, which is recited in and made part of the by-law, it appears that he found it necessary to carry a drain constructed for draining the said lands in Ellice into the township of Elma, and he set out the course which he considered to be best for that purpose, "to a branch of the Maitland river in the 14th concession of Elma," which route, commencing at the said branch of the Maitland river in the said 14th concession, he marked by stakes back to the lands in Ellice proposed to be drained, and being of opinion that certain lands in Elma would be benefited by the construction of such drain he assessed them respectively with amounts which appeared to him to be just and reasonable. No appeal having been taken by the municipality of Elma against his report, plans, assessments or estimates, the council of that municipality passed a by-law for levying from the lands in Elma the amounts so assessed upon them respectively. Thus it appeared that all the proceedings necessary to be taken under sections 570, 576, 578, 579, 580 and 581 of the said act of 1883, which sections have been in force ever since the passing in 1882 of 35 Vic. ch. 26, in order to make the by-law and the work thereby authorized valid were taken and the work was completed as contemplated by the by-law and the surveyor's report; but upon completion it proved that the branch of the Maitland in the 14th concession which the surveyor designed as and made the outlet of the waters brought down thereto by the drain was inadequate for that purpose, and that in

consequence the waters spread over several lots in the 14th concession, and by reason thereof the municipal council of the township of Ellice, upon the 4th day of August, 1890, provisionally passed a by-law numbered 265, whereby, after reciting therein that after the completion of the drain authorized by by-law 198 it was found that the outlet provided by that by-law was insufficient, it was enacted, "pursuant to the provisions of the Municipal Act," *i.e.* section 585 of ch. 184 R. S. O. 1887, which is the same as section 586 of said act of 1883, as amended by section 19 of 47 Vic. ch. 32 (1884), that a new outlet drain from the outlet of the Maitland drain in the creek, that is to say, the outlet of the drain constructed under by-law no. 198, should be constructed to the main Maitland river, crossing several lots, including lot 21 in the 14th concession of Elma, the property of the plaintiff Hiles, according to the report, plans and estimates recited in the by-law. By this by-law lot 21, the land of the plaintiff Hiles, was assessed for benefit in the sum of $38.56. Against this by-law, and the assessment made therein upon the lands in Elma, the municipal council of that township appealed, but the by-law and assessment were confirmed by the arbitrators to whom the appeal was referred under the provisions of the act in that behalf, and thereupon the by-law was finally passed on the 28th September, 1890. Subsequently, and upon the 30th May, 1891, the muncipal council of Elma passed a by-law to levy upon the lands so assessed in Elma the amount of such respective assessments. The only question now arising under this by-law is one in the case of *Hiles* v. *Ellice*, and the claim of the plaintiff Hiles therein is solely for the land taken for the drain and for damages occasioned by severance of the land by the drain, and the necessity of erecting and maintaining a bridge or bridges across the drain, &c., &c.

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Upon these actions, so referred to him, the learned referee has adjudicated and determined to the effect that if he was deciding those cases upon the first impression, and not governed by authority, he would consider the above section 576 of the act of 1883, 46 Vic. ch. 18, to apply to cases like those before him, and that therefore the engineer could properly continue as he did the drainage work into Elma, and assess the lands therein which would be benefited by such work under the provisions of the said section, but that he thought he was concluded by the judgments of the courts in *West Nissouri* v. *Dorchester* (1), and *Stephen* v. *McGillivray* (2), and upon what he understood to be the authority of those cases he thought the said by-law, no. 198, to be utterly invalid, as passed without any jurisdiction in the municipal council of Ellice to pass it. But he also adjudged and determined that, assuming the by-law to be valid, the defendants were liable as wrong-doers for negligence, as I understand his report, in not providing a proper outlet for the waters brought down by the drain; and because the work was not properly or skilfully performed, but was for a long time left unfinished at lot 25 in the 15th concession of Elma, with a flood of water passing through it and spreading on adjacent lands, whereby some of the water spread upon the lands of the respective plaintiffs; and because he was of opinion that the drain should never have been constructed upon the route adopted, but should have been taken on a wholly different route to the main river Maitland as it passes through lot no. 18 in the 14th concession of Elma. But he further was of opinion, that even though the above findings should be erroneous, and assuming that all damages arising from the construction of the drain constructed under said by-law no. 198 were only

(1) 14 O. R. 294. (2) 18 Ont. App. R. 516.

recoverable by arbitration under the provisions of the statute, and not by action, he still had power, upon the references made to him under the Drainage Trials Act of 1891, to deal with the cases in that light, and he so adjudicated, and he assessed the damages sustained by the plaintiff Hiles, in consequence of the construction of the drain constructed under by-law no. 198, whether recoverable by proceedings in action or by arbitration under the statute, at the sum of $160, as to the amount of which, assuming the defendants to be liable, there is no complaint, and he assessed the damages sustained from like causes by the plaintiff Crooks at $170, as to which amount neither is there any complaint or objection, assuming the defendants to be liable.

As to the damages claimed by the plaintiff Hiles in his action, as sustained by him by reason of the drain constructed under the said by-law no. 265, he found and adjudged as follows. He says:

> Apart from any question that might arise in case by-law no. 265 should be held invalid, and assuming these damages were not such as the plaintiff could sue for, but were only such as could be determined by arbitration under sec. 591, &c., of the Municipal Act, but such damages are not referable to me under the Drainage Trials Act, 1891, I think I have authority to deal with the matters upon this reference.
>
> I find the plaintiff's damage to be, upon this branch of the case, $110, made up as follows: $80 for loss of land, $40 for fencing and clearing up and grading banks of the drain, and $30 for one substantial bridge, making in all the sum of $150, and I find the plaintiff's farm is directly benefited by this outlet drain to the extent of $40, over and above the amount assessed against it for construction; taking this $40 from $150 I find the plaintiff's damage upon this branch of the case $110, as above mentioned.

Upon appeal from these judgments and reports of the referee a majority of the Court of Appeal for Ontario has maintained the judgments of the referee in both cases *in omnibus*, and without pronouncing any

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judgment as to the validity or invalidity of the by-laws, or of either of them, has concurred in the judgment of the referee that upon the proceedings taken before him under the Drainage Trials Act of 1891 it was competent for him to award and adjudge damages to the plaintiffs for the injuries sustained by them respectively, whether prior to the passing of that act such damages could have been recovered only by process in arbitration under the act, or by action at law as for tort. From this judgment the present appeal is taken, the defendants still contending that they are not at all liable, but if they are, that it is still a substantial point which they have a right to insist should be determined, namely, whether they are liable as tort feasors, upon the ground of their by-law being *ultra vires*, or whether they are only liable under the provisions of the statute as for damages consequential upon the construction of a work legally authorized to be constructed, for that if their liability be only of the latter character the assessments authorized by by-law no. 198 of Ellice, to enforce recovery of which a by-law was passed by the municipal council of Elma, are still recoverable, whereas if the defendants are liable as tort feasors upon the ground of the invalidity of their by-law, the work constructed thereunder is illegal and the assessments made for payment of the construction of the work are void also, and not only not recoverable in the future, but that those already paid may possibly be recoverable back.

With the first impression of the learned referee, and with the opinion expressed upon that point by Mr. Justice Burton in the Court of Appeal for Ontario, I must say that I entirely concur, namely, that the work contemplated and authorized by the by-law no. 198 was authorized by sec. 576 of the act of 1883, and that the engineer, to give effect to whose report, plans, &c.,

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the by-law was passed, had authority to assess as he did the lands in Elma, and that the said by-law and the by-law passed by the municipal council of Elma to enforce the levying of such assessments upon the lands assessed in Elma are perfectly valid and binding in all respects. Neither *Stephen* v. *McGillivray* (1) nor *Nissouri* v. *Dorchester* (2) warrants the conclusion drawn from them by the learned referee. Both of these cases rest in great measure upon the same ground, although that in *Stephen* v. *McGillivray* (1) is more extended than in *Nissouri* v. *Dorchester* (2). In the former the low lands, to drain which the scheme of drainage proposed was designed, extended over several townships situate in three different counties, not as here in Ellice alone to drain which the necessity arose to carry the drain into Elma, and thereby an incidental benefit was conferred upon lands in Elma. Then the drain in *Stephen* v. *McGillivray* (1) was not proposed to be, nor could it have been, carried into McGillivray at all, that township lying higher up than Stephen and ten miles from the proposed drain, which was designed to drain the low lands lying in Stephen and the other adjoining townships in different counties, and the engineer who devised the scheme of drainage which Stephen sought to enfore upon McGillivray, assessed McGillivray as for a benefit which he conceived justified that township being made to contribute towards the expense of the work, because, McGillivray being higher up than Stephen, water descended naturally from it into the low lands in Stephen and the other townships proposed to be drained, for which reason, as he conceived, McGillivray would derive benefit; just as in *Chatham* v. *Dover* (3), the engineer had assessed the township of Dover and lands therein as for benefit in giving it

(1) 18 Ont. App. R. 516. (2) 14 O. R. 294.
(3) 12 Can. S. C. R. 321.

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an outlet, as he termed it, such benefit and outlet consisting only in enlarging the capacity of a natural water course in Dover, by which the lands there assessed were already sufficiently drained, so as to enable it to carry off the extra waters brought down into it by the drain proposed to be constructed in Chatham. In *Nissouri* v. *Dorchester* (1), the low lands to drain which the drainage scheme there was designed, lay in both of the above-named townships, instead of, as in *Stephen* v. *McGillivray* (2), in three townships in different counties, but the principle upon that point is the same, and is that sec. 576 only applies where the lands proposed to be drained lie in one township only, and that for the drainage of these lands the scheme designed requires that the drain should be carried into a lower township, which work incidentally benefits the lands in such other township. If it does not so benefit such other township the lands in that township cannot be assessed for, or charged with, any portion of the cost of the work, but if it does they can to the extent, but only to the extent, of the benefit so conferred, and the time and place for contesting the question as to benefit or no benefit is before arbitrators, as provided by sec. 582 of the act of 1883. This, as it appears to me, is the effect of the judgment of this court in *Chatham* v. *Dover* (3).

Then, as to the finding of the learned referee that the work done under the by-law 198 was not properly or skilfully performed; that it never should have been constructed upon the route upon which it was constructed, as provided in the by-law; that it was not continued to a proper outlet; that it was left for a long time unfinished at lot 25 in the 15th concession of Elma, with a flood of water passing through it and spreading upon adjacent lands, by which means the

(1) 14 O.R. 294. (2) 18 Ont. App. R. 516.
(3) 12 Can. S. C. R. 321.

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water was turned loose upon lands in Elma, and some came upon the lands of the respective plaintiffs.

By these findings of the learned referee, and the manner in which he subsequently deals with them in his report, I understand him to mean that these circumstances either constitute negligence in the construction of the drain, for which the defendants would be liable in an action at common law, as wrong doers, even if the by-law no. 198 be valid, or at any rate they would be liable, under sec. 591, as for damage "done to the property of the plaintiffs in the construction of the drainage works, or consequent thereon." So understanding the learned referee I concur with him, but think that the proper conclusion to be drawn is that the liability of the defendants is under sec. 591, and not as tort feasors at common law.

The fact that an outlet as designed by an engineer for a drainage work and reported by him to a council, and adopted by the council, should prove to be insufficient constituted negligence in the municipality in the construction of the work when adopted by by-law has never, so far as I am aware, received countenance in the courts in this country, if indeed the contention has ever been seriously raised. No case, so far as I am aware, has arisen wherein it appeared that any engineer or surveyor prepared for the adoption of a municipal council a scheme of drainage work which did not propose an outlet which at least seemed to be sufficient to carry off the waters from the lands proposed to be drained. It has never, I think, been considered by any engineer that the drainage clauses of the Municipal Institutions Act, at any time, authorized the construction of a drainage work which, while taking off water collected on the low lands of A. B. C. and D. provided no outlet whatever for such waters, but proposed to deposit them, or "turn them loose," to

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use the expression of the learned referee, upon the lands of other persons, as E. F. G. &c., &c. If Mr. Cheeseman ever entertained that opinion he certainly did not act upon it in the report and plans made by him upon which by-law no. 198 was passed, for in them he plainly designated a stream called by him a branch of the Maitland river in the 14th concession of Elma as the outlet, and as a sufficient one, for carrying off the waters to be brought into it by his proposed drain. In the judgment of the learned Chief Justice of Ontario, pronouncing the judgment of the majority of the Court of Appeal for Ontario in the present case, I entirely concur, and I have always held the opinion that one township cannot discharge the waters collected within its area, either just inside of, or anywhere in, another township, there to be let loose, without being liable for damages to the parties thereby injured. But in such case the liability would, in my opinion, arise as for an act done without any jurisdiction whatever, utterly *ultra vires*, and not merely as for negligence in the mode of performing an act legal in itself. I cannot see therefore that section 27 of 49 Vic. ch. 37 (1886), which added some words to the text of section 576 of the Municipal Act of 1883, conferred any power or imposed any duty upon an engineer designing and laying down a scheme for a drainage work which had not already been conferred and imposed by the said section 576, as it had always been, or did anything more than make perfectly plain to the most humble capacity of the lay mind, what to the professional mind was sufficiently plain by section 576 as it previously stood in the act of 1883, and in the statutes of which that act was but a repetition and consolidation. The object appears to me to have simply been to remove any doubt there might be in the minds of any person of the humblest capacity engaged in the administration of the

act. Then as to the water suffered to overflow the adjacent lands during the construction of the work, it is to be observed that the work was let by the corporation to an independent contractor, and if any part of the injury done arose from his negligence in the execution of the work authorized by the by-law the corporation cannot in respect of such injury be held liable as tort feasors. I see no intention in the learned referee to distinguish between any overflow during the construction from that which occurred after the completion of the work. All injuries caused from overflowing lands by the waters brought down by the drain are placed upon the same footing and all, as it appears to me, fall under section 591 of the act as damage done "in the construction of the work and consequent thereon."

Finally, as to the route selected by the engineer and adopted by the by-law no. 198 not having been the one which, in the opinion of the learned referee, should have been adopted, that is a matter which was not within the jurisdiction of the learned referee to adjudicate upon. That was a point which should have been raised, if at all, as I think, by an appeal against the project as proposed by the by-law 198, and cannot be raised after the passing by the Municipal Council of Elma of a by-law for the purpose of levying the amounts of the assessments upon the lands in Elma to pay their share of the cost of the particular work as defined in the report and plans of the engineer as adopted by the by-law no. 198. In so far, therefore, as concerns the amounts adjudged by the learned referee to the respective plaintiffs for damages done to their lands during construction, and subsequently to the completion of the work, I am of opinion that judgment should be entered for those respective sums, namely, $160 in the case of Hiles, and $170 in the case of Crooks, as for

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damages sustained by them "in the construction of the drain authorized by the by-law no. 198 and consequent thereon;" and that the record of the judgment should express the recovery as being for such damages.

I entirely concur in the judgment of the Court of Appeal that Crooks, as a tenant, is as much entitled to recover damages for injury done to him during his occupation as a freeholder would be for like damage. His claim is not at all based upon section 393 of the act of 1883; his right to recover is established upon section 591, which does not qualify his right of redress for any damage done to the land to his injury during his occupation, but affects only the mode in which such redress should be obtained when, and so often as, the injury occurs. His right to recover rests precisely upon the same foundation as does the right of Hiles, in respect of the like damage done to him.

As to the amount awarded to Hiles in respect of damage done to his land under by-law no. 265, that by-law, as already pointed out, was passed under, and derives its authority from, sec. 585 of ch. 184 R. S. O. 1887, which is identical with sec. 586 of the act of 1883, after the passing of the act 47 Vic. ch. 32, sec. 19, and not under 49 Vic. ch. 37, sec. 27. Sec. 576 of the act of 1883, equally after the passing of sec. 27 of ch. 37 of 49 Vic. as before, related solely to an original by-law passed in adoption of the report of an engineer for constructing a drainage work upon a petition presented under the statute, by owners of lands in a higher township, in effecting which purpose the engineer found it to be necessary to carry his drain into a lower township; it had no relation to a by-law passed for the purpose of making a new outlet, or improving one already adopted for a drain already constructed under the authority of he act which was the purpose and object of the by-law 265, and which was authorized solely by sec. 586

of the act of 1883, as amended by 47 Vic., ch. 32 sec. 19, and without any petition being presented therefor. What the learned referee has done in respect of this matter, was to increase the amount imposed upon the plaintiff Hiles, by the by-law 265, for benefit, and then to deduct such increased amount from what the learned referee has estimated to be the damage done to him by the drain, making the amount of such damages to be in excess, not only of such increase in assessment for benefit but of that amount added to the assessment for b nefit made by the by-law. The statute which confers jurisdiction upon the learned referee gives him no authority to reopen matters which had already been closed by the provisions of the law as it existed prior to the passing of the Drainage Trials Act; and this matter was, as I think, concluded by the judgment on the appeal taken by the municipality of Elma to the by-law 265, and the assessment on lands on Elma made thereby and by the by-law passed by Elma to levy upon the landholders in Elma those assessments so confirmed by the arbitrators on such appeal. While the case was pending in appeal was, as it appears to me, the time when Hiles should have insisted that he was not assessable for benefit, as I think he was not if the damage done to his property exceeded all benefit conferred upon it by the proposed drain. Hiles cannot, I think, under the circumstances, now claim under sec. 393 as for land taken or injuriously affected by the corporation in the exercise of its powers. In respect, therefore, of this part of the learned referee's judgment I think the appeal of the defendants in Hiles's case must be allowed with so much of the costs in the courts below and upon the reference as relates to such portion of the plaintiff's claim, and that as to the residue, that as the defendants succeed in their appeal partially, viz., as regards the maintenance of

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the validity of the by-laws and the variation in the judgment, that it should, in both of the cases, be entered for the plaintiffs respectively as for "damage done in the construction of the drain as authorized by the by-law no. 198 and consequent thereon." I think there should be no costs of this appeal on either side.

I may be excused if I add a few lines for the purpose of correcting an erroneous impression as to my judgment in *Williams* v. *Raleigh* (1) which appears to be entertained by my learned brother Mr. Justice Burton, of the Court of Appeal for Ontario.

That learned judge, in his judgment in the present case (2), says:

> Mr. Justice Gwynne proceeded upon the ground that as the statute was not obligatory, but permissive, the corporation were liable if the effect of the work was to cause injury to any one, the engineer being their servant. While I disagree entirely from that view it is sufficient at present to say it was not the judgment of the court.

Now, although this court was divided in *Williams* v. *Raleigh* (1) upon the construction and application of sec. 583 of ch. 184 R.S.O,, and being so divided no judgment was given thereon, I am not aware that there was any substantial difference of opinion in the court upon the main point upon which the judgment of the court proceeded, namely, that the corporation by reason of their wilful neglect to keep in an efficient state of repair the drain called the Raleigh plains drain, which they had made to serve as an outlet to carry off the water brought down into it by the "Bell drain," and by the "drain no. 1," they were liable for the damage done to the plaintiff in an action at law, and that the plaintiff was not driven to seek redress by process of arbitration under the statute. The observations in my judgment which are alluded to by my learned brother were made in answer to an argument

(1) 21 Can. S.C.R. 105. (2) 20 Ont. App. R. 239.

addressed to us, which appeared to me to receive countenance from some passages in the judgment of the Court of Appeal for Ontario when reversing the judgment of Mr. Justice Ferguson, namely:

That when a surveyor has devised a scheme of drainage work it is for the corporation simply to construct it as designed, without incurring any responsibility in so doing.

The question to which my observations were so addressed is with preciseness stated at page 116 of the report, and after arguing the point raised by such question, and referring to the clauses of the statute, I wound up at page 118 in these words:—

The object of the clauses is to enable lands to be drained for the purpose of cultivation, and to provide means for paying the expense of so doing, and of preserving them (that is the drainage works) when constructed in an efficient state of repair to perform the purpose for which they are designed; there is nothing whatever in any of those clauses to justify the inference that the legislature contemplated or countenanced the idea that water taken from the lands of one person should be so conducted as to be deposited upon the lands of another person.

And I concluded that if they adopted a project having such an object in view they would be responsible for the consequences of such a work, for that as the statute gave them no jurisdiction to pass such a by-law they could not appeal to the statute for protection.

I am not aware that my late Brother Patterson, or any of my learned brothers, differed from me in this view, and it is a matter of gratification to find a passage in the judgment of the majority of the Court of Appeal in the present case, delivered by the learned Chief Justice of Ontario, concurring in it, where he says: "I am unable to accept the argument that one township can collect the water from a large area and discharge it just inside the line of another township where it is let loose, without being liable for damage to those injured."

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By adding after the words "just inside" as above used the words "or anywhere within," this is the precise conclusion to which my observations led, and I then, at page 117 *et seq.*, proceeded to show that the judgment in favour of the plaintiff needed no such foundation, for that it had a much firmer foundation to rest upon, namely, that the Raleigh Plains drain into which the waters both of the drain no. 1 and of the Bell drain were conducted, were by the wilful neglect and default of the defendants permitted to fall into such a state of disrepair and inefficiency as to be quite incapable of carrying off the waters so conducted into them and to have thereby in fact lost two-thirds of their original capacity; and so that however perfect the Raleigh Plains drain may have been to carry off the waters of the Bell drain when the latter was originally constructed the defendants, by their wilful neglect to perform the duty imposed upon them by statute to keep the Raleigh Plains drain, which they had made the outlet of the Bell drain and other drains, in an efficient condition to do the work imposed upon it, were liable in an action at law, and that damage done to the plaintiff's land by the overflowing of the Raleigh Plains drain could not, under the circumstances, be fairly said to be "damage done in the construction of the Bell drain or consequent thereon" so as to drive the plaintiff to seek redress by arbitration under the statute. Their Lordships of the Privy Council, however, have thought otherwise, and have thereby, should the plaintiff feel disposed to incur the expense of the inquiry directed, imposed upon the court of first instance a difficult if not impossible task, namely, where a natural or artificial water course is made the channel of outlet for several streams of water brought down into it from various different sources, and where such channel of outlet, by reason of

the neglect of the defendants to fulfil the obligation imposed upon them by statute of keeping it in an efficient condition of repair to carry off the waters so conducted into it, becomes quite inadequate for the purpose and has thereby lost two-thirds of its original capacity, from which cause it overflows its banks and causes much damage to neighbouring lands, to determine how much of the damage so done is attributable to the waters brought down into such channel of outlet from one only of such sources, as distinguished from the damage attributable to the waters brought down from the other sources. Without venturing to call in question the soundness of this judgment, it cannot but appear to the lay mind to be marvellously strange that a party should fail to obtain redress for an admitted injury, upon the ground that he had not pursued the proper course to obtain such redress, although of four of the courts of this country before which the question came three of them, including the learned trial judge who had the peculiar advantage of viewing the premises and observing the precise cause of the damage done, were of opinion that the course pursued was the right one. It is matter, however, of congratulation that in the future the effect of the Drainage Trials Act of 1891 will be to prevent parties suffering damage from drainage works being prejudiced by any such conflict of opinion in the courts as to the proper mode in which redress should be sought for the injuries inflicted. If it has not that effect I cannot see what is its *raison d'être*, and I cannot entertain a doubt that such is the object of the act.

Appeal in Hiles's Case allowed in part without costs and dismissed without costs in Crooks's Case but judgment varied.

Solicitors for appellants: *Idington & Palmer.*

Solicitors for respondents: *Mabee & Gearing.*

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*May 8.

GERSHON S. MAYES ....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Authority of Government engineer to vary terms—Delay.

Under a contract with the Dominion Government for building a bridge, the specifications of which called for timber of a special kind which the contractor could only procure in North Carolina, the Government was not obliged, in the absence of a special provision therefor, to have such timber inspected at that place and was not bound by the act of the Government engineer in agreeing to such inspection the contract containing a clause that no change in its terms would be binding on the crown unless sanctioned by order in council.

A provision that the contractor should have no claim against the crown by reason of delay in the progress of the work arising from the acts of any of Her Majesty's servants was also an answer to a suit by the contractor for damages caused by delay in having the timber inspected.

APPEAL from a decision of the Exchequer Court of Canada, (1) allowing a demurrer by the crown to suppliant's petition of right.

The suppliant, Mayes, in 1886, entered into a contract with the Dominion Government to build a bridge at Pictou, N. S., in connection with the Intercolonial Railway. The contract contained, among others, the following clauses :

15. "The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty, for any damage which he

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

(1) 2 Ex. C.R. 403.

may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister."

35. "It is distinctly declared and agreed that none of Her Majesty's ministers, officers, engineer, agents or servants, have, or shall have power or authority in any way whatever to waive on the part of Her Majesty any of the clauses or conditions of this contract, it being clearly understood that any change in the terms of this contract to be binding upon Her Majesty must be sanctioned by order of the Governor General in Council."

By the specifications the piles when in one length were to be of the best North Carolina yellow pine creosoted throughout and when spliced the square upper parts were to be of the same material. One clause of the specifications was as follows:

8. "The piles in one length, and square upper parts of spliced piles, including the upper cleat in the splice, as shewn, must contain not less than 16 lbs. per cubic foot of the best dead oil of coal tar creosote, injected under a pressure of from 120 to 160 lbs. per square inch."

"All piling intended to be creosoted must be heated through with the temperature between 212 and 250 degrees Fahrenheit, have all the air and moisture exhausted, and in that condition receive the creosote."

"The whole of the work of creosoting must be done in the most approved manner, and to the satisfaction of the engineer, or inspector, who shall have full power to reject any creosote, or creosoted timber, whether before or after treatment."

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The contractor procured the creosoted pine timber as required and wrote to the engineer asking to have the same inspected in North Carolina before it was shipped, which the engineer agreed to do, but delayed such inspection for some months whereby the suppliant was put to expense in consequence of having to cancel the charter of a vessel engaged to carry it from North Carolina and by having to proceed with his work late in the year. He proceeded against the crown by petition of right to recover damages arising from such delay, and the Exchequer Court allowed a demurrer to such petition, holding that he had no cause of action under the contract.

The suppliant appealed from that decision.

Pugsley Q.C for the suppliant.

W. H. B. Ritchie for the crown.

The judgment of the court was delivered by

THE CHIEF JUSTICE:—(Oral). We think this appeal must be dismissed. As regards the objection based on the arbitration clause, the general averment in the petition of right that all conditions precedent were performed is no doubt sufficient answer to that.

The learned judge of the Exchequer Court in giving judgment for the crown proceeded upon two grounds, first, that there was no stipulation in the contract obliging the engineer to appoint an inspector, and secondly, that the case comes within the special provision of the contract regarding delay.

As to the first ground, it is impossible to say that there was any obligation on the part of the crown to send an inspector, and the engineer had no authority to contract for any inspection of the timber. By the terms of the contract no change therein is to be binding upon the Government unless sanctioned by order of the Governor General in Council, and the statute

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provides that no contract by any of the servants of the crown shall bind it. This shows that no contract or agreement by the engineer to send an inspector to inspect the timber at the place where it was being prepared could have been obligatory on the crown. Further, there is great force in Mr. Ritchie's contention that in reality the engineer never intended to bind the crown by any such agreement, and that any offer to send the inspector to North Carolina must, on the suppliant's own allegations in the petition, be taken to have been purely gratuitous.

As to the other ground, I am of opinion that the crown cannot be held liable for delay caused by the engineer because this ground of complaint is entirely covered by the clause of the contract expressly providing that the contractor should not have any claim against the crown for damages caused by delay.

Upon all the grounds it appears that the demurrer was properly allowed and the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *C. N. Skinner.*

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

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*Oct. 18.
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*Mar. 13.

THE ATTORNEY GENERAL FOR CANADA (PLAINTIFF)..... APPELLANT;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—British North America Act, secs. 65, 92—The pardoning power of Lieutenant Governors—51 Vic. ch. 5 (O)—Act respecting the executive administration of the laws of the Province—Provincial penal legislation.

The Local Legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact. B. N. A. Act, sec. 92, ss. 15.

The Lieutenant Governor of a province is as much the representative of Her Majesty the Queen for all purposes of provincial Government as the Governor General himself is for all purposes of the Dominion Government.

Inasmuch as the act 51 Vic. ch. 5 (O) declares that in matters *within the jurisdiction* of the Legislature of the province all powers etc., which were vested in or exercisable by the Governors or Lieutenant Governors of the several provinces before Confederation shall be vested in and exercisable by the Lieutenant Governor of this Province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vic. ch. 5 (O), it is impossible to say that the powers *to be* exercised by the said act by the Lieutenant Governor are unconstitutional.

Quære: Is the power of conferring by legislation upon the representative of the crown, such as a Colonial Governor, the prerogative of pardoning in the Imperial Parliament only or, if not, in what legislature does it reside?

Gwynne J. dissenting was of opinion that 51 Vic. ch. 5. (O), is *ultra vires* of the Provincial Legislature.

APPEAL from a judgment of the Court of Appeal for Ontario (1) confirming the order and judgment of

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

(1) 19 Ont App. R. 31.

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the Chancery Division of the High Court of Justice for Ontario (1) declaring that it was within the power of the Legislature of Ontario to pass the act 51 Victoria, chapter 5, intituled "An Act respecting the Executive Administration of Laws of this Province," and each and every section thereof.

This action was brought under section 52 (2) of the Judicature Act (R. S. O. c. 44), for a declaration touching the validity of the statute of Ontario passed in 1888 (51 Vict. ch. 5) entitled "An Act respecting the Executive Administration of the Laws of this Province." The following is the statement of claim filed in the case:—

"1. The Attorney General for the Dominion of Canada alleges that the act of the Legislative Assembly of the Province of Ontario, 51 Victoria, chapter 5, entitled: 'An Act respecting the Executive Administration of Laws of this Province,' is invalid and of no force or effect, inasmuch as it was beyond the power of the said legislature to pass such statute."

2. "The said Attorney General states that the said statute purports to confer upon the Lieutenant Governor, or the administrator for the time being of the said province, powers, authorities and functions beyond those conferred upon the said Lieutenant Governor or administrator by the British North America Act, and beyond those which it is within the power of the said Legislative Assembly to confer."

3. "It purports also to include in such powers so conferred the right of commuting and remitting sentences for offences against the laws of the province or offences over which the legislative authority of the province extends, and is in this respect beyond the power and authority of the said Legislative Assembly to enact."

(1) 20 O. R. 222.

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"4. The said statute is in contravention of the limitation imposed upon the said legislature by the exception contained in section 92 of the British North America Act, as regards the office of Lieutenant Governor."

"5. The said statute purposes either to declare the meaning of or to amend the British North America Act in the matters thereby dealt with and is in either case beyond the competence of the said legislature."

The Attorney General of Ontario demurred on the ground that the act was *intra vires.*

Robinson Q.C. and *Lefroy* for the appellant: The statute having been passed became the subject of certain correspondence between the two Governments, and this correspondence was before the Court of Chancery on the argument, as well as certain other documents which are printed, and these documents we have agreed should be put before this court.

This being a case of public character a very full abstract of the argument before the Chancery Division, is given in 20 O. R. 222. Before the Court of Appeal the case was again argued at length, and the argument on the other side, having been taken down in shorthand, my learned friend, Mr. Blake, has had it printed in the form of a pamphlet. We have ours printed also, and we would suggest, with the consent of my learned friend, that without repeating these arguments in detail we hand into court these printed pamphlets, repeating here only the main propositions on both sides, which will have the effect of curtailing very much our present argument. The case is, moreover, of that character that we cannot add anything very new, with this exception, that we find it necessary to say a few words on the late decision by the Privy Council, in 1892, since the argument in the Court of Appeal, of *The Liquidators of the Maritime Bank*

v. *The Receiver General of New Brunswick* (1), which my learned friend conceives has advanced his argument very far, and renders a great part of it unnecessary by confirming the position of the province.

The learned counsel then contended that all prerogative powers and functions, not specifically bestowed by the British North America Act upon the Governor General or the Lieutenant Governors, remain, as is expressly stated by sec. 9 of that act, vested in the Queen, and can only be delegated by her through the usual channel of commissions and instructions. He also quoted as part of his argument the view adopted by the Minister of Justice in recommending the disallowance of the Quebec Act, 49 & 50 Vict. c. 98, respecting the executive power, in which he states: "The office of Lieutenant Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof is excepted from the powers conferred upon the legislatures of the provinces, and is exclusively vested in the Parliament of Canada. In the opinion of the undersigned, it is immaterial whether a legislature by an act seeks to add or take from the rights, powers or authorities, which, by virtue of his office, a Lieutenant Governor exercises. In either case it is legislation respecting his office (2).

The learned counsel further contended that the act of the Ontario legislature, now in question, was clearly *ultra vires* because it assumed to legislate upon all prerogative powers, no matter how high and sovereign a character, so far as such powers had their operation in or had respect to the matters placed within the legislative jurisdiction of the provinces by sec. 92 of the British North America Act. He pointed out that the powers contained in commissions and

(1) [1892] A.C. 437.

(2) Hodgins' Reports of Ministers of Justice, vol. 2, p. 58. *See also* pp. 201, 202.

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instructions to Governors and Lieutenant Governors were almost exclusively of a high, sovereign and fundamental character, and not what have been called minor prerogatives. The learned counsel contended that the fact that such prerogatives might in their exercise and operation touch the subjects placed within the exclusive legislative jurisdiction of the Provincial legislatures, did not bring the prerogative powers themselves within that jurisdiction, and that under what has been called the general law of the Empire, colonial legislatures have no right to legislate with regard to them, and that, therefore, the Ontario legislature had no power whatever "thus to enact." In support of these contentions the learned counsel relied on the points of argument advanced in the Court of Appeal for Ontario.

During the argument reference was also made to the instructions now received by the Governors General, and it was contended that the power of pardon there given must be exclusive and cannot co-exist in the Lieutenant Governors of the provinces, unless by delegation from the Governor General under the powers in that respect conferred upon him.

The learned counsel then referred to the case of the *Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick* (1), and contended that that case left the question involved in the present case unaffected, citing the passage in which the Judicial Committee state that the provisions of the British North America Act: "Nowhere profess to curtail in any respect the rights and privileges of the crown or to disturb the relation then existing between the Sovereign and the provinces." He contended that though that case, no doubt, decides that in matters of Provincial Government the Lieutenant Governor

(1) [1892] A.C. 437.

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is as much the direct representative of Her Majesty as the Governor General is in matters of Dominion Government, yet the fact remains that both Governors General and Lieutenant Governors only represent the Queen in a modified manner. The degree to which in either case they represent her depends upon the provisions of the British North America Act on the one hand, and the powers delegated by commissions and instructions on the other hand (1).

E. Blake Q.C., [*Æmilius Irving* Q.C. with him] for the respondent.—I may conveniently open my argument by referring to that authority to which my learned friends have referred, and which they think does not add much to the position of the province. I would ask your Lordships to consider what the case of the *Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick* (2), does establish, not in the way of stating any new views but as placing in a proper light the position of the province with reference to legislative powers. It appears to me that in that case their Lordships of the Judicial Committee had concluded to make a definite statement of their view of the position of the province, and to place their decision upon a broad and clear view of the result of the previous decisions affecting the rights of the different provinces of the Dominion. There is nothing said in that case at all inconsistent with the decision of this court from which it was an appeal. On the contrary, the decision was affirmative of the view of this court as to the prerogative of the Lieutenant Governor.

The judgment in the case referred to at page 441 of the report [1892], A.C., begins by pointing out that "the appellants did not impeach the authority of the cases of *The Queen* v. *The Bank of Nova Scotia* (3), and

(1) See also report of argument in 20 O. R. pp. 224 *et seq.*

(2) [1892] A.C. 437.

(3) 11 Can. S. C. R. 1.

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Exchange Bank of Canada v. *The Queen* (1); and they also conceded that until the passing of the British North America Act, 1867, there was precisely the same relation between the crown and the Dominion. But they maintain that the effect of the statute has been to sever all connection between the crown and the provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions." In respect to this contention, their Lordships used this language: "for these propositions, which contain the sum and substance of the argument addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority." Then there is the authoritative statement that the British North America Act does not "disturb the relation then existing between the Sovereign and the provinces. The object of the act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented and trusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues, which had previously belonged to the provinces; so that the Dominion Government should be vested with such powers, property and revenues, as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But in so far as regards those matters, which by section 92 are

(1) 11 App. Cas. 157.

specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the act." This language is important because there will be found in a subsequent part of the judgment an indication of what will necessarily follow from the idea that the Queen was not present as a part of the Provincial legislature in their legislative acts, and it follows, in the opinion of their Lordships, as a necessary proposition that she was present. Their Lordships say, at page 443 of their report: "It would require very express language, such as is not to be found in the act of 1867, to warrant the inference that the Imperial legislature meant to vest in the provinces of Canada, the right of exercising supreme legislative powers in which the British Sovereign was to have no share." And again, in speaking of the objection that the Lieutenant Governor of the province is not appointed directly by Her Majesty, but by the Governor General who has also the power of dismissal, their Lordships say: "The act of the Governor General and his Council, in making the appointment is, within the meaning of the statute, the act of the crown; and a Lieutenant Governor when appointed is as much the representative of Her Majesty, for all purposes of Provincial Government, as the Governor General himself is for all purposes of Dominion Government." So you have there a general declaration that the executive powers are divided, and that that part which is necessary for the due performance of the functions of the Provincial Government remains with the province. Then their Lordships in the case in question, after stating, as I have said, that the legislature of each province of Canada is as supreme as it was before the passing of the act, cite from the now historic case of

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Hodge v. *The Queen* (1), and then go on to say in reference to the Legislature of New Brunswick, which was in question in that case *Maritime Bank* v. *Receiver General* (2), that "it derives no authority from Canada, and its status is in no way analogous to that of a municipal administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of the word; and within the limits assigned by section 92 of the act of 1867, these powers are exclusive and supreme." They then go on to say, as I have before said, that the British North America Act should contain very express language (which it does not contain) to deprive the province of its prerogative. What was supposed to be obiter in *Théberge* v. *Landry* (3), is the deliberate opinion of the Privy Council in this case, namely, that the Queen is a party to provincial legislation.

In that case of the *Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick* (2) we find in the judgment the following passage:

> If the Act had not committed to the Governor General the power of appointing and removing Lieutenant Governors there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor General and not the Queen, whose viceroy he is, became the sovereign authority of the province, whenever the Act of 1867 came into operation. But the argument ignores the fact that by section 58 the appointment of a Provincial Governor is made by the 'Governor General in Council by instrument under the Great Seal of Canada,' or in other words by the executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown,

and then follows what I have already read on this point.

Then the judgment proceeds to discuss the point as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign,

(1) 9 App. Cas. 117. (2) [1892] A. C. 442.
(3) 2 App. Cas. 102.

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which their Lordships say appears to be practically settled by previous decisions of the Judicial Committee, referring particularly to *Attorney General of Ontario* v. *Mercer* (1), *St. Catharines Milling Co.* v. *The Queen* (2), and *Attorney General of British Columbia* v. *Attorney General of Canada* (3), and the judgment closes as follows:

> Seeing that the successive decisions of this Board in the case of Territorial Revenues are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues, which are not territorial.

That is important as giving us at last an interpretation on which we can rely for the construction of this case.

[The learned counsel then proceeded to submit the points of argument relied on in the Court of Appeal (4).]

THE CHIEF JUSTICE:—The 15th subsection of section 92 of the British North America Act and the decision in the case of *Hodge* v. *The Queen* (5) preclude the possibility of any doubt as to the right of Provincial legislatures to impose punishments by fine and imprisonment as sanctions for laws which they had power to enact.

The case of *The Receiver General of New Brunswick* v. *The Liquidators of the Maritime Bank* (6) definitively established that a Provincial Lieutenant Governor appointed by the Governor General under the Great Seal of the Dominion, pursuant to the provisions of the British North America Act, represents the Queen.

(1) 8 App. Cas. 767.
(2) 14 App. Cas. 46.
(3) 14 App. Cas. 295.
(4) See report of argument 20 O. R. pp. 229 *et seq.* and a verbatim report filed with the appeal book.
(5) 9 App. Cas. 117.
(6) [1892] A. C. 437.

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The 65th section of the British North America Act, which continues to the Lieutenant Governors of the Provinces such statutory powers as to confederation as had previously been vested in the Lieutenant Governors so far as the same are capable of being exercised after the union, does not appear to me to have any material bearing, as the prerogative of pardoning exercised by the Lieutenant Governor before confederation was not derived from any statute.

Had I been compelled to decide the substantial question argued before this court, I should have had no hesitation in holding that "the power of commuting and remitting sentences" mentioned in the second section of the Provincial act in question, was nothing less than the power to pardon.

By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's Dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot however in any way exclude the power and authority of the crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's Dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon in express terms, either by the commission under the Great Seal, or in the instructions communicated to them by the crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of

years, I should have thought that it at least implied that in the opinion of the law officers of the crown, an authority on such a point second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial Governor, and could only be executed by such an officer, in the absence of legislative authority, under powers expressly conferred by the crown.

The next question, and one which was argued on this appeal, and which, if we were compelled to decide all the questions presented we should have been obliged to pronounce upon, is one of the greatest importance, not a question of construction arising in any way upon the British North America Act, but one involving a great principle of the general constitutional law of the Empire. That question is: In what legislature does the power of conferring this prerogative of pardoning by legislation upon a representative of the crown such as a colonial Governor, reside? Is it possessed by any colonial Legislature, including in that term under our system of Federal Government as well the Dominion Parliament as a Provincial legislature, or is it confined to the Imperial Parliament? That the crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be well recognised constitutional canon. Upon this point of the locality of the legislative power to interfere with the Royal prerogative, I should have thought that the case of *Cushing* v. *Dupuy* (1) and *Re Marois* (2), decided by the judicial committee with reference to the jurisdiction of a colonial legislature to limit appeals to the Queen in Council, would, if not direct authorities, have had at least a very material application to the present question. The judgments

(1) 5 App. Cas. 412. (2) 15 Moo. P.C. 189.

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delivered in the Supreme Court of Victoria in the case of *Chun Teeong Toy* v. *Musgrove* (1) might also have afforded us great assistance. If it had been necessary to decide this last question, I should have desired further argument in order that the opinions of the learned judges who decided the Australian case and the authorities which with great industry and research they appear to have brought together might be fully discussed, for that case was not referred to in the argument, having been brought to our notice by the learned counsel for the appellant since the hearing of the appeal.

I have made the foregoing observations in order that the attention of counsel may be directed to the points I have indicated should the case be brought before us again in some other form. At present I do not intend to decide any of these questions for I am of opinion that we must dispose of this appeal upon the same ground as that taken in the judgment of Mr. Justice Osler.

This is an action instituted under the jurisdiction given by section 52, subsec. 2, of the Ontario Judicature Act which is as follows:—

> The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney General for the Dominion or the Attorney General of this Province for a declaration as to the validity of any statute or any provision in any statute of this legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said court.

The Attorney General of the Dominion by his statement of claim asks for a declaration as to the validity of the statute under consideration and every section thereof.

Whatever may have been the proper determination of this question, if the statute had been absolute in

(1) 14 Vict. L. R. 349.

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its terms, it seems to be impossible to say that an enactment which on its face is expressly made subject to a condition that the legislature has power to enact it can be *ultra vires*. The effect of such a proviso necessarily is that the act is by its very terms to be treated as an absolute nullity if beyond the competence of the legislature; it is therefore impossible to say that there has been any excess of jurisdiction.

The appeal must be dismissed.

FOURNIER J.—Cette action a été portée pour faire déclarer que l'acte 51 Vict., ch. 5, est *ultra vires* des pouvoirs de la législature d'Ontario. La réponse du procureur-général d'Ontario, contenue dans son *demurrer* est suffisante pour faire repousser la prétention énoncée dans la demande. Cet acte n'a pas pour but de faire fixer l'interprétation de l'Acte de l'Amérique Britannique du Nord, ou de l'amender, en quoi que ce soit, au delà des pouvoirs qui appartiennent à la dite législature. Elle s'en est exprimée de la manière la plus positive par la déclaration, plusieurs fois répétée dans cet acte, qu'elle n'a statué qu'en autant que comme province elle avait le pouvoir de le faire, et sans intervenir avec les pouvoirs réservés au parlement fédéral.

Lorsque la législature a déclaré qu'elle n'a l'intention de donner effet à sa législation qu'en autant qu'elle a le pouvoir de le faire et surtout lorsqu'il ne s'agit pas d'en faire l'application à un cas particulier, il est évident que la demande d'une déclaration d'inconstitutionalité de cette législation est prématurée. Il me semble que pour adopter un tel procédé on aurait dû attendre qu'il se fut présenté un cas dans lequel cet acte fut invoqué. Jusque là, il me semble qu'on ne peut demander à la cour de faire une déclaration affirmant ce que la législature s'est abstenue de déclarer. Ce qui a été ainsi déclaré provisoirement ou à titre

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d'essai peut ne pas être d'une grande utilité, mais était dans les limites de pouvoirs de la législature. Ainsi que l'a fait observer l'honorable chancelier Boyd dans son savant jugement sur cette cause :

> And, again, if the section operates on nothing it may be innocuous, but it is not unconstitutional. We are not called upon by analysis or criticism of plausible powers and functions which may be embraced in the words used to discriminate as to what are within or what without the scope of the enactment; any particular case is to be dealt with as and when it arises.

En conséquence je suis d'avis que l'action demandant une déclaration que l'acte en question est inconstitutionnel doit être renvoyée et le jugement de la cour d'appel confirmé.

TASCHEREAU J.—I am not sure if we have jurisdiction over this appeal. If not quashed, however, it must be dismissed. There is nothing in it, and I would have dismissed it at the conclusion of the appellant's argument without calling on the respondent. I would have thought that after the decision of the Privy Council in the *Maritime Bank* case (1), the appeal would have been abandoned. If it was thought expedient to have a judgment finally settling the questions raised, the case should have been directly brought to the Privy Council. Constitutional questions cannot be finally determined in this court. They never have been, and can never be under the present system.

GWYNNE J.—The act of the Ontario legislature which is under consideration, viz., 51 Vic. ch. 5 is, to say the least, peculiar in its frame and embarrassing and the argument in support of its constitutionality has failed to bring conviction to my mind. The first section of the act purports to enact ("so far as the legislature has power thus to enact") that all powers,

(1) [1892] A. C. 437.

authorities and functions which were vested in, or exercisable by the Governor or Lieutenant Governor of any of the several provinces now forming part of the Dominion of Canada under commission, instructions or otherwise, at, or before, the passing of the British North America Act in respect of like matters as the matters by that act placed within the jurisdiction of the legislature of the Province shall be vested in and exercisable by the Lieutenant Governor of the Province of Ontario. What may have been the powers, authorities, and functions thus intended to be vested in the Lieutenant Governor of the Province of Ontario the section does not indicate; but it must be construed as treating them to have been powers, authorities and functions which had been exercised in virtue of some special authority emanating directly from the crown empowering a Governor or Lieutenant Governor of some or one of the old provinces upon some occasions or occasion to exercise some Royal Prerogative in some manner, and the power, authority or function so authorized to have been executed by such Governor or Lieutenant Governor must have been other than, and in excess of, the powers, authorities and functions vested in the Lieutenant Governors of Ontario and Quebec by sec. 65 of the British North America Act.

Now the legislatures of the provinces have no jurisdiction to enact laws in relation to any matter not coming within the classes of subjects enumerated in sec. 92 of that act and among such subjects there is not one, in my opinion, which includes the matters purported to be enacted by the first section of the act under consideration; but, on the contrary, so to extend the powers, authority and functions of the Lieutenant Governor of Ontario beyond those expressly vested in him by the constitutional act is, in my opinion, a violation of the terms of the first item of sec. 92 of that

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act which vests in the legislature jurisdiction to amend from time to time the constitution of the province save and except "as regards the office of lieutenant governor." An act which purports to vest in a Lieutenant Governor of the Province the Royal Prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the constitution of the province as regards the office of lieutenant governor. Then it is argued that even if this is a correct construction of the first section and so that it cannot be held to be *intra vires*, still, by reason of the above formula used in the statute, that section cannot be adjudged to be *ultra vires*. The argument being: If the legislature has power to enact as it has enacted in the first section that section is *intra vires;* but if the legislature had not the power so to enact, the section cannot be *ultra vires* by reason of the saving effect of the formula, "so far as the legislature has power thus to enact." Thus an act of a Provincial legislature which under the shadow of such a formula deals with a subject clearly not within the jurisdiction of the provincial legislature to legislate upon, must, according to the argument, be suffered to remain upon the statute book as an act of the legislature, for what purpose it is difficult to conceive. Thus if an act of a provincial legislature should, under the cover of the formula "as far as the legislature has power thus to enact" enact and declare that within the province no offence should be punishable with death but that every offence heretofore so punishable should be punished by imprisonment in a common jail for such period as to the court or judges pronouncing the sentence should seem fit, such an act according to the argument could not be adjudged to be *ultra vires* but must be suffered to remain on the statute book as an act of the legis-

lature. It clearly cannot be said to be *intra vires*, and I confess to be unable to see how an act which is not *intra vires* can be anything else than *ultra vires*.

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The argument has failed as I have said to bring conviction to my mind. I think that the use of such a formula cannot divest the court of power to pronounce an act to be *ultra vires* if the subject matter dealt with be not within the jurisdiction of the legislature to legislate upon; that is to say if an act of a provincial legislature deals in any way with such a subject matter the act not being *intra vires* must be *ultra vires*. A provincial legislature having no jurisdiction to pass any act in relation to a matter not coming within the classes of subjects enumerated in sec. 92 of the British North America Act, if they pass an act in relation to any such matter that is an act beyond their jurisdiction to enact that is to say, is *ultra vires*, notwithstanding that such a formula as the above is used. The act under consideration, while it contains the above formula, proceeds to legislate upon a subject matter upon which, as I think, it had no jurisdiction to legislate; the formula used does not divest the act of its character of being an act of the legislature nor can it make the subject with which it proceeds to deal to be within its jurisdiction if in point of law it is not. This first section then of the act under consideration is the legislative act of a legislature having no jurisdiction over the subject matter with which the section professes to deal, and being so it is in my opinion *ultra vires*.

Then as to the 2nd section. If that section had been framed so as to enact that the lieutenant governor should have the power of commuting and remitting sentences passed under the authority of item 15 of sec. 92 of the British North America Act, there would have been I apprehend no objection raised to such an enactment; but the second section does nothing of the kind.

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It professes to proceed solely upon the basis of the first section being *intra vires*. It professes not to give to the lieutenant governor power to commute or remit the offences in the second section mentioned independently of the power purported to be conferred by the first section. It enacts as follows:

2. *The preceding section shall be deemed to include* the power of commuting and remitting sentences for offences against the laws of this province or offences over which the legislative authority of the province extends.

This mode of framing the section conveys the intention of the legislature to have been that it is only under the preceding section that the power mentioned in the second section is vested in and can be exercised by the lieutenant governor. If then the preceding section be *ultra vires* nothing remains to support the provisions of the second section. But, further, the second section purports to declare that the preceding section and the powers thereby purported to be conferred shall be deemed *to include* the power of commuting and remitting sentences not only for offences over which the legislative authority of the province extends, that is to say those mentioned in item 15 of sec. 92 of the British North America Act, but also "for offences against the laws of this province." Such offences were always misdemeanours at common law and now by sec. 138 of the Criminal Code are indictable offences unless some penalty or other mode of punishment is expressly provided by law, so that this second sec. of the act under consideration purports that the powers professed to be vested in the Lieutenant Governor of Ontario by the 1st section shall *include* the power of commuting and remitting sentences passed in certain cases by the courts in the exercise of their criminal jurisdiction a matter clearly not within the jurisdiction of the pro-

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vincial legislature to legislate upon, and therefore *ultra vires*.

I am of opinion therefore that the contention of the learned Attorney General of Canada is well founded and that the act must be declared to be *ultra vires*.

KING J. was of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

GWYNNE J.

Solicitor for appellant: *J. A. Macdonell.*

Solicitor for respondent: *Æmilius Irving Q.C.*

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*May 21.

THE SHIP "MINNIE" .... APPELLANT;

AND

HER MAJESTY THE QUEEN... .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA (BRITISH COLUMBIA ADMIRALTY DISTRICT).

Seal Fishery (North Pacific) Act 1893, 56 & 57 *Vic. c.* 23 *(Imp.) secs.* 1. 3 *and* 4—*Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel sufficiency of—Presence within prohibited zone—Bona fides—Statutory presumption of liability—Evidence—Question of fact.*

The Admiralty Court is bound to take judicial notice of an order in council from which the court derives its jurisdiction, issued under the authority of the act of the Imperial Parliament, 56 & 57 Vic. c. 23. The Seal Fishery (North Pacific) Act 1893.

A Russian cruiser manned by a crew in the pay of the Russian Government and in command of an officier of the Russian navy is a "war vessel" within the meaning of the said order in council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty court in an action for condemnation under the said Seal Fishery (North Pacific) Act 1893, and is proof of its contents.

The ship in question in this case having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the *onus* cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council.

Judgment of the court below affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (British Columbia Admiralty District) (1) by which judgment the ship "Minnie," her equipment and everything on board of her, and the proceeds

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

(1) 4 Ex. C. R. 151.

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thereof, were condemned for violation of the provisions and requirements of the "Seal Fishery (North Pacific) Act," an imperial statute passed by the Parliament of Great Britain and Ireland, on the 29th June, 1893, and of the Imperial Order in Council, passed in pursuance of the said act on the 4th July, 1894.

This was an action for condemnation under the Seal Fishery (North Pacific) Act, 1893.

The following are the material facts in the case:

The sealing schooner "Minnie" set sail from the Port of Victoria, British Columbia, on the 27th of February, 1893, fully equipped and manned for a hunting and sealing voyage in the North Pacific Ocean. On the 22nd of June, 1893, the owner of the vessel, Victor Jacobson, appointed one Julius Mohrhouse as the master of the said ship, and the said Mohrhouse was master at the time of the seizure of the vessel.

On the evening of the 17th July, 1893, about nine o'clock, the schooner was seized by the officers of the Russian cruiser "Yacoute" as being within the thirty mile zone round the Komandorsky Islands, of which group Copper Island is one. The said Komandorsky Islands are referred to in the second sub-clause of clause one, in the order in council of the 4th July, 1894.

At the time of the seizure, the master of the "Minnie" was aware of the requirements of the order in council, and of the necessity of keeping outside of the limits of the zone so prescribed by the said order in council. After the seizure the ship was searched by the officers of the Russian cruiser, and a full equipment of guns and other seal-hunting implements were found on board, together with one seal-skin. The catch of the vessel had been transferred to the "Borealis" some time previously. On the day of the seizure all the boats of the "Minnie" were lowered, for the purpose alleged by

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Captain Mohrhouse of washing the decks; but as a matter of fact, two persons expert in sealing were placed in each boat.

The sections of the statute 56 & 57 Vic. ch. 23 (Imp.) bearing on the case are the following:—

"(1). Her Majesty the Queen may, by order in council prohibit during the period specified by the order the catching of seals by British ships in such parts of the seas to which this act applies as are specified by the order.

"(2). While an order in council under this Act is in force.

"(a). A person belonging to a British ship shall not kill, take or hunt, or attempt to kill or take, any seal during the period and within the seas specified by the order.

"(6). If during the period and within the seas specified by the order, a British ship is found having on board thereof fishing or shooting implements or sealskins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this act.

"Subsection 3. (1). A statement in writing, purporting to be signed by an officer having power in pursuance of this act to stop and examine a ship, as to the circumstances under which, or grounds on which, he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated."

The clauses of the said Imperial Order in Council bearing upon this case are as follows:

"1. From and after the fourth day of July, one thousand eight hundred and ninety-three, until the first day of January, one thousand eight hundred and ninety-four, the catching of seals by British ships is hereby prohibited within such parts of the seas to

which the recited act applies, as are comprised within the following zones, that is to say (1) a zone of ten marine miles on all the Russian coasts of Behring Sea and the North Pacific Ocean, and (2) a zone of thirty marine miles round the Komandorsky Islands and Tulénew (Robben Islands)."

"2. The powers which under the recited act may be exercised by any commissioned officer on full pay in the Naval Service of Her Majesty, may be exercised by the captain or other officer in command of any war vessel of His Imperial Majesty the Emperor of Russia in relation to a British ship, and the equipment and crew and certificate thereof."

The following is a copy of the protocol signed by the captain:

"Protocol of the examination of the schooner "Minnie."

"On this 17th day of July in the year 1893, in latitude 54° 21′ N., and longitude 168° 38′ E. at a distance of twenty-two miles from the southern extremity of Copper Island, a schooner under sail was seen at 9 o'clock in the evening by His Imperial Majesty's Transport "Yacout," cruising off the Commander Islands.

"On nearing her she was ordered by the transport to bring to, which was promptly done. A whale boat at once put off from the schooner to the transport with the mate, who explained that the schooner was English, (that she was) from Victoria (that) her name was "Minnie." For six days he had taken no observations."

"The Midshipman, Michaelof Raslovlef, was sent for the examination of the aforesaid schooner, who on his return to the transport with the schooner's skipper, Julius Mohrhouse, brought with him the log-book and ship's papers and reported (that) they had on the schooner 12 whale-boats, 23 shot-guns and one rifle, and in the hold only a few seal-skins and salt.

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"After an inspection of the aforesaid log-book and papers, the ship's Commission, appointed by order of the commander of the transport, on the 5th July, in accordance with N.42 consisting of the President, Lieutenant Ginter, and of the members Lieutenant Dedenef and Midshipman Michaelof Raslovlef, found that the schooner "Minnie," (sailing) under the flag of Great Britain, belonging to Victor Jacobson, (and) under the command of Julius Mohrhouse, from Victoria, is sailing for the purpose of sealing by the way (i. e. is engaged in pelagic sealing) and called before her arrest by the transport, at San Juan, Yakoutat, and Sand Point, from which last port she sent the seal-skins she had procured to Victoria.

"The crew on the schooner consisted of 25 men. In accordance with the finding of the whole of the aforesaid commission, in compliance with the principle, s.s. 9 of the instructions to a war cruiser in the year 1893, for the protection of the Russian maritime industries in the Behring Sea, it was decided that after having seized the ship's documents, a temporary certificate be given to skipper Julius Mohrhouse, with an inscription upon it of the number and description of the documents seized, and that he be ordered to leave the territorial waters at once and go to Yokohama and there present himself to H. B. M.'s Consul and inform him that the documents of the schooner "Minnie" would be forwarded to the authorities of Great Britain.

(Members signed).

"Midshipman MICHAELOF RASLOVLEF.

"Lieutenant DEDENEF.

(Sgd.) "President, Lieutenant GINTER.

"I confirm this document.

(Sgd.) "Captain (2 Rapa) SCHMELEVSKY."

Belyea for the appellant.

Hogg Q.C. for the respondent.

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THE CHIEF JUSTICE.—(Oral) We all think that this appeal should be dismissed.

The first question is: Was the order in council sufficiently proved? I think that the judge was bound to take judicial notice of this order in council issued under the authority of the act of the Imperial Parliament from which the court derived its jurisdiction. The objection that the protocol was improperly admitted as evidence also fails. There can be no doubt that the "Yacout" was a "war vessel" though not a regular man-of-war. She was a cruiser employed in the service of the Emperor of Russia to prevent the catching of seals within the prohibited zone of the Komandorsky Islands, was in command of a commissioned officer of the Russian Navy, and officered and manned by a crew in the pay of the Russian Government and therefore *pro hac vice* was a "war vessel" of the Emperor of Russia within the meaning of that term as used in the order in council. The document was therefore clearly admissible in evidence under the statute as a statement in writing purporting to be signed by an officer having power under the act to stop and examine the ship as to the circumstances under which he actually did stop and examine her, and is proof of its contents, and that the officer who signed it was, as he purports to have been, the officer in command of the "Yacout" at the time of the seizure.

There still remains the question as to whether the "Minnie" having been seized in prohibited waters fulfils the onus cast upon her by the statute. I do not think she does. She must prove that, being fully equipped and manned for sealing, she was not "used or employed in killing or attempting to kill any seal within the seas specified in the Imperial Order in Council." The only evidence adduced for this purpose is the evidence of Captain Mohrhouse. If we were to

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say that we gave full credit to this witness we should be overruling the learned judge in whose presence he was examined, and who had the opportunity of observing his demeanour whilst under examination and had therefore means of judging of his credibility which no Court of Appeal can have. The learned judge says most distinctly that he did not believe Captain Mohrhouse, when he stated that he was in the locality where the "Minnie" was seized by accident, and that must be conclusive. From the documents and from the circumstances in evidence, I am of opinion that not only was not the statutory presumption displaced but it was proved that the "Minnie" was a sealing vessel, fully equipped and manned and in pursuit of seals and was sailing in the neighbourhood of the islands for no other purpose except to catch seals.

In giving effect to the statute we are only called upon to find whether or not the vessel, having been taken in prohibited waters, has proved that she was there for a lawful purpose. The learned judge who heard the evidence says she was not, and the evidence of Captain Mohrhouse being discarded for the reason above given that conclusion is inevitable.

The presumption of the liability of the "Minnie" as declared by the statute has not been rebutted and for this reason alone we could not reverse the finding of the learned judge; but, I repeat, even if the onus was upon the crown, the circumstantial evidence is sufficient to prove that the "Minnie" was guilty of an infraction of the statute and order in council.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Arthur Louis Belyea.*

Solicitor for respondent: *Chs. E. Pooley.*

CELIA MYLIUS (DEFENDANT).....APPELLANT; 1894

AFD *May 21.

MARGARET JACKSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Pleadings—Sufficient traverse of allegation by plaintiff—Objection first taken on appeal.

The plaintiff by his statement of claim alleged a partnership between two defendants, one being married whose name on a re-arrangement of the partnership was substituted for that of her husband without her knowledge or authority.

Held, reversing the judgment of the court below that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of plaintiff's allegation to put the party to proof of that fact.

Held also, that an objection to the insufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

APPEAL from the judgment of the Supreme Court of British Columbia, whereby the judgment pronounced by the trial judge against the appellant for the sum of $12,043.25 was affirmed, the amount, however, to be reduced to $5,270.00.

The respondent brought an action against the defendant, A. J. Jackson, her son, and the appellant to recover money lent and advanced to them as trading partners.

On the 22nd day of April, 1891, the defendant A. J. Jackson, by deed entered into a trading partnership with P. E. Mylius (the appellant's husband) for the term of five years. Shortly afterwards, a re-arrange-

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

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ment of the partnership affairs was apparently attempted by the substitution of the appellant's name in place of her husband's in the partnership but without her knowledge or authority.

At the time of the alleged contract the appellant had no separate property. The appellant by her statement of defence denied "that on the 22nd of April, 1891, or at any other time she entered into partnership with the defendant, A. J. Jackson, as alleged in paragraph two of the statement of claim."

The action came on for trial before the Honourable Mr. Justice Crease, without a jury, at the city of Victoria, when judgment was delivered in favour of the plaintiff, judgment having been previously signed against the defendant, A. J. Jackson, in default of appearance.

The present appellant then appealed to the full court and they reduced the amount of judgment to $5,270.

The decision of the full court was based upon the ground that the appellant had admitted the partnership in her pleadings and that as there was no evidence to the contrary, effect must now be given to that admission.

Belyea for appellant.

Chrysler Q.C for respondent.

THE CHIEF JUSTICE.—(Oral.) I think the appeal should be allowed upon the ground that the alleged partnership has not been proved.

At the trial it was assumed by the learned judge and by the counsel on both sides that the partnership alleged by the statement of claim was sufficiently denied by the defence. The traverse in the statement of defence is in these words:

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The defendant denies that on the 22nd of April, 1891, or at any other time she entered into partnership with the defendant A. J. Jackson, as alleged in paragraph two of the statement of claim.

The words " or at any other time " ought to be sufficient to save the pleading from the objection of " negative pregnant " even if taken at the earliest possible moment. But I think it would be monstrous that such an objection should prevail after a trial at which the parties and the judge all took it for granted that the partnership was sufficiently denied, when taken for the first time after judgment in appeal, and then not urged by the plaintiff but emanating from the court who held that the partnership, notwithstanding all that had taken place at the trial, was admitted on the pleadings.

I am of opinion therefore that the case is one in which the traverse of the allegation of a partnership was sufficient to put the plaintiff to the proof of that fact. Then, the proof in that respect wholly fails; there is no evidence that Mrs. Mylius ever entered into partnership with Jackson. Her husband may have agreed that she should be a partner but that cannot possibly bind her, and therefore, altogether aside from the question whether the appellant had separate property at the time of the alleged partnership, and upon the simple ground that a partnership has not been proved, the appeal must be allowed, the judgment below reversed, and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *A. L. Belyea.*

Solicitor for respondent: *H. B. W. Aikman.*

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*Oct. 23, 24.
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HENRY BULMER, THE YOUNGER (CLAIMANT) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN (RESPONDENT..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages—Cross appeal—Supreme Court rules, 62 and 63.

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under sections 49 and 50 of 46 Vic. ch. 17, and the regulations made under the act of 1879 provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council."

In a claim for damages by the licensee.

Held, 1. Orders in Council issued pursuant to 46 Vic. ch. 17, secs. 49 and 50 authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the crown and proposed licensees, such orders in council being revocable by the crown until acted upon by the granting of licenses under them.

2. The right of renewal of the licenses was optional with the crown and the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.

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

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The licenses which were granted and were actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as thereinafter mentioned for and during the period of one year from the 31st of December 1883 to the 31st December 1884, and no longer."

Quære. Though this was in law a lease for one year of the lands comprised in the license, was the crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment?

A cross appeal will be disregarded by the court when rules 62 and 63 of the Supreme Court Rules have not been complied with.

APPEAL and CROSS APPEAL from the judgment of the Exchequer Court (1) on a claim for damages for the breach of several agreements by which damages to the extent of $5,070.00 were awarded to the appellant.

The facts and pleadings and licenses and regulations in question issued under the Dominion Lands Act, 1883, as well as the material sections of the act are fully given in the report of the case in the Exchequer Court. (1)

No notice of any cross appeal was given on behalf of the respondent until the 7th of October, 1893, when respondent's solicitors gave notice of the intention of the respondent on the hearing of the appeal to contend by way of cross appeal that the judgment of the Exchequer Court should be set aside in so far as it awards to the appellant $5,070.18. The time for depositing security by the appellant expired on 15th March, 1893, and security for the appeal was deposited and notice of hearing for the May sittings given on that day. The appeal was inscribed for hearing on the 27th March, 1893. The appeal was adjourned by consent until the October term 1893. Notice of hearing for the October term was given on 16th September last.

(1) 3 Ex. C.R. 184.

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In addition to the cases cited and relied on by counsel in the court below and in the judgment of the Exchequer Court (1). *McCarthy* Q.C. and *Ferguson* Q.C. for the appellant cited *Cooper* v. *Phibbs* (2); *Rolph* v. *Crouch* (3); *Foster* v. *Wheeler* (4); *Godwin* v. *Francis* (5); *Jenkins* v. *Jones* (6); *Bunny* v. *Hopkinson* (7); *Walker* v. *Moore* (8); *Sikes* v. *Wild* (9); *Eichholz* v. *Bannister* (10); *Raphael* v. *Burt* (11); *Brown* v. *Cockburn* (12); *McMullen* v. *Macdonell* (13); *Graham* v. *Heenan* (14); *Gilmour* v. *Buck* (15); *McArthur* v. *The Queen* (16); *Palmer* v. *Johnson* (17); *Canada Central Railway Co.* v. *The Queen* (18); *Beaumont* v. *Cramp* (19); *Kissock* v. *Jarvis* (20).

Robinson Q.C., and *Hogg* Q.C. for the respondent cited and relied on *Aspdin* v. *Austin* (21); *Dunn* v. *Sayles* (22); *Ellis* v. *Grubb* (23); *Ferguson* v. *Hill* (24); *Crosby* v. *Wadsworth* (25); *Carrington* v. *Roots* (26); *Scorell* v. *Boxall* (27); *Petch* v. *Tutin* (28).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court, by which damages to the extent of $5,070 were awarded to the appellant,

(1) See 3 Ex. C. R. 186 et seq.
(2) L. R. 2 H. L. 149.
(3) L. R. 3 Ex. 44.
(4) 36 Ch. D. 696.
(5) L. R. 5 C. P. 295, 305.
(6) 9 Q. B. D. 128, 132.
(7) 27 Beav. 565.
(8) 10 B. & C. 420, 422.
(9) 1 B. & S. 587.
(10) 17 C. B. N. S. 708, 719.
(11) Cababe & Ellis, 325.
(12) 37 U. C. Q. B. 592, 597.
(13) 27 U. C. Q. B. 36, 38.
(14) 20 U. C. C. P. 340, 342.
(15) 24 U. C. C. P. 187-192.
(16) 10 O. R. 191, 194.
(17) 12 Q. B. D. 32.
(18) 20 Gr. 273.
(19) 45 U. C. Q. B. 355.
(20) 9 U. C. C. P. 156.
(21) 5 Q. B 671, 684.
(22) 5 Q. B. 685, 692.
(23) 3 U. C. O. S. 611.
(24) 11 U. C. Q. B. 530.
(25) 6 East 610.
(26) 2 M. & W. 248.
(27) 1 Y. & J. 398.
(28) 15 M. & W. 110.

who now by this appeal seeks to have that amount largely increased.

The crown has also instituted a cross appeal insisting that the appellant was not entitled to recover any damages. The cross appeal, however, is not regularly before the court, the notice required by general orders 62 and 63 not having been given in due time, and we must therefore disregard it, and confine our decision to the principal appeal exclusively.

The facts of the case are stated in the judgment of the Exchequer Court which is reported in the 3rd volume of the Exchequer Reports (p. 184) and to the statement I refer.

I am of opinion that the appeal must be dismissed and that upon the ground that the claimant, if entitled to recover any damages, was certainly not entitled to recover more than the judgment he appeals against has given him. The orders in council authorizing the Minister of the Interior to grant the licenses to cut timber on the timber berths in question did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the crown and the proposed licensees. These orders in council, as similar administrative orders in the case of sales of crown lands in the provinces of Ontario and Quebec have always been held to be, were revocable by the crown until acted upon by the granting of licenses under them. They embodied no agreement of which specific performance could be enforced. They were mere authorities by the Governor in Council to the minister upon which the latter was not bound to act, but might act in his discretion. This is apparent from the statutory enactment applicable to these orders in council and the licenses to be issued under them. I refer to sections

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49 and 50 of 46 Vict. cap. 17. The Dominion Lands Act of 1883 section 49 is as follows:—

> The Governor in Council may, from time to time, order that leases of the right to cut timber on certain timber berths defined in the order shall be offered at public auction at an upset bonus fixed by the order and given to the person bidding in each case the highest bonus therefor, such bonus to be paid in cash at the time of sale. The Governor in Council may also authorize the lease of the right to cut timber on any timber berth to any person who is the sole applicant for it; the bonus to be paid by such applicant to be fixed in the order authorizing the lease to him, and to be paid in cash at the time of its issue.

None of the ten timber berths in respect of which this claim is made were put up to sale by auction, but were granted under the latter part of the section, or under subsection 2 which it is not material to set out. I am at a loss to conceive any language better adapted to indicate that the order of the Governor General in Council was a mere authority which might or might not be acted upon by the minister, and which the Governor General in Council might at any time recall before it was executed by a lease or license, than that in which these clauses are expressed. Upon this ground I must hold that there was no breach of contract in respect of the four berths or limits for which orders in council were issued but for which no leases or licenses were issued. It must, therefore, depend upon the construction and effect of the leases themselves whether there has been any breach of contract.

Upon this head it is contended in the first place that there was a binding legal obligation upon the crown to renew these leases from year to year and that there was a breach of this obligation in refusing to renew for the year 1886 the six leases or licenses which had been granted for the year 1885. I am of opinion that the appellant also fails to make good this

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proposition. The leases were granted under section 50 of the act of 1883, which is in the following words:—

Leases of timber berths shall be for a term not exceeding one year, and the lessee of a timber berth shall not be held to have any claim whatever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender as the case may be under which it was obtained.

There were no conditions of sale referring to any of these leases. The timber berths for which they were granted were not in any case put up to sale by auction. It does not appear that any tender embodying any proposals for a renewal was ever made by the appellant or those through whom he claims title.

No provision relating to renewal is to be found in the leases. These instruments on their faces state that they are issued under the authority of the act of 1883 and of the order of the Governor General in Council. The order in council recommends that the license be granted under the conditions of the regulations approved by order in council of the 8th March, 1883.

Although these regulations were actually not made under the act of 1883, but under the former act of 1879, they may be assumed to have been re-adopted by the Governor General in Council for the purposes of the later act. The only regulation which has any reference to renewal is the third, which provides that:—

When a licensee has fully complied with all the above conditions, and when no portion of the timber berth is required for settlement or other public purpose of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council.

Then, assuming this provision to be incorporated in the order in council and therefore by force of the statute to apply to the leases in question, I see nothing in it making it obligatory on the crown to grant re-

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newals. I construe the 50th clause of the act as meaning that renewals are to be governed by the terms of the orders in council authorizing leases. Then reading this regulation as though it had been embodied in the orders in council in pursuance of which these leases were granted, it confers no absolute right of renewal. It is in terms as clearly facultative and permissive as language could make it. The license it says "may" be renewed, provided the Minister of the Interior shall be satisfied the conditions have been complied with, and in the absence of certain other contingencies but upon such terms as to "annual rental and royalty to be paid therefor as may be fixed by the Governor General in Council." This, therefore, if we are to construe words according to their obvious meaning and not to wrest them from their natural signification in order to reach a construction unfavourable to the crown, means that the right of renewal is to be optional with the crown; to depend on the judgment of the Minister of the Interior in the first place; and the renewal, if there is to be one, is to be on such terms as the Governor General in Council prescribes and therefore necessarily in the discretion of the latter authority. Manifestly the object of this regulation is administrative and departmental only, intended as a guide and authority to the minister and departmental officers, and not for the purpose of creating any obligation on the part of the crown towards the licensee. This disposes of the appellant's claim to a breach of contract in respect of refusals to renew.

Next we have the claim that there was a constructive eviction and failure of title which constituted a breach of certain covenants or stipulations which, though not expressed, are by law to be implied in the licenses which were granted and were actually current in 1884 and 1885. This contention is founded

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upon the clause in the license by which the Minister of the Interior confers upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as thereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer." This it is said, and no doubt correctly, is in law a lease for one year of the lands comprised in the license. From this it is argued that it follows that the same covenants for good right and title to make the lease and for quiet enjoyment are to be implied as in the case of an ordinary lease of land between subjects in which the operative word "demise" or its equivalent is used. This I at least doubt. No authority either way has been produced by the learned counsel who appeared for the appellant and addressed to the court an argument which indicated very careful preparation; nor have I after a very careful search been able to find any, upon the question whether the same implication of covenants is to be made in a lease by the crown as in that between subjects. In *Robertson* v. *The Queen* (1) I expressed the opinion that no covenant was implied in the fishery license in that case; that, however, was not a lease of land but a mere grant or license for a right of several fishery, and in the case of a grant of such a right no authority can be found for inferring a covenant. There is indeed a dictum of no less authority than Tindal C. J. the other way (2), who says that such an implication only arises in connection with a lease of land, and it has been decided that in a lease of personal property there is no such implication. In Bacon's abridgement, covenant B., it is said:

> But if a man leases certain goods for years by indenture which are evicted within the term yet he shall not have a writ of covenant for the law does not create any covenant upon such personal thing.

(1) 6 Can. S.C.R. 52. (2) See *Hinde* v. *Gray*, 1 M. & G. at p. 204

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That, however, would not be conclusive here, for undoubtedly this license does contain a lease of the land for a year, though such a lease is of course merely subordinate and incidental to the principal object which the crown and the licensee both had in view, the cutting down and acquisition of the timber. It is, however, well established that all crown grants are to be construed most favourably for the crown, and this doctrine has been adopted in the United States where the same rule of construction is applied in favour of the government to exclude implications of terms not expressed and not involved as a necessary consequence of the words actually used. I refer on this point to the case of the *Mayor of Alleghany* v. *The Ohio & Pennsylvania Railroad Co.* (1), where it is said, referring to a grant by the commonwealth:

> Nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant.

The tendency of modern decisions, moreover, is against the implication of provisions in a deed. I find that in a case decided after *Hart* v. *Windsor* (2), that of *Messent* v. *Reynolds* (3), Creswell J. expresses the opinion that these covenants are only to be implied in a lease when the word "demise" is used, but *Hart v. Windsor* (2), was not cited, and I must concede that the latter authorities, especially *Mostyn* v. *West Mostyn Coal Company* (4) are the other way. On the whole if I were compelled to decide this question of law, I should be inclined to hold that the crown was not bound by any implied covenant to be read into these licenses. It is, however, really not necessary to come to any conclusive opinion upon this point. By not presenting its cross appeal in due time the crown has lost the right to attack the judgment of the Exchequer. That judg-

(1) 26 Penn. 360.
(2) 12 M. & W. 68.
(3) 3 C. B. 203.
(4) 1 C. P. D. 145.

ment must therefore stand for the amount awarded by it to the claimant, and restricting his right to recover damages to the licenses actually existing and in force at the time of the constructive eviction, he would not be entitled to recover more than he actually paid for rentals and bonuses for that current year or for the years 1884 and 1885, an amount which would fall far short of that for which judgment has been rendered. As regards the measure of damages the authorities cited by the learned judge of the Court of Exchequer in his very able judgment demonstrate conclusively that this claimant, who applied for and took his licenses with his eyes open as regard the notorious uncertainty of the title which the Dominion Government claimed, could not recover more than the amount he had actually paid the crown.

I am of opinion that the appeal must be dismissed, and the cross appeal also; the latter with costs.

The case is one of some hardship and for that reason I am disposed to give no costs to the crown, who, in my judgment ought not to have granted the licenses in question.

Appeal dismissed without costs.

Cross-appeal dismissed with costs.

Solicitor for appellant: *A. Ferguson.*

Solicitors for respondent: *O'Connor & Hogg.*

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*June 4, 5, 6.
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*April 4.

GEORGIANA J. HOUGHTON, JOHN B. WRIGHT AND OTHERS..... } APPELLANTS;

AND

JAMES J. BELL AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction—Devise to children and their issue—Per stirpes or per capita—Statute of limitations—Possession.

Under the following provision of a will "When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money * * * and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto :

Held, reversing the judgment of the Court of Appeal, Ritchie C.J. dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.

A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the statute of limitations.

Held, affirming the decision of the Court of Appeal, that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute.

APPEAL and cross-appeal from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Ferguson J. at the trial.

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

[NOTE.—This and the following cases decided in 1892-3 the reporters have not been in a position to publish until now.]

(1) 18 Ont. App. R. 25 sub nom. *Wright* v. *Bell*.

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The action in this case was brought for the purpose of having construed the will of the late Thomas Bell and for the administration of his estate.

The said Thomas Bell died in 1840 and his property was left to his widow for life for the support of herself and her unmarried daughters. The will contained the following provision, which is the only one material to the questions raised on this appeal :—

"When my beloved wife shall have departed this life, and my daughters shall all have married or departed this life, I direct and require my trustees and executors hereinafter named to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto."

On the death of the widow and the only one of the daughters who had not married there were several children and grandchildren of the testator entitled to the benefit of the above clause. The question for decision is: Did such beneficiaries take *per stirpes* or *per capita?* The Court of Appeal held that they took *per stirpes* reversing the decision of Ferguson J. on this point.

The other question raised in the action which comes before the court on cross-appeal is, whether or not James J. Bell, one of the sons of the testator and one of the executors and trustees named in the will, is entitled to certain land which formed part of the estate by virtue of the statute of limitations. He was only fifteen years of age when his father died and never applied for probate of the will through leave was reserved for him to do so. He was aware of the will but took no part in the execution of the trusts thereunder. In 1861, with the consent of the acting

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trustee, he entered into possession of a farm which had belonged to the testator and remained in possession continuously from that time. He now claims title to the said farm by prescription.

The Court of Appeal held, affirming the decision of the trial judge, that the said James J. Bell must be considered as necessarily affected with notice of the provisions of the will and the express trusts thereby created as regards the land he claims, and as he admits that he thought he was devisee of the land when he entered the entry was not tortious and his possession was that of trustee under the will. He could not, therefore, set up the statute of limitations and claim the land as his own. The said James J. Bell took a cross-appeal to the Supreme Court from this decision, and is, also, a respondent to the main appeal on the question of the construction of the will.

S. H. Blake Q.C. for the appellants, the Wrights, and *Beck* for the other appellants in the main appeal, argued that the testator's devisees took *per capita*, citing *Tyndale* v. *Wilkinson* (1); *Payne* v. *Webb* (2); *Wood* v. *Armour* (3); *Bradley* v. *Wilson* (4); *Martin* v. *Holgate* (5); *In re Orton's Trust* (6); *In re Philps' Will* (7).

McCarthy Q.C. and *S. H. Osler* for the respondent, James J. Bell and *Hoyles* Q.C. for Charles J. Bell referred to *In re Campbell's Trusts* (8); *West* v. *Orr* (9); *In re Smith's Trusts* (10); *In re Goodhue* (11); *Board* v. *Board* (12).

In the cross-appeal *McCarthy* Q.C. and *Osler* for the appellant argued that James J. Bell was never an acting trustee and could claim the benefit of the statute

(1) 23 Beav. 74.
(2) L. R. 19 Eq. 26.
(3) 12 O. R. 146.
(4) 13 Gr. 642.
(5) L. R. 1 H. L. 175.
(6) L. R. 3 Eq. 375.
(7) L. R. 7 Eq. 151.
(8) 31 Ch. D. 685.
(9) 8 Ch. D. 60.
(10) 7 Ch. D. 665.
(11) 19 Gr. 366.
(12) L. R. 9 Q. B. 48.

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of limitations, citing *Dickenson* v. *Teasdale* (1); *Cunningham* v. *Foot* (2); *Sands* v. *Thompson* (3); and that never having accepted the trust the moment he disclaimed the deed as to him was void *ab initio*. *Doe d. Chidgey* v. *Harris* (4); *Paine* v. *Jones* (5).

Blake Q.C. and *Hoyles* Q.C. for the respondents cited *Ryan* v. *Ryan* (6); *Gray* v. *Bickford* (7); *In re Arbib & Class's Contract* (8).

Sir W. J. RITCHIE C.J.—After giving this case every consideration I am unable to arrive at the conclusion which my brother judges have reached, and therefore put forward my views with diffidence and doubt. My impression certainly is that the testator contemplated an equal distribution among his sons and daughters living at the time of distribution, and the children of the sons and daughters who may have departed this life previously thereto, meaning thereby that the children should represent their parents, not that the shares of the sons and daughters then living should be reduced by giving to the children of deceased sons and daughters more than the shares of the sons and daughters then living, thereby making an unequal distribution between the living sons and daughters, and the sons or daughters who may have departed this life; in other words I think the children of Mary Houghton took substitutionally in lieu of their mother; consequently I think that each child of Mary Houghton is not entitled to an equal share of the estate with each of the sons and daughters of the testator living at the death of Deborah Bell, and that they are not entitled to rank with such sons and daughters *per capita*.

(1) 1 DeG. J. & S. 52.
(2) 3 App. Cas. 974.
(3) 22 Ch. D. 614.
(4) 16 M. & W. 517.
(5) L. R. 18 Eq. 320.
(6) 5 Can. S. C. R. 387.
(7) 2 Can. S. C. R. 431.
(8) [1891] 1 Ch. 601.

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Ritchie C.J.

They do not take as claiming in their own right but as representing parents.

I think the object of the testator was to divide his property at the death of Deborah Bell, the last unmarried daughter of the testator, equally among his sons and daughters then living and the children representing his deceased sons and daughters; in other words that he neither desired to cut down the shares of his living sons and daughters, nor to increase the shares of the deceased sons and daughters, thereby destroying all equality, which it seems to me it was the testator's intention to secure, but that the sons and daughters should take their shares and the children of the deceased sons and daughters the shares of their respective parents, thereby preserving equality among his children; in other words, I think the children of the deceased parent took a contingent vested interest at the time of the parent's death, and the testator intended to have the division as it would have been if all the sons and daughters had survived, but substituting the children of each deceased son or daughter to the share their parent would have taken if living.

Therefore the appeal should be dismissed.

As to the cross-appeal, I do not think John Joseph Bell has established any title to the property under the statute of limitations. I think he entered on the property under the will of his father by which he was constituted a trustee, and cannot now claim the property in his own right. I entirely agree with the conclusion of the learned trial judge on this branch of the case, and think the cross-appeal should be dismissed.

STRONG J.—This appeal involves two questions, one relating to the construction of the will of Thomas Bell, which is the subject of the principal appeal, and the other as to the application of the statute of limitations

in favour of James Joseph Bell, who has raised this last point by a cross-appeal.

The clause of the will which we are required to construe is as follows:—

> When my beloved wife shall have departed this life I direct and require my trustees and executors hereinafter named to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto.

The gift then clearly was to such of the testator's sons and daughters who should survive the period of distribution, that period being the death of his widow if she should survive her daughters or the marriages of all of them, or, in the event of the widow dying leaving any unmarried daughters, then the marriage or death of the last unmarried survivor of these, an event which happened when Deborah Bell died in 1883.

Therefore, as regards the testator's sons and daughters, the gift to them having been contingent until that event—the death of the last survivor of the life tenants in 1883—thereupon became vested in such sons and daughters as then survived. As regards the testator's grandchildren who were to take under this devise the exact period of vesting is not quite so clear. According to *Marti* v. *Holgate* (1), if it applied, the interests of the children of sons and daughters of the testator who died before the period of distribution would not be contingent upon their surviving the last tenant for life but would become vested on the death of their parents, the reason for this being that, according to the construction which is authorized by *Martin* v. *Holgate* (1), the words "who may be then living" being confined by the testator to his sons and daughters, and not repeated as to the children of those sons and

(1) L. R. 1 H.L. 175.

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daughters, could not by implication be extended to the grandchildren, who would therefore take vested interests on the death of their fathers and mothers. In *Martin* v. *Holgate* (1) the devisee was to distribute and divide amongst such of certain nephews and nieces of the testator as should be living at the death of his widow, "but if either should then be dead leaving issue such issue should be entitled to their father and mother's share." The question upon this form of gift was whether a nephew having died in the lifetime of the tenant for life leaving a daughter that daughter took a vested interest upon her father's death, or whether she took only contingently upon her surviving the widow, the tenant for life, and it was held that she took a vested interest immediately upon the death of her father. It is to be observed that in that case there was no difficulty in ascertaining the share which thus vested since the children of nephews and nieces who died before the widow were to take their "father's or mother's share." Had the shares of the children of the first beneficiaries been dependent in that case, as they are in this, upon the fluctuations in a class which could not possibly be ascertained with certainty until the termination of the life estates the decision in *Martin* v. *Holgate* (1) might have been different. Otherwise, in the view which I take and which I have yet to mention as to the shares which the devisees, grandchildren as well as children, of the testator take under this will, this inconvenience would follow. The shares given to the children of sons and daughters who might die not being here given by way of substitution for those which their fathers and mothers would have taken if they had survived the life tenants, but original shares which could not be exactly ascertained until the period of distribution (the death of the last life tenant) arrived, the shares originally

(1) L. R. 1 H. L. 175.

vested would be liable to be diminished and divested *pro tanto* by subsequent events. I think, therefore, that the case of *Martin* v. *Holgate* (1) does not apply in a case like this where it is apparent that the exact shares of none of the devisees can be ascertained until the arrival of the period of distribution. Therefore, even if the will had not contained the direction which it does contain as to personal enjoyment in specie, instead of a sale and conversion by the trustees at the election of the class who were to take, I should have considered *Martin* v. *Holgate* (1), so far as it is relied on as an authority showing who were the persons composing the class of devisees to take in the present case, though of course a decision of the highest authority and conclusive as to a devise in the same terms, yet of doubtful application to the particular will before us in the present case.

It appears, however, that this question as to who were the beneficiaries to take may be solved by a reference to the direction in this particular will to which I have just now incidentally adverted. The words of the testator are:—

> But if my said family should consider it more to their advantage to keep the yearly income and divide it among them in the same manner they are directed so to do.

We have here an indication of an intention entirely repugnant to the notion that some of the devisees might take vested interests even though they should pre-decease the last life tenant. The word "family" refers to the whole class of devisees, sons and daughters and the children of sons and daughters, taking under the will; these persons are, the testator says, to have the option of enjoying in specie, so that the sale by the trustees is not to be imperative. This clearly indicates that there was to be the possibility of actual personal enjoyment *in specie* by the objects of the testator's

(1) L. R. 1 H. L. 175.

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bounty at the death of the last tenant for life, and this could not be if the children of those who died before that event, and who in their turn might pre-decease the tenant for life, were to take vested interests which would be subjects of alienation, and might therefore become vested in strangers, a construction inconsistent with the testator's intention that there might be enjoyment in specie by the "family" if they should so elect, at the death of the tenant for life.

The question here is as to the ascertainment of a class, and recognizing the case of *Martin* v. *Holgate* (1) as an authority binding on me to the fullest extent I do not think it applies, as regards the point now under consideration, to the terms of this will. The construction, then, which I attribute to the testator's language is, that in the events which have happened he has given his property to a class composed of such of his children, sons and daughters, as survived Deborah Bell, and such of the children of sons and daughters who pre-deceased Deborah Bell as were living at her death, thus excluding altogether children of sons and daughters who survived their parents (children of the testator) but died before the last tenant for life. This construction, besides being, in my opinion, the natural meaning of the testator's language, has also the support of authority so far as authority is of consequence in questions of testamentary construction. I refer to the decision of Wood V. C. in *Re White's Trusts* (2) as a case which appears to me to be strongly in point.

As regards the question principally argued, that as to the shares taken by children and grandchildren of the testator respectively, I am compelled to differ from the learned judges of the court below. I can find nothing in this will which warrants the construc-

(1) L. R. 1 H. L. 175. (2) Johns. 656.

tion contended for, namely, that the children of sons and daughters took their father's and mother's shares, in other words, took *per stirpes* and not *per capita*. It seems to me that the word "equally" used by the testator applied, as I am of opinion it must have, to a class all the members of which are to be ascertained at one and the same time; the period for distribution, the death of the last tenant for life, means exactly what, taken in its primary signification, it imports, namely, that each member of the class is to have the same share.

Further, the case of *Martin* v. *Holgate* (1) certainly applies here to show that the gift to the children of sons and daughters in this will is to be construed as a gift *per capita*. It has long been a settled rule of construction that under a gift by will to A, and the children of B, without more, all take equal shares—*per capita* and not *per stirpes*. In *Blackler* v. *Webb* (2), Lord King says that under such a devise "each should take *per capita* as if all the children had been named by their respective names." Then we have here the addition of the word "equally" to which effect could not be given save by holding that it applies as between the testator's sons and daughters on the one hand and his grandchildren on the other as well as between the latter as amongst themselves.

The class then being once ascertained all its members must take equally, and to hold otherwise, as would be done by saying that the grandchildren of the testator took *per stirpes*, *i.e.* took their parents' shares only, would be to make them take unequally with the other devisees in direct contradiction to the terms of the will.

That the will thus construed may seem harsh or capricious cannot of course have any influence in its

(1) L. R. 1 H. L. 175. (2) 2 P. Wm. 383.

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construction. The testator had a right to make any will he chose so long as he did not offend against the rules of law, and we can only derive his intention from the actual words he has used read in conjunction with the context. I am, therefore, compelled to differ from the full and able judgments delivered in the Court of Appeal on this part of the case, and to express my concurrence in the judgment of Mr. Justice Ferguson.

As regards the cross-appeal, by which James Joseph Bell seeks to have the benefit of the statute of limitations given to him, I am of the same opinion as the majority of the Court of Appeal who in this respect agreed with Mr. Justice Ferguson.

No doubt, according to *Butler and Baker's case* (1), which was determined in *Siggers* v. *Evans* (2) to be applicable to gifts and conveyances of estates burthened with onerous trusts, the legal estate vested in James Joseph Bell until disclaimer even though he had no knowledge of the will, although a court of equity would not have considered him liable as a trustee as regards the performance of active trusts until he had notice of the trusts and had accepted or at least acquiesced in them (3). The statute of limitations would not, however, have run in favour of James Joseph Bell by reason of a possession taken and held in ignorance of the will and the trusts contained in it for the statutory period of limitation. The case of *Lister* v. *Pickford* (4) is authority for this. Lord Romilly there says :

> Suppose that they (referring to certain trustees) had imagined *bonâ fide* that they themselves were personally entitled to the property, and that they were not trustees of it for any one, it would nevertheless have been certain that they would have been trustees for the *cestuis que trust* and no time would run while they were in such possession.

(1) 3 Rep. 26*a*.
(2) 5 E. & B. 380.
(3) See Lewin on Trusts 9 ed. p. 209.
(4) 34 Beav. 583.

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The point, however, does not really arise here for either James Joseph Bell had notice of the will as Mr. Justice Ferguson held he had, in which case he would of course be incapable of setting up the statute of limitations against the beneficiaries taking under it, or being ignorant of the will and being let into possession in the manner he himself describes by his brother John Bell, who had full knowledge of the will and its trusts and was undoubtedly a trustee under it, he (James Joseph Bell) was a tenant at will claiming under an express trustee, and therefore a person in whose favour the statute would not run as is expressly provided by the 30th section, of R. S. O. c. 111. This is well pointed out in the judgment of Mr. Justice Maclennan with whom I agree as regards this part of the case.

John Bell did not of course acquire, under his purchase from the purchaser at the tax sale, any title paramount to that which he took under the will, but the estate he so acquired became in all respects subject to the trusts of the will. This does not appear to have been doubted by the learned judges in the court below, and is too plain to require further observation.

The appeal should be allowed with costs and the cross appeal be dismissed with costs, the effect of which will be to restore the judgment pronounced by Mr. Justice Ferguson in every respect. I do not think that the costs of the appeal should come out of the estate; it should be dismissed with costs to be paid by the appellants; James Joseph Bell must pay the costs of the cross appeal both here and in the Court of Appeal.

FOURNIER J.—I am of opinion that the appeal should be allowed and the cross-appeal dismissed.

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TASCHEREAU J.—I have come to the same conclusion for the reasons assigned by Mr. Justice Strong.

PATTERSON J.—We have here a trust to convert the estate into money at the period of distribution and

> to divide the same equally among those of my said sons and daughters who may then be living and the children of those of my sons and daughters who may have departed this life previous thereto.

The general rule of construction was concisely stated by Vice-Chancellor Sir James L. Knight Bruce in *Leach* v. *Leach* (1) as being that:

> Words in a will are to be construed according to their ordinary sense and meaning, unless the testator has declared, or by the context shown, that he uses them otherwise.

There is nothing in this will, outside of the passage itself, to modify its meaning, and I cannot discover anything in the words used, or any justification in the authorities cited to us or in any of the numerous other cases at which I have looked, for holding otherwise than that the class of beneficiaries consists of the living sons and daughters and the children of those deceased, all taking *per capita*.

I was for some time disposed to look for an indication of a different intention in the circumstance, which I think had some influence in the court below, that the period of distribution, when the class was to be ascertained, was not at the death of the testator but at an indefinite time which, in the event, proved to be half a century later; but I cannot satisfy myself that that circumstance can, upon any grounds more substantial than mere conjecture, be taken to modify the literal meaning of the language. There are other circumstances peculiar to this will but not, so far as I can perceive, affording a safe basis for reasoning as to the intention of the testator. For example, the sons

(1) 2 Y. & C. C. 495, 499.

who were to share in the distribution took no benefit in the meantime, nor did any daughter except while she remained unmarried. Any attempt to reason from these things is as likely to lead towards the *per capita* as towards the stirpetal distribution. The leading idea may be plausibly argued to be to provide for the widow and the unmarried daughters, no thought being given to the maintenance or advancement of the others, and then to divide among the whole of the indicated class.

I can hardly find reason for saying, as Vice Chancellor Malins said in *Payne* v. *Webb* (1) that :

> If I were at liberty to conjecture what the testator intended to do I should have no doubt that he meant to divide his residuary property into seven shares, giving one share to each of his surviving children, and one share *per stirpes* to the children of the deceased daughters.

I quote *mutatis mutandis*, but even if I entertained that opinion I should feel myself bound, as the Vice Chancellor did in that case, to construe the words according to their literal meaning.

Several of the most instructive of the recent decisions are those of Lord Justice Kay when a judge of the chancery division, such as *Lord* v. *Hayward* (2), and *In re Hutchinson's trusts* (3). They are not so directly upon the point in discussion as to call for citation at present, but I find in the report of the argument of that learned judge when at the bar, or of Lord Macnaughten who was with him, in *Swabey* v. *Goldie* (4), the following passage which I may adopt as apposite and as, in my opinion, borne out by the cases he cites :

> The principle of the cases is that where the fund is to be kept together and divided at one period there is no reason for inferring distribution *per stirpes;* but if it is divisible at different times then the distribution *per stirpes* is to be preferred : Hawkins on Construction

(1) L.R. 19 Eq. 26.
(2) 35 Ch. D. 558.
(3) 21 Ch. D. 811.
(4) 1 Ch. D. 380.

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of Wills (1); *Willes* v. *Douglas* (2); *Arrow* v. *Mellish* (3); *Waldron* v. *Boulter* (4); *Turner* v. *Whittaker* (5); *Wills* v. *Wills* (6); Jarman on Wills (7).

I am of opinion that on this branch of the case the appeal should be allowed and the judgment of the court of first instance restored.

Upon the cross-appeal of James Joseph Bell he had the judgment of the court of first instance and also that of the Court of Appeal against him, the decision of the latter court not being unanimous.

I have examined the evidence carefully and I am satisfied that the judgment is correct.

The account given by the appellant of the way he was put into possession of the lands by his brother John Bell, and the understanding on which he entered upon the occupation of the lands which has lasted for nearly thirty years, is to my mind simply incredible, and it does not gain in plausibility from the style of his answers as reported by the shorthand writer. Setting all that aside, however, and assuming that he had the idea when he entered upon the farm that the will of his father gave it to him, I do not see on what principle that alters the fact that he was a devisee in trust under the will, or deprives the *cestuis que trustent* of the protection of the statutory enactment (8) that:

> No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be barred by any statute of limitations.

It might, perhaps, have been more satisfactory if John Bell and Deborah had survived so that we might have had the benefit of their testimony, but if it were important that we should know John Bell's understanding of the position enough has been shown, even

(1) P. 114.
(2) 10 Beav. 47.
(3) 1 DeG. & S. 355.
(4) 22 Beav. 284.
(5) 23 Beav. 196.
(6) L. R. 20 Eq. 342.
(7) 3rd ed. vol. II, pp. 181-183.
(8) R.S.O. (1887) c. 111 s. 30 (2).

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by the appellant himself, to make it apparent that John's understanding was very different from that on which the appellant relies. In fact all that we hear of John's doings, the action that he brought to eject Simon Peter Munger in the name of the appellant conjointly with his own, the repurchase of the lands that were sold for taxes, and other things, are consistent with the true position under the will. There is not a shadow of reason to doubt that John Bell fully understood the real situation, and there is no conceivable motive for his misrepresenting it as the appellant would have it believed that he did.

The fact of crucial importance is that the appellant held under an express trust by the terms of the will, and that the statute protects the interests given by the same will to the others.

The cross-appeal should, in my opinion, be dismissed.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for the appellants, The Houghtons: *Beck & Code.*

Solicitors for the appellants, The Wrights: *Lefroy & Boulton.*

Solicitors for the respondent, James J. Bell: *Osler, Teetzel, Harrison & McBrayne.*

Solicitors for the respondent, W. H. Wright: *Bartlett & Bartlett.*

Solicitors for the respondents, The Millers: *Mulock, Miller, Crowther & Montgomery.*

Solicitors for the respondent, Susan Nagle: *Reeve & Woodworth.*

Solicitors for the respondent, Chas. J. Bell: *Moss, Barwick & Franks.*

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THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—By-law—Water supply—Rates to consumers—Discrimination.

Under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, &c., supplied by the corporation with water, the rates imposed must be uniform. Patterson J. dissenting.

A by-law of the City of Toronto excepting Government institutions from the benefit of a discount on rates paid within a certain time is invalid as regards such exception. Patterson J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the City of Toronto.

The sole question to be decided by this appeal was as to the validity of a by-law of the City of Toronto fixing the rates to be paid for water supplied to the inhabitants so far as it discriminated between the Government and other institutions exempt from taxes and the general body of consumers.

The by-law in question contained the following provision:—

All such half-yearly rates paid within the first two months of the half year for which they are due, shall be subject to a reduction of

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

(Sir W. J. Ritchie C. J., was present at the argument but died before judgment was delivered.)

(1) 18 Ont. App. R. 622. (2) 20 O.R. 19.

fifty per cent, save and except in cases of Government or other institutions which are exempt from city taxes, in which cases the said provisions shall not apply.

The Dominion Government paid the rates imposed for some years under protest, being refused the discount of fifty per cent, and then brought an action against the city to recover the amount of the rebate which would have been allowed but for the exception in the by-law, claiming that the city had no power to discriminate between consumers as to the rates to be paid.

The statutes of the Ontario Legislature bearing on the question are set out in the judgment of the Chief Justice.

The case was heard by Mr. Justice Ferguson who dismissed the action, and his decision was affirmed by the Court of Appeal.

Reeve Q.C. and *Wickham* for the appellant.

Christopher Robinson Q.C. for the respondents.

THE CHIEF JUSTICE.—The question presented for decision by this appeal involves the validity as applied to the crown representing the Dominion Government, of a by-law of the City of Toronto, passed on the 23rd of April, 1888. By this by-law it was enacted that all half-yearly water rates

paid within the first two months of the half year for which they are due shall be subject to a reduction of fifty per cent, save and except in the cases of Government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply.

The crown in right of the Dominion has vested in it certain public property in the city of Toronto, namely: The Custom House and Customs Warehouse, the Post Office, and the Inland Revenue and Receiver General's Offices; and for several years prior to the

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institution of this action water had been supplied to these buildings by the Water Works Department of the city of Toronto. From the date of the by-law of the 23rd of April, 1888, the Water Works Department refused to make any rebate on the payment by the Dominion Government of its water rates within the time prescribed for payment by the by-law and the full amount of these rates have been paid under protest. This action has been brought to recover back the amount of the discount or rebate claimed by the crown, equal to fifty per cent, or one-half of the whole amount paid.

It has been agreed between the crown and the respondent, as appears by a consent paper which has been filed with the registrar, that the determination of this appeal shall depend altogether on the validity of the by-law. All technical questions as to the right to recover back money paid under protest are, therefore, to be excluded from consideration.

The cause was heard on a motion for judgment on the pleadings before Mr. Justice Ferguson who dismissed the action, and this judgment has been affirmed by the Court of Appeal. The crown has now appealed to this court.

By the Ontario act (35 Vict. cap. 79), authority was given to the City of Toronto through the agency of certain commissioners to construct water works in and for the use of the city and its inhabitants. These water works were to be constructed by, vested in and managed by certain commissioners. By the 12th section of this act, it was enacted that :

> The commissioners shall have power and authority, and it shall be their duty, from time to time to fix the price, rate or rent which any owner or occupant of any house, tenement or lot, or part of a lot, or both, in, through or past which the water pipes shall run shall pay as water rate or rent, whether such owner or occupant shall use the water or not having due regard to the assessment and to any special benefit and advantage derived by such owner or occupant, or conferred upon

him or her or their property by the water works and the locality in which the same is situated.

And after a provision, not material here, the section proceeds thus:

And the water commissioners shall also have power and authority from time to time to fix the rate or rent to be paid for the use of the water by hydrants, fire plugs and public buildings.

By 40 Vict. cap. 39, sec. 9, the commissioners were empowered to place meters upon any service pipes or connections within or without any house or building as they might deem expedient.

By 41 Vict. cap. 3, the water-works and the powers of the commissioners were transferred to and vested in the Corporation of the city of Toronto.

By R.S.O. 1887, cap. 192—(the General Water-works Act), it was by section 2 enacted that:

The corporation of every city, town or incorporated village, shall have power to construct, build, purchase, improve, extend, hold, maintain, manage and conduct water-works and all buildings, materials, machinery and appurtenances thereto belonging in the municipality and in the neighbourhood thereof as hereinafter provided.

Section 19 was as follows:

Subsection 1: The corporation shall regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof and the times of payment, and they may erect such number of public hydrants and in such places as they shall see fit, and direct in what manner and for what purpose the same shall be used: all which they may change at their discretion, and may fix the rate or rent to be paid for the use of the water by hydrants, fire plugs and public buildings.

By section 20 of the same act corporations are empowered to make by-laws for the management and conduct of the water-works and for the collection of the water rent, and also for allowing a discount for pre-payment.

By the General Municipal Act of Ontario (R.S.O. 1887, cap. 184, sec. 480, subsec. 3), it is made obligatory on a municipal corporation which has con-

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structed water-works, where there is a sufficient supply of water, to supply with water all buildings within the municipality situate upon land lying along any supply pipe of the corporation, upon the same being requested by the owner or occupant or other person in charge of the building.

Both the courts below were of opinion that the buildings belonging to the Dominion Government, to which water was supplied, were public buildings within the meaning of 35 Vict. cap. 9 section 12, and of section 19 of the general act R.S.O. cap. 192. It was also hold that these buildings were "Government institutions" within the terms of the by-law.

From these conclusions I see no grounds for differing and I therefore adopt them as well as the reasons upon which they are founded. I also agree that the by-law is not to be considered as imposing a tax upon the Dominion Government, and I do not understand the appellant's case to be rested on any such ground. The learned counsel for the appellant, in his factum as well as in the argument at this bar, impugned the decision under appeal not as sanctioning the imposition of a tax upon the Dominion, but as supporting a by-law which contravened public policy in rendering nugatory to some extent the general law and an express provision of the British North America Act exempting the property of the Dominion from taxation, by making that exemption the ground for a discrimination against the crown in the price charged to it for water; that is by refusing to allow it the benefit of the discount. This I consider something very different from an imposition of a tax. It is not to tax the crown but to make the crown pay a higher price for the supply of an element which the city was bound to furnish to it, for the reason that the property to which it was supplied was by law and in the public

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interest exonerated from taxation. The authority to enact the by-law allowing a discount is to be found in subsection 2 of section 20 of the general Water-works Act of 1887, having originated in the general act of 1882. I consider the authority to pass a by-law to regulate the price of the water is to be derived from section 19 of the general act. This section, it seems to me, supersedes section 12 of the local act of 1871-1872. This is not a matter of much importance. The reason that I refer to it is that the 12th section of the latter act directs that the water rates shall be fixed with a due regard to the assessment of the property supplied, meaning of course the assessment for the purpose of general taxation. Even if we are to treat the special act as being still in force, and are to attribute this by-law to the powers contained in it, this can make no difference as this reference to the assessment and to any special benefit which might be derived from the water-works applies only to the case of private owners or occupants, and has no reference whatever to the case of public buildings, the provision relating to which forms an independent branch of the same section. I am of opinion, however, that the 12th section of the special act is altogether superseded by the 19th section of the general act.

A good deal has been said in argument, and some allusion was also made to it in the judgments below, about the reasonableness of charging differential rates against persons not paying taxes. I am unable to recognize any force in this argument. The water-works were not constructed for the benefit of the rate-payers alone, but for the use and benefit of the inhabitants of the city generally, whether tax-payers or not. The provision embodied in section 480, subsection 3 of the Municipal Act (which is referred to above) has a most important bearing upon this. That provision

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makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body entrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. It must therefore have been intended by the legislature that the water was to be supplied upon some fixed and uniform scale of rates for otherwise the city might, by fixing high and exorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city, like its predecessors in title the water-works commissioners, is in a sense a trustee of the water-works, not for the body of rate-payers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable. This obligation is to be enforced by subjecting the by-laws indispensable for the legal enforcement and collection of rates, and which the city council have power to pass, to a judicial scrutiny in order to ascertain whether they comply with the conditions which, as before stated, it is a fair implication from the statute they were intended to be subjected to, and also whether they conform to the requisites essential to the validity of all municipal by-laws in being, so far as the power to enact them is left to implication, consistent with public policy and the general law, uniform in operation, fair and reasonable. A writer of high authority on the law of Municipal Corporations (1), thus states the law on this head:

(1) Dillon ed. 4, sec. 319.

In England the subjects upon which by-laws may be made were not usually specified in the King's Charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely: that every by-law must be reasonable and not inconsistent with the charter of the corporation, nor with any statute of Parliament; nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the right of private property. In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state.

And this is not new law for we find the same principle applied to the by-laws of a municipal corporation created by Royal Charter in a case reported in Hobart (1).

The first objection to this by-law is that it expressly contravenes the general policy of the law in disregarding an express enactment of the paramount legislature as well as a well defined rule of the common law. By the 125th section of the British North America Act it is enacted that:

No lands or property belonging to Canada or any province shall be liable to taxation.

Again, by an ancient and well established rule of the common law, the property of the crown is not subject to a tax imposed by a general law, and in no case unless expressly made so liable by statute (2). I entirely agree that this by-law does not attempt directly to contravene these provisions of the statute and the general law by imposing a tax or anything in the nature of a tax upon the property of the Dominion; but it does, in my judgment, contravene the general policy of the law embodied in this enactment and rule, when

(1) *Norris* v. *Staps Hobart* (Ed. 1724) p. 210.

(2) Chitty's Prerogatives of the Crown, p. 377.

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it makes the exemption conferred by paramount legislation and lawful prerogative the condition for discriminating against the crown and compelling it to pay an enhanced price for the water required for use in its public buildings. I can conceive no stronger case of a by-law conflicting with the policy of the law.

Then, a distinct ground for holding this by-law bad, irrespective altogether of the ground before stated, is that it is unreasonable and unfair in making an unwarranted discrimination against a particular consumer of water. In the case of the *Red Star Steamship Co.* v. *Jersey City* (1) a by-law of a water board requiring certain consumers of water to put in expensive meters, not making such requirement uniform and general, was held bad on this ground. The cour in its judgment says:

> The by-laws of a board of managers of city waterworks for the supply of water to the citizens must be consistent with the charter, and they must not conflict with any constitutional, statutory or common law rights of property of the citizen. This I understand to be the meaning of the proviso in section 87 of the charter, that the by-laws, rules and regulations are not to be inconsistent with the constitution and laws of the State of New Jersey or of the United States. They cannot make unwarranted discrimination in particular cases, or arbitrary charges, with the penalty of forfeiture of the right to use the water provided at the public expense for the benefit of all the citizens making a fair compensation for its use.

In this case the charter expressed the limitation that the by-laws were to be consistent with the constitutions and laws, but this does not make it any the less an authority in the present instance, for here the same qualification must be implied.

In another New Jersey case, *Dayton* v. *Quigley* (2) the Chancellor says:

> The water-works belong to the municipality and are for the benefit of the inhabitants of the city. The inhabitants are entitled to the use of the water on compliance with reasonable regulations.

(1) 45 N. J. L. R. 246. (2) 29 N. J. Eq. R. 77.

If these cases are correct exponents of the law, and I have no reason to doubt that they are approved as they have been by the distinguished jurist in whose work I find the reference to them, it is impossible that this by-law can be maintained.

Had the Provincial legislature possessed plenary powers of legislation, unfettered by any provision in the British North America Act, I should have considered that the by-laws which it empowered first the water-works commissioners and then the city to make must have been fair, reasonable and uniform regulations as regards rates. Of course in the case just supposed the exact case presented here could not have arisen, but even so, and assuming that the Provincial legislature could confer unlimited authority to impose arbitrary and discriminating rates for the water, they would not be deemed to have intended to do so from a power to make by-laws expressed in general terms. But the power of the legislature of Ontario was not in this respect unfettered; it was bound to have regard to the provision of the British North America Act, and even if it had in so many words provided directly and immediately, without any delegation to the commissioners or to the city to pass by-laws, that the property of the Dominion Government should be excepted from the benefit of any by-law which might be made in exercise of the power to allow a discount such a provision would have been palpably unconstitutional and invalid. The Provincial legislature, however, has not done this and we must intend that they did not mean to attempt to confer any such power upon the corporation, either to assume to delegate a power to do that by by-law which they could not themselves have done directly, or any other power which conflicted in any way with those conditions which in the absence of express words are

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always implied in a grant of power to a municipal corporation to make by-laws.

There can be no practical difficulty now in providing for uniform rates for all public buildings since the corporation have the power at their will to affix meters either in the inside or to the outside of any public building in which water is consumed.

It was insisted at the argument that this by-law could not be attacked in a collateral proceeding like this, but that an application should have been made to quash it. Whatever force there may have been in this objection has become immaterial since the parties have consented that the appeal should depend exclusively on the validity of the by-law, and have asked the court to dispose of the case on that ground.

The appeal must be allowed and judgment entered for the crown for the amount of the rebate claimed. The crown must also have costs in both courts below.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—That the places mentioned to have been supplied with water and in respect of which the question in this case arises are within the exception contained in the by-law of the City of Toronto under consideration cannot, I think, admit of any doubt and the only question in the case appears to me to be, whether the city council had any power to enact such an exception.

There can be no doubt that the corporation had a sufficient supply of water to enable them to supply, for they did supply, the buildings in question with water. They were therefore under the obligation imposed upon them by subsec. 3 of sec. 480 of ch. 184 R.S.O. 1887 to supply the buildings with water. Now that obligation must be construed, as it appears to me, as extend-

ing to this, that they must supply these buildings, although they are the property of the Dominion of Canada and are not assessable for city taxes, at the same rate or rent for the water consumed upon the premises as for the like service owners of buildings which are liable to be assessed for city taxes are supplied with water. There are two descriptions of water rates which are quite distinct, the one from the other, the one in the nature of an ordinary tax, and which whether water be or be not supplied for consumption is imposed upon all assessable real property in the municipality for raising a fund for the purpose of receiving payment of debentures issued for a large sum of money, the cost of construction and maintenance of the water-works, the other which is charged as a rent or rate for water actually supplied and consumed upon the premises to which it is supplied, and which is charged for at a rate fixed in proportion to the size of the building to which it is supplied, and to the purposes for which it is required—the number of baths, boilers and such like things for which it is supplied. Now as to the rate imposed upon the assessable property, it must be imposed equally upon all the property liable to such assessment in proportion to the assessed value of such property. With that rate we have nothing to do—there is none in the present case for the property of the Dominion, which the buildings here are, is not assessable for city taxes. The only questions therefore which appear to exist in the present case, are: 1st. As to the water rate charged for water actually supplied and consumed upon the premises to which it is supplied, can the corporation in any manner, directly or indirectly, impose upon one consumer of water whom they are under statutory obligation to supply with water, a greater rate or rent for the water supplied than under like circumstances, that is to say as to water supplied for

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consumption, they impose upon other consumers? and 2nd. Does a by-law which entitles one consumer to a reduction of the amount of the rate or rent due by him for water supplied to him by payment in advance of a reduced rate, and which denies to another the like reduction of the amount of rate or rent due by him for water supplied to him, constitute such inequality in the rate or rent charged for the water supplied as makes this distinction so made between the consumers of water illegal? By ch. 192, R.S.O. 1887, secs. 19 and 20, it is enacted that the corporation shall regulate the distribution and use of the water in all places and for all purposes where the same may be required and from time to time shall fix the prices for the use thereof and the items of payment, and they may fix the rate or rent to be paid for the use of the water by hydrants, fire-plugs and public buildings and for the collection of the water rent and water rate, and for fixing the times when and the places where the same shall be payable, and also for allowing a discount for pre-payment and in case of default of payment may enforce payment, &c.

Now by this power so conferred upon the corporation the legislature must, I think, be understood to have intended and enacted that the rate or rent charged to consumers of water for the water supplied to and consumed by them must be an equal rate charged to all consumers upon the like principle and just as the rate imposed upon assessable property must be an equal rate imposed upon all liable to assessment, and in my opinion the corporation has no power to impose a greater rate or charge for water supplied to a consumer who is not liable for or subject to the assessable rate upon real property than under like circumstances they do impose upon consumers of water who are subjected to such assessable rate; and I cannot but think that a by-law which purports to

give an allowance of fifty per cent by way of deduction from the rate or rent due for the water supplied and consumed to consumers who are also assessable rate-payers of the municipality and who shall pay such reduced amount of the half-yearly rate charged to them for water supplied within the first two months of each half year, that is to say so much in advance, but denies and refuses the like abatement for like payment in advance upon the amounts due as half-yearly rent or rate upon the water supplied to other consumers and because they are not subject to assessment for ordinary municipal rates, for that is what the by-law under consideration does, constitutes an inequality in the rate charged for water supplied which is not authorized by the statute.

It is idle to say that such an inequality in the amounts payable by such respective consumers of water for the water consumed by them, however equal in other respects the rate may be, is not inequality in the rates charged to such respective consumers of water for the water supplied to them. I am of opinion, therefore, that a by-law which professes to authorize such a distinction is *quoad* the distinction *ultra vires* of the corporation and invalid.

PATTERSON J.—I have not been able to see any reason for doubting the correctness of the judgment in this case.

The charge for water is not a tax.

The Provincial legislature cannot tax Dominion property.

Therefore, if this was a tax, and if the city is obliged to supply the Dominion officers with water, it would have to be supplied free from any charge.

That position is not taken by the appellant. On the contrary it is expressly disclaimed in his factum.

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Nor is it asserted that in this matter any peculiar duty towards the crown exists.

The crown has no more right to insist upon being supplied with water than has the owner of any building in the city.

It is the duty of the city (1) to supply with water,

> All buildings within the municipality situate upon land lying along the line of any supply pipe of the said corporation, upon the same being requested by the owner, occupant or other persons in charge of such building.

but it is not its duty to supply it free of charge, or free from restrictions as to the quantity to be used, or the mode in which, or the purposes for which, it may be used (2).

> The Corporation shall regulate the distribution and use of water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof and the time of payment * * and may fix the rate or rent to be paid for the use of water by hydrants, fire plugs and public buildings, and from time to time make and enforce necessary by-laws, rules and regulations for allowing a discount for prepayment.

The water-works have been constructed at the cost of the ratepayers of the city (3) by levying a rate upon all ratable property in the city of Toronto.

We look at the assessment act (4) and we find a formidable list of buildings, institutions, and property of other kinds exempt from taxation.

Buildings belonging to the Dominion Government are in the general category. The circumstance that they do not owe their exemption solely to this provincial legislation does not distinguish them from churches, schools, hospitals, poor houses, scientific institutions, orphan asylums, or any other of the long list.

(1) R.S.O. 1887, c. 184, s. 380, subs. 3.

(2) R.S.O. 1887, c. 192, s. 19.

(3) 35 V. c. 9; 37 V. c. 75; 39 V. c. 4; 41 V. c. 40.

(4) R.S.O. 1887, c. 193, s. 7.

The common feature is that they are exempt; they are not ratable property and contribute nothing to the costs of the water-works.

When therefore the city, fixing a uniform price for water supplied to buildings, provides that ratepayers may have an abatement if they pay promptly, no principle that I understand to apply to the case is violated by that provision.

Inequality and discrimination are denounced as odious and unjust but the appellant's denunciation of them is rather an inverted argument. It is in effect insisted that there shall be discrimination in favour of the properties that bear no share of the ordinary municipal burdens. Those properties enjoy the benefit of the municipal outlay to which they do not contribute, in matters which are common to all the inhabitants, roads, lights, police, &c., &c., and it is claimed that in respect of this special service of water they shall be made better off than the ratepayers by receiving the same abatement of price while they pay nothing towards the expenses of the construction of the works.

We have no question of the reasonableness or unreasonableness of the prices charged. The matter is contested as one of principle, and once we divest ourselves of the notion of a tax and set aside theories on that subject I cannot understand on what principle the claim can be supported.

I am of opinion that we should dismiss the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Macdonell & Wickham.*

Solicitor for respondents: *C. R. W. Biggar.*

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*Oct. 6.
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*Feb. 20.

ALEXANDER W. STEVENSON, *Es qual.* APPELLANT;

AND

THE CANADIAN BANK OF COMMERCE ..... RESPONDENT.

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

Insolvency—Knowledge of, by creditor—Fraudulent preference—Pledge—Warehouse receipt—Novation—Arts. 1035, 1036, 1169 *C.C.*

W. E. E., connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England on the 30th June, a note of $5,087.50 due 1st October, signed by John Elliott & Co. and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July 146 barrels were sold, and the proceeds, viz., $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 13th July McDougall, Logie & Co. failed and W. E. E. was involved in the failure to the extent of $17,000, of which amount the bank held $7,559.30 and on the 16th July Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32. On the return of W. E. E. another note of John Elliott & Co. for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms, on their joint paper, of $2,660.53. The old note of $5,087.50 due 1st October,

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

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and the one of $1,101.33 were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co. and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Ellliott & Co., and by them to the bank.

The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences.

The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th of July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference.

On an appeal and cross-appeal to the Supreme Court :—

Held, 1st, that the finding of the courts below of the fact of the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July, was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Art. 1036 C.C. Gwynne J. dissenting.

2nd, that the additional security given to the bank on the 10th of August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Art. 1035 C.C. Gwynne J. dissenting.

3rd, reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and that they could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Arts. 1169 and 1035 C.C. Gwynne and Patterson JJ. dissenting.

APPEAL AND CROSS-APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) varying the judgment of the Superior Court.

(1) Q. R. 1 Q. B. 371.

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The action was taken by the present appellant, Mr. Stevenson, as curator to the insolvent estate of William E. Elliott, formerly a wholesale oil merchant of Montreal, against the Canadian Bank of Commerce, to set aside certain transactions between Elliott and the bank as being fraudulent preferences; and to recover the amounts so received by the bank in fraud of the ordinary creditors of the estate.

The material facts upon which undue or fraudulent preference was charged were as follows:

William E. Elliott, the insolvent, was connected with two businesses in Montreal:

First there was an oil business carried on by him alone under the style of "W. E. Elliott & Co."

Secondly there was a wine business, in which he and one Alexander M. Finlayson were partners, carried on under the style of "Elliott, Finlayson & Co."

Both firms kept their bank account with the respondent bank.

On June 30th, 1887, W. E. Elliott offered for discount to Mr. Crombie the manager of the bank, a note signed by a firm of John Elliott & Co. (composed of Alfred G. Elliott, a brother of W. E. Elliott) dated June 28th, for $5,087.50, falling due October 1st, and endorsed by W. E. Elliott & Co., and Elliott, Finlayson & Co.

On July 5th, the bank received from Finlayson, who, besides being Elliott's partner in the wine business, was also his agent during his absence, promised security in the form of a warehouse receipt for 292 barrels of oil, made out to the order of W. E. Elliott & Co. and endorsed by them.

On the 13th of July a meeting was held of the creditors of McDougall, Logie & Co., a large oil manufacturing firm of Montreal, which had suspended payment some days previously, and it became a matter of public

notoriety that Elliott was involved in the failure to the extent of $17,000 for accommodation paper given by him to the failed firm, and of this amount, the Canadian Bank of Commerce held $7,559.30.

On the same day the bank at the request of Mr. Finlayson sold 146 barrels of this oil, and on the 16th July the bank got Elliott's customers notes from Finlayson, who was acting as agent for Elliott while in England, as collateral for the general liability of Elliott to the bank.

On August 8th Elliott returned and gave the bank an additional warehouse receipt for fifty-four barrels of oil.

On August 9th there was at the bank another note signed by John Elliott & Co. to the order of W. E. Elliott & Co. and discounted by Elliott, Finlayson & Co. The amount of this note was $1,101.33; it bore date April 12th, 1887, at four months, and was unsupported by collateral security.

Next day, August 10th, the two old notes of John Elliott & Co. endorsed by W. Elliott & Co. and Elliott, Finlayson & Co. for the respective amounts of $5,087.50 on which only $1,559.20 was now due, and which did not mature until October 1st, and the other unsecured note for $1,101.33, were withdrawn from the bank, and in their place were put two notes identical in terms with the former ones, bearing only the names of Elliott, Finlayson & Co. as makers, payable to the order of the bank.

On the substituted note for $5,087.50 was endorsed a memorandum stating that it was substituted for the former one, and was secured by the 146 barrels of oil remaining from the original number pledged.

On August 16th, two discounts went through the bank's books, to the credit of Elliott, Finlayson & Co.

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These were:

(1) A note for $3,500 bearing only the name of Elliott, Finlayson & Co., secured by 200 barrels of oil consisting of the 146 barrels remaining out of the 292 originally pledged and also the 54 barrels left by Elliott on August 8th with the bank.

(2) A note for $7,263.33 made by John Elliott & Co. to the order of W. E. Elliott & Co. by whom it was endorsed as well as by Elliott, Finlayson & Co. This note was nominally unsecured.

The proceeds of these discounts paid the balance due on the substituted notes—$2,660.53.

In the Superior Court Mr. Justice Loranger gave judgment in the plaintiff's favour for $4,591.24 being the value of the oil pledged after the 13th July, 1887, and the amount realized on the customers' notes, and also ordered the bank to deposit in court a promissory note of the face value of $1,174.76, or in default of doing so in the prescribed delay to pay that amount to the plaintiff.

From this judgment the bank appealed and the Court of Appeals reduced the condemnation to $1,603.46, and also ordered the deposit of a note still in their possession (1).

D. Macmaster Q.C. and *C. Geoffrion* Q.C. for appellant cited and relied on arts. 1032, 1035, 1036, 1975 and 1169 C.C.; Delorimier, Code Civil, on arts. 1032, 1034, 1035 and 1036 (2); Dalloz, Vo. Obligations (3); Larombière on Art. 1183 (4); Laurent (5).

Lash Q.C. and *Morris* Q.C. for respondents cited and relied on arts. 1139, 1488 and 1966*a*. C.C.; Leake on Contracts (6); *Pring* v. *Clarkson* (7).

(1) Q.R. 1 Q.B. 371.
(2) 8 vol. pp. L.S.E.Q. 66.
(3) No. 3000.
(4) 2 vol. p. 258, Nos. 41 and 42.
(5) 28 vol. No. 503.
(6) 3 ed. p. 769.
(7) 1 B. & C. 14.

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THE CHIEF JUSTICE:—I have read the judgment which has been prepared by my brother Fournier and I agree in the conclusion at which he has arrived, that the judgment of Mr. Justice Loranger was warranted by the evidence and ought to be restored, and I desire only to add a few observations to the reasons he has given. The fact of W. E. Elliott's insolvency from an early date in July has been established by the evidence of Mr. Stevenson (the appellant) a professional accountant who swears that it is apparent from the books of the oil business, and this is in no way contradicted. At all events after the meeting of the creditors of the firm of McDougall, Logie & Co., on the 13th of July, Elliott's insolvency became a matter of public notoriety, and the bank through its agent Mr. Crombie must be taken to have had notice of it. This last fact has been found by both the Superior Court and the Court of Queen's Bench and is no longer open to dispute. From that date Mr. Crombie was bound to know that the assets of W. E. Elliott belonged to his creditors and that he had no longer any right to deal with or dispose of them to their prejudice. Acting on this principle the Court of Queen's Bench have held that the transfer of bills receivable belonging to W. E. Elliott, made by Finlayson at the request of Mr. Crombie on the 16th of July, was an invalid transaction, for the reason that these bills were assets of an insolvent debtor which he had no right to abstract from the mass belonging to the general body of his creditors. The 200 barrels of oil, made up of 146 barrels, part of the 292 barrels originally pledged to the bank under an arrangement made in July when the note for $5,087 was discounted, and 54 barrels, the warehouse receipts for which were actually handed to Mr. Crombie by W. E. Elliott himself on the 8th of August after his return from Eng-

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land, have, however, been held by the Court of Queen's Bench to have passed out of the reach of the creditors. The reason alleged for this last conclusion is that Mr. Crombie had no notice that this lot of oil was the property of W. E. Elliott, it being apparently the property of another firm that of Elliott, Finlayson & Co., who were wine merchants, and in which firm W. E. Elliott was a partner. I cannot agree in this conclusion. Of the 200 barrels 54 were received directly from W. E. Elliott himself, who on the 8th of August, after his return from Europe, handed the warehouse receipt to Mr. Crombie at first without any specific appropriation. This was certainly notice to the bank that these 54 barrels were Elliott's property, and at all events it was sufficient to put the bank on inquiry, and if they had inquired they must have discovered (as the truth was) that the goods were assets which W. E. Elliott had no right to deal with in fraud of his creditors, and not having thought fit to inquire they are in the same position as if they had done so and had, as they inevitably must have done, ascertained the truth. My brother Patterson, who is so far of accord with me, considers, however, that as to the remaining 146 barrels the evidence is not sufficient to fix the bank with notice of the actual fraud which W. E. Elliott was perpetrating in withdrawing these goods from his creditors. I am, however, compelled to come to a contrary conclusion. The whole 292 barrels, of which these 146 formed part and which were pledged as collaterals for the $5,087 note discounted in July before there was any knowledge on the part of the bank of the actual fact of W. E. Elliott's insolvency, were arranged to be given to the bank as security for that discount by W. E. Elliott himself, so as to put him or Finlayson, who merely acted as his agent during his absence, in funds for the

purpose of the oil business. Then the effect of the transaction on the 10th of August, 1887, in pursuance of which the note for $5,087, which had then been partially paid by crediting the proceeds of the 146 barrels of oil sold, as well as another prior note for $1,001 bearing the same names, were satisfied and withdrawn from the bank by substituting two other notes of the same amount made by Elliott, Finlayson & Co., directly payable to the bank, was clearly a novation which had the same effect as a payment in money would have had as regards the former notes. The consequence was that the pledge did not attach to the new debt, but reverted to the debtor at that time represented by the creditors of the original pledgor. Then took place the transaction of the 16th of August under which the whole 200 barrels of oil were pledged anew, ostensibly by Elliott, Finlayson & Co., as collateral for a new note for $3,500 discounted. All this oil then in truth belonged to W. E. Elliott subject to the rights of his creditors. What right had the bank to suppose it belonged to Elliott, Finlayson & Co.? As regards the 54 barrels which they had received directly from W. E. Elliott I have shown they had such notice as must be held fatal to their title. But I am unable to say that they are in a more advantageous position in respect of the remaining 146 barrels. The bank knew that these were originally also the property of W. E. Elliott, and that they had been pledged for a loan made for his own use, for I think the circumstance that the proceeds of the original discount were carried to the credit of Elliott, Finlayson & Co. is a circumstance of little importance. It must have been known to Mr. Crombie when he got the warehouse receipt for the 292 barrels that Finlayson was acting as W. E. Elliott's agent, and held a power of attorney from him. The mere circumstance that the warehouse receipts (which I am con-

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vinced by the evidence of Mr. Davis were not deposited with the bank until after the 12th of July when one of them bears date) were handed in by Finlayson after Elliott's departure makes no difference, for he did this in his capacity of agent for Elliott. Then the very nature of the goods themselves indicated *primâ facie* that they were part of the stock in trade of the oil trading firm and not of the wine merchants. Altogether these circumstances pointed strongly to the fact that W. E. Elliott was pledging his own goods and not those of the wine business, in which he was a partner; and in the total absence of proof of any direct affirmation by Finlayson that the property in the oil belonged to his firm, I am of opinion that it must have been apparent to Mr. Crombie at the time of the original pledge that the oil really belonged to W. E. Elliott. At all events the attendant circumstances were such as to be quite sufficient to have made it incumbent on Mr. Crombie to have investigated the matter further when, after the insolvency and on the 16th of August, he again took the same goods in pledge after the property in them had by the transaction of the 10th of August become revested in W. E. Elliott. This unusual and irregular transaction of the 10th of August by which the novation already referred to was operated was carried out not only in the interest of the bank but also in the interest of W. E. Elliott, and there was therefore the additional circumstance to be taken into consideration that Finlayson, if the oil had been really the property of his firm, would not after it had been once set free from the original pledge be likely again to pledge it for the benefit of Elliott who was then notoriously insolvent. A little questioning, which I should have thought any careful man of business would have subjected the parties to, would have brought to light the fraud which Elliott was practising

on his creditors. I am very far from saying that Mr. Crombie was consciously a party to any fraudulent scheme, but he did not take proper precautions, and the consequence of his forbearance to make the inquiries which the conduct of the parties ought to have suggested must be held fatal to the security he took.

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In what I have said I do not of course mean to lay down any proposition of law; all I decide is that the circumstances referred to create a *primâ facie* presumption, not of law but of fact, that Mr. Crombie knew the oil belonged to W. E. Elliott and that this presumption has not been in any way rebutted. In other words I hold that it is established by sufficient circumstantial evidence that the bank was not in good faith.

The appeal must be allowed, the judgment of the Queen's Bench reversed, and that of the Superior Court restored with costs to the appellants in all the courts.

FOURNIER J.—L'appelant, en sa qualité de curateur à la faillite de W. E. Elliott, a intenté contre la banque, intimée, une action pour faire annuler certaines transactions entre elle et Elliott, comme ayant été faites en fraude des créanciers de ce dernier et pour recouvrer les montants reçus par elle au préjudice des créanciers d'Elliott.

L'honorable juge Loranger a rendu le jugement de la Cour Supérieure à Montréal pour $4,591.24, et a aussi condamné la banque à déposer en cour certains billets promissoires, au montant de $1,174.76, ou à défaut de ce faire dans le délai prescrit, l'a condamnée à en payer le montant au demandeur (l'appelant) en sa dite qualité de curateur.

La banque a appelé de ce jugement et la Cour du Banc de la Reine a réduit la condamnation à $1,603.46, et a aussi ordonné le dépôt des billets promissoires, par son jugement en date du 21 mai 1892.

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Le curateur duement autorisé par les créanciers demande la restoration en plein du jugement de la Cour Supérieure.

Les deux cours sont d'accord à déclarer que des préférences frauduleuses ont été faites en faveur de la banque, intimée, au préjudice des créanciers de W. E. Elliott et Cie.

L'insolvable, W. E. Elliott et Cie, faisait d'abord des affaires seul, sous le nom de W. E. Elliott et Cie, comme marchand d'huiles ; il faisait aussi commerce comme associé dans un commerce de vins avec Alexander M. Finlayson, sous les noms et raison de Elliott, Finlayson et Cie.

Dès le premier juillet, 1887, et avant cette date, W. E. Elliott et Cie était déjà insolvable. Ce fait est prouvé par le curateur qui en parle d'après la connaissance qu'il en a acquise par les livres de l'établissement, ainsi que par le fait que W. E. Elliott et Cie, avait beaucoup d'autres dettes qui n'étaient pas entrées dans leurs livres de compte.

Vers le 8 juillet, 1887, le dit W. E. Elliott et Cie dont les affaires étaient déjà en mauvais état, présenta à M. Crombie, gérant de la banque de Commerce, pour escompte un billet daté le 28 juin 1887, à quatre mois de date pour la somme de $5,087.50, signé par John Elliott et Cie, et demanda que le produit de l'escompte fût porté au crédit du commerce de vin, Elliott, Finlayson et Cie, et offrit comme sûretés collatérales des marchandises provenant du commerce d'huiles tenu par lui seul, sous le nom de W. E. Elliott et Cie.

D'après le témoignage de Crombie la banque aurait reçu le 5 juillet de Finlayson, associé d'Elliott dans le commerce de vin et son agent pendant l'absence du premier en Angleterre, les sûretés promises, sous forme de reçus d'entrepôts pour 292 barils d'huile, faits à l'ordre de W. E. Elliott et Cie et endossés par eux en faveur de

Elliott, Finlayson et Cie. Cependant l'un des reçus d'entrepôts pour partie des 292 barils porte la dat pu 12 juillet, une semaine après la date donnée par Crombie comme étant celle à laquelle il lui a été remis. Davis, courtier et gardien d'entrepôt, qui a émis un de ces reçus jure positivement qu'il l'a émis le 12 juillet et non pas avant.

Le 8 juillet le dit billet de $5,087.50 est escompté et entré dans les livres de la banque qui en porte le montant au crédit d'Elliott, Finlayson et Cie. Le même jour ces derniers donnent un écrit par lequel ils reconnaissent avoir donné les 292 barils d'huile comme sûreté collatérale du paiement du billet de $5,087.50.

Plus tard, vers le 13 juillet, ils autorisèrent la banque à réaliser sur l'huile qu'elle détenait comme sûreté collatérale, et à en appliquer le produit en déduction du billet de $5,087.50, quoiqu'il eût encore plus de deux mois à courir avant son échéance. La banque vendit en conséquence pour la somme de $3,528.30, cent quarante-six barils d'huile sur les 292 qu'elle avait reçus en gage. Elle en porta le prix au compte des dits Elliott, Finlayson et Cie, ce qui réduisit le montant du dit billet à $1,559.20, déduction faite des intérêts.

Le lendemain de cette vente dont elle toucha le prix l'intimée fit avec Elliott et Finlayson un arrangement par lequel elle consentit à remettre à John Elliott et Cie le billet de $5,087.50 dont ils étaient les faiseurs, et pour lequel les 292 barils d'huile avaient été transportés comme sûreté collatérale et sur lequel il restait encore dû une somme de $1,559.20. John Elliott et Cie, les faiseurs de ce billet, étaient solvables et l'intimée accepta au lieu de leur billet celui d'Elliott et Finlayson pour le même montant que le billet originaire de $5,087.50. Ce changement de débiteur accepté par la banque a eu l'effet d'opérer une novation de la dette et par conséquent son extinction conformément à l'art.

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1169 du Code civil. La banque par cette novation, équivalant à un paiement, perdit les 146 barils d'huile non vendus. D'après l'art. 1975 elle ne pouvait retenir le gage que jusqu'au paiement; ce paiement a eu lieu ici par une novation qui a mis fin au gage et a fait retourner les 146 barils d'huile non vendus à W. E. Elliott et Cie. Ils avaient été originairement mis en gage par ce dernier afin de laisser à Finlayson les fonds nécessaires pour conduire ses affaires en son absence. Le 10 août, ce but ayant été atteint, l'huile fut dégagée par la novation du billet qui a mis fin au contrat qu'elle avait fait lors de l'escompte du billet de $5,087.50. Lorsque cette transaction a été faite pour la substitution du billet, le 10 août, le dit W. E. Elliott était notoirement en faillite depuis le 13 juillet. De sorte que par la libération des 146 quarts d'huile opérée par la novation les dits 146 quarts d'huile redevinrent la propriété du dit W. E. Elliott.

Ces 146 quarts ainsi libérés du gage dans lequel ils avaient été compris avec 54 autres quarts d'huile restant encore à W. E. Elliott, formaient avec les dettes actives de son commerce la presque totalité de son actif. Nous allons voir maintenant le détail des opérations par suite desquelles la banque de concert avec Finlayson, l'agent de W. E. Elliott, réussit à se les approprier au préjudice des créanciers

Le 13 juillet survint la faillite de McDougall, Logie et Cie, manufacturiers d'huile, de Montréal, dans laquelle W. E. Elliott et Cie se trouvait débiteur au montant de $17,000 pour des billets d'accommodation fournis à cette maison. Cette responsablilité entraîna la banqueroute de W. E. Elliott et Cie, qui devint alors notoire et publique, comme l'ont déclaré les deux cours Supérieure et d'Appel qui sont d'accord à fixer la faillite de W. E. Elliott et Cie au 13 juillet.

Finlayson, associé d'Elliott et qui conduisait ses affaires pendant l'absence de celui-ci, a connu le même jour, 13 juillet, toute l'étendue des responsabilités d'Elliott et Cie envers McDougall, Logie et Cie. Le montant de cette dette qui n'avait pas été entré dans ses livres avait l'effet inévitable de le rendre absolument insolvable. On va maintenant voir dans cette cause une chose bien rare ; c'est que, malgré la banqueroute notoire de W. E. Elliott, la banque continue à transiger avec lui par son agent Finlayson et par son gérant Crombie, comme s'il eût joui de la plus grande solvabilité.

Le 16 août elle escompta les billets suivants pour Elliott, Finlayson et Cie 1. Un billet de $3,500 avec la garantie collatérale de 200 barils d'huile. Ces deux cents barils se composaient des cent quarante-six quarts restant des 292 originairement donnés en gage et qui avait été dégagés par le paiement de la dette, au moyen de la substitution de billets comme on l'a vu plus haut—et de 54 autres quarts que Elliott avait laissé à la banque le 8 août, sans en avoir reçu aucune avance ; 2. Un autre billet de $7,263.33 de John Elliott et Cie à l'ordre de W. E. Elliott et Cie endossé par eux et par Elliott, Finlayson et Cie. Le produit de ces escomptes servit à payer la balance due sur les billets substitués, $2,660.33, composée, savoir : de la balance de $1,559.20 sur le billet de $5,087.50 et celle de $1,101.33 montant d'un billet pour lequel il n'avait pas été donné auparavant de garantie. Sur le total de cet escompte se montant à au-delà de $10,000, $2,660.33 des dettes de W. E. Elliott et Cie seulement furent payées, et la balance, au delà de $7,000, fut employée à l'acquit des $7,000 de billets de McDougall, Logie et Cie, endossés par W. E. Elliott et Cie et détenus par la banque. Ce n'est qu'après avoir épuisé tout son actif par ces diverses transactions qu'Elliott et Cie fit cession en faveur de ses créanciers.

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La divergence d'opinion entre les deux cours est surtout quant à l'effet légal de la mise en nantissement des deux cents barils d'huile.

La Cour d'Appel a déclaré que la banque ne connaissant pas que l'huile mise en gage par Elliott, Finlayson et Cie n'était pas leur propriété, le nantissement qu'ils en avaient fait était valable. Au contraire dans la Cour Supérieure l'honorable juge Loranger a maintenu que la substitution de billets du 10 août, en libérant les faiseurs des billets originaires de $5,087.50 de John Elliott et Cie. avait mis fin au contrat fait lorsque le billet avait été escompté et que la banque avait alors perdu le droit de retenir les 146 barils d'huile qui avaient fait retour à W. E. Elliott, alors en faillite. La mise en gage qui en fut faite subséquemment, avec les 54 barils déjà laissés à la banque, le fut à une époque où la banqueroute d'Elliott et Cie était connue de la banque et partant nulle. La différence de $2,998.00 qu'il y a entre les deux jugements, repose entièrement sur la différence d'opinion entre les deux cours au sujet du nantissement des deux cents barils d'huile.

D'après le jugement des deux cours la banqueroute d'Elliott est devenue notoire le 13 juillet, et Crombie, le gérant de la banque, en a eu connaissance le même jour.

Il est évident que le jugement de la Cour du Banc de la Reine, quant aux 54 barils laissés vers le 8 août à la banque par W. E. Elliott, qui ne reçut alors aucune avance de fonds, est erroné, car il était notoirement en banqueroute depuis le 13 juillet. Il est vrai que plus tard, le 16 août, les 54 barils furent joints aux 146, restant du premier nantissement de 292, et furent donnés en garantie, mais après l'ouverture publique et notoire de la faillite de W. E. Elliott; le nantissement alors fait se trouve partant nul comme fait en fraude

des créanciers d'Elliott et Cie, pendant que celui-ci était en faillite.

La mise en gage des deux cents barils d'huile a été maintenue par la Cour du Banc de la Reine sur le principe que cette transaction a été faite dans le cours ordinaire des affaires, et qu'en l'absence de preuve de connivence entre les parties dans le but de commettre une fraude, et de connaissance de la part de la banque que l'huile n'appartenait pas à Elliott et Finlayson, la banque doit être considérée comme ayant acquis un titre légal à la dite quantité d'huile, avec plein droit d'en disposer pour son profit.

Ces transactions seraient sans doute valables s'il était vrai que la banque n'agissait pas de connivence avec Elliott et Finlayson et si elle ignorait que l'huile ne leur appartenait pas. Mais la preuve établit, au contraire, bien clairement que l'huile était la propriété de W. E. Elliott. Crombie, le gérant de la banque qui connaissait la faillite de W. E. Elliott depuis le 16 juillet, savait aussi que cette quantité d'huile appartenait à W. E. Elliott, parce qu'il avait eu les reçus d'entrepôts le 8 juillet, lorsque les 292 barils avaient été donnés comme sûreté collatérale la première fois. Il ne pouvait ignorer que la balance de 146 quarts avait été dégagée par le paiement du billet de $5,087.50 et était redevenue la propriété de W. E. Elliott le 10 août, à une époque où étant en faillite il n'était plus possible de la donner comme garantie collatérale.

Il n'est pas possible de considérer la banque comme agissant suivant le cours ordinaire des affaires lorsqu'elle retirait le 10 août le billet de $5,087.50, qui n'était dû que le premier octobre suivant, pour y substituer un autre billet du même montant, portant la même date, mais signé par Elliott, Finlayson et Cie, à l'ordre de la banque, perdant ainsi son recours contre le faiseur originaire, John Elliott et Cie, qui étaient con-

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sidérés comme solvables. Ce n'était pas non plus suivant le cours ordinaire des affaires de banque de prendre un billet payable à son ordre comme celui qui fut substitué.

C'était encore moins suivant le cours ordinaire des affaires d'escompter pour un failli dont elle connaissait, par son gérant Crombie, la faillite depuis un mois et de faire un contrat de nantissement que la faillite rendait nul.

N'est-il pas étrange que six jours après avoir fait cette substitution de billets et presque au moment de la faillite de W. E. Elliott, le gérant Crombie, avec la participation d'Elliott, Finlayson et Cie, ait eu recours à l'expédient de l'escompte d'un billet de $3,500 pour s'approprier les deux cents barils d'huile ? En effet, les 146 barils d'huile dégagés par la substitution de billets, avec les 54 livrés par W. E. Elliott à la banque vers le 8 août, furent donnés comme sûreté collatérale de ce nouvel escompte fait dans le but de cacher l'irrégularité des transactions de la banque avec Elliott et Finlayson. La mise en gage par Finlayson des 146 barils d'huile en garantie de ce nouveau billet de $3,500 est une reconnaissance complète qu'ils avaient été dégagés de la garantie du billet de $5,087.50 ; mais la faillite les avait fait revenir à W. E. Elliott. Crombie dit de ces transactions que le jugement de la Cour du Banc de la Reine a trouvée faite suivant le cours ordinaire des affaires :

I do not know what to make out of it.

D'après le témoignage de Crombie, le 16 avril 1887, le produit de l'escompte du billet de $7,263 et de celui de $3,500 se trouvait au crédit d'Elliott, Finlayson et Cie, et leur donnait une apparence de crédit. Mais un examen de l'emploi de ces argents fait voir que l'escompte de $7,263.33 n'était qu'une manœuvre de tenue de livres de compte, que la banque ne s'est nullement

départie de l'argent,—qu'il n'y a eu qu'un changement d'entrées dans le grand-livre.

Ce jour-là, le 16 août, la banque possédait pour $7,559.30 du papier déshonoré de McDougall, Logie et Cie, endossé par W. E. Elliott, qui se trouvait entraîné dans la dite faillite. Elliott, Finlayson et Cie étaient aussi endosseurs du papier de McDougall, Logie et Cie au montant de $2,288.51. La banque fit alors volontiers l'escompte des susdits deux billets dont le produit servit au paiement du papier de McDougall, Logie et Cie.

Indépendamment de la valeur des deux cents barils d'huile que la banque a illégalement obtenus par les moyens détournés ci-haut mentionnés, elle s'était, en outre, le 16 juillet, fait remettre des billets de pratiques du commerce d'huile de W. E. Elliott au montant de $2,768. Quant à ces billets le jugement de la Cour d'Appel a tout-à-fait confirmé celui de la Cour Supérieure. Il condamne l'intimée à remettre la somme reçue sur ces billets et à rendre ceux qui lui restent entre les mains. Le considérant de la cour du Banc de la Reine est en ces termes:

Considering that the Bank by its Manager, Alexander M. Crombie, had reason to know that the said William E. Elliott was insolvent on the 16th of July, 1887, when at his instigation the agent of the said William E. Elliott transferred to it the said promissory notes to the amount of $2,768.78, as collateral security for bills or promissory notes for which he might be liable, and when he was so liable to the Bank to the extent of $7,559.30, for accommodation given by him to the then suspended firm of McDougall, Logie & Co., and his own insolvency had become notorious;

Considering that the said transfer was, in effect, a payment by an insolvent to a creditor knowing his insolvency, and that under article 1036 of the Civil Code it must be deemed to have been made with intent to defraud, and that the Bank appellant must therefore be compelled to restore the said promissory notes, or their value, for the benefit of the said William E. Elliott's creditors.

Ce considérant est fondé sur la preuve. D'ailleurs cette partie du jugement n'est pas attaquée.

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Mais le fait si emphatiquement déclaré que la banque, par son agent Crombie, a su qu'Elliott était insolvable le 16 juillet, ne doit-il s'appliquer qu'à la remise de billets. N'a-t-il pas aussi ses effets légaux sur la mise en gage des deux cents barils d'huile ? D'abord, il ne peut y avoir de difficulté par rapport aux 54 quarts d'huile qui ont été laissés à la banque, le 8 août par Elliott et Cie sans recevoir aucune avance. Ces 54 quarts étaient dégagés de tous liens et faisaient partie de la masse en faillite. Ni W. E. Elliott ni son agent ne pouvait plus en disposer. La remise gratuite qui en avait été faite le 8 août à la banque était nulle à cause de la faillite d'Elliott, suivant l'article 1034 Code Civil. Les 146 quarts dégagés par la novation opérée le 10 août ne pouvait plus, à cause de la faillite à la masse de laquelle ils étaient rentrés, faire le sujet d'un contrat même onéreux, ni par Elliott, ni par son agent, avec la banque, comme le gage qui en a été fait le 16 août par Finlayson, parce que d'après le jugement de la Cour du Banc de la Reine la banque avait connaissance par Crombie de la faillite d'Elliott. D'après l'article 1035 cette mise en gage du 16 août est nulle.

Il n'est pas facile de comprendre aussi pourquoi la Cour du Banc de la Reine n'a pas fait application des effets légaux de la faillite à la mise en nantissement des deux cents barils d'huile, comme elle l'a fait pour la remise de billets de pratiques. La raison qu'elle en donne est que la mise en nantissement a été faite dans le cours ordinaire des affaires, mais les faits cités plus haut prouvent que tel n'a pas été le cas. Cette transaction n'a été faite par la banque qu'avec la parfaite connaissance, qu'elle avait par son gérant Crombie depuis le 16 juillet, de la faillite de W. E. Elliott, et dans le but d'obtenir une injuste préférence sur les autres créanciers.

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En conséquence, l'appelant a droit d'obtenir, en addition au jugement de la Cour du Banc de la Reine, la somme de $2,998, produit de la vente des deux cents barils d'huile, et que la condamnation de l'intimé rendue par la Cour Supérieure soit rétablie avec dépens.

Appel alloué avec dépens et contre-appel renvoyé avec dépens.

TASCHEREAU J. concurred with FOURNIER J.

GWYNNE J.—The plaintiff sues as curator of the estate of one William E. Elliott who on the 18th August, 1887, abandoned all his estate and effects for the benefit of his creditors. At the time of such abandonment he was a partner with one Alexander M. Finlayson doing business together as wine and spirit merchants, under the name, style and firm of Elliott, Finlayson & Co., and he himself at the same time was carrying on a business of his own as a dealer in oil under the name of W. E. Elliott & Co. The declaration alleges that for some time prior to the said abandonment he was a customer of the defendant bank as was also the firm of Elliott, Finlayson & Co., and that Elliott himself and the firm of Elliott, Finlayson & Co. procured advances from the defendants upon negotiable paper, and that he the said William E. Elliott with intent to defraud his creditors made divers fraudulent and preferential payments to the defendants and gave them divers large quantities of oil and bills and notes and other negotiable instruments as collateral security to the defendants for their advances; and that he retired certain notes placed by him and by the firm of Elliott, Finlayson & Co. with the defendants for discount and upon which the defendants made certain advances, before the maturity of the said notes, and that the defendants, fraudulently and to the prejudice

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of the creditors of the said William E. Elliott, accepted payments on account of the said notes before maturity and released certain parties theretofore bound to the said William E. Elliott as parties to the said negotiable instruments and accepted, nominally from the said firm of Elliott, Finlayson & Co., but really from the said William Elliott, a large quantity of oil the property of the said William E. Elliott, as collateral for the pretended advances made by the defendants to the said Elliott and to the said firm of Elliott, Finlayson & Company; and that at the time the said preferential payments were made the defendants and their manager Alexander M. Crombie were aware of the fact that the said William E. Elliott was insolvent and unable to pay his creditors in full; and the said payments were made with the object of obtaining for the said defendants a preference over and above the other creditors of the said insolvent and that the amount of such preferential payments exceeded the sum of ten thousand dollars. The defendants met this declaration by a demurrer and a general denial of all the allegations in the declaration and especially by a denial that the defendants ever received from the said William E. Elliott any fraudulent and preferential payments and they averred that any collateral security which the defendants received was legally received.

The evidence in the case discloses the facts following namely, that on the 8th July, 1887, the defendants through their manager, Alexander M. Crombie, discounted for the firm of Elliott, Finlayson & Company a promissory note for $5,087.50 bearing date the 28th of June, 1887, payable three months after date, which was made by a firm styled John Elliott & Co., payable to the order of the said William E. Elliott & Co., and endorsed by the said William E. Elliott and by Elliott, Finlayson & Co. This note was discounted by the

defendants upon the hypothecation by way of collateral security of 292 barrels of oil whereof Elliott, Finlayson & Co. represented themselves to be and by certain warehouses receipts produced by them appeared to be the *bonâ fide* owners. The hypothecation of this oil was attempted to be assailed by the plaintiff at the trial but upon no solid grounds; and it is now unnecessary to discuss the grounds upon which it was assailed for the transaction has been maintained by the judgment of the Superior Court and no appeal from that judgment has ever been taken. That transaction, therefore, which lies at the foundation of a considerable portion of the subsequent transactions which are assailed by the plaintiff must now be regarded as absolutely unimpeachable.

Now upon the 13th July, 1887, a trading firm styled McDougall, Logie & Co. became insolvent and the failure of this firm disclosed the fact that William E. Elliott was liable as accommodation endorser upon the paper of the firm to the amount of about $16,000 or $17,000 of which paper to the amount of $7,559.30 was held by the defendants. In the paper so held by the defendants were two promissory notes which the defendants had discounted for W. E. Elliott, the one for $1,441.74, and the other for $1,541.62 amounting together to $2,983.36 made by McDougall, Logie & Co., payable to and endorsed by Wm. E. Elliott & Co. At the time of the failure of McDougall, Logie & Co. William E. Elliott was not in Canada he having left for England about the 6th or 7th of July, after the defendants had agreed to discount for Elliott, Finlayson & Co. the above note for $5,087.50, with the hypothecation of the 292 barrels of oil as collateral security but before the actual discounting of that note which took place on the 8th July. When William E. Elliott left for England it appears, as testified by

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Alexander M. Finlayson, that he left with Finlayson a general power of attorney enabling him to act for Elliott in all matters relating to his private affairs and to the business of William E. Elliott & Co. Upon the failure of McDougall, Logie & Co. Finlayson communicated the information by cable to Elliott, who, as Finlayson swears, replied by cablegram that he, Elliott, on his return would settle everything. Finlayson swears that at this time he had no idea that Elliott was insolvent or likely to become so. In consequence of the two notes above mentioned, amounting to $2,983.36, having become due by reason of McDougall, Logie & Co.'s failure, Mr. Crombie applied to Finlayson, as representing Elliott, for some collateral security in respect of these notes. Mr. Crombie swears that at this time he had no information whatever of the insolvency of Elliott, nor had he until about the 3rd of September, upon his return from his vacation upon which he had left Montreal on the evening of the 15th August, and that when he left Montreal upon that occasion he entertained no doubt whatever of the solvency of Elliott. He said that when Elliott first did business with the bank, which was in the spring of 1887, he represented himself to be possessed of considerable means, and he presented a statement of his affairs which Mr. Crombie believed to be true and which showed him to be, if it had been true, perfectly solvent; in fact so much so that his liability to the amount o $16,000 or $17,000 upon McDougall, Logie & Co.'s paper did not shake Mr. Crombie's confidence in his solvency, although he says that it made him consider it to be his duty to ask for the collaterals upon McDougall, Logie & Co.'s failure, which he says he would have done if Elliott had been worth $100,000. He acted in that matter as he considered to be his duty to the bank, and he had no knowledge whatever of

Elliott's insolvency. That he was then insolvent there can be no doubt, and that he was an unscrupulous and dishonest man may be admitted, but he appears also to have been a clever concealer of his true character and of the true condition of his affairs, for not a single witness was called who spoke of any doubt as to his solvency having been entertained by any one, notwithstanding his liability as appearing on the paper of the insolvent firm of McDougall, Logie & Co.

The material question, however, in the present case, is the knowledge of the defendants or their officer of Elliott's insolvency at the time of the transactions with the defendants which are assailed by the plaintiff. The only officer of the defendants to whom such knowledge is imputed is their manager at Montreal, Mr. Crombie, who swears most positively not only that he had no such knowledge, but that he had not a doubt as to the solvency of Elliott until he heard of his insolvency upon his return from his vacation about the 3rd of September, and nothing has been suggested as bringing home knowledge of Elliott's insolvency save only the fact that he was upon McDougall, Logie & Co.'s paper as an accommodation endorser to the amount of $16,000 or $17,000. Upon the 16th July, 1887, Finlayson, acting under a power of attorney from Elliott, and believing as he swears Elliott to be then perfectly solvent, in reply to Mr. Crombie's request for collateral security for the notes of the insolvent firm of McDougall, Logie & Co., which had been discounted by the bank for Elliott, handed to him the promissory notes of divers persons made payable to W. E. Elliott & Co., but not then yet due, amounting in the whole to $2,768.78, to be held as such collateral security. Upon Elliott's return to Montreal on the 7th or 8th of August Finlayson informed him of what he had so done, of the

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notes so deposited with the defendants as such collateral security. They subsequently collected the sum of $1,593.24, and still have a note of John Paxton & Co. which is not yet paid, amounting to $1,165.32. Upon the 13th of July, 1887, Mr. Finlayson, acting on behalf of the firm of Elliott, Finlayson & Company, requested Mr. Crombie, as manager of the defendants, to sell 146 of the barrels of oil deposited as collateral upon the discounting of the note of the 28th June for $5,087.50, and to credit the firm with the proceeds as against the note. A sale was accordingly made of 146 barrels of the oil through Elliott, Finlayson & Company's broker to a firm named R. C. Jamieson & Co., upon their promissory note for $3,528.80 payable and paid to the bank on the 9th August, 1887, and by the defendants then applied in reduction of the said note for $5,087.50. Upon the return of Mr. W. E. Elliott from England, and on or about the 7th or 8th August, he called upon Mr. Crombie at the bank and deposited with him a warehouse receipt for 54 other barrels of oil as the property of Elliott, Finlayson & Co., with a view to their shortly obtaining an advance thereon from the bank. He spoke of being temporarily put about by the failure of McDougall, Logie & Co., who were largely indebted to him, and he stated that if an arrangement could be made whereby the defendants would give up the note for $5,087.50 of which John Elliott & Co. were makers, and also another note dated the 12th April, 1887, for $1,101.33 whereof John Elliott & Co. were also makers, and which would fall due on the 15th August, his brother Alfred Elliott, who represented John Elliott & Co., would assist him with a note or money sufficient to enable him to get over the temporary difficulty in which the failure of McDougall, Logie & Co. had placed him. Eventually it was agreed between Mr. Crombie and Elliott, Finlayson & Co.,

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that as the bank still held 146 barrels of oil as collateral security for the balance which would remain due on the note for $5,087.50 after crediting thereto the proceeds of the 146 barrels sold to R. C. Jamieson & Co., the defendants would take notes of Elliott, Finlayson & Co. bearing the same dates respectively and for the same amounts respectively, and coming due respectively at the same periods as the notes for $5,087.50 and $1,101.13 which the bank already held, in order to enable them to get the assistance promised by John Elliott & Co. upon their getting the notes already given by that firm removed out of the way, and thus giving until the 15th of August when the note for $1,331.56 would fall due to enable the proposed arrangement with John Elliott & Co. to be completed. Accordingly upon the 10th of August, 1887, the defendants gave up to Elliott, Finlayson & Co. the said two notes made by John Elliott & Co., upon receiving from Elliott, Finlayson & Co, in substitution therefor their promissory notes as follows:—

Due 1st October, 1887. MONTREAL, June 28th, 1897.

$5,087.50. Three months after date we promise to pay to the order of the Canadian Bank of Commerce at our office in Montreal, five thousand and eighty-seven dollars and fifty cents for value received.

ELLIOTT, FINLAYSON & CO.

Upon the back of this note was endorsed the following memorandum:—

This note is substituted for that of John Elliott & Co. for same amount due 1st October, 1887, removed from the Canadian Bank of Commerce to-day and secured by warehouse receipts for oils, some of which have already been realized by the bank. This note to be returned to us on payment of the balance due 10th August. E., F. & CO.

MONTREAL, 12th April, 1887.

Due 15th August, 1887.

$1,101.33. Four months after date we promise to pay to the order of the Canadian Bank of Commerce, at our office in Montreal, eleven hundred and one dollars and thirty-three cents for value received.

ELLIOTT, FINLAYSON & CO.

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On the same day Elliott, Finlayson & Co. together with the above notes delivered to Mr. Crombie the letter following:—

MONTREAL, 10th August, 1887.

To the Manager of the Canadian Bank of Commerce, Montreal.

DEAR SIR,—Referring to John Elliott & Co.'s notes for $1,101.33 due 15th August and $5,087.50 due 1st October, discounted with you and which have been handed to us to-day we now replace them by our notes as per memo. at foot to which please attach the warehouse receipts you hold against John Elliott & Co.'s notes and credit us with the amount of cash realized by the sale of linseed oil. As soon as the balance of the loan is paid you we will claim our two notes.

Yours faithfully,

ELLIOTT, FINLAYSON & CO.

Memo—Our note 4 months 12th April due 15th August. $1,101.33
Our note 3 months 28th June due 1st October... 5,087.50

$6,188.83

Upon the 15th August when the note for $1,101.33 became due, Elliott, Finlayson & Co. brought to Mr. Crombie their own note for $3,500 made payable to the bank and falling due on October 3rd, and a note for $7,263.33 dated August 12 and payable five months after date made by John Elliott & Co. payable to W. E. Elliott & Co. and endorsed by W. E. Elliott & Co. and by Elliott, Finlayson & Co., and requested him to discount these notes for them with the hypothecation as security for the note for $3,500 of two hundred barrels of oil, namely, the 146 barrels already held by the bank as collateral to the note for $5,087.50 and the 54 barrels the warehouse receipts for which had been left with him on or about the 7th or 8th of August.

Mr. Crombie on the said 15th August before leaving Montreal on his vacation which he did on the evening of that day agreed to discount the two notes for them holding the warehouse receipts for the 200 barrels of oil as collateral security for the note for $3,500 and Elliott, Finlayson & Co. undertaking to pay the balance

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remaining due on the note for $5,087.50 amounting to $1,559.20 and the note for $1,101.33 and he left instructions on leaving Montreal on the 15th with the bank officers that the said two notes should be discounted and the proceeds placed to the credit of Elliott, Finlayson & Co. which was accordingly done on the 16th August, upon Elliott, Finlayson & Co. hypothecating as agreed upon the 200 barrels of oil as collateral security for the note for $3,500. By the sale of this oil the defendants subsequently realized the sum of $2,998.

Upon this evidence the learned judge in the Superior Court rendered a judgment by which he adjudged that the defendants should pay to the plaintiff the sum of $4,591.24 being the amount realized by them from the notes handed to Mr. Crombie on the 16th July, 1887, and from the sale of the 200 barrels of oil hypothecated by Elliott, Finlayson & Co. on the 16th August, 1887, as collateral security for their note for $3,500 then discounted for them by the defendants and that they should give up to the plaintiff the note of Paxton & Co. payable to W. E. Elliott which they had not received payment of. This judgment is based upon a finding by the learned judge as stated in his judgment that the said notes and oil were the property of the said W. E. Elliott and were appropriated by him in fraud of his own creditors for the purpose of securing the debts of the firm of Elliott, Finlayson & Co. when he the said W. E. Elliott was insolvent. and that the defendants had become accomplices with the said W. E. Elliott in the committing the said fraud upon his creditors by accepting his property as security for advances made to the firm of Elliott, Finlayson & Co. when they knew the said W. E. Elliott to be insolvent. From this judgment the defendants appealed to the Court of Queen's Bench Montreal in appeal which court has varied the

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said judgment in the manner and for the reasons following as appearing in the judgment of that court:

Considering that the insolvency of the said William E. Elliott became notorious about the 13th day of July, 1887, when it became known at a meeting of the creditors of the firm of McDougall, Logie & Co., which had suspended payment, that he was involved to the extent of $17,000 for accommodation paper which he had given to that firm and of which the bank held paper to the extent of $7,559.30, and that the said William E. Elliott made a judicial abandonment for the benefit of his creditors on the 18th day of August, 1887;

Considering that the lot of 200 barrels of oil transferred to the bank on the 16th August, 1887, and held by the firm of Elliott, Finlayson & Co., under warehouse receipts issued in favour of the said William E. Elliott, but duly endorsed over by him to it, and was ostensibly its property, and that there is no proof that the bank was aware or even suspected that the said oil was not its property;

Considering that (under the arts. 1488 and 1966a of the Civil Code) the bank acquired a valid title to the said lot of oil when the said firm of Elliott, Finlayson & Co. on the 16th day of August, 1887, transferred it to the bank as collateral security for the payment of a promissory note for $3,500 payable on the 3rd day of October, 1887, and then discounted for the said firm, and the said bank cannot now be troubled for the said oil or for the said sum of $2,998, being the proceeds of the sale thereof;

Considering that the bank, by its manager, Alexander M. Crombie, had reason to know that the said William E. Elliott was insolvent on the 16th of July, 1887, when at his instigation the agent of the said William E. Elliott transferred to it the said promissory notes to the amount of $2,768.78 as collateral security for bills or promissory notes for which he might be liable, and when he was so liable to the bank to the extent of $7,559.30 for accommodation given by him to the then suspended firm of McDougall, Logie & Co., and his own insolvency had become notorious.

Considering that the said transfer was in effect a payment by an insolvent to a creditor knowing his insolvency, and that under art. 1036 of the Civil Code it must be deemed to have been made with intent to defraud, and that the bank appellant must therefore be compelled to restore the said promissory notes, or their value, for the benefit of the said William E. Elliott's creditors.

The judgment then proceeds to allow the appeal of the defendants against the judgment of the Superior Court as to the said sum of $2,998 realized from the sale

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of the said 200 barrels of oil, but condemns the defendants to pay to the plaintiff the sum of $1,603.46, the amount realized from the notes handed to Mr. Crombie on the 16th July, 1887, with interest thereon, and to deliver up to the prothonotary of the Superior Court of the district of Montreal the John Paxton & Co.'s note for $1,165.32 within a prescribed time, or in default to pay the amount thereof to the plaintiff. From this judgment the plaintiff has appealed, and the defendants have entered their cross-appeal.

As to the principal appeal which is that of the plaintiff and relates to the $2,998 realized by the defendants from the sale of the 200 barrels of oil hypothecated by Elliott, Finlayson & Co. as collateral security for their note for $3,500 discounted for them on the 16th of August, there cannot in my opinion be entertained a doubt that the judgment of the Court of Queen's Bench at Montreal in appeal is well founded and cannot therefore be disturbed.

That the defendants and their manager Mr. Crombie, when upon the 8th July, 1887, they discounted for Elliott, Finlayson & Co. the note for $5,087.50, did so upon the faith of their having the 292 barrels of oil then hypothecated by Elliott, Finlayson & Co. as collateral security for the advances made to them upon that note, and that they had reason to believe and did believe Elliott and Finlayson to have full power to hypothecate the oil as they did as their own property, the evidence does not warrant a doubt and the *bonâ fides* of the defendants in that transaction is not now a matter in dispute.

Upon the receipt by the defendants on the 9th of August, 1887, of the sum of $3,528.30, the proceeds of the 146 barrels of oil sold to R. C. Jamieson & Co., the amount becoming due upon the above note was reduced to the sum of $1,559.20 for which the defendants

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held the remaining 146 barrels of oil as collateral and they continued to hold those 146 barrels as the property of Elliott, Finlayson & Co. and as security for the said sum of $1,559.20 in virtue of the arrangement made on the 10th August until the 16th of August when Elliott, Finlayson & Co. hypothecated the same 146 barrels together with the other 54 barrels the receipts for which represented that oil also to be the property of Elliott, Finlayson & Co., as collateral security for Elliott, Finlayson & Co.'s note for $3,500 discounted by the defendants on the said 16th of August.

Now as to this hypothecation of these 200 barrels of oil on the 16th of August there does not appear to be a particle of evidence which would justify a judicial tribunal in adjudging that Mr. Crombie the defendant's manager knew or had reason to believe that in truh Elliott, Finlayson & Co. had no right to deal with or to hypothecate as they did the oil in question. It is to my mind inconceivable that Mr. Crombie would have sacrificed the favourable position which upon the 10th of August, 1887, the defendant held in relation to the 146 barrels of oil then held by them under hypothecation and have authorized the discount for them of their note for $3,500 on the 16th of August if he had not thoroughly believed that the right of Elliott, Finlayson & Co. to hypothecate the said 200 barrels of oil as security for that note as they did was indisputable beyond all doubt and question, and the judgment of the Court of Queen's Bench in appeal that there is no evidence justifying an adjudication that the defendants or their manager knew or had reason to know or believe that Elliott, Finlayson & Co. had no such right is in my judgment unimpeachable. The appeal therefore of the plaintiff must, in my opinion, be dismissed with costs.

Now as to the cross-appeal which affects the notes handed over to Mr. Crombie by Mr. Finlayson as agent for W. E. Elliott on the 16th of July, 1887, as collateral security for the two notes amounting together to $2,983.36 made by McDougall, Logie & Co., and which by the failure of that firm had become due. This transaction is only disputed upon the contention that at the time when it took place the defendants through their manager Mr. Crombie knew that W. E. Elliott was insolvent, and that the object of the defendants' manager was thereby to obtain for them a fraudulent preference over W. E. Elliott's other creditors and that therefore the transaction was void under art. 1036 of the Civil Code. The pivotal point in the transaction is the knowledge of Mr. Crombie on the 16th July, 1887, that W. E. Elliott was then insolvent. It is not suggested that there is any direct evidence that Mr. Crombie had such knowledge. The direct evidence is altogether to the contrary effect. He himself was the only witness examined upon the point and he most positively denies upon oath that he had any such knowledge then or at any time prior to his return to Montreal from his vacation on or about the 3rd of September, and he swears that when he left Montreal on the 15th August, after having made arrangements with Elliott, Finlayson & Company for the discounting of the two notes for $2,500 and $7,263.36 respectively, he did not entertain the slightest doubt of Mr. W. E Elliott's solvency. The evidence, therefore, in order to be sufficient to justify the imputing to Mr. Crombie the knowledge required by the terms of art. 1,036 so as to avoid the transaction, must be sufficient to displace wholly this peremptory denial by Mr. Crombie of all knowledge of W. E. Elliott's insolvency. Now what the Court of Queen's Bench, in that part of their judgment which is the subject of this cross-appeal, proceed

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upon, is not that any direct evidence of knowledge of W. E. Elliott's insolvency has been brought home to Mr Crombie, but upon this that in their opinion and judgment the insolvency of W. E. Elliott became notorious on about the 13th July (although there was no evidence given of the fact of such imputed notoriety) when it then became known at a meeting of the creditors of the firm of McDougall, Logie & Co., which had suspended payment, that Elliott was involved to the extent of $17,000 for accommodation endorsements of the paper of that insolvent firm which the defendants held to the amount of $7,559.30, and that therefore the defendants by their manager, Mr. Crombie, had reason to know that the said W. E. Elliott was insolvent when he received the promissory notes for $2,768.78 on the 16th July, 1887, at a time when Elliott's insolvency had become notorious, and they therefore concluded that the transfer of these notes to the defendants was in effect a payment by an insolvent to a creditor knowing his insolvency, and that therefore it must, under art. 1036, be deemed to have been made with intent to defraud. This language, while it seems to relieve Mr. Crombie, the defendants' manager, from any imputation of a positive intent to defraud and from any imputation of falsely denying that he had knowledge of W. E. Elliott's insolvency when the transaction of the 16th July, 1887, took place, rests the judgment of the court upon the foundation that, as alleged in the judgment, the insolvency of Elliott was then notorious, and that, therefore, because of the imputed notoriety of such insolvency, Mr. Crombie had reason to know that W. E. Elliott was then insolvent, whether in point of fact he did know it or not. The judgment thus seems to introduce into the art. 1036 language not to be found in it, but which was in the repealed Insolvent Act of 1875, whereby

contracts made by a creditor with a debtor (whom the creditor not only knew to be insolvent, but whom he had probable cause for believing to be insolvent) or after his inability to meet his engagements had become public and notorious, were avoided. But in the present case, as already observed, it is not suggested that there was any direct or positive evidence that upon the 16th July, 1887, it was a notorious fact that W. E. Elliott was insolvent; not a witness was called to testify to such a fact, and there was no direct or positive evidence whatever offered to that effect. That he was then notoriously insolvent is a conclusion drawn by the court from the single fact that at a meeting of the creditors of the insolvent firm of McDougall, Logie & Co, held on or about the 13th July, 1887, Mr. Elliott appeared to be an accommodation endorser upon their paper to the amount of about $17,000, of which the defendants held paper to the amount of $7,559.30. The question therefore is reduced to this: Did that fact, so appearing, constitute in law or in fact such notoriety of the fact that W. E. Elliott was then insolvent as to justify the imputation of knowledge that Elliott was in point of fact then insolvent to Mr. Crombie, against his positive denial upon oath of any such knowledge and against his oath that Elliott had impressed him with such a belief in his solvency that his being involved as accommodation endorser on McDougall, Logie & Co.'s paper to the amount of $17,000 did not shake his confidence in Elliott's solvency?

If Elliott's insolvency was so notorious a fact upon the 16th July as to justify the imputation of the knowledge of the fact then to Mr. Crombie, of course Elliott could not have taken up any of the notes of McDougall, Logie & Co. upon which he was endorser, nor could any other creditor of Elliott's have then or at any time since accepted payment from him of any debt whatever

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due by him. In my judgment the fact that Elliott appeared to be a creditor of McDougall, Logie & Co., as accommodation endorser of their paper to the amount of $17,000, afforded no evidence of Elliott himself being then insolvent, and as there was no other evidence whatever from which it has been suggested that upon the 16th of July, 1887, Mr. Crombie had reason to know or believe and should have known or believed Elliott to be then insolvent, the transaction of that day stands unimpeached. The case of *Allen* v. *The Quebec Warehouse Company* (1) was appealed to by the learned counsel for the plaintiff, and the rule there recognized that the Judicial Committee of the Privy Council will not interfere with the judgment of two courts concurring upon a question of fact unless the finding be clearly erroneous, but neither that case nor the rule therein recognized can apply to a case where the conclusion upon the question of fact involved is drawn from premises which afford no warrant for the conclusions, and the rule moreover is expressly qualified by the condition that the conclusion is not clearly erroneous, and with great deference I must say that it appears to me it would be as reasonable to hold upon the evidence in the case that upon the 15th of August, 1887, when Mr. Crombie agreed to discount the notes for $3,500, and $7,263.86, he knew or had reason to know that Elliott intended to execute upon the 18th August a judicial abandonment of his estate, as to hold that upon the 16th July he must have known or had reason to know that Elliott was then insolvent from the circumstance that upon the 13th July the insolvent firm of McDougall, Logie & Co. appeared to be indebted to him as accommodation endorser upon their paper to the amount of $17,000 for so much of which as the assets of the insolvent firm should be insufficient to pay he

(1) 12 App. Cas. 101.

would be liable. In my opinion, therefore, the cross appeal should be allowed with costs and the action in the court below be ordered to be dismissed with costs.

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PATTERSON J.—We have an appeal by Stevenson, the plaintiff in the action, and a cross-appeal by the bank.

The cross-appeal cannot, in my opinion, succeed.

There is no room to question the fact that William E. Elliott was insolvent, whether he or any one else knew that he was, early in July, 1887. On the 13th of that month the fact transpired at a meeting of the creditors of the insolvent firm of McDougall, Logie & Co. that Elliott was liable for $17,000 of the debts of that firm. From that time the courts below, that is to say, the Superior Court and the Court of Queen's Bench, agree in holding that his insolvency was notorious and that the Bank of Commerce knew of it. There was ample evidence to sustain that conclusion, and although it may be that evidence would also have warranted the finding that knowledge of Elliott's insolvency was not brought home to Mr. Crombie, the bank manager, until a later date, yet we must, as I apprehend, take the fact to be as found by the courts below.

Elliott had discounted with the Bank of Commerce paper of McDougall, Logie & Co. to the amount of $2,983, and he was further liable on two other notes of that insolvent firm held by the Bank of Commerce, the whole amount being more than $7,500.

On the 16th of July, Elliott being then absent from Canada, Mr. Crombie asked Mr. Finlayson, who was acting for Elliott, for collateral security, and obtained customers' notes to the amount of $2,768.78. These were expressed in the receipt given for them as being security for the general liability of Elliott, although the security seems to have been asked for with particular reference to the item of $2,983.

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The bank has been held liable, under article 1036 of the Civil Code, to account for these assets to the plaintiff as curator of the property and effects of W. E. Elliott.

The cross-appeal is against that decision. The complaint I understand to be rather against the finding of the fact that the bank had knowledge of Elliott's insolvency on the 16th of July than against the view of the law on which the court acted.

I think we must dismiss the cross-appeal.

In the direct appeal the curator seeks to recover from the bank the value of 200 barrels of oil, as assets of the insolvent W. E. Elliott in the business of dealer in oil which he carried on under the name of W. E. Elliott & Co., and which oil was pledged to the bank by the wine house of Elliott, Finlayson & Co. of which W. E. Elliott was a member.

In the court of first instance the plaintiff sued for 346 barrels of oil and he recovered for part, viz., 200 barrels and failed as to 146 barrels. The defendants appealed from that decision to the Court of Queen's Bench and there the decision was against the plaintiff as to the whole of the oil.

On the 8th of July, 1887, the bank discounted for Elliott, Finlayson & Co. a note for $5,087.50, made by John Elliott & Co and endorsed by W. E. Elliott & Co. and by Elliott, Finlayson & Co. To secure that note Elliott, Finlayson & Co. transferred to the bank several warehouse receipts for oil, covering in all 292 barrels, which had been endorsed to that firm by the oil firm of W. E. Elliott & Co.

That transaction was, in both of the courts below, held to be unimpeachable.

The note was dated the 28th of June and was due on the first of October, 1887. It was negotiated with the bank on the 8th of July.

Familiar as the provisions of the Bank Act (1) respecting warehouse receipts may be we may usefully refer to one or two of them. Section 53 subsection 2 authorizes a bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour in the course of its banking business; but, by subsection 4, the bank shall not acquire or hold any warehouse receipt or bill of lading to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank.

In connection with this, and in anticipation of what is to follow, we may note that the customer of the bank was here Elliott, Finlayson & Co. The advance of money was to that firm, and, in the essence of the transaction, the other parties to the note were sureties to the bank for the debt incurred by the firm, although of course they became themselves directly liable under the law merchant. The warehouse receipts were security for the debt so incurred by Elliott, Finlayson & Co.

It became convenient at a later date, in connection with the business of the Elliott firms, to relieve the firm of John Elliott & Co. from liability on the note. That was effected by substituting for the note, with the consent of the bank, another note similar in date, amount and tenor, except that it was made by Elliott, Finlayson & Co. and payable to the bank.

I do not see that that substitution affected in any way the security of the bank under the warehouse receipts. The debt was still the debt of Elliott, Finlayson & Co. contracted on the 8th of July, in security for which the receipts had been endorsed to and received by the bank.

That change in the form of the obligation was made on the 10th of August, 1887. Part of the oil, viz., 146

(1) R. S. C. ch. 120.

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barrels, had been sold before that date by the bank at the request of Elliott, Finlayson & Co., and had realized $3,528.30. The date of the sale is not proved. The warehouse attendant says the oil was transferred to the purchaser on the 12th of July, and it seems that one of the warehouse receipts produced in evidence bore date the 13th of July, while there is very direct evidence that receipts for 292 barrels were in the hands of the bank manager on the 5th of July, and were formally pledged on the 8th. These apparent discrepancies are scarcely for this court to investigate with a view to find conspiracy and fraud which the courts below have not found.

The purchase money of $3,528.30 was received by the bank on the 9th of August leaving $1,559.20 of the original amount of $5,087.50 unpaid, and as security for that balance the bank continued to hold the remaining 146 barrels of oil.

Then another change of scene takes place.

Elliott, Finlayson & Co. paid off the balance of $1,559.20 on the 16th of August and thereby redeemed the pledge of the oil.

On the same day, however, or the day before, they procured from the bank the discount of a note made by John Elliott & Co. for $3,500, and secured that advance by warehouse receipts for 200 barrels of oil. Where did they get that oil? For 146 barrels they had the old receipts, and for 54 barrels there was a warehouse receipt made, like all the rest, to W. E. Elliott & Co. which W. E. Elliott had himself, a few days before, left with the bank in anticipation of advances being made upon it.

It is not made clear, either by the evidence or by any express finding of fact, how the ownership of the oil, or at all events of the original 292 barrels, really stood as between the oil firm of W. E. Elliott & Co., or

more properly Elliott himself, and the wine firm of Elliott, Finlayson & Co. Elliott, as it would appear from evidence given by Finlayson, had not put into the wine business the agreed amount of capital. His transfers of oil may have been payments on account of his capital. Apart from the imputation of fraud as against Elliott's creditors there is no reason why the transfer of the receipts by Finlayson should not convey a good title to the bank.

In the Superior Court it was held that the original transaction of the 8th of July was valid because the bank did not, at that date, know of the insolvency of Elliott, and therefore the bank was entitled to retain the proceeds of the sale of the 146 barrels in July, but that the pledge of the 200 barrels in August after the insolvency was known was invalid.

This reasoning seems to have regarded the transactions as if between Elliott and the bank, not laying stress on the intervention of Elliott, Finlayson & Co.

The Court of Appeal looked at the matter from a different standpoint, and (referring to the articles 1488 and 1966*a* of the Civil Code) held that it was not established that the bank when it took the sureties from Elliott, Finlayson & Co., to whom they had been duly endorsed by Elliott, knew that they did not belong to the wine firm.

On that ground the bank was held to be entitled to retain the whole 346 barrels of oil.

I am not prepared to differ upon the question of fact from the court below, at least so far as the original 292 barrels are concerned.

The 146 sold in July are out of the question. The other 146, which were released on the 16th August by the payment of the debt of $5,087, were pledged again on the same day, and whatever the bank may have

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known at that time of the circumstances of W. E. Elliott it had acquired no new information, as far as disclosed by the evidence, respecting the title to the 146 barrels which up to that date it had held as pledgee of Finlayson. Treating the transaction, as the Court of Appeal treated it, as between the bank and Finlayson, and not as between the bank and Elliott, I do not see sufficient grounds for interfering with the decision as far as the 146 barrels of oil are concerned.

The other 54 barrels do not stand in quite the same position. The warehouse receipt for the 54 barrels, which was dated the 30th of June, does not appear to have been endorsed to Elliott, Finlayson & Co. On the 8th of August, after the bank knew, as the fact is found to be, of Elliott's insolvency, Elliott himself brought that receipt to the bank and left it for the purpose of an advance to be afterwards made. The advance was made to Elliott, Finlayson & Co. on the 16th, and the receipt then for the first time endorsed over by Elliott.

Under these circumstances the reasoning of the Court of Appeal does not seem to apply to the lot of 54 barrels, and as to that lot I think the judgment of the Superior Court should be restored.

The 200 barrels sold for $2,998. The proportion for 54 barrels is $809.46.

I think the appeal should be allowed to that extent, and I suppose with costs.

Appeal allowed and cross-appeal dismissed with costs.

Solicitors for appellants: *Macmaster & McGibbon.*

Solicitors for respondents: *Morris & Holt.*

JAMES MACARTHUR AND (BY AMENDMENT) THE COMMERCIAL BANK OF MANITOBA (PLAINTIFFS)..... APPELLANTS;

AND

DAY HART MACDOWALL (DEFENDANT) RESPONDENT.

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*Oct. 21, 24, 25.
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*May 1.

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

Promissory note—Transfer when overdue—Equities attaching—Agreement between maker and payee—Holder for value without notice—Evidence.

An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a *bonâ fide* holder for value who takes it after dishonour. Strong C.J. and Taschereau J. dissenting.

APPEAL from a decision of the Supreme Court of the North-west Territories (1) affirming the judgment for defendant at the trial.

The facts of the case are fully set out in the judgments hereinafter published.

Christopher Robinson Q. C. for appellants.

Ferguson Q.C. and *McKay* for the respondent.

THE CHIEF JUSTICE.—I am compelled to dissent from the judgment of the court in this case. I therefore only write shortly to indicate the grounds on which I differ, not intending to state fully the arguments and authorities in support of my view. I agree in the facts as found by the court below, and as stated

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

(1) 1 N.W.T. Rep. Pt. 3 p. 56.

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in the judgment of the majority of this court, with the exception of the conclusions arrived at as to the character of the transaction by which the present appellant acquired his title to the note in question. The note was given by MacDowall to Knowles to be used for a particular purpose and not for general use as an accommodation note, and it was actually pledged to the bank by Knowles as a collateral security. The bank acquired the note in good faith as holders for value without notice and was paid off by the appellant with his own money, and this was done in pursuance of an arrangement made between the assignee in insolvency of Knowles, the appellant and the bank. The note came into the hands of the appellant upon the bank being paid off, and after it was due. The appellant had no notice of the agreement between Knowles and the respondent at the time he paid the bank and got the note.

If I had to deal with the evidence directly I should take it to be proved that the note was given as an accommodation note generally to be used as Knowles thought fit, but I cannot act upon that view of the evidence in the face of the finding of the court below, based though it is exclusively upon the evidence of the respondent himself. If it had been held to be an accommodation note generally the respondent would have been liable even though the appellant had taken it from Knowles himself after it was due and with notice

But assuming as I must on the findings of the court below that the note was given on the particular agreement which the respondent states, it is clear that the appellant had no notice and I do not consider a holder for value who takes a note signed and delivered by the maker upon such an agreement as this, in good faith, without notice, though overdue, can be affected

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by any collateral agreement controlling the use which was to be made of the note though it may have been negotiated in fraud and in violation of that agreement. It appears to me that the appellant was not entitled to recover the full amount of the note, but was entitled to stand in place of the bank who were paid off with his money, that is he is entitled to be subrogated to the rights of the holder from whom he acquired title. There is no pretense for saying that the bank had notice or was otherwise than a *bonâ fide* holder for value to the extent of the sum for which the note had been pledged to it, whatever that might on taking proper accounts be ascertained to be. I understand the law to be that an endorsee or holder for value, although taking a promissory note after maturity, is entitled to the benefit of the title of any prior holder in due course whether the name of such prior holder appears on the paper or not. In other words, an agreement between the maker and payee that a note should only be used for a particular purpose does not, although the note was negotiated in fraud of that agreement, constitute an equity which attaches to the note in the hands of a *bonâ fide* holder for value even although he takes it after dishonour.

By the Bills of Exchange Act, 1890, section 27 subsection 3, it is enacted that when the holder of a bill has a lien on it arising from contract or implication of law he is deemed to be a holder for value to the extent to which he has a lien. By the 29th section a holder in due course is defined, and that in terms within which the evidence shows that the bank indubitably came. The bank took the note in good faith and for value, and at the time had no notice that Knowles was negotiating it in breach of faith or that there was any defect in his title. It was, therefore, a holder for value and also a

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holder in due course strictly in accordance with the provisions of the act.

Subsection 3 of section 29 is as follows:

A holder whether for value or not who derives his title to a bill through a holder in due course and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

It cannot be pretended on the facts that the appellant was a party to any fraud committed by Knowles in negotiating the note, or that the appellant had when he took the note from the bank any notice of such fraud.

It is true that the note was overdue when it came into the appellant's hands but that makes no difference. Section 36 subsection 2 of the act provides that:

When an overdue bill is negotiated it can be negotiated only subject to any defect of title affecting it at maturity and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it.

Under this provision the appellant would have been clearly entitled to avail himself of the title of the bank. The bank did not endorse the note but it had been endorsed in blank by Knowles and had thus become negotiable as an instrument payable to bearer, and the appellant upon delivery would have become entitled to the protection assured him by this provision. It is pretended however that the appellant acquired his title to the note not from the bank but from Coombs, the assignee in insolvency of Knowles. The evidence establishes directly the contrary of this proposition. Coombs was, it is true, an assenting party to the arrangement in pursuance of which the bank transferred the notes to the appellant just as a mortgagor is, on a transfer of a mortgage property, made for precaution an assenting party to the transfer, but beyond this the transfer was not a transaction between Coombs and

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the appellant, but between the latter and the bank. The appellant's money paid off the bank and the securities were handed over directly by the bank to the appellant. Neither the law, business usages nor common sense authorize us to characterize such a transaction as a payment of the note by the maker and its re-issue by him. The circumstance that the draft and cheque for the amount paid to the bank passed through Coombs's hands can make no difference; it is clear that the appellant intended to acquire, and supposed, as he had a right to do, that he was acquiring, the title from the bank directly to himself. I am therefore of opinion that by force of the explicit statutory provisions I have referred to the appellant was entitled to recover the amount for which the bank, as pledgee of the note, could have maintained an action against the respondent. The note was dated the 10th November, 1889, and being payable 18 months after date did not fall due until the 13th May, 1891. The statute came into operation on the 1st September, 1890, and it contains no provision restricting its operation to notes made after that date. At this time the note was therefore current; Mr. Duncan McArthur the manager of the bank says it came into their hands "in the early fall of 1890"; granting that this was after the first of September, 1890, the act would not apply to the transfer by Knowles to the bank, though I should have thought it would apply to the subsequent transaction between the bank and the appellant, for I see no reason why the act should not apply to the subsequent transfer of pre-existing securities. But it makes no difference whether the act applies or not. The act is an almost literal transcript of the English Bills of Exchange Act of 1883. Judge Chalmers who was the draughtsman of that act, in his digest of the law of Bills and Notes (1) certainly says:

(1) 4 ed. p. 2.

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In so far as the act *alters the law* it is presumed it does not apply to any instrument made before its date.

And he refers to the cases of *McLean* v. *Clysdale Banking Company* (1) and *Leeds Bank* v. *Walker* (2), but in both these cases the transactions which it was held the act did not affect had taken place before the day fixed for its coming into force. I find no decision showing that the act is not applicable to the negotiation of a note made before it came into force but which had been negotiated after it became law. I do not think, however, it makes the least difference whether the statute or the pre-existing rules of the common law are to govern in the present case. All the provisions of the act to which I have referred were old law, and the statute did not in any of them make the slightest alteration. It merely formulated the law in these respects. I may, therefore, even if the act has no statutory application here, make use of it as Lord Blackburn did in *McLean* v. *Clysdale Bank* (1) as a text reproducing in precise and convenient formulas the old law on the particular subjects in question. In the case just referred to Lord Blackburn says :

I do not think the Bills of Exchange Act applies to this case for it did not receive the royal assent until some months after the cheque had been issued ; but I do think that the enactments in that act are very good evidence of what had been the general understanding before it was passed, and of what was the law on the subject.

As regards the rights of the bank as pledgee of the note, that they were by the general law merchant before the statute was passed precisely the same as defined by section 27 of the act, appears from *Ex parte Newton* (3) ; the latter case shows that the pledgee of a bill upon which the pledgor being the drawer could not have recovered against the acceptor could only recover the amount for which the

(1) 9 App. Cas. 106. (2) 11 Q. B. D. 84.
(3) 16 Ch. D. 330.

bill is held in pledge, but that to that amount he is entitled to recover. That section 29 subsection 3 before set forth is identical with the former law is shown by *May* v. *Chapman* (1). Section 36 subsection 2 merely gives statutory effect to the law as laid down in *Fairclough* v. *Pavia* (2).

If therefore the evidence fails to establish, as I think it does, that there was a payment by or on behalf of the maker, and a re-issue of the note, the law clearly entitles the appellant to recover the amount for which the bank as pledgee was entitled to a lien on it. I do not refer the appellant's title to recover to the general doctrine of subrogation merely, but to those independent rules of the law merchant which I have pointed out, rules founded in commercial convenience, and necessary, not only to protect holders in good faith of negotiable paper but also to ensure the negotiability of such securities. These rules which had previously been well established by adjudged cases have now been adopted and confirmed by the statute. But, whilst I say this, I also think it very material that, as Mr. Robinson argued, these principles are entirely conformable to the very just and equitable doctrine of subrogation to which they most undoubtedly owe their origin.

Since writing the foregoing I have been referred by the learned counsel for the appellant to the case of *Cowan* v. *Doolittle* (3). That case was more complicated in its facts than the present, but after having made a careful analysis of it I find that it sustains the propositions of law which I have before advanced to the fullest extent, and decided as it was by a most distinguished court I should not hesitate, if I had no other authority to follow than this case of *Cowan* v. *Doolittle* (3),

(1) 16 M. & W. 355. (2) 9 Ex. 690.
(3) 46 U. C. Q. B. 398.

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to decide the present appeal in the manner I have indicated.

The appeal should be allowed with costs.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—I concur in the reasons given by the Chief Justice for allowing the appeal and in the conclusions at which he has arrived.

GWYNNE J.—I am of opinion that this appeal must be dismissed. The sole question in the case really is whether the plaintiff MacArthur purchased the note sued upon from the assignee of the insolvent estate of Knowles, the payee of the note, or from the Commercial Bank of Manitoba. If from the assignee of Knowles the action cannot be maintained, for there can be no doubt that the note was given to Knowles under such circumstances that he never could have maintained an action upon it against the defendant, and the plaintiff MacArthur became purchaser of it after it had become due. I cannot entertain a doubt that the transaction was one of purchase by the plaintiff McArthur from the assignee of Knowles of a whole batch of notes, including the one sued upon, as part of the estate of the insolvent Knowles. MacArthur, it is true, knew that the draft which he gave to the assignee of Knowles for all the notes which he purchased would go to the bank, but that was necessary to enable MacArthur's title as purchaser from the assignee of a portion of the notes which were held by the bank to be made perfect. The oral and documentary evidence is, to my mind, absolutely conclusive upon the question. Joseph Knowles had been in partnership with the plaintiff MacArthur as private

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bankers, &c., at Prince Albert, Saskatchewan, where the defendant resided. The partnership was dissolved and thereafter each of them carried on business separately for himself. Knowles made an arrangement with the Commercial Bank of Manitoba at Winnipeg for advances to be made to him upon notes of his customers to be deposited as collateral security and upon real estate. The arrangement, as testified by the bank manager, was that the bank would advance to him to the extent of seventy-five per cent of the face value of notes to be deposited but that they would allow him to overdraw his account. Upon the note now sued upon the bank in October, 1890, advanced to Knowles $4,100, and he had also been allowed to overdraw his account to some extent. In January, 1891, Knowles failed in business and by an indenture dated the 28th of that month, he assigned and transferred all his estate, effects, choses in action, and his real estate to one Joseph M. Coombs, his executors and administrators and assigns upon trusts following: first upon trust to pay all the costs, charges and expenses, &c., attending the preparation and execution of the said trust indenture, and secondly to pay off the indebtedness of the said Knowles to the Commercial Bank of Manitoba and Katherine W. McLean, a secured creditor, and in the next place to pay and divide the clear residue into and among his other creditors ratably and proportionately and without preference or priority according to the amount of their respective claims, and lastly to pay the residue, if any, to Knowles himself.

Upon the 25th of February, 1891, the bank inclosed in a letter from Winnipeg to MacArthur at Prince Albert nine of the notes deposited by Knowles with the bank amounting in the whole to $6,912.27, and coming due between that date and the 13th May, among which was the note now sued upon.

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Upon the 8th April the manager of the bank wrote to the plaintiff MacArthur the following letter :—

(Private.) WINNIPEG, 8th April, 1891.

JAMES MACARTHUR, Esq., *Re* KNOWLES,
Prince Albert.

DEAR SIR,—Referring to our C. S. 46 D. H. MacDowall $5,500 due 11th May next, when M. MacDowall was down here some time ago he led me to understand that he did not intend to pay this note. Please let me know what the prospects of collecting it are and give me what information you can in regard to the matter.

Yours truly,
R. T. ROKEBY,
Manager.

To this letter Mr. MacArthur seems to have replied by a letter not produced of the 14th April, for on the 18th April, 1891, the manager of the bank wrote, addressed and sent the following letter to MacArthur :—

WINNIPEG, 18th April, 1891.

DEAR SIR,—*Re* C. S. 46, MacDowall $5,500 due May 13th.

I have received your letter of the 14th instant and note contents. If the note is not paid when due hand it to Mr. Newlands for immediate suit and get judgment as quickly as possible. Meanwhile Newlands can find out quietly all that MacDowall has which may be available to satisfy the judgment.

Yours truly,
R. T. ROKEBY,
Manager.

The note appears to have been sent to MacArthur in February, under the impression that it was payable at Prince Albert where MacDowall resided from the same 18th April. The manager of the bank wrote, addressed and sent another letter to MacArthur directing him to return the note at once to the bank at Winnipeg where the manager had found that the note was payable and not as he had been under the impression at Prince Albert. MacArthur appears to have received from the manager of the bank another letter dated 23rd April (not produced) in relation to Knowles's liability to the bank and to the collateral

securities held by the bank therefor; and he appears to have contemplated at that time purchasing from the assignee of Knowles the note held by the bank as collateral security and other property belonging to the insolvent estate of Knowles if he could make an arrangement with the bank to procure funds necessary for that purpose and on the 1st May, 1891, he wrote to the manager of the bank the following letter:—

PRINCE ALBERT, SASK., 1st May, 1891.

R. T. ROKEBY, Esq., *Re* KNOWLES,
Winnipeg.

DEAR SIR,—In further reference to your letter of the 23rd ultimo and list of notes, it would appear that about $2,000 in notes sent by you to Knowles for collections was collected by him and the proceeds kept. I understand that he is now in Toronto, so that instead of you being short a margin in notes of about $1,100 you are short about $3,000. The best properties to be put on the market now are the following:—

Lot 2, block G., R. L. 78, say	$ 250 00
Lot 22, block D., R. L. 79, say	750 00
W ½ lot 5, block C., R. L. 78, say	400 00
Lot 11, block B., R. L. 78, say	500 00
S. ½ R. L. 79, P. A. S. B., say	2,000 00
	$3,900 00

I think the above lots would sell for the amounts set down provided they were sold on easy terms of payment. *I have thought of making an offer to the estate for the notes held by you and other property* for the amount of your bank's claim, provided I could make an arrangement with your Board regarding payment of same. The amount of your claim you state to be $16,807—taking off the MacDowall note due 11th May, $5,500—$11,307. I propose for the favourable consideration of your Board the following, viz.: that I assume this amount and give my notes to you at 2, 4, 6, 8, 10, 12 and 14 months in equal instalments and furnish together with same collateral notes to the amount of the principal and $2,000 more as a margin. I may state that I consider at least $1,000 of the notes held by you to be doubtful and at best are all slow. When in consideration of this matter I trust you will inform your Board that I have reduced my own indebtedness to your bank $1,600 since September, and that in the face of the most depressed business season I have ever seen here and without materially reducing the security then given.

Yours truly,
J. MACARTHUR.

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Now when this letter was written, MacArthur well knew that the notes which the bank held and for the purchase of which together with other property he says he thought of making an offer to the Knowles estate were held by the bank merely as collateral security for the debt of Knowles, and what he proposes is not that he should purchase from the bank any of those notes so held as collateral security for the debt of Knowles but that they should accept his offer in extinguishment of the Knowles debt, thus leaving the assignee of his estate free to deal with MacArthur for the sale to him of the collaterals held by the bank, that is to say that they should accept MacArthur's notes for the amount of the Knowles debt payable as proposed in the letter together with collaterals to the like amount to be furnished by MacArthur and $2,000 in addition to be deposited by him by way of margin. To this proposal the manager of the bank replies by a letter dated 6th May, 1891, as follows:—

JAMES MACARTHUR, Esq.,
Prince Albert.

DEAR SIR,—Your letter of the 1st instant received and I note contents of same for which I am obliged. I shall write you again in regard to the proposed sale of property. With regard to your proposition to buy out our claim, you of course understand that in the meantime we are practically acting as trustees for the assignee, but *if he is willing to make a deal with* you in the way you speak of, we are quite ready to sell you our claim as it stands at present—$16,918, payable $2,000 in cash, and your note at 2, 4, 6, 8, 10, 12 and 14 months in equal instalments at nine per cent interest. You to give us collateral note with a margin of $2,000. If the MacDowall note is paid on the 11th instant the amount can be deducted.

Yours truly,
R. T. ROKEBY,
Manager.

P.S.—I saw Mr. MacDowall. I think he may possibly pay $500 or less, if pressed, on account and renew. He will hand over the property as security for the note till paid. Please say if above is satisfactory to you.

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Now by this letter the manager of the bank informs MacArthur that if he can make a deal with the assignee of Knowles' insolvent estate in respect of the purchase of the collateral notes which the bank held and for the purchase of which MacArthur by his letter of the 1st May informed the bank that he contemplated making an offer to the Knowles estate, they will take from him in satisfaction of their claim against Knowles $2,000 in cash and his notes for the balance of their claim payable in seven equal instalments at 2, 4, 6, 8, 10, 12 and 14 months with interest at nine per cent, he furnishing *collateral note with a margin of* $2,000. This proposition so made by the bank in answer to the one made by MacArthur placed him in a position to deal with the assignee of the Knowles estate for the purchase of the collaterals, and so understanding the letter he appears to have acted thereon accordingly, for, as Mr. Coombs the assignee testified, MacArthur spoke to him in the beginning of May as to the purchase of the notes, and offered eighty-five per cent of their face value. Coombs in his evidence says: "his proposal was to purchase the notes held by the Commercial Bank and also those held by me, the proceeds of auction sales." Coombs expressed his approval of the offer and said that if approved by a committee of Knowles's creditors he would accept it and carry it out, and he told MacArthur to put his proposal in writing. Thereupon MacArthur addressed to him the following letter:—

PRINCE ALBERT, SASK., 12th May, 1891.

J. M. COOMBS, Esq., *Re* KNOWLES,
Assignee.

DEAR SIR,—It has occurred to me that to insure more rapid progress in the winding up of this estate, *you might be open to entertain an offer for the notes held by you and other property sufficient to wipe out the Commercial Bank claim.* I shall be glad to meet with you and discuss the matter at your convenience.

Upon receipt of this letter Coombs called a meeting of certain creditors of Knowles acting as an advisory

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board and laid the matter before them; this was at Prince Albert. The meeting was held between the 12th and 19th of May. MacArthur attended the meeting and some mention was made of this MacDowall note. MacArthur pointed out that it did not bear interest, and some remarks were made as to whether it would be met. MacArthur produced a telegram from the bank manager at Winnipeg saying that it had not been paid. At this time the notes held by Coombs for property sold by him as assignee amounted to $2,228.60. There was also another small parcel of notes received by Coombs from the sheriff amounting to about $352, and the notes held by the bank, a list of which was furnished by MacArthur to Coombs, amounted to $13,305; these notes the bank held as collateral security for their debt which then amounted in round numbers to $17,634, for which they held security upon real estate of Knowles valued at $20,030. At the close of the above meeting of the creditors of Knowles Coombs, subject to the approval of his solicitor, agreed to sell to MacArthur without recourse against the estate of Knowles the whole of the above notes, amounting in round numbers to the sum of $16,086, for $13,673.56, being eighty-five per cent of the face value of the notes, thus also giving to MacArthur the benefit of all interest accrued and accruing upon them. The transaction was finally completed on the 20th May, 1891, at Prince Albert, by MacArthur handing to Coombs his, MacArthur's draft on the Commercial Bank of Manitoba, at Winnipeg, for the said sum of $13,673.56, and by Coombs handing to MacArthur the notes he himself held and endorsing them "without recourse," and by Coombs and MacArthur respectively signing at the foot of the list of the notes held by the bank and furnished by MacArthur which included the MacDowall note now sued on amounting in the whole to the said sum of $13,500, the receipts following:—

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1. Received of J. MacArthur the sum of eleven thousand four hundred and seventy-nine dollars and twenty-five cents, being eighty-five cents on the dollar for the above mentioned list of notes.

M. COOMBS.

2. Received from J. M. Coombs, assignee of the estate of J. Knowles, the above mentioned notes.

J. MACARTHUR.

Coombs says that he endorsed the notes which he himself held "without recourse" in accordance with the agreement upon which he says all the notes were sold by him to MacArthur, and that he then had a conversation with MacArthur as to this provision in respect of the notes which were at Winnipeg, namely, the notes held by the bank, and that MacArthur said that as to them it was no matter as they were all past due and that he afterwards corrected himself saying that one of Graham & Nelson's was not past due. In fact Coombs says that everything as to the sale of the notes was completed when he received from MacArthur the draft for $13,673.56.

On the 20th May, Coombs inclosed to the Commercial Bank the above draft, together with one for $600 on the Imperial Bank, in the following letter:—

PRINCE ALBERT, 20th May, 1891.

DUNCAN MCARTHUR, Esq.,
Manager Commercial Bank of Manitoba,
Winnipeg.

Re estate of JOSEPH KNOWLES.

SIR,—Inclosed I forward you draft for $13,873.56, drawn by James MacArthur on Commercial Bank of Manitoba and draft for $600 on Imperial Bank, Winnipeg; total $14,273.50, to be applied *towards liquidating your claim against this estate.*

In the interest of the other creditors I am anxious to settle your claim in full and release the real estate, and in order to meet the balance of your claim I would like to dispose of by public auction or private sale, as the case may be, the following portions of the real estate now held by you as security, viz.:

Lot 22, block D., R. S. 79.
W ½ 5, " C. " 78.
Westerly part 3, block G. R. L. 78.
Part 11, block B. R. L. 78.

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Under the agreement between the Commercial Bank and Mr. Knowles I think I am at liberty to do this with your approval, the proceeds to be turned over to you or so much thereof as may be necessary to meet your balance, particulars of which please furnish me with. I may remind you that the title to the westerly portion of lot 11, block B, R. L. 78, is still incomplete. I have spoken to your solicitor, Mr. Newlands, about it and he is only waiting instructions to put the matter in shape. Will you please write me stating that you will carry out any sale made by me of the above mentioned properties for the benefit of intending purchasers, also that you will reconvey the balance of the real estate upon the receipt of your claim in full.

Please acknowledge receipt of draft and oblige,

Yours truly,
J. M. COOMBS.
Trustee estate J. KNOWLES.

To this letter Mr. Coombs received in reply a short letter acknowledging receipt and stating that Mr. Rokeby was away and that on his return he would write to Mr. Coombs. On the 9th June, 1891, Mr. Rokeby wrote as follows in a letter inclosing a statement as asked for by Mr. Coombs :—

COMMERCIAL BANK OF MANITOBA,
WINNIPEG, 9th June, 1891.

J. M. COOMBS, Esq.,
Assignee, Prince Albert.
Re estate JOSEPH KNOWLES.

DEAR SIR,—On my return to business to-day, your letter of the 20th May, together with inclosures *relating to the sale of collateral notes to James MacArthur*, was placed before me and I now beg to say that we confirm the sale as arranged. I now inclose statement showing the balance due us at 21st May, viz. $3,361.27.

With regard to the sale of properties proposed to be made to cover the balance of our account, we hereby authorize you to sell and we agree to convey the said properties when requested ; of course you understand that we shall only release the whole of our securities when the balance due us with interest to date has been fully paid.

We are quite willing that Mr. Newlands should complete the title to the westerly portion of lot 11, block B.R.L. 78. His account has to be added to the amount due to us and it may be as well for him to complete the matter now. In regard to the price of the properties to be

sold I would suggest that in case any question may be raised by any of the creditors, you should submit any offer to us before accepting the same.

Yours truly,
R. T. ROKEBY,
Manager.

The statement inclosed in the above letter showing the amount remaining due by the Knowles estate to be $3,361.27, is as follows:—

Estate of Joseph Knowles. To Commercial Bank of Manitoba, 1891, May 21st. To indebtedness as per statement rendered		$17,534 83
Paid James MacArthur 2½ per cent on collection of $4,039.75		100 00
		$17,634 83
By draft of James MacArthur, *being amount of collateral notes purchased by him from estate*	$13,673 56	
By draft on Imperial Bank	600 00	
		14,273 56
Balance due to bank		$3,361 27

Now it is plain by this letter that the bank recognized the sale of the notes as having been made by Coombs, as the assignee of Knowles, to MacArthur. Upon receipt from Coombs of MacArthur's draft the bank accepted it and paid and applied the amount, together with the proceeds of the draft for $600 on the Imperial Bank, towards liquidation of the Knowles debt. The amount so applied exceeded the whole amount of the notes held as collateral security by the bank, and the balance of their debt amounting to $3,361.27 was secured by the real estate held by the bank valued at $20,000. From that moment the notes which the bank had held became, in virtue of the assignment and transfer thereof, involved in the receipt signed by Coombs at the foot of the list of the notes and given to MacArthur, the absolute property of MacArthur and thenceforth the bank could not have or acquire any title or interest

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whatever in them unless in virtue of a title to be derived from MacArthur, and this is precisely the light in which not only the manager of the bank but MacArthur himself understood the transaction, for immediately upon receiving from Coombs his receipt at foot of the list of the notes he on the same 20th May addressed and sent a letter to the defendant, wherein he says:

DEAR SIR,—I have purchased the notes belonging to the Knowles estate. Your note for $5,500 I find is past due, and as I cannot suppose you would care to have it go to suit I shall be glad to have your draft for payment as soon as possible. I may say that if it is inconvenient to meet the whole amount now I might be able to renew a part.

Yours truly,
J. MACARTHUR.

And on the same day he addressed a letter to the manager of the bank explaining why he had not answered his letter of the 6th May, and informing Mr. Rokeby that he, MacArthur, had purchased the notes from the assignee of Knowles. The letter is as follows:

PRINCE ALBERT, SASK., 20th May, 1891.

R. T. ROKEBY, Esq., *Re* KNOWLES,
Winnipeg.

DEAR SIR,—In further reference to my letter of the 1st inst., and yours of the 6th, I found that upon meeting Mr. Coombs and his committee that I could make a purchase of the notes belonging to the estate, *but regarding the balance required to make up the amount* due you they thought it would be better to get you to allow a sale at auction in Coombs's name of so much real estate as would pay off your claim.

As I had no doubt that this would meet your views, I purchased the notes to the amount of $13,673.56, *for which I have issued my draft on you.* I inclose my draft for $1,200 in your favour and I have charged your account with $100 being 2½ per cent for collecting $4,039.75 of Knowles notes (I saw the assignee regarding the rate and he considered it all right). Mr. Coombs will remit by this or the following mail $700, which makes $2,000. I inclose my notes at 2, 4, 6, 8, 10, 12 and 14 months for $1,667.65 each for the balance and a list of notes now held by you *assigned by Coombs to me and by me to you.* I inclose collateral notes to the amount of $2,268.21. I hold notes named in inclosed list for collection and arrangement. I shall have them all put in current order and forward to you without delay. Regarding the MacDowall

note, I have written him by this mail and expect to be able to arrange with him. Both Mr. Newlands and Brewster consider it all right. If you desire me to assume the balance of your account due by the Knowles estate I can do so upon your terms, but as Coombs is very anxious to have your amount closed out as soon as possible, I consider it much the best for all parties that he be allowed to sell without a transfer from you to me. He writes you by this mail upon this subject.

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The list of notes referred to in the above letter as being inclosed therein and as being " a list of the notes held by you and assigned by Coombs to me and by me to you " was not produced. It appears, however, that it was a list of notes which had been in MacArthur's possession on collection for the bank before he purchased them from Coombs, for in the next paragraph of his letter he says that he holds the notes mentioned in the list for collection and arrangement, and that he would have them all put in current order and forwarded to the bank without delay. By this he no doubt meant to convey that as soon as he could get them put into current order by renewals he would forward the renewals to be held as collateral for his liability to the bank for their accepting and paying his draft for $13,673.56. That the MacDowall note was not in that list must be inferred from the fact that it was not then in the actual possession of MacArthur, it was still in the bank at Winnipeg where it fell due on the 13th May, where it remained, but as the property of MacArthur until the 2nd July when he got it for the purpose of bringing an action upon it, since which time the bank, as Mr. Rokeby says in his evidence, has never had any custody or control of the note, and he stated further that the note had never been entered in any of the books of the bank as being held collateral to MacArthur's liability to the bank, and MacArthur in his evidence says that the bank never had any right or title to the note derived from him. His evidence upon this point is as follows:—

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I first got it as agent of the bank in February, but sent it to the bank. I first got it again after I purchased it when I wanted to sue on it. *The Commercial Bank had nothing to do with it since I bought it,* they were to have, it was understood that the bank were to take it and others as collateral security when put in current shape, but this was never so put, the bank has no lien or claim upon it legally.

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Mr. Rokeby in his evidence stated that so far as the bank was concerned the whole transaction between him and Coombs and between him and MacArthur was contained in the letters produced, the only one of which not already referred to is the following of the 9th June, 1891, from Rokeby to MacArthur:—

JAMES MACARTHUR, *Re* KNOWLES,
Banker, Prince Albert.

DEAR SIR,—Your letter of the 20th ult. *re your purchase of the collateral notes in this estate* was placed before me on my return to business to-day, and I have given instructions that the matter be carried through in accordance with your arrangement. The inclosed statement shows how the matter stands as between the bank and the estate and as between the bank and you.

With regard to the amount paid to us direct on account Campbell's $600 note this was applied in reduction of the debt, and our account to the assignee was just so much less so that it will be in order for you to arrange the matter with him. We have authorized Mr. Coombs to sell the properties mentioned in his letter in order to close out the balance due us and we will convey to the purchasers when sales are made. Mr. Newlands may as well complete the title *re* westerly portion of lot 11, block B. R. L. 78, as suggested by the assignee. His account not being included in our account, will be chargeable against the estate when rendered. It is distinctly understood that none of our securities are to be relinquished until our account has been settled in full together with interest until paid. With *reference to your notes* in payment of the balance *due by you*, I may first say that I trust you will be able to meet them or most of them at any rate at maturity, as two of our directors think that you have made a very good thing of this purchase, and consequently I would like to see the matter well taken care of. *As soon as you get the collaterals into shape please forward for registration, as the bank in order to meet your views and to assist you in this deal* is parting with the best of its security. I trust you will make quite sure of your ability to meet the notes and to carry the matter through. Please let me hear from you as to this.

Yours truly,
R. T. ROKEBY,
Manager.

The statement inclosed in this letter was the statement already referred to as inclosed to Mr. Coombs, showing the balance due by the Knowles estate to be $3,361.27, and an account opened with MacArthur wherein he is debited with his draft for $13,673.56 and credited with $1,300, showing a balance due by him of $12,373.56, against which is placed his seven notes for $1,767.65, each with interest at nine per cent.

Now upon this evidence there cannot be entertained a doubt that the transaction whereby MacArthur acquired the note sued upon was one of purchase from the assignee of the Knowles estate of the whole batch of notes, amounting in the whole to $16,086 and including the note sued upon, as one purchase for the sum of $13,673.56 for which he gave to the assignee of Knowles his draft upon the Commercial Bank. Upon that draft being accepted by the bank, and the amount being by them applied to the credit of their claim against the estate of Knowles, the bank ceased to have any claim or title to or interest in the note which became the absolute property of MacArthur, but his title, as the note was overdue when purchased by him from the assignee of the Knowles estate, was only such as could be acquired by purchase of a chose in action belonging to the estate of Knowles in the hands of the assignee of that estate for sale, and as the transaction between Knowles and the defendant upon which the note was made by the defendant was such that Knowles could not have recovered against the defendant in an action brought against him, so neither can MacArthur and the appeal must be dismissed with costs.

PATTERSON J.—There are two plaintiffs, MacArthur and the Commercial Bank of Manitoba. I shall not have to refer to the bank as a party to the action and

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shall for brevity sake use the term "the plaintiff" as meaning MacArthur.

In my reference to the facts I shall not attempt to discuss the details of the evidence. That has been done with sufficient fulness by my brother Gwynne who has made it very clear that the findings of fact by the courts below cannot be disturbed.

The plaintiff bargained with Coombs, the assignee of the estate of Knowles, for the purchase of promissory notes which belonged to the estate.

There were three lots of notes. One consisting of forty-seven notes, including the note of the defendant now sued upon and of the nominal amount of $13,505, was held by the Commercial Bank of Manitoba as collateral security for a debt of upwards of $17,000 due by Knowles. Another lot consisted of thirty-six notes, amounting nominally to $2,228.60, which were not in the hands of the bank. The plaintiff bought these notes at eighty-five per cent of their nominal amount.

Lists of these two lots of notes were produced in evidence, each list having appended to it two receipts, viz., one from Coombs, the assignee, for the price, and one from the plaintiff for the notes. The price acknowledged for the one lot is $11,479.25, being eighty-five per cent of $13,505, and for the other $1,894.31, being eighty-five per cent of $2,228.60. These two receipted amounts make $13,373.56. The third lot of notes was bought for the lump sum of $300, making the whole price $13,673.56.

The negotiation with the estate of Knowles and the purchase of the notes from the estate was with the concurrence of the bank, and with an understanding between the bank and the plaintiff as to the mode in which the plaintiff was to be supplied with money to pay for the notes. In accordance with that understanding the plaintiff paid Coombs by a draft on the

bank, which the bank received from Coombs on account of the debt of Knowles, for $13,673.56, and the plaintiff accounted to the bank for that sum partly by giving his own notes for $12,373.56 of the amount, and giving as collateral security for his notes all the notes purchased from the Knowles estate.

The transfer of the notes from the assignee of Knowles estate to the plaintiff took place on the 19th or 20th of May, 1891.

The defendant's note fell due and was protested for non-payment on the 13th of that month. It was therefore an overdue note when the plaintiff took it.

The history of the note, as shown by the judgment delivered at the trial, was that Knowles, who had been partner with the plaintiff in the business of private bankers, and who continued that business after the dissolution of the partnership, wanted to provide a fund on which he could draw in the event of depositors with the dissolved firm withdrawing their deposits. He accordingly arranged with the defendant that the defendant should make the note in question and he conveyed some lands to the defendant by way of security, though by conveyances absolute on their face. The defendant accordingly made the note, payable 18 months after date, with an understanding that it might be renewed for 18 months longer, it being also agreed between the defendant and Knowles that the note was not to be used unless required for the purpose of providing the fund mentioned, and that if it was discounted it should be at the Bank of Ottawa where it was payable, and not elsewhere.

It was a violation of the terms of this agreement in both its branches to transfer the note as collateral security for other debts of Knowles, and to negotiate it in that manner with the Commercial Bank.

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The bank, which took the note without notice of the agreement, could of course have enforced it against the defendant. But the plaintiff does not take the bank's title. He bought from the Knowles estate. The bank would have had no right to sell the note which it held as collateral security unless prepared to account for its full value, and according to the findings, which are in my opinion the correct result of the evidence, the bank did not sell the note. It held the notes, that is to say, one of the three lots of notes, as security for the debt of Knowles, and receiving payment of that debt from Coombs, partly by means of the plaintiff's draft, it freed the notes as assets of the Knowles estate, though it again received them with the other notes as a pledge from the plaintiff.

The appeal is ventured on in the hope of displacing that apprehension of the facts. The contention is thus formally put by the plaintiff in his factum.

The appellant's contention is on the correspondence and on the evidence, and in regarding the legal effect of the transaction, that the sale was made by the bank directly to the plaintiff MacArthur.

It was suggested that the plaintiff might recover what he paid for the note, if not the full amount, under the title of the bank. I do not know what he paid for this or any other individual note, because the eighty-five per cent was on in the whole amount and not on each note, but whatever he paid was paid to the Knowles estate and not to the bank.

The transaction between the plaintiff and Coombs is essentially the same as it would have been between the plaintiff and Knowles.

The plaintiff took a note which was overdue and which was an accommodation note. The circumstance that it was an accommodation note would not by itself interfere with the negotiation of it after it was due; but, being overdue, the plaintiff could take

it only as subject to its equities. An agreement not to negotiate an accommodation note after it was due would be such an equity. We find that asserted in a series of cases from *Charles* v. *Marsden* (1) downwards. All the cases on the subject, as late as the year 1868, will be found commented on by Malins V.C. in *Ex parte Swan* (2) in a dissertation which may be referred to in place of citing the various cases.

After pointing out that the endorsee of an overdue bill takes it subject to the equities of the bill, not the equities of the parties, and that a set-off is not in general an equity that attaches to a bill, the learned Vice-Chancellor refers to the case of *Holmes* v. *Kidd* (3) as an illustration of what an equity attached to the bill itself is. I shall read what he says of that case (4).

In that case the acceptor had accepted a bill of £300, depositing with the drawer certain canvas which he was to be at liberty to sell as a means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was whether the indorsee could recover. Here, Mr. Justice Erle said: "The question is whether the receipt of the money by the drawer is a bar to the action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency." That contingency is the equity which attached to the bill and which bound him, having taken it after maturity. Mr. Justice Crompton said: "Upon the concoction of this bill it was agreed that it was not to be paid if the canvas was sold. That agreement directly affects the bill, and was part of the consideration for it. The case therefore differs from that of a right of set-off against the indorser, which is merely a personal right not affecting the bill. In the present case the equity attaches directly to the bill. The plaintiff, therefore, got a defeasible title only."

The statement of the law by Vice Chancellor Malins in *Ex parte Swan* (2) is referred to with approval by Lord Justice Giffard in *Ex parte Oriental Commercial Bank* (5),

(1) 1 Taun. 224.
(2) L. R. 6 Eq. 344.
(3) 3 H. & N. 891.
(4) L. R. 6 Eq. 360.
(5) 5 Ch. App. 358.

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in which case an officer of the bank misapplied moneys of the bank in the purchase for himself of certain bills of exchange which he endorsed over after they were due. It was held that the equity of the bank to follow its money into the bills that were purchased with it could be enforced against the endorsee who had taken the bills after they were due.

In the present case the note of the defendant was made and was intrusted to Knowles for the special purpose of aiding Knowles, by providing a fund for the payment of depositors, if that should become necessary, in order to keep his business going. The defendant could have insisted that Knowles should use the note only in the way for which it was intended, and only for the purpose of keeping his business going, and could have restrained him by injunction from using the note after he had given up his business. That was an equity attaching to the note itself in the hands of Knowles and is enforceable against the plaintiff who took the note when overdue.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *H. W. Newlands.*

Solicitor for respondent: *James McKay.*

ALVA MARTINDALE, *ès-qual. et al*.....APPELLANTS; 1892

AND *June 3.

DAME SUSAN M. POWERS... .....RESPONDENT. 1893

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *Mar. 1. *May 1.

Quality of plaintiff—General denegation—Succession—Acceptation of by minor subsequent to action—Art. 144 *C. C. P.—Don Mutuel—Property excluded from but acquired after marriage.*

Held, 1st., affirming the judgment of the court below, that the quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant. *A défense en fait* is not a special denial within the meaning of art. 144 C. C. P.

2nd. The acceptation of a succession subsequent to action and *pendente lite* on behalf of a minor as universal legatee has a retroactive operation.

3rd. Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz.: $5,000; and that after the husband's death the wife (the respondent in this case) was entitled until a proper inventory had been made of the deceased's estate to retain possession of the farm. Taschereau and Gwynne JJ. dissenting.

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

This was an action brought by Alva Martindale in his quality of tutor to the minor child James Curtis

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

(1) Q. R. 1 Q. B. 144.

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Martindale, universal legatee of his grandfather Curtis Martindale, and by Eli Martindale in his quality of curator to the substitution of property created by the last will of the late Curtis Martindale, claiming from Susan M. Powers widow of the late Curtis Martindale for the minor child and the substitution a certain farm being cadastral lot no. 2,414 of the township of Stanbridge.

Susan M. Powers, the respondent, pleaded 1st. a general denial and 2nd. a special plea that under the terms of a *don mutuel* by marriage contract she was entitled to retain possession of the land until paid the amount due to her, viz.: $5,000.

The facts as disclosed by the pleadings and the evidence are as follows:

Two years prior to his marriage with respondent Curtis Martindale, who was then a widower, had made a donation of the farm in question to his son John Martindale, under the usual terms of supporting his father during the remainder of his natural life, and with the condition that in the event of the son predeceasing the father the title should revert to the latter. Under this agreement John Martindale and his family went to reside with the father, Curtis Martindale, upon this farm, but some months prior to respondent's marriage with the father, Curtis Martindale, the son, John Martindale, had bought a farm for himself from a Mrs. Whitman, on the opposite side of the highway from the farm in question in this case, and had removed with his family to the Whitman farm, and was living on it. On the 11th December, 1869, and prior to the execution of his marriage contract, a notarial document was executed between Curtis Martindale and his son John, which recites in the first place the terms of the donation deed and then declares that as Curtis Martindale has proposed

to said John Martindale to occupy and cultivate said land (i. e. the original home farm) and to take the management of the stock &c., the said John Martindale agrees to pay to said Curtis Martindale $200 yearly in lieu of support, taxes, maintenance, &c., and as security therefor he mortgages his own farm, i. e. the farm he had bought from Mrs. Whitman, and upon which he was then living. The agreement goes on to recite that even if said John Martindale should at any time thereafter be called upon to resume the cultivation of the land, he should be exonerated from the care of horses, cows, &c., belonging to Curtis Martindale.

Then by marriage contract dated the same 11th December, 1869, Curtis Martindale settled upon his wife, (present respondent) the property, real and personal, of which he might die possessed to the extent and value of $5,000 "save and except therefrom the farm and personal property thereon now in the occupancy of John Martindale."

On the 9th December, 1870, the deed of donation to John Martindale was for valuable consideration resiliated and $900 were paid to him by Curtis Martindale for improvements, &c.

Curtis Martindale died 27th March, 1885, having previously to wit, on 10th November, 1888, made his last will whereby he named as his residuary legatee, without designation of any specific property, the eldest of his own four sons who might be living at the time of the testator's decease, and his widow took possession of all his property including the farm claimed by the appellants.

There was no special plea specifically denying the status of the plaintiff, but oral evidence was given to prove the status which was objected to.

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It was admitted that no inventory had been made of the deceased's estate.

Racicot Q.C. and *Amyrauld* for appellants. The qualities and status of the plaintiffs *ès-qualités* and of the minor child James Curtis Martindale as well as the defendant herself as mentioned and described in the writ of summons, and all the other allegations of the plaintiff's declaration, not having been specially denied are deemed by law to be admitted by defendant. *La Banque Union* v. *Gagnon* (1); *Reinhardt* v. *Davidson* (2); *Gibeau* v. *Dupuis* (3); *Bain* v. *City of Montreal* (4).

But moreover there is sufficient evidence in the case of the status of the minor child as the courts below have found as a matter of fact.

On the principal question on this appeal viz., as to the farm reserved in the marriage contract, we contend that the intention of the parties as expressed by the stipulation in the marriage contract was that the said farm and the movables should be absolutely reserved from the *don mutuel*, and that as the farm claimed is shown to be the farm reserved from the *don mutuel* in the marriage contract it is not material whether it came into the hands of the testator by virtue of the resiliation of the donation to his son John under some of the provisions of the donation, or by virtue of the voluntary resiliation made of said donation as was actually done.

The *don mutuel* in the marriage contract of $5,000 to be taken by the survivor out of the property left by the predeceased is a donation *à cause de mort*, assimilated to a particular legacy, and the respondent survivor cannot retain the property claimed, as her right is simply to get $5,000 out of the estate. Art. 757 C.C.

(1) 15 Q. L. R. 31;
(2) 15 R. L. 42;
(3) 18 L. C. Jur. 101;
(4) 8 Can. S. C. R. 252.

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Respondent at death of Curtis Martindale was left in possession of his whole estate, movable (moneys, claims, goods and chattels, &c.,) and immovable. She has appropriated the whole of the movable estate which was of considerable value without any inventory and she cannot retain the farm claimed by appellants *ès-qualités* without accounting for what she has got already and irrespective of the amount of the balance due her and of the value of the farm.

Baker Q. C. for respondent. Having denied each and all the allegations of the declaration the appellants were bound to prove the status of the minor child from the registry o civil statu .

The exclusion of the property from the *don mutuel*, if it applies to the farm in dispute, had its *raison d'être* only by reason of one of the above circumstances happening; the parties cannot be presumed or held to have contracted with reference to the unforeseen case of a voluntary resiliation of the deed of donation, and the acquisition by Curtis Martindale of the property by onerous title.

On the 9th December, 1870, after the marriage, the father and son resiliated the deed of donation, the father paying the son $900 to indemnify the latter for moneys advanced and labour done and performed in improving the premises and a mutual acquittance and discharge of all obligations up to that date was given.

The renunciation by Curtis Martindale of the sum of $200 per annum, and the payment by him of $900 to his son, impoverished and reduced his estate by so much and diminished respondent's chance of being paid her marriage settlement at the time of his decease.

By the deed of 9th December, 1870, there was an interversion of title and Curtis Martindale became the proprietor of that farm, not in virtue of any condition of said original donation but by an onerous title,

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which was not in existence at the date of the marriage contract, and stands therefore *quoad* that contract entirely in the light of a distinct and new acquisition secured at the cost of the estate settled upon respondent by the marriage contract, and must be held liable for the stipulation and effect of that contract.

The reasons for the exclusion which existed at the time of the contract have disappeared. The property belonged to Curtis Martindale in the same manner as if he had acquired it from a stranger and passed to respondent in virtue of her marriage contract. If appellants wanted to get possession they should have had made an inventory and until that is done respondent is entitled to retain possession.

THE CHIEF JUSTICE :—Curtis Martindale, a widower, the testator under whose will the plaintiff claims (in the quality of tutor of James Curtis Martindale, a minor) married in 1869 the respondent and defendant Susan Powers, under a contract of marriage by which community was excluded, and *don mutuel* to the extent of $5,000 was stipulated. Previous to this, in 1867, Curtis Martindale had made a deed of donation of a farm to his son John Martindale. By the clauses and stipulations of this deed of donation the son John Martindale was to work the land; the donor, Curtis, was to live on it; the produce was to be equally shared, and Curtis, the donor, was to furnish half the seed. On the eve of the marriage, by a deed executed before the same notary as the marriage settlement and dated the same day, 11th December, 1869, the deed of 1867 was modified by providing that Curtis should work the farm himself, and that John, instead of working the farm and giving his father half the produce, should pay him $200 a year. For the payment of the annuity thus stipulated for John hypothecated a

farm which he had acquired by purchase, not from the testator but from the widow Whitman. The marriage settlement expressly excluded from the *don mutuel* the farm and personal property described as being "now in the occupancy of John Martindale, of the said township of Stanbridge, yeoman, one of the sons of the said Curtis Martindale, which said property both real and personal is not included nor intended to be included as forming any part or parcel of the said sum of $5,000."

The first question is whether this exclusion or exception applies to the farm which was the subject of the donation by Curtis to John or to the Whitman farm, which John had hypothecated to his father to secure the annuity of $200 under the deed of the 11th December, 1869, varying the original deed of donation. Mr. Justice Tait held that the exception applied to the farm in the donation deed. Chief Justice Lacoste and Mr. Justice Hall, though they decided the case in the respondent's favour upon another and distinct ground, held that the exception did not refer to the donation farm but to the Whitman farm.

Subsequently the testator made his will which contained this provision under which the plaintiff claims:

> As to the residue or remainder of my property whether real or personal, movable or immovable, money, notes of which I may die possessed or seized of, I will and bequeath the same and every part thereof unto the eldest of my four sons, Ari, John, Eli and Alva Martindale, who may be living at my demise, and for such son of my said four sons above named to use and enjoy the same during his natural life; and after his death to be transmitted unto his lawful issues from generation to generation, in the direct line as far as the laws of this Province will allow.

Subsequently to the marriage and on the 9th December, 1870, the testator for the consideration of $900 bought out John altogether as regards the farm previously given him.

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The present is a possessory action to recover the excepted farm. The pleas were the general issue, and a special plea which however does not conclude to the dismissal of the action but merely prays imposition of terms in the defendant's favour.

The following points arose:

1. It was said that the quality of the minor represented by the plaintiff was not proved, in that it was not proved by legal evidence that he was the eldest grandson at testator's death, the oral evidence of Ari not being legal proof. The courts below answer this by holding that the quality not being specifically denied it must be taken to be admitted, the general issue not being a sufficient denial. In this I concur. Then it was said that no acceptation of the succession on behalf of the minor as universal legatee (or legatee by title universal) was proved, and in fact it appeared that there had been no acceptation until after the action. The Court of Queen's Bench answers this objection by showing that the want of acceptation was a relative not an absolute nullity, and that the acceptation subsequent to action had a retroactive operation, for which proposition the Chief Justice refers to authors who establish this to be the law.

2. The next question is: What property was intended to be excepted as the farm described as being "in the occupancy" of John? Was it the donation farm, the old homestead, or was it the Whitman farm? I cannot agree that it was anything but the former as the first judge, Mr. Justice Tait, held it was; but both the judges whose notes we have, the Chief Justice and Mr. Justice Hall, seem to think the exclusion was intended to apply to the Whitman farm though they do not say this clearly.

3. Then comes the main point on which the Court of Queen's Bench decided, reversing Mr. Justice Tait.

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What was the effect of the re-purchase for $900 by the testator from John, carried out by the deed of 9th December, 1870? The Court of Queen's Bench hold that, granting the exception did refer to the homestead, it was a new purchase, a new acquisition of an onerous title, just as if John had sold to a stranger and the lands had gone through half a dozen hands, and had then been re-purchased by the testator, in which case it would be just the same as if it had been a piece of land in which the testator had never had any previous interest. I think the Court of Queen's Bench were right in this which was their *ratio decidendi*.

The appellants further say that the judgment appealed from is *ultra petita* as the special plea does not conclude to the dismissal of the action. The plain answer is that the general issue does so conclude.

The appeal must be dismissed with costs.

FOURNIER J.—Le 11 décembre, 1869, feu Curtis Martindale avait fait avec Susanne Powers, son épouse, intimée en cette cause, un contrat de mariage contenant, entre autres conventions matrimoniales, la suivante:

That whatever property the said Curtis Martindale and Susan Powers now have or that they shall or may hereafter acquire, both real and personal, upon decease of one of them, the same shall belong to the survivor of them, for and to the extent of the sum of $5,000, current money of this province, in sole and absolute property forever (save and exempt therefrom the farm and personal property thereon now in the occupancy of John Martindale, one of the sons of the said Curtis Martindale, which said property, both real and personal, is not included not intended to be included as forming any part or parcel of the said sum of $5,000, anything herein contained to the contrary in anywise notwithstanding).

Au décès de Curtis Martindale sa veuve, l'intimée, a pris possession de toutes ses propriétés, comprenant la terre et la maison dans laquelle vivait le dit Curtis Martindale lorsqu'il s'est marié et dans laquelle il a vécu avec elle jusqu'à son décès.

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Curtis Martindale est décédé le 27 mars 1885, ayant préalablement fait son testament le 10 novembre 1883, instituant pour son légataire résiduaire le fils aîné de ses quatre enfants qui serait vivant à l'époque de son décès.

La déclaration en cette cause allègue que James Martindale, enfant mineur, âgé d'environ sept ans, fils d'Eli Martindale, remplit la condition du testament et se trouve en conséquence le légataire résiduaire désigné, et réclame par l'action prise en son nom par son tuteur, Alex. Martindale, la terre et la maison dans laquelle a vécu Curtis Martindale, et dont sa veuve, l'intimée, a pris possession en vertu de son contrat de mariage.

L'intimée répond à cette action qu'elle a droit à ces propriétés en vertu de la clause ci-dessus citée de son contrat de mariage avec le testateur, dans lequel il a été stipulé que le survivant des deux époux prendrait dans la succession du prédécédé des propriétés mobilières et immobilières au montant de $5,000.

Elle a aussi allégué que l'identité du mineur réclamant n'avait pas été suffisamment établie et qu'il n'a pas été prouvé légalement qu'il soit le fils légitime de Elie Martindale. Elle a de plus positivement nié que la propriété qu'elle détient soit celle qui a été exclue du don mutuel par son contrat de mariage.

Il est vrai que la preuve de la filiation du mineur n'a pas été faite en la manière ordinaire par la production d'un acte de baptême. Elle consiste dans un certificat du secrétaire-trésorier donné en vertu de la 39 Vict. c. 20 et de la 50 Vict. c. 7. L'intimée n'ayant point soulevé d'objections spéciales à cette preuve il n'est pas nécessaire de décider dans la présente cause de la force probante de ce certificat, que les Statuts refondus de la province de Québec (art. 5784) semblent avoir mis au rang des actes de l'état civil.

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L'appelant ayant pris dans la déclaration la qualité de tuteur à James Curtis Martindale, enfant mineur d'Eli Martindale et d'Alma Gardner, cette qualité doit être censée admise dans notre pratique, à moins qu'elle ne soit spécialement niée. L'art. 144 C. P. déclare que tout fait dont l'existence ou la vérité n'est pas expressément niée ou déclarée n'être pas connue est censé admis.

L'intimée a aussi soulevé l'objection que le tuteur n'était pas autorisé, lors de l'émanation de l'action, à accepter le legs pour le mineur. L'autorisation, il est vrai, donnée par le conseil de famille, à accepter pour le mineur la succession de son grand'père, n'a été donnée qu'après l'institution de l'action.

Ce défaut d'autorisation n'est pas considéré comme une nullité suffisante pour faire renvoyer l'action ; il suffit qu'elle soit donnée pendant l'instance.

Au mérite la question unique est de savoir si la propriété dont l'intimée est en possession est la même que celle qui a été exemptée par le contrat de mariage de l'effet du don mutuel. L'intimée croyant que cette clause doit encore avoir son effet s'est efforcée de nier que ce fut la même propriété et a prétendu que c'était une autre qu'elle n'a pu indiquer ; mais en dépit de ses dénégations il est clair que c'est la même. Par son acte de donation à John Martindale Curtis Martindale s'était réservé certains droits sa vie durant avec droit de retour de la propriété dans le cas où son fils le prédécéderait. La prétention que la propriété exclue serait celle qui a été achetée par John Martindale de la veuve Martindale est insoutenable, parce que Curtis Martindale n'a jamais eu de droits sur cette propriété qui ne lui a jamais appartenu et ne lui appartenait pas dans le temps du contrat de mariage. L'exclusion eut été une absurdité palpable, mais il avait des raisons d'exclure l'autre sur laquelle il n'avait qu'un droit de retour et que

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d'ailleurs il avait donnée à son fils. Il était raisonnable de l'exclure ne fut-ce que pour prévenir son épouse qu'elle ne devait pas compter sur cette propriété dans laquelle il vivait alors.

Il est évident par le témoignage de l'intimée qu'elle a parfaitement compris que la propriété qu'elle occupe est celle qui a été exclue du don mutuel par le contrat de mariage. Mais par suite des transactions faites entre Curtis et John Martindale cette clause d'exclusion n'a-t-elle pas cessé de s'appliquer à la propriété en question? Cette propriété avait d'abord été donnée par Curtis à son fils John Martindale le 1er septembre, 1867, à diverses charges et obligations et entre autres, à celle de faire vivre son père et de pourvoir à ses besoins.

Le jour même du contrat de mariage, 18 décembre, 1869, par acte passé par le notaire qui a fait le contrat de mariage, la donation fut modifiée en par le donataire consentant à payer à son père une rente de $200, au lieu des charges et obligations stipulées en la dite donation.

Jusqu'à présent la propriété réclamée est demeurée sujette à l'exclusion du don mutuel, mais en est-il de même après l'acte de résiliation de la dite donation?

Le 9 septembre, 1870, durant l'année qui a suivi le mariage, Curtis et son fils John Martindale ont, par acte authentique, résilié et annulé l'acte de donation de la susdite propriété et déclaré qu'il serait considéré annulé de même que s'il n'avait jamais existé et que la terre y désignée, savoir: la moitié sud du lot n° 4, dans le 4me rang des lots du township de Stanbridge était redevenue la propriété du dit Curtis Martindale, ses héritiers et ayant cause.

Cette résiliation fut faite pour bonne et valable considération, savoir: pour la somme de $900 pour indemniser le dit John Martindale des améliorations et réparations faites sur la dite propriété, sur laquelle

somme il reconnût et confessa avoir reçu celle de $200 dès avant l'exécution du dit acte, et quant à la balance de $700 elle fut déclarée payable en la manière stipulée au dit acte, avec hypothèque sur la propriété indiquée au dit acte.

Par cet acte de résiliation Curtis Martindale a obtenu un titre complet et parfait de la dite propriété qu'il avait d'abord donnée à son fils et dans laquelle il ne s'était réservé qu'un droit de retour au cas où son fils le prédécèderait. Ayant acquis un droit absolu à la dite propriété pendant la durée du mariage, cette propriété est partant devenue sujette à l'effet de la clause du don mutuel qui s'étend à toutes les propriétés mobilières ou immobilières qui pourraient être acquises par les conjoints pendant la durée de leur mariage.

L'exclusion a donc cessé d'exister et la propriété doit être considérée comme une nouvelle acquisition faite par Curtis pendant le mariage et se trouve partant sujette au don mutuel.

Il est vrai cependant que la femme n'a droit à ces propriétés que jusqu'à concurrence du montant de $5,000 qui forme le don mutuel. Mais comme il n'a pas été fait d'inventaire il n'est pas possible de décider si les propriétés dont l'intimée est en possession valent plus que le montant du don mutuel. Il n'a été fait aucune preuve pour établir ce fait. Le demandeur *ès-qualité* avant d'exercer son action aurait dû plutôt faire faire inventaire. Il aurait alors pu constater si l'intimée avait en sa possession plus que la somme à elle due, et la cour aurait pu adjuger en conséquence ; mais dans l'état où est la cause la cour, en lui accordant ses conclusions, courrait le risque de déposséder inutilement l'intimée, à laquelle, probablement, après inventaire, il faudrait restituer les mêmes propriétés.

Par tous ces motifs je suis d'avis que l'appel doit être renvoyé et l'action renvoyée avec dépens.

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TASCHEREAU J.—The questions raised by the respondent as to the status of the appellant, and as to the want of authority of the appellant's tutor to accept the legacy in question, have been determined against her by both courts below, and relate to questions of practice and pleading upon which we, as a general rule, do not interfere with the rulings of the provincial courts. I would, moreover, add in this case that the respondent's contentions on these two points are unfounded. As to the proof of appellant's status, by the pleadings the only fact put in issue and specially denied by the respondent is the identity of the farm reserved in the marriage contract from the operation of the *don mutuel à cause de mort* therein contained, with the farm left by the late Curtis Martindale at his death, and sought to be recovered in this cause by appellant.

Now, the qualities and status of the appellant and of the minor child, James Curtis Martindale, as well as the defendant herself, as mentioned and described in the writ of summons, and all the other allegations of the appellant's declaration, not having been specially denied are deemed by law to be admitted by defendant.

As to the acceptation by the tutor of the legacy in question with the authorization of the family council I deem it quite sufficient, if it was necessary at all, though made *pendente lite*. Demolombe (1) is explicit on this point:

> Le tuteur est le mandataire général du mineur, et il a qualité pour agir en son nom toutes les fois qu'il est de l'intérêt du mineur qu'on agisse. Les formalités et les conditions auxquelles la loi a soumis ce mandat ont été introduites dans le seul intérêt du mineur et elles ne doivent pas être retournées contre lui. Elles ne concernent pas les tiers ; ceux-ci sans doute sont fondés à opposer au tuteur une fin de non-recevoir résultant du défaut d'autorisation ; ils sont fondés à refuser d'aller plus loin et d'engager la lutte judiciaire, mais voilà tout. La mesure de leur intérêt est la mesure de leur droit ; et il suffira au

(1) Nos. 687 et 715.

tuteur pour détruire toute objection de la part des tiers d'obtenir du tribunal un délai afin de se procurer l'autorisation du conseil de famille.

Mais l'autorisation même postérieure effacerait la nullité ou plutôt l'irrégularité des procédures antérieurement faites.

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I am clear, with the two courts below, that the respondent cannot have the appellant's action dismissed upon these two grounds.

Upon the real merits of the case I am of opinion that the Superior Court's judgment which maintained the appellant's action was right, and that the Court of Appeal was in error in reversing it.

The point taken by the respondent upon the identity of the farm claimed by the appellant with the farm excluded from the *don mutuel* in the marriage contract seems to me untenable. That Curtis Martindale could have intended to exclude the Whitman farm from this donation is a proposition that cannot seriously be contended for. Why exclude that Whitman farm? It never belonged to him; he had no claim whatever to it. I have no doubt that, as found by the Superior Court, the farm excluded is the farm now claimed. And the Court of Appeal in its formal judgment does not find the contrary, but bases its conclusion to dismiss the appellant's action upon the ground that as the farm now claimed by the appellant reverted back to his father by the restitution of September 9th, 1870, which the court holds is an onerous title, therefore the exception in the marriage contract has no effect, and the farm consequently passed to the respondent. I cannot assent to that proposition. That is reading out of the marriage contract the exception or reservation it makes in clear terms. The respondent may possibly have some rights against her husband's succession. That we have not here to determine, one way or the other. But she has, in my opinion, no title to the home farm itself. A farm was clearly excluded from

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her *don mutuel*. That farm, I say, is and cannot be any other but the home farm. Now this home farm clearly belonged to Curtis Martindale at his death, and consequently by his will passed to his son, the appellant. I have no doubt on the case, and would allow the appeal.

GWYNNE J.—By the deed of September, 1867, Curtis Martindale gave and granted, with warranty, to his son, John Martindale, the S. ½ of lot no. 4, in the 4th range of the township of Stanbridge, together with all the live stock and implements of husbandry and all other personal property enumerated in a schedule annexed to the deed, to have and to hold unto and to the sole use of the said John Martindale, his heirs and assigns, forever, subject to certain reservations and conditions therein contained; and first and expressly upon condition that the said John Martindale should till and cultivate the said tract of land during the natural life of the said Curtis Martindale, and account for and deliver to the said Curtis the equal undivided half of all the crops which should be raised and gotten from the said land, and one equal moiety of all the butter and cheese that might be made thereon, and one equal moiety also of all the live stock that might be raised from the stock mentioned in the said schedule, yearly and every year during the lifetime of the said Curtis; and upon condition further that in addition to the above, the said John Martindale should support and maintain the said Curtis as well in sickness as in health, in all things becoming his rank and condition for and during his natural life; and it was agreed that the said Curtis and the said John should bear and pay, in equal shares, all taxes and assessments on the said property, and also all costs and charges for keeping the implements of husbandry on the farm in good order;

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and that each should supply one half of the seed necessary for the cultivation of the said farm from year to year. To the fulfilment of all of the above conditions upon the part of the said John, to be performed during the lifetime of the said Curtis, the said John bound himself if he should survive the said Curtis, but it was thereby provided, covenanted and agreed by the respective parties to the said deed, that in case of the death of the said John happening before the death of the said Curtis, the widow or heirs of the said John should not be held to the performance of anything therein contained towards the said Curtis, and that the said tract of land, together with the personal property mentioned in the said schedule, should revert to and become the property of the said Curtis, save and except such buildings as the said John might have erected on the said land, which buildings or improvements should belong to the heirs or legal representatives of the said John Martindale. During the year 1868 John Martindale worked the farm under the terms of the above deed, and lived in the dwelling-house upon the farm with his father, who by the deed had reserved to himself during his life certain rooms therein. In the year 1869, and prior to the month of September in that year, John Martindale, together with his wife, moved to a neighbouring lot in an adjoining concession on lot 5, in the 5th range of lots in Stanbridge, which he had purchased from his aunt, a Mrs. Whitman. Upon the 6th of September, 1869, he entered into an agreement with one Curtis Murray, with the consent of the said Curtis Martindale, testified by the latter being a party to and signing the said agreement by which it was agreed as follows:—

John Martindale, by and with the consent of his father, Curtis Martindale, does hereby agree to let his farm, known as the south half of lot No. 4, in the fourth range of lots, in the township of Stanbridge,

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to Certes Murray, to work and carry on at the halves, for the term of two years, commencing on the 10th day of March, in the year of our Lord 1870, and to continue two years therefrom, unless one of the said parties should be dissatisfied, in which case said Murray is to leave at the end of one year. Said Martindale agrees to put on said farm eight cows, but reserves one of said cows for the use of his father, if he requires it, in which case he, the said John Martindale, agrees to pay the said Murray one half the expense of keeping said cow. Also he agrees to put on five sheep; said Martindale agrees to put on two brood mares, to be used on the farm, with one double wagon and double harness, together with all the necessary implements of husbandry for carrying on the said farm. Said John Martindale agrees to let said Murray have the use, for the first year, of one half of fifty acres of land which he owns on lot No. 5, in the 5th range of lots in Stanbridge, for pasturing two horses and building a portion of the line fence on the said piece of land; said Martindale reserves a newly stocked piece of meadow in the south field, said meadow supposed to contain three or more acres for his father to mow, for his own use, if he chose to do so. He reserves also the north part of the horse barn (the part for putting the hay in), to put his hay, and the south part of the stable for his colt; he reserves the south part of the dwelling-house, known as the old part, for his father. Said John Martindale and Murray are each to have two yearling heifers pastured on the farm the first summer, and if said Murray keeps the farm more than one year the two heifers belonging to Martindale are to be wintered on the farm with the cows if they are with calf, but not otherwise. If the brood mares should have colts the first year they are to belong to Curtis Martindale and John Martindale, but if they should raise colts the second year they are half to belong to Murray and half to Curtis Martindale. Each of the said parties to furnish one half of the seed sown or planted on the said farm, together with one half of the salt for the stock and dairy, and one half of the butter tubs. Said Murray is to put on one cow for his family use, which is to be pastured on the farm, but not wintered. Said Murray agrees to carry on said farm in a good husbandlike manner, and to deliver to Curtis Martindale one equal half of all crops grown and harvested on said farm by measure or weight, together with one half of the butter, pork, and all other products of the farm and dairy. It is agreed between the said parties if the said farm does not produce sufficient hay to winter the stock of the farm, that Curtis Martindale shall reduce the stock by selling such stock as he may think proper. Said Murray agrees that at whatever time he leaves said farm he will leave the buildings and all tools of the farm in as good condition as he finds them, save and except the natural wear of said pro-

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perty. Each of the said parties is to pay one half of all the taxes for which said farm is liable during the two years, and keeping the farming tools in order. Said Murray agrees to move on to the farm on the twentieth day of September, in the year of our Lord, 1869, and to take charge of the stock and dairy, and to have one half of the profits of the dairy for taking care of the stock up to the 10th day of March, in the year of our Lord, one thousand eight hundred and seventy.

Each of the said parties John Martindale, Curtis Martindale and Murray signed that agreement. Now it is to be observed that this agreement does not divest John Martindale of the estate in the lot vested in him by the deed of September, 1867. The agreement of September, 1869, only modifies the provisions of the former agreement as to the personal working of the farm by John Martindale authorizing him to substitute Murray in his place for the limited period and to the extent and upon the terms prescribed in the agreement without in any manner prejudicing John Martindale's title and rights under the deed of September, 1867. It might be that before the 10th of March, 1870, John Martindale and Murray might mutually agree to put an end to their agreement, in which case equally as after the expiration of the two years or one year, as the case may be, as mentioned in the agreement, John Martindale's liability to Curtis for the working of the farm under the deed of September, 1867, would continue in full force. In the interval between the 6th September, 1869, and 10th March, 1870, the only clause of the agreement of the 6th September, 1869, in actual operation was the last whereby Murray agreed to move on to the farm on the 20th September, for the purposes in that clause mentioned, and his possession under that clause until the 10th March, 1870, would be only in right of, and as the servant or substitute of, John Martindale in whom the estate in the property was still vested by the deed of September, 1867. Now in

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this state of things the instrument of the 11th December, 1869, by and between John and Curtis Martindale was executed, and thereby after reciting the deed of donation of September, 1867, and the terms therein contained upon which John Martindale had bound and obliged himself to till and cultivate the farm during the life of Curtis, and after reciting further that,

> The said Curtis Martindale hath proposed and offered unto the said John Martindale to occupy and cultivate the said tract of land and to take management of the stock belonging to the same with the horses that are mentioned in the said schedule (annexed to the deed of donation) and that said John should pay unto the said Curtis Martindale yearly, and every year so long as he the said Curtis Martindale shall live, the sum of $200 per annum, in lieu of all support and maintenance as well as payment of taxes and all other obligations expressed to be done and performed by the said John Martindale towards the said Curtis Martindale, in and by the said foregoing deed of donation: And in case the said John Martindale should at any time hereafter be called upon to cultivate the said tract of land and farm mentioned in the said foregoing deed of donation, the said Curtis Martindale doth hereby agree to feed the cows and horses reserved in the said foregoing deed of donation out of the undivided crops raised upon the said farm, and that the said John Martindale be exonerated from the care of the said cows and horses, in case he may at any time hereafter be called upon to resume the cultivation of the said tract of land and farm mentioned and described in the said foregoing deed of donation.

To all which the said John Martindale did thereby consent and agree to accept the said conditions. It was witnessed that the said John Martindale did thereby promise and oblige himself to pay unto the said Curtis Martindale, for and during his natural life, the sum of $200 per annum for each and every year in lieu of support and maintenance as mentioned in the foregoing deed of donation, and that the first such annual payments should become due at the expiration of one year from the day of the date thereof, and from thence annually during the natural life of the said Curtis Martindale, any thing in the said foregoing deed of

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donation contained to the contrary in anywise notwithstanding. The deed also contained the following clause:—

> And for surety for the payment of the said sum of $200 per annum, the said John Martindale doth hereby specially mortgage and hypothecate the west half of lot No. 4, in the 4th range of Stanbridge with all the buildings thereon.

There can I think be no possible doubt that the lot here intended to be mortgaged is the lot conveyed to John Martindale by the said deed of donation and that the word "west" half was inserted by inadvertence for the word "south" half. The west half would be composed of the north-west and south-west quarters of which latter John was possessed as part of the south half conveyed to him by the deed of donation; to the north-west quarter he had no title, and it is obvious that he intended to mortgage half of lot 4, in the 4th range, which therefore must be the south half to which alone he had title. Now in relation to this instrument it is to be observed that it does not divest John Martindale of the estate in the farm vested in him by the deed of donation. It merely suspends and modifies certain of the conditions and obligations imposed by that deed upon John in connection with his tilling and cultivating the farm and taking care of the live stock, &c., &c., &c. It does not profess to annul these obligations wholly, but merely to suspend and modify them, for the instrument expressly contemplates that John might at some future period be required to resume those obligations, in which event certain modifications are agreed upon, and it provides for the annual payment by John to Curtis of $200 in lieu of and substitution for the maintenance and support in sickness and in health, which, by the deed of donation John was obliged to render to his father over and above his share in the crops raised upon the farm and in the produce and

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increase of the live stock, &c., &c., &c. John's right to erect buildings and to make improvements upon the farm is unaffected, in fact his legal estate as the proprietor of the farm is untouched, save in this that Curtis accepts from John a mortgage upon the farm in security for the payment by John to Curtis during his life of the said annuity of $200.

Upon the same 11th December, 1869, but after the execution of the above instrument of that date, the marriage contract under consideration was prepared by and executed before the same notary who had prepared the above instrument of that date between John and Curtis Martindale and the said deed of donation. The clause in the marriage contract under which the question in this case arises is as follows:—

But it is however hereby expressly declared, stipulated, covenanted and agreed by and between the said parties that whatever property the said Curtis Martindale and Susan Marie Powers now have or that they shall or may hereafter have, both real and personal shall, upon the decease of one of them, belong to the survivor of them for and to the extent of $5,000, current money of this province, in sole and absolute property forever (save and except therefrom the farm and personal property thereon now in the occupancy of John Martindale of the said township of Stanbridge, yeoman, one of the sons of the said Curtis Martindale, which said property both real and personal is not included nor intended to be included as forming any part or parcel of the said sum of $5,000, any thing herein contained to the contrary in anywise notwithstanding.

The contention of the respondent is that the land mentioned in the deed of donation cannot be the farm mentioned in the clause of exception and reservation in the marriage contract, upon the suggestion that it was not then "in the occupancy of John Martindale," and so did not conform to the description of the farm mentioned in the marriage contract—that the lot which John was in possession of and living on in the 5th range was the only one in his occupancy, and that it alone answered the description of the farm in the

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marriage contract; that this must be regarded as the farm intended in the exception and reservation in the marriage contract, or that the exception and reservation must be void for uncertainty. If we should hold that the lot of land in the 5th range, which John had purchased from his aunt, Mrs. Whitman, was the lot of land or farm which, by the marriage contract, was excepted and reserved from the operation thereof, we must construe the exception as being of property in which Curtis Martindale had then no interest whatever, nor, so far as appears, any contemplation of acquiring, or that he might acquire an interest therein at any future period. So construed, the exception and reservation of that lot would be utterly senseless. It is not possible, therefore, to construe the language used as referring to that piece of land, and as the evidence shows that Curtis had no interest in any land other than that which he had in the south half of lot no. 4, in the 4th range, in virtue of the instruments of the 1st September, 1867, and the 6th September and 11th December, 1869, which latter was executed immediately before the execution of the marriage contract, the exception must be absolutely void unless it can apply to that lot of land. The question, therefore, simply is:— Is the description given of the farm intended under the words "now in the occupancy of John Martindale" so inapplicable to the south half of the said lot no. 4 that it cannot apply to the only farm to which it could reasonably apply? And, in my opinion, it clearly is not, for upon the 11th day of December, 1869, when the marriage contract was executed, it is clear that John was the proprietor of the said south half lot, subject to the mortgage thereon which upon that day he executed in favour of Curtis in security for the annuity of $200 thereby made payable to Curtis during his life, and the possession which Murray then had of the farm

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under the agreement of the 6th September, 1869, being under John, and for John, and as his substitute, with the consent of Curtis, to fulfil the stipulations and obligations which had been incurred by John in the deed of donation, the draughtsman of the marriage contract, with perfect propriety, might refer to the farm as then in the occupancy of John, who was the proprietor of the land in title, and in occupation of it through his servant and substitute, Murray. I am of opinion, therefore, that there can be no doubt that the farm referred to in the marriage contract as excepted and reserved from the operation thereof is the farm mentioned in the deed of donation, which was not at all inaccurately referred to as being, on the 11th December, 1869, in the occupancy of John. Neither can there be, in my opinion, any doubt that the land so designated must still be held to be excepted and reserved from the operation of the marriage contract. At the time of the execution of that contract Curtis Martindale could only have acquired the legal estate in and title to that piece of land by one or other of three ways, namely:—1st. By foreclosure of the mortgage for non-payment of the $200 per annum, in security for which it was executed; or, 2nd. by surviving John; or, 3rd. by resiliation of the deed of donation by mutual agreement, which is the mode by which Curtis Martindale, in December, 1870, did become seized of the land. Now, there is nothing in the marriage contract qualifying the mode by which Curtis should acquire title to the farm in order that it should be excepted from the operation of the marriage contract; and it cannot be maintained as a proposition of law that the exception was only to prevail in the event of Curtis acquiring title by survivorship. What is excepted is the farm itself if Curtis should be seized of it at the time of his death, regardless of the mode by which Curtis might

acquire title to it. The fact that by the deed of resiliation Curtis covenanted to pay John $900 for improvements cannot operate to prevent the exception having effect in accordance with its terms. That sum would seem to be payable to John's estate if the title of Curtis had accrued by survivorship. But however that may be, effect must be given to the exception and reservation of the farm from the operation of the marriage contract under the circumstances in which the title of Curtis thereto has accrued equally as if his title had accrued by foreclosure of the mortgage or by his surviving John.

In all other respects I concur in the judgment of the Court of Queen's Bench at Montreal, as delivered by the learned Chief Justice of that court. This appeal must, therefore, in my opinion, be allowed with costs, and the judgment of the Superior Court restored.

As to the evidence of Mr. Rice to the effect that—

> On the morning of the day on which the marriage contract was made Curtis Martindale came to him and said he had taken his farm back from his son John that morning so that he could give the defendant security upon it for her contract; that he was going to give her a contract for $5,000, and give her security for it upon the property he had just taken back from his son John.

Besides that this evidence was inadmissible, Mr. Rice would seem to have been labouring under a misconception of the conversation which he said had taken place eighteen years previously, for it is plain that Curtis had not taken back the farm from his son on the morning of the day on which the marriage contract was made, but that, on the contrary, he had only suspended and modified the stipulations and conditions in the deed of donation as to John's tilling and cultivating the farm, and had accepted a mortgage on the farm executed by John to secure the $200 per annum thereby agreed to be paid to Curtis in lieu of and substitution for maintenance. It was not until the month

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of September, 1870, when the deed of resiliation was executed, that Curtis took back the farm. These observations, however, have no bearing on the case, except in answer to an imputation of bad faith in Curtis in his having, while professing to intend to give the defendant security upon the farm as a marriage portion, in point of fact excepted and reserved that farm from the operation of the contract.

SEDGEWICK J. concurred with Fournier J.

Appeal dismissed with costs.

Solicitors for appellants: *Racicot & Amyrauld.*

Solicitors for respondent: *Baker & Martin.*

FREDERICK B. HAYES (PLAINTIFF).....APPELLANT; 1892

AND *Nov. 7.

REMIGIUS ELMSLEY (DEFENDANT).....RESPONDENT. 1893

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *June 14.

Vendor and Purchaser—Agreement to pay interest—Delay—Default of vendor.

Under a contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time interest should be paid from the date of the contract the vendor is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept whereupon the vendor brought suit for rescission of the contract which the court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance :

Held, affirming the decision of the Court of Appeal, that the vendee was not obliged to pay interest from the time the suit for rescission was begun as until it was decided the vendor was asserting the failure of the contract and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits.

Held, that up to the time the vendor became in default the vendee, by his agreement, was precluded from claiming rents and profits and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid.

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

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

The only questions raised on this appeal were whether or not the defendant, under a contract to sell real estate to the plaintiff, was entitled to interest from the date of the contract or for any part of the time since elapsed, and whether or not the plaintiff was entitled to the rents and profits of the said real estate of which he had not paid the purchase money and was never in possession. The circumstances under which these questions arose sufficiently appear from the above head note and the judgment of the court.

Donovan for the appellant.

W. Cassels Q.C. for the respondent.

The judgment of the court was delivered by :—

THE CHIEF JUSTICE.—By the contract dated the 24th November, 1886, the purchase money was to be paid in cash within twenty-one days from that date and on delivery of the conveyance, which was to be prepared by the vendor and delivered free of costs to the purchaser. The vendor was to remain in possession and in receipt of the rents and profits until the payment of the purchase money when the purchaser was to be let into possession. The contract contained the following clause as to interest:

> If from any cause whatever the said sum of $40,000 is not paid within thirty days from the date hereof together with the said proportion of taxes, interest from the said date shall be paid thereon at the rate aforesaid to the vendor, but this stipulation is without prejudice to the vendor's right to cancel the sale as above provided.

The purchaser never having been let into possession his liability to pay interest depends entirely upon the

(1) 19 Ont. App. R. 291 (2) 21 O. R. 562.

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terms of the agreement. According to these he became liable to pay interest from its date, namely, from the 24th November, 1886, when at the expiration of thirty days from that date he had failed to pay the purchase money. No difficulty arose as to the title; that was perfectly good and accepted as such. It was then for the vendor to take the next step by preparing and tendering a proper conveyance. What was done as to this may be stated in the words of the learned Chief Justice in the case of *Elmsley* v. *Hayes*, the action for rescission. The learned Chief Justice says:—

In a very few words I will state why I feel compelled to join in allowing this appeal. On July 6th plaintiff's solicitor sends a draft of conveyance requiring acceptance so as deed can be executed in a week. This draft was fatally defective and impossible for defendant to accept. It was not a mere mistake in writing the word "lessee" for "lessor" but it required the vendee to covenant for the performance of the covenants on the part of the tenant or lessee, thus emphasizing the mistake. The letter reached defendant next day. He delays answering till the 17th and then sends an amended draft. Plaintiff's solicitor on same day returns the draft unopened, declares the contract at an end and files the bill for rescission in three days, viz.: from the 20th July.

It is a well settled rule of the law of vendors and purchasers of real estate as administered by courts of equity, that a purchaser is relieved against an obligation to pay interest imposed by a clause expressed in the same terms as those which are used in this contract, namely, a clause providing that if there shall be delay "from any cause whatever," after a certain date interest shall be paid, when it can be shown that the delay was caused by the wilful default of the vendor (1).

As to what constitutes wilful default on the part of the vendor no exact definition can perhaps be found. It is certainly, however, extensive enough to include

(1) Dart Vendor and Purchaser 6 ed. p. 719; *Greenwood* v. *Churchill* 8 Beav. 413.

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what may be called gross negligence to perform obligations which he has imposed upon himself by his contract. It must therefore *a fortiori* comprehend cases in which the vendor is not merely guilty of inaction and neglect, but in which he actually repudiates his agreement altogether, and also cases in which he makes grossly untenable claims and refuses to complete except on the terms that such claims are acceded to. In both these latter respects was the vendor in the present case in default. First, from the date of the action for rescission begun on the 20th July, 1887, until the 10th March, 1891, when that litigation was terminated by the judgment of the Court of Appeal, the vendor, the present respondent, was most energetically asserting the determination of the contract, and insisting that he had ceased to be bound by it. Upon the plainest principles he could not be entitled to claim interest under the contract from a purchaser not in possession nor in receipt of the rents and profits, during the period covered by this litigation. And it makes no difference that during part of this time the purchaser may have been claiming more than he was entitled to; the unfounded claim of the one cannot be set off against that of the other, and it is manifest that during the whole time the respondent was thus seeking a judicial rescission of the contract the appellant was relieved from the obligation of offering to pay the purchase money since the attitude of the respondent in that litigation was a continuous declaration that he would not accept it.

From the termination of the litigation in the first action until the commencement of that for specific performance, now under appeal, the vendor was insisting on terms to which he was not entitled, that is to say, to the payment of interest during the pendency of the action for rescission. This is shown by the course

taken by the respondent in his defence of this action and otherwise. He made this specific claim most distinctly, and down to the date of the present judgment he has by his own course of conduct, if not in words and correspondence too, and by his line of defence herein, always insisted on his right to be paid this interest, so that the appellant was justified in assuming that it was useless to offer to pay the purchase money without the interest thus unjustifiably claimed. I am therefore of opinion that there was continuing wilful default from the 20th July, 1887, down to the date of the present judgment of this court, and that consequently the purchaser cannot be ordered to pay interest during that interval. From the 24th December, 1886, to the 20th July, 1887, or perhaps only to the 17th July, 1887, the purchaser is bound to pay interest, for during that time the respondent was not in default.

The purchaser is not entitled to any account of rents and profits. He had no right to possession until he paid his purchase money and therefore was not entitled to receive any rents and profits, or to possession, down to 20th July, 1887, when the vendor became in default. Since that date he has been relieved from the payment of interest and he could not possibly be entitled to rents and profits for the time during which the purchase money was unpaid and the vendor is deprived of interest. To give him this would be to take from the vendor the fruits both of his estate and the purchase money and would be little less than confiscation.

If the appellant has been damnified by the respondent's refusal to carry out his contract the remedy for that should have been sought in damages and not in an account of rents and profits. Any claim for damages was, however, renounced by the appellant at the trial of the present action.

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The appeal must be allowed to the extent indicated. The appellant is to be declared entitled to specific performance upon payment of the purchase money and interest from 24th November, 1886, to 20th July, 1887, and the respondent must pay the costs in all the courts. In default of payment of purchase money and interest by a day to be fixed in the judgment, the contract is to be declared to be rescinded.

Appeal allowed with costs.

Solicitor for appellant: *Joseph A. Donovan.*

Solicitors for respondent: *Kingstone, Wood & Seymour.*

MARY STEVENSON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

ROBERT H. DAVIS (DEFENDANT).....RESPONDENT.

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*Mar. 20.

*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Contract of sale—Interest payable by purchaser—Delay—Duty to prepare conveyance.

A person in possession of land under a contract for purchase by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery and interest thereon from the date of the contract is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.

The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered. Fournier and Taschereau JJ. dissenting.

A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. Fournier and Taschereau JJ. dissenting.

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

The action in this case arose out of a contract for the sale of land in the following terms.

"This memorandum witnesseth that Robert H. Davis, Esq., sheriff, has agreed to purchase from the heirs of

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

(1) 19 Ont. App. R. 591. (2) 21 O.R. 642.

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R. V. Griffith, deceased, the Griffith homestead in North Gayuga, immediately adjacent to the town of Gayuga, containing about sixty acres, being parts of lots 30, 31 and 32, in the first concesssion north of the Talbot road, for the price or sum of $2,000 ; possession to be taken at once by the purchaser, and the purchase money to be paid as soon as the conveyances are ready for delivery; interest to be paid on the purchase money from the date of possession; the purchaser to be paid a fair value for straw and manure taken off the property by R. J. Martin since last autumn, at a valuation satisfactory to both parties."

Under this agreement the defendant Davis entered into possession but the preparation of the conveyance was delayed owing to some of the vendors being infants which rendered it necessary to procure the approval of the official guardian to the conveyance. When it was eventually prepared by the solicitor for the purchaser, but who has been held by the Divisional Court to have been acting for the vendor in preparing it, it was executed and given to the agent of the vendors to deliver to the purchaser who objected to one of its provisions. It was altered, however, to the satisfaction of the purchaser in presence of representatives of both parties and accepted.

On entering into possession of the land the defendant had deposited the amount of the purchase money in the bank to a separate fund, the deposit bearing no interest and after a time he changed the deposit so that it would draw three per cent. On accepting the conveyance he refused to pay any larger amount for interest than he had received for this money and the vendors claiming six per cent from the date of the contract brought this action to recover the same.

The Divisional Court and the Court of Appeal held in favour of the contention of the defendant.

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Donovan for the appellants.

Furlong for the respondent.

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

THE CHIEF JUSTICE.—This is an action brought by vendors of land against the vendee to recover the purchase money. I am of opinion however, that the rules of decision to be applied, when upon any of the questions arising in such an action there is a difference in the principles heretofore prevailing in courts of law and courts of equity, are to be found in the latter system. This seems to be the effect of the change wrought, not in procedure merely but in the law itself, by section 53, subsection 12, of the Judicature Act.

We must therefore be guided by the rules applied by courts of equity in carrying out purchases of real property, both as regards the obligation to pay interest and also as to the preparation of the conveyance.

By the contract the purchaser, the respondent, was to be let into possession (which was done), he was to pay interest from the date of possession and to pay the purchase money as soon as the conveyances were ready for delivery.

The respondent being in possession and being bound by the contract to pay interest, (reciprocal terms,) he could not according to the established principles of courts of equity be exonerated from his liability for interest so long as he retained the possession, unless he brought himself within two essential conditions. These conditions required first, that the vendors should be in wilful default, a somewhat vague and not very appropriate expression used in such cases. Secondly, that the purchaser should deposit the purchase money in a bank or other proper place of deposit, not to his general current account, but to a

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separate account, so that he might be in a position to retort, when his objection to pay interest was met by the fact that he was enjoying the possession of the land, that he was losing the use of the purchase money.

The second condition the vendor so far complied with when on the 2nd May, 1889, he deposited $1,975 and $87.19 in a bank, of which the plaintiffs' agent, Mr. Mitchell, had notice. The two sums deposited together exceeded the amount of the principal sum due on account of price, and this, on the authority of *Kershaw* v. *Kershaw* (1) would have been sufficient to stop the running of further interest if the first condition I have mentioned had existed, that is if the vendors had been in default. There was not, however, any wilful default on the part of the vendors. Delay was caused in completion by the infancy of some of the vendors and the consequent necessity of obtaining the concurrence of the guardian or officer whose sanction was required to the conveyance. The title in all other respects was perfectly good and there were no objections on that score. It is not suggested that the vendors were guilty of any unreasonable delay in procuring the assent of the officer of the court. And at all events the decision in the case of *De Visme* v. *De Visme* (2) has not been followed and delays caused by the state of the title do not, unless there has been in addition some gross negligence or misconduct, amount to wilful default. It is said, however, that the vendor tendered an insufficient conveyance, a deed that had been avoided by alteration, and one to which other objections were made. I have looked into the point about the alteration and have satisfied myself that it was made before delivery and whilst the deed was a mere escrow in Mitchell's hands, and with the assent

(1) L. R. 9 Eq. 56. (2) 1 McN. & G. 336.

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of all parties, and therefore that it did not vitiate the deed. (1) I do not, however, dwell on this, nor do I adopt it as a ground of decision.

I say that the vendors were in no default respecting the conveyance. It was not their duty to prepare the conveyance but the duty of the purchaser according to the general practice in all cases in which the agreement of the parties has not made some other provision. No such provision is to be found in this contract for the clause that "the purchase money to be paid as soon as the conveyances are ready for delivery" contains nothing militating against the well-established general rule referred to. It is the duty, indeed it may be called the privilege, of the purchaser to prepare his own conveyance; this, however, when ready for execution the vendor must procure to be executed. The reference in the contract does not imply that the vendors were to be burdened with this duty of preparing the conveyance merely because it speaks of the delay of the conveyance, for that refers to their final execution by delivery and to their delivery to the purchaser after having been prepared by him and executed by the vendors. All that the vendors' agent did then in preparing the instrument which was delivered to him as an *escrow* signed and sealed by the vendors, was in excess of any obligation of the contract and entirely gratuitous on the part of the vendors who consequently were not, by reason of the mistake and alteration, guilty of any default whatever. The delay in completion was entirely the fault of the purchaser himself, in not first preparing his own conveyance and then calling on the vendors to execute it or to procure its execution.

The judgment of the Chief Justice of the Queen's Bench was right in all respects save one. I should

(1) See Elphinstone on Interpretation of Deeds pp. 25-26.

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have thought the plaintiffs entitled to their costs of the action, but that was not and could not have been a subject of appeal. Therefore the appeal must be allowed with costs and the judgments of the Divisional Court and Court of Appeal reversed with costs to the appellants in both these courts, and the judgment of the Chief Justice of the Queen's Bench Division must be restored.

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellants: *Joseph A. Donovan.*

Solicitors for respondent: *Furlong & Beasley.*

DAVID ALLISON (PLAINTIFF).....APPELLANT; 1894

AND *May 21, 22.
Oct. 9.

N. McDONALD (DEFENDANT)..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Discharge—Action on promissory note—Security for mortgage debt.

A. and B., partners in business, borrowed money from C. giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved A. assumed all the liabilities of the firm and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt and afterwards brought an action against B. on the promissory note.

Held, affirming the decision of the Court of Appeal, that the note having been given for the mortgage debt C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands which he had incapacitated himself from doing.

Held, also, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change his release of the principal, A., discharged B., the surety, from liability for the debt.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) in favour of the plaintiff.

The facts upon which the decision in this case was based may be briefly stated as follows:

The defendant, McDonald, carried on business in partnership with Adam Allison the plaintiff's brother, and the firm borrowed $1,000 from the plaintiff giving

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

(1) 20 Ont. App. R. 695. (2) 23 O. R. 288

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him a mortgage on partnership property and a joint and several promissory note as security. The partnership having been dissolved Adam Allison carried on the business alone, and agreed to pay the liabilities of the firm. The plaintiff after the dissolution gave Adam Allison a discharge of the mortgage given to secure his loan but was not paid, and Adam Allison mortgaged the lands again to raise funds. Eventually Adam Allison became insolvent and absconded and plaintiff endeavoured to recover the amount of his loan from defendant by action on the promissory note.

At the trial plaintiff's action was dismissed but an appeal to the Divisional Court resulted in the judgment at the trial being reversed and judgment entered for plaintiff for the recovery of the amount of the note with interest from its maturity. On further appeal the Court of Appeal reversed the decision of the Divisional Court and restored the judgment of the trial judge. The plaintiff then appealed to this court.

Aylesworth Q.C. for the appellant. Unless the terms of dissolution of the partnership changed the relationship between the partners into that of a principal and surety the discharge of the mortgage would not affect plaintiff's remedy on the note. *Swire* v. *Redman* (1); *Birkett* v. *McGuire* (2).

If there was such change of relationship unless plaintiff had knowledge of it he was under no duty to preserve securities or look after the interest of defendant specially. *Oakeley* v. *Pasheller* (3).

Robinson for the respondent referred to *Duncan, Fox & Co.* v. *North and South Wales Bank* (4).

The judgment of the court was delivered by

THE CHIEF JUSTICE. — The respondent Norman McDonald, and one Adam Allison, a brother of the

(1) 1 Q. B. D. 536.
(2) 7 Ont. App. R. 53.
(3) 4 Cl. & F. 207.
(4) 6 App. Cas. 1.

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appellant David Allison, were in 1888 in partnership as bankers, and in the course of their business borrowed $1,000 from the appellant who was also a banker. As security for this loan Allison & McDonald gave the appellant their joint and several promissory note dated the 2nd March, 1888, payable two years after date, for $1,000 with interest at ten per cent. They also as further security for the loan gave the appellant a mortgage on certain lands in South Dorchester. The defeasance contained in this mortgage was in the following words:

> Provided this mortgage to be void on payment of the said sum of one thousand dollars according to the tenor of a promissory note made and bearing even date herewith made by the said mortgagors to the mortgagee for one thousand dollars and interest thereon as provided by the said note.

In February, 1889, Adam Allison and the respondent dissolved partnership. By the terms of the agreement for dissolution Adam Allison (who was to continue the business) undertook to pay all the liabilities of the partnership and the respondent relinquished all the assets to Adam Allison. On the 1st of July, 1889, the respondent conveyed his interest in the equity of redemption of the mortgaged property to Adam Allison. On the 19th May, 1891, the appellant gave up the security of the mortgage in favour of his brother and executed a statutory discharge which had the effect of vesting the equity of redemption in Adam Allison. Adam Allison subsequently mortgaged the property for a new loan to another lender. On the 16th July, 1891, Adam Allison, having become insolvent, made an assignment for the benefit of creditors. On the 20th August, 1891, the appellant brought the present action to recover the amount of the promissory note from the respondent. The respondent set up in his defence that by releasing the mortgage the appellant had dis-

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charged him. The cause was originally heard before the Chancellor who dismissed the action. The learned Chancellor's judgment proceeded upon two distinct grounds: First, he held that the mortgage and promissory note having been given for the same debt, the appellant could not recover upon the note after having released the mortgage inasmuch as, apart altogether from any relation of principal and surety existing between Adam Allison and the respondent, the latter, on payment of the note, would have been entitled to a transfer of the mortgage which the appellant had, by discharging that security, put it out of his power to give him; secondly, the Chancellor's decision was put upon the independent ground that the dissolution agreement had changed the relationship of Adam Allison and the respondent *inter se*, and that from thenceforward it had become that of principal and surety in consequence of Adam Allison's undertaking to pay off the liabilities of the firm; that the appellant had notice of this alteration in the relationship of his debtors when he released the mortgage; and that consequently he, the respondent, was discharged.

The Queen's Bench Division on appeal dealt only with the latter point, and on the security of *Swire* v. *Redman* (1) held that both the respondent and Adam Allison having contracted with the appellant as principal debtors, and there having been no relation of suretyship actually existing between them at the time the promissory note and mortgage were given, the subsequent change in their relation to each other could not affect the appellant even though he had notice of it; and on this ground they reversed the Chancellor's judgment. The learned judges of the Queen's Bench Division do not seem to have had their attention

(1) 1 Q. B. D. 536.

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directed to the first point; at all events they do not deal with it in the judgment of the court. The Court of Appeal have, by a majority of three to one, reversed the judgment of the Queen's Bench and restored the Chancellor's judgment, the dissenting judge being Mr. Justice Maclennan. The judgment of the Court of Appeal proceeds upon the point taken up in the first branch of the Chancellor's judgment, namely, that the appellant could not call upon the respondent to pay the mortgage debt without being prepared upon payment to re-convey to him the lands mortgaged to secure the debt which he had incapacitated himself from doing. Upon this point I entirely agree with the judgments of Mr. Justice Burton and Mr. Justice Osler delivered in the Court of Appeal.

So completely is the principle upon which they have decided the case supported by authority that it would, under the old system of procedure when law and equity were administered separately, have been of course to enjoin an action to recover on a promissory note brought under such circumstances as are disclosed by the evidence in this record. The rule is elementary and so well established that it is almost superfluous to quote authorities in support of it. The principle is the plain and just one that he who gives a pledge in security for a debt is, upon payment, entitled to a return of that which he has given in security, from whence it follows that if the creditor is unable to return the pledge he will not be allowed to exact the debt. *Palmer* v. *Hendrie* (1); *Lockhart* v. *Hardy* (2); *Walker* v. *Jones* (3). It has even been carried so far that in the case of *Schoole* v. *Sall* (4) Lord Redesdale restrained a mortgagee from suing at law upon his personal securities, not because he could not re-convey

(1) 27 Beav. 349; 28 Beav. 341.
(2) 9 Beav. 349.
(3) L. R. 1 P. C. 50.
(4) 1 Sh. & Lef. 176.

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the mortgaged estate, but because he could not re-deliver up all the title deeds which had been handed over to him, having lost them. Amongst the cases cited above those of *Walker* v. *Jones* (1) and *Palmer* v. *Hendrie* (2) are indistinguishable in principle from the present which they also closely resemble in their circumstances. Even if the mortgagee had obtained an absolute foreclosure by which he had made the mortgaged estate his own, and had then sold it for its fair value but for less than the mortgage debt, he could not sue the mortgagor on his bond, covenant, note or other collateral personal security for the unsatisfied residue, and that for the same reason, that he could not give him back the estate. In Coote on mortgages (3) the law is stated very clearly and concisely as follows:

> Ordinarily speaking a mortgagee can avail himself of all his collateral securities, but he cannot transfer the mortgage and retain the collateral securities or sever them from the mortgage: and where he assigned the latter and retained the former he was restrained from proceeding on the collateral security pending a suit for redemption. So he cannot proceed on his collateral securities if he has sold the estate, though fairly, for less than was due; and if he join with the purchaser of the equity of redemption in a sale and permit him to receive the purchase money the mortgagee, not being able to re-convey the estate, will not be allowed to sue the mortgagor for the amount so permitted to be received. He is also restrained from proceeding on his collateral securities if, having put the title deeds out of his power, he is unable to convey the estate effectually.

In Fisher on Mortgages (4) the law is summarized in the same way.

It is out of the question to say that the conveyance of the equity of redemption by the respondent to Adam Allison made any difference or entitled the appellant to release the mortgage in the way he did thus disregarding the equitable right of the respondent to have a re-conveyance of the mort-

(1) L. R. 1 P. C. 50.
(2) 27 Beav. 349; 28 Beav. 341.
(3) Ed. 1884, p. 794.
(4) 4 ed. p. 13.

gaged estate if compelled to pay the debt. Notice of the conveyance by the respondent to Adam Allison ought, as Mr. Justice Osler points out, if it had had any effect, to have made the appellant more cautious in his dealings with the estate, for, if any inference was to be drawn from it, that inference ought to have been that Adam Allison having obtained that conveyance had in law, apart from the actual agreement, on the dissolution become bound to indemnify the respondent against the mortgage debt, inasmuch as the purchaser of an equity of redemption *primâ facie* comes under that obligation to the mortgagor. If the agreement on the dissolution had been, not only that Adam Allison was to have the equity of redemption, but further that the respondent was to pay the mortgage debt, and the appellant had had notice of such an arrangement between the partners, then, but not otherwise, he would have been justified in releasing the mortgage so as to vest the legal estate in his brother. It was not essential that the respondent should prove that the appellant had notice of the dissolution agreement; he had no right to put the security out of his hands without being sure that the respondent had no further claim to it and would not be prejudiced by a release. Not having done this he must take the consequences of his negligence and cannot now sue the co-debtor, whose clear right of redemption he has destroyed, for the personal debt.

I prefer putting my judgment on the same ground as the Court of Appeal, not that I can have now any doubt about the Chancellor being perfectly right in the second ground on which he placed his judgment so far as regards the law. The case of *Swire* v. *Redman* (1) cannot now be regarded as a binding authority if it

(1) 1 Q. B. D. 536.

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ever was one. *Rouse* v. *Bradford Banking Co.* (1) even if it has not demonstrated that *Oakeley* v. *Pasheller* (2) was originally an authority against the doctrine of *Swire* v. *Redman* (3), has at least shown that the construction put upon that case by Lord Cairns and Lord Hatherly in *Overend Gurney & Co.* v. *Oriental Financial Corporation* (4) and by the Irish Exchequer Chamber in *Maingay* v. *Lewis* (5) was such that the law must now be considered as settled in accordance with those decisions. I should have thought that when *Pooley* v. *Harradine* (6) and the class of cases to which that decision belongs had once decided that it was a good equitable defence to an action on a promissory note to show that a party appearing upon the paper to be primarily liable was in truth *ab initio* a mere surety for another party appearing to be secondarily liable, and that a creditor for value having no notice of such relationship when he took the paper was nevertheless upon having such notice bound to deal with the parties according to their real relationship and could not release the real principal without discharging the surety, that the whole question was conceded. I confess I think these decisions were very great innovations upon the rights of creditors, but I have never been able to see what difference it can make to the creditor, if he is to be bound by notice given to him after the debt is contracted, whether the parties were principal and surety *ab initio* or only became so by some subsequent arrangement between themselves of which he has notice. I entirely agree with the law as laid down by the Chancellor, whose view is now confirmed by *Rouse* v. *Bradford Banking Co.* (1), and I should have probably considered myself

(1) 7 Repts. 33; S. C. [1894] 2 Ch. 32.
(2) 4 Cl. & Fin. 207.
(3) 1 Q. B. D. 536.
(4) L. R. 7 H. L. 348.
(5) Ir. Rp. 5 C. L. 229.
(6) 7 E. & B. 431.

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bound by his finding on the question of notice, but I must say that I think the evidence on that point was very weak, and that too on a question the affirmative of which ought to be proved beyond all doubt, for if the rights of a creditor are to be affected by an agreement between his joint and several debtors that one shall thereafter be a principal and the other a mere surety I am of opinion that the clearest proof of notice should be given.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Hanna & Cowan.*

Solicitor for respondent: *John A. Robinson.*

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*May 25, 26.

*Oct. 9.

IN THE MATTER OF THE HESS MANUFACTURING COMPANY.

GEORGE W. EDGAR (LIQUIDATOR.).....APPELLANT;

AND

WILLIAM SLOAN (CONTRIBUTORY).....RESPONDENT.

Winding-up Act—Contributory—Shares paid for by transfer of property—Adequacy of consideration—Promoter selling property to company—Trust—Fiduciary relation.

Shares in a joint stock company may be paid for in money or money's worth and if paid for by a transfer of property they must be treated as fully paid up; in proceedings under the winding-up act the master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.

There is a distinction between a trust for a company of property acquired by promoters and afterward sold to the company and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.

A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him the contract may be rescinded provided the property remains in such a position that the parties may be restored to their original status.

There may be cases in which the property itself may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of

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

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the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) which affirmed the ruling of a master who had placed the respondent on the list of contributories of the company.

The material facts of this case, which are fully set out in the judgment of the court, may be briefly stated as follows:—

The appellant, liquidator of the Hess Manufacturing Company which is being wound up under the Winding-up Act of Canada, seeks to have the respondent placed on the list of contributories under the following circumstances.

In 1889 two brothers named Hess, wishing to purchase a site for building a factory but not having the means to do so, applied to the respondent, who was father-in-law to one of them, to assist them and he entered into an agreement with the owners of the proposed site by which it was to be conveyed to him free of charge provided the contemplated factory was erected and running within a limited time, and if not he was to pay $3,000 for it. The respondent had the factory built and received a conveyance from the owners and a company was formed to carry on the manufacturing of furniture of which he was a provisional director subscribing for shares to the amount of $7,500. The building had cost over $7,000, and some $5,000 was expended on it after its completion.

The respondent after its formation transferred to the company the property so purchased with the building

(1) 21 Ont. App. R. 66. (2) 23 O.R. 182.

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having previously mortgaged it for $7,000, and was allotted 360 shares of paid-up stock of the value of $50 a share. The company having failed the liquidator appointed under the winding-up act applied to the master to have the respondent placed on the list of contributories for these 360 shares. It appearing that 234 shares had been transferred before the winding-up proceedings commenced the master acceded to the request in respect to the remaining 126 holding that when the respondent bought the property he did so as trustee for the contemplated company and had consequently given no value for his stock. This decision was affirmed by the Divisional Court but reversed by the Court of Appeal and the liquidator has appealed to this court.

The directors of the company when the property was transferred by the respondent were his son and the Hess brothers one of whom was his son-in-law.

S. H. Blake Q.C. and *Raney* for the appellant. Dr. Sloan got these shares without paying the full consideration and is liable to account to the company *Society of Practical Knowledge* v. *Abbott* (1); *Pagin & Gill's case* (2); *White's case* (3).

The last two cases are authority for placing him on the list of contributories.

There is no doubt that respondent stood in a fiduciary relation to the proposed company and that the contract with him might have been rescinded; *New Sombrero Phosphate Co.* v. *Erlanger* (4); and if he was a trustee the contract with him could not have been ratified by the shareholders; *Flitcroft's case* (5); *Mann* v. *Edinburgh Northern Tramways Co.* (6). And see *Hichens* v. *Congreve* (7); *Beck* v. *Kantorowicz* (8).

(1) 2 Beav. 559.
(2) 6 Ch. D. 681.
(3) 12 Ch. D. 511.
(4) 5 Ch. D. 73; 3 App. Cas. 1218.
(5) 21 Ch. D. 519.
(6) [1893] A. C. 69.
(7) 4 Russ. 562.
(8) 3 K. & J. 230.

It is not necessary that we should show fraud if the company never received value for the shares. *In re Eddystone Marine Insurance Co.* (1); *Ooregum Gold Mining Co.* v. *Roper* (2); *Lydney & Wigpool Iron Ore Co.* v. *Bird* (3).

Moss Q.C. and *Haverson* for the respondent. If shares are paid for in money's worth instead of money they must be treated in winding-up proceedings as fully paid up. *In re Baglan Hall Colliery Co.* (4).

Admitting that Dr. Sloan was a promoter that would not debar him from selling his property to the company provided he observed the duties appertaining to the relation of a promoter to the company. *New Sombrero Phosphate Co.* v. *Erlanger* (5). At all events the only remedy would be recission of the contract of sale.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal in a proceeding instituted under a Dominion Act of Parliament for the winding-up of the Hess Manufacturing Company (Limited), a joint stock company incorporated by letters patent under the general act of Ontario. The liquidator made an application to the master in ordinary to place the name of Dr. Sloan, the respondent, on the list of contributories in respect of 360 shares of $50 each. The master decided in favour of the liquidator as regarded 126 shares (of the aggregate nominal value of $6,300), and dismissed the application as to the remaining 234 shares. Both parties having appealed the appeals were heard before Mr. Justice Meredith, who sustained the master's ruling. The present respondent, Dr. Sloan, then appealed to the

(1) [1893] 3 Ch. 9.
(2) [1892] A. C. 125.
(3) 33 Ch. D. 85.
(4) 5 Ch. App. 346.
(5) 3 App. Cas. 1218.

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Court of Appeal, which court allowed the appeal by a majority composed of Osler, Maclennan and Ferguson JJ., the Chief Justice dissenting. The liquidator has now, pursuant to leave given by an order in chambers, appealed to this court.

The facts material to the appeal may be stated as follows:—

In 1889 William Hess and Emil Hess, his son, who were then out of business and not in good credit in consequence of having met with losses by fire, were desirous of establishing a furniture manufactory. They found a site which they thought would answer their purpose at the town of West Toronto Junction. This land belonged to R. S. McCormack, W. L. McCormack and Charles J. Boon. The Hesses were not in a position to take the title in their own name; they therefore applied to Dr. Sloan, the present respondent, who was the father-in-law of Emil Hess, to become the purchaser of this land, and to undertake the performance of the conditions upon which the owners agreed to convey it; to this request the respondent assented. Accordingly by an agreement dated in September, 1889, and made between the McCormacks and Boon of the one part, and Dr. Sloan, the respondent, of the other part, it was agreed that if Sloan should build upon the land within seven months a factory for furniture manufacture, with the capacity for employing not less than thirty hands, that then, when D. W. Clendennan and others, the purchasers of the west half of the lot, should pay their purchase money the vendors would convey the east half to the respondent, and if the respondent should not build the factory within seven months he would pay $3,000 purchase money for the same land, the factory if built within seven months being intended "to wholly satisfy said purchase money."

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Soon afterwards the respondent entered into contracts for the erection of a factory which was accordingly built and completed in the month of March, 1890. The land was duly conveyed to Dr. Sloan by the vendors at some date prior to the 19th February, 1890; the exact date does not appear. Dr. Sloan who was then a physician practising at Blyth, in the county of Huron, was not at West Toronto Junction whilst the factory was being built, and the work was superintended by Emil Hess, his son-in-law, who acted under a power of attorney from the respondent. The respondent expended in the construction of the factory and the building appurtenant to it the sum of $7,300, and upwards of $5,200 had in addition been expended on the factory before its acquisition by the company, as will be hereafter mentioned, being money furnished for that purpose by Alice Hess, the wife of Emil Hess, and Elizabeth Hess the wife of William Hess. William Hess and Emil Hess also contributed their time, labour and services during the erection of the factory, the former in superintending and assisting in the mechanical part of the work, especially the plumbing, the latter giving his attention to the management of the financial and other business incidental to the enterprise. On the 27th of November, 1889, the Hess Manufacturing Company of West Toronto Junction (Limited) was incorporated by letters patent under the Great Seal of the Province of Ontario, pursuant to the provisions of chapter 157 of the Revised Statutes of that province. The object and purpose of the company was stated in the letters patent to be the manufacturing and selling of all kinds of furniture. The capital stock of the company was fixed at $40,000, divided into 800 shares of $50 each. The place of business of the corporation was to be at West Toronto Junction. Dr. Sloan, Hugh

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Boulton Morphy and Francis Charles McDowell were named in the charter as the first directors of the company, and it was recited therein that William Sloan, the respondent, had taken shares to the amount of $7,500, and that Elizabeth Hess, Alice Grace Hess, Hugh Boulton Morphy and Francis Charles McDowell had severally subscribed shares in varying amounts, and that nothing had been paid in upon any of the shares so subscribed for. These letters patent were granted pursuant to the statute, after due publication of advertisements as thereby required, upon a petition addressed to the Lieutenant-Governor. This petition was signed by the several parties mentioned as stockholders in the letters patent, representing themselves to be subscribers for the shares before mentioned.

On the 22nd December, 1889, a stock book of the company was opened, and the several parties before named signed a memorandum of agreement inscribed therein by which they agreed to take the number of shares mentioned in the letters patent.

On the 27th January, 1889, a general meeting of all the shareholders was held whereat all were present either in person or by proxy. Those present personally were H. B. Morphy, Emil G. Hess, William Hess and Elizabeth Hess. H. B. Morphy was the son-in-law of William Hess, Emil G. Hess was his son, and Elizabeth Hess his wife. There were also present by proxy Dr. Sloan (the respondent), W W. Sloan, his son, and Alice Hess, the daughter of Dr. Sloan and wife of Emil Hess. At this meeting W. W. Sloan, William Hess and Emil Hess were elected directors for the ensuing year. The following resolution was then passed:—

Moved by Alice Grace Hess and seconded by Emil George Hess: whereas arrangements have been made with Dr. William Sloan, of the Village of Blyth, in the County of Huron, for the purchase for the

purposes of the company of the factory site (describing it) together with all the buildings erected on said described lands, there being a four-story brick factory 45 by 127 feet, a boiler and engine house, one story, 26 by 55 feet, a brick dry kiln 36 by 50 feet, a brick smoke stack 85 feet high, and a frame stable erected on the land; and whereas the said Dr. Sloan has agreed to sell such land and buildings to the company for the sum of $25,000 payable as follows: The company to assume a mortgage of $7,000 on the said lands, and issue to the said Dr. Sloan $18,000 of paid-up capital stock of the company, the subscription for $7,500 of the said capital stock by Dr. Sloan to be included in such issue of paid-up stock for $18,000 and such subscription of $7,500 to be deemed therefore as merged therein. Resolved that the shareholders accept the terms of sale as herein stated with the said Dr. Sloan, and the directors of the company are hereby empowered and authorized to carry out such purchase and pass any necessary by-laws and execute all documents and make such entries in the books as are necessary to effectuate the same.

This resolution was confirmed at a directors' meeting held on the 21st March, 1890, and is also said to have been confirmed at a subsequent shareholders' meeting held on the 26th of April, 1890. On the 19th of February, 1890, Dr. Sloan mortgaged the property to secure $7,000 to the Canada Permanent Building Society, which corporation advanced that sum to him as a loan. This recouped his expenditure, less about $300. On the 21st of March, 1890, the property was conveyed by Dr. Sloan to the company pursuant to the resolution of the 27th of January, 1890, and additional shares to the number of 210 were entered in the stock book as being taken up by Dr. Sloan, making in all, with the 150 originally subscribed for, 360 shares, representing $18,000, and which were by the resolution of the 27th of January, 1890, to be all treated as paid by the conveyance of the property for which they and the $7,000 mortgage formed the consideration. Previous to the loan by the Canada Permanent Building Society the property was valued by the valuator for that company, Mr. Wellington J. Peck, at the sum of $25,100, and without entering upon any critical ex-

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amination of the evidence, which in the view I take is not very material, I may say at once that upon the evidence of the value of the land, and of the expenditure on the buildings and improvements, I consider this valuation to have been by no means an excessive one. These 360 shares so allotted to Dr. Sloan were therefore, according to the terms of the resolution of the 27th of January, 1890, to be, and were considered by all parties, and treated, as paid-up shares. Of these 360 shares Dr. Sloan subsequently, and at the instance of the Messrs. Hess, transferred 20 shares to Messrs. Hoover & Jackson who had assisted in starting the company, by way of remuneration for their services, and he also transferred 214 shares to Elizabeth Hess, the wife of William Hess, leaving 126 shares which were standing in his name at the date of the winding up order, and in respect of which the master has put him on the list as the holder of unpaid shares to that amount. These 126 shares, Dr. Sloan says, were intended to be transferred by him to his daughter, the wife of Emil Hess, it being intended, Dr. Sloan himself having been paid for his expenditure within $300 by the money raised on mortgage, that the paid-up shares were to be divided between the two ladies who had provided the residue of the money with which the factory had been built, to repay them for their outlay. That these ladies had expended at least $5,200, probably $5,500 or even more in this way, appears without contradiction from the evidence. By an arrangement between these parties, Dr. Sloan the respondent, and Mrs. William and Mrs. Emil Hess, the price received by him was to be thus apportioned. Dr. Sloan says he considered himself a trustee for these ladies for any residue of price remaining after he had been satisfied for his own outlay. This arrangement between the parties as to the disposition of the price

can be no concern of the liquidator, the creditors, or the company, provided the latter got valuable consideration for what it gave; and by the conveyance by Dr. Sloan of the land and buildings the company did beyond question acquire a property worth $25,000, unless that property was, by the legal result of what had taken place already, upon equitable principles, the property of the company held by Dr. Sloan as a trustee for it. Upon this state of facts the master treated Dr. Sloan as the holder of 126 unpaid shares amounting to $6,300 for which sum the respondent has been placed upon the list of contributories.

My first proposition is that the master's whole proceeding was *ultra* his jurisdiction; that under the winding-up order he had no jurisdiction to entertain the question of Dr. Sloan's liability under the facts here in evidence that question being one which could only be properly litigated in an action in due form instituted by the liquidator on behalf of the company. In considering this case it must at the very outset strike any one that a judicial result which would have the effect of vesting in a joint stock company without any consideration whatever, absolutely for nothing, property which has been produced by an expenditure of certainly not less than $5,200, can hardly be a sound one, and yet that would have been virtually the effect of the master's order had it been allowed to stand. Granting for the sake of this argument all that is contended by the liquidator about the trust of the land itself, yet the company got more than the land; it got the improvements in the creation of which large sums of money had been invested, and I maintain if these 126 shares are now to be treated as unpaid shares the company would get these improvements gratuitously, by a lucrative title as a mere gift. The only principle upon which the master

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could have acted in making the order he did was in assuming that no consideration whatever had been given for the shares. If any consideration was given it was beyond the master's competence to inquire into the adequacy of it. For this, as I should expect, I find ample authority in the books. Shares can be paid for either in money or money's worth, and when paid for by property conveyed to the company the value of the property given in consideration will not be inquired into. On this head Lord Justice Lindley in his book on Company Law, (1) has the following passage :—

> Previously to the above enactment it had been decided, when the statute in question (that requiring in England an agreement in writing when payment is otherwise than in cash) does not apply, it may be taken as settled that shares may be fully paid up not only in money but in money's worth ; and shares which are *bonâ fide* given as paid up in payment of property transferred to the company or of services rendered to it, or of claims against it, must on the winding up of a company be treated as paid up shares ; and in the absence of fraud the court will not inquire into the value of that which is taken by the company in payment instead of money ; for example, where payment was made in paper which turned out to be worthless it was nevertheless treated as duly made.

And in Brice on Ultra Vires, (2) it is said :—

> Shares must be paid for but not necessarily in money, and the amount of the consideration will not be examined by the courts.

So that unless a case of fraud was made and proved which could only be done in a formal action to rescind it must be held that there was a valuable consideration given *bonâ fide* for the 126 shares in question in the improvements alone, even granting that there was some trust as regards the land, and therefore the master in a winding-up proceeding could not say the shares were wholly without consideration and unpaid for, which he must be able to do before he can put a

(1) 5 ed. p. 785. (2) 3 ed. p. 298.

holder on the list as a contributory for unpaid shares. I wholly differ from the master when he refers his jurisdiction to the R.S.O. c. 157, section 61. That manifestly has no application here; to make it apply it must first be shown that the shares are unpaid. The master thus assumes that which is the very question in dispute. As no attempt has been made to demonstrate that this section 61 has any reference to such a case as this, I may content myself with the answer I have just given. It is, however, very apparent that consideration to the full value of the shares was received by the company, and this for the reasons given in the able judgments delivered by the three learned judges who formed the majority of the Court of Appeal, who very clearly demonstrated the correctness of their conclusions. I suppose no one can dispute the authority of *The New Sombrero Phosphate Company & Others* v. *Erlanger & Others* (1). That case was decided in the House of Lords after two arguments, the last before an exceptionally large House consisting of nearly all the law lords of that day, and it is therefore as high an authority as could possibly be invoked. I am then content to let the present case be tested entirely by this case of *The New Sombrero Company* v. *Erlanger* (1). In order to make out that there was no consideration for these shares it must then be proved that Dr. Sloan, when he conveyed to the company, was a mere trustee for it. This cannot be better put than it is by Mr. Justice Osler in his judgment, where he says:—

> In a case like the present the liquidator must make out that at the time the purchase was made the appellant stood in such a position that he could not claim to have bought the property for himself; in other words, that he was not in a position to sell to the company when afterwards formed, because that company, when it came into

(1) 3 App. Cas. 1218.

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existence, had already acquired the right to say that the purchase was made by the appellant for them, and not for himself.

The evidence shows that a joint stock company was contemplated from the beginning, a company which might take over the land acquired by Dr. Sloan after a factory had been built upon it. But was there any trust which such a company could have enforced against Dr. Sloan, or could Dr. Sloan after bringing the company into existence have compelled it to accept the land and to indemnify him for his expenditure upon it? This is the test question and it admits of but one answer; most emphatically no enforceable trust of the kind just mentioned ever existed. Dr. Sloan could, after building the factory, have refused to convey it to a company; he could have sold it to any purchaser, or he could have kept it and worked the factory himself; or he might have abstained from building at all on the land, have paid the purchase money of $3,000 and thus have acquired the title to the land which the vendors would have been bound to convey to him on payment of the ascertained price. This is law which no one can gainsay, for it is, as the learned judges who were the majority in the Court of Appeal have shown, the law as laid down in all the opinions delivered in the House of Lords in the New Sombrero case, and thus expressed in a passage in the speech of the Lord Chancellor given as a quotation in the judgment of Mr. Justice Osler, but which is in words so apposite to the present case that I must repeat it. Lord Cairns says:

> The syndicate in entering into this contract acted on behalf of themselves alone and did not at that time act in or occupy any fiduciary position whatever. It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, it seems to me, perfectly free to do with the island whatever they liked, to use it as

they liked and to sell it how and to whom and for what price they liked.

It is not merely because the language of the Lord Chancellor in the extracted passage is adapted to the facts disclosed by the evidence in the present case that it is of value here, but for the further reason that it makes with great exactitude and clearness a distinction which is the key to the decision in the Erlanger case and must be decisive in the present case. Lord Cairns here distinguishes between a trust for the company of the property acquired by the promoters and afterwards sold to the company, which he says did not exist in the case before him, and which may with confidence be said not to have existed in the present case' and that fiduciary relationship which is engendered by the promoters of a company, between themselves and the company, coming into existence so soon as the latter is formed. This is a distinction running through all the cases but one which has not always been sufficiently kept in mind. As regards any trust of the land acquired from McCormack by the respondent, I repeat, there was none. On the one hand Dr. Sloan was as free to deal with the company in respect of it as if it had been property of which he had been the owner for thirty years before he sold to this company, but on the other hand he was beyond all doubt a promoter of this company and whether he sold it this land which he and those whose interests he represented had acquired with a view of building upon it a factory and afterwards transferring it to a company or whether he sold them land which he had bought and paid for years before, in neither case could he deal with the company as an ordinary vendor, who had had nothing to do with the promotion of the company, might have done; he could only sell under the restrictions which courts of equity have imposed upon

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fiduciary vendors of the particular class known as promoters of joint stock companies. Thus it was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further it was above all the duty of Dr. Sloan as a vendor selling property to a company towards which he stood in a fiduciary relation to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence and which would, as the expression is, keep him at "arms' length" in making the bargain. Some of these duties Dr. Sloan performed but not all. Now it was because the promoters failed in the performance of their duties, because they were guilty of misrepresentation and concealment as to the price they had paid and in other respects, that the House of Lords upheld the judgment which set aside the sale in the New Sombrero Phosphate Company's case. It was not in that case decided that there was no consideration whatever for the conveyance of the island, nor that any paid-up shares which had found their way into the hands of the vendors as part of the consideration were wholly unpaid shares, nor that the company had merely acquired what was already their own property; but in that action, which was one to set aside the contract not as void but only as voidable in equity, it was decided that the sale must be rescinded and the parties put in *statu quo*; that is that the property was to be re-conveyed to the promoters who had sold it and the price returned by them to the vendors.

Whilst I say that this distinction between a trust of the property and the personal fiduciary relationship of the vendors exists, and that it is the very turning point in most of the cases which have been determined upon this question of the validity of sales by promoters, I am far from saying that there may not possibly be a case in which the property itself may be regarded as being bound by a trust in some cases *ab initio*, in others in consequence of *ex post facto* events. For instance, if a promoter of a company acquires property ostensibly for the company from a vendor who is by the terms of the bargain to be paid by the company when it comes into existence, either in money or shares, and the company is formed and this agreement is carried out, and part of the price which has been paid by the company finds its way in pursuance of some secret arrangement between the vendor and the promoter into the hands of the latter, that is a secret profit which the promoter who in such a supposed case has put himself in the position of an agent for the company cannot retain. It makes no difference that in such a case the property may have passed through the hands of the promoter and have been formally conveyed by him to the company; it would be in no sense his own property which he would in such a case be deemed to convey, but the property of the company. In this hypothetical case there would be no contract to rescind; that would not be the appropriate relief; and although the company might not be in a position to ask for rescission by reason of its having conveyed away the property, it would still be entitled to compel the promoter to account for and repay his secret profit, and if any portion of that consisted of paid-up shares of the company issued as such as part of the consideration still held by the promoter, such shares might in a winding-up proceeding

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be treated as unpaid shares. But the supposed case, of which the *Emma Silver Mining Co.* v. *Grant* (1) is an example, is not the case here; this property was acquired not for the company, and the consideration which consisted of the money expended in building the factory was not paid for out of the funds of the company but by Dr. Sloan and those he represented out of their own monies, just as in the New Sombrero case and other cases to which I will refer.

The principles of decision which are thus to be applied here have been given as the *rationes decidendi* in many other cases besides the New Sombrero case.

Thus in *Gover's Case* (2), Lord Justice James says :—

> At the time when this agreement was made there was no company in existence, and no promoter, trustee, or director; the company had not even an inchoate existence except in the brain of Mappin; and the utmost that could be said of Mappin was that he was a projector of a company which he intended and had agreed to promote.

Again Lord Justice James says :—

> It is surely open to any man, in point of law, to sell his property to a joint stock company and to invite persons to form themselves into a joint stock company to purchase from him, just as it is open to any man to sell to any persons in the world the right to become his partners in any property or undertaking. * * * * * * * No impropriety in the contract can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties.
>
> I may illustrate my view by referring to a contract which, I think, would be within the act. If, instead of contracting to sell to the company, or inviting the company to become shareholders in the thing itself, Mappin had invited them to become shareholders with him in a contract, and they had accepted that invitation, then he would, by the terms of his offer, and by their acceptance of that offer, have made himself their agent as from the date of that contract, and any bye or collateral contract made for his own benefit would be a contract by a trustee for the company or partnership.

(1) 11 Ch. D. 918. (2) 1 Ch. D. 182.

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In the same case Lord Justice Bramwell puts the pith of the judgment of the court in a very few words. He says:—

> Here Mappin entered into the contract, not as promoter but as intending to be so.

The doctrines promulgated in this case of Gover's in which Lord Justices James, Mellish and Bramwell concurred have never been displaced but have been recognized as sound, and acted upon in all subsequent cases. The distinction to which I have adverted was also acted upon and was the groundwork of the judgments of Pearson J. (1) and the Court of Appeal (2) in *Re Cape Breton Co.* Lord Justice Cotton in the course of his judgment in that case says :—

> Numerous cases have been brought before the Court, but none of them are like the present, because in all the cases where relief was given the case was that of a trustee or a director who had sold to the company, at an enhanced price, property which he had acquired when he was a trustee or director, and he was held to be liable for the difference on the ground that at the time he acquired his interest in the property he was in the position of a trustee. The principle of those cases is very clear. It is this: That having bought the property while he was a director, and so in the position of a trustee for the company, and having afterwards made it over to the company without disclosing his interest, he was estopped from saying that he originally bought the property on his own behalf, or otherwise than for and on behalf of the company. When, therefore, he pays a large additional sum of money out of the coffers of the company for the property, he is putting into his own pocket a sum of money by way of purchase money paid by the company for that which was already their own.

Lord Justice Fry in the same case makes some observations peculiarly apposite to the present case. He says :—

> It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it is bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal against the will of his agent to enter into a new contract with the agent, a thing which is

(1) 26 Ch. D. 221. (2) 29 Ch. D. 796.

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plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand.

This case of the Cape Breton Company was not one of an action to rescind but was a proceeding under the 165th section of the Companies Act, 1862, to make a director account for a profit he had made on the sale of certain properties to the company. It was held by the Court of Appeal that he was not so answerable, and further, that the property having been in the course of winding-up proceedings sold so that the company could not restore it if the contract were set aside it was too late for rescission. The House of Lords (1) affirmed the judgment of the Court of Appeal upon the ground that the shareholder who made the application had not any interest sufficient to give him a *locus standi* being a holder of fully paid-up shares in a limited company which had become insolvent. The law as laid down in the judgments of the Lords Justices Cotton and Fry has, however, never been questioned nor could it be, since it conforms in all respects to the decision of the House of Lords in the New Sombrero case. In *Re Ambrose Lake Tin and Copper Mining Company* (2), Lord Justice Cotton, dealing with an order similar to that made by the master in the present case, which had been made by the Vice-warden of the Stannaries Court in a winding-up proceeding, thus forcibly and clearly stated the true doctrine:—

> The principle of the order must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time

(1) 12 App. Cas. 652, sub nom. Bentinck v. Fenn.

(2) 14 Ch. D. 390.

when the so-called vendor acquired the property he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the Court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price, and to say this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain. * * * * * * * I can quite understand an action to set aside the contract altogether, but that is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract, "We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company, which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it."

I may be excused for making this long quotation since every word of it has a direct bearing on the case before us, and it is besides a very clear exposition of the doctrines which prevailed in the Erlanger case. It shows that the master's order was in the very teeth of existing authority and is conclusive of the present appeal.

The last case which I shall refer to is that of the *Ladywell Mining Company* v. *Brookes* (1) the circumstances of which have a remarkable resemblance to those in evidence here. There it was again held that the fact that the parties who sold the property to the company were the promoters of the company, and had the company in contemplation when they acquired the property, did not make them trustees for the company of the property itself. And further, that although as promoters they stood in a fiduciary relation to the

(1) 35 Ch. D. 400.

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company when they afterwards sold to it, and that not having complied with all the obligations incumbent on them as fiduciary vendors the contract might for that reason have been rescinded, yet that it was too late for rescission as the landlord of the property (which was leasehold) had entered and avoided the lease for a forfeiture. Lord Justice Cotton in his judgment entirely adheres to what he had stated in his former judgments in the cases already cited on the point of there being no trust *ab initio*, and he also confirms what he had said in the Cape Breton case (1), as to its being too late for rescission. The opinion of Lord Justice Lindley is to the same effect, and this is worthy of note inasmuch as that very learned judge has always shown a disposition to go further in giving relief in this class of cases than other judges have thought possible. Upon the point that there can be no rescission without a re-conveyance of the property Lord Justice Lindley is very distinct. He says:—

> There might be a case for rescission if rescission were possible, but rescission is not possible because the property acquired by the company does not belong to the company any longer. The landlord has taken possession and rescission is out of the question.

The judgment of Lord Justice Lopes is also in entire accordance with those of the other judges on both points. I am therefore justified in saying that this case is another conclusive authority against the present appellant. Many other reported cases might be added to those I have specifically mentioned; those cited, however, are so distinct in their terms, so exactly applicable, and are decisions of courts of such high authority, that no further citations are necessary to establish the propositions of law upon which the judgment of the Court of Appeal is founded. I admit that there are *dicta* by text writers attributable, I think,

(1) 29 Ch. D. 795.

to confounding cases which merely establish that a promoter stands in a fiduciary relation to the company with those which hold that he is to be considered as a trustee of property which he actually acquires for the company, but these *dicta* cannot possibly outweigh the judgments of the House of Lords and the Court of Appeal which proceed entirely on a recognition of a difference between the two cases.

I consider, therefore, that it is fully established that Dr. Sloan was never a trustee for the company of the property which he conveyed to it by the conveyance of the 21st of March, 1890; that, therefore, the master was wrong in his adjudication that the respondent was a holder of 126 unpaid shares and liable to contribute as such; and that this order would have been also erroneous even if it had been established that Dr. Sloan had acquired the land at West Toronto Junction as a trustee for the company since there had been a large expenditure on that property, either by Dr. Sloan or by those he represents (it matters not which), which if the master's order was allowed to stand the company would get without any consideration, thus making it operate as nothing short of confiscation of the money which the evidence shows the wives of the Messrs. Hess had honestly expended in the improvements; a result as unwarrantable by any doctrine of courts either of law or equity as it is repugnant to one's notions of justice and fairness.

There can of course be no rescission, which is the only remedy where there has been non-observance by a fiduciary vendor, such as a promoter who sells property to the company, of the rules of equity governing such sales, for the property has been sold (1) and cannot be restored, and in any event relief by way of rescission is beyond the jurisdiction of the master in a

(1) See appellants factum p. 15.

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winding-up proceeding under the Dominion statute. Then, it is not competent in such cases to the master, not having jurisdiction to rescind, to make the vendor account for any profit which may have accrued to him or to those whom he represented. This is made apparent by a passage in the judgment of Lord Justice Cotton in the Cape Breton Company case (2), and by Lord Cairns in the New Sombrero case, where the question is passed upon in the following terms:

> That part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the re-sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below.

It is therefore out of the question to say that the master's order is to be supported because the $6,300 which is represented by these 126 shares was an amount less than or equal to a profit which was derived by the sale to the company. Further, in point of fact, even if it was open to the master, proceeding under the winding-up act, to give such relief as that last alluded to, the facts would not warrant it, for it is, I think, sufficiently established that the $25,000 which the respondent received for the conveyance was not in excess of the value of the property which the company acquired under that deed. This is, I think, a fair conclusion from the evidence, even if we assume the shares to have been worth their par value in the market, but I have shown in an early part of this judgment that where it is said that shares must be paid up in money or money's worth, that by no means involves the proposition that the property must be equal to the nominal value of the shares; on the contrary, decided

(2) 29 Ch. D. 804.

cases show that the courts will not inquire into the value in the absence of fraud.

Therefore from every point of view the order made in the master's office is unsustainable.

This being the proper disposition of the case it is of course extra judicial to say anything about what might have been the result of an action for rescission had the same facts been presented in that form; I do so, however, to prevent any misapprehension, so that it may not be supposed that in anything I have said I have presumed to detract in any way from the salutary rules which have been laid down by the English courts as governing the contracts of promoters with the companies they have brought into life. Of course an action for rescission must have failed for the reason before mentioned that in consequence of the sale of the property the parties could not be put *in statu quo* (1). But if it had not been for that circumstance I think such an action must have succeeded. Disinterested as was the conduct of Dr. Sloan throughout these transactions, which resulted in a loss to him of some $275 besides infinite trouble and annoyance, and free as he has been from first to last from the imputation of any selfish object, he has still, I think, been wanting in his duty as a person who at the time of the sale stood toward this company in a fiduciary relation, that is to say as having been one of its promoters.

Without undertaking to give an exhaustive description of these duties I will say that they at least include the obligations before stated, viz., those of selling for a price not exorbitant; concealing nothing that it was proper the directors of the company should

(1) See as further authorities on this point *Great Luxembourg Railway Company* v. *Magnay* 25 Beav. 586. *Lindsay Petroleum Company* v. *Hurd* L. R. 5 P. C. 221.

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know in order to form a fair judgment as to the value of the property; and making no misrepresentations of facts material to the purchase. All these requirements, I think, Dr. Sloan sufficiently complied with. There remains, however, another duty which the respondent did not perform. It is in such cases as the present the duty of one who has been a promoter of the company to see that his contracts with it are made through the medium of a board of directors who are entirely independent of him, that is a board comprised of persons who are entirely free of his influence; men who are not mere instruments subject to his dictation and subservient to his interests; and with such a board he must deal at arm's length. This obligation was not properly fulfilled in the agreement for sale of the 27th of January, 1890, nor when the conveyance was afterwards executed on the 21st of March, 1890, for no one can for a moment suppose that the board, composed as it was, was an independent body unsusceptible to the influence of Dr. Sloan and the *cestuis que trust* whose interests he represented. The object of requiring that the board of directors should in case of this kind be independent persons, free from any control or influence which the promotor could exercise over them, is the protection of the shareholders, and as this includes the protection of future shareholders as well as those who have already become such no ratification by the existing body of shareholders can so confirm the transaction as to make it free from impeachment by one who has not been an actual party to the confirmation. That this is the law is also established by *Erlanger* v. *New Sombrero Phosphate Company* (1).

I make these last observations not with any view of reflecting on Dr. Sloan but in order to guard against

(1) 3 App. Cas. 1260.

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any inference that I had taken it upon myself to disregard rules of law laid down by very great lawyers in deciding a case in the House of Lords.

For these reasons, which are in the main the same as those given in the judgments in which the majority of the Court of Appeal have recorded their opinions, I have come to the conclusion that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Dewart & Raney.*

Solicitors for the respondent: *Haverson & St. John.*

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*Mar. 30, 31.

*Oct. 9.

D. W. ALEXANDER (PLAINTIFF).....APPELLANT;

AND

JAMES WATSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of agreement—Guarantee.

A., a wholesale merchant, had been supplying goods to C. & Co. when, becoming doubtful as to their credit, he insisted on their account being reduced to $5,000 and security for further credit. W. who had endorsed to secure a part of the existing debt thereupon gave A. a guarantee in the form of a letter as follows :—

"I understand that you are prepared to furnish C. & Co. with stock to the extent of $5,000 as a current account but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand but the total amount not to exceed eight thousand dollars, including your own credit of five thousand, unless sanctioned by a further guarantee." * * * A. then continued to supply C. & Co. with goods and in an action by him on this guarantee :

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of $5,000, and at the time of action brought such indebtedness having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum A. had no cause of action.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Rose in favour of the plaintiff.

The decision in the case turns on the construction of the guarantee set out in the above head-note. The facts are fully set out in the judgment of Mr. Justice Sedgewick.

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

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Christopher Robinson Q.C., and *Clark Q.C.*, for the appellant referred to *In re Sherry* (1); *Martin* v. *McMullen* (2).

Delamere Q.C. and *English* for the respondent cited *Pike* v. *Dickinson* (3).

FOURNIER J.—I am in favour of dismissing this appeal for the reasons given by the majority in the Court of Appeal.

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

GWYNNE J.—It is very important to bear in mind the character and particulars of the debt of Charlesworth & Co. to the plaintiff at the time that they procured the defendant, who was the uncle of one of the partners of the firm of Charlesworth & Co., and who was security for the company to a bank to the amount of $65,000 and deeply interested in the success of the company, to give to the plaintiff the guarantee sued upon, and also what had passed between the plaintiff and Charlesworth & Co., which caused the latter to procure the defendant to give the guarantee.

Immediately prior to the 11th August, 1886, when the guarantee was given, the debt of Charlesworth & Co. to the plaintiff as found by the referee amounted to the sum of $10,486.95, of which sum $1,262.14 was in respect of customers' paper discounted by the plaintiff for Charlesworth & Co. The referee has also found that the plaintiff was also the holder of notes made or endorsed by the defendant as surety for the firm in respect of $3,431.30, portion of their debt to the plain-

(1) 25 Ch. D. 692.
(2) 20 O.R. 257.
(3) 7 Ch. App. 61.

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tiff, and that when the guarantee was given one of the said notes for the sum of one thousand dollars was delivered up by the plaintiff to the defendant.

The account for bills, etc., discounted by the plaintiff for the firm, as appears by Exhibit L attached to the referee's report, was as follows:—

BILLS DISCOUNTED BY PLAINTIFF FOR FIRM.

When discounted.	Name.	Date due.	Amount.
1886.			
March 22d,	Forbes,	Nov. 24th,	$185.41
July 24th,	Magee,	Oct. 26th,	153.00
do.	Munro,	Nov. 17th,	202.30
do.	Weir,	Nov. 25th,	76.00
do.	Wilson,	Dec. 8th,	195.43
July 22d,	Crabb,	Nov. 25th,	450.00
			$1,262.14

The second, third and fourth of the above items were endorsed by the defendant.

The debt of Charlesworth & Co. to the plaintiff then consisted of two parts, the one secured, the other unsecured. The secured portion consisted of $4,262.14, for $3,431.30 of which the defendant himself was the security, and the unsecured portion, resting upon the credit of Charlesworth & Co. alone, amounted to $6,224.81; for this sum with the exception of $200 cash lent on the 30th July, 1886, the plaintiff held the promissory notes of Charlesworth & Co. alone for several sums, maturing respectively at various periods between the 11th August, 1886, and the 12th January, 1887.

While the debt stood thus Charlesworth & Co. were pressing the plaintiff to furnish them with more goods on their own credit. This the plaintiff peremptorily refused to do.

After some negotiation upon the subject the plaintiff finally consented to suffer $5,000 of the debt to

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stand as an open account, but insisted that for any further goods Charlesworth & Co. should require they must furnish security and that they must reduce their debt by cash or collaterals to the said sum of $5,000. To these terms Charlesworth & Co. acceded. Now, as the plaintiff already held, as shown above, security for $4,262.14 of the amount of Charlesworth & Co.'s debt, no part of which was then due, it plainly never was nor could have been contemplated by the plaintiff or Charlesworth & Co. that the latter were either to pay cash or give collaterals by way of reduction of or security for notes so already secured and not yet due; or that the notes of Charlesworth & Co. for the unsecured portion, which the plaintiff had most probably discounted at and transferred to his bank, should be paid or secured by collaterals before they should mature. The reasonable construction of the agreement is that it was the unsecured amount of their debt to the plaintiff that Charlesworth & Co. had agreed to reduce by cash or collaterals to $5,000 and that the intent and understanding of the parties was that the notes given by Charlesworth & Co. for such unsecured portion, as they should mature, should be either paid in cash or secured by collaterals so as to leave the open account of $5,000 so agreed upon to stand upon their own security alone. This agreement having been arrived at with Charlesworth & Co. and the plaintiff, and the former having pressing need for further goods to be furnished to them by the plaintiff which he refused to give without security, they procured the defendant to give the guarantee sued upon. Horatio George Charlesworth, a witness called by the defendant, and who procured the guarantee to be given and in whose handwriting it is, says:—

He (the plaintiff) refused to give us any more credit for goods unless we would secure him in some way, and a guarantee from Mr.

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Watson was suggested, and that was obtained and handed to Mr. Alexander.

The guarantee so procured is as follows:—

TORONTO, 11th August, 1886.

D. W. ALEXANDER, ESQ.,

DEAR SIR,—I understand you are prepared to furnish Charlesworth & Co., with stock to the extent of five thousand dollars, as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars, including your own credit of five thousand dollars, unless sanctioned by a further guarantee, and the note for one thousand dollars now held by you to be given up.

Yours truly, JAS. WATSON.

Upon the guarantee being handed by Charlesworth & Co. to the plaintiff a note of the defendant which the plaintiff held as security for $1,000, part of Charlesworth & Co.'s debt to the plaintiff, was, as the referee has found, delivered up to the defendant, and the defendant took from one Dunspaugh his promissory note for $3,000 as an indemnity against the defendant's liability on the said guarantee, and (Dunspaugh having become insolvent) proved against his estate in respect of the said note for $3,000 and has received a dividend thereon. By this arrangement the secured portion of Charlesworth & Co.'s debt to the plaintiff was reduced to $3,262.14, and the unsecured portion increased to $7,224.81.

Upon the faith of this guarantee the plaintiff supplied Charlesworth & Co. with goods to the amount of $3,000. The goods so supplied slightly exceeded that sum, but the plaintiff's claim is limited by the guarantee to $3,000.

Upon the 20th November, 1886, Charlesworth & Co., having failed, made an assignment for the benefit of their creditors, and their estate being insufficient to

pay their liabilities in full this action is brought against the defendant upon his guarantee, and the referee to whom the action was referred has found that the defendant was indebted to the plaintiff in the sum of $2,188.01 with interest from 1886, that is as I understand him to mean from the date of the assignment on the 20th November, 1886.

The defendant's contention now is threefold.

1st. That the guarantee was given upon the faith, expressed, as is contended, upon its face, that the plaintiff should thereafter furnish goods to Charlesworth & Co. to the amount of $5,000 as the plaintiff's proportion of the contemplated open current account, which he never did, and that therefore the guarantee never had any force or effect at all.

2nd. That upon the true construction of the guarantee it is necessary that the plaintiff must have the full amount of his share of the current account, namely, $5,000, before the guarantee becomes available to him; that the guarantee merely secures the plaintiff against the loss of any greater amount than $5,000 upon the contemplated account current; and

3rd. That assuming the defendant to be at all liable under the guarantee he is not liable to the amount found by the referee for that on or about the 1st of November, 1886, Charlesworth & Co. placed in the hands of the plaintiff collaterals to the amount of $2,984.04 out of which after the assignment but before any dividend was paid on the Charlesworth insolvent estate the plaintiff realized $2,588.17, a considerable portion of which, as contended by the defendant, was applicable to the liquidation of that portion of Charlesworth & Co.'s debt to the plaintiff, to which the defendant's guarantee applied.

There is no foundation, in my opinion, for either of the first two of these contentions. I cannot upon the

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evidence entertain a doubt that the defendant well knew that Charlesworth & Co. had then an account with the plaintiff upon which they were indebted to him in an amount exceeding $5,000, and that he refused to supply them with any more goods without security. The defendant well knew also, for he admits that Charlesworth & Co. so informed him, that it was important with them that their account with the plaintiff should not be stopped—that they should continue to get credit from him which they could not get without furnishing security.

Interested also as the defendant was, and admits himself to have been, in the maintenance of the credit of Charlesworth & Co., and in their business being carried on, the plain intention of the defendant in giving the guarantee and handing it to Charlesworth & Co. to be used by them was that they should use it for the purpose of perfecting their arrangement with the plaintiff, by giving it to him as security for such goods as the defendant should require to its extent; the plain purpose and intent was that the current account mentioned in the guarantee, for $3,000 of which the defendant agreed to become responsible, was an account limited to $8,000 consisting of $5,000 then due and unsecured from Charlesworth & Co. to the plaintiff and the $3,000 for which the defendant became responsible.

It appears further by the referee's report that Charlesworth & Co. not only paid upon the unsecured portion of their debt to the plaintiff as the notes representing such debt matured but also paid part of the two notes for $1,000 each secured by the defendant; and at the time of Charlesworth & Co. making their assignment on the 20th Nov., 1886, they had paid upon the unsecured portion of their debt the sum of $2,235.36 (as appearing in Exhibit G), which sum being de-

ducted from the sum of $7,224.78 the total amount of the unsecured account left the sum of $4,989.42 the amount due upon the unsecured account at the date of the assignment, to which being added the $3,000, amount of defendant's guarantee, made the open account to which that guarantee applied, when it was then finally closed, to be $7,989.42. The defendant's liability was then three-eighth parts of the account so closed. To this amount interest would have to be added until the account should be liquidated in whole or in part; and in three-eighths of so much of that amount as still remains due the defendant is indebted to the plaintiff.

Not knowing the dates or date at which the plaintiff received dividends upon Charlesworth & Co.'s estate we cannot tell the amount of interest to be added to the above sum in order to determine accurately the amount remaining due after deducting the amount of dividends paid but we can, apart from such interest, determine the amount to which the above sum, treating it as principal, is reducible by the amount of dividend paid.

The referee's report shows that the estate of Charlesworth & Co. paid and the plaintiff has received 29 cents in the dollar, which upon the above sum of $7,989.42, amounts to the sum of $2,316.92, leaving the balance of $5,662.50. The defendant's liability, save in so far as the above interest and any other payments if any there be to the benefit of which the defendant is entitled may affect the account is three-eighths of this sum of $5,672.50, being $2,127.18. But the defendant contends and apparently with great reason that the $2,588.17 received by the plaintiff from the collaterals placed in his hands on or about the 1st Nov., 1886, was as applicable to the liquidation of that portion of the debt to which the defendant's guarantee applied as to any other portion.

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Now no part of that sum would be applicable to the payment of any part of the discounted paper amounting to $1,262.14 other than so much of such paper as should not be paid by the parties primarily liable thereon; and exhibit "L" attached to the referee's report seems to show that the sum of $179.90 was the total amount not so paid. Then exhibit "G" shows that at the time of the assignment there was due upon one of the sums of $1,000 secured by the defendant only $539.87, and upon the other only $510.44, making together the sum of $1,050.31, to which being added the above $179.90 makes the sum of $1,230.21 as the whole amount besides the account to which the defendant's guarantee applied, to which the said sum of $2,588.17 was apparently applicable.

It does therefore, seem, unless capable of some explanation which I do not see on the referee's report, that the defendant is entitled to some considerable benefit from the collaterals upon which the plaintiff received the said sum of $2,588.17.

I think therefore that though the appeal must be allowed with costs in all the courts the case must be referred back to the court in which the action was instituted and is pending with direction that it should be ascertained by reference to the same or to some other referees what appropriation was made by the plaintiff of the said sum of $2,588.17, and of any other sums if any received from the said collaterals, for the purpose of determining what amount if any of the amount of the said collaterals of $2,984.04 received by the plaintiff, if any, should have been applied in reduction of the amount to which the defendant's guarantee applies; with the amount paid to the plaintiff by error in excess of what he was entitled to receive from Charlesworth & Co.'s estate and for which he is liable to the estate the defendant has nothing to do beyond

the amount of 1 cent per dollar which the referee has found to be his dividend share in that sum.

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SEDGEWICK J.—The appellant is a wholesale leather merchant carrying on business in Toronto. Prior to the 11th August, 1886, he had been supplying leather and other goods to the firm of Charlesworth & Co., of the same city, and on that date the indebtedness of Charlesworth & Co. to him amounted to the sum of $10,486.95. It would appear that he, the appellant, became doubtful as to the credit of his customers and not only insisted that the amount of their indebtedness should be reduced to $5,000 but that if they required any further credit they could only get it upon furnishing security. Thereupon they applied to the defendant Thomas Watson who was interested to some extent in Charlesworth's affairs and he thereupon wrote out and delivered to the appellant a guarantee in the following form :—

TORONTO, 11th August, 1886.

D. W. ALEXANDER, ESQ.,

DEAR SIR, — I understand that you are prepared to furnish Charlesworth & Company with stock to the extent of $5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars, including your own credit of five thousand, unless sanctioned by a further guarantee, and the note for one thousand now held by you to be given up.

Yours truly,

(Signed) JAMES WATSON.

Upon receiving this document he gave up the one thousand dollar note therein mentioned, and subsequently sold them goods or advanced them money to the extent of $3,081.69.

On the 30th October, following, Charlesworth & Company failed. Their estate was realized and the appellant received his due proportion of the assets from the assignee of the estate. This action was com-

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menced against the guarantor on the 23rd December, 1889, to recover the sum of $3,000 alleged to be still due upon the defendant's guarantee, and was referred pursuant to section 102 of the Judicature Act to Mr. Clarkson, an accountant, as special referee. His findings so far as they are necessary, in my view, for the purpose of determining this appeal were that, on the day when the guarantee was given, Charlesworth & Company were indebted to the plaintiff in the sum of $10,486.95. Between the date of that document and their failure the plaintiff had advanced to them on current account $3,081.69; that during the same period he had received from them on account $6,855.95, and that he had also received as dividends from the Charlesworth estate the sum of $3,186.16, leaving the net indebtedness to the plaintiff at the commencement of this action irrespective of interest $3,631 (the exhibits annexed to his report, however, showing the true amount to be $3,526.53); and he further found that the amount of the defendant's indebtedness upon his guarantee to the plaintiff was the sum of $2,188.01, for which amount with interest he ordered judgment to be entered for the plaintiff.

Upon appeal from this report to Mr. Justice Rose it was confirmed.

Upon the case being brought before the Court of Appeal judgment was ordered to be entered for the defendant, the appeal being unanimously allowed with costs.

I am of opinion that, for the reason hereinafter pointed out, the conclusion arrived at by the Court of Appeal as to the defendant's liability upon the guarantee in question is the correct one. Assuming the guarantee to have been what all parties seem to have understood it to be, namely, a proposal to *continue to* furnish Charlesworth & Co. with stock to the extent of $5,000 as a current account, I think the

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intention of the parties clearly was that the plaintiff was to continue to allow Charlesworth & Co. to be indebted to him in the sum of $5,000. They would not give him a credit beyond that sum unless such credit was guaranteed, and the agreement on the part of the guarantor was that if the plaintiff should sell to Charlesworth & Co. goods to the extent of $8,000, he, the guarantor, would pay any loss which the plaintiff might sustain in the event of Charlesworth & Co.s failure beyond the sum of $5,000, provided such excess did not exceed $3,000. There was nothing in the guarantee to prevent the plaintiff from giving an unlimited credit to the Charlesworths; they had, however, the defendant's guarantee to pay on account of such indebtedness $3,000 should it turn out that upon the final settlement of affairs the plaintiff's loss exceeded by $3,000 the $5,000 which they were to allow without security. Inasmuch, however, as according to the report of the referee the loss of the plaintiff in connection with the whole account was not $5,000 but only $3,526.53, there was no liability on the part of the defendant to which his guarantee could attach, although had an action been brought upon it at the time of the failure there would have been a liability, a liability wiped out in the interim by the dividends received from the estate.

On this ground I think the appeal should be dismissed with costs.

KING J.—I concur in the judgment delivered by Mr. Justice Sedgewick.

Appeal dismissed with costs.

Solicitors for appellant: *Meredith, Clark, Bowes & Hilton.*

Solicitors for respondent: *Delamere, Reesor, English & Ross.*

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*May 25.

*Oct. 9.

THE TRENT VALLEY WOOLLEN MANUFACTURING COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

OELRICHS & CO. (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of goods by sample—Place of inspection—Delivery—Sale through brokers—Agency—Acquiescence.

Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase.

Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general.

Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there unless the latter are shown to have been cognizant of it, and can be presumed to have made their contract with reference to it.

If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court in favour of the defendants.

The action in this case was for damages for breach of a contract by defendants to purchase wool from

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

(1) 20 Ont. App. R. 673.

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plaintiffs in New York. The facts of the case are fully set out in the judgment of the court, the main question for decision being the validity of the contract within the statute of frauds, the authority of brokers in New York to bind the defendants being disputed, and the right of defendants to have the wool forwarded to their place of business in Campbellford for inspection, plaintiffs contending that they were bound to inspect in New York.

Christopher Robinson Q.C., and *Clute* Q.C., for the appellants, argued that the agreement to buy goods "laid down in New York" did not necessarily mean that New York was the place of delivery. If it was it did not follow that they must be inspected there. They relied on *Perkins* v. *Bell* (1), and cited also *Grimoldby* v. *Wells* (2); *Barnard* v. *Kellogg* (3).

McCarthy Q.C., for the respondents, referred to Campbell on Sales (4).

The judgment of the court was delivered by:—

THE CHIEF JUSTICE.—This was an action brought by the respondents against the appellants for the non-acceptance of certain wool which the respondents agreed to sell to the appellants. The trial took place before Mr. Justice Falconbridge, without a jury, and the action was by him dismissed. This judgment was, however, reversed on appeal.

The appellants carry on a large woollen factory at Campbellford in Ontario. The respondents are merchants at New York, engaged in the wool trade there. On the 26th March, 1894, Messrs. Cass & Mote, brokers in New York, sent six samples of Buenos Ayres wool to the appellants, at the same time writing to them as follows:

(1) [1893] 1 Q. B. 193.
(2) L. R. 10 C. P. 391.
(3) 10 Wall. 383.
(4) 2 ed. pp. 411-2 and 560.

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We send you by mail to-day some samples of Buenos Ayres wool as per memo below and wait your report on same.

The samples were numbered 126-127-129-130-131 and 132 and the prices of each lot were stated. To this letter the appellants replied on the 31st March, 1890, first by a telegram as follows:

If you will give us six months flat will take lots 127-128-129-130-131-132, answer quick.

It is explained in the evidence that the expression "six months flat" meant payment by promissory note payable six months after date without interest. On the same day (the 26th March) the appellants confirmed their telegram by a letter in the same words. By telegram of the same date Messrs. Cass & Mote informed the appellants that the wool was on the other side of the Atlantic, a fact which they had omitted to mention in their letter, and on the same day they wrote confirming their telegram. The appellants in reply to the telegram sent the following:

Our offer is for wool laid down in New York

to which Cass & Mote replied by letter of the 1st of April, 1890, saying:

We so understand your offer.

On the 3rd of April the brokers sent to the appellants the following despatch:

Can get 125-130-131, prices named four months, privilege six months adding sixty days interest, shall we take them? Cannot get other three lots, answer.

To this the appellants answered on the same day:

If you cannot get six months, to date from arrival of wool at New York, we withdraw our offer.

To this Messrs. Cass & Mote replied also on the same day:

Telegram received have bought the three lots B. A. pulled at six months.

The mention of lot number 125 in Cass & Mote's telegram of the 3rd of April was clearly a mistake for 127; no such number as 125 was included in the list

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of lots originally sent to the appellants, and in the contract afterwards entered into, as will be stated, this mistake was rectified; although some stress was laid in the argument in the court below on this circumstance it is of no importance and no further notice of it will be taken here.

The contract was perfected by the delivery and transmission to the respective parties to the contract, that is to the respondents as vendors and to the appellants as vendees, of bought and sold notes the bought note having been sent to the appellants and the sold note handed to the respondents. These bought and sold notes were as follows:

NEW YORK, April 3rd, 1890.

Bought for Trent Valley Woollen Co.
From Messrs. Oelrichs & Co.
N. Y. City.

To say
127 about 14,000 lbs. B.A. pulled wool at 35c. per pound in bond.
130 about 7,000 lbs. B.A. pulled wool at 34½c. per pound in bond.
131 about 7,000 lbs. B.A. pulled wool at 35c. per pound in bond.

Terms, note at 6 months. To arrive
Tare, actual CASS & MOTE.
Remarks. Brokers.
Ship via.

NEW YORK, April 3rd, 1890.

Sold for Messrs. Oelrichs & Co. to Trent Valley Woollen Co.
Campbellford, Ont., Canada.

To say
127, about 14,000 lbs. B.A. pulled wool at 35 cents per pound in bond.
130 " 7,000 " " at 34½ cents per pound in bond.
131 " 7,000 " " at 35 cents per pound in bond.

Terms, note at six months. To arrive.
Tare, actual. CASS & MOTE,
Remarks. Brokers.
Ship via.

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The appellants retained the bought note and made no objection either to the terms of the contract or to the authority of Messrs. Cass & Mote as brokers to bind them. On the 28th May, 1890, the wool arrived at New York of which the appellants were at once advised by telegram from the respondents to whom they replied also by telegram as follows:—

If wool is equal to samples in our possession representing the lots send it on, if not do not want it.

To which the respondents replied:

You must accept the wool here before we ship it.

Then ensued a correspondence between the parties by letter and telegraph in which the respondents insisted that they were not bound to forward the wool until it was accepted by the appellants in fulfilment of the contract and as equal to samples, and that they were not bound to forward the wool to Campbellford in order that the appellants might there examine and compare it with the samples, but that such examination must take place in New York, and in the course of which the appellants on their part contended that notwithstanding the terms of contract they were entitled to have the wool sent to Campbellford in order that it might be there inspected before acceptance by the respondents. The result was that the wool was stored on the New Jersey side of the port of New York, and ultimately sent to Canada; first to Sherbrooke and then to the Auburn Woollen Mills at Peterborough where it was used, a large reduction of price having been necessitated by a general fall in prices, and also by the reason of the wool having, after it arrived at New York and after it had been refused by the appellants, been damaged by moths.

The points insisted upon by the appellants in their defence to the action were, first, that there was no contract for the reason that Messrs. Cass & Mote were

not the appellants' brokers and had no authority to sign the bought and sold notes as their agents, and secondly, because either upon the construction of the contract by itself, or with the addition of a term which it is said ought to be added to it, by implication, arising from the usage of trade, the appellants had the right to have the wool forwarded to them at Campbellford before acceptance in order that it might be there ascertained if it agreed with the samples.

Upon the first point raised I am of opinion that the appellants were bound by the contract entered into by Cass & Mote; they knew perfectly well that Cass & Mote were dealing with them as brokers for the respondents, the real vendors, and their letters and telegrams sent in the course of the negotiations which preceded the signing of the brokers' notes implied authority to Cass & Mote to perfect the contract on their behalf. But even if there had been no original authority to Messrs. Cass & Mote to complete the contract on behalf on the appellants there was such acquiescence by the latter as amounted to ratification of the agreement embodied in the bought and sold notes and entered in the brokers' books. Mr. Owen, the appellants' manager, who acted for the company throughout the transaction out of which this dispute has arisen, in his evidence given at the trial, admits this very distinctly. I extract the following passage from his evidence :—

Q. You received a telegram from Cass & Mote; "Have bought the lots B. A. pulled at six months." Did you reply to that telegram? A. I do not think we did.

Q. You were content to rest there? A. Certainly.

Q. And you received the sold note or bought note, whichever it was, and you rested on that? A. Yes.

Q. You did not object to that? A. No.

Q. You did not write down to them and say "You have no right to sign that for us?" A. We did not consider they signed it for us.

Q. You rested on that as a transaction completed? A. Yes.

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These sale notes were signed by Cass & Mote as brokers as appeared from the bought note in which the whole bargain, including the names of both sellers and buyers, was stated and this gave the appellants distinct notice that the brokers were, if without authority, at least assuming, to act as their agents. If they objected to this they should at once have repudiated their act, but instead of doing anything of the kind they acquiesced as Mr. Owen states, and said nothing until the dispute about inspection and delivery arose. If authority is wanted in support of the view that the appellants were bound by the contract the authorities quoted in the judgment of Mr. Justice Falconbridge, who decided against the appellants on this point, are decisive in the respondents' favour. The citation from Campbell on Sales (1) shows that from two distinct points of view the failure to object concludes the appellants. First, the bought and sold notes give each party information of the terms of the contract and afford an opportunity of objecting to the contract either as not within the authority of the broker, on any ground, personal, as regards the other party to the bargain, and "they further afford the presumption that the contract is ratified if no objection is made within a reasonable time."

Further if the notes are acquiesced in and are in identical terms they "complete a new consensus forming a good contract (and one valid within the Statute of Frauds) if there was not a valid contract already and a novation of the contract if there was."

The appellants' manager himself, on his examination for the purposes of discovery, disclaims all objection on this head. He says:—

Q. And this fact did not suggest to you the advisability of keeping the samples?

(1) 2 ed. p. 566.

A. No; it never entered our head to keep the samples; we did not think it was necessary; if we had we would have kept them. We wanted it distinctly understood that we never tried to get out of the wool in any shape at all; there was no catch about it; we acted fair and honest.

Q. I suppose the real question as far as your company is concerned is as to this question of inspection in New York, or the sending on to Canada for inspection?

A. We claim we have always inspected at Campbellford.

Q. That is the real difference between you?

A. Certainly we did not try to get out of it in any other way. We never agreed to go to New York and never had gone to New York and we did not see why we should go to New York in this case.

Of course no admission of this kind would preclude the appellants from insisting on any point of law arising upon the facts, and I do not refer to the evidence for any such purpose as that but as establishing the fact of acquiescence in the terms of the contract of sale which it certainly does beyond all question.

The contract therefore must be held to be sufficiently established and there remains only the question, which was the real issue between the parties, as to the performance of the contract. Were the appellants bound to inspect the wool and take delivery at New York, or were they entitled to have it forwarded to Campbellford for their inspection there? I should have said when stating the facts that, in the absence of any proof by the appellants that the wool was not equal to sample, there is sufficient *primâ facie* evidence to establish the fact that it did agree with the sample and upon its arrival at New York was sound and merchantable wool. I refer to the testimony of Mr. Isherwood, a member of the Liverpool firm which sold the wool to the respondents, to that of Mr. Schlinghoff described as an "outside man" in the employ of the respondents who examined the wool at New York, and to that of Mr. Kendry, the manager of the Auburn Woollen Mills at Peterborough, who ultimately pur-

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chased and used it. If therefore it was material to the respondents' case to show that the goods agreed with the samples I take that fact to have been well proved in the absence of contradiction by the appellants.

Then, were the appellants well founded in their claim to inspect the wool at Campbellford before taking delivery of it and giving the promissory notes for the price? That it was the intention and understanding of both parties that delivery should be at New York is evident from the appellants' second telegram of the 31st March, in which they say: "Our offer is for wool laid down at New York"; and from the letter of Messrs. Cass & Mote of the 1st of April replying thereto, in which they say: "We so understand your offer." Therefore if we are entitled to consider this stipulation as to the wool being laid down at New York as forming a term of the contract, then the delivery was by the express contract of the parties to be at New York, and there the vendors were bound to deliver and the vendees to accept. This is further confirmed by the telegram of the 3rd of April in which the appellants say they will withdraw their offer unless the brokers can get six months' credit, to date from arrival of the wool at New York. The payment was to be by promissory note; the giving of this note and the delivery and final acceptance of the wool were according to settled construction to be concurrent acts; the vendors were therefore bound to accept or reject the wool promptly in order that the vendees might receive the paper representing the price which they were entitled to receive as soon after the arrival of the goods as would allow a reasonable interval for inspection. If these telegrams are to be excluded, and we are to confine the contract within the limits of the bought and sold notes which say nothing about any place of delivery, it will make no difference, as the law

is that where the contract of sale is silent as to the place of inspection of goods sold by sample it is to be presumed that the purchaser is to accept the goods at the place of delivery which here was undoubtedly New York, being the place at which the contract was made.

Therefore upon the construction of the written contract, with or without the aid of the telegrams which preceded it, and excluding any addition to its terms by evidence of custom, it is plain that the respondents were right in their contention that the place of inspection was New York, and the respondents were not bound to forward the goods to Campbellford before receiving the note to be given for the price. That this is the law is apparent from the cases of *Perkins* v. *Bell* (1); and *Thomson* v. *Dyment* (2) which are ample authority for the proposition. It follows that unless we are able to say that it is sufficiently proved that there existed some mercantile usage to the contrary warranting us in superadding to the contract by implication a term providing for an inspection at the appellants' mills at Campbellford the respondents are entitled to recover damages for the breach of the contract of sale. Such an addition to the agreement of the parties may, no doubt, if sufficiently proved, be engrafted on it by parol evidence of the custom.

The case is thus narrowed to a question of evidence. Is it sufficiently proved that there existed a usage of trade controlling the *primâ facie* effect of the contract as expressed in the written agreement of the parties, by importing into it by implication an additional term? I am of opinion that no such usage is proved. The evidence entirely fails to establish it. The Canadian wool merchants called to prove a custom such as the appellants contend for have not shown that any

(1) [1893] 1 Q.B. 193. (2) 13 Can. S.C.R. 303.

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such general custom exists even with regard to contracts made in Canada. What these dealers, four witnesses, two from Montreal, one from Toronto, and one from Hamilton speak of, is not a general usage or course of practice universally governing the trade but of the course pursued by them in their own business. Such evidence is of course insufficient to establish a universal custom of trade and must be regarded as irrelevant. For the same reason the evidence of Mr. Breckenridge, the manager of a woollen mill at Carleton Place, and of Mr. Owen, the appellants' own manager, is insufficient to establish anything like a general usage of trade. Then the existence of any universal custom in Canada is negatived by the two witnesses called by the respondents, Mr. Rosamond and Mr. Kendry, whose evidence must be deemed conclusive on this point. The authorities establish that in order to engraft a new term in a mercantile contract by evidence of this kind a general course of dealing must be shown to exist, and that isolated instances of the way in which particular parties carry on their business is inadmissible.

Even if it had been established by sufficient evidence that such a mercantile custom as is contended for prevailed generally in the wool trade in Canada that could not possibly affect the respondents, New York merchants selling goods in the New York market and not shown to be cognizant of any such Canadian usage as the appellant contend for. The passage from the judgment of the Privy Council in *Kirchner* v. *Venus* (1) quoted in the respondents' factum is so apposite that, being as it is binding upon us as a conclusive authority, I transcribe it here.

> The ground upon which it appears to us that this case must be decided in favour of the appellants is this, that when evidence of usage

(1) 12 Moo. P.C. 361.

of a particular place is admitted to add to or in any manner affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their contract with reference to it. But no such presumption can arise when one of the parties is ignorant of it. In this case the indorsees of the bills of lading were evidently not in Liverpool but in Sydney, and though they may be agents of persons residing in London, there is no evidence that these gentlemen were acquainted with the alleged usage in Liverpool.

The additional authorities referred to by the respondents, *Bartlett* v. *Pentland* (1); *Pearson* v. *Scott* (2); *Bayliffe* v. *Butterworth* (3); *Pollock* v. *Stables* (4); *Greaves* v. *Legg* (5); Addison on Contracts (6); are all to the same effect.

In the argument of the learned counsel for the appellants, as well as in the factum presented on their behalf, much reliance was placed on the argument *ab inconvenienti*. It was said that the inconvenience of inspecting at New York would be so great, and the presumption of a contrary practice consequently so strong, that it requires but little evidence to establish the usage contended for. This argument is sufficiently met by what has been already demonstrated, namely, that in the absence of sufficient legal evidence of a usage one is not to be inferred from circumstances for the purpose of altering the terms expressed by the parties in their written contract. But so far from the weight of the argument from inconvenience being in favour of the appellants it is, in my opinion, strongly in favour of the respondents. To say that a New York merchant entering into a contract for the sale of goods at New York, calling for delivery there, is to be either bound to send the goods to Canada, and also an agent to be present at an inspection, in order to ascertain if

(1) 10 B. & C. 760.
(2) 9 Ch. D. 198.
(3) 1 Ex. 425.
(4) 12 Q. B. 765.
(5) 11 Ex. 642.
(6) 9 ed. p. 66.

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the goods correspond with the sample, or to submit to an *ex parte* inspection there, before being paid the price, would be to introduce into contracts a condition so unreasonable and inconvenient as seriously to interfere with the conduct of business, and would inevitably lead to the insertion in contracts of special clauses excluding the operation of such a usage. On the other hand there would be no inconvenience in an examination of the goods at New York. The objection that the wool could not be examined in the bonded warehouse at New York entirely fails, for it is plain upon the evidence that if it should have been found necessary to open the bales that could have been done at comparatively small expense by changing the entry from one for direct export to Canada into an ordinary bonded warehouse entry according to the United States customs regulations, upon which a permit could be obtained for a thorough examination of the goods so held.

The respondent in his factum takes the objection that this was not a sale by sample at all. I incline to think that this objection is well founded. I do not, however, express any decided opinion upon it, for I desire to place my judgment upon the same grounds as those on which the judgments of the Chief Justice and the Chancellor proceeded, and upon the hypothesis assumed by the appellants that this was a sale by sample.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Clute & William.*

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

SIMON C. WALSH (DEFENDANT).....APPELLANT; 1894

AND *May 26. *Oct. 9.

FREDERICK T. TREBILCOCK (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Betting on election—Stakeholder—R. S. C. c. 159 s. 9—Accessory—R.S.C. c. 145 s. 7—Action for money staked—Parties in pari delicto.

R. S. C. c. 159 s. 9 provides *inter alia* that "every one who becomes the custodian or depositary of any money * * * staked wagered or pledged upon the result of any political or municipal election * * * is guilty of a misdemeanour" and a subsection says that "nothing in this section shall apply to * * * bets between individuals."

Held, reversing the decision of the Court of Appeal, Taschereau J. dissenting, that the subsection is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R.S.C. c. 145. *Reg.* v. *Dillon* (10 Ont. P. R. 352) overruled.

After the election, when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him the parties being *in pari delicto* and the illegal act having been performed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in favour of the plaintiff.

The plaintiff and one Richards made a bet on the result of an election for the House of Commons and deposited the sums so bet with the defendant as stakeholder. By the result of the election plaintiff lost his

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

(1) 21 Ont. App. R. 55.

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wager and the money was paid by defendant to Richards after notice given by plaintiff claiming a return of the money and plaintiff brought an action to recover his share of the amount deposited with defendant on the ground that the betting was illegal and the contract to pay the money to Richards consequently void. The question for decision was whether or not the stakeholder was guilty of a misdemeanour under R.S.C. ch. 159 sec. 9, and if he was, whether or not the plaintiff was an accessory to the offence under ch. 145; if a misdemeanour was committed to which plaintiff was accessory he could not recover.

The trial judge, the Divisional Court and the Court of Appeal all held that plaintiff could recover following *Reg.* v. *Dillon* (1).

Meredith Q. C. for the appellant. Betting is illegal and even without the statute R. S. C. ch. 159 this action would not lie. *Herman* v. *Jeuchner* (2) overruling *Wilson* v. *Strugnell* (3).

A contract may be enforced where the betting is only collateral to the agreement but not where it is the basis of it. See *DeMattos* v. *Benjamin* (4); *Harvey* v. *Hart* (5). See also *Scott* v. *Brown* (6).

Aylesworth Q. C. and *McKillop* for the respondent. R.S.C. c. 159 only makes illegal the machinery for carrying on the business of betting, and does not apply to transactions between individuals. *Reg.* v. *Dillon* (1). See *Cox* v. *Andrews* (7).

Even if defendant committed a misdemeanour plaintiff cannot be held to be an accessory. *Reg.* v. *Heath* (8); *The Queen* v. *Tyrrell* (9).

(1) 10 Ont. P. R. 352.
(2) 15 Q. B. D. 561.
(3) 7 Q. B. D. 548.
(4) 63 L. J. Q. B. 248.
(5) W. N. [1894] 72.
(6) [1892] 2 Q. B. 724.
(7) 12 Q. B. D. 126.
(8) 13 O. R. 471.
(9) [1894] 1 Q. B. 710.

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THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal affirming that of the Common Pleas Division, which in turn upheld the decision of Mr. Justice Street, the trial judge. The action was brought by the respondent against the appellant to recover $500, the amount of a deposit which had been paid to the appellant as a stakeholder under the following circumstances. Just before a general election for the House of Commons, on the 23rd February, 1892, the respondent and one John R. Richards made a wager on the result of the election for the electoral district of the city of London, for which John Carling and Charles Hyman were candidates, each party betting $500, Richards betting that Carling would be gazetted as the member elected, and the respondent betting that Hyman would be so gazetted. The bet was reduced to writing and each party deposited $500 in the hands of the appellant as a stakeholder. Subsequently and after the election, on the 29th February, 1892, the respondent gave the appellant a written notice claiming a return of his deposit and directing him not to pay over the money to Richards, and this notice was repeated by one from the respondent's solicitor on the 4th March, 1892. Notwithstanding this the appellant did pay over the money to Richards (whose candidate, Carling, had been gazetted) taking from him a bond of indemnity. The respondent then brought the present action in all the stages of which he has been successful. But one of the learned judges who have dealt with the case in the several courts through which it has passed has taken the view contended for by the present appellant. In the Court of Appeal the Chancellor of Ontario differed from the other three members of the court. The same result was also arrived at in a similar action of *Trebilcock* v. *Gustin*, in

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which the present respondent was plaintiff, and which came before the Queen's Bench Division.

There was no difference between the parties as to the facts. The respondent's right to recover depends entirely on a question of law. There can be no doubt that a wager on the result of a Parliamentary election is at common law a contract forbidden by public policy, and in that sense illegal. This is shown by the case of *Allen* v. *Hearn* (1). It may also be within the prohibition contained in section 131 of the Election Act, although that section, as I had occasion to point out in the *North Perth Election Case* (2), has a much wider scope and is not confined to aleatory contracts like wagers. This question of the legality or illegality of the wager, or whether the illegality depends on common law or statute, is of no importance in the present case. The authorities show most conclusively that whether a wager be legal or illegal either of the parties to it may withdraw his deposit or stake from the hands of a stakeholder at any time before the latter has paid it over. We have no statute such as the Imperial statute 8 & 9 Vict. ch. 110, which was in question in the cases of *Hampden* v. *Walsh* (3); *Batson* v. *Newman* (4); *Diggle* v. *Higgs* (5); and *Trimble* v. *Hill* (6). It was held in these cases that the common law had not been altered in this respect by the statute, and that the law remained as it had been settled by the cases of *Lacaussade* v. *White* (7); *Eltham* v. *Kingsman* (8); and *Hastelow* v. *Jackson* (9).

In *Hampden* v. *Walsh* (3), Lord Chief Justice Cockburn thus states the law:—

(1) 1 T. R. 56. See also *Atherfold* v. *Beard* 2 T. R. 610.
(2) 20 Can. S.C.R. 352.
(3) 1 Q. B. D. 189.
(4) 1 C.P.D. 573.
(5) 2 Ex. D. 422.
(6) 5 App. Cas. 342.
(7) 7 T. R. 535.
(8) 1 B. & Ald. 683.
(9) 8 B. & C. 221.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager and others in which the wager not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing who can at any time claim it back before it has been paid over. In the latter the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to the 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal, and the Courts of King's Bench and Exchequer were at variance on this point. In *Eltham* v. *Kingsman* (1) the Court of King's Bench, consisting of Lord Ellenborough C. J., Bayley, Abbott and Holroyd JJ., held that even where a wager was legal the authority of a stakeholder, who was also (as is the case of the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here" says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man" says Abbott J. "who has made a foolish wager may rescind it before any decision has taken place." In the later case of *Emery* v. *Richards* (2), the Court of Exchequer, where money had been deposited on a wager of less than £10, on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict. not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of *Eltham* v. *Kingsman* (1) does not, however, appear to have been brought to the notice of the court, and in our view the decision of this court was the sounder one. We cannot concur in what is said in Chitty on contracts, 8th ed. p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of *Eltham* v. *Kingsman* (1) and *Hastelow* v. *Jackson* (3), and in that view we concur.

This case was followed and the law as laid down by Cockburn C.J. adopted in the before cited cases of

(1) 1 B. & Ald. 683.
(2) 14 M. & W. 728.
(3) 8 B. & C. 221

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Trimble v. *Hill* (1), *Batson* v. *Newman* (2) and *Diggle* v. *Higgs* (3), and in the two last of these cases, as well as in *Hastelow* v. *Jackson* (4) and *Hampden* v. *Walsh* (5), the notice of withdrawal was not given to the stakeholder until after determination of the event. There can therefore be no doubt of the respondent's right to recover if the law had depended altogether upon these authorities.

Certain statutory provisions peculiar to the legislation of the Dominion, not avoiding the wager, but making, as it is contended, the depositing in the hands of the stakeholder for the purpose of the wager by itself an illegal act, are relied on by the appellant as disentitling the respondent to recover back his money.

By Revised Statutes (Canada) chap. 159, subsec. (*c*), sec. 9, it is enacted that:

(1) Every one who * * * becomes the custodian or depositary of any money, property or valuable thing, staked, wagered or pledged * * * upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast is guilty of a misdemeanour and liable to a fine not exceeding $1,000, and to imprisonment for any term not exceeding one year.

(2) Nothing in this section shall apply to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked to be paid to the winner of any lawful race * * * or to bets between individuals.

By Revised Statutes (Canada), chap. 145, sec. 7, it was enacted:

That every one who aids, abets, counsels or procures the commission of any misdemeanour, whether the same is a misdemeanour at common law or by virtue of any act, is guilty of a misdemeanour, and liable to be tried, indicted and punished as a principal offender.

Section 9 of chapter 159 has with a very slight addition been carried into the Criminal Code 1892, of which it now forms the 204th section. Section 7 of chapter 145 has not been adopted textually in the Code, but the act it declares a misdemeanour is now included and made a substantive offence by section 61

(1) 5 App. Cas. 342.
(2) 1 C. P. D. 673.
(3) 2 Ex. D. 422.
(4) 8 B & C. 221.
(5) 2 Q. B. D. 189.

of the Code. The Code did not, however, come into force until the first of July, 1893, and we must therefore have regard only to the provisions of the Revised Statutes.

The appellant's contention is that the first mentioned statute makes the mere receipt of the deposit or stake to abide the event of the bet a misdemeanour on the part of the stakeholder who becomes the depositary of it and that chapter 145 section 7 also made the party to the wager who deposited the money for the purpose of it guilty of a misdemeanour as a party aiding, abetting and procuring the commission of a misdemeanour. The respondent insists that this being a "bet between individuals" section 9 of chapter 159 has no application inasmuch as the effect of those words in the concluding clause of that section is to save from the operation of the statute, not only "bets between individuals" but also deposits made for the purpose of such bets.

Two points which have not been seriously disputed may be disposed of at once. First, if the proper construction of section 9 is that which the appellant contends for and the depositary of such a bet as the parties made in the present instance on the result of a political election is guilty of a misdemeanour, there can be no doubt that the party to the wager who deposits the stake is within the definition of one who aids and abets or procures the commission of a misdemeanour within the 7th section of chapter 145. It follows that in such case the respondent would, by reason of his complicity in the unlawful act of taking the money on deposit, be *in pari delicto* with the appellant, and if such was the respondent's position the law is clear that he cannot recover money so deposited. The authorities show decisively that when money is paid for an illegal purpose which when consummated would

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put the party paying and the party receiving it *in pari delicto* there is *locus pœnitentiæ* open to the party paying so long as the illegal purpose has not been carried out. But where both parties are equally wrong, and the mere payment of the money (as to the stakeholder in the present case) constitutes the illegal act, there can be no withdrawal, and the money cannot be recovered back. This is so clearly the law that it is hardly necessary to cite cases to maintain the proposition. I will, however, refer to one or two of the latest authorities. In *Scott* v. *Brown* (1) Lord Justice Lindley says:

> *Ex turpi causâ non oritur actio.* This old and well known legal maxim is founded on good sense, and expresses a clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson* (2).

In *Herman* v. *Jeuchner* (3) the case was that a man procured another to go bail for him on depositing in the hands of the surety the amount of the bail by way of indemnity in case of default. This was of course illegal, being in contravention of the Statute of Bailbonds, 23 Hy. 6 ch. 9. The principal sued the bail to recover the money alleging the illegality and insisting that the illegal purpose had not been carried out. The Court of Appeal held that the payment of the money to the surety was itself an illegal act. In *Kearley* v. *Thomson* (4) the illegal purpose had only

(1) [1892] 2 Q. B. 724.
(2) Cowp. 343.
(3) 15 Q. B. D. 561.
(4) 24 Q. B. D. 742.

partly been consummated, yet it was held that the money paid for the illegal purpose could not be recovered back. In *Taylor* v. *Bowers* (1) the Court of Appeal say:

> If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.

And it is worthy of remark that so far from the courts evincing any disposition to relax the law on this head we find the Court of Appeal in *Kearley* v. *Thomson* (2) saying that:

> The application of the principle laid down in *Taylor* v. *Bowers* (1) and even the principle itself may at some time hereafter require consideration, if not in this court, yet in a higher tribunal.

Next, we come to what is really the single substantial question in the case, that on which the judgments of all the courts below have proceeded, the proper construction of the 9th section of chapter 159 of the Revised Statutes. If we read the first part of this section 9 apart from the proviso contained in subsection 2, I cannot conceive any one having a reasonable doubt of its application to the present appellant as the custodian or depositary of money staked and wagered upon the result of a political election. These are the very words of the statute. Surely the appellant received the money now sought to be recovered as a custodian or depositary of it as money which had been staked and wagered by the respondent with Richards on the result of the London Parliamentary Election. The case comes, therefore, within the exact and literal terms of the enactment. Its plain construction according to the language used (reading it of course without the proviso) involves no absurdity, no inconsistency,

(1) 1 Q. B. D. 300. (2) 24 Q. B. D. 742.

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and does not bring it into collision with any other provisions of the statute. Construing it thus according to the plain meaning of the words it is, in my opinion, a most salutary enactment, and one which would be effectual in stopping the evil practice of betting on elections. To any one who would doubt this I would say the very case before us shows that this would be the beneficial consequence of a strict construction of the statute. The actual bet now in question never would have been made without putting up the money, and the money never would have been put up if it could have been foreseen that neither the winning gamester nor the party depositing could have made the stakeholder pay it over (1).

It is argued, however, that the second subsection of chapter 9 in saying that the penal clauses shall not apply to " bets between individuals " makes the whole statute inapplicable to a deposit made for the purpose of a bet or wager such as this on a parliamentary election, because such wager was made between "individuals." I am not able to read the words of the proviso in this way. *Primâ facie* they mean that the section shall not apply to a bet or wager, not that they shall not apply to the case of a deposit made for the purpose of a bet or wager. It is said, however, that we are to construe these words as equivalent in meaning to the words "any money deposited for the purpose of a bet between individuals." I know of no principle upon which we are entitled so to alter the *primâ facie* meaning of the words in which the intent of the legislature is expressed by adding other words, at least under such conditions as we have here. The words of exception as they stand are perfectly intelligible. They apply to bets only, not to deposits. The legislature says, in effect, nothing which

(1) See in connection with this, *Barclay* v. *Pearson* the missing word case. [1893] 2 Ch. 154.

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has been said in the preceding part of the section, making a deposit of money illegal and punishable, shall apply to the bets in respect of which such deposit has been made if such bets are between individuals. There is nothing absurd or even inconsequential in this. It may well be that it was considered by Parliament that making the deposit of money an illegal act, without extending the prohibition to the bets themselves, would be an effectual way of putting down the evil the act was aimed at; but whether it would or would not have that effect is not the question; it is sufficient that the words have in their primary signification a plain obvious meaning which leads to no illegal or absurd result, and is controlled by no context requiring us to apply to them an extended or secondary meaning. The well known "golden rule" so often referred to in the judgments of Lord Wensleydale (1) and originally propounded by Mr. Justice Burton in the case of *Warburton* v. *Loveland* (2) therefore requires us to give the language used its plain ordinary meaning. The courts have sometimes construed the words used in statutes not according to their strict grammatical and ordinary signification, but as elliptical modes of expression used as symbols for some secondary meaning. This was the case of *Robertson* v. *Day* (3) where the Privy Council adopted this mode of construction. But this was expressly referred to the principle that the context called for such an interpretation. Here, as I have said, I can find no such context, for I cannot find that there is pervading the statute any general intent to confine it to pool selling or pool-rooms, which is the reason ascribed for enlarging the actual words "bets between

(1) See per Lord Blackburn, *British Railway Co.* 6 App. Cas. 131. *Caledonian Railway Co.* v. *North* (2) 1 Hud. & Br. 635.
(3) 5 App. Cas. 63.

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individuals" so as to include deposits for the purpose of such bets. If the legislature had indicated an intention to confine this provision of the act to pool-rooms and pool selling it would, of course, be the duty of the courts to obey their mandate, but it must be observed that the statute in that case so far as applicable to bets on elections would have been useless; it would not have struck at the mode in which such bets are usually made, and would moreover be palpably open to evasion. I cannot agree that we are to add words which would manifestly have the effect of producing such a result. Moreover the statute was a remedial one; construing it literally it was intended as a remedy designed for the public benefit to suppress the evil practice of depositing money for the purposes of bets at elections. It ought, therefore, to receive a beneficial construction which in this instance accords with the strict grammatical construction. If there had been in the enactment itself any indication that it was to be restricted to deposits made at particular places, or with persons belonging to particular classes such as pool sellers, or professional gamblers, it would have been different, but as I have said there is no indication of any such intent in the statute. Betting on elections between individuals may be considered a great evil, but if the legislature did not think fit to inflict a penalty for that their omission to do so is no reason why we should hold that they did not intend to suppress another attendant evil, when they have in so many words said that they did so intend.

I regret that I should be compelled to differ from so many learned judges for whose opinions I have a most sincere respect, but I can find no answer to the argument on which the Chancellor has based his judgment.

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Since writing the above I have read the judgments delivered in the Queen's Bench Division in the case of *Trebilcock* v. *Gustin*, not yet reported. The learned Chief Justice of the Queen's Bench rests his judgment in that case on the principle that the appellant, a stakeholder, is estopped from disputing the right of his bailor, the person who has deposited the money with him, to withdraw it. I entirely agree that this would be so if there had been no illegality in the act of depositing itself. But if I have successfully demonstrated, as I have to my own satisfaction, that the mere making of the deposit was in itself made by the statute an unlawful act, then, for a reason of public policy which makes the resulting rule altogether paramount to any estoppel operating as between the parties, an illegal act having been consummated, the depositor cannot recover back his stake.

The appeal must be allowed with costs and the action dismissed with costs to the appellant in all the courts below.

FOURNIER J.—I am of opinion that this appeal should be allowed with costs, for the reasons given in the judgment of the Chief Justice which I have read.

TASCHEREAU J.—I would dismiss this appeal. The defendant, appellant, has, in my opinion, entirely failed to impeach or weaken in any way the cogent reasoning of the learned judges who formed the majority in the court appealed from. Chief Justice Armour's opinion in the analogous case of *Trebilcock* v. *Gustin* also clearly demonstrates, in my opinion, the unsoundness of the defendant's contentions.

SEDGEWICK J.—This is an action brought by the respondent against the appellant to recover five

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hundred dollars deposited in the month of February, 1892, with the appellant to abide the event of a wager. The wager was in writing as follows:

> Mr. F.T.Trebilcock [the respondent] bets Mr. J. E. Richards ($500) five hundred dollars, that C. S. Hyman is the gazetted Member of Parliament for the city of London at the coming election for the Dominion House to take place on Friday, the 26th day of February, 1892.
>
> (Signed,) FRED. T. TREBILCOCK.
> (Signed,) JOHN E. RICHARDS.

After the election the respondent demanded from the appellant the $1,000 deposited with him, and subsequently demanded from him the sum of $500 deposited by him with the appellant.

After the gazetting of the member for the city of London (Sir John Carling, the opponent of Mr. Hyman, having been declared elected) the appellant paid over the whole money to Richards.

The action was tried before the Honourable Mr. Justice Street, sitting without a jury, who directed judgment to be entered for the respondent for the sum of $500 deposited by him with the appellant, with interest and costs.

The appellant then appealed to the Common Pleas Divisional Court of the High Court of Justice, and subsequently to the Court of Appeal for Ontario, both appeals being dismissed, Mr. Chancellor Boyd, sitting as a member of the Court of Appeal, dissenting.

The appeal is now from the judgment of that court.

The only questions involved are, first, the proper construction to be given to cap. 159 R.S.C. sec. 9, and cap. 145 R.S.C. sec. 7, and secondly, the effect of these statutes upon the transaction.

Now, I propose to construe this statute cap. 159 sec. 9 according to its plain and obvious meaning. I do not care what the intention of Parliament was in passing it if that intention has not been given effect to by the

language used. The words themselves must govern. These words so far as they affect this case are as follows:

> Every one who * * * (c) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged * * upon the result of any political or municipal election * * is guilty of a misdemeanour and liable to a fine not exceeding $1,000, and to imprisonment for any term not exceeding one year.

Now the appellant Walsh became the custodian of $1,000 staked upon the result of the London election, a political election. Was that a misdemeanour under the statute? The majority of the Court of Appeal have said no, that the object Parliament had in view was to restrain the abuse to which gambling and betting leads where betting houses or places for recording or registering bets or wagers or selling pools are kept in which money may be staked or deposited in advance or otherwise by all comers, or in which other forms of gambling upon the result of a race or election or other event are facilitated, but that it leaves untouched the stakeholder or depositary of moneys casually bet upon a political election as not being within the mischief of the act; and they rely upon subsection 2, viz.: "nothing in this section shall apply to * * bets between individuals" as conclusively showing that such was the object of the legislation.

Now, if the words of the section are to be any guide as to the legislative intention they show that instead of proposing to deal with two the legislature intended to deal with four practices supposed to be detrimental to public welfare, describing each practice in a separate sub-clause. These are (*a*) the use of premises for registering bets and selling pools; (*b*) the use of apparatus for these purposes; (*c*) the holding of stakes in connection with election bets and bets upon illegal matches of any kind; and lastly (*d*) the registration of such bets.

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I cannot here see the slightest indication on the part of the legislature that the two last mentioned practices were limited by the question of place; that they might lawfully be exercised on the street but became indictable offences when indulged in within the threshold of the betting house; that their criminal character was to be determined by the matter of a road line.

Neither is there any indication that the holding of moneys bet upon elections was, in the conscience of Parliament, less injurious to public morals than the keeping of betting houses or the possession of gambling apparatus. The same sanction is prescribed in each case; the same penal consequences ensue. In the legislative eye they are equal mischiefs. Then as to the exception in subsec. 2 above set out; it is clear that the main section does not attempt to make betting of itself a misdemeanour, not even betting upon political or municipal elections. Betting in any shape or form may be, I believe it is, a mischief; its tendency from first to last is opposed to the greatest good of society; but as a sensible legislature never attempts to suppress even an admitted evil unless there is a fair chance that with the nation's help the attempt will succeed, it did not in the present instance make betting pure and simple, a mere exchange of words between individuals, a criminal offence. But the keeping of betting houses, the public selling of pools, the possession and working of gambling apparatus, the registration in books kept for the special purpose of wagering transactions, and the actual receiving and possessing of money or other property as a stake upon political or other illegal bets, were overt acts, admittedly mischievous but at the same time susceptible of easy proof, and therefore they one and all were made illegal. The excepting statement as to bets between individuals was a declaration by the legislature (it

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may have been an unnecessary statement) that in this particular act it was not attempting to deal with betting *per se*, but only with these concomitants of betting specified in the main section.

So far I am discussing whether the appellant Walsh, the stakeholder, was chargeable with the statutory offence. In any event I do not see how the excepting clause assists him. He made no bet, but he did an act which certainly within the letter, and I believe within the spirit and intention, of the act was expressly declared to be a misdemeanour.

And I am strongly confirmed in this view by a consideration of the analogous Imperial act, 16 & 17 Vict. ch. 199, the provisions of which I doubt not were present to our own Parliament when passing this act. In that act it is manifest that the practices dealt with were acts done in particular places. From the fact that in our act *place* is not made by express words material as regards the offences specified in *c* and *d*, we are justified in assuming that the question of place was immaterial.

Then as to the construction of sec. 7 of chap. 145 :

> Every one who aids, abets, counsels or procures the commission of any misdemeanour whether the same is a misdemeanour at common law or by virtue of any act is guilty of a misdemeanour and liable to be tried, indicted and punished as a principal offender.

Now the making of a bet is one thing, the recording or registration of a bet is another thing and the depositing in the hands of a stake-holder of the amount bet is again another thing. I admit that under the statute the bet itself was not proscribed ; whether the committing to writing of the terms of the bet was a recording or registration of the bet, and consequently a misdemeanour, we are not called upon in this case to decide. I am of opinion, at all events, that it was a misdemeanour on the part of Walsh to act as stake-

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holder of the money. His offence, his only offence, was the taking of the money. Was not the giving of the money to him by the respondent Trebilcock, knowing as he did the purpose of the deposit, an aiding or counselling or procuring of the stake-holder's taking? In my view of this there can be no doubt and therefore Trebilcock was a misdemeanant liable to punishment as a principal offender.

The final inquiry then is: Trebilcock having paid the stake in question, having committed an indictable offence and (we may assume for the purpose of argument having, upon conviction, undergone a year's imprisonment and paid a fine of $1,000,) can he now recover from the stake-holder the $500 wager? (It is quite immaterial that he may have lost his bet and that Richards under the *code d'honneur* was entitled to the $1,000).

Now I agree that apart from the statutes referred to the respondent was entitled to recover and the decision of the courts below was right.

In Roscoe's *nisi prius*, 16th edition, page 590, the law is summed up as follows:

> Where money has been paid in pursuance of an illegal contract it is generally irrecoverable.

Certain exceptions are, however, given as follows:

> But in some cases it is recoverable as money had and received to the use of party paying it; e.g. 1. Where the contract remains executory though the plaintiff and defendant be *in pari delicto* as a deposit upon an illegal wager. Where the plaintiff authorized his money to be applied to an illegal purpose he may recover it before it has been paid over or applied to such purpose. 2. Money is recoverable from a stake-holder in whose hands it has been placed upon an illegal consideration though executed by the happening of the event upon which a wager is made, provided the money has not been paid over by the stake-holder to the other party, or was paid over after notice to the contrary.

And this statement of the law is fully borne out by the very recent case of *Barclay* v. *Pearson* (1) where the cases of *Hasletow* v. *Jackson* (2) and *Hodson* v. *Terrill* (3) are reviewed and followed, and the law as above stated by Roscoe is approved.

It will be observed that in this extract from Roscoe, as well as in *Barclay* v. *Pearson* (1), the phrases "illegal contract," "illegal purpose," "illegal consideration," are used, and that the right to recover from a stake-holder is treated as an exception to the general rule that "money paid in pursuance of an illegal contract is generally irrecoverable." The word "illegal" has more than one meaning; a contract may be voidable and in that sense illegal at the option of only one of the parties to it; he may take advantage of its illegality although the other party may not; a contract may be illegal because solely upon grounds of public policy the courts will refuse to enforce it, no further penal consequences resulting; and a contract may be illegal because Parliament has enacted that the entering into it is a criminal offence, subjecting the parties to punishment in consequence of their having made it. Is there any distinction between these different kinds of illegality? The general principle is illustrated by Lord Mansfield in *Holman* v. *Johnson* (4).

But courts will aid a party, as the cases cited show, where having only contemplated an illegal act and paid money to an agent (as in the case of an unenforceable bet) in furtherance of it he has, before anything further is done, before any offence is actually committed, done all things necessary to reinstate himself.

But where a plaintiff has actually crossed the line and committed an offence against the criminal law is

(1) [1893] 2 Ch. 154; 3 Rep. 396.
(2) 8 B & C. 221.
(3) 1 C. & M. 797.
(4) Cowp. 341.

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there then a place for repentance? I am inclined to think there is not.

Pollock in laying down the general rule says:

> Money paid or property delivered under an unlawful agreement cannot be recovered back unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral).

In *Tappenden* v. *Randall* (1) where the exception above referred to is established, it is intimated that it probably would not be allowed if the agreement were actually criminal or immoral; in that case Heath J. says:

> Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person. But when nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract.

I pass by numerous cases since; *Pearce* v. *Brooks* (2); *Rex* v. *Dr. Berenger* (3); *Reg.* v. *Aspinall* (4); and refer particularly to *Scott* v. *Brown* (5) decided by the court of Appeal in August last, where the court refused to enforce a contract held to be an illegal transaction and subjecting the parties to indictment for conspiracy.

In the present case, as already stated, the plaintiff had not only proposed the committing of an indictable offence—if that had been all the *locus pœnitentiæ* would have still been open—but had carried his proposition into effect, had committed a criminal act—had by the simple act of paying the stake-holder the money aided and abetted him in becoming in the words of the statute "the custodian of money staked upon the result of a political election," the result being that both are *in pari delicto*, both are amenable to the

(1) 2 B. & P. 467.
(2) L. R. I Ex. 213.
(3) 3 M & S. 67.
(4) 2 Q. B. D. 48.
(5) [1892] 2 Q.B. 724; 4 Rep. 42.

criminal law and neither can avail himself of the civil courts for redress. In my judgment the appeal should be allowed with costs and the action dismissed with costs in all the courts below.

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KING J.—I concur in the judgment delivered by the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Meredith & Fisher.*

Solicitors for the respondent: *Magee, McKillop & Murphy.*

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*May 26.

*Oct. 9.

A. HENDERSON (PLAINTIFF).....APPELLANT;

AND

THE BANK OF HAMILTON (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Jurisdiction—Action for redemption—Foreign lands—Lex rei sitæ—Action in personam.

An Ontario Court will not grant a decree for redemption of a mortgage on lands in Manitoba at suit of a judgment creditor of the mortgagor whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario.

The only *locus standi* the judgment creditor would have in an Ontario court would be to have direct relief against the land by means of a sale, to which relief he would be restricted in such a case in a suit in the courts of Manitoba, and a decree for a sale would have been unenforcible in the latter province.

A court of equity will, where personal equities exist between two parties over whom it has jurisdiction though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands but strictly *in personam;* but such relief will never be extended so far as to decree a sale in the nature of an equitable execution.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favour of the plaintiff.

The material facts of the case are set out in the judgment of the court, and the question for decision on the appeal was as follows:—

Is the plaintiff Henderson, domiciled in Ontario, who has obtained a judgment in a Manitoba Court against one Lillico and registered such judgment

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

(1) 20 Ont. App. R. 646. (2) 23 O. R. 327.

which, by the Manitoba Registry Act became a charge upon the lands of Lillico in that province, entitled to a decree from a court in Ontario for redemption of a mortgage on said lands in an action for redemption against the defendant the Bank of Hamilton.

Mabee for the appellant referred to *Bradley* v. *McLeish* (1); *Campbell* v. *McGregor* (2).

Robinson Q.C. and *Aylesworth* Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appellant brings this action in the character of a judgment creditor of the defendant Peter Lillico in respect of a judgment recovered in the Court of Queen's Bench in the Province of Manitoba, having obtained a charge upon certain lands of the judgment debtor situate in that province by registering his judgment pursuant to the provisions of a provincial statute. The appellant alleges that the respondents, the Bank of Hamilton, are mortgagees of Lillico of the same lands under a registered mortgage in respect of which they are entitled to priority over the appellant and he accordingly seeks to redeem the bank. In the last aspect of the case there was no dispute as to the facts. The cause was tried before the learned Chief Justice of the Queen's Bench Division who dismissed the action. From this judgment there was an appeal to the Divisional Court of Queen's Bench by which court the original judgment was reversed and a judgment was pronounced whereby the appellant was declared to be entitled to redeem the respondents, the Bank of Hamilton, and an account was directed to be taken by the master of what was due on the mortgages to the bank, upon payment of

(1) 1 Man. L. R. 103. (2) 29 N. B. Rep. 644.

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which the bank was directed to convey the mortgaged lands to the appellant. No provision was, however, made by this judgment for the event of the appellant failing to redeem, the usual direction that in such event the action should be dismissed not being contained in the judgment but being, as it would appear, advisedly omitted. Neither was any provision made for raising the appellant's charge by a sale of the lands in the case of redemption by him.

The statute of Manitoba under which the judgment was registered provides that the effect of registering a judgment upon the lands within the limits of the registry office in which the registration takes place shall be as follows:—

> From the time of the recording of the same the said judgment shall bind and form a lien and charge on all the estate and interest aforesaid in the lands of the judgment defendant in the several registration divisions in the registry offices of which such certificate is recorded, the same as though charged in writing by the defendant under his hand and seal.

This enactment is manifestly copied from the English statute 1 & 2 Vict. chap. 110, sec. 13.

The question presented for the decision of the Court of Appeal was whether the appellant, having no *locus standi in curiâ* except such as this statutory charge conferred, was entitled to enforce it against the Manitoba lands in the Ontario courts, and this question the Court of Appeal have answered in the negative.

It is important to distinguish between the judgment and the charge or lien created by the statute. This is not an action upon the judgment but one to enforce the statutory charge. The appellant's claim does not in any respect involve relief in respect of any personal obligation, either against the bank or against Lillico, the judgment debtor. The charge created by the statute is exclusively a real right affecting the

lands, unaccompanied by any personal liability, and it creates no equity enforceable *in personam* against any one. When law and equity were administered by separate courts, courts of equity held that where personal equities existed between parties over whom they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction, they would give relief by a decree operating not directly upon the lands but strictly *in personam*. The well known case of *Penn* v. *Lord Baltimore* (1) was a case of this kind, and on a similar principle relief was given against a defendant within the jurisdiction by decreeing foreclosure in default of redemption of mortgages of foreign lands. But in all such cases there was some personal obligation in the nature of a trust or other equity which the court enforced, as it was said, by affecting the conscience of the party against whom it decreed relief. This indirect mode of affecting lands over which the court could not properly have any direct judicial authority was, however, confined to the class of cases mentioned, and was never extended so far as to give direct relief in respect of charges on lands by decreeing a sale in the nature of an equitable execution, or the raising of a bare charge such as the statute has conferred on the appellant in the present case. Such decrees would have been unenforceable in the foreign jurisdiction and might have brought the courts decreeing them into collision with the forum within whose local jurisdiction the lands were situated.

The only *locus standi* which the appellant in this appeal has is to have direct relief against the land by means of a sale, for we know that in such cases as these the courts of the Province of Manitoba restrict the relief which they give to a sale of the lands. All

(1) 2 White & Tudor's L.C. 6 ed. 1047.

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analogy is therefore against the appellant's contention and although no case precisely in point can be produced yet the case of *Norris* v. *Chambres* (1), referred to by Mr. Justice Osler in delivering the judgment of the Court of Appeal, is so like the present in the principles involved that without disregarding that authority, decided in the first instance by Lord Romilly, M.R., and affirmed on re-hearing by Lord Campbell, Chancellor, we could not do otherwise than dismiss this appeal. *Norris* v. *Chambres* (1) was a case in which it was sought to enforce a vendor's lien against real property out of the jurisdiction, and the observations of the Master of the Rolls apply *a fortiori* to such a case as the present. I also refer to the cases of *Re Hawthorne* (2); and *Harrison* v. *Harrison* (3). In *Norris* v. *Chambres* (4) Lord Campbell in giving judgment says:

> I think that, upon the authority of *Penn* v. *Lord Baltimore* (5), which has often been acted upon, the plaintiff would have been entitled to succeed if he could have proved that the claim for a declaration of the proposed lien or charge on the mine was founded on any contract or privity between him or the deceased John Sadlier and the defendants, the purchasers of the mine. * * * But I agree in thinking, with the Master of the Rolls, that the plaintiff has failed to show any such contract or privity. Upon the evidence adduced the purchasers of the mine whom he sues, are to be considered as mere strangers, and any notice which they may have had of transactions between Sadlier and the Company (which has now ceased to exist) cannot give this court jurisdiction to declare the proposed lien or charge on lands in a foreign country. An English court ought not to pronounce a decree even *in personam* which can have no specific operation without the intervention of a foreign court, and which, in the country where the lands to be charged by it lie, would probably be treated as *brutum fulmen*.

Wharton in his treatise on the Conflict of Laws (6) says:—

(1) 29 Beav. 246; 3 DeG. F. & J. 583.
(2) 23 Ch. D. 743.
(3) 8 Ch. App. 346.
(4) 3 DeG. F. & J. 583.
(5) 2 White & Tudor's L. C. 6 ed. 1047.
(6) 2 ed. sec. 291.

It has already been stated that all interests in land, whether consisting of equitable interests, charges, trusts, or servitudes, all interests, in other words, that may fall under the term *lien* in its most general sense, are controlled by the *lex rei sitæ* even in the opinion of those who would confine that law within the narrowest limit. * * * The only way by which title can be made to such *liens*, or the only process by which such *liens* can be enforced, is that of the *situs*.

Mr. Justice Story, who was more liberal than other commentators in relaxing the strict rule of the *lex rei sitæ*, thus states his views (1) :

Not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates are deemed to be, in the sense of law, immovables and governed by the *lex rei sitæ*.

What I take to be the result of these and other cases is well summarised by a modern text writer as follows: (2)

All questions as to the burdens and liabilities of immoveable estate situate in a foreign country depend, in the absence of any trust or contractual obligation, simply upon the law of the country where the real estate exists ; wherefore if the contested claim is based upon the right to land, and must be determined by the *lex loci rei sitæ*, and the only ground for instituting proceedings in this country is that the defendants are resident here, the courts of this country have no jurisdiction.

It may be said that the relief which the appellant seeks, and that which has been accorded to him by the judgment of the Queen's Bench Division, is a mere decree or judgment *in personam* against the Bank of Hamilton. The answer to this is, however, that the right of the appellant is one limited to enforcing a direct charge on the lands, and that the redemption of the bank is merely ancillary to this, for even if we hold the appellant entitled to judgment we could not allow that pronounced by the Court of Queen's Bench to stand unaltered. That is a mere partial and fragmentary judgment, which, if it related to property within

(1) Conflict of laws, 8 ed. sec. 447.

(2) Nelson's cases on Private International Law p. 148.

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the jurisdiction, would for that reason alone be defective for not having gone on to direct ulterior relief by a sale of the land. That a judgment if one were pronounced for the sale of the lands could not be fully carried out without the aid of the courts of the *situs* is apparent, if we bear in mind that Lillico, the judgment debtor, is without both jurisdictions, and that the title of a purchaser could not be perfected without either a conveyance from him or a vesting order which the Manitoba courts alone would have jurisdiction to grant and enforce.

The tendency of modern decisions has been to decline jurisdiction with reference to foreign land, and when we consider that if the arguments invoked for the present appellant were to prevail we might be asked to uphold a judgment of a Quebec court in an hypothecary action respecting lands in Ontario, or *vice versâ* a judgment in an action in the Ontario courts directing a sale of hypothecated immovables in the Province of Quebec, the convenience, good sense and sound jurisprudence of the rules laid down in the later English authorities, which have now culminated in the decision of the House of Lords in the case of the *British South Africa Co.* v. *The Companhia de Moçambique* (1), become at once apparent. It is unnecessary to write more fully, as Mr. Justice Osler in his very able judgment delivered in the Court of Appeal, and which proceeds on the same *ratio decidendi* as the judgment of this court, has fully expounded the principles upon which it must be held that the Ontario courts have no jurisdiction to entertain this action.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Mabee & Gearing.*

Solicitors for respondents: *Scott, Lees & Hobson.*

(1) [1893] A. C. 602.

E. B. LARIVIÈRE (PLAINTIFF).....APPELLANT; 1894

AND *Nov. 5

THE SCHOOL COMMISSIONERS FOR THE CITY OF THREE RIVERS (DEFENDANTS) ..... } RESPONDENTS.

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

Bond in appeal—School mistress—Fee of office—Future rights—R. S. C. ch. 135, sec. 29 (b)—C. S. L. C. c. 15 s. 68—R. S. Q., art. 2073.

E. Larivière, a school mistress, by her action claimed $1,243 as fees due to her in virtue of sec. 68, ch. 15 C. S. L. C. which was collected by the School Commissioners of the City of Three Rivers, while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, dismissed the action.

On a motion to the Supreme Court of Canada to allow bond in appeal, the same having been refused by a judge of the court below. the Registrar of the Supreme Court and a Judge in Chambers, on the ground that the case was not appealable:

Held, that the matter in controversy did not relate to any office or fee of office within the meaning of sec. 29 (b) of the Supreme and Exchequer Courts Act, R.S.C. c. 135.

2. Even assuming it did, no rights in future would be bound and the amount in dispute being less than $2,000, the case was not appealable.

3. The words "where the rights in future might be bound" in subsec. (b) of sec. 29, govern all the preceding words "any fee of office, &c." *Chagnon* v. *Normand* (16 Can. S.C.R. 661); *Gilbert* v. *Gilman* (16 Can. S.C.R. 189); *Bank of Toronto* v. *Le Curé &c. de St. Vierge* (12 Can. S. C. R. 25); referred to.

MOTION for allowance of security on appeal from the judgment of the Court of Queen's Bench for Lower Canada.

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

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LARIVIÈRE v. THE SCHOOL COMMISSIONERS FOR THE CITY OF THREE RIVERS.

This was a motion by way of appeal from the decision of Mr. Justice Taschereau confirming the ruling of the registrar in chambers on an application made by the appellant.

The facts and proceedings in the case are as follows:

On the 22nd August, 1877, the defendants engaged the plaintiff as teacher of a separate girl's school in school district no. 4 of the city of Three Rivers. The resolution adopted by the defendants on the subject was to the effect that the plaintiff should keep the said school at the same salary and upon the same conditions as the Reverend Sisters of Providence, who taught it before her. This was for a salary of $144 a year with lodging and heating.

The plaintiff kept the school from August, 1877, until July, 1891, fourteen years.

The plaintiff alleged that during this period the monthly fees payable on account of the children attending the school belonged exclusively to the plaintiff, but that the School Commissioners received these fees and refused to render any account of them, or to pay them over; and she brought her action to compel them to make such payment.

It was admitted by the parties that the plaintiff was engaged at the same salary and upon the same conditions as the Sisters of Providence, viz., $200 per annum, when they themselves provided lodging and heating, and $144 per annum when the Commissioners provided lodging and heating.

But the plaintiff contended that she was entitled to the monthly fees over and above the salary mentioned, and she based her action on sec. 68 of ch. 15 C. S. L. C. which enacts as follows:—

"The monthly fees payable on account of children attending a Model School, or a separate girl's school, or a school kept by some religious community forming

a school district, shall form no part of the school fund; but such monthly fees, to the amount established for the other children in the municipality, shall be payable directly to the teacher, and be for his or her use, unless different monthly fees have been agreed upon."

The defendants by their pleas alleged that the plaintiff had no right to these fees, because the Reverend Sisters never pretended to have any right to receive them;

because the plaintiff received her salary each year without reserving any right to receive these fees;

because on the 4th January, 1892, she sued the defendants for a part of her salary and did not include any claim for those monthly fees and she must be considered as having abandoned her right to those fees; and

because her salary of $144 constituted a different monthly payment or agreement (*une rétribution ou convention différente*) which deprived the plaintiff of the right to claim the monthly fees, even assuming she would otherwise have the right to them.

The defendants also pleaded a plea of prescription which need not now be considered.

The Superior Court dismissed the plaintiff's action for the reasons set out in the pleas of the defendants above summarized, and this judgment was confirmed by the Queen's Bench.

A bond has been filed to the form of which objection has been taken by counsel for defendants.

The registrar, before whom the application came in the first instance, held that there was no jurisdiction to entertain the appeal as no rights in future would be bound, and he referred to *Bank of Toronto* v. *Le Curé, &c., de Ste Vierge* (1); and *Gilbert* v. *Gilman* (2).

(1) 12 Can. S. C. R. 25.

(2) 16 Can. S. C. R. 189.

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J. A. Ritchie then made a motion by way of appeal from the above decision of the registrar in chambers before Mr. Justice Taschereau who refused the motion.

Thereupon an application was made to the Supreme Court of Canada.

J. A. Ritchie was heard for the appellant, and *McDougall* Q.C. for the respondents.

Per Curiam: The position of school mistress is not an office within the meaning of section 29 (*b*) of ch. 135 R.S.C. Even assuming it were an office the appellant having ceased to be in the employ of the respondents no rights in future were bound.

The words "where the rights in future might be bound," in subsection (*b*), section 29, govern the preceding words "any fee of office, &c." See *Chagnon* v. *Normand* (1); *Gilbert* v. *Gilman* (2).

Motion refused with costs.

(1) 16 Can. S.C.R. 661. (2) 16 Can. S.C.R. 189.

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INSURANCE, FIRE—*Condition in policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.*] A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, &c., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between $3,000 and $4,000. An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, &c. (as in the conditions) were not answered. The trial judge gave judgment in favour of N., which the court *en banc* reversed and ordered judgment to be entered for the company. *Held*, affirming the decision of the court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost the condition was not complied with. *Held*, further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N. a new trial was unnecessary and judgment was properly entered for the company. NIXON *v.* THE QUEEN INSURANCE CO. — — — — — — 26

2——*Fire insurance - Condition against assigning policy—Breach of condition.*] A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with or in any way encumbered the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S. the insured under said policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy. *Held*, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S., without such consent, made it void and he could not recover the amount insured in case of loss. SALTERIO *v.* CITY OF LONDON FIRE INSURANCE CO. — 32

INSURANCE, FIRE—*Continued.*

3——*Condition in policy—Change of title in property insured—Chattel mortgage.*] A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; that the policy should not be assignable without the consent the company indorsed thereon; and that all encumbrances effected by the assured must be notified within fifteen days therefrom. *Held*, reversing the decision of the Supreme Court of Nova Scotia, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. *Sovereign Ins. Co.* v. *Peters* (12 Can. S. C. R. 33) distinguished. *Held*, further, that it was an incumbrance even if the condition meant an incumbrance on the policy. CITIZENS' INS. CO. OF CANADA *v.* SALTERIO — — — 155

INSURANCE, LIFE—*Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.*] A condition in a policy of life insurance provided that if any premium, or note, etc., given therefor was not paid when due the policy should be void. *Held*, affirming the decision of the Court of Appeal, that where a note given for a premium under said policy was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void. *Held* further, that a demand for payment after the maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force MCGEACHIE *v.* NORTH AMERICAN LIFE INS. CO. — — — 148

INSURANCE, MARINE — *Marine insurance—Misrepresentation—Vessel "when built"—Repairs to old vessel—Change of name—Register.*] Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made.—Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect.—Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired and given a new name and register but containing the original engine, boiler and machinery with some of the old material, is a misrepresentation and avoids the policy whether made with intent to deceive or not. Taschereau J. dissenting NOVA SCOTIA MARINE CO. *v.* STEVENSON — — 137