REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

GEORGE DUVAL, ADVOCATE.

ASSISTANT REPORTER

C. H. MASTERS, BARRISTER AT LAW.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. REGISTRAR OF THE COURT.

VOL. 16.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER
1890.

JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

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

" " Samuel Henry Strong J.

" " Telesphore Fournier J.

" " Henri Elzear Taschereau J.

" " John Wellington Gwynne J.

" " Christopher Salmon Patterson J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

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

ERRATA.

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

Page 149—Transpose foot-notes 5 and 6.

" 395—Line 13. For "Jones" read "MacFarlane."

" 581—Line 15 from bottom. For "35 Vic." read "38 Vic.

" 606—Line 4 from bottom. For "sub-sec. 34" read "sub-sec. 31."

Page 615—Line 7. For "sec. 31" read "sec. 8 sub-sec. 31."

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Petition of Right Act, 1876, *sec.* 7—*Statute of Limitations*—32 *Henry* 8 *ch.* 9—*Rideau Canal Act*, 8 *Geo.* 4 *ch.* 1—6 *Wm.* 4 *ch.* 16—7 *Vic. ch.* 11 *sec.* 29—9 *Vic. ch.* 42—*Deed—Construction of—Estoppel.*

Under the provisions of 8 Geo. 4 ch. 1, generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on

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

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the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and by deed of Feb. 6th, 1832 the said William McQueen conveyed the whole of the lands originally granted to Grace McQueen to said Lt.-Colonel By in fee for £1,200.

By 6 William 4 ch. 16, persons who acquired title to lands used for the purpose of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic. ch. 11, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that pupose, be restored to the party or parties from whom the same were taken."

By 9 Vic. ch. 42, Canada, it was recited that the foregoing proviso had given rise to doubts as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. 4 ch. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for revesting in him and his grantees the portions of lands taken but not required for such purposes.

By the 19-20 Vic. ch. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The appellant, the heir-at-law of William McQueen, by her petition of right sought to recover from the crown 90 acres of the land originally taken by Colonel By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the crown.

Held per Gwynne J. (in the Exchequer)—Under the statute 8 Geo. IV the original owner and his heirs did not become divested of their estate in the land until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless in virtue of an agreement with such owner. Nor was there any conversion of realty into

personalty effected by the act until after the expiration of said period. By the deed made by William McQueen of the 6th February, 1832, all his estate in the 110 acres, as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the act and so vesting the 110 acres absolutely in His then Majesty, his heirs and successors.

2. Such deed was not avoided by the statute 32 Hy. VIII ch. 9, Col. By being in actual possession as the servant and on behalf of His Majesty and taking the deed from William McQueen while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.

3. There was no reversion or revesting of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the means provided by the Legislature for that purpose, and the estate of the former owner in the land has been by like authority divested out of him and vested in the crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be revested in him by reason of its ceasing to be used for the purpose for which it was expropriated.

4. Assuming that Grace McQueen had by operation of the act become divested of her estate in the land in her lifetime and that her right had become converted into one merely of a right to compensation which upon her death passed as personalty, the non-payment of any demand which her personal representative might have had could not be made the basis or support of a demand at the suit of the heir-at-law of William McQueen to have revested in him any portion of the lands described in the deed of the 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate which it professed to pass.

5. The proviso in the 29th section of 7 Vic. chap. 11, as explained by 9 Vic. ch. 42, was limited in its application to the lands

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which were originally the property of Nicholas Sparks and not conveyed or surrendered by voluntary grant executed by him and for which no compensation or consideration had been given to him.

6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an act of Parliament to which she would be an assenting party.

In the Supreme Court held :—

1. Per Ritchie C.J. By the deed of the 6th February, 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him.

2. Per Ritchie C.J. and Strong and Gwynne JJ. The suppliant is debarred from recovering by the Statute of Limitations, which the crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.

3. Per Strong J. Independently of this section, the crown, having acquired the lands from persons in favor of whom the statute had begun to run before the possession was transferred to the crown that body incorporated under the title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute.

4. Per Strong J. The act 9 Vic. ch. 42 had not the effect of restricting the operation of the revesting clause of 7 Vic. ch. 11 to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within sec. 29 of 7 Vic. ch. 11 of the benefit of that enactment.

5. Per Strong J. A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under sec. 29. Where it is within the power of a party having a claim against the crown of such a nature as the present to resort to a petition of right a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the crown.

6. Per Strong J. By the express terms of the 3rd section of 8 Geo. IV ch. 1, the title to lands taken for the purposes of the canal vested absolutely in the crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal; and all that Grace McQueen could have been entitled to at her death was the compensation provided by

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the act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative as forming part of her personal estate. Therefore as regards the 110 acres nothing passed by the deed of 6th February, 1832. And up to the passing of 7 Vic. ch. 11, no compensation had ever been paid by the crown, nor any decision as to compensation binding on the representative of Grace McQueen.

7. Per Strong J. The proviso in sec. 29 of 7 Vic. ch. 11 applied to the 90 acres not used for the purposes of the canal, and had the effect of revesting the original estate in William McQueen as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But if it had the effect of revesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail.

8. Per Strong J. This deed did not work any legal estoppel in favor of Col. By which would be fed by the statute vesting the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Col. By.

Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representative of Col. By anything she might recover from the crown under the 29th section of 7 Vic. ch. 11, but the heirs or representatives of Col. By would in turn become constructive trustees for the crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

9. Per Strong J. The deed of the 6th February, 1832, being in

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equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Henry 8 ch. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.

10. Per Fournier and Henry JJ. The mere setting out and ascertaining of the lands was not sufficient to vest the property in His Majesty, and Grace McQueen having died without having made any contract with Col. By the property went to William McQueen her heir-at-law.

1. Per Fournier, Henry and Taschereau JJ. The deed of the 6th February, 1832, made before the passing of 7 Vic. ch. 11 sec. 29, and five years after the crown had been in possession of the property in question, conveyed no interest in such property either to Col. By personally or as trustee for the crown, and the title therefore remained in the heirs of Grace McQueen.

2. The proviso in sec. 29 of 7 Vic. ch. 11 was not limited by 9 Vic. ch. 42 to the lands of Nicholas Sparks and the appellant is entitled to invoke the benefit of it.

3. The 90 acres now used for the purposes of the Canal did not by 19 Vic. c. 54 become vested in Her Majesty, nor were they transferred by the B. N. A. Act to the exclusive control of the Dominion Parliament. The words "adjuncts of the canal" in the first schedule of the B. N. A. Act could only apply to those things necessarily required and used for the working of the canal.

4. The crown was not entitled to set up the Statute of Limitations as a defence by virtue of sec. 7 of the Petition of Right Act, 1876, that section not having any retroactive effect.

5. Per Fournier, Henry and Tashereau JJ. There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 Vic. ch. 11.

The court being equally divided the appeal was dismissed without costs.

APPEAL from the judgment of Mr. Justice Gwynne in the Exchequer Court in favor of the crown.

The suppliant by her petition of right alleged :—

Paragraph 1. That by letters patent dated the 20th May, 1801, under the great seal of the province of

Upper Canada, lots lettered E and D, in concession C, in the township of Nepean, containing 400 acres, were granted unto one Grace McQueen in fee simple.

Paragraph 2. That by letters patent, dated the 10th day of June, 1801, under the great seal of the said province, lots D and E in broken concession D on the river Rideau in the said township of Nepean were granted unto the said Grace McQueen in fee simple.

Paragraph 3. That the said Grace McQueen entered into possession of the lands so granted to her and, save as hereinafter appears, continued in possession of the said lands down to and at the time of her death.

Paragraph 4. That by an act of the Provincial Parliament of the said province of Upper Canada, viz.: 8 Geo. 4, ch. 1, passed on the 17th of February, 1827, commonly referred to as the Rideau Canal Act, it was enacted (as in this paragraph alleged, but which it is not necessary to set out at large).

Paragraphs 5, 6 and 7. That by the said act it was further enacted, as in these paragraphs alleged, but which it is unnecessary to set out here.

Paragraph 8. That Lieut.-Col. John By, of the Royal Engineers, was the officer employed by His Majesty to superintend the work of making the said Rideau Canal, and he set out and ascertained certain parts of the said parcels or tracts of land comprised in the said two several hereinbefore stated letters patent and deeds of grant respectively, as aforesaid, amounting altogether to 110 acres or thereabouts, as necessary for making and completing the said canal, and other purposes and conveniences mentioned in the before stated act, and said 110 acres were forthwith taken possession of by His said Majesty, his heirs and successors; and the land which he so set out and ascertained, as aforesaid, was described on a certain plan signed by him and lodged by him in the office of the Surveyor-General of the

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said late province of UpperCanada, and now fyled in the office of Her Majesty's Crown Land Department for the province of Ontario.

Paragraph 9. Some time after the passing of the said act the said Grace McQueen died intestate, being at the time of her death possessed of the said parcels or tracts of land comprised in the said two several deeds of grant, or of so much thereof as had not been set out and ascertained for the purposes of the said canal, as before mentioned; and she left Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. And on the 31st day of January, 1832, the said Alexander McQueen, by a deed poll of that date, under his hand and seal, released unto the said William McQueen all his right and interest to and in the said parcels of land, to hold the same unto the sole and proper use of the said William McQueen, his heirs and assigns forever.

Paragraph 10. The Rideau Canal was completed and opened for traffic throughout its length some time in the month of May, 1832.

Paragraph 11. That by an act passed the 9th day of December, 1843 (7 Vic. c. 11) the lands and other property therein mentioned, including the Rideau Canal and the lands and woods belonging thereto, were vested in the principal Officers of Her Majesty's Ordnance in Great Britain, and their successors in the principal said office, subject to the provisions of the said act.

Paragraph 12. That on or about the 20th day of October, 1845, the said William McQueen died intestate, leaving the suppliant his only legal issue and his sole heir-at-law,—him surviving.

Paragraph 13. No payment, indemnity or compensation was ever made to the said Grace McQueen, nor to the suppliant, nor to any person entitled to receive

the same, in respect of the said part of the said 110 acres so set out as necessary for the canal purposes, but not used for the purposes of the said canal.

Paragraph 14. That the real property adjoining the said lots granted to the said Grace McQueen formerly belonged to one Nicholas Sparks. A portion of this was set out and ascertained as necessary for the purpose of the said canal, and was accordingly taken from the said Nicholas Sparks under the authority of the said Rideau Canal Act. And after the passing of the said Act, 7 Vic. c. 11, the said Nicholas Sparks applied for a restoration of part of the land so taken from him, and thereupon was passed an act of the Provincial Parliament of Canada (9th Vic., c. 42), A.D. 1846, intituled:—'An Act to explain certain provisions of the Ordnance Vesting Act, 7 Vic. c. 11, and to remove certain difficulties which have occurred in carrying the said provisions into effect.'

Paragraphs 15 and 16 set out what is alleged to be the most material part of 9 Vic. c. 42.

Paragraph 17 sets up the suppliant's contention as to what the effect of 7 Vic. c. 11, as explained by 9 Vic. c. 42, was.

Paragraph 18. That in pursuance of the last mentioned act a considerable portion of the land taken from the said Nicholas Sparks for the said Rideau Canal has since been restored to him; but that no part of the land of the said Grace McQueen so set out and taken as aforesaid for canal purposes, held by Her Majesty but not used for canal purposes, to wit: 90 acres or thereabouts of the said 110 acres, has ever been restored to the said Grace McQueen, nor to the said late William McQueen, nor to suppliant.

Paragraphs 19, 20, 21 and 22. That by an act of the Provincial Parliament of Canada, viz., 19 Vic. c. 45,

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it was among other things enacted as in these paragraphs is alleged.

Paragraph 23. That several years after the death of the late William McQueen, to wit: in 1869–70, suppliant caused to be presented to the Governor General of Canada in Council a memorial urging the facts and circumstances aforestated, and praying for the restoration of the said 90 acres of land, but that no part of the said land has been restored to her.

Paragraphs 24, 25, 26, 27 and 28 contain an extended legal argument in support of the suppliant's claim to have the said 90 acres restored to her.

Paragraph 29. The suppliant insists that the said 90 acres not so used for the purpose of the said canal, and which passed to or became vested in Her Majesty therefore have, by lapse, passed to and are now vested in the suppliant, as if the said canal had never been made and the said acts had never been passed; yet Her Majesty's Government in Canada have all along, since the construction of the said canal, taken and held possession of the said 90 acres, and still hold possession thereof, and have taken the rents and profits thereof, and have sold parts thereof,—and made conveyances thereof to purchasers and given possession to such purchasers, and have received the purchase money thereof; and the suppliant submits that Her Majesty should deliver possession to the suppliant of the said land remaining unsold, and should pay to the suppliant the rents and profits of the lands unsold: and, as to the portions of the said lands so sold, should pay the present value thereof, and that the suppliant should have a re-conveyance of all such lands as have not been sold.

Paragraph 30. That by the British North America Act, 1867, the said lands and tenements were transferred to the Dominion of Canada.

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Paragraph 31. That, in any case, Her Majesty was and is a trustee for the suppliant of all of the said lands that were not actually used for the purposes of the said canal, and it should be so declared. And the prayer of the petition is that all such parts of the said two parcels or tracts of land comprised in the said two several deeds of grant, dated respectively the 20th day of May and the 10th day of June, 1801, as were supposed to be taken to the use of the said Rideau Canal, but not used for that purpose, may be restored to and be re-vested in the suppliant, according to her right and interest to and in the same; and that an account of the rents and profits thereof may be taken, and, together with the costs of this petition, be paid to the suppliant; and as to such portions thereof as have been sold, that the values thereof may be paid to the suppliant, and also the rents and profits thereof prior to the selling thereof by Her Majesty, and that for the purposes aforesaid all necessary orders and decrees may be made and accounts taken.

To this petition Her Majesty's Attorney General for the Dominion of Canada has filed an answer, wherein:—

Paragraph 1—He admits that letters patent issued, bearing date respectively the 20th day of May, 1801, and the 10th of June, 1801, as mentioned in the first and second paragraphs of the said petition, whereby certain lands were granted to Grace McQueen in the said petition mentioned.

Paragraph 2 admits the passing of the Act of Parliament of the late province of Upper Canada (being the Act 8 Geo. 4. c. 1), referred to in the fourth, fifth, sixth and seventh paragraphs of the said petition, to which, however, for greater certainty he refers.

Paragraph 3 admits that Colonel By, in the 8th paragraph of the said petition named, was the officer

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employed by His late Majesty to superintend the work of making the said canal, and that he set out and ascertained certain parts of the said parcels of land comprised in the said letters patent, comprising altogether 110 acres or thereabouts, as necessary for making and completing said canal, and other purposes and conveniences mentioned in the said act, and that the land which he so set out and ascertained as aforesaid is described in a plan lodged by Colonel By in the office of the Surveyor-General of the late province of Upper Canada, and signed by him.

Paragraph 4 admits that the said Grace McQueen died intestate some time before the 31st day of January, 1832, and after the passing of the said act, but denies that she died seized or possessed of the whole of the said parcels of land; and charges that the parts thereof set out and ascertained by Colonel By, as required for the uses and purposes of the said canal, were at the time of her death vested in His Majesty, and His Majesty was then in possession thereof for the purposes of the said canal.

Paragraph 5 admits that the said Grace McQueen left her husband, Alexander McQueen, her surviving, and also William McQueen, her eldest son and heir-at-law, and admits the execution of the deed dated 31st day of January, 1832, from Alexander McQueen to William McQueen, but denies that any estate or interest in the said lands set out and ascertained by Colonel By, as aforesaid, descended to the said William McQueen or passed to him under said deed.

Paragraph 6 charges that the said Colonel By was, at the time of the execution of the indenture dated 6th February, 1832, hereinafter referred to, an officer in the service of His Majesty the late King William IV, and had in charge for His Majesty the said canal and the works connected therewith, and the lands set apart and

taken therefor, including the lands in question in this matter; that by an indenture dated 6th day of February, 1832, made at Bytown, in the late province of Upper Canada, between the said William McQueen and Colonel By, the said William McQueen, for the consideration therein mentioned, granted, conveyed and confirmed unto the said Colonel By, his heirs and assigns forever, all the lands and premises which are the subject matter of the suppliant's petition, together with appurtenances and all the estate, right, title, interest, claim, property and demand whatsoever, either at law or in equity, of the said William McQueen, of or to or out of the same, and every part thereof; and submits that upon the death of the said William McQueen, after having conveyed to the said Colonel By the said lands and premises, and all his interest therein, no right or interest therein passed to the suppliant, as stated in the twelfth paragraph of her petition, and that she has no title to the said lands and premises and cannot now assert any claim in respect thereof.

Paragraph 7 submits that any interest in the said lands and premises acquired by the said Colonel By, under the said indenture of 6th February, 1832, having been acquired by him under the circumstances above referred to, passed in equity to His Majesty, His successors and assigns, and that Her Majesty the Queen is now entitled thereto.

Paragraph 8 submits that the said conveyance by William McQueen to Colonel By was operative under the provisions of the second section of the said act 8 George IV., c. 1, and passed to the said Colonel By, on behalf of His Majesty, the fee simple and legal estate in the lands so set apart by him for the purposes of the said canal.

Paragraph 9. The ninth section of the said act 8

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George IV, ch. 1, provided that in estimating the claim of any individual to compensation for property taken or for damage done under the authority of the act, the arbitrators or jury in assessing such damages should take into their consideration the benefit likely to accrue to such individual from the construction of the said canals, by enhancing the value of his property or producing other advantages.

Paragraph 10. That some time after obtaining the conveyance of the 6th day of February, 1832, Colonel By took proceedings under the said act 8 George IV, ch. 1, to obtain, by arbitration, compensation or damages from His Majesty in respect of the lands comprised in the said conveyance of the 6th day of February, 1832, and that therein he claimed compensation or damages for the lands now in question.

Paragraph 11 charges that an award was duly made in writing in the course of the said arbitration proceedings, whereby it was awarded and determined that by reason of the enhancement of the value of the other land which at the time of her death belonged to the said Grace McQueen, and of other benefits and advantages which accrued to her, and those claiming under her, from the construction of the canal, as provided in the 9th section of the said act, His Majesty was not liable to make compensation for the lands in question in this matter taken under the said act.

Paragraph 12 charges that afterwards Colonel By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act, to assess the said damages and compensation claimed by him, and that the jury duly delivered their verdict to the same effect as the said award.

Paragraph 13 submits that by reason of the enhancement of the value of other lands of the said Grace McQueen, and of the other benefits and advantages

which accrued to her and those representing her, the crown never became liable to make compensation for the lands in question in this matter.

Paragraph 14 charges that the said William McQueen, as heir-at-law of the said Grace McQueen, inherited the said other lands which had been so enhanced in the value, and by the said deed of 6th February, 1832, sold and conveyed the same to the said Colonel By, and received from him such enhanced value, by reason whereof the said William McQueen received the value of the lands in question in this matter.

Paragraph 15 admits the 7 Vic. ch. 2, and also the 9 Vic. ch. 42, but as to the effect thereof craves leave to refer to said acts.

Paragraph 16 submits that upon the true construction of the said acts the benefit of the said proviso was and is confined to Nicholas Sparks, therein mentioned, and that the same did not extend to the lands in question.

Paragraph 17 submits that the claim against the crown for compensation or damages by reason of the taking of the lands in question in this matter was personal estate of the said Grace McQueen, and passed at her death to her personal representative, and not to her heir-at-law; and by an act (2 Vic. ch. 19) it was expressly enacted that from and after the 1st day of April, 1841, all and every the provision of the said act, 8th year of King George the Fourth, ch. 1, should in respect of claims brought forward after that period, cease and determine.

Paragraph 18. And it was further by the last-mentioned act enacted that claims made before the said 1st day of April, but not duly prosecuted as required by the said act, should thenceforward be barred, as if they had never been made.

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Paragraph 19. And it was further by the last-mentioned act enacted that it might be lawful for the Lieutenant-Governor to issue a proclamation requiring all persons to prosecute their claims within the time so limited, or that such claims should thereafter be barred.

Paragraph 20 avers that on the 9th day of September, in the last-mentioned year, such proclamation was duly made by the Lieutenant-Governor in Her Majesty's name, and the same was published in the official gazette and claims, on behalf of Her Majesty, the benefit of the said act and proclamation, and submits that thereby all claims of every kind against Her Majesty, in respect of the said lands, by the said Grace McQueen or her representatives, or any person claiming through or under them or either of them, including the suppliant, became and were and are for ever barred on and after the 1st day of April, A.D. 1841.

Paragraph 21 admits that in pursuance of the acts of 1844 and 1846 some part of the lands taken from Nicholas Sparks for the said canal was restored to him, and that no part of the land in question was ever restored to the suppliant, or to those through whom she claims, and charges, that no land taken for the canal from any other person was restored to the owners under the said proviso and acts, other than to the said Sparks.

Paragraph 22 admits the passing of the act of the 19th of June, 1856, (19 and 20 Vic. c. 45), and by virtue thereof the lands in question became vested in Her Majesty for the uses of the late Province of Canada, and craves leave to refer to its provisions.

Paragraph 23 admits that by the British North America Act the same lands, or so much thereof as had not previously been sold or disposed of, became

vested in Her Majesty for the use of the Dominion of Canada.

Paragraph 24 denies that Her Majesty is a trustee for the suppliant of the said lands, or any part thereof.

Paragraph 25 charges that from the original setting apart and taking of the said lands, until the year 1843, the said lands were vested in Her Majesty, in right of Her Imperial Crown, during all which time the suppliant, or those through whom she claims, might have proceeded against Her Majesty by petition of right or otherwise in Her Majesty's courts in England, but they never did so.

Paragraph 26 charges that from the year 1843 to the year 1856 the lands in question were vested in the principal officers of Her Majesty's Ordnance, and the said principal officers of Her Majesty's Ordnance were also during all the times last mentioned in possession thereof, and the suppliant or those under whom she claims might, during all the last mentioned time, have sued and impleaded the said principal officers in the courts of the late province of Canada for the recovery or restoration of the said lands, but they neglected so to do.

Paragraph 27 charges that the suppliant and those under whom she claims have been guilty of such laches and delay in respect of the said claims as precludes the suppliant in equity from now prosecuting the same.

Paragraph 28 claims, under the provisions of the Petition of Right Act, the statutes of limitations.

Paragraph 29 admits the presentation of the memorial mentioned in the 23rd paragraph of the suppliant's petition and that after mature deliberation and consideration the Privy Council refused to entertain it, of which due notice was given to the suppliant.

Paragraph 30 submits on behalf of Her Majesty

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that the petition shows no grounds for relief against Her Majesty in respect of any of the matters contained therein.

Paragraph 31 submits that under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect of any of the said lands heretofore sold or disposed of, or in respect of the rents and profits of any of the said lands and that the suppliant is not entitled to any such account as prayed for in the said petition.

Upon this petition and the answer thereto a special case has been agreed upon, which is also divided into paragraphs wherein it is admitted as follows :—

Paragraph 1, admits that by letters patent of the respective dates mentioned in the petition, the lots of land therein mentioned, containing 600 acres, were granted in fee simple to Grace McQueen.

Paragraph 2. That on the 17th February, 1827, the act 8 Geo. IV, ch. 1, (commonly called the Rideau Canal Act), was passed.

Paragraph 3. That on the 18th day of September, A. D. 1827, Grace McQueen died intestate, leaving, her surviving Alexander McQueen, her husband, William McQueen her eldest son and heir-at-law.

Paragraph 4. That as set forth in the 8th paragraph of this petition, prior to the death of Grace McQueen, Colonel By, the officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act, for His then Majesty, for the uses and purposes of the said canal, had, from the parcels of land patented as aforesaid, ascertained, set out and taken possession of one hundred and ten acres thereof which he thought necessary and proper for the purposes of the said canal; and that the officers of

Her Majesty, for Her Majesty or the principal officers of Her Majesty's Ordnance, or the purchasers from Her Majesty hereinafter mentioned, as the case may be, have had possession of the same from thence hitherto.

Paragraph 5. That as set forth in the 9th paragraph of the said petition, the said Alexander McQueen, by deed dated 31st January, 1832, released all his right, title and interest in all the said lands to the said William McQueen and his heirs, and that the said Alexander McQueen died in or about the year 1851.

Paragraph 6. That by an indenture dated the 6th February, 1832, a copy of the memorial of which is put in as evidence of its contents, the said Wm. McQueen, for the consideration therein mentioned, purported to grant, convey and confirm all the said lands patented as aforesaid unto the said Col. By, his heirs and assigns.

Paragraph 7. That at the time of the execution of the said indenture the said Col. By was the officer in the service of His Majesty the late King William the Fourth, who had in charge for His Majesty the said canal and the works connected therewith and all the lands set apart and taken therefor.

Paragraph 8. That the Rideau canal was completed and opened for traffic some time in the month of May, 1832.

Paragraph 9. That on the 20th day of April, 1836, the act of the late Province of Upper Canada, 6 Wm. IV. ch. 16, was passed.

Paragraph 10. That on the 11th of May, 1839, the act 2 Vic. c. 19, was passed, and on the 9th of September of that year a proclamation was issued and published as set forth in the 20th paragraph of the answer filed to the suppliant's petition.

Paragraph 11. That on the 9th day of December, 1843, the act 7 Vic. c. 11, was passed.

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Paragraph 12. That on the 20th day of October, 1845, the said Wm. McQueen died intestate, leaving him surviving the suppliant, Lucy McQueen, who for the purposes of this case is to be treated as his only child, heiress-at-law and next of kin.

Paragraph 13. That A.D. 1846, the act of the Legislature of the late Province of Canada 9 Vic. c. 42, was passed.

Paragraph 14. That in the year 1856 the act 19 and 20 Vic. c. 45, was passed.

Paragraph 15. That in the year of Our Lord 1859, the Consolidated Statutes of Canada, chapters 24 and 36, were passed.

Paragraph 16. That in the year 1867 the British North America Act was passed.

Paragraph 17. That on 12th day of April, 1867, an act was passed by the Parliament of Canada, called the 'Petition of Right Act.'

Paragraph 18. That of the 110 acres of the lands and premises so set out and ascertained and taken possession of as aforesaid, only about 20 acres thereof have been actually used for canal purposes.

Paragraph 19, sets out a provision of the 9th sec. of 8 Geo. IV. c. 1.

Paragraph 20. That after obtaining the conveyance of the 6th February, 1832, Colonel By took proceedings, under 8 Geo. IV c. 1, to obtain by arbitration compensation from His Majesty in respect of the lands now in question.

Paragraph 21. That an award was made in the matter of the said arbitration, whereby it was awarded and determined that by reason of the enhancement of the residue of the lands, whereof the said Grace McQueen at the time of her death was seized, from the construction of the canal, His Majesty, under the provisions of the 9th sec. of the act, was not liable to make

any compensation for the lands in question in this matter.

Paragraph 22 That upon the action of the said Col. By this award was afterwards affirmed by a jury empanelled under the act.

Paragraph 23. That the documents relating to the said arbitration and assessment proceedings, in the three preceding paragraphs mentioned, are to be treated as part of the special case.

Paragraph 24. That the said McQueen, as heir-at-law of the said Grace McQueen, inherited the said other lands which are stated in the said arbitration proceedings to have been enhanced in value, and which are included in the said deed of the 5th February, 1832.

Paragraph 25. That no payment or compensation in money has ever been made by the crown to Grace McQueen, or to William McQueen, or to the suppliant, or to any person claiming under them, for the 20 acres actually used for canal purposes or for the residue of the 110 acres set out, ascertained and taken possession of as aforesaid, but not so used.

Paragraph 26. That in pursuance of the acts 7 Vic. ch. 11, and 9 Vic. ch. 42, some part of the lands taken from Nicholas Sparks for the said canal was restored to him, but that no part of the land in question was ever restored to the suppliant, or to those through whom she claims.

Paragraph 27. That on the 18th day of February, A.D. 1869, the Under Secretary of State for Canada, being duly authorized in that behalf to represent Her Majesty, advertised for sale by auction a portion of the said lands and premises for building lots, and on the 16th March, 1869, portions of the said lands were sold for the benefit of Her Majesty in pursuance of the said advertisement and that such sale took place, notwithstanding a formal protest of the suppliant in writing

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and set out at large in this paragraph was served upon the officer in charge of the Ordnance Lands Department and on the several purchasers at the sale.

Paragraph 28. That in the same year, 1869, the suppliant caused to be presented to the Privy Council of Canada a memorial to the effect set out in the 23rd paragraph of her petition, and that the Privy Council after mature consideration and deliberation upon the matters alleged in the said memorial, and on certain reports made to the Council by the Department of Justice, to which department the said memorial had been referred, to report thereon, resolved by an order duly made and notified to the suppliant that the claim preferred by her could not be entertained, and that reference may be made to the documents referred to in this paragraph for evidence of their contents.

Paragraph 29 is a *verbatim* admission of the matters of fact alleged in the 25th and 26th paragraphs of the answer of the Attorney-General of Canada to the suppliant's petition.

The questions submitted for the opinion of the court on the facts, documents and statutes referred to in the foregoing case are as follows:—

"1st. Did William McQueen take the lands in question, or any part thereof, as heir-at-law of Grace McQueen; and, if so, what part?

"2nd. Had Grace McQueen, at the time of her death, as to the portion of the said lands taken and used as aforesaid, any right to compensation or damages in respect thereof; and, if so, in respect of what portion did such right pass to her heir or to her personal representative?

"3rd. Were the deeds dated 31st January, 1832, or 6th February, 1832, or either of them, void at common law or under the statute 32 H. 8, ch. 9, or otherwise?

"4th. If the said lands, or any part thereof descended,

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is Lucy McQueen entitled to recover the same or any part thereof, or is she barred or precluded from so doing by the statutes of limitations, or laches, or otherwise?

"5th. If the said right to compensation or damages passed to the heir-at-law of Grace McQueen, in whom would it be now vested? Assuming it still to exist, is it barred by the statute of limitations, or by laches, or by the said arbitration proceedings, or otherwise? And would the fact that there never has been any person representative of Grace McQueen preserve the right as against the statute of limitations?

"6th. Is the statute of limitations any defence when pleaded by Her Majesty in this petition of right under the fact herein stated?

"7th. If at the time of his death William McQueen was residing out of Canada, and the suppliant was then a minor, residing out of Ontario, and if the suppliant has continued to reside out of Ontario ever since, would that prevent the statute of limitations from running in favor of Her Majesty, assuming that Her Majesty can set it up as a defence to the petition?

"8th. Is the suppliant entitled to recover by petition of right the said lands, or any part thereof, under the facts and circumstances herein stated?

"9th. Is the suppliant entitled to recover by petition of right compensation or damages for the taking of the said lands or any part thereof under the facts and circumstances herein stated?

"10th. Is the suppliant entitled to recover by petition of right the purchase money of the parts of the said lands sold by the crown, and, if so, is she entitled to interest thereon?

"11th. Is the suppliant entitled to recover by petition of right mesne rents and profits and, if so, from what date?

Mr. *Gormully* appeared on behalf of the suppliant and Mr. *Lash* Q.C. for the crown.

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GWYNNE J.—(After reading the above statement of the case delivered the following judgment in the Exchequer Court:—)

"In the year 1876 a similar petition of right was filed in this court by the heirs of the late Colonel By, claiming relief in their favor, similar to that which the suppliant, Lucy McQueen, now claims by her petition, and upon the answer of the Attorney-General having been filed to the petition, a special case was stated, wherein some questions were submitted to the court similar to some of those which are now submitted.

"The late Chief Justice of this court, Sir Wm. B. Richards, delivered his judgment in that case dismissing the petition.

"Upon the argument before me of the present case it was urged by Mr. Lash, upon behalf of the crown, that any of the questions decided by Sir W. B. Richards in that case, similar to those submitted now, should be deemed concluded by his decision; and upon the other side I was requested by Mr. Gormully to express my own views in the case, independently of the judgment of the late Chief Justice in the former case.

"In view of the apparent magnitude of the claim asserted by the suppliant, and inasmuch as upon as thorough a consideration of the case as I am able to give it, I have arrived at the conclusion that there is no ground whatever upon which the claim of the suppliant to any portion of the relief prayed by her can be supported, and as in some minor particulars my mode of arriving at this conclusion may appear to be somewhat different from that by which the late learned Chief Justice arrived at the like result as to the claim of the heirs of Colonel By, I have thought it right that I should state fully the mode of reasoning which has satisfied my mind that the claim of the suppliant can-

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not be rested upon any foundation of either a legal or equitable character.

"The act 8 Geo. 4, ch. 1 in its preamble recites that:

> Whereas His Majesty has been most graciously pleased to direct measures to be immediately taken under the superintendence of the Military Department for constructing a canal uniting the waters of Lake Ontario with the River Ottawa, and affording a convenient navigation for the transport of naval and military stores, and whereas such canal when completed will tend most essentially to the security of this Province by facilitating measures for its defence and will also greatly promote its agricultural and commercial interests, and it is therefore expedient to provide by law any necessary facility towards the prosecution of so desirable a work.

And it was therefore enacted that the officer employed by His Majesty to superintend the said work should have full power and authority to explore the country lying between Lake Ontario or the waters leading therefrom and the River Ottawa, and to enter into and upon the lands or grounds of or belonging to any person, and to survey and take levels of the same, or any part thereof, and set out and ascertain such part thereof as he shall think necessary and proper for making the said canal, locks, aqueducts, tunnels and all such other improvements, matters and conveniences as he shall think proper and necessary for making, effecting, preserving, improving, completing and using the said navigation, and also to make, build, erect and set up in and upon the said canal, or upon the lands adjoining or near the same, such and as many bridges, tunnels, aqueducts, sluices, locks, weirs, pens for water tanks, reservoirs, drains, wharves, quays, landing places and other works, as the officer aforesaid should think requisite and convenient for the purposes of the said navigation and also from time to time to alter the route of the said canal, and to amend, repair, widen and enlarge the same, or any other of the conveniences above mentioned; and also to construct, make and do all other matters and things which he shall think necessary and

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convenient for making, effecting, preserving, improving, completing and using the said canal, in pursuance of and within the true meaning of this act, doing as little damage as may be in the execution of the several powers to him thereby granted.

By the 2nd section it was enacted that after any lands or grounds should be set out and ascertained to be necessary for making and completing the said canal, and other purposes and conveniences thereinbefore mentioned, the officer aforesaid was thereby empowered to contract, compound, compromise and agree with all persons, &c., &c., who should occupy, be possessed of, or interested in, any lands or grounds which should be set out or ascertained as aforesaid, for the absolute surrender to His Majesty, His heirs and successors, of so much of the said land as should be required, or for the damages which he, she or they should reasonably claim in consequence of the said intended canal locks and other constructions and erections being cut and constructed in and upon his, her or their respective lands, and that all such contracts, agreements and surrenders should be valid and effectual in law, to all intents and purposes whatsoever.

By section 3 it was enacted that such parts and portions of land or lands covered with water as might be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts as might, upon any alteration or deviation from the line originally out laid for the said canal, be ascertained and set out as necessary for the purposes thereof, should forever thereafter be vested in His Majesty, his heirs and successors.

By the 4th section it was enacted that if, before the completion of the canal through the lands of any person, no voluntary agreement should be made as to

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the amount of compensation to be paid for damages according to the act, the officer superintending the said work should at any time after the completion of such portion of the canal, upon the notice or request in writing of the proprietor of such lands, or his agent legally authorized, appoint an arbitrator, &c., and provision was made for the determination, by arbitrators, one so appointed, another by the claimant and a third by the two so appointed, of the amount to be paid to such claimant.

Sections 5, 6, 7, 8 provided for submission of the question of the amount to be paid to such claimant to a jury, in case the officer superintending the work or the party claiming should decline to abide by the award of the arbitrators, and

By the 9th section it was enacted that in estimating the claim of any individual to compensation for property taken or for damage done under the authority of the act, the arbitrators or jury assessing such damages should take into their consideration the benefit likely to accrue to such individual from the construction of the said canal by enhancing the value of his property: Provided also that it should not be competent for any arbitrators or jury to direct any individual claiming, as aforesaid, to pay a sum in consideration of such advantages over and above the amount at which the damages of such individual should be estimated.

Now the first question that arises under this act, as it appears to me, is: At what instant of time did Grace McQueen become, if she ever did in her lifetime become, divested of her estate in the 110 acres, part of the lands granted to her in fee? Unless she became divested of the fee simple estate granted to her, so that such estate in the 110 acres became, under the provisions of the statute, absolutely vested in His

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late Majesty King George the Fourth, His heirs and successors, the estate granted to her by the letters patent in the whole of the lands therein mentioned, including the 110 acres, must have devolved upon her heir-at-law William McQueen *eo instanti* of her dying intestate, subject, however, to the interest of her husband as tenant by the courtesy; but whichever be the correct view to take makes no difference in the result.

That Grace McQueen did not become divested of her estate immediately upon the lands deemed to be necessary by the officer in charge of the construction of the contemplated canal having been first ascertained on survey and staked out upon the ground, (which are acts that might have been done without the owner of the land having any knowledge whatever of them) appears to me to be clear from the provisions of the 2nd and 4th section of the act; for by the former the power given to the officer to contract with the owners for the amount to be paid for the lands, and for their surrender to His Majesty, is stated to be given as a power coming into operation. only after the lands shall have been set out and ascertained to be necessary, &c., &c., and the section provides that all contracts, agreements and surrenders made under this power shall be valid and effectual to all intents and purposes whatsoever.

Now, for what purpose could they be valid and effectual, unless it be for the purpose of vesting the fee of the lands required in His Majesty, and how could they operate for that purpose if, *eo instanti* of the lands having been set out and ascertained, and therefore before the officer became empowered by the act to contract with the owner, the fee simple estate of such owner had become divested out of him and vested absolutely in His Majesty by the terms of the act? Then, again, by the 4th section the period

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during which the officer in charge is empowered to enter into contracts with the owner of land taken, while such owners are deprived of all powers of having the amount of compensation to be paid to them determined by compulsory process, is made to extend over the whole period that the works shall be in progress of construction through the lands of the respective owners. The right of the owner to have the amount of his compensation determined by arbitration does not accrue to him until after the completion of the canal through his lands. The section says:

> If before the completion of the canal through the lands of any person no voluntary agreement shall have been made as to the amount of compensation to be paid for damages according to this Act, the officer superintendent of the work shall at any time after completion of such portion of the canal, upon notice or request in writing of the proprietors of such lands, appoint an arbitrator, &c. &c.

This section seems to me to regard the former owner as still proprietor of the land taken during the whole period that the work through his land is in progress, and at least until the time stated, when in default of a voluntary agreement having been entered into the proprietor of the land may enforce an arbitration to determine the amount to be paid to him for compensation. Then, again, the provision in the 9th section, that in estimating the claim of any person to compensation for property taken the arbitrator or jury assessing such damage shall take into consideration the benefit likely to accrue from the construction of the canal by enhancing the value of his property (namely the portion not taken), seems to exclude the possibility of any person being entitled to compensation for lands taken, other than the person entitled to the estate in the land; for, if before a voluntary agreement should be entered into, and before the amount of compensation to be paid to an owner in fee for land

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taken from him should be determined by an award or by the verdict of a jury, and *eo instanti* of the required land being set out and ascertained by a survey, the owner should have become divested of his estate and the lands so set out should have been absolutely vested in His Majesty, and the title of the former owner in fee turned into a claim merely for compensation which upon his death, intestate, would devolve upon his personal representative, and if such personal representative could claim the compensation, the provisions of the 9th section could not be carried into effect; for such person, if entitled to recover, could by no possibility have his right affected by the benefit which the construction of the canal would attach to the remaining lands not taken which would belong to the heir-at-law of the intestate deceased. Moreover, the 4th section which alone provides for the ascertainment by compulsory process of the amount to be paid for land taken, names the proprietor of the land as the only person who can bring into action the compulsory process, and he is the only person with whom the provision of the 9th section would be given any effect. It is, moreover, contrary to the spirit of legislation to deprive any person of his estate in lands by expropriation for the public use, unless upon voluntary agreement, or until compensation shall be secured, by some process of law provided for the purpose, such as are the provisions contained in the various Acts of the late Province of Canada, affecting the Board of Works, whereby it was provided that until payment and tender into court of some amount as and for compensation and submission to arbitration, in the absence of a voluntary agreement to determine the amount which should be paid, the owner of the lands required for the public use does not become divested of his estate.

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For these considerations, I think the proper construction to be put upon the act, notwithstanding the words of the 3rd section, is that the original owner, at the time of the lands being first set out and ascertained by survey on the ground, and his heirs, do not become divested of their estate in the land, at least until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless it be in virtue of an agreement being entered into with such owner.

The provisions of the act, 6 Wm. 4 c. 16, seem to me to confirm this view, for that act contemplates, and makes provision for the case of parties acquiring title to lands taken after the commencement of the works, for in a proviso to the 3rd section of that act it is enacted that in all cases of a sale of property made after the commencement of the works, compensation shall be made, either to the former owner or to the assignee, as it may appear just to the arbitrators under the facts proved to them.

Now the statute 8 Geo. 4 c. 1, was passed on the 17th February, 1827, and Grace McQueen died intestate, as is stated in the special case, upon the 11th of September, 1827, after Colonel By had set out and ascertained, but how is not stated, the 110 acres parcel of the 600 acres of which she was seized in fee. The special case does not allege that when she died the canal had been constructed through her lands. In view of the period which had elapsed since the passing of the act we might safely conclude that it had not, but the special case does not even allege that any part of the works had been commenced when she died. In the view, however, which I take it would make little difference if they had been because, for the reasons which I have already explained, I am of opinion that when she died intestate,

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without any contract having been entered into with her by Colonel By, her heir-at-law, Wm. McQueen, to whom his father only tenant by the courtesy, had released all his right, was the only person with whom a contract could have been entered into by Col. By under the provisions of the act, and it was competent for him to enter into a contract in respect of the 110 acres so taken. In this result, although arrived at in a different way, I entirely concur with the judgment of Sir. W. B. Richards in the case instituted in this court by the heirs of Colonel By against the Crown (1). The cases of *Richards* v. *The Attorney-General of Jamaica* (2), and *Frewen* v. *Frewen* (3) do not appear to me to have any bearing upon this case, for the question which arose in those cases was who was entitled to the compensation, into a claim for which what had been real estate was by certain acts of Parliament clearly converted, whereas here there is no question as to the person entitled to receive compensation for the land taken; but the question is, whether the heir-at-law of a former owner is entitled to have vested in him land taken from his ancestors upon the ground of its ceasing to be used for the purpose for which it was taken. Moreover, for the reasons I have given, I am of opinion that no conversion of realty into personalty was effected by 8 Geo. IV, c. 1, at least not during the period therein mentioned within which voluntary agreements might be entered into, nor until the arrival of the time when, by the act, the right was vested in the proprietors of lands taken of proceeding to obtain compensation for the lands taken by compulsory process, in case a voluntary contract should not be entered into before the arrival of that

(1) *Tylee* v. *The Queen* 7 Can. S. C. R. 651.

(2) 6 Moore P.C. 381.

(3) 10 Ch. App. 610.

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time. Neither have the cases as to the right to money agreed to be paid for the purchase of lands not yet conveyed when the vendor dies, passing to his personal representative, any bearing upon this case, because then the amount of the purchase money has been ascertained by the contract of the parties enforceable in equity, and they proceed upon the principle that equity regards as done, what has been validly agreed to be done. And, moreover, there is no question here as to any right to compensation, or as to who was the party entitled thereto. William McQueen, then, being competent to contract in respect of the 110 acres, appears to have entered into a contract with Col. By for the sale of all his estate and interest therein for the consideration of two hundred and twenty pounds provincial currency paid to him, for this I take to be the conclusion to be arrived at upon the true interpretation of the transaction expressed by the indenture of the 6th February, 1832.

From the memorial of that indenture which has been produced and has been agreed to be taken as evidence of the contents of the indenture itself, it appears that thereby William McQueen, described as heir-at-law of Grace McQueen, in consideration of twelve hundred pounds of lawful money of the Province of Upper Canada, to him paid, the receipt whereof is thereby acknowledged, did give, grant, bargain, sell, assign, release, transfer, convey and confirm with covenants of seizin, right to transfer, freedom from incumbrances, quiet enjoyment and general warranty unto the said John By, *habendum*, to him and his heirs forever, the 600 acres granted to Grace McQueen by the precise description covering the whole 100 acres, as contained in letters patent of the 20th of May and the 10th of June, 1801.

Now, whether the money so paid to William McQueen was or was not the money of His then Majesty is a

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matter with which neither William McQueen nor any person claiming under him can have anything to do. Whether it was in whole or in part Col. By's money, or money belonging to the crown over which he had control, was a matter in which Col. By and the crown were the sole parties concerned and if Col. By chose to apply his own money in satisfying William McQueen to the full value of the lands taken from him for the purpose of the canal, all claims of William McQueen or of any person claiming under him to have any compensation for the lands so taken would be satisfied and discharged equally as if the money applied in paying him had been the monies of His Majesty or public monies under the control of Col. By. Whether Col. By in such a case could or could not procure reimbursement from the crown for monies so advanced by him out of his own pocket would be a matter wholly between himself and the crown, and after the payments so made to William McQueen the latter could not ever after, nor could his heirs-at-law, be heard to assert, under any circumstances whatever, a right to have any part of the land so paid for re-conveyed to him or them founded upon the assertion that the land had not been paid for.

Whether an estate did or did not pass by the deed executed by William McQueen would be a matter of no importance, for the deed still stands as a conclusive acknowledgement that it was as and for the purchase money for the whole 600 acres that the £1,200 was paid, and if no estate in the 110 acres passed, still the fact remains that William McQueen got paid the full value of these 110 acres upon the faith that, upon the execution of the deed, whatever estate, right, title or interest he had therein was divested out of him and his heirs for ever, and in fact and in law all title and interest of him and his heirs therein became thereby forever extinguished; but as it appears to me, the estate o

William McQueen in the hundred and ten acres equally as in the residue of the 600 acres did at law pass by the deed, notwithstanding at least anything contained in the statute of 32 Henry 8 ch. 9, which, in my opinion, has no bearing upon the case. That act was passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.

If A, by the command of and as the agent and servant of B, disseised C, and some years afterwards A, being still in possession as the agent and servant of and upon behalf of B took a conveyance identical in terms with that of the deed of the 6th February, 1832, from the heir-at-law of C, or from C himself, without any re-entry having been made by him, such a conveyance was never supposed to be within the act. The transaction would not be within the mischief pointed at by the act, and so would not be within the operation of it; the conveyance would at law operate as a release and the legal estate of the heir of B or of C, as the case might be, could undoubtedly in law become released to and vested in A whatever right in equity B might be able to enforce against him. Now that is the case here: Col. By as the agent of His Majesty, who could never be himself in actual possession, entered upon and took actual possession of the 110 acres in the lifetime of Grace McQueen; while in such actual possession as the servant of and in behalf of His Majesty, he takes the conveyance from William McQueen heir-at-law of Grace while he is out of possession. Such a conveyance is a good conveyance at law by way of release unaffected by the statute of Henry the eighth equally as the conveyance to A by the heir-at-law of C in the case above put; and His Majesty would have equal equity to enforce his rights against his agent and ser-

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vant Col. By as, in the case put, B would have against A. The person out of possession executing such a deed to the person in actual possession could not, nor could his heir-at-law, ever after be heard to base a claim to any part of the land comprised in the conveyance founded on the contention that the conveyance was void within the statute of Henry the eighth.

The deed then of the 6th February, 1832, not having been avoided in law as to the hundred and ten acres in question by reason of anything contained in the statute of Henry the eighth, the effect of that deed as to those 110 acres was, in my opinion, to make it operate as a contract or agreement made with Col. By as agent of His Majesty within the provisions of 2nd section of 8 Geo. 4 ch. 1, and so by force of that statute to vest those 110 acres absolutely in His then Majesty, His heirs and successors, free and absolutely released and forever discharged from all claims whatsoever of the said William McQueen and his heirs, whose title thereto became utterly extinguished, leaving Col. By, if the monies paid by him to William McQueen in respect of the hundred and ten acres were his own, to claim indemnity therefor as best he could from the crown. Had he presented his claim in the shape of a purchase made by him on behalf of His Majesty, at the rate of two pounds per acre, possibly his claim might have been recognized; but he does not appear to have done so, but on the contrary, as in paragraph 20 of the special case is stated, he, some time after the execution of the conveyance of the sixth day of February, 1832, took proceedings under the act 8 Geo. 4 ch. 1, to obtain by arbitration compensation or damages from His Majesty in respect of the lands comprised in the said indenture of the 6th February, 1832, and therein he claimed compensation for the lands now in question, and thereupon, as in paragraph 21 of the special case is stated,

an award was made in writing in the cause of the said arbitration proceeding, whereby it was awarded and determined that by reason of the enhancement of the value of the other land, which at the time of her death belonged to the said Grace McQueen, and of the benefits and the advantages that accrued to her and those claiming under her from the construction of the canal, as provided in the ninth section of the said act, His Majesty was not liable to make any compensation for the lands in question in the matter taken under the act, and as is stated in paragraph 22 of the special case. Afterwards Colonel By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act to assess the said damages and compensation claimed by him, and the jury delivered their verdict to the same effect as the said award.

By paragraph 23 of the special case it is agreed that the documents relating to the said arbitration and assessment proceedings in the three preceding paragraphs mentioned are to be treated as part of the special case.

I have repeatedly tried to get these arbitration papers which are so made part of the special case and have deferred giving judgment in the case for a long time in the hope of getting them, but either for the reason that they have been mislaid and cannot be found, or for some other reason, they have not been furnished to me. I was particularly anxious to see them, as I think that if produced they would probably remove what I cannot but think is an error in the admission in the special case, where it is said that it was Col. By himself who took the proceedings in arbitration.

He could not have done so while he was the officer in charge of the canal representing the crown and in

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re Holmes (1) cited in the argument it appears that the arbitration took place in 1840 in consequence of a claim for compensation having been made by the trustees of the will of Col. By, who, as also appears in that case, died upon the 1st February, 1836.

When it is said in the special case that the arbitration took place at the instance of Col. By as claimant we must assume it to have taken place after he ceased to be the officer in charge of the canal upon behalf of the reigning Sovereign and when some other person as officer in charge represented the Sovereign.

Now Col. By having purchased the lands described in the conveyance of the 6th February, 1832, and having procured those lands to be, by that indenture, conveyed to himself, could not, it may be admitted, as against the crown, have asserted an interest in the 110 acres set apart for the use of the canal, although the effect of persons in a position of trust purchasing in their own name lands required for the purposes of their trust was not at that early period very well understood in Upper Canada; however, it was the crown alone who could object and it was competent for the Sovereign to waive his strict rights and as an act of grace to recognise Col. By as the proprietor of the land in question and so recognising him to enter into an arbitration with him as with any other proprietor of land taken for the purposes of the canal under the provisions of the act 8 Geo. 4 ch. 1. It was only in the character of proprietor of the land that Col. By could have claimed to have an arbitration under the act, and the special case admits that the arbitrators appointed and the jury summoned to assess the amount of compensation if any to be paid to Col. By for the hundred and ten acres, were so appointed and summoned respectively under the provisions of the act, and that they adjudged and determined that

(1) 2 J. & H. 527.

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under the provisions of the act he was not entitled to the payment of any sum of money by way of compensation, for that the enhanced value attached by the construction of the canal to the residue of the land, not taken, was sufficient and complete compensation for the value of the land taken.

We have seen that if any pecuniary payment by way of compensation had been awarded it was competent for the arbitrators and jury to say whether it was, under the particular circumstances of the case, to be paid to the claimant Col. By as assignee of the former owner, or to the former owner; and as Col. By paid William McQueen at the rate of two pounds per acre for the land taken for the canal, there can be no doubt, in justice, if any sum had been awarded it would have been made payable to Col. By and not to William McQueen or any person representing him. The arbitrators and jury having adjudged and determined that no sum was payable under the provisions of the act for the reasons above given, Col. By, who had paid William McQueen two pounds per acre for the land, was compelled to be content with the benefit received by him in the enhanced value attached by the work to the residue of the land which he bought from William McQueen.

Under the circumstances I am unable to see upon what principle of law or equity any claim in favor of the heir-at-law of William McQueen can be asserted as founded upon the allegation that "no pecuniary compensation was paid by the crown to Grace McQueen or to William McQueen, or to any person claiming under them," as admitted in the special case and asserted in the petition of right filed in this case. It would be difficult to reconcile with any principle of law or equity the recognition of such a claim founded upon the fact that the crown *ex gratiâ* abstained from

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insisting, as against Col. By, upon rights which it might have insisted upon and granted him an arbitration under the act, treating him as being, as the indenture executed by William McQueen represented him to be, the proprietor, as purchaser for full value from William McQueen, of all the land in question.

But it is said that the law does not permit more land to be taken from any person by process of expropriation for a public purpose than is necessary for the purpose, and that if more be taken than is necessary for the purpose for which it is taken the part not used reverts upon the non-user or cesser of use at common law to the former owner, although at the time of expropriation the full fee simple value of the land taken may have been paid to the former owner from whom it was taken.

Upon this assertion of right is founded the claim made in this case, that 90 acres of the 110 taken not being used, as is said, directly or indirectly, for the purposes of the canal have reverted to the heir-at-law of Grace McQueen, although it appears in the case Col. By paid to him the full value of the whole 110 acres, under the belief that the legal estate therein, as well as in the residue of the lands granted to Grace McQueen by the letters patent of the 20th of May and the 10th of June, 1801, had passed to Col. By in virtue of the indenture of the 6th February, 1832, executed by William McQueen. That the land of a private person cannot legally be expropriated for a public purpose to any greater extent than is necessary for the purpose for which it is expropriated may be admitted, but it is plain that the right to restrain expropriation beyond what is necessary for the purpose of the expropriation must be exercised at the time of the expropriation.

There must be some mode of determining then what

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is necessary; and with respect to the expropriation for the purposes of this canal, the mode of determining what was necessary is in express terms provided by the act 8 Geo. 4 ch. 1; but when the land required for the particular purpose is ascertained and determined by the means provided by the Legislature for that purpose, and the estate of the former owner in the land has been by like authority divested out of him and vested in the crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be revested in him, by reason of its ceasing to be used for the purpose for which it was expropriated. With respect to the particular act in question here. the late learned Chief Justice Sir John Robinson in the Court of Queen's Bench for Upper Canada, in *Doe. Mallock* v. *H. M. Ordnance* (1) thus expresses himself:

The Legislature passed in 1827, the act 8 Geo. 4,ch. 1, for granting certain facilities to the government for the construction of the Rideau Canal. They recite in it that "the work would tend most essentially to the security of the province by facilitating measures for its defence as well as promote greatly its agricultural and commercial interests" and when this double public advantage is considered we cannot doubt that the Legislature intended that the discretionary powers which they were about conferring upon the military officers to be intrusted by His Majesty with the superintendence and charge of the canal should be such as would enable them to carry out the design on what they might consider an efficient and proper scale with reference to the protection and security of the work in war as well as in peace. I have so held on several occasions when it was made a question before me at *nisi prius* whether the lands which the military engineers had taken were in fact necessary.

(1) 3 U. C. Q. B. 388.

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Although there might possibly be such an evident abuse of the powers given by the statute as would make it right to hold that what was pretended to be done under its provisions was not in fact done with a view to execute its powers but only under colour and pretence of its authority, yet it has always appeared to me that wherever there could be said to be any room for question as to the necessity, it ought to be assumed that the public officers had used their discretion fairly and in good faith, in which case the question of the land being necessary or not necessary must be governed by their judgment and not by the judgment of any court or the opinion of any other person public or private, and this appears to me to be not only legal but highly reasonable when we consider the great public interests involved on the one hand, and on the other the care taken to secure to every individual whose property may be taken possession of a just compensation for its value.

A passage from Mills on Eminent Domain (2 Ed.) was cited on the argument in support of the claim which is asserted as a common law right upon the part of the suppliant as heir-at-law of William McQueen, but that passage refers to a case where the estate or interest expropriated is an use or easement: when the fee simple is the estate expropriated that author expounds clearly what is the language also of the common law.

At section 50 he says:—

It is the exclusive privilege of the Legislature to determine the degree and quality of interest which may be taken from an individual as well as the necessity of taking it. An easement or usufruct may be taken or the entire property may be taken so as to be vested absolutely, without reversion to the original owner in case of a change in the use. In such case the owner is paid the entire value of the land and should have no reversion. When only an easement is taken it is presumed that the full value is not given and that the owner receives a lesser amount when there is reserved to him the chance of reversion on a discontinuance of the public user. * * * When the full value has been paid the land with all the materials thereon belongs to the public, there is no right of easement remaining in the owner and the lands so taken may be sold for other purposes. Land taken originally for an almshouse or hospital may, after years of increase in the population of a city, become unsuitable for such purposes and may be sold by the public. Otherwise the owner having received the full value of his land might either compel the public to

continue a public institution in an unsuitable place or receive in addition to the value of his land the erections made on it.*** When the state takes land for its own purposes it is presumed to take the fee.

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Now if the arbitration which took place with Col. By in respect of the land in question, instead of having been had with him, as the special case states, had taken place with William McQueen, and the arbitrators and jury had adjudged and determined, as they did upon the arbitration with Col. By, that the enhancement in value put upon the adjoining lands of William McQueen not taken (by the construction of the canal) gave to him full value for the land taken, such an award having been authorised by the act, when the fee in the lands taken became as it did by force and operation of the statute vested in the crown to the same extent as if a money value had been paid by the crown directly to William McQueen, the fact that any part of the lands taken under the act ceased to be used for the purposes of the canal, could not have the effect of revesting in William McQueen or his heirs the land taken, and which had ceased to be used for the purposes for which it was taken. Nothing short of another act of parliament could divest the crown of the fee which was vested in it by the act 8 Geo. 4 ch. 1, or authorize the appropriation of the lands so vested in the crown to any other purpose than stated in the act. A case of *Mulliner* v. *Midland Ry. Co.*(1) was relied upon by the learned counsel for the suppliant, but that was a decision rendered upon 127th sec. of the Imperial Statute 8 and 9 Vic., ch. 18, usually called the Land Clauses Consolidation Act, a section which directs a much more natural and equitable appropriation of land not required for the purpose for which it was acquired than to give it back to the original owner who was already paid for it and who might no longer have any interest in any adjoining land, which is the unnatural

(1) 11 Ch. D. 617.

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and inequitable appropriation which in such a case is by the learned counsel for the suppliant attributed to the common law. That section enacts as follows :—

> And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act or any act incorporated therewith, but which shall not be required for the purposes thereof be it enacted as follows: Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superflous lands and apply the purchase money arising from such sales to the purposes of the special act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the land adjoining thereto in proportion to the extent of their lands respectively adjoining the same.

Then the 128 sec. enacted that before the promoters of the undertaking should dispose of any such superfluous lands they should, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands, if any, from which the same were originally taken, or if such person refuse to purchase the same or cannot after diligent enquiry be found, then that the like offer should be made to the person or to the several persons whose lands should immediately adjoin the lands so proposed to be sold.

I have hitherto treated the case as if Grace McQueen had died seized in fee of the land in question, and that, having died intestate, as is admitted in the case, the lands descended to William McQueen who, by force of the contract made with him by Col. By, received full value for the lands taken, and that his estate therein by force of such contract, for giving effect to which the deed of the 6th February, 1832, was executed, and by force of the statute operating upon the contract made with Col. By, the crown's agent in the matter, for the sale of the land to him, became vested

in His then Majesty, his heirs and successors forever, under the provisions of the statute in that behalf. But assuming Grace McQueen to have become during her lifetime divested of her estate in the lands, and that therefore upon her death intestate those lands did not descend to her heir-at-law William McQueen, (it is unnecessary to notice the interest of her husband as tenant by the curtesy), still the claim which is asserted upon the petition of right on behalf of the suppliant would not be a whit advanced.

If Grace McQueen was not seized of the land in question at the time of her death it must have been solely because the statute 8 Geo. 4 ch. 1 had already operated in her lifetime to divest her of her estate and to vest the lands in fee in his then Majesty, his heirs and successors forever, for the purposes of the act. I have already referred to the difficulty which, as it appears to me, such a construction of the act would create as to the awarding compensation if none had been agreed upon between Grace McQueen and Col. By in her lifetime and I do not propose to refer to it again, but shall assume, as has been argued in the suppliant's interest, that she had by the operation of the act become divested of her estate in the land in her lifetime and that her rights had become converted into one merely of a right to compensation which upon her death passed as personalty.

Assuming it to have so passed, it would have been a right enforceable at the suit or demand of a personal representative. Although beneficially it would have belonged to the next of kin, if when her heir-at-law William McQueen in this character of assumed owner of the land in question received, as he did receive from Col. By, the price agreed upon between them as the full value of the land taken, he at least could have no pretence of claim in his character of next of kin to

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any further compensation; but assuming for the sake of the argument that there were other persons who as next of kin of Grace McQueen would have had an interest in regarding her claim as a mere personal demand and who would not have been prejudiced in the assertion of their demand by reason of William McQueen having wrongfully received, if it was wrongful in him to receive, the full value of the land taken, such a claim could only have been asserted, if at all, under the act.

And whether it could have been enforced under the act or not, either before or after the time limited in that behalf by the statute 2nd Vic. ch. 19, matters not, for it is obvious that a claim which a personal representative of Grace McQueen could have asserted in the interest of her next of kin and which never was asserted, could never be made the foundation of a claim at the suit of an heir-at-law of William McQueen, who either rightfully or wrongfully received payment of the full value of the land taken and covenanted to warrant and defend his vendee in the enjoyment of the estate, which in consideration of such payment he purported to convey, to have re-vested in such heir-at-law the fee simple estate in the lands purported to be sold by his ancestor, upon the ground of the land sold ceasing to be used for the purpose for which it was acquired. The non-payment of any demand, if any, which a personal representative of Grace McQueen might have had could never be made the basis or support of a demand at the suit of the heir-at-law of William McQueen to have revested in him any portion of the lands described in the indenture of the 6th February, 1832, after the execution of that indenture by William McQueen, whether that indenture was effectual or not for passing the estate which it professed to pass.

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If, then, the suppliant is not, upon principles of the common law, entitled as heir-at-law of William McQueen to the relief claimed in her petition of right filed in this case, and for the reasons already given I am of opinion that she is not, she cannot have acquired any title to such relief unless it be by force of some act of the legislature.

It is, however, contended that the proviso set out in the suppliant's petition of right as being contained in the 29th section of the act of the Parliament of Canada, 7 Vic. ch. 11, has the effect of conferring upon the suppliant the right asserted by her in her petition of right.

That act recited among other things that divers lands and real property being within the province of Canada had been at various times set apart from the crown reserves or from the clergy reserves, and had been placed under the charge and control of the officers of Her Majesty's Ordinance or of the Commander of the Forces for purposes connected with the defence of the province and the service of the said department, and that divers other lands and real property had been at divers times purchased for like purposes, and conveyed or surrendered to, or in trust for Her Majesty or Her royal predecessors, or had been taken for like purposes under the authority of some act or acts of the legislature of the late province of Lower Canada or of the late province of Upper Canada, and are by the provisions of such acts vested in Her Majesty, and the price or compensation of and for the same hath been paid out of the funds provided for that purpose by the parliament of the United Kingdom, and that it might be expedient that such parts of the said lands as might not be wanted for the service of the said department or for the military defence of the province should, from time to time, be sold or disposed of.

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And it was therefore enacted that all lands covered with water, canals, &c., within the province of Canada, and at the time of the passing of the act vested in Her Majesty or in any person or persons, officer or officers, in trust for Her Majesty and set apart and occupied for purposes connected with the military defence of the province, or placed under the charge and control of the officers of the said Ordinance Department or of the commander of Her Majesty forces, or other military officer or officers, whether the same have become vested in Her Majesty or her royal predecessors for such purpose by the cession of this province, or have been by her or them set apart or transferred from the lands of the crown or from the clergy reserves, or have been purchased for such purpose by any person or officer and paid for out of the funds provided for that purpose by the parliament of the United Kingdom, and surrendered or conveyed to Her Majesty or her royal predecessors, or to some person in trust for her or them, or have been set apart or transferred, or have been taken for any such purpose under the authority of any act, or law in force in this province or in any part thereof by whatsoever mode of conveyance the same shall have been purchased or taken, and whether in fee or absolute property, or for any life or lives or, term or terms of years, or for any lesser interest or a *titre de cens*, and more especially the lands and other real property mentioned and described in the schedule annexed to the act, shall be and the same are hereby vested in the principal officers of Her Majesty's Ordinance in Great Britain, and their successors in the said office according to their respective nature and quality, and the several estates and interests therein subject to the provisions of this act, and in trust for Her Majesty, her heirs and successors, for the service of the said department, or for such other services as Her Majesty,

her heirs or successors, or the said principal officers, shall from time to time direct.

In the schedule above refered to, is particularly, described the Rideau Canal and the lands purchased taken or set out and ascertained as necessary for the purposes of the said canal, and marked and described as necessary for such purpose on a certain plan lodged by the late Lieut.-Col. By, of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the office of the Surveyor General of the late province (of Upper Canada), and signed by the said Lieut.-Col. By, and now filed in the office of Her Majesty's Surveyor-General for this province, and all the works belonging to the said canal or lying or being on the said lands.

Then the 12th section of the act authorized the principal officers to sell or exchange or to let and demise the lands so vested in them, and the 13th section enacted that the monies to arise from such sales, demises, &c., should be applied to such purposes as Her Majesty, heirs or successors, should direct.

The act also authorized the principal officers in their discretion to acquire other lands, &c., for the service of the department or for the defence of the province, and made provision for the mode of acquiring such lands.

The act also contained clauses having peculiar relation to lands acquired in that part of the province formerly constituting Lower Canada and placed under the control of the principal officers. The 9th section in which the proviso relied upon by the suppliant is found in one of those sections—it enacts—that it:

Shall be lawful for the said principal officers to grant any *censitaire* holding lands or other real property, within the censive of any seigniory vested in them under the provisions of this act, a commu-

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tation from all seigniorial rights, burthens and charges on such lands or real property on the same terms and conditions on which such commutations might be granted by Her Majesty without this act, but the lands or real property, with regard to which such commutation shall be granted, shall hereafter be held in *franc-aleu roturier*, as shall also any lands or real property which, being within the boundaries of any seigniory vested in the said principal officers under provisions of this act, shall be granted or conveyed by them to be holden otherwise than *censive*, provided always that nothing herein contained shall prevent the said principal officers from granting any lands or real property within any such seigniory to be held *en censive*, if they and the grantee shall so agree—provided always and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal which have not been used for that purpose be restored to the party or parties from whom the same were taken.

How this proviso, the operation of which, if given effect to, would be so wholly at variance with the objects for which, as appears by the preamble and the first enacting clause the act was passed, came to be inserted in this section, which relates to a subject having no connection whatever with the subject to which the proviso relates, seems very singular. It presents to my mind, if such a thing were possible, the appearance of having been thus introduced by some person interested upon behalf of some private person, and that the proviso and its effect must have altogether escaped notice when the bill was passing through the legislature and until after the royal assent had been given to it. No motive for the insertion of such a clause is suggested in the act or can well be conceived. It seems to be impossible to conceive that the legislature could have contemplated that lands taken under the Rideau Canal Act for a work which the military authorities considered to be necessary for the defence of the province, and which lands had been purchased and paid for by His then Majesty with funds provided for the purpose by the Imperial Government, should be restored to the parties from whom they had so purchased, without any considera-

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tion whatever being given therefor by the persons to whom they should be so restored, and that the sole reason for such restoration should be that they had not been used for canal purposes, although for military purposes of defence they might perhaps be very necessary; but necessary or not necessary for military purposes, what motive could induce the Imperial authorities, whose assent to such a proviso would be necessary, to consent that any lands which had been purchased and paid for out of funds supplied by the Imperial Government, which had been at the sole cost of constructing the canal, should be restored, without any consideration whatever, to the persons who had received full value therefor, is neither suggested nor is to my mind at all conceivable.

If indeed there had been a case of lands having been taken, for which the private owner from whom they had been taken had neglected to take measures to enforce payment of compensation by arbitration under the act within the time limited by 2nd Vic. ch. 19, and that any of such lands were not required for the purposes of the canal, a motive of justice might be suggested for provision being made for restoration of such land to the owner from whom it had been so taken without any consideration given therefor or arbitration had, but the proviso as introduced into the act is not framed so as to be limited to such a case; and yet, as appears by the subsequent act passed for the express purpose of explaining what was meant by the proviso, that seems to have been the only reason which could be suggested as explanatory of its object.

The act 9 Vic. ch. 4, which was passed for the express purpose of explaining this proviso so inserted in the 29th sec. of 7 Vic. ch. 11, recites the proviso and that doubts had arisen as to the true intent and meaning of the same, and as to the land to which it was intended

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to apply, and that proceedings at law and in equity which had arisen out of such doubts had been commenced and were still pending and that during the last session of the Legislature a bill had been passed by the Legislative Council and Legislative Assembly of the province for the purpose of explaining and amending the said act, as far as regards the effect of the said proviso and of setting such doubts at rest, but that the bill having been reserved for the signification of Her Majesty's pleasure thereon had not received the Royal Assent, and that the principal officers of Her Majesty's Ordinance, as well as the private parties interested, were desirous that the doubts aforesaid should be removed, and that all matters in difference between them should be fairly and amicably settled, and it was therefore enacted, that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, Esquire, under the provisions of the act 8 Geo. 4 ch. 1, except so much thereof as is actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the basin and by-ward as they stood at the passing of the Ordnance Vesting Act, and excepting also a track of 200 feet in breadth to on each side of the said canal, the portion of the said land so excepted having been freely granted by the said Nicholas Spark to the late Col. By of the Royal Engineers for the purposes of the canal, and excepting also a tract of 60 feet round the said basin and By-wash (wherever the present ordnance boundary stones stand beyond that distance from the said basin and by-wash, but where they stand within that distance then they shall bound the tract so excepted), which is freely granted by the said Nicholas Sparks to the said principal officers for the purposes of the said canal, provided there be no buildings thereon, and that notwithstanding anything in the act last cited

(8 Geo. 4 ch. 1) or in the act passed in the second year of Her Majesty's reign intituled: An act to limit the period for owners of land making claims for damages already occasioned by the construction of the Rideau canal, and for other purposes therein mentioned or any judgment, decree, verdict or decision of or in any court of law or equity, all the lands to which the said proviso is applicable as aforesaid shall, if retained by the principal officers of Her Majesty's Ordinance under the provisions of this act, be paid for by them in the manner provided by this act and any parts thereof which shall not be so retained and paid for shall be and the same are hereby declared to be absolutely re-vested in the said Nicholas Sparks, or the other parties, respectively, to whom the same may have been conveyed by him before the 10th day of May, 1846, to his and their own proper use forever; and such conveyances shall not then be invalidated by any want of possession in the said Nicholas Sparks, or adverse possession by the said principal officers at the time they were respectively made.

The 2nd sec. of the act enacts that the principal officer should, within one month after the passing of the act, obtain a certificate from the officers commanding Her Majesty's forces in the province, setting forth what parts of the lands to which the proviso is applicable it is necessary to retain for the service of the ordnance department for military purposes, and that such parts should be retained by and should remain vested in the said principal officers in trust for Her Majesty, and that the remainder, if any, should be immediately thereafter absolutely vested in the said Nicholas Sparks, or the party or parties claiming under him, to his and their own proper use forever, any law to the contrary notwithstanding. The fourth section makes provisions for the purpose of ascertaining the sum to be paid for

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the parts of the said land so retained as aforesaid by three arbitrators, namely, one James Sutton Elliott, or in case of his death, inability to act or absence from the Province for more than one month, such other persons as the said principal officers shall appoint, and Stewart Derbyshire, or in case of his death, inability to act or absence from the province for more than one month, such other person as the said Nicholas Sparks, his heirs, executors, administrators or assigns should appoint, and John Alexander McDonald, Esq., or in case of his death or refusal or inability to act, such other as the other two arbitrators should agree upon.

Then by the seventh section it was among other things enacted that the sum awarded should be respectively paid to the parties entitled to the same within three months after making the award, and that if any sum awarded should not be so paid within three months, as aforesaid, then that the land for which the same should have been awarded should be forthwith, after the expiration of the said period, restored to the said Nicholas Sparks, or the parties claiming under him as aforesaid, and should be, and was thereby, vested in him or them by the mere fact of such non payment within said period, and further, that if the said principal officers should fail to obtain the certificate of the officers commanding His Majesty's forces in this province, within the time limited in the act for that purpose, or should negligently fail to comply with any of the other requirements of the act, or if through non-attendance or other wilful neglect of the said James Sutton Elliot, or other persons appointed in his stead by the said principal officers, the other arbitrators should be prevented from proceeding, and such wilful default or neglect should continue for three months, then at the expiration of the said period the land to which the said proviso is hereby made applicable should be absolutely

re-vested in the said Nicholas Sparks or those claiming under him as aforesaid by the mere fact of the expiration of such period.

Now, from this act, the object of passing which, was to explain the true intent and meaning of the above proviso so singularly inserted in the 29th section of 7 Vic. c. 11. and to remove difficulties attending giving effect to that proviso, it is apparent that its intent was not to divest the principal officers of so much of the land vested in them by the first enacting clause of 7 Vic. c. 11, as had not been used for the purposes of the canal as the proviso literally imported. On the contrary the intent was to leave still vested in them under 8 Geo. 4 c. 1 and 7 Vic. c. 11, all the lands to which the proviso was applicable, or so much thereof as the commanding officer of Her Majesty's forces in the province should certify to be necessary to be retained not merely for the use of the canal, but for the service of the ordnance department for military or canal purposes, subject however to the condition that the lands so retained, (notwithstanding anything in 2 Vic. ch. 19) should be paid for at their value, to be ascertained by arbitration had between the principal officers of the one part and Nicholas Sparks of the other part in the manner provided in the act, and that payment of such value, when so ascertained, should be paid to Nicholas Sparks, or the persons claiming under him, and that the residue of the land, not so certified to be necessary and therefore not so arbitrated upon, should be and was thereby re-vested in Nicholas Sparks, or those claiming under him.

In addition to the reasons given in the judgment rendered by the late Chief Justice Sir W. B. Richards in the case above alluded to for holding that the proviso must be construed as being limited in its application to the lands of Nicholas Sparks, it appears to me

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that the plain object of the act and of the proviso whose intent is explained by the act 9 Vic. c. 42, was to prevent the principal officers taking advantage of 2nd Vic. ch. 19, for the purpose of retaining without payment of compensation certain lands which had been set apart and taken under 8 Geo. 4 c. 1 and which had not been conveyed by voluntary grant or surrender to Her Majesty, Her Royal predecessors or to Col. By for the purpose of the canal or to any one in trust for His late Majesty or arbitrated upon under the provisions of 8 Geo. 4 c. 1, and as all the land to which the statutes declare the proviso is applicable, if retained by the officer commanding Her Majesty's forces, was to be paid for at a value to be ascertained upon an arbitration with Nicholas Sparks, and to Nicholas Sparks or those claiming under him, and the balance not so paid for was declared to be restored to and vested absolutely in Nicholas Sparks, and those claiming under him, it appears to me to be plain that all the lands to which the proviso applied were lands which were originally the property of Nicholas Sparks, and not conveyed or surrendered by voluntary grant executed by him, and for which no consideration or compensation had been given to him. He, most possibly, was the only person who, not having been agreed with as to price by the officer in charge, had not availed himself of the compulsory process supplied by 8 Geo. 4 c. 1, within the time limited by 2 Vic. c. 19, and was therefore the only person whose lands were intended to be affected by the proviso.

The whole frame of the explanatory act shows that there never was entertained such an intention as that lands, for which the owners had received full value, as William McQueen had for the land in question here from Col. By, who was the officer in charge acting on behalf of and representing His Majesty, should

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become revested in the said William McQueen, who had already received full value therefor, or in his heirs-at-law in which character the suppliant claims the right asserted in the petition of right in this case.

The reason why a portion of the excepted land is said to be retained without having to be arbitrated upon to ascertain a value to be paid by the principal officers, namely, "The portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Col. By of the Royal Engineers for the purposes of the canal," shows that the proviso was only intended to apply to lands not granted and not arbitrated upon, and the reason so given so exactly corresponds with the mode adopted in taking title from William McQueen that it appears very plain I think that if there was any lands formerly belonging to William McQueen which were in the same position as the land of Nicholas Sparks as to which provision for future arbitration was made, the 110 acres mentioned in the deed of the 6th February, 1832, must have been and would have been excepted for precisely the same reason as the above excepted part of the lands of Nicholas Sparks, which were retained vested in the principal officers without any arbitration being had in respect thereof under the provisions of the act 9 Vic. c. 42.

Then it is clear that, and indeed it is admitted that (notwithstanding anything contained in 7 Vic. c. 11.) the lands in question here were by 19 Vic. c. 54 vested in Her Majesty for the public uses of the late Province of Canada and that while still so vested they were by the B. N. A. Act placed under the exclusive control of the Dominion Parliament. So that even if there were such principle of the common law as that contended for by the suppliant (although no such principle is recognized by the common law) still it

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would not be applicable to the present case, for by the force and effect of acts of the legislature these lands are placed under the exclusive control of the Dominion Parliament, which therefore is the sole power capable of giving to the suppliant any estate or interest whatever in the lands in question.

As to the contention that Her Majesty is a trustee of the lands in question in trust for the suppliant there is no foundation for such a contention; Her Majesty never could be placed in such a position unless by the express provisions of an act of Parliament to which she was herself an assenting party and the existence of such an act of Parliament is not suggested.

When, therefore, the 8th, 10th and 11th questions submitted in the special case are answered, as for the reason above given they must be, in the negative the whole case made by the suppliant's petition of right is disposed of.

In the view which I have taken, although my opinion as to the points suggested in the 1st, 2nd and 3rd questions sufficiently appears in the judgment I have delivered, still the questions there put are quite immaterial if, as I am of opinion, in answer to the 8th question, the suppliant is not entitled to recover the lands in question or any part thereof under the facts and circumstances stated in the case, so neither, for the like reason, is it material to determine whether, if she ever had a right to recover any part of the lands in question, such right would or not be now barred by the statute of limitations.

For the like reason, and for the further reason that the 5th question puts a merely hypothetical case relating to a subject, namely a claim for compensation for the land, a matter which forms no part of the case set up or the relief prayed by the petition of right, that question is quite immaterial in this case, and I

decline to express any opinion upon a purely hypothetical case and which if given would amount to no more than an *obiter dictum* as the point in respect of which the question is put has no bearing whatever upon the case made and the relief prayed by the suppliant.

The 7th question, for the like reason that it purely relates to a hypothetical case not set up in the petition of right, and having no relation to the case thereby made and the relief thereby prayed, is also quite immaterial to the decision of this case.

The 9th question is also immaterial as the suppliant has not in her petition of right made any claim, if she had any, for compensation for the land taken.

In fact, as I have already said, the whole case is answered when I answer as I do the 8th, 10th and 11th questions in the negative, and say that the suppliant is not entitled to any relief upon the claim and case asserted in her petition of right under the facts and circumstances appearing in this case.

Her petition of right, therefore, must be dismissed with costs.

On appeal to the Supreme Court.

McDougall Q.C. and Gormully appeared on behalf of the appellant and Lash Q. C. on behalf of the respondent.

SIR W. J. RITCHIE C. J.—I think the appeal in this case should be dismissed. Without going over all the points raised, and on which a great deal may be said, there are two very simple grounds which I think fatal to the suppliant's right to recover, and first, it appears that by memorial of a deed of bargain and sale dated the 8th of February, 1832, William McQueen (under whom the suppliant claims) heir-at-law of Grace McQueen of the one part, and Col. By of the other part in considera-

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tion of the sum of £1200 sold, &c., certain tracts of land therein particularly described "to have and to hold the said granted premises, with all the privileges and appurtenances thereof to him the said John By, his heirs and assigns, to their own use for ever, with covenants of seizin, right to transfer, freedom from incumbrances, quiet enjoyment, and general warranty; subject, however, to the reservation and conditions contained in the original grant thereof from the crown," which deed was registered the 6th June, 1862. Several questions have been raised as to the legal effect of this deed, whether it passed the title to Col. By, or whether John By purchased the property on his own behalf or for the crown whose servant he was at the time. But these questions appear to me wholly immaterial because, whether the deed transferred the property to John By or whether he purchased on behalf of himself or the crown, if William McQueen had a right to make this deed which, as at present advised, I think he had, and that the deed took effect from its date as a good valid transfer of his interest in the lands mentioned therein to John By, the title forever passed out of William McQueen; but assuming it did not then I am of opinion William McQueen was estopped by his own act and could not, during his lifetime, have impunged or disputed the validity and general effect of his own deed: so neither can the suppliant who claims under him, she being in like manner estopped.

The crown has also invoked the benefit of the statute of limitations which, in my opinion, is a clear answer to this claim, if the crown can raise such a defence, and that it can do so is not, in my opinion, open to doubt or controversy. The seventh section of 39 Vic. c. 28, declares what defences may be raised. The statute is as follows :—

7. The statement in defence or demurrer may raise, besides any

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legal or equitable defence in fact or in law available under this act, any legal or equitable defence which would have been available had the proceeding been a suit or action in a competent court between subject and subject, and any grounds of defence which would be sufficient on behalf of Her Majesty may be alleged on behalf of any such person as aforesaid.

I am, therefore, of opinion that by virtue of the effect of the said deed as well as of the statute of limitations, the claimant is barred and the appeal must be dismissed.

STRONG, J.—The lands which the appellant seeks to recover by this petition of right are part of a larger tract originally granted by the crown to Grace McQueen in 1801.

Grace McQueen died intestate on the 18th of September, 1827, leaving William McQueen her eldest son and heir-at-law; her husband Alexander McQueen also survived her.

By deed poll dated the 31st of January, 1832, Alexander McQueen released all his title and interest as tenant by the curtesy to William McQueen.

By indenture dated the 6th of February, 1832, and made between William McQueen of the first part and John By, a Lieutenant Colonel in the Royal Engineers of the second part, William McQueen purported to convey the whole of the lands originally granted to Grace McQueen to Colonel By in fee for the valuable consideration of £1,200. On the 17th February, 1827, the act 8 Geo. 4 ch. 1, commonly called the "Rideau Canal Act," was passed by the legislature of the then existing Province of Upper Canada, whereby the construction by the crown of a canal connecting the waters of the River Ottawa with those of Lake Ontario was authorised, and certain powers and authorities incidental to and necessary for the performance of the undertaking were conferred upon the crown. By the first section of this act it was enacted (amongst other things) that—

The officer employed by His Majesty to superintend the said

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works should have full power and authority to explore the country lying between Lake Ontario and the waters leading therefrom and the River Ottawa, and to enter into and upon the lands or grounds of, or belonging to, any person or persons, bodies politic or corporate, and to survey and take levels of the same, or any part thereof, and set out and ascertain such parts thereof as he shall think necessary and proper for making the said canal locks, aqueducts, tunnels and all such other improvements, matters and conveniences as he shall consider proper and necessary for making, effecting, preserving, improving, completing and using in the said navigation.

By the 2nd section it is enacted :—

That after any lands or grounds shall be set out and ascertained to be necessary for making and completing the said canal and other purposes and conveniences hereinbefore mentioned the officer aforesaid is hereby empowered to contract, compound, compromise and agree with all bodies politic, communities, corporations aggregate or sole, guardians and all other persons or persons for themselves or as trustees not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent whether infants, lunatics, idiots, femmes covert, or other person or persons who shall occupy, be possessed of or interested in any lands or grounds which shall be set out or ascertained as aforesaid for the absolute surrender to his Majesty, his heirs and successors, of so much of the said land as shall be required, or for the damages which he, she or they may reasonably claim in consequence of the said intended canal, locks, towing paths, railways and other constructions and erections being cut and constructed in and upon his or their respective lands, and that all such contracts, agreements and surrenders shall be valid and effectual in law, to all intents and purposes whatsoever any law statute or usage to the contrary notwithstanding.

The 3rd section enacted :—

That such parts and portions of land or lands covered with water as may be so ascertained and set out by the officers employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts and portions as may, upon any alteration or deviation from the line originally laid out for the said canal, be ascertained and set out as necessary for the purposes thereof, shall be forever thereafter vested in His Majesty, his heirs and successors.

The 4th section provided for a mode of fixing and assessing compensation, in the first instance by arbitrators, and secondly by a jury, in cases where no volun-

tary agreement as to it was arrived at before the completion of the canal; it directed that in such cases one arbitrator should be appointed by the land owner, one by the officer superintending the works, and a third by the two arbitrators so firstly appointed, and that these three arbitrators should, after hearing evidence upon oath, award the amount of compensation to be paid to the claimant. The 5th sec. provided that if either the officer superintending the work or the claimant should be dissatisfied with the award, they might decline to abide by it, and have the amount of compensation assessed by a jury, upon giving notice to that effect within ten days after the award. And the following sections prescribed the mode in which the jury should be summoned, and the procedure to be followed before it.

Section 9, which is of especial importance here, was as follows :—

In estimating the claim of any individual for property taken or for damage done under the authority of this act, the arbitrators or juries assessing such damages shall take into their consideration the benefit likely to accrue to such individual from the construction of the said canal by its enhancing the value of his property or producing other advantages; provided always, nevertheless, that it shall not be competent to any arbitrators or jury to direct any individual claiming as aforesaid to pay a sum in consideration of such advantages over and above the amount at which the damages of such individual shall be estimated.

In 1836 an amending act was passed (6 Wm. 4 ch. 16), but in my opinion it contains nothing material to the present case, being confined exclusively to cases of claims by land owners for lands damaged by reason of stone, earth, timber or other materials having been taken therefrom and to injuries caused by diversion of water-courses and the overflowing of lands, and not applying to the case of lands taken for the purposes of the canal.

In 1839 an act (2 Vic. ch. 19) was passed whereby all claims not prosecuted before the 1st of April, 1841, were to be absolutely barred.

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In 1843 an act known as the Ordnance Vesting Act (7 Vic. ch. 11) was passed whereby the Rideau Canal and the lands and works thereto belonging were vested in the principal officers of Her Majesty's Ordnance in Great Britain. The 29th section of this act, which forms the basis of the claim asserted by the suppliant in this petition of right, is in the following words:—

That all lands taken from private parties at Bytown under the authority of the Rideau Canal Act, for the uses of the canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

In 1846 the act 9 Vic. ch. 42 was passed whereby it was declared that the provision contained in the 29th section of the act of 1843 should be applicable to lands at Bytown taken from Nicholas Sparks. It has been suggested rather than argued, on behalf of the crown, that this latter act of 1846 had the effect of restricting the operation of the re-vesting clause of the 7 Vic. ch. 11, to the lands of Nicholas Sparks. I may say at once that this objection is wholly unsustainable; the whole scope of the latter act shows that the object of this provision was to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within the 29th section of the act of 1843 of the benefit of that enactment. This is so clear that it does not call for further discussion, and 9 Vic. ch. 42 may therefore be dismissed from further consideration.

In the 4th paragraph of the special case agreed on between the crown and the suppliant upon which the cause was heard in the court below, it is stated as follows:—

Prior to the death of Grace McQueen Col. By, the then officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act for His then Majesty for the uses and purposes of the said canal, had from the parcels of lands patented as aforesaid ascertained, set out and taken possession of 110 acres thereof which he thought necessary and proper for the purposes of the said canal, and the officers of Her Majesty or the purchasers from Her Majesty have held possession ever since.

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The 18th paragraph of the case is as follows :—

Out of the 110 acres or thereabouts of the lands and premises so set out, ascertained and taken possession of as aforesaid only about 20 acres thereof have been actually used for canal purposes.

The case also contains the following statements and admissions of facts :—

20. Some time after obtaining the conveyance of the 6th day of February, 1832, Col. By took proceedings under the said act (8 Geo. 4 ch. 1) to obtain by arbitration compensation or damage from Her Majesty in respect to the lands comprised in the said conveyance of the 6th February, 1832, and that therein he claimed compensation or damages for the lands now in question.

21. An award was made in writing in the cause of the said arbitration proceedings, whereby it was awarded and determined that by reason of the enhancement of the value of the other land which at the time of her death belonged to the said Grace McQueen, and of other benefits and advantages that accrued to her and those claiming under her, from construction of the canal as provided in the 9th section of the said act, His Majesty was not liable to make compensation for the lands in question in this matter taken under the said act.

22. Afterwards Col. By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act to assess the said damages and compensation claimed by him, and the jury duly delivered their verdict to the same effect as the said award.

23. The documents relating to the said arbitration and assessment proceedings in the three preceding paragraphs mentioned are treated as part of this special case.

The title of the lands in question having been, by legislation set out in the case and which need not be further referred to here, transferred from the principal officers to the crown, the greater part of the lands have been sold by the latter to purchasers for valuable consideration. William McQueen, the heir-at-law of Grace McQueen, died intestate in 1845, leaving the suppliant Lucy McQueen, his only child and heir-at-law, who now presents her petition of right seeking to recover from the crown the ninety acres of land originally taken by Col. By, but not used for the purposes of the canal, or such portion thereof as still remains in the

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hands of the crown, and an indemnity for the value of such portions of these ninety acres as have been sold by the crown. And the questions thus raised for decision on the facts stated and admitted in the special case and the statutory enactments already mentioned, having been decided against the suppliant upon the hearing of the cause in the Exchequer Court she now appeals to this court.

I have no doubt that a petition of right is an appropriate remedy available to the suppliant for the assertion of any title she may have to relief under the 29th section of the act of 1843, directing lands not used for the canal to be restored to the parties from whom the same were taken. In the case of *Re Holmes* (1) (which was a proceeding by way of petition of right in the English Court of Chancery respecting these same lands) Vice Chancellor Sir W. P. Wood suggested that the remedy might be by *mandamus*, but the late case of *Re Nathan* (2) shows conclusively that where it is within the power of a party having a claim against the crown, of such a nature as the present, to resort to a petition of right a *mandamus* will not lie; and further that a *mandamus* will never under any circumstances be granted where direct relief is sought against the crown.

In order to consider what are the substantial rights of the suppliant upon the admitted facts it is necessary first to determine the construction of the provisions of the Rideau Canal Act (8 George 4 ch. 1) as to the effect of the powers to take lands therein contained, and also the exact meaning of the 29th section of the act of 1843 (7 Vic. ch. 11), the latter enactment being the foundation of the suppliant's title to relief, if any she has.

A question has been raised in relation to the time at which lands taken for the purposes of the canal by the officer appointed to superintend its construction

(1) 2 J. & H. 527. (2) 12 Q. B. D. 461.

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vested in the crown, whether the title to such land vested immediately on its being, in the words of the 2nd section of the 8 Geo. 4 ch. 1, "set out and ascertained to be necessary for making and completing the canal," or whether it did not vest until the price of the land should be fixed and a surrender agreed to between the commanding officer and the land owner under the terms of the 2nd section, or if there was no such voluntary agreement until the compensation was fixed according to the fourth and following sections, which latter proceeding could, by the express words of the statute, only be taken after the completion of the canal. I am of opinion that by the express terms of the 3rd section the title to lands taken for the purposes of the canal vested absolutely in the crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal.

The third section applies alike to land and land covered with water, and it expressly declares that lands ascertained and set out as provided for in the 1st section shall be "forever thereafter vested in His Majesty, His heirs and successors." This, it is true, was not in accordance with the course generally followed in later statutes authorizing expropriation for the purpose of works of public utility, but it is to be remembered that here the expropriation was not in favor of a corporation empowered to execute the work with a view to private gain, but was in favor of the crown directly, for the purpose of a great public work designed for the purposes of military defence as well as for commercial transit and which was considered as of inestimable value to the new and sparsely inhabited country through which it was to be constructed. It was no doubt further considered that the crown being bound to indemnify owners whose lands were taken, the security they had in this liability of the crown to pay the compensation did not require the

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addition of a retention of the title until payment, or a lien upon the land themselves. It could hardly be supposed that the title to lands actually appropriated to the line of the canal itself was to remain in the original owner after its completion until compensation was actually paid, and until the canal was completed the amount of compensation could not, according to the specific terms of the act, be ascertained, and that for the manifest reason that in ascertaining the amount of compensation regard was to be had to the benefit which the land owner might be considered to derive from the enhancement in value of his other lands caused by the construction of the canal. It seems therefore scarcely open to argument that the lands vested in the crown immediately upon their being set out and ascertained. This is the construction which seems always to have been adopted by the Upper Canada courts, and which the Court of Queen's Bench considered correct in the case of *Doe Malloch* v. *The Principal Officers* (1). It is sufficient, however, to say that it is a construction which the literal terms of the 3rd section makes so imperative that no other can possibly be admitted.

Such then being the proper construction of this 3rd section, all that Grace McQueen could have been entitled to at the time of her death was the compensation for the lands so taken provided by the act, and to be ascertained in the manner therein prescribed; and the right to receive and recover the sum of money at which this compensation should be assessed either by arbitrators or by a jury, must have vested, on the death of Grace McQueen, not in her heir-at-law William McQueen, but in her personal representative as forming part of her personal estate. If the statute had contained any provision for re-conversion, similar to that found in the English Lands Clauses Consolidation Act,

(1) 3 U. C. Q. B. 487.

which provides for the re-investment in land of money paid as compensation for the lands of a *feme covert* taken by railway companies, the case would have been different, for in that case the heir-at-law would have been entitled to the money, but no provision of this kind is to be found in any of the statutes relating to the Rideau Canal. The conversion was therefore absolute (1), and at the time of her death Grace McQueen was entitled to a compensation in money which vested in her personal representative and to nothing else.

It is therefore clear that so far as the 110 acres originally "set out and ascertained" for the purposes of the canal in the lifetime of Grace McQueen are concerned, nothing passed by the conveyance of February, 1832, from William McQueen to Col. By. No interest in the land, for William McQueen had acquired no title to this 110 acres, the statute having previously to Grace McQueen's death vested the fee in the crown absolutely, and no right to the compensation could have been acquired by Col. By, even if William McQueen had assumed to assign it, for William McQueen as heir-at-law had no title to that, which was personal estate and had, therefore, vested in the personal representative of Grace McQueen. The arbitration proceedings mentioned in the special case as having been had between the crown and Col. By were all void and ineffectual so far as the present suppliant is concerned, Col. By having no title to claim compensation and not being within the provisions of the statute in that respect. Therefore, up to the date of the statute 7 Vic. ch. 11 no compensation had ever been paid by the crown, nor had there ever been any decision as to compensation binding on the representative of Grace McQueen under the statute or otherwise. Then by

(1) See *Steed* v. *Preece* L. R. 18 Eq. 192; *Ex parte Flamank* 1 Sim. N.S. 260.

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the 29th section of this last mentioned statute passed on the 29th December, 1843, it was enacted:—

That all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

The 90 acres of land which the suppliant now seeks to recover by this petition of right seem to be within all the conditions required by this section. The lands were situate at Bytown; they had been taken from a private owner under the authority of the Rideau Canal Act for the uses of the canal, and had not been used for the purposes for which they had been taken. Had Grace McQueen been then alive, and had there been no sale or attempted sale and conveyance of the lands by her, it cannot, in my opinion, be doubtful that immediately on the passing of the act these 90 acres of land would have become re-vested in her—for I construe the act as by implication vesting the title in lands to be "restored"—the latter word (certainly a most inartificial and inappropriate expression) applying, in my opinion, as well to the title as to the possession, in such a way that the land owner entitled to the benefit of it was by force of the statute itself, and without the necessity of a grant by the crown, re-instated in his former title in the lands, the possession of which the crown was bound also to restore to him. This 29th section is in other respects very generally and loosely worded, inasmuch as it leaves it open as a matter of doubt whether, under the description of "lands taken," lands taken and paid for by the crown, or for which compensation under the statute had been awarded to the land owner and paid by the crown are included. I should think it plain, however, that lands acquired by voluntary purchase, as well as lands originally taken under powers conferred by the act, but for which compensation had been awarded and paid by the crown, were not within this re-vesting clause. In either of such cases the title of

the crown would be referable to purchase and would not be solely dependent on the expropriation clause of the act. This consideration is, however, not pertinent to the present case for, there is nothing to show that any price or compensation was ever paid or even fixed or determined either by agreement or otherwise between the crown and Grace McQueen, or her personal representative to whom, after her death, such compensation belonged. This section is further loose, ambiguous and incomplete in not making any express provision in terms for the very likely case of the death of the original owner by directing to which set of representatives, the personal or the real, the lands should be restored. I think, however, from the nature of the property, "land," from the word used by the legislature, "restored," implying a reinstatement in title, and from the absence of any adequate reason for preferring the personal representatives to the heir, that it was intended that the statute should have, and that it had, the effect of revesting the original estate in the heir-at-law of the owner from whom the land was taken. Therefore *primâ facie*, and subject to the effect upon his title of the sale and deed of 1832, purporting to sell and convey these lands to Col. By, the statute of 1843 did vest the title in fee, in these 90 acres of land in William McQueen as the heir-at-law of his mother, or at least did give him a statutory right to call upon the crown for a conveyance and for delivery of possession ; and that subject, to the same exception, upon the death of William McQueen in 1845 the same estate and right vested in the suppliant as his heir-at-law.

We have next to consider whether the deed of February, 1832, whereby William McQueen purported to convey the lands in question to Col. By, had any and what effect upon the title or rights acquired by the former under the statute. In considering this question it is to be borne in mind that on this record all equitable

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defences are open to the crown. The Petition of Rights Act of 1876 is express on this point. Now, I have already pointed out that this deed of the 6th of February, 1832, could have had no operation as a conveyance by which any estate passed at the time. The deed itself is not before us. All we have is a copy of the memorial of its registration. From this it does not appear that the deed contained any recitals, though certain covenants for title by the vendor are stated to have been comprised in it, namely, covenants of siesin, right to transfer, freedom from encumbrances, quiet enjoyment and general warranty. In the absence of recitals it is impossible that this deed, one of bargain and sale, the common assurance then in use in the country operating under the statute of uses, worked any estoppel in favour of Col. By which would be fed by the statute, (7 Vic.ch. 11 sec. 29) vesting the legal estate in William McQueen. The covenants for title, according to a recent English authority, *The General Finance Co.* v. *Liberator Building Society* (1) do not by themselves create any estoppel, and although this is certainly contrary to a former decision of the Court of Queen's Bench of Upper Canada (2) the reasons given for the decision by Jessell, M. R. seem to be conclusive. It is, therefore, clear that there was no legal estoppel which could have effected the estate when it revested in William McQueen. It is, however, a well established principle of the law of real property that if a vendor having, no title to an estate, undertakes to sell and convey it for valuable consideration his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser and he or his heir-at-law will be compelled to convey to such

(1) 10 Ch. Div. 23. (2) *Doe Irvine* v. *Webster*, 2 U.C.Q.B. 224.

purchaser accordingly. In other words the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. This doctrine is not to be confounded with that of estoppel at common law, nor with that relating to specific performance of the usual vendor's covenant for further assurance. It is purely equitable and applies altogether irrespective of express covenant, being founded on the right of a purchaser for valuable consideration to call upon his vendor to carry out his contract whenever he becomes in a position to do so, even though at the date of the agreement to sell he had no interest in the subject of the sale.

Instead of entering into any lengthened discussion of the cases which might be cited in support of this principle of equity, I extract a passage from a text writer of high repute, not as by itself an authority but as conveniently stating the rule, which will be found amply supported by the decisions referred to by the learned author in support of his text. Mr. Dart in his "Vendors and Purchasers," 5th edition, (1) says :—

So also the purchaser may in equity, under the covenant for further assurance although not running with the land, require the vendor to perfect a defective title even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration, and this right seems to exist independently of such a covenant, and may be enforced against the vendor's representatives and parties claiming under him for valuable consideration with notice. And the rule seems to be the same even where he has no estate in the land at the date of the conveyance. It was, however, decided in an old case that such an equity could not be enforced against the heir, but there seems to be no good ground for such a distinction; and it has been judicially disapproved of by Lord St. Leonards.

Further, the same conclusion may be reached by regarding the covenant of warranty, which the memorial shows the deed to have contained, though it does not appear to have contained the usual covenant for

(1) P. 808.

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further assurance, as one susceptible of specific performance, just as the latter covenant would have been. From this it follows that if we were to give the suppliant the relief she asks by this petition of right the land and money recovered by her would, in equity, be bound by a trust for, and in short would belong to, the heirs of Col. By, and might be immediately reclaimed by them, and we should thus be, indirectly and through the intervention of a trustee giving to the same person, who in the case of *Tylee* v. *The Queen* (1) sought relief against the crown in respect of this same land just what the Exchequer Court in that case conclusively adjudged they were not entitled to recover. The judgment in this case of *Tylee* v. *The Queen* (1) is not, it is true, mentioned in the printed case or in the pleadings, but it was referred to in argument at the bar in such a way as to involve the admission that we may safely refer to the statement of it contained in the report already cited.

There is, however, still another consideration why, upon an application of the equitable doctrine already referred to, it would be impossible without injustice to the crown to adjudge these ninety acres of land or their value to the present suppliant. I have already said, and I only repeat it to adhere to it, that I cannot hold that Col. By intended in fact to acquire the 110 acres parcel of the 600 acres purchased by him from William McQueen for the use of the crown or otherwise than as his own private property. It is true that he acquired no estate in this portion of his purchase as the title had already vested in the crown, but whether advised as to the legal rights of the crown or not, I am satisfied that Col. By in his dealing with William McQueen was acting in his own interest and not in that of the crown. The 110 acres, were part of the tract of 600 acres included in the purchase deed; the

(1) 7 Can. S. C. R. 651.

residue beyond the 110 acres, it is not and could not be disputed Col. By acquired for his own behoof and held and dealt with as his own private property. The price for the whole six hundred acres was £1,200. It is not proved or even suggested that this purchase money was paid out of the monies of the crown or otherwise than out of Col. By's own private funds, nor is it even pretended that he had public monies in his hands wherewith to make the purchase. Moreover we find Col. By, by taking the abortive arbitration proceedings before referred to to enforce the payment of compensation by the crown, most distinctly asserting his claim to be as between himself and the crown the beneficial owner of this land, and thus repudiating any intention of having acted as a trustee for the crown in the matter of the purchase. I could not come to any other conclusion on the facts admitted without assuming to draw inferences and make presumption which would be directly contrary to those which the actual circumstances warrant. Further I cannot see any principle on which we should be justified in holding, as a matter of legal presumption, that contrary to the fact the purchase of this land would, if it had been effectual, by reason of the official relationship in which Col. By stood towards the crown have enured for the benefit of the crown in such a way as to vest the legal title in the latter. I think, however, that upon another and that an equitable not a legal principle the crown would, if Col. By had made an effectual purchase of these lands now in dispute, have been entitled to say that, standing as he did in the peculiar and quasi fiduciary position as regarded the crown of the commanding officer having on behalf of the crown the whole charge, control and management of the Rideau Canal and the works connected with it, any purchase which he might make of lands already set apart as required for the use of the canal

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must have been deemed to have been made as a trustee for the crown, and that a constructive trust would have arisen respecting any such property so acquired by Col. By, which trust a court of equity would, almost as a matter of course, enforce against him or those claiming under him as volunteers or as purchasers with notice.

It may, however, be said that inasmuch as according to the construction I have put upon the 3rd sec. of 8 George 4, ch. 1, the title to this land vested in the crown so soon as the 110 acres were "set out and ascertained" to be necessary for the use of the canal, the conveyance to Col. By was as regards the land in question wholly ineffectual and inoperative, William McQueen having had nothing to sell or convey, and that consequently any claim which the heirs of Col. By could now set up would arise from the statute of 1843, which was entirely matter *ex post facto*, and that therefore the doctrine of equity applicable to purchases by fiduciary agents can have no application. To this objection it must, in my opinion, be answered that as between the heiress-at-law of William McQueen, the present suppliant, and the heirs or devisees of Col. By, this land is in equity the property of the latter; the suppliant's ancestor having sold it to Col. By and having been by him paid the agreed price for it. That the very foundation of this equitable title of the representatives of Col. By is the contract of purchase and the deed of February, 1832, and that although this purchase, at the time it was entered into, had no present effect as regards an actual title to the land in question, it was just as much in contravention of the rule of equity which disables a person from purchasing property, in respect of which he has fiduciary duties to perform, as it would have been if the legal estate had passed under the conveyance. The principle on which this salutary rule of equity is founded is, as is well known,

the honesty, justice and good policy of incapacitating one who has undertaken the performance of services or duties towards others requiring that trust and confidence should be reposed, from placing himself in a position in which his interest would conflict with his duty. To apply this to the present case, it was the obvious duty of Col. By, even as regards lands already set out and ascertained, and the title to which, as I hold, had therefore absolutely vested in the crown, to abstain from purchasing or trafficking for his own private gain in the claims or supposed rights of the owners of such lands, for the reasons that, there must have existed a hope or expectation that if not of right, yet from the justice, grace and favor of the crown, lands which should, after the construction of the canal was completed, prove not to be required for the work, but to be superfluous for any of its purposes, would not be retained by the crown, but would be returned to the owners from whom such lands had been compulsorily taken, or those to whom they might have assigned their claims. With a view to making profit out of purchases and dealings in the claims of land owners, it would be the direct interest of a commanding officer, who had so far forgotten his duty as to indulge in such speculations, to sacrifice the interests of the crown, by making it appear that lands really required for the canal were in fact superfluous and might be dealt with as the crown would probably be disposed to deal with such lands by returning them to the original owners or their assigns, which, as we have seen, was in fact ultimately done by the statute of 1843. The inevitable tendency of such dealings would therefore be most prejudicial to the rights and interests of the crown. That Col. By himself considered his purchase had placed him in a position antagonistic to the crown, is shown by his own conduct in claiming compensation and by the grossly

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irregular and abortive arbitration proceedings which he entered upon. It is clear, therefore, that although nothing passed under the deed of February, 1832, yet the suppliant could not withold from the heirs or representatives of Col. By anything she might recover from the crown under the 29th section of the act of 1843, but it is equally plain that these same heirs or representatives of Col. By would in turn become constructive trustees for the crown of what they might so recover, by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

The estate sought to be recovered is therefore, to use the technical expression of conveyancers, "at home" in the hands of the crown and upon the plainest principles of equity and in order to avoid circuity we are required to do justice to the crown by dismissing the suppliant's petition of right.

In the argument before this court the learned counsel for the suppliant dwelt with much force on the point that the deed of February, 1832, was void for maintenance either at common law or under the Statute 32 Hy. 8 cap. 9 relating to the sale of pretenced titles, for the reason that William McQueen had been out of possession for more than a year when he executed it. I hold this deed to have been inoperative as a conveyance upon another ground, viz., that William McQueen had, irrespective of being out of possession, no title whatever remaining in him to sell or convey; but I give effect to the deed as being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire. There is nothing in the statute of Henry 8th or in the rules of the common law avoiding contracts savoring of maintenance conflicting with this use of the deed, according to the ordinary every day principles of equity as shown by the passage I have quoted from

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the work of Mr. Dart. Courts of equity constantly administer this relief and no judge or text writer has ever suggested that such an equity in any way conflicts with the law as to maintenance, and I never heard of such a point being even argued before. In requiring a vendor who had nothing vested in him when he executed the conveyance to convey an after-acquired interest the court treats the conveyance as a contract to convey such after-acquired interest, and for the reason that an expressed contract to convey an after-acquired interest would be perfectly free from the objection in question I fail to see why an implied agreement to the same effect should be open to it, more especially as this whole doctrine of maintenance has now, since the passing of the statute which permits the assignment of rights of entry, become almost entirely obsolete. I should say it was principally in a view of the case different from that which I take, viz., that which regards the Rideau Canal Act as not vesting the title to lands taken until after payment of compensation, that this objection of maintenance was argued. It was said that in that case the crown had been in possession for more than a year when the deed of 1832 was made, and that although the title was then in William McQueen it did not pass as the deed was void for maintenance. As I construe 8 Geo. 4 cap. 1, this point does not arise and I express no opinion on it. I understood, however, that the same objection of illegality for maintenance was raised to the validity of the deed in the other aspect of the case which, following the old Upper Canada decisions, I do take, viz., that lands vested as soon as they were set out and ascertained, and it is from this standpoint that I have addressed myself to the objection, and to my own satisfaction sufficiently answered it.

Reverting for a moment to the construction of the

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29th section of the act of 1843, I would say that if I have missed the true construction of that section by holding that restoration of the lands was to be made to the heirs and real representatives, and not to the personal representatives of the original owner the suppliant would still fail inasmuch as she is not the personal representative of Grace McQueen, and no such person is a party to the petition.

Further, the statute of limitations which has been pleaded by the crown is, as it appears to me, a defence to this claim, as it was also held by Richards C.J. to be to that put forward by the devisees of Col. By in *Tylee* v. *The Queen* (1).

The Petition of Rights Act of 1876 contains a clause —the 7th—which seems to authorize this defence, even if the case of *Rustomjee* v. *The Queen* (2) is to be taken as a sufficient authority to show that such a defence would not be available to the crown under the English Petition of Right Act. This 7th section authorizes the crown to raise "any legal or equitable defences " which would have been available had the proceeding " been a suit or action in a competent court between " subject and subject."

By the 4th section of the statute of limitations, Rev. Stats. Ontario, ch. 108, no action is to be brought to recover land but within ten years after the right first accrued. As is well known the following sections of the statute prescribing the time when the right to recover shall be deemed to have accrued in the several cases provided for are not exclusive. In the somewhat unusual case of a title to land being conferred by statute as in the present case, the right to recover must be deemed to have accrued so soon as the statute conferring the title began to operate. The statute 7 Vic. ch. 11, not being limited to come into operation at a time subsequent to the date at which it

(1) 7 Can. S.R.C. 651. (2) 1 Q. B. D. 487.

received the royal assent, took effect at the latter date, viz., the 29th December, 1843, at which time, if this were an action between subject and subject, the suppliant's right would be held to have accrued. Therefore the twenty years, which formerly constituted the statutory bar, elapsed on the 30th December, 1863, when not only the remedy of the suppliant, but by the express provision of the 15th section of the act (which is identical in terms with section 34 of the English act (3-4 W. 4 ch. 27), her right and title to the lands in question also, became extinguished. I fail to see that any answer can be suggested to this defence of the statute. I have considered the case of *Rustomjee* v. *The Queen* (1), holding that the statute of limitations of James 1st was not a defence which the crown could set up to a petition of right. That case is, however, clearly distinguishable from the present in these important respects. The English Petition of Right Act, 1860, which applied in the case of *Rustomjee* v. *The Queen* (1) contains no provisions similar to the 7th section of the Canadian act just set out. Further it appears to me to be questionable whether the decision in *Rustomjee* v. *The Queen*, (1) which related to a *quasi* personal demand against the crown, the remedy for which, not the right itself, would be alone barred by the statute of limitations applicable to it in the case of a subject would apply at all to a claim to recover land where not merely the remedy but by the express words of the act, the "right and title" of the claimant, that is his right and title against all the world, became extinguished at the expiration of the statutory period. I should have thought that in such a case if the crown were in possession the right and title would become barred in its favor as well as in favor of all other persons. So far has this view prevailed, indeed,

(1) 1 Q. B. D. 487.

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that it was even held by a great authority on such questions—Lord St. Leonards—that although the statute in its terms only purported to extinguish the title of the claimant out of possession that it did this so effectually, that in a case where no disabilities could be shown to exist it operated by way of positive prescription and conferred such a perfect title on the party in possession that a court of equity would treat it as marketable and force it on a purchaser (1). I am content, however, to rest this defence of the statute of limitations on the 7th section of the Canadian Petition of Right Act, 1876, as a defence which would have been available if this had been an action between subject and subject; and so considered to hold that the title asserted by the suppliants has long since been barred and extinguished.

It is no answer to this defence of the statute of limitations to say that there was no statutory provision regulating the procedure by petition of right before 1875 when the first Petition of Right Act, 38 Vic. ch. 12, was passed. It does not follow that there was no remedy against the crown either by mandamus or some other proceeding prior to the statute which only prescribed the practice to be applied in such cases and did not originate the remedy. It is said to be a constitutional obligation binding on the advisers of the crown to put in a course of judicial enquiry any reasonable claim on the part of a subject to recover his property in the hands of the crown, and this obligation existed before as well as since the statute of 1875.

Moreover, the statute began to run in 1843 in favor of the body incorporated under the title of the "Principal Officers of Ordnance," in whom the possession of the land remained until it was handed over to the crown as representing the province in 1856.

(1) *Scott* v. *Nixon*, 3 Dr. & War. 388.

That corporation was capable of suing and being sued by the express terms of the act incorporating it. Then nothing can be better established as a universal rule of English law, applying to all statutes of limitations from the statute of fines down to the statutes passed in the 3-4 W. 4, whatever may be their character, whether operating by way of extinguishment of the right or bar to the remedy, that when the statute once begins to run no disability afterwards supervening will stop the running; it continues to run, notwithstanding any subsequent disabilities even though. as Sir William Grant says in *Beckford* v. *Wade* (1), it should be one actually excluding the possibility of obtaining relief, as by the closing of the courts during war or rebellion. The authorities on this head are too numerous and conclusive to leave the least doubt on the point (2).

It is plain therefore that the well known rule of Roman and French law *contra non valentem agere nulla currit præscriptio*, does not in its entirety hold good in English law.

Then to apply the above rule to the present case and to consider its effect when taken in connection with the 7th section of the Petition of Rights Act of 1876, it is manifest that if the crown, after having held the possession of the land from the date of the transfer to the province in 1856, had sold it to a subject, and the purchaser, after the lapse of the statutory period of 20 years dating from 1843, that is for a period making up 20 years when added to the time of possession by the principal officers (namely, the 13 years between 1843 to 1856) but before he had himself held

(1) 17 Ves. 97.

(2) *Doe Duroure* v. *Jones*, 4 T. R. 300; *Cotterell* v. *Dutton*, 4 Taun. 826; *Homfray* v. *Scroope*, 13 Q. B. 509; *Rhodes* v. *Smethurst*, 6 M. & W. 351; *Skeffington* v. *Whitehurst*, 3 Y. & C. 1; *Beckford* v. *Wade*, 17 Ves. 97.

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it for 20 years, had been sued by the suppliant for the recovery of the land, such a purchaser could undoubtedly have successfully pleaded the statute. And if so the crown is enabled by the 7th section of the Petition of Rights Act to do the same, since it is by the express terms of that enactment authorized to set up all defences which would have been available in the case of a subject.

Further, independently of the 7th section of the Petition of Rights Act it would appear clear that the crown acquiring lands from persons in favor of whom the statute of limitations had begun to run before the possession was transfered to the crown would, on the principle of the authorities before referred to, be entitled to the benefit of the statute. Granting that the statute would not begin to run whilst the lands were in the hands of the crown by reason of the claimant being disabled from maintaining an action for the recovery of the land, yet when the statute began to run whilst the land was in the possession of subjects, as were the Principal Officers of Ordnance, it would seem the subsequent disability arising from the possession vesting in the crown ought not to have any other or different effect from that caused by other supervening disabilities such as infancy or coverture.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J :—Le présent appel est d'un jugement rendu par la cour d'Echiquier, le 19 novembre 1883, renvoyant la pétition de droit de l'appelante avec dépens.

Les faits de la cause sont longuement exposés dans la pétition de l'appelante et dans le cas spécial soumis de consentement par les deux parties.

L'aïeule de l'appelante Grace McQueen était incon-

testablement propriétaire en vertu de lettres patentes émises sous le grand sceau, le 20 mai et le 10 juin 1801, d'une grande étendue de terrain dont celui réclamé en cette cause faisait partie. Ce terrain serait plus tard passé en la possession de la Couronne, dans les circonstances suivantes, conformément à l'admission des parties.

4o. Prior to the death of Grace McQueen, Colonel By, the then officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act for His then Majesty, for the uses and purposes of the said Canal, had from the parcels of land patented as aforesaid, ascertained set out and taken possession of one hundred and ten acres thereof, which he thought necessary and proper for the purposes of said Canal, and the officers of Her Majesty or the purchasers from Her Majesty, hereinafter mentioned have held possession of the same from thence hitherto.

La 2e section de l'acte du canal, 8 Geo. 4, ch. 1, donnant à l'officier en charge de la construction du canal le pouvoir d'expropriation pour les fins du canal, est conçu en ces termes (1):

Les sections 4, 5, 6, 7 et 8 du même acte pourvoient au mode de procédure à suivre pour l'évaluation des dommages.

Grace McQueen est décédée *ab intestate* le 11 septembre 1827, laissant comme son héritier légal, Wm McQueen.

Des 110 acres pris pour les fins du canal il n'en a jamais été employés que vingt, le surplus, 90 acres, quoique n'ayant jamais été considéré comme nécessaire pour cette fin, est cependant resté en la possession de la Couronne.

Parmi les moyens de défense invoqués est le suivant:.

13. I submit that by reason of the enhancement of the value of other lands of the said Grace McQueen, and of the other benefits and advantages which accrued to her and those representing her,

(1) See p. 62.

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the crown never became liable to make compensation for the lands in question in this matter.

La vérité de cet étrange moyen de défense est constatée de la manière la plus positive dans les termes suivants de l'article 25 du *special case*, où il est dit :

25o. No payment or compensation in money has ever been made by the crown to Grace McQueen or to William McQueen or to the suppliant or to any person claiming under them for the 20 acres actually used for canal purposes or for the residue of the hundred and ten acres set out, ascertained and taken possession of as aforesaid but not so used.

Il n'est ni admis ni prouvé que Grace McQueen ait jamais consenti en faveur de la Couronne un contrat ou titre quelconque pour transférer à cette dernière le *fee simple* qui lui appartenait dans le terrain en question.

Toutefois il est évident d'après les plaidoiries et les admissions de faits des parties qu'il n'en existe pas et qu'il n'y en a jamais eu. L'article 4 des admissions, constate que c'est avant la mort de Grace McQueen que le colonel By,

Has ascertained, set out and taken possession of one hundred and ten acres.

Il est donc certain qu'il y a eu prise de possesion sans titre à moins que le *setting out* ne soit lui-même un titre, comme on le prétend. D'après la 2e section de 8 G. 4 ch. 1, (*Canal Act*) ce n'est qu'après le procédé préliminaire de détermination du terrain nécessaire pour le canal que l'officièr en charge

is empowered to contract, compromise and agree with all persons who should occupy, be possessed of or interested in any lands or grounds which should be set out or ascertained as aforesaid, for the absolute surrender, etc.

L'interprétation de cette clause a donné lieu à la question de savoir à quelle époque Grace McQueen s'est trouvée expropriée et dépossédée de sa propriété, si toutefois elle l'a été, et quand la Couronne en a été investie. La simple prise de possession pour les fins

du canal suffisait-elle pour cela, où bien ne fallait-il pas après la détermination du terrain requis *a contract, compromise or agreement* auxquels la même section donne les effets légaux en ces termes :

And all such contracts, agreements and surrenders should be valid and effectual in law, to all intents and purposes whatsoever.

Les opinions se sont partagées à ce sujet. Sir William Richards, dans la cause de *Tylee* v. *La Reine* (1) où les représentants du colonel By réclamaient comme sa propriété le terrain en question en cette cause, a décidé que le seul procédé de détermination (*setting out and ascertaining*) avait été suffisant pour investir légalement Sa Majesté de cette même propriété. Dans son jugement de la présente cause, au sujet de la même propriété réclamée maintenant par les représentants de Grace McQueen, l'honorable juge Gwynne, après une longue et savante dissertation sur cette question, en est venu à la conclusion que Grace McQueen étant décédée sans avoir fait aucun contrat avec le colonel By, elle a laissé la propriété en question à William McQueen, son héritier légal. Son argumentation sur ce point me paraît concluante ; comme la citation en serait trop longue, je réfère à son jugement dans cette cause, sur cette question.

D'après l'honorable juge, un titre de Grace McQueen ou de ses représentants était nécessaire pour investir Sa Majesté de la propriété en question. D'après l'opinion de Sir William Richards, le *setting out* et la prise de possession par le colonel By étaient suffisants pour donner un titre à la Couronne. Je suis d'avis avec l'honorable juge Gwynne qu'un titre était nécessaire, mais je ne crois pas comme lui que le *deed* du 6 février 1832 par William McQueen au colonel By, qu'il suppose avoir agi dans cette transaction comme *trustee* de la Couronne, soit un titre suffisant pour avoir investi la Couronne. J'en donnerai les raisons ci-après.

(1) 7 Can. S. C. R. 651.

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L'opinion de l'honorable juge Gwynne sur la nécessité d'un titre a été partagée par Sir Hugh Cairns, alors solliciteur général et plaidant comme tel pour Sa Majesté dans la cause *re Holmes*, (1) où les mêmes questions, au sujet du même terrain ont été soumises à la cour de Chancellerie, en Angleterre, en vertu d'une pétition de droit contre Sa Majesté. Les représentants du colonel By fondaient leur réclamation sur l'acte que lui avait consenti William McQueen, le 5 février 1832; l'honorable solliciteur général dit à ce sujet:

Moreover the suppliants have shown no title, which, if in any one, is in the representative of Grace McQueen.

Le jugement qui renvoya cette pétition est fondé sur le seul motif d'absence de pouvoir dans la cour de Chancellerie en Angleterre pour disposer d'une propriété immobilière en dehors des limites de sa juridiction. Mais on trouve dans l'opinion du solliciteur général une réfutation complète des prétentions du colonel By. Dans une autre partie de son argumentation, après l'exposé des objections à la juridiction de la cour, il exprime l'opinion que c'est aux héritiers de William McQueen qu'appartient cette propriété:

If all these difficulties [*au sujet de la juridiction*] were got over, the persons entitled to claim the restoration would be the representatives of William McQueen, and not those who claim under colonel By. The conveyance of 1832 passed all the interest which William McQueen had in the land, but it would not pass an interest which was only enacted by a long subsequent act of parliament in favour of "the party or parties from whom the land was taken." The suppliants are not such parties.

En effet lorsque la vente à By a été faite par William McQueen, le 6 février 1832, la Couronne était déjà en possession depuis au-delà de cinq ans, c'est-à-dire depuis au moins le 11 septembre 1827, date du décès de Grace McQueen, de sorte que William McQueen

(1) 2 J. & H. p. 540.

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n'avait pu transférer à By des droits à une propriété dont il n'était pas en possession et qui avait depuis longtemps auparavant été enlevés à sa mère au nom de la Couronne qui en était alors en possession.

De plus, cet acte du 6 février 1832, fait onze ans avant la passation de la 7 Vict., ch. 11, sec. 29 (*Vesting Ordnance Act*), ne pouvait transférer au colonel By des droits qui n'ont pu appartenir à William McQueen que onze ans plus tard, en vertu du proviso de la section 29. Ceci devrait être concluant si ce n'était à cause du caractère de *trustee* que l'honorable juge Gwynne attribue au colonel By dans cette transaction du 6 février 1832.

Il n'est pas douteux que lorsque le colonel By exerçait ses attributions dans les limites de la loi 8 Geo. 4, ch. 1, et prenait possession de terrains nécessaires pour les fins du canal, il devait être regardé comme un *trustee* pour Sa Majesté. Mais peut-on lui prêter cette qualité lorsqu'il agit dans une transaction tout à fait en dehors des pouvoirs qui lui sont conférés par le statut, pour l'acquisition d'un terrain qui n'était pas nécessaire pour le canal—à une époque (le 6 février 1832) où le canal était construit, puisqu'il fut ouvert au trafic deux mois après—et pour un terrain qu'il n'a cessé de réclamer comme sa propriété personnelle, comme le démontrent les faits admis et prouvés. Il a protesté bien des fois et de la manière la plus formelle contre cette qualité de *trustee* de la Couronne qu'on lui a prêtée dans la transaction du 6 février 1832. Loin de là, il a mainte fois réclamé en justice et autrement cette propriété comme ayant été acquise par lui et pour son bénéfice personnel, et à défaut de la propriété, une compensation. Une première fois il a obtenu une référence à arbitres, qui ont refusé de lui accorder des dommages à raison de cette propriété. Cette même réclamation a été plus tard référée à un jury, qui a

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décidé comme les arbitres l'avaient déjà fait. Il ne s'est pas contenté de protester personnellement contre cette qualité de *trustee*, ses héritiers et représentants ont soutenu comme lui qu'il n'avait pas cette qualité—et l'un d'eux, C. W. By, a réclamé cette propriété, en juillet 1856, par une demande adressée au gouverneur en conseil, réclamation qui a été repoussée par la Couronne. Les *trustees* de la succession du colonel By ont même réclamé cette propriété, en Angleterre, par une pétition de droit devant la cour de Chancellerie—*in re Holmes* (1). Cette réclamation était encore une répudiation de la qualité de *trustee*. En dernier lieu la même propriété a encore été réclamée par ses héritiers et représentants devant la cour d'Echiquier du Canada, dans la cause de *Tylee* v. *La Reine* (2), où des efforts considérables ont été faits pour faire déclarer que cette propriété appartenait à ses héritiers. Cette procédure ne reposait que sur sa prétention qu'il n'avait pas agi comme *trustee*, mais pour lui-même. Non seulement le colonel By et ses représentants ont nié cette qualité de *trustee*, mais la couronne elle-même se trouve en avoir fait une répudiation solennelle par l'acte 7 Vic. ch. 11, section 29, en déclarant que les propriétés non employées pour l'usage du canal seraient rendues à ceux de qui ils avaient été prises. C'était dire clairement que n'étant pas nécessaires pour le canal, elles avaient été prises illégalement par le colonel By, et répudier sa prétendue qualité de *trustee*. En face de cette répudiation de la part des deux parties intéressées peut-on se fonder sur cette prétendue qualité de *trustee* pour lui faire produire l'effet d'une vente valide et légale. Sans l'attribut de cette qualité au colonel By, l'honorable juge Gwynne aurait été forcé d'admettre que la Couronne n'avait pas de titre, et la conséquence inévitable eut été un jugement en faveur de l'appelante.

(1) 2 J. & H. 527. (2) 7 Can. S. C. R. 651.

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Il me semble que cela suffit pour faire voir que le titre de propriété appartenant à Grace McQueen, en vertu des lettres patentes du mois de mai et juin 1801, n'a jamais été aliéné ni en faveur du colonel By personnellement, ni par son entremise comme *trustee*, en faveur de la couronne. Ce titre existe encore de droit dans la personne des représentants de Grace McQueen.

Indépendamment de ce titre l'appelante peut encore en invoquer un autre, reposant sur un texte de loi. C'est celui qui résulte du proviso suivant de la section 29 de la 7 Vic. ch. 11, conçu en ces termes:

Provided always and be it enacted, that all lands taken from private owners at Bytown, under authority of the Rideau Canal Act, for the use of the Canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

Ainsi que je crois l'avoir établi plus haut le titre de Grace McQueen n'ayant jamais été aliéné, il ne reste donc à sa représentante, l'appelante, qu'à faire voir qu'elle est encore dans les conditions de pouvoir invoquer le bénéfice de ce proviso. Je ne crois pas devoir m'arrêter aux considérations qui ont été faites sur l'endroit qu'occupe cette disposition dans la section 29, comme n'ayant pas de connexion avec les autres parties de cette section où l'on dit qu'elle se trouve isolée et hors de place. Ce ne sont nullement des raisons pour ne pas lui donner son plein et entier effet, si elle est d'ailleurs claire et précise. En outre, elle me semble là à sa place, aussi bien que dans aucune autre partie de l'acte. Il s'agit, il est vrai, de la manière de donner des titres par les officiers de l'ordonnance, dans des seigneuries du Bas-Canada,—mais comme il n'y en avait pas à donner à ceux dont on avait illégalement pris les propriétés sous prétexte qu'elles étaient nécessaires à la construction du canal, il n'y avait qu'en ordonner la restitution. Et il était d'autant plus nécessaire de le faire que la 1ère clause de cette loi

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mettant au nombre des propriétés transférées aux principaux officiers de l'ordonnance, le canal Rideau, *canal and works, lands, &c.*, les dits officiers auraient pu croire que les terrains auxquels le proviso fait allusion leur étaient aussi transférés. Dans le but d'éviter des difficultés, il est évident que la loi ne leur a imposé à cet égard qu'un devoir bien simple et bien facile à remplir, celui de remettre les propriétés prises mais non employées à l'usage du canal, aux personnes de qui elles avaient été prises. Il n'y avait pour cela qu'à en abandonner la possession dont se démettait le Couronne sans en investir les officiers de l'ordonnance comme le fait voir la cédule à la fin de l'acte, transférant le canal et les terrains *lawfully purchased and taken, &c., as necessary for the purposes of the canal.* Ceux qui n'avaient pas été employés pour l'usage du canal n'étaient donc pas mis sous leur contrôle. Les propriétés par l'opération de la loi étaient rendues aux propriétaires. Les officiers de l'ordonnance n'avaient qu'un devoir de constatation de l'identité de ces propriétés a remplir pour mettre ce proviso à exécution.

Quoi qu'il en soit, ce proviso, fait pour réparer de graves injustices commises dans la construction du canal, avait sa place dans cet acte et doit être d'autant plus respecté qu'il n'offre pas un doute possible sur sa portée et sa signification.

Maintenant à quelles conditions sont soumises les personnes désignées dans ce proviso ? Il faut—1o Qu'elles établissent que les propriétés ont été prises sous l'autorisation du *Rideau Canal Act* pour l'usage du canal ; 2o. Que ces mêmes propriétés n'ont pas été employées pour les fins du canal. Voilà les seules conditions imposées. L'admission de faits constate que la propriété réclamée a été prise pour les fins du canal, art. 4, p. 21 du dossier—et l'art. 25 reconnaît qu'elle n'a pas été employée à cette fin. La

preuve de l'appelante étant complète et son droit clairement établi par le proviso, rien ne devrait donc plus faire obstacle à la remise de sa propriété.

Mais pour éviter de donner effet à une disposition légale aussi claire que celle dont il s'agit, on refuse de lui reconnaître le caractère général et absolu que lui donne les termes dans lesquels elle est conçue, pour en restreindre l'application au bénéfice d'un seul individu, Nicholas Sparks.

Cette prétention est appuyée sur la 9e Victoria, ch. 42, dont on trouve une analyse dans le jugement de l'honorable juge Gwynne qui, comme Sir William Richards dans la cause de *Tylee* v. *La Reine*, exprime l'opinion que ce statut n'a été passé que pour venir au secours de Nicholas Sparks.

Il est certain que ce statut déclare que le proviso de la 29e clause de la 7e Vict., ch. 11, *shall be construed to apply to all land at Bytown set out and ascertained and taken from Nicholas Sparks* en vertu de l'acte du canal Rideau, 8 Geo. 4, ch. 1,—et il est pourvu à un mode de procédure pour le faire rentrer en possesion. Du fait que Sparks seul est mentionné dans cet acte, on n'en peut conclure autre chose si ce n'est qu'il est un de ceux auxquels il était applicable, il n'est pas déclaré être le seul ayant le droit d'invoquer le bénéfice du la loi, il est seulement dit que le proviso sera interprété comme le comprenant. Nulle expression comporte l'idée qu'il ne s'applique à aucune autre personne et aucune expression dans l'acte n'en comporte la révocation. Comme ces dispositions législatives ne sont pas en contradiction les unes avec les autres, elles peuvent et doivent également subsister, comme indépendantes les unes des autres. On a donné aussi, suivant moi, à la 9e Vic., ch. 42, un effet restrictif que ne comporte pas la teneur de ses dispositions. Cet acte ne

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me paraît aucunement affecter les droits de l'appelante en vertu du proviso.

Une autre objection est que par l'acte 19 Vic. ch. 54, la Couronne a été investie du terrain réclamé. L'honorable juge Gwynne s'exprime ainsi au sujet de cette proposition :

Then it is clear that, and indeed it is admitted that (notwithstanding anything contained in 7th Vic. c. 11,) the lands in question here were by 19 Vic. c. 54 vested in her Majesty for the public uses of the late Province of Canada, and that while still so vested they were by the B. N. A. Act placed under the exclusive control of the Dominion Parliament.

Malgré tout le respect que j'ai pour l'opinion de l'honorable juge, je suis forcé de différer avec lui sur cette question. Il me semble, au contraire que cet acte, dont le but était de transporter à l'un des principaux secrétaires d'Etat pour le département de la guerre les terrains qui étaient en vertu de la 7e Vic. ch. 11 sous le contrôle des principaux officiers de l'ordonnance, a soigneusement évité de faire aucune mention du terrain réclamé, et que les expressions employées font voir qu'il est resté dans la position qui lui a été faite par le proviso de la section 29.

Les propriétés mentionnées dans cet acte ont été divisées en deux classes énumérées dans la première et la deuxième cédules annexées au dit acte. Celles de la première cédule consistant en constructions et travaux militaires, sont transportées au principal Secrétaire d'Etat pour la guerre. Celles de la deuxième cédule sont déclarées retourner à Sa Majesté pour l'avantage de la province. Au nombre de ces propriétés se trouve le Canal Rideau dans le paragraphe ainsi conçu :

Rideau and Ottawa Canals, City of Ottawa Barracks, Block houses and adjuncts of the Canal.

A moins de prétendre que les 90 acres des terrains réclamés se trouvent compris dans le terme " adjunct,"

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il est évident qu'ils en sont exclus. Le mot *adjunct* qui est défini en anglais "*something added to another but not essentially a part of it*," ne peut s'appliquer qu'aux choses nécessaires et actuellement employées à l'exploitation du canal. Les 90 acres en question n'en ont jamais fait partie et n'ont jamais été employés à l'usage du canal, comme le fait est reconnu et admis, et ne peuvent être par conséquent considérés comme un "adjunct" du canal.

Ce statut loin d'avoir investi la Couronne de la propriété en question pour le bénéfice de la province en révoquant le proviso, a au contraire réservé les droits de tous ceux qui avaient des réclamations au sujet des terrains, bâtisses ou autres propriétés mentionnées dans la section 7 précédente. Cette section est celle opérant le transport des propriétés de la cédule 2e.

La section 9 va encore plus loin en limitant la révocation de l'acte 7 Vict., ch. 11, aux seules propriétés mentionnées dans la 2e cédule, elle laisse évidemment subsister le proviso de la section 29. De sorte que ce statut n'affecte en aucune manière le droit de l'appelante.

Il y a le même argument à faire contre la prétention que le terrain en question a passé au gouvernement fédéral par l'acte de confédération. La section 108 lui transporte les propriétés mentionnées dans la 3e cédule, article 1er: "*Canals, with lands and water powers connected therewith.*" Cet article comprend certainement le canal Rideau, et les mots "*with lands connected therewith,*" comprennent bien certainement aussi les terrains nécessaires et employés à l'usage du canal, mais ne comprennent pas les 90 acres qui sont admis n'avoir jamais été employés à l'usage du canal.

Après avoir attentivement examiné les divers statuts qui concernent le sujet en question, j'en suis venu à la conclusion qu'aucun d'eux n'a eu l'effet de révoquer le proviso de la section 29, et qu'il doit encore avoir son

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plein et entier effet et qu'il forme un titre légal en faveur de l'appelante. Pour conclure je citerai les paroles de Sir Hugh Cairns *in re Holmes* (1) qui, suivant moi, sont parfaitement applicables à cette cause :

There has been no conveyance to vest the legal estate in the Crown or previously in the ordnance officers, and the enactment that the lands be restored is not a direction that they shall be reconveyed, nothing being necessary except the surrender of possession.

Il est vrai que les opinions exprimées par Sir Hugh Cairns dans cette cause, *re Holmes* (1), n'ont pas reçu la sanction judiciaire, parce que la cour de Chancellerie se déclarant incompétente à statuer sur les droits de propriété d'immeubles situés en dehors des limites de de sa juridiction, ne rendit en conséquence aucune décision sur les autres questions débattues.

Mais ces opinions de Sir Hugh Cairns n'en sont pas moins de la plus haute importance et ne méritent pas moins la plus grande considération, non seulement à cause de la science profonde de cet éminent jurisconsulte, mais aussi par le fait que dans cette cause il parlait officiellement comme Solliciteur-général, au nom de Sa Majesté, et que sa haute fonction que l'on peut assimuler à une magistrature, l'obligeait dans ce débat entre Sa Majesté d'un côté et des sujets de l'autre, à dire de quel côté se trouvait la loi et la justice. Il s'est formellement déclaré contre les prétentions des héritiers By, déclarant que la loi avait ordonnée de rendre la propriété en question aux héritiers de Grace McQueen.

Ces opinions me paraissent non seulement justifier les droits de l'appelante, mais en être en même temps une admission solennelle devant Sa Majesté.

La Couronne oppose encore deux autres moyens de défense, le premier fondé sur la prescription introduite par la septième clause de l'acte des pétitions de droit de 1876, et la deuxième, un *estoppel*, fondé sur l'acte de vente du 6 février 1832, au colonel By, par William

(1) 2 *J. & H.* 535.

McQueen, dont l'appelante est héritière en loi et comme telle garante de l'exécution des dits actes.

La 7e section de l'acte des Pétitions de droit est en ces termes:

The statement in defence or demurrer may raise beside any legal or equitable defences in fact or in law available under this Act, any legal or equitable defence which would have been available had the proceedings been a suit or action in a competent court between subject and subject, and any grounds of defence which would be sufficient on behalf of Her Majesty may be alleged on behalf of any such person aforesaid.

La Couronne par cette section se trouve avoir maintenant le droit qu'elle ne possédait pas avant ce statut, dans Ontario, et qu'elle ne possède pas encore actuellement en Angleterre, d'invoquer les statuts de *limitation*. Ce droit ne lui est pas conféré d'une manière directe, il est une conséquence du privilège accordé à Sa Majesté de plaider tous moyens de droit ou d'équité qui pourraient l'être, comme dans une poursuite entre particuliers. Les statuts de limitation ou de prescription étant un moyen de défense à la disposition des particuliers; l'effet de cette section est de permettre à la Couronne de s'en prévaloir.

L'acte des pétitions de droit a été passé pour combler une lacune considérable dans notre législation qui ne permettait pas de mettre la Couronne en cause pour le règlement des difficultés résultant de ses nombreux contrats pour travaux publics, réclamation de propriété, etc., etc. Il y avait urgence à cet égard et pour rémédier à ces graves inconvénients, il ne fallait qu'un simple acte accordant la faculté de poursuivre la Couronne, et réglant le mode de procéder. Aucune législation nouvelle sur le droit civil n'était nécessaire pour cela. Les droits d'action sont réglés par le droit civil de chaque province et doivent être jugés et décidés d'après ce même droit.

La Couronne n'ayant pas avant cet acte le droit de

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plaider prescription, on a donc en lui accordant le privilège apporté une modification importante au droit civil des provinces dans lesquelles ce droit n'existait pas avant d'avoir été introduit par cette loi. Cette modification est d'autant plus importante que Sir W. Richards dans son jugement de la cause de ***Tylee*** v. ***La Reine*** (1) a donné à cette loi un effet rétroactif, et déclar prescrits et éteints les droits qui ne l'auraient pas été sans cela. En supposant qu'il n'y aurait eu que ce seul moyen de défense, Tylee aurait donc vu ses droits éteints et prescrits au moment où entrait en force une loi qui en lui ouvrant la port des tribunaux, lui enlevait en même temps son droit d'action. Tylee n'est pas un cas isolé, l'appelante n'est pas non plus seule dans cette position anormale. Cette proscription, car c'en est une, et des plus injuste, fait main basse sur les droits acquis de nombreux sujets qui sachant que la Couronne ne prescrivait pas contre eux, ne se sont guère hâtés de faire valoir leurs réclamations contre elle. Il est de toute évidence que cette loi viole des droits acquis et que son approbation sera dans bien des cas une véritable spoliation consommée au nom de la loi. Peut-on dire que la loi avait en vue un pareil résultat? Certainement non, car rien dans son texte n'indique une semblable intention. Les criantes injustices qu'elle causerait si elle était appliquée aux transactions passées sont de puissantes raisons en loi pour refuser de lui donner un effet rétroactif. Le sujet qui fait la matière de cette législation était tout-à-fait nouveau, et, comme toute loi nouvelle, elle ne doit avoir d'application que pour le passé. Cette loi pouvant causer des injustices aussi graves que celles auxquelles je viens de faire allusion, ne peut donc avoir d'effet rétroactif à moins d'une disposition formelle à cet effet qui n'existe pas. Il n'est guère nécessaire de référer aux autorités sur la rétroactivité des lois. Elles

(1) 7 Can. S. C. R. 651.

sont très connues et on en trouvera une longue liste dans la cause de *Taylor* v. *La Reine*, (1).

Pour arriver à admettre la rétroactivité de cette loi, Sir W. Richards s'est sans doute appuyé sur cette considération, qu'en général, la présomption de non rétroactivité des lois ne s'applique pas à celles qui ne concernent que la procédure et la pratique des cours. Ceci est sans doute vrai pour ce qui concerne la procédure et la pratique, mais non pas lorsqu'il s'agit comme ici d'un principe du droit civil: la prescription. Mais même en fait de procédure, il y a des exceptions dans les cas où la nouvelle procédure préjudicierait aux droits établis sous l'ancienne, ou porterait préjudice à la bonne foi des parties (2).

But the new procedure would be presumably inapplicable where its application would prejudice rights established under the old or would involve a breach of faith between parties.

Le même auteur page 271 dit:

The general principle, indeed, seems to be that alterations in procedure are always retrospective, unless there be some good reason against it (3).

Puisque d'après l'autorité ci-dessus, il y a lieu de faire exception à l'application de ce principe lorsqu'il y a de bonne raison, l'exception doit être appliquée dans le cas actuel, car je ne pense pas qu'il puisse s'en trouver un seul dans lesquels il y ait de meilleurs et plus justes raisons pour ne pas donner d'effet rétroactif à la loi. J'ai déjà signalé plus haut les graves injustices qui résulteront de la rétroactivité de cette loi. Elle détruit certainement le droit de propriété de l'appelante. Et dans quelles circonstances? C'est lorsque la Couronne admet qu'elle n'a jamais payé à l'appelante le prix de sa propriété, ni à ses auteurs, ni à qui que ce soit pour elle, lorsqu'un texte de loi

(1) 1 Can. S. C. R. 65.
(2) Maxwell p. 273.
(3) See per Lord Blackburn in *Gardner* v. *Lucas*, 3 App. Cas. 603; and *Kimbray* v. *Draper*, L. R. 3 Q. B. 163.

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non révoqué, le proviso de la section 29, reconnaissait ses droits et qu'aucune prescription ne les affectait. Par cette rétroactivité on lui enlève sa propriété pour l'attribuer contre toute justice à Sa Majesté, qui a déclaré en vertu d'une loi que cette propriété devait être rendue à l'appelante. Et encore on ne peut arriver à ce déplorable résultant qu'en donnant à la disposition 7 de l'acte des Pétitions de droit un effet qui dépasse la limite des pouvoirs du gouvernement fédéral. Cette disposition, si elle a l'effet d'introduire une prescription qui n'existait pas, est évidemment inconstitutionnelle comme enfreignant les droits des législatures provinciales—tout autant qu'un statut du parlement fédéral qui aurait déclaré à cette époque que Sa Majesté avait eu et aurait à l'avenir le droit d'invoquer les limitations et prescriptions.—Un semblable statut eût attiré l'attention et n'aurait sans doute pas été adopté parcequ'il eût été considéré comme une invasion des droits des provinces—mais dans la forme adoptée, on ne s'est pas aperçu qu'on donnait simplement à la Couronne le droit de faire les mêmes défenses que dans les causes entre particuliers, on lui accordait un droit dont l'application pour le passé causerait de graves injustices. Je crois que, comme loi de procédure, il y a lieu de faire ici l'exception dont parle Maxwell. De plus, je considère cette disposition contraire aux droits des provinces, comme inconstitutionnelle. J'en conclus, pour ces deux motifs, qu'on ne peut opposer à l'appelante la prescription fondée sur la 7e section de l'acte des Pétitions de droit, etc.

Quant à l'*estoppel* fondé sur l'acte de vente du 6 février 1832 par William McQueen au colonel By, il est clair qu'il ne peut être opposé à l'appelante, d'abord parce qu'elle n'était pas partie à cet acte, et ensuite parce que cet acte pour la partie concernant les 110

acres était nul pour les raisons que j'ai données plus haut, et enfin parceque le titre de l'appelante est établi par la loi, le proviso de la section 29. De plus, d'après les autorités suivantes, on ne peut se prévaloir de l'*estoppel* contre un acte du parlement:

Everest and Strode Law of Estoppel (1).

It is, perhaps, owing to the above rule, viz: that an Act of Parliament is a record to which every one is privy, that the doctrine of estoppel has been considered to have no application so as to permit parties to a contract to estop themselves in face of an Act of Partiament. However, whatever its origin, such a rule has been laid down (c) in *re* Stapleford Colliery Co., Barrow's case (2).

Bacon V. C. dans la cause *in re* Barrow, dit (2):

But the doctrine of estoppel cannot be applied to an Act of Parliament Estoppel only applies to a contract *inter partes*, and it is not competent to parties to a contract to estop themselves or any body else in the face of an Act of Parliament.

Pour tous ces motifs j'en suis venu aux conclusions suivantes: 1o. Que les droits de propriété appartenant à Grace McQueen en vertu des lettres patentes du mois de mai et juin 1801, n'ont jamais été légalement aliénés; 2o. Que la partie de sa propriété prise sous prétexte qu'elle était nécessaire à la construction du canal, n'ayant jamais été employée à cet usage, le proviso de la section 29 de 7 Vic., ch. 11, en ordonne la restitution. 3o; Qu'aucune prescription ne peut lui être opposée. 4o; Qu'il n'y a pas lieu non plus d'invoquer un *estoppel* fondé sur l'acte du 6 février 1832.

Je suis d'avis que l'appel devrait être alloué.

HENRY J.—This is an action brought by petition of right and involves the title to a large and very valuable property, consisting of about ninety acres in the City of Ottawa, part of which is known as Cartier Square. It originally formed a part of patents to one Grace McQueen, dated 10th May, 1801, and 10th June,

(1) P. 40. (2) 14 Ch. D. at p. 441.

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1801, containing about 600 acres. Under a statute of Upper Canada, passed in 1827, (8 Geo. 4, ch. 1) commonly called the Rideau Canal Act, His then Majesty was invested with certain powers and authorities necessary to the making, maintaining and using the canal intended to be completed under His Majesty's direction for connecting the waters of Lake Ontario with the River Ottawa, and for other purposes therein mentioned. Lieut. Col. John By, of the Royal Engineers, was the officer employed by His Majesty to superintend the work of making the canal, and it is admitted that he some time before the passage of the act, and before the death of Grace McQueen, measured and made a plan of about 110 acres out of the lands granted or conveyed by the patents before mentioned to her, and took possession thereof for His Majesty, and it is alleged that such possession has been continued up to the time of the bringing of this suit, which was on the 1st of February, 1879. The canal was finished and opened in May, 1832. Grace McQueen died intestate on the 18th September, 1827, a few months after the passing of the act, leaving William McQueen, the father of the suppliant, her sole heir-at-law. He died intestate on the 20th October, 1845, leaving the suppliant his sole heiress at law. That in the ordinary course would have established the title to the lands in question in the suppliant. How then has she been divested of that title?

It is said in the first place that she was divested of the title to the 110 acres by the act of Col. By as before stated. I cannot arrive at that conclusion for the statute provides that the laying off of the land and the filing of the plan made of itself no expropriation, and provided that the engineer in question was authorized to arrange for payment for it with the owner and obtain a surrender of title to His Majesty.

Such was not done in the lifetime of Grace McQueen, nor afterwards, and it does not appear that she had any knowledge of the laying out of the 110 acres or of the filing of the plan. She never was paid anything for the land so set apart and I have no hesitation in declaring that the title to it was in her at the time of her death, and that title descended to William McQueen her son and only heir. In *Re Holmes*, (2); Sir Hugh Cairns, Solicitor General, on the part of the Crown, referring to the circumstances of this case, said:

> There has been no conveyance to test the legal estate in the Crown, or previously in the ordnance officers; and the enactment that the lands be restored is not a direction that they shall be re-conveyed, nothing being necessary except the surrender of possession.

Again, on page 536 he says:—

> If all these difficulties were got over the persons entitled to claim restoration would be the representatives of William McQueen, and not those who claim under Col. By. The conveyance of 1832 passed all the interest which Wm. McQueen had in the land, but it could not pass an interest which was only created by a long subsequent act of Parliament in favor of "the party or parties from whom the land was taken." The suppliants are not such parties.

The positions so taken by the learned solicitor were combatted by counsel on the other side, and did not form any part of the judgment in the case. Independently, then, of the dicta just quoted, we must consider the effect of the deed from William McQueen to By on the 6th February, 1832. At that time the canal was about finished, and it was opened for traffic in May following. The 110 acres were then in the possession of the crown, and not in possession of either McQueen or By. I am, therefore, of opinion there was no legal conveyance of the 110 acres to By. The title was after that either in the crown or in McQueen. If McQueen held the title, but even out of possession, the

(1) 2 H. & J. 535.

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law denied him the power or right to transfer it; if he did not transfer it it remained in him. If he should subsequently obtain the possession either by a suit at law or otherwise he would then be in a position to make a legal transfer, and if seeking to recover the posession from a wrongful holder by a suit at law the defendant could not prevent his recovery by setting up the inoperative conveyance. We are not now trying the question as to which party to the conveyance the recovery would finally benefit. The case before us is between the party who made the inoperative conveyance, who was no doubt the titled owner, and one who claims that the title was divested before the conveyance. If that position is established the right of the claimant never existed.

It is admitted on all sides that but 20 out of the 110 acres were required for the canal purposes, and that no part of the remaining 90 acres was ever used or considered necessary for the use of the canal. The possession of it was, however, as I think wrongfully withheld at all events since the passage on the 9th of December, 1843, commonly called "The Ordnance Vesting Act." That act vested by general terms certain public lands, &c., including the Rideau Canal, and the lands and works belonging thereto in the principal officers of Her Majesty's Ordnance in Great Britain, and their successors in office, subject to the provisions of the said act. Now one important provision of that act in the 29th sec. is as follows:—

> Provided always, and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal which have not been used for that purpose be restored to the party or parties from whom they were taken.

Now the 90 acres in question in this suit were taken as the proviso states but not used—all lands similarly placed became subject to the enactment—no matter

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from how many parties they had been taken. They were to be "restored" not reconveyed. It may be fairly argued that if the legislature or party or the parties who framed the act considered the parties wholly divested of the title to the lands in question we would have found the word re-conveyed instead of the word restored, and directions given and authority enacted for the party or parties to make the conveyances. If that is not the true construction then a most inapt word was used to provide for a conveyance. I entirely agree with Sir Hugh Cairns that no conveyance was considered necessary and that none is provided for. It is a legislative intimation to the parties in effect saying—The crown has taken more of your land than was necessary for the canal, the title of what was necessary for the canal and which has been used for that purpose, with other public properties of various kinds, has been handed over to the principal officers of Her Majesty's Ordnance, but they are not to have anything to do with the lands taken but not used for canal purposes. The enactment in the proviso not only proclaims that the principal officers of the ordnance shall have no title in or control over the now used lands, but actually conveys them to the parties from whom they were taken. The act is a general and most comprehensive one and intended to cover all the lands and property held by the crown and containing the declaration that the crown should no longer exercise any right to or have any interest in the lands referred to.

In 1856 an act was passed by the legislature of the late Province of Canada, intituled:

An act for transferring to one of Her Majesty's Principal Secretaries of State the powers and estates and property therein described now vested in the principal officers of the Ordnance and for vesting other parts of the Ordnance's estate and property therein

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described in Her Majesty the Queen for the benefit, use and purpose of this Province.

Section 9 of that act is as follows :

With respect to all lands and other real property comprised in the second schedule to this act annexed, which by this act shall be vested in Her Majesty the Queen for the benefit, use and purposes of this Province in the said recited act of the seventh year of the reign of Her present Majesty, and every clause, matter and thing therein contained, shall from and immediately after the passing of this act be repealed, and the same is and are hereby repealed accordingly.

On reading the second schedule referred to it will be found that a great many lots of land and other property are described and included. The only reference to the Rideau Canal is in the last line of the schedule and in these words : "Rideau and Ottawa Canals;" and under the descriptive heading there are the words, "City of Ottawa, Barracks, Block-houses and adjuncts of the Canals."

What, then, is meant by the words adjuncts to the canals ? Surely they cannot be intended to apply to the 90 acres which, since the opening of the canal in 1832—24 years before—had not only never been used in connection with the canal, but which was considered by the government agents as not required for the working or maintenance of it, and which must have been within the knowledge of the legislature which passed and those who prepared the proviso in the act 7 Vic. ch. 11. The evidence furnished by the case clearly shows that for 24 years previous to 1856 the 90 acres in question formed no part of the adjuncts of the canal. If not sec. 9 above quoted not only does not repeal the proviso in question so as to affect the 90 acres, but virtually re-enacts it. It is to that extent a legislative declaration that that proviso was in force in 1856 and should have subsequent operation.

The transfer to Her Majesty made by sec. 6 of the act of 1856 were stated to be:

All and every the lands and other real property in this province comprised in the second schedule to the act annexed, being a portion of the messauges, lands, tenements, estates and heriditaments, comprised within the provisions and meaning of the said in part recited act of the 7th year of the reign of Her present Majesty, which prior to the passing of this act were by the said recited act or otherwise vested in the said principal officers of Her Majesty's ordnance, and their successors in the said office and which have been used or occupied for the service of the ordnance department or for military defence, &c.

Now, to include lands in that referential description it must be shown first that such lands were at the passing of the act vested in the principal officers of the ordnance department, for the statute only refers to lands previously so vested. I have already shown that the 90 acres in question were never so vested, and that the title of Grace McQueen and her heirs remained undivested, notwithstanding the laying off of the 110 acres and the filing of the plan. The further proof necessary would be to show that the lands to be vested in Her Majesty for the use of the Province had been used or occupied either for the service of the ordnance department, which is not pretended, or for military defence, and which is also not pretended. In fact, the evidence afforded by the case shows that the 90 acres in question was not used; if used at all it was not for the service of the ordnance department or for military defence. The lands held and used for military purposes are designated in the first schedule, and if the lands in question had been so used they would have been therein included. For these reasons then, I conclude that the 90 acres in question were not included in the section in question.

The next section (the 7th) contains this enactment:

Provided always, and be it further enacted, that nothing herein contained shall be taken to affect the rights of any parties claiming any of the lands, buildings, or other property referred to in the next preceding section, and in the said second schedule.

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If then the suppliant was entitled to claim the land in question at the passing of that act her rights are reserved to her thereby.

This statute is re-enacted *verbatim* in the Consolidated Statutes of Canada (1859) at page 292.

It is contended that the act 9 Vic. chap. 4, which passed at the instance of Nicholas Sparks, excluded all other persons in whose favor the proviso in the act 7th Vic. chap. 11, was enacted, but I cannot bring myself to the conclusion that it had any such legal result. If the suppliant had the legal estate in the 90 acres in question either at common law or by the operation of the statute 32 Henry VIII, the enactment contained in the proviso did not add to her title, but if she had not then I am of the opinion she got such a title as would convey to her the fee simple, and that title could only be divested by direct legislation. It was well known when that proviso was enacted that 90 out of the 110 acres had never been used for canal purposes and it being contrary to all law relative to the expropriation of private lands for public purposes that the 90 acres being such a large excess should, in the first place, have been marked off and, a greater wrong still, retained—it is but right to conclude that the 90 acres should be restored. Neither Grace McQueen nor her heirs got any payment whatever for the 110 acres, but it is argued that because an award was made at the instance of Col. By deciding that the property unexpropriated was increased in value to the extent of the 110 acres, her son was paid for them. My objection to that contention is that he was in no way a party to the reference and his interests were not affected by the award. In the next place neither of the reference papers were produced nor was the award, and it is therefore impossible to say whether the reference for the valuation was for the 110 acres or

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for but the twenty then being used. From the fact that it was then known that the ninety acres were not then required or used, I think the proper conclusion, in the absence of proof to the contrary, is that the arbitration only had reference to the 20 acres then being used and, further, it is not easy to believe that it would be a necessary sacrifice of more than one sixth of the whole of the 600 acres or that any arbitrators would have so awarded. It appears from the case that Nicholas Sparks had made a surrender of his title to certain parts of land to Col. By for canal purposes and thereby divested himself of all claim thereto. He parted with such parts by a surrender and it was not taken by expropriation proceedings. When therefore the act 7th Vic. chap. 11, was passed he occupied a position in respect to the lands surrendered wholly different from that of Grace McQueen's heirs. It was considered, therefore, that as respects his interests in the whole of his lands taken further legislation might be necessary. To make title in him as to the lands surrendered it was necessary not merely to restore the possession but to give him a title, either by express legislation or by a re-conveyance, to be authorized by an act. In the view of Lord Cairns, when arguing the case of *re Holmes* (1), before mentioned, and which I have adopted, no conveyance to the heir of Grace McQueen was necessary. The act of 1846 (the Sparks act) was considered necessary to provide for such re-conveyance, and it was done by duly reciting that doubts existed as to the construction of the proviso in the act 7 Vic. chap. 11, and it was enacted that portions of the land should be conveyed to him; but the legislature then and for the first time excepted such lands as might be desirable to retain for the service of the Ordnance Department for military purposes.

(1) J. & H. 527.

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The legislature, therefore, as far as the canal purposes were concerned by that act gave effect to the terms of the proviso, but as some of the land might be required for military purposes, for which purposes Sparks had made no surrender, it enacted virtually an expropriation to obtain them under the common and usual terms by valuation of and payment to be made therefor. That was substantially, as far as Sparks was concerned, a re-enactment of the terms of the proviso. The legislature then speaking by the act, said to Sparks: We will carry out the terms of the proviso and convey all the unused land to you, but some of the land may be required for military purposes. We will except such in case it may be required, and if required, will pay you for it. If then Sparks was entitled to the substantial restoration of it by the necessary legal means, why should not other parties still more favorably situated be equally so? The difficulty in Sparks' case may have been considered to have arisen from the surrender he made by which his title to parts of the land was divested, but had he occupied the position of William McQueen I am of opinion no act would have been necessary to explain the terms of proviso. There may too have been other reasons why doubts were entertained as to the proviso. Independently, then, of the legislation as to the lands of Sparks by the act of 1846, the reason for the doubts, as to the true intent and meaning of the same referred to in the act, and as to the land to which it was intended to apply, are not recited or explained. I have already referred to the doubts as to the position of Sparks, after his surrender of parts of his land for canal purposes, but there must have been doubts also as to the extent to which the proviso operated as far as he was alone concerned, for I find the act declares:

That the proviso should be construed to apply to all the land at Bytown set out and ascertained, and taken from Nicholas Sparks, Esq., under the provisions of the act 8 Geo. 4 ch. 1, excepting such

parts as were actually occupied as a part of the canal, and some other exceptions defining what was to be retained.

The section in which this provision appears shows that under the circumstances it might been considered necessary in Sparks' case to define particularly the land to which the proviso was intended to apply, and therefore the reason is shown why the words referring to the same in the enactment were used. The matter was therefore one between Sparks alone and the public, and whatever way the matter was compromised or settled should not affect the rights of others. The application to the legislature was no doubt intended only to settle such doubts and difficulties as existed between those interested parties, and was never intended, I take it, to affect the rights of others. Sparks wanted a declaration as to the meaning of the proviso, and the extent to which his interests were affected as regards the quantity of his land to be restored and I conclude that the legislature meant nothing further. The act recited "that proceedings at law and equity which had arisen out of such doubts had been commenced and were still pending." In 1846 suits at law and in equity were pending. In such suits, from the references to them, we must conclude Sparks alone was interested and the legislature was appealed to for aid to settle the matter in difference. This was done by the act giving Sparks a construction of the proviso, which gave him substantially the same as the proviso. That construction is in favor of the claimant's case. At all events she is unaffected by the act as the declaration in favor of Sparks does not directly or even indirectly limit the terms of the proviso to the lands of Sparks but leaves it as to others in full force. It was in my opinion but an explanatory act applicable solely to the claims of Sparks and so intended. It could only have affected the interests of others by

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an express and direct application to them and not by speculative inferences liable to error and the working of injustice.

To the petition of right in this case title to the land in question herein is pleaded to be in Her Majesty for the benefit and use of Canada. I have carefully examined and considered the provincial statutes and have shown that the land was not included in any of them having for their object the transfer of title or interest in the public lands and property from the trust held, as to them, by the principal officers of Her Majesty's Ordnance Department, and I have shown also that it was not included in the trust previously created in those officers. I will next refer to the Imperial Confederation Act of 1867. The 108th section—the only one necessary to be looked at—is as follows:—

> The public works and property of each Province enumerated in the third schedule to this act shall be the property of Canada.

The third schedule referred to in the section just recited is headed:

> Provincial public works and property to be the property of Canada.

The only items of the schedule affecting the question are the 1st, 9th and 10th—the 1st is:

> Canals, with lands and water powers connected therewith.

For thirty-five years previous to the passing of that act the 90 acres in question had not been connected with the canal, and if considered to have been so connected the connection, such as it had been, was severed by the act of 1843.

The 9th item is as follows:

> Property transferred by the Imperial Government and known as Ordnance property.

That item certainly does not include the 90 acres in question.

The 10th item:

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Armories, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes.

That item does not include the 90 acres in question, for it never was set apart for "general public purposes or, indeed, for any special public purpose.

If the title to the 90 acres was never vested in the principal officers of Her Majesty's Ordnance or the Secretary for War it certainly never passed to Her Majesty for the benefit or use of Canada and it did not pass to Canada by the Imperial Confederation Act.

I am, therefore, of the opinion that the defence set up on that ground must fail. If since the Confederation Act was passed the possession of the 90 acres has been held by some parties connected with the Dominion Government claiming under that act, it is my opinion that such holding was unauthorized.

I have thus shown my opinion to be that the suppliant, after at all events the passing of the act of 1843, was legally entitled, at least, to the 90 acres in question. It is, however, contended that her claim was barred by the statute of limitations and I will proceed to consider that question.

Up to the time of the passing of the act of Canada passed on the 12th of April, 1876, entitled: "An act to make further provision for the institution of suits against the Crown by petition of right," the defence of the statute of limitations could not be pleaded by the sovereign.

By section 7 of that act: "Any legal or equitable defences which would have been available had the proceedings been a suit or action in a competent court between subject and subject will be available to the crown."

The provision is comprehensive enough to include the defence of the statute of limitations, and we are not to inquire whether or not the legislature meant to

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enable the sovereign to set up that defence. Whether such a defence can be admitted under the circumstances in this case is a matter calling for consideration. To answer such an inquiry it is necessary to consider the circumstances under which the legislation in question took place and the legislature had no doubt in providing a new jurisdiction the right to prescribe how it should be exercised. Sir Peter Maxwell, in his work on "The Interpretation of Statutes," at page 257, says:—

> Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. *Nova constitutio futuris forman imponere debet non praeteritis.* They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended. It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed out of respect to the legislature to be intended not to have a retrospective operation.
>
> See *Williams* v. *Smith* (1); *Jackson* v. *Woolley* (2); *Re Suche & Co.* (3); *Re Cochran's Estate* (4); and *Young* v. *Hughes* (5).

At page 273 the same author says:—

> But the new procedure would be presumebly inapplicable where its application would prejudice rights established under the old, or would involve a breach of faith between the parties.

In *Re Phœnix Bessemer Steel Co.*, (6) Jessel M. R. as to a question whether an act had a retrospective effect says:—

> The general principle upon which alterations of the law are made is not to interfere with rights and interests that are already ascertained and determined. Nothing is more reprehensible in legisla-

(1) 4 H. & N. 559.
(2) 8 E. & B. 778.
(3) 1 Ch. D. 48.
(4) L. R. 5 Eq. 209.
(5) 4 H. & N. 76.
(6) 45 L. J. Eq. 11.

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tion than to deprive people of their rights without compensation. * * * If the act is to have the effect contended for (a retrospective one) the result will be to deprive these creditors of an ascertained right. I am of opinion that cannot be done without express words.

In *re Joseph Suche Co.*, (1) the same learned judge referring to his previous judgment just cited and quoted from, after saying he might decide the case on other grounds, says :—

However, I have since consulted other judges, and I prefer on the present occasion to rest my decision on the general ground, that the section was not intended to apply to any winding up that had been commenced before the act came into operation. I so decide because it is a general rule that when the legislature alters the rights of parties by taking away from them, or conferring upon them, any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them at all. It was said that there is one exception to this rule, namely, that where the enactment merely affects procedure and does not extend to rights of action in those cases enactments have been held to apply to existing rights, and it is suggested that the alteration made by section 10 comes within this exception. I am of opinion it does not. It is not merely an alteration in procedure. It is an alteration in the right to prove for a debt.

The learned judge then referring to the alterations of the law by the enactment under consideration, says : "That is not procedure."

In *Wright* v. *Greenwood* (2), which was an action to recover a medical bill, the defence was that under the provisions of sec. 32 of 21-22 Vic. ch. 90, the plaintiff not being a registered practitioner could not recover. The section provided that no person should be entitled to recover in such a case "unless he shall prove upon the trial that he is registered under this act." The court, however, held that provision inapplicable to cases where the services were performed before the passing of the act. The act provided that no person could re-

(1) 45 L. J. Eq., at p. 13; 1 Ch. D. 48. (2) 1 B. & S. 758.

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cover, but because it interfered with a vested right it could not be declared to have a restrospective operation. That is a much stronger case than that now under consideration.

See also *Hughes & others* v. *Lumley & others* (1) and *Vansittart* v *Taylor* (2) where the same principle was declared.

See again *Dash* v. *Van Kleeck* (3) wherein Chief Justice Kent in an exhaustive judgment decides a case in the same way. It is laid down in the head note:

It is a principle of universal jurisprudence that laws civil and criminal must be prospective and cannot have a retroactive effect.

In *Society, &c.* v. *Wheeler* (4) Judge Story says:

Upon principle every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past must be deemed retrospective and this doctrine seems fully supported by authorities.

In *Calder* v. *Bull* (5) Chase, Justice, afterwards Chief Justice, delivering the judgment of the Supreme Court of the United States says

Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive and it is a good general rule that a law should have no retrospect.

Again:

Every law that is to have an operation before the making thereof as to commence at an antecedent time or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed and the like, is retrospective.

The governing authorities, as I read them, announce the law to be that where vested rights are concerned statutes shall not have reference to retrospective effect unless made expressly to have it and that such statutes are not to be considered as affecting procedure only.

(1) 4 E. & B. 358.
(2) 4 E. & B. 910.
(3) 7 Johns. 477.
(4) 2 Gallison at p. 139.
(5) 3 Dallas 386.

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For the reasons stated I am of opinion the appeal should be allowed and judgment entered for the suppliant with costs.

TASCHEREAU J.—I am of opinion that the suppliant's claim is not barred by the statute of limitations.

It appears from the facts admitted that some time prior to the 18th September, 1827, Col. By, the officer in charge of the Rideau Canal works, had set out, ascertained and taken possession of for His Majesty King George IV. the 110 acres of land in question in this suit. It also appears that in February, 1832, the canal was almost completed. These 110 acres were then consequently vested in the crown. It follows, in my opinion, that the sale by William McQueen to Col. By of these 110 acres was void and of no effect. How could Col. By, holding, as he did, this land as trustee for the crown, buy it for himself? How could he get a title from McQueen, when, to his, Col. By's own knowledge, the title was in the crown? None of this land passed to Col. By, by that deed of sale. Then, subsequently by the 7 Vic. ch. 11, it was enacted that "all lands taken from private owners at Bytown under the authority of the Rideau Canal Act, for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." Now, it was only in 1869 that it was declared by the crown that 90 acres out of the 110 acres taken from McQueen were not wanted for the canal.

I would hold that up to then the crown could not prescribe against 7 Vic. ch. 11, and that since then she holds these 90 acres as trustee.

I would allow the appeal and hold that the suppliant is entitled to these 90 acres. As the judgment of the court will dismiss the appeal it is, however,

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useless for me to inquire what would be, in my opinion, the extent or nature of the remedy the suppliant would be entitled to had the judgment been in her favor upon the question of the statute of limitations.

GWYNNE J. adhered to his judgment in the Exchequer Court, adding, that on the question of the statute of limitations he concurred with the Chief Justice and Strong J.

Appeal dismissed, but without costs.

Solicitors for appellant: *Belcourt & MacCraken.*

Solicitors for respondent: *O'Connor and Hogg.*

FREDERICK GRINNELL.....APPELLANT ; 1888

AND *Mar. 23, 24.

HER MAJESTY THE QUEEN.....RESPONDENT. *Dec. 14.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duties—Article imported in parts—Rate of duty—Scrap brass—Good faith—46 Vic. ch. 12, s. 153—Subsequent legislation—Effect of—Statutory declaration.

G., manufacturer of an "Automatic Sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada, with the intention of putting the parts together there and putting the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts, and the Customs officials then caused the same to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, undervaluation, and knowingly keeping and selling goods illegally imported, under secs. 153 and 155 of the Customs Act of 1883.

Held, reversing the judgment of the Exchequer Court, that there was no importation of sprinklers, as completed articles, by G. and the act not imposing a duty on parts of an article the information should be dismissed.

Held also, that the subsequent passage of an act [48-49 V. c. 61, s. 12, re-enacted by 49 V. c. 32, s. 11] imposing a duty on such parts was a legislative declaration that it did not previously exist.

APPEAL from the judgment of Mr. Justice Gwynne in the Exchequer Court in favor of the crown.

The claimant Grinnell was a manufacturer of an article known as "Grinnell's Automatic Sprinkler,"

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

(Mr. Justice Henry was present at the argument, but died before judgment was delivered.)

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and having had the same patented in Canada, he was obliged to manufacture it here. Before importing any of the materials he called on the Custom house appraiser at Montreal, and showed him the different parts of a sprinkler, as well as one put together ready for use, and asked how these parts should be entered for duty, and according to the evidence of the claimant and one of his witnesses the appraiser informed him that the part should be entered as manufactures of brass, and the claimant proceeded to import the parts for making these sprinklers and had them entered for duty as above.

There was little or no labor performed on the sprinklers in Canada, and everything, including solder and screws for putting them together, was imported from the United States. After several of these entries had been made the customs authorities seized a number of the completed articles, and also a number not put together, and claimed that they were undervalued and should pay duty at the rate imposed on the article in its finished state according to its market value. The seizure was made under secs. 153 and 155 of the Customs Act of 1883.

The importer filed his claim to the goods in the Exchequer Court of Canada and the matter was heard before Mr. Justice Gwynne.

Girouard Q.C. for the claimant.
Hogg for the crown.

His Lordship decided against the claimant's contention and delivered the following judgment:—

GWYNNE J.—In the month of January, 1885, the customs officers at Montreal seized 5,606 articles of manufactures in brass, called "Grinnell's Automatic Sprinklers" for non-payment of duty.

The article is patented in the United States by a Mr.

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Grinnell who is president of the Providence Steam and Gas Pipe Company, which company has the monopoly of manufacturing the patented invention in the United States by license from Mr. Grinnell, the patentee.

Mr. Grinnell obtained letters patent for his invention in Canada, also, upon the 28th day of April, 1882. These letters patent are subject to conditions therein contained that the same and all the rights and privileges thereby granted should cease and determine, and the patent should be null and void, at the end of two years from the date thereof, unless the patentee, his executors or administrators, or his assignee or assignees, should within that period have commenced, or should after such commencement continuously carry on in Canada, the construction or manufacture of the invention thereof thereby patented in such manner that any person desiring to use it might obtain it, or cause it to be made for him, at a reasonable price at some manufactory or establishment for making it or constructing it in Canada, and further that the patent should be void if after the expiration of twelve months from the granting thereof the patentee, his executors or administrators, or his assignee or assignees for a whole or part of his interest in the patent, should import or cause to be imported into Canada the invention for which the patent was granted.

In the months of February, March and August, 1884, Mr. Grinnell, the patentee, not having previously made, or caused to be made, the patented invention at any manufactory or establishment in Canada, imported into Canada a large number of the several pieces manufactured in brass, which had been manufactured in the United States by and under the license held by the "Providence Steam and Gas Pipe Company," and which being put together constituted the complete

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patented article, to the number in the whole of about 10,000 sprinklers. These he entered, not as the automatic sprinklers but simply as manufactures in brass valued at 8c. per pound, and his claim is that this was a proper entry and valuation and that he had, therefore, in fact, paid all duty chargeable under the circumstances.

This claim rests upon the contention that the mere putting together in Canada of the parts of the sprinklers so imported constituted the manufacturing or constructing of the patented article in Canada, within the meaning of the above condition in that behalf contained in the letters patent of the 28th April, 1882.

There is evidence that the cost of putting them together in Canada would be little over 3 cents apiece, although the patentee sets the price at or about 12½ cents apiece.

It is established beyond all doubt by the evidence that the pieces of manufactures in brass so imported constituted all the parts of the patented article to the minutest particular, and that they had no value whatever, and in the condition they were, as imported, could have been applied to no use whatever, except as parts of the patented article for which purpose they had been imported.

The price of the patented article sold in Canada was $1.25 apiece, but the claimant insists that 75 cents of this is for royalty, and he contends that the sprinklers seized were constructed or manufactured in Canada, and that he has complied with the conditions of the letters patent in that respect, and that, therefore, the utmost that could be charged against him is an undervaluation of the material of which they are made, and as he contends a *bonâ fide* undervaluation if it be one at all, and that the case does not come within sections 153

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and 155 of the Customs Act of 1883 upon which the information is framed.

This contention necessitates an enquiry, whether the putting together of the pieces of the sprinklers in Canada, which pieces had all been manufactured in the United States, is a construction or manufacture of the patented invention in Canada within the meaning of the conditions in the letters patent, and I am of opinion clearly that it is not, and that the conditions of the letters patent were violated by the importations made in February, March and August, 1884. The articles then imported constituted in fact Grinnell's automatic sprinklers in pieces, and so were importations of the patented invention after the expiration of twelve months from the issuing of the letters patent, and the putting the several parts together in Canada was not a compliance with the conditions of the letters patent that within two years from their date the patentee should commence and continuously thereafter carry on in Canada the construction or manufacture of the patented invention.

It is a preposterous fallacy to say that a patented invention, every minutest particle of which was manufactured and constructed in the United States, was manufactured or constructed in Canada. I confess that I am wholly unable to understand how any business man of plain common sense could conscientiously entertain the idea that it was.

I am obliged, therefore, to come to the conclusion that the manner in which these "automatic sprinklers" which have been seized, and which were so, as aforesaid, imported in pieces, were imported into Canada, was a plain evasion of the letters patent and of the "Customs Act."

As they must be regarded when so imported as having been the patented invention, as in fact they were

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in pieces, they should, in my opinion, have been entered at the price of the patented invention in the United States, where they were manufactured, that being the only market value which they had in the country from which they were imported.

Of those so imported some three thousand or over were sold by the patentee in Canada at the price of $1.25 apiece, and it cannot, I think, admit of a doubt that the object of importing them as they were imported, and of setting the valuation of 8c. per pound upon them, was to obtain the benefit of sales of the patented article in Canada at the full price, including the royalty, without paying duty upon them as the patented article. I must therefore, I think, hold that the case does come within the sections upon which the information is framed, and that the crown is entitled to judgment.

It was alleged by the claimant that upon entering the pieces of the sprinklers he consulted one of the Government appraisers, who, as he says, directed him to enter them as he did, as "manufactures in brass," but he does not allege in his evidence that such appraiser directed him to value them at any particular price; that was the independent act of the claimant himself.

It was in point of fact under the item, "manufactures in brass," that as automatic sprinklers they should have been entered, but at the value of the patented article which, in truth, the parts entered substantially were. The appraiser, however, says that he has no recollection of having ever seen the parts until the sprinklers were seized, and that he has no recollection either of Mr. Grinnell or any other person having ever spoken to him upon the subject of the sprinklers or their parts, but he says it is frequently the practice of parties to make partial statements,

keeping back some of the main facts, in order to feel their way before passing entries, and that something of this kind may have passed, although he does not recollect that it did in the present case; but he is quite certain that if he had been shown the parts, and if the patented article had been explained to him, and if he had been asked how the parts of the patented invention should have been valued for duty, he would have replied, "At the value of the patented article in the United States, less the cost of putting them together in Canada." This advice would, I think, need qualification as to the right of deducting the cost of the putting together of the parts in Canada, assuming such putting together in Canada not to have been, as I am of opinion it was not, a compliance with the act of Parliament relating to patents of invention and the conditions contained in the letters patent.

The claimant declares that he acted *bonâ fide*, and that his intention was to comply in good faith both with the conditions of his letters patent and the customs law.

As to this, I can only say that, in my opinion, it is to be much regretted that good intentions should have been obscured by any veil, however flimsy and transparent, when we come to observe it closely, it proves to be.

Judgment must be for the crown.

From that judgment the claimant appealed to the Supreme Court of Canada.

Girouard Q.C. and *MacMaster* Q.C. for the appellant contended that no automatic sprinklers were ever imported, and the crown could not claim duty for such on the importation of these parts. The same claim might be made if only one part was imported and thus each part might have to pay the duty on the whole.

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The United States v. *Breed* (1), *Adams* v. *Bancroft* (2) and *Wile* v. *Cayley* (3) were cited.

Hogg for the crown, referred to the Customs Act of 1883, secs. 68-9 and 153, and cited *Torrance* v. *Boutillier* (1), *Attorney General* v. *Rothstein* (2).

Sir W. J. RITCHIE C.J.—The information in this case contains four counts : the first is that a certain person or person did, with intent to defraud the revenue, smuggle or cladestinely introduce into Canada, at the port of Montreal, certain goods subject to duty, portions of which consisted of 5,606 Grinnell's Automatic Sprinklers.

The second count, under section 153 (Customs act of 1883) was, that certain persons did, between 1st February, 1884, and 1st September, 1884, make out and attempt to pass and did pass, through the Custom house at Montreal false and fraudulent invoices of certain goods subject to duty, viz., 5,606 Grinnell's Automatic Sprinklers, imported from the United States of America.

The third count, under section 153 was : That certain persons did, between the 1st of February and the 1st of October, 1884, attempt to evade, and did evade, the payment of part of the duties on certain goods, viz., 5,606 Grinnell's Automatic Sprinklers of great value, viz., $5,606, by entering said goods at the Custom house at a value much below the proper value, namely, $655. 33, and said entry was made with intent and design of defrauding the revenue.

The fourth count, under section 155, was : That certain persons, between 1st February, 1884, and September 1st, 1884, did knowingly keep and sell certain duti-

(1) 1 Sum. 166.
(2) 3 Sum. 384.
(3) 14 U. C. Q.B. 285.
(4) 7 L. C. R. 106.
(5) 8 L. C. J. 130.

able goods, portions of which consisted of 5,606 Grinnell's Automatic Sprinklers, which had been illegally imported into Canada whereon duties lawfully payable had not been paid.

It seems to me that the question in this case is not whether the bringing in the parts composing the sprinklers in an unfinished state, and completing them so as to be in a state to be used as automatic sprinklers with a view of satisfying the provisions of the patent law, as contemplated by the claimant, is a *bonâ fide* compliance with the conditions of the claimant's letters patent The only question, it appears to me, we have to deal with is simply: Do the invoices presented to the Customs officers correctly describe the goods which were entered as boxes of brass at 30 per cent., machine at 25 per cent., boxes mechanics' tools at 30 per cent., solder at 25 per cent., punched brass at 30 per cent. and manufactured brass, boxes brass bodies at 30 per cent.? And do such invoices give the true and fair market value of the articles as invoiced? And was, or was not, this a compliance with the Customs laws?

STATEMENT OF DEFENCE.

The statement of defence of the claimant, Grinnell, and the evidence given in support of it, is as follows:—

5. That at the time of the arrival of the first shipments, and before making the entry thereof, the said claimant requested the hardware appraiser of the Customs Department at Montreal, one J. F. Hilton, to inform the said claimant, as a foreigner, under which item of the Canadian tariff the said parts so imported should be entered, exhibiting the same to him at the same time and explaining to him the purpose for which they were intended; and that it was on his information that the said parts were entered under the heading and in the manner in which they were entered.

6. That the said parts were entered at their proper valuation in the market where they were produced, and the invoices exhibited were, and are, true and according to the facts, and the said valuation was made in good faith.

EXTRACT FROM AFFIDAVIT OF MR. GEORGE REAVES.

5. That deponent was present at the interview between the said

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Frederic Grinnell and the said hardware appraiser, J. F. Hilton, and that the statement thereof made in paragraph five of the said claim and answer is true.

CLAIMANT'S EVIDENCE.

Q. Did you have any conversation with any of the Custom officers about the time of making the first entry to the Custom house in Montreal? A. I did; I went to the Custom house with Mr. George Reaves for the express purpose of showing the material which I wished to import, and of explaining fully the intended use, so far as the Custom house officials should require me to do, in order to instruct him as to the dutiable value of the material that I was wishing to import.

Q. You went with whom? A. Mr. Reaves, as stated in the previous answer.

Q. Did you say that you saw Mr. Hilton? A. I saw an official whom I knew at the time to be an appraiser, and was, no doubt, informed by introduction of his name, but that, of course, was not material to me, my whole thought being to give full instructions as to what I wanted to do, and after this seizure had been made I learned that this appraiser's name was Hilton.

Q. Who told you that his name was Hilton? A. I think, as a matter of accident, perhaps, more than anything when I went to Montreal after the seizure, that I learned his name when I called upon Mr. Wolff at the Custom house in Montreal and Mr. Hilton was called in.

Q. You identified the same man? A. If I was called upon to swear whether it was the same man or not I should prefer not to swear.

Q. Was Mr. Reaves with you? A. He was. Mr. Reaves was personally acquainted with Mr. Hilton at the time of our first call and had had business of the same character with him before and, of course, knew him when he called the second time.

Q. What did you show to Mr. Hilton at the time of your first interview? A. I showed him the parts of the sprinklers just as shown in Exhibit 6. I took those parts to Montreal for the express purpose of showing them to the proper authorities, and explained to the appraiser the purpose for which they were intended and showed him a sprinkler with parts put together.

Q. Did you explain to him the parts of the sprinkler? A. I do not think that I explained to Mr. Hilton anything in the nature of the operation of the automatic sprinkler; I had no object in doing so.

Q. Did you tell him what was the object of that sprinkler complete? A. I presume that I did; but I have no distinct recollection of explaining the working of the device. I showed the device in order

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to show Mr. Hilton that these parts entered into a constructed device.

Q. Mr. Reaves was present? A. He was.

Q. What answer did you receive from Mr. Hilton? A. I cannot recall Mr. Hilton's language, but it was then decided that the articles were dutiable as manufacturers' brass, and the amount of duty was not discussed because that is all shown in the schedule or in the tariff.

Q. Did you come to that conclusion in the presence of Mr. Hilton? A. We got that information from Mr. Hilton.

Q. And you so entered the first shipment in that way? A. We did.

Q. Had no trouble? A, No question whatever was raised. The second shipment was made the same way and no question was raised.

Q. The third shipment in August was also made the same way; and when did you hear of any complaint on the part of the Custom authorities in Montreal? A. I heard no complaint whatever until I was notified by telegraph from the Providence Steam and Gas Pipe Company, sent to me in the South, saying that they received word from Mr. Reaves that the Customs authorities had seized all of my sprinklers, and tools for constructing the same, which were in his building in Montreal.

Q. That was when? A. The date of Mr. Reaves' despatch from Montreal to the Providence Steam and Gas Pipe company was January 6th, 1885, and that despatch was repeated, or the substance of that repeated, to me. Mr. Reaves also wrote to me on January 5th.

* * * * * *

Q. Till the time of the seizure made by the Customs authorities had you any knowledge of the customs laws of Canada? A. I had not any knowledge of the customs laws of Canada, and did not seek any information other than what I sought from the appraiser, supposing that his information was all-sufficient, with no thought that there was any statute that would apply to my importation as relating to parts of devices.

Q. Did Mr. Hilton allude to the duty on parts? A. Mr. Hilton, or the appraiser whom I saw at my first visit in this connection, made no allusion whatever to the duty on parts of devices, nor raised any discussion or question, or doubt as to whether he was correct in his decision.

Evidence of Mr. George Reaves. Examined by Mr. Girouard, Q.C., on behalf of the claimant, Grinnell.

I have already given my affidavit in this matter when the case was pending before the Department of Customs, and a copy thereof has just been communicated to me for inspection. I acted here for Mr. Grinnell in a friendly way in connection with the

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importation of sprinklers; this was without consideration of any kind. I am familiar with the facts of this case from its inception. Mr. Grinnell used a part of my premises for the purposes of these sprinklers; the first three months he was charged no rent; after that time he paid rental. He used this place as a manufacturing shop for the purposes of these sprinklers. During the carnival, that is, in the early part of eighteen hundred and eighty-four, the first importation of these sprinklers was made; it was first addressed to me—the first shipment was sent to my care and the first customs entry was passed by Moses Davis, custom broker. Mr. Grinnell wished to be here before the first customs entry was made, as he wished to put matters in such a shape that in the event of any patent suits being instituted he would have everything clear and satisfactory. He came to Montreal and he interviewed Mr. Hilton, the hardware appraiser, in my presence; he showed the different parts of the sprinkler to Hilton, and informed him what his intentions were with regard to their manufacture. He also informed him by whom the different parts were made in the United States, and why they were manufactured out of the manufacture of the Providence Steam Pipe Company, of which he was president. He also told him he intended to manufacture a sprinkler in Montreal and that he had to do it in that manner to protect his Canadian patent. Hilton looked at the different parts of the sprinkler which were shown to him and he told him how to enter them, and his directions were followed by his broker, Davis, in making the entry. I believe that Mr. Grinnell showed a sprinkler all finished, but I am positive he showed him all the parts and how to put them together to make a perfect sprinkler. There was no trouble about the first shipment just mentioned. More shipments were made during the same year in the same manner without any trouble. The sprinklers were all made up and constructed and it was only after this that the customs seizure was made by Messrs. Wolff and Grose, during the following summer or fall. They asked for the key and took possession of the place; they applied for my correspondence with the Providence Steam Pipe Company and got it as I happened to be out at the time. My clerk gave it. I am not aware that I have any correspondence now with Mr. Grinnell with reference to the matters at issue in this case; the officer saw the whole correspondence I had with him or the company.

Cross-examined by *William D. Hogg*, Esq., barrister, on behalf of the plaintiff, to whose questions deponent answers as follows:—

The first entry was made after our interview and visit with Hilton. It was during the carnival of 1884, or thereabouts. I saw Hilton in

his own office at the examining warehouse in the customs building. Mr. Grinnell and I were the only ones present. I introduced Grinnell to Davis as a broker, and Grinnell explained the business to Davis which he wanted him to do for him. Mr. Hilton, after hearing the explanations of Grinnell, told him the classification for customs duties under which the entry should be made, and told him the rate of duty at which the material would be charged. The explanations which Mr. Grinnell gave, as I remember, were full and clear and sufficient to obtain from Mr. Hilton the information which he, Grinnell, required. I have no doubt that throughout Mr. Grinnell acted in good faith. Our interview with Mr. Hilton lasted about ten or fifteen minutes. I think the interview was in the forenoon. Mr. Hilton seemed to take an interest in the explanation and understood what was said. And further deponent saith not, and the foregoing having been read over to him he declares it contains the truth and has signed.

It is true that Mr. Grinnell is an interested party, but Mr. Reaves is, as appears by the evidence, entirely disinterested, and Mr. Grinnell thus speaks of him :—

Q. Has Mr. Reaves, who was with you at the time of said interview or since, any interest in your sprinkler business or in the sprinkler business of the Providence Steam and Gas Pipe Company in the United States or Canada? A. Mr. Reaves had no interest either at that time or since, or any expectation, so far as I know, of any interest in any sprinkler business. My business intercourse with Mr. Reaves was purely and wholly in the nature of seeking information from an experienced business man in high standing in the city of Montreal, so that my matters might be attended to with the least expense and care on my part.

Q. Has he been your agent in Montreal charged with looking to your interest in that matter whenever you were not present there? A. He has been my agent, but without any compensation whatever except in the matter of the rent of his building and a small amount which I remitted him to cover his expenses to Ottawa.

And not the slightest imputation has been cast on the character of either Mr. Grinnell or Mr. Reaves, nor does there appear to have been anything in the manner in which these witnesses gave their evidence to discredit their testimony, and therefore we must assume them to be reputable and credible witnesses.

Now, how is this clear and most circumstantial account of the interview met? Simply by the *non mi ricordo* of Mr. Hilton. This is what he says :—

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John F. Hilton sworn. Examined by Mr. Hogg:—

Q. What is your occupation? A. Appraiser of hardware, port of Montreal.

Q. I suppose you have heard of this seizure? A. Yes.

Q. Did you ever see the boxes containing the parts of an automatic sprinkler like this (Grinnell's Ex. 6)? A. I could not say.

Q. Do you remember having an interview with Mr. Grinnell? A. I do not.

Q. Do you know Mr. Grinnell? A. No.

Q. Do you know Mr. Reaves of Montreal? A. Yes.

Q. Do you remember having an interview with Mr. Reaves? A. I could not say that positively; I think he called on me at one time.

Q. I suppose you have a great many interviews in your capacity of appraiser? A. A great many.

Q. It is stated by Mr. Grinnell in his evidence (counsel reads from evidence as to conversation by claimant with witness in company with Reaves). Do you remember these gentlemen showing you a box containing the parts of an automatic sprinkler? A. I do not.

His Lordship—Did you ever see those parts before the seizure? A. Never to my knowledge.

Q. Have you had long experience as appraiser in the customs? A. Yes.

Q. How many years? Between seven and eight.

Q. As appraiser of hardware? A. Yes.

Q. If these parts had been shown to you as you see them now, and the device explained to you, what would you say? A. I should say that the duty should be paid on the cost of the completed article manufactured in the United States, less the cost of putting it together in Canada.

Q. You have no recollection of stating to Mr. Reaves that it was to be entered as brass? A. No.

Q. If the parts had been shown to you, would it have been possible for you to have said so? A. I would not have made the answer that is there stated.

Q. You are sure of that? A. As certain as I can be of anything.

Q. What do you say now about the interview? I cannot recollect it now.

His Lordship—Have you no recollection of anything of the kind? A. No, my Lord.

Q. And what do you say would be the proper value for duty on these articles? A. The proper value would be 30 per cent. on the cost, as I have stated

Cross-examined by Mr. Girouard:—

Q If you were called upon to-day by an importer to make an entry of these goods you would tell him to enter it as the finished

article. Was not the tariff changed within a year or two? A. There has been no alteration in that respect.

(Counsel refers witness to clause 10 of the customs' tariff of 1885.)

Q. Is not that clause direct upon the point? A. Yes.

Q. Would you undertake to swear that you did not say to Messrs. Grinnell and Reaves to enter these goods as manufactured brass? A. I would not swear.

Q. Under what clause of the act of 1883 are you justified in telling them to enter the goods as finished brass? I should only give my decision upon the value and get at it as if the article was finished.

(Letter from J. F. Hilton, appraiser to the Collector of Customs).

APPRAISER'S OFFICE, CUSTOMS EXAMINING WAREHOUSE,
HARDWARE DEPARTMENT,
MONTREAL, 16TH FEBRUARY, 1885.

SIR,—I beg to return to you copy of letter from the Commissioner of Customs, which was contained in departmental file No. 235, referring to entries at this port of parts of Grinnell's automatic sprinklers. In reply to the statement by Mr. Grinnell that he, in company with Mr. G. Reaves, called upon me previous to the first entry for these goods, and presented samples of the different parts, explaining the purpose for which they were intended, and asked the status which they should take under the customs tariff, on which he was informed by me that he might enter them as manufactures of brass not elsewhere specified, and not as finished machines, or parts of finished machines, etc., I beg to say that at this time I have no recollection whatever of any such visit having been made by Mr. Grinnell or Mr. Reaves, and regret to say that I am unable to give Mr. Grinnell's statements either an explicit denial or confirmation. I consider it extremely unlikely, however, that I should have given such answers to Mr. Grinnell's enquiries as he states.

How can any court refuse to accept and act on the uncontradicted testimony of two such witnesses as Grinnell and Reaves, when the party with whom the interview is alleged to have taken place will not even deny the accuracy of Grinnell's and Reaves' statements, but simply says that he has "no recollection whatever of any such visit by Grinnell or Reaves, and that he is unable to give Mr. Grinnell's statements either an explicit denial or confirmation?" Under these circumstances, I think we are bound to find, as a matter of fact, that the statements of Grinnell and Reaves are

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true, and that all the parts of a sprinkler were shown to the appraiser, and the purpose for which they were intended explained to him, and that a sprinkler was shown to him with the parts put together, and that it was then decided that the articles were dutiable, and should be entered as manufacturers' brass, and not the slightest intimation given that they should be entered and pay duty as automatic sprinklers. If confirmation of the truth of Mr. Grinnell's and Mr. Reaves' statements was required, could stronger evidence be found than in the invoice submitted for entry, where the goods were described as "automatic sprinkler materials," and in the action of the customs authorities on those invoices in entering the goods as manufactured brass at the values set forth in the invoices? And in such a case as this, to whom could an importer apply with more propriety and confidence than to the appraiser of hardware?

The first shipment having been entered in that way and no question whatever raised, and the second in the same way and no question whatever raised, and the third shipment also made in the same way and no question raised, under such circumstances does it not look rather strange and, to say the least of it, a very harsh proceeding that the first intimation to Mr. Grinnell should be by a telegram on the 6th of January, 1885, that the customs authorities had seized all his sprinklers and tools for constructing the same which were in his building in Montreal? Apart from the question of harshness or hardship, with which we have really nothing to do, except that it would seem but right that when public officers undertake to act in such a harsh manner they should be well satisfied before they do, by such a summary proceeding, destroy the business operations of importers, that the law will justify their action, as I shall show it will not in this case, if the statement of Grinnell and Reaves in

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reference to the interview with Hilton are true, was not the charge of smuggling completely answered and rebutted, as well as the charges of false and fraudulent invoices, evading duties by entering the goods below their proper value with intent to defraud the revenue, and of knowingly keeping and selling goods illegally imported? If this is not so let us consider the case on strictly legal grounds.

Let us see what the law is as to the construction of revenue laws.

The term "smuggling" has been defined to be

The difference of importing prohibited articles, or defrauding the revenue by the introduction of articles into consumption without paying the duties chargeable thereon (1).

It is a technical word, having a known and accepted meaning. It implies illegality, and is inconsistent with innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid payment of duty (2).

Maxwell on Statutes (3) says:—

Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is presumed that the legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is, therefore, expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.

See per Bramwell L.J. in *Wells* v. *London, Tilbury, etc., Ry. Co.* (4); per Mellish L.J. in *Re Lundy Granite Co.* (5); per James L.J. in *ex parte Jones* (6); per *curiam* in *Randolph* v. *Milman* (7); *Green* v. *The Queen* (8); *ex parte Sheil* (9).

No doubt revenue laws are to be so construed as will most effectually accomplish the intention of the legislature in passing them, which simply is to secure the collection of the revenue. And it is clear that this

(1) McCulloch's Commercial Dictionary Vo. "Smuggling."
(2) U. S. *v.* Claflin, 13 Blatch, at p. 184.
(3) P. 346.
(4) 5 Ch. D. 130.
(5) L. R. 6 Ch. 468.
(6) L. R. 10 Ch. App. 665.
(7) L. R. 4 C. P. 113.
(8) 1 App. Cas. 513.
(9) 4 Ch. D. 789.

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intention of the legislature, in the imposition of duties, must be clearly expressed, and in case of doubtful interpretation the construction should be in favor of the importer; as said by Lord Cairns in *Cox* v. *Rabbits* (1):—

> My Lords, a taxing act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax it is not to be imposed.

And by the same learned judge (Lord Cairns) in *Partington* v. *The Attorney General* (2):—

> I am bound to say that I myself have arrived without hesitation at the conclusion that the judgment ought to be affirmed. I do so both upon form and also upon substance. I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

What were the laws in force bearing on this case at the time these goods were imported? By the customs acts and tariff then in force, 46 Vic., ch. 12, it is enacted:—

> Section 68. Where any duty *ad valorem* is imposed on any goods imported into Canada the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.
>
> Section 69. Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article and so, *bonâ fide*, paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases.

(1) 3 App. Cas. 478. (2) L. R. 4 H. L. 122.

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hereinbefore referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented may appear just and reasonable to bring up the amount to the true and fair market value as required by this section.

The only item in the tariff under which these goods could be entered, and a duty imposed, was under schedule A:—Goods subject to duty: brass, manufactures of brass not elsewhere specified, 30 per cent. *ad valorem*. And the 41st section of 46 Vic., chap. 12, 1883, provides that the person entering goods inwards shall deliver to the collector or other officer an invoice of such goods, showing the place and date of purchase and the name or style of the person or persons from whom the goods were purchased, and a full description thereof in detail, giving the quantity and value of each kind of goods so imported.

This being the law governing the case, what are the facts as applicable to the law? It is established beyond controversy that no Grinnell's automatic sprinklers, in a condition to be used as such, were imported into Canada; that to complete them required labor and skill in drilling, riveting, soldering and testing. The evidence on this point is as follows:—

Mr. Grinnell continues his evidence as follows:—

The sprinklers were constructed at No. 18 Hospital street, city of Montreal. They were constructed from pieces of stamped and punched and cast brass which were imported from the United States by me, which pieces were purchased of parties in the United States making a specialty of such work, and the construction in Canada consisted in putting these pieces together, doing a certain amount of mechanical work in the way of drilling and pinning and soldering necessary to constitute them a completed device. After so being constructed careful examination was made of them by a party expert in this work. They were also subject to a test by hydraulic pressure, by means of a force pump, to ascertain whether the castings were sound, and also whether the valve which is embodied in the sprinkler was correctly adjusted so as to be, and to remain, permanently water-tight. The sprinklers were then packed in suitable boxes for shipment to any desired point.

Q. Do you require workmen of some skill to properly put the said parts together and test the sprinklers? A. We do. We require

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men who are experienced in that work; men of more intelligence than the average mechanic, and men that are strictly to be depended upon in the matter of the care which it is necessary to exercise in determining whether those sprinklers when constructed are properly constructed.

Q. How many men did you employ in Montreal so to construct the said sprinkler? A. There were three men at work.

The witness Stone says:—

Q. For what purpose did you go to Montreal? A. For the purpose of manufacturing sprinklers.

Q. Which sprinklers? A. The Grinnell Automatic Sprinkler.

Q. What do you mean by manufacturing? A. Well, I did what work there was to be done on them.

Q. What did you do on them? A. Well, I had the drilling, and pinning, and the setting up, soldering and inspection of them, testing.

Q. Where was that done? A. 18 Hospital street, in the city of Montreal.

Q. In the same building as Mr. George Reaves? A. Yes, sir.

Q. Did you have tools there for that purpose? A. Yes, sir.

Q. Does exhibit No. 20 contain a list of said tools? A. Yes, sir; I should say it did.

Q. You had a fire in the place? A. Yes, sir.

Q. You produce, then, there the automatic sprinkler exactly as exhibit 13 is? A. Yes, sir.

Q. Before producing the automatic, did you make what may be called the open sprinkler, as exhibit 12? A. Before producing the automatic I had to make it exactly as exhibit No. 12—that is the open sprinkler and after that I added the automatic feature and it became exhibit 13.

Q. You soldered the automatic, too? A. Yes, sir, I soldered the automatic and put together the other parts.

Q. Those parts were coming where from? A. They were coming from Providence.

Q. And shipped to Montreal? A. Yes, sir.

Q. Did you have anything to do with the preparation of the entry in the custom house in Montreal. A. I went there several times to get them.

Q. But you had nothing to do with the preparation of the necessary papers? A. No, sir.

Q. Do you know who it was done by? A. I think Mr. Reaves attended to that.

Q. After putting together the said parts, what did you do to ascertain that the automatic sprinkler was perfect? A. We had a testing machine there.

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Q. Could it become a perfect sprinkler till then? A. No, sir.

Q. And that was done in Montreal? A. Yes, sir.

Q. Without being tested, what did it amount to? A. Well, it would amount to considerable, probably, if we put them up, and if they proved defective it would be a serious loss.

Q. It is an impossibility to use the sprinkler without testing it? A. Yes, sir, I should say it was.

It was shown that 10 or 15 per cent. of the materials imported proved unfit for completing the sprinklers and making them fit for use and had to be reshipped to the United States as scrap brass. It was equally well established that the materials of parts of the sprinklers, with a view of being put together and completed in Canada, were purchased from two different and independent manufacturing establishments, neither of which manufactured all the parts belonging to the sprinklers; that the prices charged by these manufacturers, respectively, were the proper and fair market values, honestly invoiced, and were entered in accordance therewith, the separate invoices forming a portion of the entries as showing clearly what was purchased from the one and from the other, and the prices paid therefor. There was no item of the tariff imposing either a specific or *ad valorem* duty on automatic sprinklers; if there had been then the observation of Taney C.J. in *Kanthaus* v. *Frick* (1), would be applicable. He says: "The charge of a specific duty upon an article in a particular form or vessel is a charge upon the whole article as described, including the vessel or material described as containing it!"

We have seen that the item of the tariff under which these goods could be entered and a duty imposed was under schedule A—Goods subject to duty: Brass—Manufactures of brass not elsewhere specified, 30 per cent. *ad valorem*. Let us carefully examine these invoices and entries, and see whether they are or are not the invoices and entries contemplated by the act.

(1) Taney's Reps. 96.

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The first invoice is 2th February, 1884, and is as follows:—

(His Lordship here read the invoice, exhibit No. 20, page 13 of the case, of tools sent to Montreal and shipped to Grinnell by the Providence Steam and Gas Pipe Company, Providence, R.I., dated at Providence, Feb. 1st, 1884, and signed by F. H. Maynard, secretary of the company. Also exhibit 15, an invoice of a number of pieces of punched brass, with the weights, and of lead, dated 17th January, 1884, shipped by the Gorham manufacturing company to Grinnell. Next exhibit 19, an invoice of brass bodies and other articles, from the Providence Steam and Gas Pipe company to Grinnell. Next exhibit 31, the entry of these goods dated 12th February, 1884, being report No. 15109 and entry No. 32072, the value for duty being $366 and the duty 105.55, with the affidavits of Grinnell and of his agent J. Kinleyside attached. Next exhibit 9 A, invoice of brass bodies, etc.. from the Providence Steam and Gas Pipe company dated 6th March, 1884, amounting to $215.25. Then exhibit 16, invoice of punched brass and lead from the Gorham Manufacturing company, dated 10th March, 1884, $83,76. Then exhibit 32, entry of the last two invoices dated 25th March, 1884, being report No. 19139 and entry No. 38074. Value for duty in dollars $299, duty $89,70, with the same affidavits as the former entry, made by Charles A. Stone and J. Kinleyside. And lastly, exhibit 18, invoice from the Providence Company of brass bodies, punched brass, etc., amounting to $614.74, and dated 19th August, 1884, and exhibit 30 entry of the same dated 30th August, 1884, being report No. 5055 and entry No. 9481. Value for duty $615 and duty $184,50 with a similar affidavit by J. Kinleyside.)

It has not been attempted to be controverted that for the parts Grinnell purchased from the Providence Steam and Gas Pipe company, and the Gorham Manu-

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facturing company, respectively, he paid the prices at which they were supplied to him, and that for those articles he was charged the fair market price or value, and that at those prices he entered the goods. The evidence on this point is as follows:—

Q. For that purpose, I believe, Mr. Grinnell, you imported into Canada certain parts, and you will please state what parts and from whom? A. I imported all of the parts necessary to construct the automatic sprinkler in Canada. A certain part of the sprinkler known as the body of the sprinkler was furnished to me by the Providence Steam and Gas Pipe company, partially finished; the remaining parts of the sprinkler, which consisted of the punched or stamped brass, I obtained from the Gorham Manufacturing company for two shipments, and from the Providence Steam and Gas Pipe company the same material which they had previously purchased of the Gorham company, and imported all of these parts into Canada for the purpose of constructing the automatic sprinkler.

Q. The entries in the custom's in question in this cause, I believe, refer to those very importations of parts? A. Yes, they do.

Q. At what price did you get the said parts from the said parties; was it the usual market price? It was the usual market price so far as the market price had ever been established for such pieces.

Q. Did you get the said parts from the Gorham company at the same price they were selling the same to other parties? A. I did; I obtained them at the same price. They were selling them to the Providence Steam and Gas Pipe Company, who were the only parties purchasing these particular pieces.

Q. Now, could you tell at what price you got the parts that were manufactured by the Providence Steam and Gas Pipe Co.; was it a fair market price? A. It was.

Q. Upon what basis did you place that market price? A. The Providence Steam and Gas Pipe Company's account of the cost of this work was taken, and a fair margin of profit was added to the cost of the part they furnished.

Q. You made the entries in the Custom house in Montreal, or caused them to be made? A. I attended personally to part of the proceedings of entering the first invoice; the remaining part of the work was done by an authorized broker in Montreal, to whom I was introduced by Mr. Reaves.

Q. Were the said entries made upon the prices you paid to the said concern? A. They were on invoices that were sworn to by representative officers of each of these concerns before the British consul here in Providence.

Q. Can you tell to-day whether, by error or other cause or causes,

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there was any mistake or omission in the said entries or value of said parts? A. No error; none whatever, to my knowledge.

Q. Were they done in good faith? A. Entirely in good faith.

I do not understand that it is contended that the invoices submitted were not *bonâ fide* and truthful; if it is the evidence of Mr. Grinnell is direct, and I am bound to believe, and do believe, in the absence of any evidence to the contrary, that what he says is strictly true. He says, in answer to the question:

Q. Have you personal knowledge of the invoices furnished on your behalf with the Department of Customs in Montreal in connection with this case? A. I have.

Q. Are they correct and true? A. They are.

Q. Genuine? A. They are.

Q. Are they according to facts? A. They are.

Q. In good faith? A. They are.

Q. Will you say the same thing about the letters coming either from you or from the Providence Steam and Gas Pipe Co., filed in this matter? A. I do; they were all written in good faith and in the strict line of honest business correspondence, and contain the facts in every particular. The same is to be said of my correspondence with my counsel, Mr. Girouard, wherein I set forth the facts in relation to this whole matter for his instruction.

The invoices, then, having been duly produced, and the articles correctly described and *bonâ fide* entered at the prices paid for them at the place from which they were imported, how can it be said that any of the counts of the information can be sustained? What other invoices could the claimant have produced or the collector accepted? Were they not in the very terms of the statute? How can it be said that the goods were undervalued, when they were valued at the prices paid for them by the importer in the market where he bought them? How otherwise can their market value be established than by showing the market value of the article at the place of production, and the fair, *bonâ fide* amount there paid? It being always borne in mind that at the time these articles were imported there was no law applicable to this case authorizing the imposition of the same rate of duty when imported in Canada

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in separate parts as there is now by the statute 48 Vic., ch. 61, which declares as follows:—

Customs and Excise acts amended—48 Vic., cap. 61.

12. When any manufactured article is imported into Canada in separate parts, each such part shall be charged with the same rate of duty as the finished article, on a proportionate valuation, and when the duty chargeable thereon is specific, or specific and *ad valorem*, an average rate of *ad valorem* duty, equal to the specific and specific and *ad valorem* duty so chargeable, shall be ascertained and charged upon such parts of the manufactured article.

and which was re-enacted by 49 Vic., cap. 32, sec. 11.

What is now desired to be accomplished seems to me an endeavor to give a retroactive operation to this section which, instead of showing a retroactive operation, may fairly be said to indicate that until this clause was enacted there was no justification for the imposition of duties on parts of articles proportionate to the finished article, and I am much inclined to think that it was in this view that Mr. Hilton considered that it was right that the duty should be imposed on the material as imported, and not on the finished article which clearly was not imported; and in giving his testimony I am inclined to think he had in his mind the then state of the law, and not what it was when the goods were imported. This enactment would seem to be a legislative declaration that, until the passing of these acts of 48–49 Vic., and 49 Vic., there was no law to justify the imposition of duty on imported parts of manufactured articles in reference to the value of the finished article. In *Morris* v. *Mellin*, (1) Edward Holroyd *amicus curiæ*, suggested that the statute 7 G. 4, c. 57, s. 33 was a legislative declaration that the provisions of the statute 3 G. 4 c. 39 did not extend to the assignees of an insolvent debtor.

Littledale J.

The statute of 7 G. 4 c. 57 s. 33 recites that it was expedient to extend the provisions of the statute 3 G. 4 c. 39, and enacts that the last mentioned act shall extend to the assignee of every prisoner who shall, within the time therein mentioned, apply

(1) 6 B. & C. 455.

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to the insolvent court for his discharge from confinement, as if the last mentioned act had been expressly therein enacted; and it then declares that all warrants of attorney, etc., etc., which, by the last mentioned act, were declared to be fraudulent and void against the assignees of a bankrupt, shall be deemed fraudulent and void against the assignees of an insolvent debtor. This, as it seems to me, is a legislative declaration that the statute 3 G. 4 c. 39 did not make such instrument void against the assignees of an insolvent debtor. Upon the whole, I think that this rule ought to be discharged.

And in *Bennett* v. *Daniel* (1) Lord Tenderten C. J., recognized *Morris* v. *Mellin* as good law.

Where, then, is the evidence in this case to support the charges of smuggling, false invoices, false and fraudulent undervaluation, or of knowingly keeping and selling goods illegally imported? I cannot discover it. Therefore, on the law and the facts, apart from the conduct and declarations of Hilton and the action of the Customs officials in passing the goods with full knowledge of all the circumstances connected with their importation which, in the absence of any evidence to the contrary, it is to be presumed they must have had through Hilton, I think the crown has failed to establish any breach of the revenue laws as alleged in the information, and the appeal must be allowed with costs and the information dismissed with costs.

STRONG J.—I am of opinion that the judgment of the Exchequer Court cannot be sustained. The statute of 1885 introduced, for the first time, the principle of valuing manufactured component parts of a manufactured article according to the proportions they bear to the market value of the completed article for purposes of home consumption. Previous to that amendment of the law there could have been no valuation of these pieces of brass, intended to form component parts of these sprinklers, except according to their actual separate value as pieces of manufactured brass, as they were, in fact, valued. Then, if they were entered and

(1) 10 B. & C. 506.

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valued according to law there can be no question of an intention to evade the revenue. Sprinklers, as completed articles, never were, in fact, imported, and these pieces of brass never had existed as sprinklers before their importation. Therefore, the crown does not establish that there was an importation of automatic sprinklers in detached pieces, but it is simply a case of the importation of manufactured pieces of brass which were, it is true, intended to constitute parts of automatic sprinklers to be formed out of them after importation when, for the first time, the different pieces were to be adjusted to each other. The case of a watch or a carriage completed abroad, then taken to pieces and imported in separate parts, is wholly different, and the same may be said of the case where the several parts, without being actually put together previous to importation so as to form one whole, are yet so identified with the one specific whole which is to be formed out of them that they are appropriated to one particular instrument or machine, and to no other; in such circumstances it may well be said that there is an importation of a particular machine in parts, but in the present case there was nothing resembling this.

It is, of course, a rule that a statute cannot be evaded by doing indirectly that which it forbids to be done directly. But this rule is not to be extended so as, by implication, to bring within the statute a case not provided for nor in the contemplation of the legislator, even though, owing to its omission, parties may be enabled to contravene the policy of the act and to do, though not in the way prohibited by the act, that which it was the object of the legislature to prevent. In order to bring a case within the purview of a statute the language in which the law is expressed must be sufficiently comprehensive to include the alleged infraction. In other words, it is no evasion of

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an act of Parliament, in a legal sense, to do that which may tend to prevent the attainment of the end which the legislature had in view, provided parties keep outside the provisions of the statutes (1). If any authorities are wanting for this principle of construction two strong instances in which it was recognized and applied in recent times are afforded by the cases of *Wilson* v. *Robertson* (2), and *Deal* v. *Schofield* (3).

I think the present was *casus omissus* in the customs and tariff laws until express provision was made for it by the act of 1885. Indeed, the very circumstance that such an act was considered necessary and was passed implies that the previously existing state of the law contained no provision applicable to the importation of such articles otherwise than as manufactured brass.

The judgment of the Exchequer Court should be reversed with costs, and the claim of the appellant to a release of the goods allowed with costs.

FOURNIER J.—I entirely agree with the judgment of the Chief Justice in this case.

TASCHEREAU J.—I would allow this appeal with costs, and dismiss the information with costs, for the reasons given by the Chief Justice.

GWYNNE J. took no part in the judgment.

Appeal allowed with costs.

Solicitors for appellant: *Girouard, Delorimier & Delorimier.*

Solicitors for respondent: *O'Connor & Hogg.*

(1) See Maxwell on statutes, page 142.

(2) 4 E. & B. 923.

(3) L. R. 3 Q. B. 8.

JOHN V. ELLIS.....APPELLANT; 1888

AND *Oct. 2.

GEORGE F. BAIRD.....RESPONDENT. 1889

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Mar. 18.

Appeal—Contempt of court—Discretion—R. S. C. c. 135 s. 27—Final judgment—Practice in case of contempt.

By a *rule nisi* of the Supreme Court of New Brunswick E. was called upon to show cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. On the return of the rule it was made absolute, and a writ of attachment was issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court, where he might be ordered to answer interrogatories and by his answers purge if he could his contempt. If unable to do this the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash said appeal.—

Held, that the judgment appealed from was not a final judgment from which an appeal would lie under sec. 24 (a) of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

MOTION to quash appeal for want of jurisdiction.

The appellant is editor of a newspaper in St. John, N.B., and as such published certain articles concerning judicial proceedings in regard to an election in New Brunswick. The respondent, one of the candidates at such election, obtained a rule *nisi* for an attachment for contempt against the appellant, which was afterwards made absolute, and this appeal was brought

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

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from the judgment of the Supreme Court of New Brunswick making the said rule absolute.

The practice in New Brunswick in matters of constructive contempt is as follows: On application supported by affidavits, which is usually made by the Attorney-General, a rule *nisi* is granted, requiring the person alleged to be in contempt to show cause why an attachment should not issue against him, or why he should not be committed for contempt. On the return of this rule, if it has been properly served and within four days, if sufficient cause is not shown against it, it is made absolute. The court then orders the prosecutor to administer interrogatories to the party in contempt within four days, he either giving bail for his appearance to answer the same or being committed to gaol. After the interrogatories are administered, if the contempt is not purged by the answers thereto, or in case of refusal to answer, the party is adjudged guilty of contempt and the court imposes sentence therefor.

These were the proceedings in the present case, and the rule for an attachment being made absolute the appellant gave sureties for his appearance to answer the interrogatories, and then brought his appeal. Pending the appeal the time for answering the interrogatories has been extended by the court below.

Currie moves to quash the appeal for want of jurisdiction.

There are several objections to the jurisdiction of the court in this case.

First—The case is not ripe for appeal. Until the interrogatories are administered, and the court is in a position to pronounce sentence, there is no final judgment. Corner's Crown Practice (1), Dunn's Crown Practice (2).

(1) P. 28. (2) P. 220.

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Secondly—There is no appeal unless contempt is expressly mentioned in the statute giving jurisdiction in this court.

Thirdly—The subject matter in this appeal is entirely within the discretion of the court brought into contempt, and the appeal is expressly taken away by statute. R.S.C. c. 135, s. 27. Rapalje on Contempt (1); *McDermott's Case* (2); *Rainy* v. *Justice of Sierra Leone* (3).

Fourthly—The matter of contempt is not, and from its nature cannot be, a subject matter of appeal. See *Hayes* v. *Fischer* (4); *New Orleans* v. *S. S.Co.* (5); *Ex-parte Kearney* (6); *Shattuck* v. *The State* (7).

The Privy Council will never entertain such appeals. See Macpherson's P.C. Prac. (8).

Davis Q.C. *contra* cited *Rex* v. *Elkins* (9), on the first of the above grounds, that the case was not ripe for appeal, and *Jarmain* v. *Chatterton* (10), where an appeal in a case of contempt was entertained and the rule governing such appeals laid down.

SIR W. J. RITCHIE C.J.—I am of opinion the motion to quash should be granted without costs, on the ground that there was no final adjudication; and, in my opinion, the party appellant was led into error by the action of the court, and should not suffer therefor.

STRONG J.—I am of opinion that the motion to quash must be granted. The rule *nisi* was in the alternative for an attachment or to commit the appellant for contempt. It was made absolute generally, and the rule absolute does not specify which alternative was

(1) P. 11.
(2) L. R. 2 P. C. 341.
(3) 8 Mo. P.C. 47.
(4) 102 U. S. R. 121
(5) 7 Wheaton 38.
(6) 20 Wall. 392.
(7) 51 Miss. 50.
(8) 2 Ed. p. 48 and cases there cited.
(9) 4 Burr. 2129.
(10) 20 Ch. D. 493.

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granted. As the granting of the rule was followed up by an attachment, we must assume that it was intended to make the rule absolute in the alternative which asked for this writ; more especially as the appellant did not move against the writ for irregularity, but gave bail to it. Then this writ of attachment is merely the first step in the procedure to punish for contempt of court. It is only a process to bring the party to be attached into court in order that he may answer. The proceedings subsequent to the execution and return of the writ include the bringing of the body into court, the requiring the defendant to answer to the contempt and to answer interrogatories and there is then a formal adjudication, followed by sentence. Until there has been an adjudication as to the defendant's guilt or innocence of the contempt there is no final judgment from which an appeal can lie.

There seem to be two modes of proceedings for contempt of court—one formal and plenary, the other summary. The former mode of proceeding is that which has been adopted in the present case.

I proceed altogether upon what appears on the face of the proceedings; the rules *nisi* and absolute, and the writ of attachment itself—the exigency of which is that the appellant shall be attached in order that he may "appear and answer." Surely when the stage of appearance in answer to process of this kind has alone been reached, and there has not even been a hearing, there cannot be said to be any final judgment. In the opinions delivered by some of the learned judges they do not advert to the distinction between the summary mode of procedure and the more formal mode of proceeding adopted in the present case.

I agree with the Chief Justice, that there should be no costs.

FOURNIER J. concurred.

TASCHEREAU J.—I would quash this appeal, on the ground that the judgment appealed from is not a final judgment.

GWYNNE J.—In Easter Term, 1887, a rule was issued out of the Supreme Court of the Province of New Brunswick, Crown side, *exparte* George F. Baird, the above respondent, calling upon the above appellant, the editor, publisher and proprietor of the "St. John Globe" a newspaper printed and published in the city of St. John, in the Province of New Brunswick, to show cause in Trinity Term then next why an attachment should not be issued against him, or why he should not be committed for contempt of court for writing printing and publishing in the issue of the said "St. John Globe" newspaper, on the 18th March preceding, an article under the caption of "The Queen's Election," and certain other articles in other issues of the newspaper mentioned in the rule

in which said articles the said John V. Ellis has been guilty of a contempt of this honourable court in scandalising this court, and particularly His Honor Mr. Justice Tuck, one of the Justices thereof, in calumniating and vilifying the applicant George F. Baird, and in commenting on matters of said election, said recount and said order *nisi* for a writ of prohibition in a manner calculated to prejudice and that does prejudice the public before the hearing and judicial decision of said matters, and so as is calculated to prevent the said applicant George F. Baird from obtaining a fair and impartial disposal of said matters, &c. Upon reading the said articles in the newspapers aforesaid, and upon reading the affidavit of George F. Baird.

Upon this rule being served and the matter being brought up again before the court, if it should appear that the appellant had written and published the articles complained of, or any of them, all that remained to be done by the court, after hearing the appellant show cause in person or by his counsel as he was

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called upon by the rule to do, was to pronounce judgment either convicting the appellant of the offence and passing appropriate sentence upon him for such offence, or otherwise dealing with the case as justice might require and to the court should seem meet.

From the judgment and expression of opinion as delivered by the learned Chief Justice of the court, and which is made part of the case laid before us, it appears that the appellant appeared in obedience to the above rule and showed cause thereto, as he was called upon by the rule to do; for the learned Chief Justice there says:—

> The writing and publishing of the articles complained of are admitted by Mr. Ellis, but his counsel contends that they do not amount to a contempt of court, for two reasons.

He then states these reasons, and adds:

> I do not think either of these objections is sustainable.

He then proceeds to deal with those objections, and to define the law as to contempt of court and to apply it to the circumstances of the case before him; and referring to the proceedings which were before Mr. Justice Tuck, and which formed the subject of comment in the articles complained of, he concludes:

> In what he (Mr. Justice Tuck) did, he was acting for this court judicially, and in the administration of justice, and the language which was used respecting him in the matter, in some at least of the articles published, was a contemptuous interference with the judicial proceedings in which he was acting.

From the above it appears beyond doubt that in the opinion of the learned Chief Justice the appellant, by writing and publishing the articles complained of (as admitted by him), was guilty of a contempt of court; and if that opinion had been embodied in the rule of court issued thereupon, which is the subject matter of this appeal, the appellant would have been, beyond all doubt, convicted of the offence of contempt of court

with which he had been charged, and by the rule *nisi* cited to appear in court and answer; but the learned Chief Justice concludes his judgment thus:

I am therefore of opinion that the rule should be made absolute for an attachment.

Not, it is to be observed, for committal of the appellant, as for an offence of which he had been convicted.

Mr. Justice Fraser expressed his concurrence in the judgment of the learned Chief Justice.

Mr. Justice Wetmore, after referring to the circumstances of the case, the nature of the proceedings before Mr. Justice Tuck, and a point that had been argued that he had been acting without jurisdiction, and that, therefore, the articles constituted no contempt of court, concludes thus:

I cannot fancy any cause that could be reasonably shown against making the rule absolute; but if there was any, there would have been ample opportunity to have presented it for the judges' consideration at the return of the rule *nisi*. But supposing I am all wrong in the views I have expressed, and that Judge Tuck had no right to have granted the rule *nisi*, what justification would his error be for the articles published in the "Globe" newspaper? It appears to me, none whatever; so, whether Judge Tuck was right or wrong—the severe articles are equally such a contempt of court as call for the attachment.

And he agreed with the Chief Justice that an attachment should be ordered.

Now as the appellant was before the court and showed cause to the rule *nisi*, and admitted the publication by him of the articles complained of, and as a majority of the court were clearly of opinion that the publication of the articles, so admitted by the appellant to have been published by him, was a contempt of court, it does not clearly appear why judgment should not have been pronounced, convicting the appellant of the contempt and passing an appropriate sentence therefor, instead of ordering an attachment to issue, the object of which appears, from the judg-

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ment of Mr. Justice Palmer, to be still to keep the matter of the rule *nisi sub judice*, and to be an interlocutory proceeding only. He says :—

I do not say that Mr. Ellis is guilty of the acts charged against him or convict him of a contempt of this court ; all I at present say is that sufficient is shown to make it our duty to bring him into court to answer for the acts charged against him. When here, it will be the duty of this court to give him an opportunity to fully defend himself and, if it turns out, according to his own oath, that he has not violated any of the principles I have endeavored to state it will be the pleasant duty of this court to acquit ; if otherwise. it will be our duty, no matter how unpleasant, to inflict upon him the punishment that the law directs, which is just such punishment as will prevent a repetition of the crime by him or by anybody else.

Now, whether or not the articles contain matter which, being published as admitted, constitutes a contempt of court, is a question the determination of which depends upon the construction by the court of the articles themselves—and the publication having been admitted by the appellant, and counsel who showed cause for him having been heard, I fail to see why the matter should not have been considered as quite ripe for adjudication, without any further opportunity of showing cause being given to the appellant. However, the court seems to have adopted the view expressed by Mr. Justice Palmer as to the object of the attachment being issued—for the order made by the court, and which is the subject of this appeal, simply is that the rule *nisi* be made absolute and upon the rule so made absolute the court has issued a writ of attachment, addressed to the sheriff of the city and county of St. John commanding him to attach the appellant, so that he may have him before the court on a day named " to answer for certain trespasses and contempts brought against him "—thus adopting the view expressed by Mr. Justice Palmer as being the object and purpose of the attachment ordered, namely, as an interlocutory pro-

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ceeding to enable the appellant to show cause why he should not be "convicted" of the offence of contempt of court and to defend himself against the charge brought against him. It appears, therefore, that the order of the court, which is the subject of this appeal, is not a final adjudication in the matter, and that therefore it is not appealable to this court. The appeal, therefore, must be quashed and with costs.

Appeal quashed without costs.

Solicitors for appellant: Weldon, McLean & Devlin.

Solicitor for respondent: L. A. Currie.

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*Oct. 10.
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*Mar. 18.

PATRICK TRAINOR (PLAINTIFF).....APPELLANT;

AND

THE BLACK DIAMOND STEAMSHIP COMPANY OF MONTREAL (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Contract—Carriage of goods—Negligence—Bill of lading—Exception from liability under—Pleading.

A bill of lading acknowledged the receipt on board a steamer of the defendants, in good order and condition, of goods shipped by T. (fresh meat) and contracted to deliver the same in like good order and condition * * * loss or damage resulting from sweating * * * decay, stowage, * * * or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners or other persons in the service of the ship, or for whose acts the shipowner is liable (or otherwise howsoever) always excepted, namely (setting them out).

Held, affirming the judgment of the court below, Sir W. J. Ritchie C.J. and Fournier J. dissenting, that the clause "whether arising from the negligence, default or error in judgment of the master," &c., covered as well the preceding exceptions as those which followed, and was not limited in its application by the words "from any of the following perils," and the defendants were, therefore, not liable for damage to the goods shipped resulting from improper stowage, which was one of the excepted perils.

APPEAL from a decision of the Supreme Court of Prince Edward Island, setting aside a verdict for the plaintiffs and ordering a non-suit.

This was an action of damages against the defendant company for negligence in storing and carrying the

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

plaintiffs goods, fresh beef and mutton, from Charlottetown to St. Johns, Newfoundland. The defence was that the injury to the goods arose from causes for which the defendants were exempt from liability under the bill of lading.

The exemptions in the bill of lading were amongst others, the following: "(The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master or mariners, restraint of princes and rulers, or people, or resulting from strikes or mob, loss or damage resulting from sweating, insufficiency of package, leakage, breakage, pilferage, wastage, rust, frost, decay, rain, spray, stowage, or contact with or smell or evaporation from any other goods, insufficiency of marks, numbers, address, or description of goods shipped, injury to wrappers, however caused, or from any of the following perils (whether arising from the negligence, default or error in judgment of the pilot, master mariners, engineers or other persons in the service of the ship, or for whose act the shipowner is liable or otherwise howsoever) always excepted, namely, risk of craft or hulk, or transhipment, explosion, heat, fire at sea, in craft or hulk, or on shore, boiler, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused."

One of the contentions of the defendants was that the words in the above exceptions, "whether arising from the negligence, default or error etc" covered what went before, as well as what came after them.

The negligence principally relied on by the plaintiffs was in the manner of stowing the goods on the vessel, and as to this the learned judge who delivered the judgment of the full court, and who had also tried the case, says: "In my charge to the jury, I said that it appeared that during the time the meat was being

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packed it rained, the hatch was uncovered and that the meat packed under it must have been much wetted. That it also appeared that the men engaged in packing necessarily trod upon it with their boots on in this wet state, and that it was for the jury to say whether this was a proper mode of shipping and stowing the meat. That, in my opinion, a more improper manner of treating goods committed to a carrier could not be imagined, and I think so still." But he held that it was competent for the defendants to protect themselves against liability for any and all negligence, and that the bill of lading did so protect them in this case. He also found that the word "stowage," in the exceptions in the bill of lading, necessarily meant "improper stowage."

The plaintiffs claimed that even if the defendants were protected from liability on account of gross negligence, which they disputed, yet as they had only pleaded exemption on account of a portion of the exempted clauses, and the damage was occasioned by a clause not pleaded, namely, heating, they could not claim the benefit of such exceptions.

The Supreme Court, *en banc*, sustained the judgment of the trial judge in favor of the defendants. The plaintiff then appealed to this court.

Davies Q.C. and *Morson* for the appellant. It cannot be disputed that the defendants were guilty of negligence, and they must show that they are protected by the exceptions which they have pleaded. If they choose to rely, in their pleadings, on specified exceptions they cannot claim the benefit of others which are not pleaded.

The bill of lading does not relieve the owner from the necessity of providing a seaworthy ship and proper accommodation for stowing the cargo.

The following authorities were relied on. *Steel* v.

The State Line S. S. Co. (1); *Stanton* v. *Richardson* (2); *Tattersall* v. *The National Steamship Co.* (3); *Gillespie* v. *Thompson* (4); Hutchinson on Carriers (5).

Peters for the respondents. The plaintiffs did not declare against us for not providing a seaworthy ship and cannot rely on it now.

In the bill of lading the exception for "stowage" must be taken to mean "negligent stowage," as there could be no damage for stowage not negligent.

SIR W. J. RITCHIE C.J.—I think it was the duty of the shipowners to provide: first, a suitable vessel; secondly, a suitable place in that vessel having regard to the nature of the cargo shipped; and thirdly, to take it on board at a suitable time and in a suitable manner, that the shipowners are bound to provide a ship reasonably fit for the purpose of the carriage of the cargo, that is meat, in this case, which they contracted to carry and that the shipowners warrant the fitness of their ship when she sails, and that if the proviso in the bill of lading that the owners will not be responsible for the default of the master applies to this case it does not relieve them from the implied obligation to provide a vessel efficient and properly equipped for the service.

Then, did the shipowners make provision sufficient to enable them to fulfil their contract? I think they did not. If the meat could not be shipped under the hatchways without the hatchways being uncovered, and the meat exposed for an hour and a-half to the pouring rain, and without the men trampling on it with their wet muddy boots, and spitting their tobacco juice on it, certainly the place was not, in my opinion, a fit and proper place, either as to the time of loading,

(1) 3 App. Cas. 72.
(2) L. R. 7 C. P. 421; L. R. 9 C. P. 390.
(3) 12 Q. B. D. 297.
(4) 6 E. & B. 477, n.
(5) Sec. 270.

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during a pouring rain, or as to placing the meat there at all. It was, in my opinion, the duty of the shipowners to ship the cargo, having reference to its nature and liability to injury, at a time when it could, with reasonable and proper care, be safely shipped; and the shipowners, having like reference, were, in my opinion, bound to ship the cargo in a proper place where it could be stowed without being so trampled or spit upon; in other words, having undertaken to carry fresh meat, the obligation was on them to furnish a vessel fit to carry, in a fit and proper place, that cargo, and it cannot be disputed that the place in which this meat was put was an improper place if the meat could not be shipped dry and without being trampled and spit upon; and it was, therefore, not a fit and proper place for the purpose. As was said by the Privy Council in "The Freedom" (1):

> The simple truth is, that they did not make provisions sufficient to enable them to fulfil their contract.

And after stating that the shipowners ought to have known that without ventilation and without circulation of air, &c, a portion of the cargo shipped would be damaged, the judgment proceeds:

> As they did not, in fact, provide sufficiently against such a natural, if not necessary, consequence, they imposed upon themselves the disability to fulfil the express contract into which they had entered under the bill of lading. In this view it is not material to the plaintiffs whether the defendants are or are not chargeable with neglect, default or improvidence. It is enough for the plaintiffs to have established that the defendants have not performed their contract and have not sustained either of the defences which they have pleaded as a legal excuse for non-performance.

I think it was not right or proper to remove the meat from the warehouse, as one of the witnesses says, in a pouring rain; and the judge says, "it rained during the whole time of the loading and there was no covering over the hatchway," about 8 feet square;

(1) L.R. 4 P.C. 603.

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"(the mate explained that the lowering tackle could not work if there had been)."

I think they should have waited until the weather was suitable for shipping such a cargo.

The learned judge says:

In my charge to the jury I said that it appeared that during the time the meat was being packed it rained, the hatch was uncovered and that the meat packed under it must have been wetted; that it also appeared that the men engaged in packing necessarily trod upon it with their boots on in this wet state; and that it was for the jury to say whether this was a proper mode of shipping and stowing the meat; that, in my opinion, a more improper manner of treating goods committed to a carrier could not be imagined, and I think so still.

And the jury have so found it, and, in my opinion, loading meat at an improper time, on a rainy night with open hatches, and at a place where the men had to trample on the meat with muddy boots and to spit tobacco juice on it, are not within any of the exceptions of the bill of lading.

In my opinion, the loss was caused by the previous default of the shipowners. In the case of a bill of lading it is different from that of a policy of insurance, because there the contract is to carry with reasonable care, unless prevented by the excepted perils; if the goods are not carried with reasonable care, and are consequently lost by perils of the seas, it becomes necessary to reconcile two parts of the instrument and this is done by holding that if the loss through perils of the seas is caused by the previous default of the shipowners he is liable for this breach of his covenant. Per Willes J. in *Grill* v. *General Iron Screw Collier Co.* (1), said to be the true view of Lord Herschell in *Wilson* v. *Owners of Cargo* per *The Xantho* (2).

The bill of lading acknowledges the articles to have been shipped in good order and well conditioned

(1) L. R. 1 C. P. 611. (2) 12 App. Cas. 510.

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and they are to be delivered in like good order and well conditioned at the port of St. Johns with the following exceptions:

The act of God, the Queen's enemies, pirates, robers, thieves, vermin, barratry of master or mariners, restraint of princes and rulers; or people, or resulting from strikes, or mob, loss or damage resulting from sweating, insufficiency of package, breakage, pilferage, wastage, rust, frost, decay, rain, spray, stowage, or contract with or smell or evaporation from any other goods, insufficiency of marks, numbers, address, or descriptions of goods shipped, injury to wrappers however caused, or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or other person in the service of the ship, or for whose acts the shipowners is liable, or otherwise howsoever) always excepted—namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused. Collision, stranding or peril of the seas, rivers, navigation of land transit of whatever nature or kind soever, and howsoever caused, with liberty in the event of the steamer putting back or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer, and with liberty to sail with or without pilots, to call at any intermediate port or ports, and to tow and assist vessels in all situations.

As at present advised, I think the exception as to exemptions from negligence or default applies to the "following perils" and not to the antecedents named, namely, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or other persons in the service of the ship, or for whose act the shipowner is liable, or otherwise howsoever, and so "whether arising from negligence" does not apply to all that has gone before, but only to the perils afterwards enumerated, and if so the exceptions in the bill of lading did not protect the shipowners from negligence as to stowage, or any of the other matters named in the bill of lading anterior to the provision relating to negligence, &c., and therefore

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they did not contract themselves out of liability arising from negligent stowage.

I think to enable the shipowner to contract against the effect of his own, that is his servants' negligence, the contract should be so clear and unambiguous as not to be open to any reasonable doubt as to the intention of the parties; if not made so clear, the construction should be against the shipowner and in favour of the shipper.

Be this as it may, I think the terms of the bill of lading relate to the carriage of the goods on the voyage and not to anything before the commencement of the voyage.

In this case the bill of lading acknowledges the receipt of the goods in apparent good condition, to be delivered from the ship's deck in like good order and condition, and there is evidence to show that the meat was in good condition when received by the shipowners in their warehouse.

(His Lordship then read a portion of the evidence and proceeded):

Can there be any doubt that this meat left the warehouse in good condition and was landed at St. John's in a most dirty, filthy, disgraceful condition?

I think the evidence was quite sufficient to warrant the jury in arriving at the conclusion that the meat when received at the warehouse and when ready to be shipped was in good condition.

No doubt, as in the case of "The Freedom" (1), from the cramming of the ship so as to prevent any circulation of air and the closing of the hatches the atmosphere in the ship's hold became heated, damp and vitiated, without means of escape, and this atmosphere was the proximate cause of the damage to the meat, the subject of this suit; and this was

(1) L. R. 3 P. C. 603.

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aided and accelerated by reason of taking in the cargo at an improper time, in view of the heavy rain falling and in view of the treading on of the meat with the dirty boots of the packers, and the tobacco spitting on the meat by the stowers. The duty of defendant to carry and deliver these goods arises out of his contract, and his failure to do so is a breach of that contract. I am of the opinion in this case that, independent of and apart from any construction to be put on the bill of lading, the defendants have broken their contract, without any sufficient excuse or justification, and t ht this action is maintainable. Upon this point the law seems to be abundantly clear.

In *Czech* v. *The General Steam Navigation Company* (1) Bovill C. J. says :

The evidence in every case must vary according to its peculiar circumstances; but if the goods are damaged, and no reasonable explanation of the damage can be given, except the negligence of the defendants, a jury are justified in finding that such negligence is proved.

WILLES J :

I will, however, assume that it is so for the purpose of this case, but it does not, therefore, restrict the plaintiffs as to the nature of the evidence by which such negligence shall be proved. To explain this by an illustration: If a shipment of sugar took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case I think the shipowner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh water then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship.

(1) L. R. 3 C. P., at p. 18.

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In *Phillips* v. *Clark* (1) Cockburn C. J. says :—

The question arises upon these words in the margin of the bill of lading, "Not accountable for leakage or breakage." Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms, yet it seems to me that we ought not to put such a construction upon the contract as is here contended for when it is susceptible of another and more reasonable one. * * * *

But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence. The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence. I therefore think the plaintiff is entitled to judgment.

Crowder, J.:

It could hardly have been contemplated by the plaintiff that the defendant should be utterly absolved from the obligation of taking any care of the goods. The construction put upon the contract by my Lord is evidently the most just and reasonable, as absolving the defendant from liability for leakage and breakage, the result of mere accident, where no blame was imputable to the master, and for which, but for the stipulation in question, he would have been still liable. It clearly was not intended to relieve him from responsibility for leakage or breakage, the result of his negligence and want of care. The construction contended for on the part of the defendant would be giving the contract a sense not necessarily involved in the words as they stand.

In *Taylor et al* v. *The Liverpool and Great Western Steam Company* (2) it appears by the statement of the case that the following were the material parts of the bill of lading:

Received, in good order, &c., on board the steamship Nevada, one box, said to contain precious stones of the value of £250, to be

(1) 2 C. B. (N. S.) 161. (2) L. R. 9 Q. B. 546.

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delivered from the ship's deck (subject to the exceptions and restrictions in the following and undermentioned clause) at the port of New York; the act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master and mariners, restraints of princes and rulers, or people, sweating, insufficiency of package, in size, strength, or otherwise, leakage, breakage, pilferage, wastage, rain, frost * * * and all damage, loss or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default or error in judgment of the pilot, master, the mariners, engineers, stevedores, or other persons in the service of the shipowners, always excepted.

Lush J. says:

The first question is, does "thieves" include persons on board the ship, or is it to be limited, as has been held in cases as to policies of insurance, to persons outside the ship and not belonging to it. The word is ambiguous, and being of doubtful meaning it must receive such a construction as is most in favor of the shipper, and not such as is most in favor of the shipowner, for whose benefit the exceptions are framed; for if it was intended to give to it the larger meaning which is now contended for, the intention to give the shipowner that protection ought to have been expressed in clear and unambiguous language. It is not, I think, reasonable to suppose, when the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. The shipowner must protect himself if he intends this by the use of unambiguous language. * * *

The case of *Czech* v. *General Steam Navigation Co.* (1) seems to me to have no direct bearing on this case. There it was stipulated in the bill of lading that the shipowner should not be liable for breakage, leakage or damage (which had been decided by previous cases not to include leakage, or breakage, or damage caused by the negligence of the shipowner or his servants).

The language of Lush J. is quoted in *Hayn* v. *Culliford* (2) and acted on by Denman, J. in delivering the judgment of the court.

In *Grill* v. *General Iron Screw Colliery Co.* (3), Kelly C. B. says:

With respect to the question whether a loss by the negligence of the defendant's servants is within the exception in the bill of lad-

(1) L. R. 3 C. P. 14. (2) 3 C. P. D. 418.
(3) L.R. 3 C. P. 476.

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ing, I am of opinion that is concluded by authority. The cases of *Phillips* v. *Clark* (1) in the Common Pleas, and *Lloyd* v. *General Iron Screw Collier Co.* (2) in the Exchequer, are expressly in point; and we ought not to overrule those decisions, though sitting in a Court of Error, unless we think them to be opposed to some principle of law or to common sense. I agree with my brother Channell that, independently of all authority, the loss in this case is not within the exception. If shipowners wish to except losses resulting from the negligence of themselves or their servants they must do so by express language, though they may thereby make the bill of lading repugnant. To show how impossible it is to construe the exception in this bill of lading in the way contended for by the defendants, I need only refer to what Cresswell J. says in *Phillips* v. *Clark* (1). The question there arose upon a bill of lading which contained a stipulation that the owner was not to be accountable for leakage and breakage, and that learned judge says: "Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly, and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage and breakage, leaving the rest as before." That is to say, the ordinary obligation of the owner to take due and proper care of the goods was left untouched by the exception. It appears to me, and I believe to the rest of the court, that the loss in question arising from negligence is not within the exception, and that the liability of the owners is only to be excluded by express words.

With reference to the duty of the shipowners to provide a fit and proper ship, and proper accommodation for stowage of the goods, the law is also clear. On this point I refer to the following authorities:—

In *Tattersall* v. *National Steamship Co.* (3) the bill of lading contained the following exceptions and conditions:

These animals being in sole charge of shippers' servants, it is hereby expressly agreed that the National Steamship Company, Limited, or its agents or servants, are, as respects these animals, in no way responsible for either their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals;

(1) 2 C. B (N. S.) 156; 26 L. J. (C. P). 168.
(2) 3 H. & C. 284; 33 L. J. (Ex.) 269.
(3) 12 Q. B. D. 300.

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all dogs to be placed wherever the captain may appoint, but at the sole risk of the shipper and (or) owner, the act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or people; loss or damage resulting from heat, boilers, steam or steam machinery, including consequences of defect therein, or damage thereto, collision, stranding, or other perils of the sea, rivers, steam and steam navigation; and all damage, loss or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from the negligence, default or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners.

Day J. says:—

I take it to have been clearly established, if not previously, at any rate since the case of *Steel* v. *State Line Steamship Company* (1), that where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purposes of such carriage. In this case it is clear that the ship was not reasonably fit for the carriage of these cattle. There is, therefore, a breach of their implied engagement by the defendants, and the plaintiff having sustained damage in consequence, must be entitled to recover the amount of such damage, unless the defendants are protected by any express stipulation.

I have considered the terms of the bill of lading, and as I construe it, its stipulations, which have been relied upon, all relate to the carriage of the goods on the voyage, and do not in any way affect the liability for not providing a ship fit for their reception.

They were damaged simply because the defendant's servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them.

A. L. Smith J. says:

It is admitted that the damage was occasioned by the negligence of the shipowner's servants before the voyage commenced, in not properly cleansing and disinfecting the ship. There is unquestionably a duty on the part of the shipowner to have the ship reasonably fit for the carriage of the goods. The case of *Steel* v. *The State Line Steamship Company* (1) conclusively so decides. Is there, then, anything in this bill of lading to exempt the defendants from what would *primâ facie* be their liability in respect of the breach of this duty? I do not think there is. The terms of the bill of lading

(1) 3 App. Cas. 72.

which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not, in my opinion, relate to anything before the commencement of the voyage.

Bovill C. J. In *Stanton* v. *Richardson* (1):

The ship must be fit to receive any reasonable cargo of the nature that the shipowner undertook to carry.

In Carver's Carriage by Sea (2) the law is thus laid down:

A shipowner will not be exonorated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them, or to guard against their possible effects; *Siordet* v. *Hall* (3), *The Freedom* (4), or to arrest their consequences. (See illustrations cited in Ang.-Carr, ss. 160-164), *Notara* v. *Henderson* (5). And where these causes have followed upon a departure from the proper prosecution of the voyage, and would not have operated but for that, the shipowner is not excused; as where a tempest has been encountered after a deviation from the proper course; *Scaramanga* v. *Scamp* (6), *Davis* v. *Garrett* (7). And see *infra*, ch. X.; or where the cargo has deteriorated owing to improper delay on the voyage. *Hawes* v. *S. E. Ry. Co.* (8), but see *Baldwin* v. *L.C. & D. Ry. Co.* (9).

And further, the shipowner is always responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness. This is so, although the shipowner may have taken all reasonable pains and precautions to make the ship seaworthy, if, in fact, he has failed to make her so. He undertakes absolutely that she shall be fit, on sailing upon the voyage, to carry the cargo which she has on board, and with it to encounter safely whatever perils a ship of that kind may fairly be expected to be exposed to in the course of that voyage at that season of the year. If her unfitness becomes a real cause of loss or damage to the cargo the shipowner is responsible, although other causes, from whose effects he is excused, either at common law or by express contract, have contributed to produce the loss. *The Glenfruin* (10), *Steel* v. *State Line SS. Co.* (11), *Kopitoff* v. *Wilson* (12), *Lyon* v. *Mells* (13).

(1) L. R. 7. C. P. 431 L. R. 9 C. P. 390.
(2) P. 18.
(3) 4 Bing, 607.
(4) L. R. 3 P.C. 594.
(5) L.R.5.Q.B. 346; 7 Q.B. 225.
(6) 4 C. P. D. 316; 5 C.P.D. 295.
(7) 6 Bing. 716.
(8) 52 L. T. 514.
(9) 9 Q. B. D. 582.
(10) 10 P.D. 103.
(11) 3 App. Cas. 72.
(12) 1 Q. B. D. 377.
(13) 5 East 428.

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Ritchie, C.J.

Lord Blackburn, in *Steel* v. *State Line Steamship Co.*, (1), said:—

I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think, also, in marine contracts—contracts for sea carriage—that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit.

The conclusion, then, at which I have arrived, is that the defendants were guilty of a breach of duty in taking the meat on board at an improper time, in reference to the state of the weather, and also in the manner in which it was handled on being taken on board. If the majority of the court agree in this view, and with the construction I have put on the bill of lading, then the appeal should be allowed with costs, and the verdict restored. If, on the contrary, a majority cannot arrive at this conclusion, then, as the defendants were also guilty of a breach of duty in failing to provide a fit and proper ship, and a fit and proper place in that ship for the stowage of goods contracted to be carried; and as the plaintiffs can maintain an action for such breach of duty, but as the trial of this case seems to have turned rather on the terms of the bill of lading than on any breach of the implied obligation of the shipowners, the appeal should be allowed with costs and a new trial ordered, with leave to the plaintiff to amend his declaration as he may be advised and to the defendants to amend their pleas to meet such amended declaration.

STRONG J.—If the respondents' liability as carriers had been in no way restricted by contract there was

(1) 3 App. Cas. 86.

ample evidence to warrant the verdict. The decision of the court below, in setting aside the verdict, can, therefore, only be supported by establishing that the terms of the bill of lading were such as to exonerate the respondents from liability for the negligence of their crew; and this is the only question which need be considered. The exception in the bill of lading is as follows:

The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master or mariners, restraint of princes and rulers, or people, or resulting from strikes or mob, loss or damage resulting from sweating, insufficiency of package, leakage, breakage, pilferage, wastage, rust, frost, decay, rain, spray, stowage, or contact with or smell or evaporation from any other goods, insufficiency of marks, numbers, address or description of goods shipped, injury to wrappers, however caused, or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or other persons in the service of the ship, or for whose acts the shipowner is liable, or otherwise howsoever, always excepted—namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused. Collision, stranding or other peril of the seas, rivers, navigation or land transit of whatever nature or kind soever, and howsoever caused, with liberty, in the event of the steamer putting back or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer, and with liberty to sail with or without pilots, to call at any intermediate port or ports, and to tow and assist vessels in all situations.

It appears to me that the construction of this exception is plain, and entitles the shipowners to the exemption which they claim. The obvious and grammatical reading of it is, that "loss or damage resulting from stowage" is an excepted peril "whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or other persons in the service of the ship, for whose acts the shipowner is liable, or otherwise howsoever.

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That this, and not that which would confine the exception of negligence to the perils immediately afterwards enumerated, is the proper construction is apparent when we consider that what is excepted is "loss or damage," which might result as well from perils antecedently specified as from those subsequently mentioned.

The bill of lading in *Steel* v. *State Line Company* (1) was similarly worded, but the House of Lords there did not pronounce any judgment on the question of construction, inasmuch as it was sufficient for the disposition of that case to hold that the shipowners were liable on the implied undertaking that the ship was seaworthy, of which it was held there had been a breach and from which there had been no dispensation from liability. That case is, therefore, not an authority here for either party.

As regards contracts for carriage of goods by sea, the Legislature has not interposed to control the contracts of the parties, stipulating for freedom from liability for negligence, as it has in England in the case of railway and canal companies, and here also to some extent in the case of railway carriers. In cases like the present the parties are free to enter into any contract they may think fit.

It is no doubt a well established and sound rule of construction that the exception of liability for the negligence of the crew and other persons for whose acts the owner is, by the general law, responsible, should be provided for in the most plain and unequivocal terms, and that all doubtful or ambiguous clauses should be strictly interpreted against the owner for whose benefit they are introduced into the contract. But giving the appellant the full benefit of this rule, I am unable to see that there can be the least doubt as to the meaning of the exception found in this bill of lading.

(1) 3 App. Cas. 72.

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Then, this being the proper construction of the instrument the onus was upon the respondents to bring themselves within it, and this I am of opinion they have done, since the evidence clearly established that the damage to the meat was caused by bad stowage, careless exposure to rain, and the negligent conduct of the crew. The verdict was therefore properly set aside. As I have said, it was for the respondents to bring themselves within the exception, and the plaintiff would have made a sufficient *primâ facie* case by merely proving that the meat reached its destination in a damaged condition. The plaintiffs did not, however, confine themselves to a *primâ facie* case of this kind, but by their own evidence established that the loss was occasioned by some of the excepted perils and the negligence of the crew, from which, on the construction of the exception already indicated, it resulted that the plaintiff by his own case established that there was no cause of action. The rule was therefore properly made absolute for a non-suit, and this appeal should be dismissed with costs.

FOURNIER J.—I entirely concur in the judgment prepared by the Chief Justice, and think the appeal should be allowed.

TASCHEREAU J.—I concur with my brother Strong, and for the reasons by him given I think that this appeal should be dismissed.

GWYNNE J.—There can be no doubt that these defendants might have by their contract with the plaintiff, if the latter had pleased to enter into such a contract, exempted themselves from all liability for any loss or damage which should happen to the carcasses of meat delivered to them to be carried, even though such damage or loss should in any respect result from a cause occurring before the vessel in which the meat

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was to be carried should proceed upon her voyage, and even though such cause should arise or be occasioned by the negligence of the defendants, or any of their servants, or of any person for whose acts, default or neglect they should be responsible.

The plaintiff's declaration in the present case contains five counts, the substantial allegations in each of which are, that the plaintiff delivered to the defendants certain goods of the plaintiff upon a certain contract made by the plaintiff with the defendants, whereby the latter agreed to use due and proper care in stowing the said goods on a ship of defendants, and carrying them from Prince Edward Island to St. Johns, Newfoundland, and there to deliver them to the plaintiff in as good condition as they were received by them (certain perils and causalties only excepted), and that the defendants, though not prevented by any of the perils or casualties excepted, did not use such due and proper care as aforesaid, and failed to carry the said goods safely and to deliver them to plaintiff in good condition as aforesaid, but so carelessly and negligently conducted themselves in the stowage of the said goods and otherwise in the premises, and took such bad care of the goods, that by reason thereof a great part of the said goods became lost to the plaintiff, and much damaged and deteriorated in value.

To these counts the defendants pleaded several pleas, among others that the goods mentioned in the declaration were delivered to the defendants and were received by them to be carried under a bill of lading signed on behalf of the defendants and accepted by the plaintiff, and that except the contract contained in the bill of lading there was never any contract between the defendants or the plaintiff. They then set forth the bill of lading *verbatim*, which contained a clause exempting the defendants from any loss or damage which

should occur to the goods (which consisted of carcasses of meat) from, among other causes, sweating, insufficiency of package, decay or stowage, and they averred in one plea that the loss and damage complained of arose from sweating, in another from insufficiency of package, in another from decay, and in another from stowage, all being excepted cases in the bill of lading. To these several pleas the plaintiff replied, that, although admitting that the said goods were delivered to and received by the defendants on the terms and conditions in the said bill of lading mentioned, yet the plaintiff alleged that the said several causes which the defendants in their said respective pleas alleged to have been excepted in the said bill of lading were occasioned by and arose through the negligence of the defendants, and were not, nor was either of them, within or covered by the several and respective exceptions in the said bill of lading as alleged. The substantial issue offered by these replications was simply this: Admitting the loss and damage to have arisen from sweating, from insufficiency of package, from decay, or from stowage, in whole or in part from some or one of those causes, were these several causes within the clause of exemption from liability contained in the bill of lading if they arose or were occasioned, as the replications alleged they were, by the negligence of the defendants? Now, as the bill of lading was set out *verbatim* in the pleas to which these replications were pleaded, the question of the defendants' liability could have been determined upon demurrer to the replications, which, admitting the only matter of fact alleged in them, namely, that the several causes of loss and damage pleaded were occasioned by the negligence of the defendants would have raised the single question of law upon the right determination of which the defendants' liability depends, namely, whether the

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bill of lading does or does not exempt the defendants from liability, assuming the causes of loss and damage as pleaded by the defendants to have been occasioned by the negligence of the defendants as alleged in the replications. Instead of demurring, the defendants, however, joined issue, which still left the question of the defendants liability to be determined as a matter of law depending upon the construction of the contract contained in the bill of lading. At the trial the plaintiff went into evidence which proved that the immediate cause of the loss and damage proved was sweating and decay, which necessitated the condemnation and destruction of a great part of the meat as unfit for human food ; but it was alleged that this sweating and decay arose or was aggravated by improper stowage, and evidence was adduced on the part of the plaintiff, although contradicted by witnesses of the defendants, to show that the men employed in stowing the meat on the vessel trampled upon and otherwise ill-treated it, and this ill-usage of the meat in the stowing of it contributed, as was alleged by some of the witnesses, in some measure though not altogether, to the sweating and decay which were the immediate cause of the loss and damage. At the close of the plaintiff's case the defendants' counsel moved for a non-suit, upon the ground that by the contract in the bill of lading the defendants were exempt from all liability, even though the causes of damage did arise by reason of the negligence of the defendants. Leave was renewed to the defendants to move the court above to enter a non-suit and the case was left to the jury, chiefly upon the point raised as to the mode in which the meat was stowed in the vessel, and with a charge which assumed the defendants not to be exempted from liability arising from such mode of stowing the meat and the jury rendered a verdict for the plaintiff with $600

damages. Upon a motion made in the court above a rule *nisi* was obtained by the defendants to show cause why this verdict should not be set aside and a verdict entered for the defendants, or a non-suit entered, or a new trial granted on the following grounds:

1. That the learned judge misdirected the jury in charging them that the defendants were liable for damages caused by improper stowage—that he should have charged that the defendants were exempted from such damages by the exemptions in the bill of lading.

2. That the learned judge refused to charge that the defendants were not liable for decay.

3. That the judge refused to charge that the defendants were not liable for sweating or heating.

4. That the damages were excessive.

5. That there should be a verdict entered for the defendants as to the counts alleging negligence in carrying, because there was no evidence of negligence in carrying.

6. That there should be a verdict for defendants on the tenth plea —which was, that the plaintiff could have protected himself from the loss which occurred by insurance.

This rule the court, after argument, made absolute for entering a non-suit, from which judgment this appeal is taken, and thereby the case is brought back to the original and sole question upon which the plaintiff's right of action turns, namely, does or does not the contract in the bill of lading exempt the defendants from liability for loss or damage occurring from sweating, or from decay, or from stowage—assuming these causes to have been occasioned by the negligence of the defendants? The answer to this question depends simply upon the proper answer to be given to the subsidiary question, namely, upon the proper construction of the contract do the words inserted therein, namely,

Whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers, or other persons in the service of the ship, or for whose acts the shipowner is liable, or otherwise, howsoever always excepted

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apply only to the points enumerated subsequently to this clause, or does the clause apply as well to the preceding causes of loss enumerated, or such of them as could arise from the negligence of the persons named, which included, among other causes, loss or damage resulting from "sweating," or from "decay," or from "stowage," as well as to loss or damage arising from any of the perils subsequently enumerated?

The whole sentence in which the clause of exemption occurs is not expressed with the most perfect grammatical precision, but the collocation of the part relating to negligence cannot have the effect of limiting the application of that part to the causes of loss subsequently enumerated; and in my opinion it applies equally to such of those previously enumerated as could be occasioned

by the defendants or any other persons employed in the service of the ship, or for whose acts the shipowner is liable.

The rule, therefore, to enter a non-suit was, in my opinion, properly granted, and this appeal should be dismissed with costs.

It was argued that under the first count the plaintiff was entitled to recover something for the want of due and proper care and skill of the defendants in stowing the goods, though there was no attempt made to distinguish the loss, if, indeed, it could be done, from the subsequent loss by sweating and decay; but it is not pretended that there was, indeed it is concluded by the admissions on the pleadings that there was not, any contract whatever between the defendants and the plaintiff in relation to the goods but that contained in the bill of lading, and the contract in the first count is stated as one promise to use proper skill in stowing, and to carry, &c., certain perils and casualties only excepted, which plainly applies to the one contract in the bill of lading; so that, apart from a breach of the contract in

the bill of lading, it is apparent that the plaintiff has not alleged any cause of action in respect of which he could recover upon this record.

A technical point was also taken, namely, that the rule *nisi* for leave to enter a non-suit contains, as is contended, no grounds for a non-suit but only for a new trial; but there is nothing in this objection, even if it could be entertained on an appeal, for the objection to the rulings of the judge which are stated, namely, that the defendants were liable for damages caused by improper stowage—that he should have ruled that they were exempted from such damages by the exemptions in the bill of lading—that he refused to direct that the defendants were not liable for decay, or for sweating or heating—if these objections were well founded are sufficient reasons why the plaintiff should be non-suited, and the court below having made the rule absolute for a non-suit a court of appeal cannot take notice of such a technical objection; which, if there was anything in it, affected only a matter of procedure in the court below.

Appeal dismissed with costs.

Solicitor for appellant: *Neil McLeod.*

Solicitor for respondents: *Arthur Peters.*

1888 PIERRE DANSEREAU (PLAINTIFF).....APPELLANT;

*Oct. 16.

AND

1889 FERDINAND BELLEMARE (DEFENDANT).....RESPONDENT.

*Jan. 15.

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

Patent—Carriage tops—Combination of elements—Novelty.

P. D. obtained a patent for an improvement in the construction of carriages by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely in sections of wood or other rigid material with glass sashes all round, and the carriage be opened in the centre into two principal parts and at once converted into an open uncovered carriage. In an action for infringment of this patent,

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court, Ritchie C. J. and Gwynne J. dissenting, that the combination was not previously in use and was a patentable invention.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) in an action brought against respondent, a carriage manufacturer, of the city of Montreal, for damages for the infringement of a patent of invention, issued to appellant on the 6th May, 1881, for an improvement in the construction of carriages, called "Dansereau's carriage tops."

The letters patent give the following definition of the invention claimed by appellant:

"It consists in the combination of a top made in

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

folding sections as described, with the posts D, O & P arranged to turn down substantially as set forth."

The paper called specification which is annexed to the letters patent contains a more explicit description of the pretended discovery and is as follows :—

"This invention has reference more particularly to the construction and arrangement of the top of carriages, to obviate the difficulty that when tops are made so that they "let down" and are formed of flexible material and in a short time show all the ribs of the bows, and thereby become shabby looking and ill shaped, and this defect cannot be remedied without removing the covering of the top, or replacing it with a new one; by my invention a rigid top is provided, arranged in sections so that when it is desired to "turn down" the top, it may be folded up and then turn down. Also, as constructed, whenever the top that I have invented becomes shabby it is only necessary to coat it with paint to make it look as good as new. My invention also enables glass pannels to be used all round the carriage, a thing that is very much desired by the public at this time."

Six months after the registering of this patent, the plaintiff caused an additional one to be registered with the following description :

"It consists first in the combination of a top divided into rigid parts and hinged together as described, one of the said parts secured in posts C and the whole of the parts turning back, with the said posts; 2nd, in the combination of a top divided into rigid parts as described and arranged to turn completely back as described, with back turn down posts C and front turn down posts H."

The defendant pleaded :

1st. The carriage tops manufactured by the defend-

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ant were neither an imitation of those built by the plaintiff nor an infringement on his patent.

2nd. The pretended invention of plaintiff was not one in reality and his patent was null and void. At the date when said patent was registered carriage tops made of rigid material and folding by sections were well known to the public, and had been in use for a considerable time; the plaintiff was not the inventor of the carriage tops described in his letters patent; plaintiff's patent had been obtained by fraud and false representations and could not form a basis of a suit at law.

These two pleas were followed by a general denial.

After evidence on both sides was concluded the court, of its own motion, appointed experts to examine and compare the carriage tops of four carriages made by respondent and alleged by appellant to be infringements on his patent; and also to examine the carriage top of one carriage, in the possession of C. A. Dumaine, alleged by respondent to be made on the same principle as appellant's invention, and to have been in use long before the appellant obtained his patent; and to ascertain and report on the 17th September, 1883, whether they were constructed on the principle covered by the appellant's patents, exhibits Nos. 1 and 2, and to state the differences, if any existed.

The court on the said 17th September, on motion of appellant extended the delay for the experts to report, until the 20th of September, 1883, the report was then filed, and was favorable to plaintiff's contentions.

The court rendered judgment in favor of the plaintiff, which judgment was subsequently reversed by the Court of Queen's Bench.

Geoffrion Q. C. for appellant.

Saint Pierre for respondent.

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Sir W. J. RITCHIE C.J.—I cannot discover that the invention is novel, that it developes any new principle, or exhibits the application of known principles to a new use. The principle claimed by the plaintiff on the folding of carriage-tops appears to have been applied and used by Dumaine in reference to the front part of carriages for some time before the plaintiff obtained his patent, and plaintiff's patent would seem to be only the application of the same principle to the rear part, and Mr. Larivière, one of the experts, says: "the principle of the front part of Dumaine's carriage could be applied to the rear part as well, and the fact that the post is solidly attached to the top, or connected with it, by means of hinges does not constitute any difference."

The principle in Dumaine's carriage seems to be precisely the same as the invention covered by the letters patent 1 and 2. In both the top is solid in front, both open by sections, and the principle is, therefore, exactly the same in both cases; therefore, as I can discover no new invention by plaintiff in this case, I am not disposed to interfere with the judgment of the Queen's Bench—that plaintiff's patent disclosed no new patentable invention or discovery.

STRONG J.—I am in favor of allowing the appeal for the reasons which will be given by my brother, Mr. Justice Taschereau.

FOURNIER J.—I agree with the view of the case taken by Mr. Justice Taschereau and also with the reasons given by Mr. Justice Loranger, in the Superior Court, for upholding the appellant's patent.

TASCHEREAU J.—This is an appeal by the plantiff from a judgment in an action brought against respondent, a carriage manufacturer, of the city of Montreal,

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for damages for the infringement of a patent of invention, issued to appellant in May, 1881, for an improvement in the construction of carriages, called "Dansereau's carriage tops," which was extended by a subsequent patent issued on 7th November, 1881.

The Superior Court had maintained the plaintiff's action but the Court of Appeal reversed the judgment, and dismissed the action on the ground that the said patent discloses no new patentable invention or discovery.

It appears by the first patent and specifications, and drawings annexed thereto, that the invention of the appellant is an improvement in the construction of carriages, by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof folding in themselves, and of the carriage posts on hinges, that the whole carriage top can be made (like stationary tops) entirely in sections of wood or other rigid material, with glass sashes all round, and the carriage be opened in the centre into two principal parts, and at once converted into an open uncovered carriage.

The arrangement of all the parts being (as shown by the specifications and drawings) combined in such a way that the sections of the roof opened and folded in themselves, the lining is protected from the weather and the sashes also protected by a special device. One of the most important devices used in the combination, to convert the carriage from a covered to an uncovered carriage, is that some of the sections of the roof, are rigidly attached to the door posts, so that when the carriage is to be converted from a closed into an open carriage, two of the door posts are thrown back on hinges with the rigid sections attached, and two are thrown forward with the other rigid sections of the roof attached; or in summer, the top may be

left up as a protection from the sun, with the sides, back, and front, all open, the sashes being let down.

The respondent pleaded first, that he had not copied plaintiff's invention, and secondly, that the patent covered no new or patentable invention.

As to the first of these pleas, there is no question. That the respondent did manufacture carriage tops similar in principle to the one described in this patent is clearly proved, and in fact was hardly denied by the respondent at the hearing. The two experts found against the respondent on this point

On the second of the respondent's pleas, by which he alleged that the plaintiff's patent disclosed no new or patentable invention, there is more difficulty.

I have however come to the conclusion that this plea is also unfounded, and that the judgment of the Superior Court was right.

The respondent, to sustain this, examined seven witnesses, Dumaine, Racette, Roussel and Giroux, carters: Maccabe, a blacksmith, and Houle and Papineau, carriage makers; the two latter only may be classed as mechanics skilled in the subject matter of the invention, but do not appear to have had any long experience in the business.

The first witness, Dumaine, who is described as a cooper and a carter, says, that on a visit to New York, in 1878, he got the plan of a carriage top, which he brought to Montreal, and that the front part folded like the model B, and that he had a carriage of his own, remodelled on the same plan by a carriage maker, but he could not tell, without having the carriage before him, whether it closed like the model or not. Racette, a carter, in the employ of Dumaine, says he saw a few months previous to 1881, a carriage, the front of which was like appellant's model, but it appears the carriage he saw belonged to Mr. Dumaine.

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Houle, a carriage maker says, he saw the carriage of Mr. Dumaine, and that it folds up like appellant's. That he had seen carriages like appellant's for five, six, or seven years, perhaps longer; but he afterwards says, he never saw carriages like Mr. Dumaine's until he saw his. He does not say where he had seen any other carriages like the model, whether in Canada or the United States, and he describes no other carriages than Mr. Dumaine's.

Papineau testifies that he made in 1880, a carriage with folded top like that of model, that it was a round carriage, repaired for Mr. Hoofsteter. He had made one for Mr. F. X. Roy like the model, but Mr. Roy had been prosecuted by appellant, and he had been told that Mr. Roy had promised to make no more carriages like that, and that the suit had been settled.

Maccabe, a blacksmith, says that he examined the carriage of Mr. Dumaine and that the front part closes in the same way as appellant's model B; he then states and describes differences in the constructions, and adds, *que ca revient toujours à peu près à la même affaire.* But he never made any carriage like the model B.

Giroux, a carter, says he has seen carriage tops folding like the model B for a long time—Mr. Marlo had one for nine years. Mr. Hoofsteter had one for three or four years. Mr. Marlo's was made by F. X. Roy—as to the carriage of Mr. Marlo, he cannot say positively *qu'elle ferme les deux draps ensemble.*

These were the witnesses produced by respondent in support of this plea.

On examining Papineau's testimony it appears that Roy had been prosecuted for manufacturing carriages on appellant's model, and that the action had been settled by Roy promising not to manufacture any more. This statement rebuts the assertion that the carriage made for Marlo by Roy, had been made prior

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to the appellant's patent, for, if such had been the case, there would have been no reason for Roy's settling appellant's action and stopping the manufacture. It may be observed here that the appellant's invention was found by expert and skilled carriage makers to be so new and useful that they consented to pay $10 and $20 as royalty for each top manufactured on the model patented. Giroux, being a carter and not a carriage maker, and therefore not skilled in the construction of carriages, the general appearance of the folding of the top might have seemed to him so like the model, that he could see no difference in principle. It does not appear that he examined Marlo's carriage with any care, for on cross-examination, he is unable to say how it closed; consequently he could make no comparison. Giroux also says, that Mr Hoofsteter had one folding like the model for three or four years, but he says that it was a coupé; he says also that this was the same carriage that the witness Papineau says he altered from a round top, for Mr. Hoofsteter, by cutting the front.

As the points of resemblance of Marlo's carriage and Hoofsteter's carriage to the appellant's are not shown, the only carriage known prior to appellant's patents, about which there can be any question of resemblance, in the principle of construction, is that of Dumaine. As to the respondent's plea, that appellant's alleged invention was used by others long before appellant obtained his patent, the respondent seeks to show this, by attempting to prove that the carriage of Dumaine constructed by him, before appellant obtained his patent, was on the same principle as appellant's.

The respondent attempted to sustain this part of his plea by the same witnesses above referred to, but in my opinion, completely failed in his attempt.

The appellant brought in as witnesses men of large experience in the carriage trade, in Montreal, who all

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swear that they never saw any tops folding on the same principle as the one patented, and the evidence on this part of the case strongly preponderates in favor of the plaintiff. The material part of the contestation, as already remarked, was as to one of Dumaine's carriages, which the respondent alleged was similar and anterior to that of the plaintiff. But the report of the expert Simpson against this contention seems to me so clear and able, that I am not surprised that the Superior Court did not hesitate to adopt it.

I would allow the appeal with costs *distraits*.

GWYNNE J.—I am of opinion that this appeal should be dismissed upon the grounds taken in the Court of Queen's Bench for Lower Canada, appeal side, that the appellant's patent disclosed no novelty.

Appeal allowed with costs.

Solicitors for appellant: *Geoffrion, Dorion, Lafleur & Rinfret.*

Solicitors for respondent: *Saint Pierre, Globensky & Poirier.*

EBENEZER E. GILBERT, *et al.* (DEFENDANTS)..... .... } APPELLANT; 1889 *Jan. 15.

AND

FRANCIS E. GILMAN, (PLAINTIFF).....RESPONDENT.

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

Jurisdiction—Appeal—Future rights—Supreme and Exchequer Courts Acts Sec. 29 Subsec. (b.)

In an action for $1333.36, a balance of one of several money payments of $2000 each, one whereof the defendants agreed to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendants remained in the hands of the government, the defendants contended that the security had been released by the action of the government and they were therefore not liable to pay the amount sued for, or any further instalments. The Court of Queen's Bench (appeal side) held that the security had not been released and gave judgment for the amount claimed. The defendants applied to one of the judges of that court and obtained leave to appeal on the ground that if the judgment was well founded then future rights would be bound and they had become liable for two other instalments of $2000 each for which actions were pending.

Held, that the appeal would not lie, because even if the future rights of the defendants were bound by the judgment such future rights had no relation to any of the matters or things enumerated in subsec. *b.* of sec. 29 of the S. & E. C. Act.

The words "where the rights in future might be bound" in this sub-section are governed and qualified by the preceding words, and to make a case appealable when the amount in controversy is less than $2000, not only must future rights be bound by the judgment, but the future rights to be so bound must relate to "a fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tenements, or to annual rents out of lands or tenements, or to some like matters and things."

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

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court by which the respondent's action for $1,333.36 was dismissed.

The only point determined upon this appeal was that the judgment of the Court of Queen's Bench in this case was not appealable.

The petition presented by appellant to the Court of Queen's Bench (appeal side) for leave to appeal to the Supreme Court of Canada sets forth the grounds relied on by appellant and is as follows:

"To any of the honorable judges of the Court of Queen's Bench, Province of Quebec, appeal side, sitting in Montreal, the petition of Ebenezer E. Gilbert *et al.*, the respondents above mentioned, respectfully show:

"That by judgment of this honorable court rendered on the twenty-second day of December, instant, they have been compelled to pay to the appellant the sum of eleven hundred and sixty-six dollars and sixty-seven cents ($1,166.67) and costs, as well in the Court of Queen's Bench as in the Superior Court.

"That said judgment was based on a letter, whereby in substance your petitioners agreed to pay the appellant the sum of two thousand dollars per annum, for the use of certain security (to the extent of $15,000) deposited by appellant with the government of the Dominion of Canada, so long as such security was not released by said Government of Canada.

"That your petitioners contended that such security had been released on the twentieth of November, 1885, by the return then made by the said government of Canada, through your petitioners to the said appellant, of a certain deposit receipt of the Exchange Bank of Canada for a like sum of fifteen thousand dollars ($15,000.00), but which return of said deposit receipt

this honorable court has decided not to constitute a release of the said security.

"That the said government of Canada contends that by the return of said deposit receipt, the said security was entirely released, the said appellant having brought a direct action against the said government of Canada for the sum of fifteen thousand dollars ($15,000 00), which is now before the Exchequer Court for the Dominion of Canada, and the said Government now defending the said action, and refusing to return to the said Gilman the said sum of fifteen thousand dollars ($15,000.00) claimed by him.

"That by reason of the premises, if the judgment of this honorable court is well founded, your petitioners have become liable already for the payment of two other sums of two thousand dollars each, to wit, for the year commencing on the twenty-sixth day of July, 1886, and on the twenty-sixth day of July, 1887, and actions for said sums have been instituted by the appellant against your petitioners, and one of said actions is now pending in appeal before this honorable court, and the other one is pending before the Superior Court for the district of Montreal.

"That by reason of the premises, the judgment rendered in this cause is of a nature to bind and affect certain rights between the parties, and does in fact decide the said two cases for two thousand dollars each, pending as aforesaid before the courts in this district.

"Whereby the present judgment is susceptible of appeal to the Supreme Court of Canada.

"Wherefore your petitioner prays that he may be permitted to appeal from the judgment of this court, rendered in this cause on the twenty-second day of December, inst., to the said Supreme Court of Canada, and justice will be done."

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The parties having been heard Mr. Justice Church made the following order:

"Seeing that the matter in controversy in this cause relates to matters or things where the rights in future might be bound, and that the said Ebenezer E. Gilbert, *et al.*, have given security to the extent of five hundred dollars, as required by the 46th section of chapter 135 of the Revised Statutes of Canada (The Supreme and Exchequer Courts Act, 1886), that they will effectually prosecute their said appeal, and pay such costs and damages as may be awarded against them by the Supreme Court, the appeal to the Supreme Court is hereby allowed."

Before the Supreme Court Mr. *Gilman* moved to quash the appeal on the ground of want of jurisdiction.

C. Robinson Q. C. and *Archibald* Q. C., contra.

SIR W. J. RITCHIE C. J.—I certainly for one do not see my way to entertain this appeal, especially when we take it in connection with the decision of this court in the *Bank of Toronto* v. *Le Curé and Les Marguilliers, &c.*, (1), and also the late decision in the Privy Council, in *Allan* v. *Pratt* (2).

The statute enacts "no appeal shall lie wherein the matter in controversy does not amount to the sum of value of two thousand dollars." In this court when the question first arose we held that the matter claimed in the declaration was to govern as being the amount in controversy, but a late decision of the Privy Council has determined that the matter in controversy is the amount of the judgment. In this case it is not claimed that either the amount claimed by the declaration or adjudged by the judgment amounts to the sum of two thousand dollars. Then to make it appealable the appllant must be prepared to

(1) 12 Can. S. C. R. 25. (2) 13 App. Cas. 780.

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show that it "relates to a fee of office,"—which it is not,—"duty, rent, revenue or sum of money payable to Her Majesty"—which it is not,—or "to any title to lands or tenements",—which it is not,—or "annual rents" that is annual rents out of lands or tenements—which it is not,—or "such like matters or things where the rights in future might be bound." I have no doubt that the words "such like matters or things" are governed by the preceding words. If ever the doctrine *noscitur a sociis* is applicable it is in this case—and under these circumstances I cannot see how we can get the matter within the above named exceptions of the section, or within the portion of the section which declares that to make the case appealable the matter in controversy must amount to two thousand dollars.

As to the argument of inconvenience all I can say is that the legislature has not given the right of appeal in the present case. If hereafter a case should arise in connection with this transaction in which the amount in controversy is two thousand dollars and it is determined in a manner hostile to the present appellant, then such a case would be appealable to this court, not because it affects any future rights, but because the amount in controversy was sufficient, and this court would not be bound in that matter by any decision of the court below, inasmuch as that court is not a superior tribunal to this court.

Under these circumstances I cannot escape the conclusion that this is not an appealable case and therefore the appeal must be quashed with costs.

STRONG J.—The jurisdiction to entertain this appeal must depend altogether on sec. 29, sub-sec. *b*. of the Supreme and Exchequer Courts Act. It is said that future rights will be bound by the judgment appealed if it is allowed to stand unreversed. It is plain however that

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this is not enough, for not only must future rights be bound by the judgment in order that an appeal may be admitted when the amount in controversy is less than $2000, but further the future rights to be so bound must relate to some or one of the matters or things specified in the sub-section in question, viz: to a fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tenements, or to some like matters and things where the same consequence will follow, viz: when future rights will be bound. Now it is manifest that in the present case, even if future rights will be bound by the judgment under appeal, such future rights will have no relation whatever to any of the matters or things enumerated in this sub-section in question.

It therefore follows that the case does not come within the only exception to the first part of section 29 to which jurisdiction to entertain it has been ascribed, and the appeal must therefore be quashed.

FOURNIER J.—I do not dissent. I have given my reasons at length in the cases of *Joyce* v. *Hart* (1), *Bank of Toronto* v. *Le Curé et les Marguilliers, &c. de la Paroisse de la Nativité* (2), and in *Reburn* v. *Corporation of Ste. Anne* (3) as to my interpretation of this section 29 giving a right of appeal in cases coming from the Province of Quebec.

In my opinion the case of *Allan* v. *Pratt* (4) decided by the Privy Council is not applicable to the present case.

TASCHEREAU J.—I need only add that we are asked to read this section as if it read—"Or in any matters or things where the rights in future might be bound."

(1) 1 Can. S. C. R. 321.
(2) 12 Can. S. C. R. 25.
(3) 15 Can. S. C. R. 92.
(4) 13 App. Cas. 780.

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But the words the legislature has used are "such like matters," thereby qualifying them to such matters or things as are precedently mentioned. Now what would be the result if we were to adopt the construction contended for? Take an extreme case. Suppose a man owed $1,900 payable by instalments, and the action was taken only when all the instalments were due, the case would not be appealable, but if after default of the first instalment, could it be said he had a right to appeal because the decision on that instalment would affect the decision as to future instalments? Certainly not. But putting aside the consideration of "rights in future," I am clearly of opinion that this case is not appealable and this conclusion is in affirmance of the decision of this court in the case of the *Bank of Toronto* v. *Le Curé et les Marguilliers, &c* (1). As to *Allan* v. *Pratt*, (2) I do not think this case comes up under the part of the section of the act to which that decision is applicable. I suppose, however, that we are bound by that decision and the members of the bar from the Province of Quebec, will no doubt understand that the decision of this court in *Joyce* v. *Hart* (3) has been overruled.

PATTERSON J.—There are no future rights, within the meaning of the clause limiting appeals from the Province of Quebec, affected by this judgment. The words "or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound," cannot be construed to include this claim for the balance of one of the money payments which the defendant was to make to the plaintiff every year as long as certain security given by the plaintiff for the defendant remained in the hands of

(1) 12 Can. S. C. R. 25. (2) 13 App. Cas. 780.
(3) 1 Can. S.C.R. 321.

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the government. If the amount claimed in the action had been for more than $2,000 while the judgment was recovered for less than that amount, the limitation of the appealable amount would have applied, because the matter in controversy which, as explained in *Allan* v. *Pratt* (1), means the matter in controversy upon the appeal, would have been only the smaller sum. Here, however, the claim is only for the balance of $1,339.36.

There may be actions for sums under the minimum appealable amount where the judgment will be conclusive of the right to much larger sums, as *e. g.*, an action to recover one instalment upon an obligation to pay a large sum by small instalments, or an action by a legatee claiming the income of a fund where the present right to the income and the ultimate right to the fund itself depend on the validity of the will. In such cases, when the whole amount involved in the decision exceeds $2,000 it is not to be supposed that the parties are precluded from appealing merely because the money immediately payable, and the payment of which is sought to be enforced, is under that sum. But the right to appeal in such cases arises, or rather the limitation is excluded, not because future rights are involved, but because the matter in controversy is the whole fund or the whole obligation and amounts to the sum or value of $2,000.

Appeal quashed with costs.

Solicitors for appellants : *Archibald, Lynch & Foster.*

Solicitor for respondent : *J. N. Greenshields*

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(1) 13 App. Cas. 780.

In re HENRY O'BRIEN.....APPELLANT ; 1888

AND *Mar. 16.

THE QUEEN UPON THE RELATION OF FREDERIC FELITZ (PLAINTIFF). } RESPONDENT ; 1889 *Mar. 18.

AND

WILLIAM H. HOWLAND.....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contempt of court—Constructive contempt—Appeal—Discretion of court—R. S. C. c. 135 s. 27—*Obstructing litigation—Prejudice to suitor—Locus standi.*

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by sec. 27 of the Supreme and Exchequer Courts Act. Taschereau J. dubitante.

The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the Province, not only under sec. 24, sub-sec. (*a*) of Supreme and Exchequer Courts Act as a final judgment in an action or suit, but also under sub-sec. (l) of sec. 26 of the same act, as a final judgment " in a matter or other judicial proceeding " within the meaning of said sec. 26.

The adjudication that the appellant, a solicitor and officer of the court and moved against in that quality, has been guilty of a contempt is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court. When the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt.

The alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for the defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given but before the motion was made the notice was countermanded and the appeal abandoned.

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

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Held, that the proceedings in the cause before the master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for contempt he had no *locus standi* and his application should not have been entertained.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of Mr. Justice Proudfoot (2) who held the appellant guilty of contempt in publishing a certain letter in the Toronto Daily Mail.

These proceedings took place in the course of proceedings by *quo warranto* against Howland, a candidate for Mayor of Toronto, by which his qualification for the office was attacked. The matter was heard before a master and the next morning an editorial appeared in the Mail commenting on the proceedings and stating that Howland had made a bad blunder in running for Mayor without being qualified. The appellant was a strong supporter of Howland and chairman of his committee, and he caused to be published in the Mail a few days later the following letter explaining the position, which was the alleged contempt of court :—

To the Editor of the Mail.

SIR,—The many friends of Mr. W. H. Howland must have been gratified (as doubtless he was himself) as well by your timely and heartily expressed suggestion that he should now be returned by acclamation, as by your appropriate remarks on the conduct of those who have been stirring up this litigation. There is one remark, however, which I must ask your indulgence to refer to and explain.

You say Mr. Howland made a bad blunder in running without a proper qualification. It was perhaps natural to assume this on the supposition that the law was correctly expounded last Tuesday. We contend it was not so, but will speak of that hereafter. Mr. Howland's advisers, however, had to take the law as they found it. How then did it stand before the election ?

1. Ever since we have had municipal institutions it has been

(1) 14 Ont. App. R. 184. (2) 11 O. R. 633.

assumed that a husband properly rated, and whose wife has the necessary property, had the right to vote and qualify in respect of that property. The generally received and acted upon opinion was that the property had under such circumstances the right to representation, and that this right was in the husband. The whole country has acted on this view, and the right has never been questioned until now. It might have been brought up at any time since the Married Woman's Act of 1859, but was not.

2. Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the Howland case. This decision has never been over-ruled, is consistent with common sense, and with the universally accepted opinion on the subject.

Under these circumstances the counsel who advised Mr. Howland that his qualification was sufficient were amply justified in so doing. They did so advise Mr. Howland plainly and distinctly when asked by him. If they were wrong surely the blame should rest on them, and not on the person who had been unhesitatingly advised that he had the qualification required by law.

You may naturally ask: Why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law. But the legislature on both sides of the House, on the matter being presented, at once admitted that the interpretation of Chief Justice Richards was correct and according to the original intention of the legislature, and thereupon declared that to be the case, and removed the apparent difficulty. This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of relying upon a reversal of the late judgment by a higher authority, has determined to go at once to the people, encouraged thereto partly by your own manly utterance on the subject, and by the universal expressions of sympathy and support which he has received.

It may be necessary as a question of costs to appeal from the recent judgment, but that does not now effect the question before the electors.

Yours, etc.,

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Before the publication of this letter the legislature of Ontario, then in session, passed an act declaring the qualification claimed by Howland (one in respect to his wife's property) to be sufficient for the purpose of the election and Howland was again a candidate for the mayoralty; and the intention of this letter was alleged by O'Brien, in the proceedings for contempt, to be to do away with the effect on the electors of the Mail's editorial. After the passing of this declaratory act the solicitors of Mr. Howland in the *quo warranto* proceedings gave notice of abandonment of the appeal which they had contemplated from the judgment of the master.

Subsequent to the service of this notice of abandonment application was made in the *quo warranto* suit to the divisional court for an attachment against O'Brien for contempt of court for publishing the above letter, and he was adjudged guilty of such contempt and ordered to pay the costs of the application to the informant in the suit, the order of the court stating that as no prejudice could then result to the informant from the letter no punishment would be inflicted. This decision was confirmed by the court of appeal, and from the judgment of the latter court this appeal was brought to the Supreme Court of Canada.

Bain Q.C., for the respondent, objects to the hearing of this appeal for want of jurisdiction. *Ashworth* v. *Outram* (1); *McDermott's case* (2); *Jarmain* v. *Chatterton* (3); *Rainy* v. *The Justices of Sierra Leone* (4). See also R. S. C. ch. 135, sec. 27.

S. H. Blake Q. C. for the appellant. This is not the exercise of a judicial discretion unless every judgment of a court is such. *Witt* v. *Corcoran* (5); *Ashworth*

(1) 5 Ch. D. 943.
(2) L. R. 2 P. C. 341.
(3) 20 Ch. D. 493.
(4) 8 Moo. P.C. 54.
(5) 2 Ch. D. 69.

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v. *Outram* (1); *Jarmain* v. *Chatterton* (2); *Re Johnson* (3); *Re Wallace* (4); *Re William Arrandale* (5) are cases in which the courts in England entertained appeals in matters of contempt.

The proceedings in the original suit being at an end the informant had no right to make this application; *Metzler* v. *Gounod* (6).

There was no contempt of court in the appellant's letter. *Plating Co.* v. *Farquharson* (7); *Dallas* v. *Ledger* (8).

The master had no jurisdiction to hear the matter as it was connected with an election. *Reg.* v. *Duncan* (9).

The learned counsel referred also to *Lechmere Charlton's case* (10); *Lincoln Election Case* (11); *Reg.* v. *Wilkinson* (12).

Bain Q. C. for the respondent. The proceedings in the original suit could not be abandoned without the order of the court. *Ex parte Turner* (13).

See also *Tichborne* v. *Mostyn* (14); *Daw* v. *Eley* (15).

The order is simply one for payment of costs for which an appeal will not lie.

SIR W. J. RITCHIE C. J.—I am of opinion that the appeal should be allowed with costs.

STRONG J.—In January, 1886, Mr. William Henry Howland was, by a large majority of votes, elected Mayor of Toronto. On the 18th February, 1886, the respondent in the present appeal, Mr. Frederic Felitz, as relator, instituted proceedings in the nature of a

(1) 5 Ch. D. 943.
(2) 20 Ch. D. 493.
(3) 20 Q. B. D. 68.
(4) L. R. 1 P. C. 283.
(5) 3 Moo. P. C. 414.
(6) 30 L. T. N. S. 264.
(7) 17 Ch. D. 49.
(8) 4 Times L. R. 432.
(9) 11 Ont. P. R. 379.
(10) 2 Mylne & C. 339.
(11) 2 Ont. App. R. 353.
(12) 41 U. C. Q. B. 42 at p. 107.
(13) 3 Mont. D. & D 523 at p. 544.
(14) L. R. 7 Eq. 55 n.
(15) L. R. 7 Eq. 49.

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quo warranto against Mr. Howland to set aside the election upon the ground of want of qualification. This *quo warranto* afterwards, and on the 20th of March, 1886, came on to be heard before the master in chambers who, on the 23rd of March, delivered judgment unseating Mr. Howland. On the 26th of March, 1886, the defendant gave notice of appeal against the judgment of the master to a judge in chambers. On the 29th of March the defendant served the solicitors of the relator with a notice that the notice of appeal previously served was withdrawn and that the appeal was abandoned. On the same 29th of March, 1886, the relator in the *quo warranto* proceeding, the present respondent, Frederic Felitz, served the appellant, Henry O'Brien, Esq., who had acted as solicitor for Mr. Howland in the proceedings to set aside the election and who had also been one of his principal supporters in the contest, with a notice of motion to commit him for contempt of court. This notice of motion was as follows:—

Take notice, that by special leave granted by His Lordship the Chancellor, this court will be moved on behalf of the above named Frederic Felitz on Thursday the 1st day of April, 1886, at the hour of eleven o'clock in the forenoon, or so soon thereafter as counsel can be heard, for an order to commit Henry O'Brien, of the City of Toronto, Esq., solicitor for the above named William H. Howland in this cause, to the common gaol of the county in which he may be found, on the ground that the said Henry O'Brien while such solicitor and while the proceedings in this cause are still pending has been guilty of contempt of this court and for his said contempt of court in writing and publishing and procuring to be published in the issue of the Toronto Daily Mail of Saturday the 27th March, 1886, a letter addressed to the editor of the Mail, with the heading "The Mayor's position explained" and signed "Henry O'Brien".

And that all necessary attachments may be issued for that purpose and for an order that the said Henry O'Brien do pay the costs of this application, or for such other order as to the said court may seem just.

And take notice that on such application will be read the affidavits

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of Frederic Felitz and Christopher William Bunting this day filed, and exhibits therein referred to, together with papers and proceedings taken herein.

Dated this 29th day of March, 1886.

Yours, &c.

BAIN, LAIDLAW & Co.

Solicitors for relator.

To Henry O'Brien.

Barrister, Toronto, and to Messrs. Robinson & O'Brien, Solicitors for W. H. Howland.

The notice of countermand of the notice of appeal was accompanied by a letter written and addressed by Messrs. Robinson & O'Brien, the solicitors for Mr. Howland, to the respondent's solicitors, which was as follows:—

68 Church Street, Toronto, March 29th, 1886.

Messrs. BAIN & LAIDLAW, Toronto.

DEAR SIRS,—We have served on you a notice of abandonment of the motion for appeal from Mr. Dalton's judgment herein. It was only given as a matter of form to preserve the right of appeal (if any) as the counsel who were advising in this matter were out of town; but as Mr. Howland has decided (as already publicly announced) his intention not to appeal, but to go again before the electors, and as the question of costs is unimportant, the appeal is now formally abandoned, as the thought of appealing was in effect abandoned when Mr. Howland made his announcement that he would run again.

Yours truly,

ROBINSON & O'BRIEN.

The 15th paragraph of the affidavit filed by the appellant in answer to the notice to commit was in the following words:—

15. That the notice of motion to commit me in this matter was not served until after I had written the letter now shown to me marked with the letter "D" and the notice of abandonment now shown to me and marked with the letter "C" and after such notice had been actually delivered to the solicitors for the applicant in this matter.

The letter "D" here referred to was the letter before set out.

This statement contained in the 15th paragraph of the affidavit is not in any way contradicted.

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It appears from the affidavits filed by the appellant that the publication complained of as a contempt was induced by, and was written and published for, the purpose of explaining an editorial paragraph which appeared in the Mail newspaper of the 24th March. This paragraph was as follows :—

THE MAYORALTY.

It is eminently proper that the occupant of the mayor's chair should be duly qualified accerding to the requirements of the act; and without doubt Mr. Howland has made a bad blunder in running for the positicn last January without having the necessary qualifications. Nevertheless there is reason to fear that the suit which terminated yesterday in his being unseated was brought and carried on more for the purpose of tormenting him and putting him to expense than of vindicating the law. What course Mr. Howland intends to pursue we do not know, but there should be no trouble in securing his re-election by acclamation. It is due to him and to the people who chose him for the chief magistracy that no obstacle should be placed in the way of his return.

The letter complained of as being a contempt was, as Mr. O'Brien swears, written on the 26th of March, before the notice of appeal was served, and was published in the Mail newspaper on the 27th of March. It is set forth *in extenso* in the order made on the motion to commit and is in the following words :—

To the Editor of the Mail.

SIR,—The many friends of Mr. W. H. Howland must have been gratified (as doubtless he was himself) as well by your timely and heartily expressed suggestion that he should now be returned by acclamation, as by your appropriate remarks on the conduct of those who have been stirring up this litigation. There is one remark, however, which I must ask your indulgence to refer to and explain.

You say Mr. Howland made a bad blunder in running without a proper qualification. It was perhaps natural to assume this on the supposition that the law was correctly expounded last Tuesday. We contend it was not so, but will speak of that hereafter. Mr. Howland's advisers, however, had to take the law as they found it. How then did it stand before the election ?

1. Ever since we have had municipal institutions it has been assumed that a husband properly rated, and whose wife has the necessary

property, had the right to vote and qualify in respect to that property. The generally received and acted upon opinion was that the property had under such circumstances the right to representation and that this right was in the husband. The whole country has acted on this view, and the right has never been questioned until now. It might have brought up at any time since the Married Woman's Act of 1859 but was not.

2. Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the Howland case. This decision has never been over-ruled, is consistent with common sense and with the universally accepted opinion on the subject.

Under these circumstances the counsel who advised Mr. Howland that his qualification was sufficient were amply justified in so doing. They did so advise Mr. Howland plainly and distinctly when asked by him. If they were wrong surely the blame should rest on them, and not on the person who had been unhesitatingly advised that he had the qualification required by law.

You may naturally ask, why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law. But the legislature on both sides of the House, on the matter being presented, at once admitted that the interpretation of Chief Justice Richards was correct and according to the original intention of the legislature, and thereupon declared that to be the case and removed the apparent difficulty. This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of relying upon a reversal of the late judgment by a higher authority, has determined to go at once to the people, encouraged thereto partly by your own manly utterance on the subject, and by the universal expressions of sympathy and support which he has received.

It may be necessary as a question of costs to appeal from the recent judgment, but that does not now affect the question now before the electors.

Yours, etc.,

HENRY O'BRIEN.

Toronto, 26th March.

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The motion to commit came on to be heard before Mr. Justice Proudfoot on the 13th of April, 1886, and on the 28th of April the learned judge pronounced judgment adjudging the publication of the letter complained of to be a contempt and ordering the appellant to pay the costs of the application. The formal order drawn up was as follows:—

> This court finds that the writing and publishing of the letter aforesaid by the said Henry O'Brien was, under the circumstances under which it was written and published, a contempt of this court. But this court having regard to the circumstances appearing in the affidavits, and being of opinion that no prejudice can now result to the relator from the publication of the said letter, doth not see fit to make any order save that the said Henry O'Brien do forthwith pay to the said relator his costs of this application to be taxed.

From this order Mr. O'Brien appealed to the Court of Appeal for Ontario. This court (which was constituted of four judges, viz: the Chief Justice of Ontario and Burton, Patterson and Ferguson JJ.) by a majority of three judges to one affirmed the order of Mr. Justice Proudfoot and dismissed the appeal, the dissenting judge being Mr. Justice Burton. Mr. O'Brien then appealed to this court.

The first question we have to decide is that raised by the respondent as to the jurisdiction of this court to entertain the appeal. This objection presents no difficulty in view of the decisions upon the question of jurisdiction which have already been pronounced here. I am clearly of opinion that we have jurisdiction to entertain the appeal, not only under section 24 sub-section (*a*) of the Supreme and Exchequer Courts Act (R.S.C. cap. 135) but also under sub-section (1) of section 26 of the same act. The Court of Appeal is the highest court of final resort in the Province of Ontario, and the judgment appealed from is a final judgment according to decisions which the court is bound to follow. Further, if it is not a final judgment in "an

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action or suit" it is nevertheless a final judgment "in a matter or other judicial proceeding" within the meaning which decided cases have attached to those words as used in section 26 sub-section (1).

I refer to the following authorities as conclusive against the objection, viz., *Wallace* v. *Bossom* (1): *Wilkins* v. *Geddes* (2); *Lenoir* v. *Ritchie* (3); *Chevalier* v. *Cuvillier* (4); *Shields* v. *Peak* (5): *Shaw* v. *St. Louis* (6); *McKinnon* v. *Kerouack* (7); *Whiling* v. *Hovey* (8).

That the order in question contains an adjudication that the appellant had been guilty of contempt although the word "adjudged" is not used is, I think, too clear to require any observation. The expression "the court finds" is amply sufficient to meet all the requirements as to an adjudication pointed out as regularly essential by Lord Lyndhurst, Chancellor, in *Ex parte Sandau* (9); and I find the equivalent, or perhaps the less distinct, expression of an adjudication "this court is of opinion" in common use in the precedents given in Seton.

Then, it is said that this is merely an appeal on a question of costs. This objection also appears to be wholly untenable. The proceeding to commit for contempt is of a penal and quasi-criminal character. The order complained of contains, in the first place, a distinct adjudication that the appellant has been guilty of a contempt of court, and it then proceeds (waiving other punishment) to inflict what is in substance, if not in form, a penalty or punishment by ordering the appellant to pay the costs. The adjudication that the appellant, a solicitor and officer of the

(1) 2 Can. S. C. R. 488.
(2) 3 Can. S. C. R. 203.
(3) 3 Can. S. C. R. 575.
(4) 4 Can. S. C. R. 605.
(5) 8 Can. S. C. R. 579.
(6) 8 Can. S. C. R. 385.
(7) 8 C. L. J. 36.
(8) 14 Can. S. C. R. 515.
(9) 1 Ph. 605.

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court and moved against in that quality, has been guilty of a contempt is, by itself, an appealable judgment and would have been so even if it had not (as in fact, however it has) been followed by sentence. As Mr. Blake forcibly urged the order under appeal affixes to the appellant, as a professional man, a stigma from which he is entitled to be relieved if he has been found guilty upon insufficient evidence or for insufficient reasons.

Again, by ordering him to pay costs as a consequence of this conviction the court inflicts upon the appellant a punishment which, if not so in name and form is yet in substance and effect, a fine for his contempt. There can be no analogy between an appeal from such an order as this and one from a decree or order in an ordinary case relating to property or private rights which is confined to an adjudication as to costs to be paid by one party to the other.

The authorities to this effect are clear and entirely support what is said on this head in the judgment of Mr. Justice Burton in the court below.

Having thus disposed of the preliminary objections which were raised at the hearing of the appeal we may now proceed to consider the case upon its merits.

Contempts of a court of justice being a court of record, other than those committed in its presence (*sedente curiâ*), have received the name of constructive contempts and may be classed under two entirely distinct and very different heads. In the first place it is held to be a contempt to interfere with the due course of justice by publishing comments or criticisms on pending litigation which may have the effect of influencing the minds of those who will be called upon to decide either upon the facts or the law, jurors or judges, and thus cause prejudice to either of the suitors whose rights are in controversy. Such contempts are, when pro-

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ceedings are taken to punish them and restrain their repetition, always in practice brought under the notice of the court by the litigant who considers himself aggrieved by the publication or comment, and the order made usually extends to prohibit a repetition of the offences as well as to punish for the past contempt. In cases of this kind, provided the litigation is still pending, the suitor complaining is considered as having a *locus standi* to institute the proceedings and is recognized by the courts, at least in cases of private litigation, as the proper person to prosecute the proceedings for the contempt. As Mr. Justice Burton has pointed out in his very clear and able judgment, it was a contempt of this class which was complained of by the respondent. The notice of motion indicates this very plainly. The motion of which notice was given was for the committal of the appellant on the ground that he, while solicitor for Mr. Howland and while the proceedings in the cause were still pending, had been guilty of contempt in writing and publishing and procuring to be published in the "Toronto Daily Mail" of Saturday the 27th day of March, 1886, a letter addressed to the editor of the Mail.

It is plain, therefore, that what the respondent complained of was not the contents of the letter *per se*, but the publication of it "while the proceedings in the cause were still pending". This, if the respondent brought himself within the proper conditions, was a matter which he had a sufficient *locus standi* to complain of. There is, however, nothing in the notice of motion from which it is to be inferred that the motion which the respondent proposed to make was not as a party interested and on his own behalf but merely as a champion of public justice, and by way of asserting the dignity of the court by calling for the punishment of a person who had been guilty of contempt in publishing a libel on

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one of its officers, a matter in which the respondent had no greater interest than any other of Her Majesty's subjects. As I shall show hereafter the respondent had no qualification entitling him to constitute himself the prosecutor of a contempt of this latter kind.

Then regarded as a contempt of the first class before defined, that is as one calculated to prejudice the interest of the respondent in litigation in which he was then engaged and which was actually in progress, our first inquiry must be: Was the respondent at the time he served the notice of motion and made the motion to commit in a position which entitled him to the recognition of the court for such a purpose? Before considering this it is important to recall certain dates already mentioned. The master's judgment unseating the mayor was pronounced on the 23rd of March, and the letter which is the subject of complaint was written on the 27th of the same month. Now it is obvious that if no step in the cause had been taken between these two dates, the 23rd and 27th, there would have been no litigation pending which could have been prejudiced by the letter to the newspaper, and consequently the respondent would not have been in a position to complain of that communication as a contempt of court. The master's judgment was final and conclusive unless appealed against within the time limited by statute. If no notice of appeal had been given the case would, on the 29th of March when notice of motion was served, have stood in exactly the same position as an ordinary action at law which had been tried by a jury, and in which the time for moving against the verdict had not expired. On the 26th of March, however, notice of appeal was served. The appellant in the affidavit which he filed in answer to the motion to commit states the reason for serving this notice of appeal to have been that the counsel by whom

he was advised was absent from Toronto, and being in doubt what to do he gave the notice of appeal, on the last day for so doing, as a matter of precaution and with the intention of abandoning the appeal if it should appear in consultation with counsel that Mr. Howland was qualified to be a candidate under the new act passed by the legislature subsequent to the judgment. All this, however, appears to be quite immaterial. We have the indisputable fact that from the 26th until the morning of the 29th March an appeal was pending. On the 29th, however, and before the notice of motion to commit the appellant was served, a notice countermanding the notice of appeal, and distinctly abandoning it, was delivered to the respondent's solicitors accompanied by the letter from Mr. O'Brien before set out, and which also states that the appeal was abandoned and further gives the reason I have already mentioned as that which had induced the appellant to serve the notice of appeal. It is to be especially observed that this notice and letter were actually served and delivered before the contempt proceedings were initiated by the serving of the notice of motion to commit. The effect of this abandonment of the appeal was, of course, not merely to restore the proceedings to the state they were in prior to the notice of appeal being served, but to preclude all right to appeal and to make the master's judgment from that time absolutely conclusive, and thus finally to terminate the litigation. The case is, therefore, stronger than that of a party, who had obtained a verdict the time for moving against which had not expired, complaining of a publication calculated to interfere with his rights. In the latter case the proceedings might be said to be, in a sense, still pending though dormant for the time, since it would be still within the power of the party against whom the verdict had been found to move for

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a new trial, but here after the notice waiving the appeal the proceedings were finally closed and disposed of in favor of the respondent.

The case of *Dallas* v. *Ledger*, which I have not seen reported anywhere but in the Times Law Reports for the 27th of March, 1888, appears to have been a much stronger case than this, a rule for a new trial having been actually pending, but it was there held by a Divisional Court composed of Mr. Justice Stephen and Mr. Justice Field that an article published by the defendant criticising the verdict and the conduct of the jury generally, in very strong and uncourteous language, was not such an interference with the course of justice as warranted the court in granting a rule *nisi* calling upon the defendant to answer as for a contempt. The learned judges who decided that case must have thought that the article would have been wholly innocuous as regarded the application for a new trial and, indeed, Mr. Justice Stephen points out that it was only material in the contingent event of a new trial being granted, and the case being brought before another jury. In the present case, if the appeal had gone on it is impossible to suppose that this article, having no reference to facts or evidence but to a dry question of law, could have had the slightest influence on the judge in chambers before whom it might have come on appeal. Moreover, when the notice of motion was served all proceedings by way of appeal had been abandoned so that, as I hold, agreeing in that respect entirely with Mr. Justice Burton in the Court of Appeal, the respondent had no *locus standi* entitling him to make the motion which he did treating the letter as a contempt as having a tendency to exercise an undue influence over the regular course of justice, inasmuch as all proceedings had reached a final termination.

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Agreeing again with Mr. Justice Burton I do not think we are called upon to consider whether this letter was a contempt included in another class of such offences against the administration of justice, namely, as containing injurious reflections upon a judicial officer of the court. The respondent has, manifestly, not based his motion on any such ground, and even if he had the matter was one with which he was not concerned if I am right in holding that the proceedings in the *quo warranto* case had terminated, but it was for the court on the publication being brought to its notice, if it considered the letter a contempt, to have interfered *ex officio* and to have itself instituted proceedings calling the appellant to account for his contumacious conduct. Further, I may add that although I admit the letter might have been more courteously worded I, at present, fail to see that it exceeded the bounds of that fair criticism upon the public administration of justice which every one is entitled to write and publish. That the writer was inaccurate in his law, as he manifestly was, for it is beyond doubt that the decision of the learned master was perfectly correct, can make no difference provided his remarks were made in good faith, and that they were so made appears, I think, from the fact that the letter complained of was not a spontaneous communication to the "Mail" by Mr. O'Brien but was an answer to, and was elicited by, certain editorial comments on the mayoralty case contained in a preceding number of the same newspaper. The observations which are said to constitute a contempt have reference, not to facts but exclusively to questions of law. The letter certainly does allege that the learned master had pronounced an erroneous decision, but it does not contain any imputation that such alleged error proceeded from

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any improper motive. The most that can be said against Mr. O'Brien is that in this letter he erroneously stated that Chief Justice Richards had decided the same point of law in a different way from that in which the master had determined it in the mayor's case and, further, that the master's decision was wrong in law. Although I altogether differ from Mr. O'Brien's views of the law I cannot say that in publishing these criticisms under the circumstances stated in his affidavit he was guilty of any contempt of court.

I am of opinion that the appeal must be allowed with costs to the appellant in all the courts.

FOURNIER J. was also of opinion that the appeal should be allowed for the reasons given by Gwynne J.

TASCHEREAU J.—I am not prepared to assent to, or dissent from, the judgment about to be entered. I was doubtful as to our jurisdiction and as to the right of appeal under the Supreme Court Act and more especially under section 27 thereof. I will not, however, unnecessarily delay the judgment. I hope that Parliament will interfere and protect the dignity of the provincial courts by making their decisions in matters of contempt final.

GWYNNE J.—In *McDermott* v. *The Judges of British Guiana* (1), there was no question as to whether or not the publication complained of constituted a contempt of court, and all that the judicial committee there say is:—

Not a single case is to be found where there has been a committal by one of the colonial courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this

(1) L. R. 2 P. C. 363.

committee has ever entertained an appeal against an order of this description.

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But this practice of the judicial committee of the Privy Council, however invariable it be, has no bearing upon the question before us, which is whether or not an appeal lies by law to this court in the present case, a question which must be determined by the statute constituting the court. It may be admitted that an order convicting a party of contempt of court committed in *facie curiæ* may be so drawn as to leave nothing which could be open upon an appeal, and so to exclude an appeal, but in the present case the publication complained of as a contempt of court is set out at large in the order that is appealed from, and a question is raised as to the proper construction to be put upon that publication and whether under the circumstances appearing in the case that publication can in point of law be held to have been a contempt of court.

Now, that an appeal lies in the present case in virtue of the express provisions of the Supreme and Exchequer Courts Act, ch. 135 of the Revised Statutes of Canada, there can be no doubt unless it is excluded by the 27th section of that act which enacts that:—

No appeal shall lie from any order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same.

The contention that an order of a court pronouncing a publication to contain matter which constitutes it a contempt of court, and adjudging the party convicted of such contempt to pay costs to the suitor who made the application to commit the party for such contempt, is an order so made in the exercise of the judicial discretion of the court as to take from the party against whom it is made all right to appeal from it cannot, in my opinion, be for a moment entertained. Whether

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matter published out of court constitutes a contempt of court may involve a question whether it constitutes a defamatory libel upon a judge or other officer of the court, or a question whether it can properly be construed to interfere with the due administration of justice in some pending proceeding, or to be calculated to influence the result of the pending proceedings, which questions of law and fact must need be determined before the accused could be convicted of the offence of contempt of court. Now, whether matter published out of court be or be not a libel upon the court or upon some judge or other officer thereof, or whether it could or not interfere with the due administration of justice in any particular pending proceeding, can never be said to rest in the unquestionable discretion of the court before which a motion for an order to commit is made and to be free from all appeal to a higher tribunal calling in question the correctness of the decision of the court upon its construction and view of the matter published. That the matter published in the present case did not, under the circumstances appearing in the case, justify an adjudication that it constituted a contempt of court was, and still is, the point in issue, and that is an issue which, for its determination, called for a judgment, not rendered in the exercise of an arbitrary discretion of the court to which the question of law was submitted, but rendered in accordance with the principles of law and justice equally as any other point of law in any action, suit or judicial proceeding is submitted, and so equally subject to revision on appeal. The 27th section of the act relates, in my opinion, to matters which the court or a judge may at its or his pleasure decide indifferently one way or the other and not to a matter submitted to judicial enquiry and adjudication as the principles of law and a proper construction of the facts involved

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in the case require. In *Daw* v. *Eley* (1) a motion was made to commit a solicitor, as in the present case, for contempt of court in writing for publication letters tending to influence the result of the suit for one of the parties to which he was solicitor, and Lord Romilly, Master of the Rolls, before whom the motion was made, while adjudicating that the solicitor was guilty of contempt of court in writing the letters, directed that the order should not be enforced for a fortnight for the express purpose of enabling the solicitor to appeal. In *Witt* v. *Corcoran* (2), an order declaring that defendant had committed a breach of an "injunction," but giving no directions except that the defendant should pay the costs of an application to commit him, was appealed against, and it was contended for the plaintiff that no appeal lay for that the order was merely for the payment of costs and that the act under which proceedings were taken provided that there should be no appeal for costs where they are in the discretion of the court, but Lord Justice James giving judgment that an appeal lay, says:—

> There is no discretion as to whether a man has or has not been guilty of something alleged against him. The defendant says he has been guilty of nothing, and if the court had been of that opinion it could not have ordered him to pay the costs any more than it could dismiss a bill and order the defendant to pay the costs of the suit. The court has made an adjudication and as a consequence of that adjudication has ordered the defendant to pay the costs. If the court had thought that no contempt had been committed it could not have ordered the defendant to pay the costs. The defendant must have a right to appeal against the adjudication.

In *Jarmain* v. *Chatterton* (3) an appeal was taken from an order refusing to commit a party for an alleged contempt of court and directing the applicant

(1) L. R. 7 Eq. 49.
(2) 2 Ch. D. 69.
(3) 20 Ch. D. 493.

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for the order of commitment to pay the costs of the application, and it was contended upon the authority of *Ashworth* v. *Outram* (1) that an application to commit for contempt is a matter in the discretion of the judge and that no appeal lay from his refusal to commit, but the Master of the Rolls giving judgment, said :

> It is clear that Lord Justice James never intended in *Ashworth* v. *Outram* to lay down a new rule, and that his words must mean that in the circumstances of that case there was no appeal. The case of *Ashworth* v. *Outram* is not in our way here where a question of right is discussed—where the defendants are asserting that the plaintiffs have no right to what they claim.

And Lord Justice Brett, in the same case, explains *Ashworth* v *Outram* :

> As being a case in which there was no dispute as to the meaning of the order said to have been disobeyed—no dispute as to whether it had been disobeyed or not—but the Vice Chancellor in the circumstances of the case came to the conclusion that he should exercise his discretion indulgently, that is, he merely made the costs of the motion costs in the cause, and there was no appeal as to his construction of the agreement, the appeal was confined to the mode of enforcing an order, and was simply from the discretion of the court ; and the court of appeal said that when an appeal is simply on this ground although the court has jurisdiction on so delicate a matter it will not exercise it ; here the meaning of the order is in dispute, and a considerable question arises whether the Vice Chancellor did not interpret the order in a different way from that in which this court has construed it.

So in the case now before us the questions were and are as to the proper construction of the letter which is charged to have been a contempt of court ; and whether under the circumstances appearing in the case the order of the court below adjudging its publication to have been a contempt of court, and ordering the solicitor of the defendant in the *quo warranto* proceeding to pay to the relator in that proceeding the cost of his application to commit was a proper order to have been

(1) 5 Ch. D. 943.

made, and these are questions that, in my opinion, are proper questions to be submitted to this court by way of appeal from such order.

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It is impossible I think to read the case as it is reported in 11th O. R. 633, under the title *Regina ex relatione Felitz* v. *Howland in re O'Brien*, without perceiving that the application to commit O'Brien the solicitor of the defendant Howland for contempt of court in writing and causing to be published the letter in question was made by the relator in the *quo warranto* proceeding instituted by him against the defendant Howland as a matter of right claimed to be vested in him as a suitor in that proceeding, and on the ground that the publication of the letter was, as was contended on his behalf, calculated to prejudice his case, and to interfere with the due administration of justice in the determination of and the adjudication in that proceeding, and that it was so entertained by the divisional court in which the application was made. The contention upon behalf of the relator was that although judgment had been rendered by the master in chambers in the *quo warranto* proceeding which was a final determination of the matter unless appealed from, yet that a notice of appeal from that judgment had been served upon the relator and that after such notice had been served the letter complained of was published and that, therefore, the *quo warranto* proceeding was still pending so as to leave vested in the relator a right to complain that the publication of the letter was calculated to prejudice his case and to interfere with the due administration of justice therein. The judgment of the master in chambers which adjudged that Mr. Howland, the defendant in the *quo warranto* proceeding, had not a legal qualification to warrant his being elected mayor of the City of Toronto was rendered on

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the 23rd March, 1886. On the 26th of March Mr. O'Brien, as solicitor of the defendant, gave a notice of appeal from that judgment. On the 27th March the letter complained of appeared in the Mail, a newspaper published in the city of Toronto. On the 29th of March notice of the abandonment of the appeal was served upon the relator's solicitor, and upon the same day but after the service of such notice the motion to commit was made. All these facts appeared in an affidavit made by Mr O'Brien in answer to the motion, in which affidavit he also stated that the letter complained of was written by way of answer to an article which appeared in the Mail newspaper on the 24th March, which was annexed to his affidavit, and he said that by reason of a statement in that article to the effect that Mr. Howland had made a bad blunder in running for mayor without a qualification, serious injury, as he was informed, was done to Mr. Howland's reputation as a public man and that he, Mr. O'Brien, held it to be his duty, being familiar with the matter, to explain his, Mr. Howland's, position, and he added that his sole object in writing the letter and the only thought in his mind was a desire to correct a misapprehension which had been raised in the public mind by the said article and by certain other statements of a like nature which were apparently intended to try and prevent Mr. Howland from again becoming a candidate as mayor of the city. He further stated in his said affidavit, that upon the 25th of March, after discussion among Mr. Howland's supporters, it was finally decided not to appeal from the judgment, and that instructions to that effect were given to him, and that an announcement of such decision was published in the newspapers that evening and the next morning, and he stated further to the effect that the notice of appeal served by him on the 26th March

was given by him merely as a precautionary measure, as the 26th was the last day upon which such notice could be served, and to keep the matter open until the decision of Mr. Howland and his supporters could be communicated to Mr. Howland's counsel who was then absent from Toronto. He stated further that he wrote the letter complained of on the morning of the 26th March before the notice of appeal was served, and that as it was only written for the purpose and under the circumstances aforesaid, namely, to answer the article published on the 24th March, it did not occur to him to withdraw it in view of any possible contention that the *quo warranto* proceedings could be said to be still pending, and further that when he wrote the letter he believed that his professional connection with the proceedings was in fact at an end, and that he wrote the letter simply as a citizen in the interests of the candidate he had supported at the last election, and intended to support again, and he added that as a matter of fact at such time no proceedings were pending in said *quo warranto* matter. The letter as published contained the following paragraph at the conclusion of an argument wherein he stated his reasons for thinking the judgment which had been rendered to be wrong in point of law :—

> This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of reversing the late judgment by a higher authority has determined to go at once to the people, encouraged thereto partly by your own manly utterances on the subject, and by the universal expressions of sympathy and support which he has received. It may be necessary as a question of costs to appeal from the recent judgment, but that does not now affect the question before the electors.

The letter he subscribed with his own signature in disavowal of any intention of treating with disrespect the master in chambers who had rendered the judg-

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ment which the letter commented on. Mr. O'Brien's affidavit concluded as follows:—

While I am unable to conclude that in writing the said letter I offended against any rule of this honorable court, or any rule of professional etiquette, or was guilty of disrespect to the learned master, if it should be thought I, in any way, offended in these respects or if there are (unintended by me) any expressions which could in any way indicate that I thought the learned master had not acted with impartiality, I must unfeignedly say that I deeply regret them and desire to withdraw the said letter so far as the same are concerned.

Now the relator's counsel in supporting his motion insisted that the relator was not deprived of his right to make the motion and to press it by reason of notice of abandonment of the appeal having been served before the motion was made, for that the relator's position was to be considered as at the time the letter was published, and that he was entitled to insist upon his rights as they were then, and he contended that the tendency of the publication was to interfere with and to obstruct the due administration of justice in his *quo warranto* proceeding which by reason of the notice of appeal he contended was still pending at the time of the publication of the letter although it had ceased to be so when the motion was first made. In support of this contention he relied upon *Skipworth's Case* (1); *Tichborne* v. *Mostyn* (2); and *Daw* v. *Eley* (3) from which latter case he quoted the following passages as appears by the report of the case (4).

The principle is quite established in all these cases that no person must do anything with a view to pervert the sources of justice, or the proper flow of justice; in fact they ought not to make any publications or to write anything which would induce the court, or which might possibly induce the court or the jury, the tribunal that will have to try the matter to come to any conclusion other than that which is to be derived from the evidence in the cause between

(1) L. R. 9 Q. B. 230.
(2) L. R. 7 Eq. 55. N.
(3) L. R. 7 Eq. 59.
(4) 11 O. R. 635.

parties * * * (1) Gentlemen who are concerned for contending clients in this court, whether solicitor or counsel, should abstain entirely from the merits of these questions in public print.

The context in immediate connection with the last quotation is

If they do it at all they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of the subject and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant and has the strongest possible interest in his success is, in my opinion, highly reprehensible.

Now all the above cases so relied upon were cases of flagrant attempts to taint and obstruct the due course of the flow of justice by scandalous vituperation of a judge before whom a case was shortly to be tried with a view to endeavoring to prevent his trying the case, and by interested representations of facts in such a manner as to endeavor to obtain a result of legal proceedings not yet tried different from that which should be derived from the evidence in the cause and different from what would follow in the ordinary course. It cannot therefore, I think, admit of a doubt that the motion was made simply in assertion of a legal right vested in the relator in the *quo warranto* proceeding to make it upon the ground that, as he contended, the publication complained of was calculated, and had an evident tendency, to affect the result of the *quo warranto* proceedings to the prejudice of the relator and thereby to obstruct and interfere with the due administration of justice in that proceeding; and that it was upon this ground that the motion was entertained and adjudicated on by the court appears, I think, from the terms of the order which was made upon the motion which, after stating that the motion was made by the relator, and setting out the letter at length, concludes as follows:

(1) L. R. 7 Eq. 61.

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The court finds that the writing and publishing of the letter aforesaid by the said Henry O'Brien was, under the circumstances under which it was written, and published, a contempt of court; but this court having regard to the circumstances appearing in the affidavits and being of opinion that no prejudice can now result to the relator from the publication of the said letter doth not see fit to make any order save that the said Henry O'Brien do forthwith pay to the said relator his costs of this application to be taxed.

The reason for the court arriving at the opinion which is stated in the order—that "no prejudice can now result to the relator" is shown to have been the abandonment of the appeal; so that it appears, I think, to be clear, not only that the motion was made, but that it was entertained and adjudicated upon by the court, as one which the relator as a suitor in a cause pending in court had a vested right in law to make, because of the prejudice to his suit by reason of the tendency which the publication of the letter had to obstruct the due administration of justice in the *quo warranto* proceeding instituted by him, and that it was because of the tendency so to prejudice the relator in the result of that proceeding that the court pronounced the publication to have been a contempt of court, and ordered Mr. O'Brien to pay to the relator the costs of his application. We may therefore, I think, confine ourselves to the consideration of the question whether the publication of the letter can properly be said to have had a tendency to obstruct the flow of justice and to interfere with its due administration to the prejudice of the result of the *quo warranto* proceeding instituted by the relator, and we are, as it appears to me, relieved from determining whether or not there is anything in the manner in which the judgment of the master in chambers is commented upon in the letter which can be said so to transgress the bounds of fair criticism as to justify the letter being adjudged to have been for that reason a contempt of court, for a

judgment of a court of justice is open to fair comment and criticism which may call in question its soundness in point of law even though it be still open to revision upon appeal. This much, however, may, I think, be said of the letter, that whether the reasoning upon which the soundness of the learned master's judgment was impugned be sound or otherwise, and whether the authorities and references by which the writer essayed to support his argument when properly understood gave weight to his argument or had the contrary effect, the whole tenor of the letter nevertheless appeared upon its face to be, as it was intended to be, an argument calling in question a judgment delivered upon purely legal grounds, and that if a motion to commit the writer of the letter as guilty of contempt of court upon any public grounds, as that the letter contained a very calumnious vituperation or a personal attack upon the integrity of the judge, or as having a tendency to bring him or his judgments into contempt with the public, there could not have been found, I think, in modern times at least, any precedent for entertaining such an application upon such grounds upon like materials ; and certainly none of the authorities which were relied upon by the relator in the present case would have had any application in such a case.

Upon the question, then, as to the prejudice to the relator in the *quo warranto* proceeding instituted by him all the authorities are to the same effect, namely, that any publication, the object of which is, or the evident tendency of which is, though not intended, to bend and pervert the source of justice, or to disturb its free course, as to induce the tribunal having to try a matter in litigation to come to any decision other than that which is to be derived from the evidence in the cause between the parties, is a contempt of court which any suitor whose suit may be prejudiced by such

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publication has an undoubted legal right to bring under the notice of the court and to demand its adjudication thereon.

The matter which in *Tichborne* v. *Mostyn* and *Tichborne* v. *Tichborne* (1) was pronounced to be a contempt of court was an article in a newspaper pronouncing certain affidavits sworn by several persons upon behalf of the claimant in a cause pending in court, but which had not yet been laid before the court, to be in some particulars false, absurd, and worthless, and upon the strength of facts alleged within the knowledge of the writer commenting upon the plaintiff's case unfavorably, and that so freely that the solicitor of the plaintiff filed an affidavit in support of the motion, stating his belief that the article was likely to create a prejudice against the plaintiff and to prevent witnesses from making affidavits. The court then came to the conclusion that the comments in the article had a clear and distinct tendency to direct and sway the mind of the court and jury by whom the case was to be determined. *Onslow's* and *Whalley's Case* (2) was a case of a most open undisguised attempt to interfere with the result of a trial about to take place by prejudicing the minds of the public, from whom the jurors should have to come, by most inflammatory addresses at public meetings, charging several persons alleged to be related to the claimant in that suit of *Tichborne* v. *Tichborne*, (1) who was about to be put upon his trial for perjury committed by him in the suit, with having entered into a conspiracy to deprive him of his legal rights, well knowing him to be the person he represented himself to be and, as such, heir to the Tichborne estates, and endeavoring to influence the public mind in favor of the claimant upon his said approaching trial. While in *Skipworth's*

(1) L. R. 7 Eq. 55 n. (2) L. R. 9 Q. B. 219.

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Case (1)there was added to the above a scandalous vituperation of the Chief Justice, with a view to trying to prevent his presiding at the approaching trial, accusing him of having already prejudged the case, and an attack upon the witnesses with a view to prejudicing the trial.

In *Lechmere Charlton's* case (2) the contempt of court consisted in a barrister writing and sending to a master in chancery a letter which contained threats to induce him, in the absence of the opposite party to a matter in litigation before him, to alter the decision at which he was supposed to have arrived and to come to a conclusion favorable to the case advocated by the writer of the letter. In *Littler* v. *Thompson* (3) the publication complained of was an article in a newspaper which alleged that certain affidavits made in support of a motion by the plaintiff for an injunction contained glaring misrepresentations which the writer of the article declared that he believed and hoped would lead to an indictment for perjury. The article also reflected severely upon the conduct of the plaintiff and characterized the chancery proceedings instituted by him as vexatious and unprincipled. Lord Langdale, Master of the Rolls, held that the effect of the publication seemed to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. In *Daw* v. *Eley* (4) the publication complained of entered into a free discussion as to the merits of an invention the novelty and utility of which were the subject of litigation, and the writer spoke with great apparent authority upon the subject, professing to be familiar with all the facts bearing upon the case and to treat the subject as if he was a per-

(1) L. R. 9 Q. B. 230.
(2) 2 Mylne & C. 339.
(3) 2 Beav. 129.
(4) L. R. 7 Eq. 49.

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fectly independent stranger, whereas he was in truth the solicitor of one of the litigating parties whose position the article sustained. Lord Romilly, Master of the Rolls, giving judgment in this case says:—

> In this case the main question to be tried is the novelty of the plaintiff's invention.

Then after quoting largely from the article he adds:

> Can any body doubt that if I were persuaded that the whole of the statements in that letter were true, it would very seriously affect my opinion as to the solidity and originality of Mr. Daw's patent? Then it is to be observed that this is written not by a mere stranger, who might say that he really knew nothing about the cause, but it is written by the solicitor of the gentleman who is opposed to Mr. Daw in this suit; surely that is a very strong feature in the case. He must wish that his client should succeed, and I venture to say that there is no solicitor who would not in the same position feel the same thing, and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which if believed must have a beneficial effect upon his client, and afterwards say: "I had no intention of that sort at all however much I may wish for it." It must be regarded as an endeavor to interfere with the due administration of justice.

This is the case which was mainly relied upon by the relator in support of his motion, yet a case more different from the present it would be difficult to conceive. In all the cases care is taken to point out how the publication complained of in each was calculated to affect the result of a pending suit. Here nothing has been suggested having such a tendency.

There never was any fact whatever in issue. The sole question was one of law, namely. whether the property of the defendant's wife upon which the defenddant had qualified as mayor of the city of Toronto was a good qualification in point of law. The master in chambers rendered judgment that it was not. The matter never could be brought again before him. The point of law which was in litigation was finally determined by his judgment unless it should be reversed

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upon appeal, so that Mr. O'Brien's letter, which stated his reasons for thinking the qualification to be good, and the master's judgment to be erroneous, could in no conceivable manner prejudice the relator's case unless the matter of the letter could be construed to have a tendency to interfere with the due administration of justice in a court of appeal in the event of the master's judgment being brought before such a court by appeal; a suggestion that it could have such a tendency as offering by implication a grave insult to that court would seem to partake of a contempt of court more than any thing in the letter complained of, which, as a legal argument, appears to have been, in the opinion of the Court of Appeal for Ontario, exceedingly weak, defective and inconclusive, but whether the argument be weak or strong, the suggestion that this argument, stamped as it was with the infirmity that it expressed merely the legal opinion of the solicitor of the party against whose contention the judgment had been rendered, might have a tendency to taint, obstruct or interfere with the due administration of justice in the court of appeal in the event of the matter being brought before that court is a preposterous proposition for which there is no foundation, and in my opinion it cannot be and should not have been entertained. That it could have no such tendency after abandonment of the appeal of which notice had been served is admitted on the face of the order which is the subject of the present appeal; but if for that reason the letter was innocuous when judgment was given upon the application to commit, it was equally innocuous when the motion was made, for the notice of abandonment had then already been served so that the relator was then deprived of the ground upon which alone he invoked and persistently pressed for the interference of the court, and so the

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language of the Court of Appeal in England in *Plating Co.* v. *Farquharson* (1) becomes most appropriate in the determination of the present case. Lord Justice Cotton there says, with the full concurrence of the Master of the Rolls :—

> Where there is no case for a committal the party moving ought to have no costs to his motion.

And Lord Justice James says :

> That in such cases he would not only not give the party moving his costs, but should be inclined to make him pay costs.

These motions he thought to be a contempt of court in themselves, because they tend to waste the public time.

Now when the relator made the motion in the present case which he subsequently insisted upon, he well knew that he could suffer no possible prejudice from the letter complained of ; the motion therefore was made and persisted in by him vexatiously, in my judgment, and without reasonable cause. I think, therefore, that this appeal should be allowed with costs, and that the order of the Chancery Divisional Court of the Supreme Court of Justice for Ontario now appealed from should be ordered to be discharged and an order in its place be ordered to be issued out of that court refusing the relator's motion with costs.

Appeal allowed with costs.

Solicitors for appellant : *Robinson & O'Brien.*

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

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(1) 17 Ch. D. 56.

THE CORPORATION OF THE CITY OF LONDON (DEFENDANTS) } APPELLANTS: 1888 * Oct. 22.

AND

SUSAN GOLDSMITH (PLAINTIFF).....RESPONDENT: 1889 *Mar. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Public highway - Construction of crossing—Elevation above level of street.

A Municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk is at an elevation of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street. Strong and Fournier JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division of the court, the judgment of the Divisional Court (1) and of the judge at the trial in favor of the plaintiff.

This was an action against the city of London for damages caused by the plaintiff striking her foot against a street curbing raised above the level of the crossing and falling down, by which she was seriously injured. The accident occurred after dark and the plaintiff claimed that both from the improper construction of the crossing, it being alleged to be from four to six inches below the level of the sidewalk, and from its being allowed to fall into disrepair, the city was guilty of negligence and liable to the plaintiff for the injuries sustained by the fall. The

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

(1) 1 O. R. 26.

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defendants claimed that the only objection to the crossing was as to the manner of construction, namely, below the level of the sidewalk, and as that was a matter discretionary with the civic authorities the courts should not interfere with their action. It was also claimed by the defence that the sidewalk was only elevated one and a-half or two inches.

At the trial a verdict was given for the plaintiff and the damages assessed at $500. The Divisional Court sustained the verdict, the Chief Justice dissenting, and on appeal the judges of the Court of Appeal were equally divided in opinion, and the judgment of the Divisional Court was therefore affirmed. The defendants then appealed to the Supreme Court of Canada.

W. R. Meredith Q.C. for the appellants. The rule governing actions of this kind is that the defendants are not liable unless they could be indicted for a nuisance which it is clear could not be done in this case. *Ringland* v. *The City of Toronto* (1); *Boyle* v. *The Town of Dundas* (2); *Ray* v. *The Town of Petrolia* (3); *The Town of Portland* v. *Griffiths* (4).

As to how far the courts will interfere with municipalities in the exercise of their judicial functions see *Slattery* v. *Nailor* (5); *St John* v. *Pattison* (6).

The following authorities were referred to as cases *ejusdem generis* where the defendants were held not liable. *Metropolitan Ry. Co.* v. *Jackson* (7); *Giblin* v. *McMullen* (8); *Crafter* v. *The Metropolitan Ry. Co.* (9); *Metropolitan Ry. Co.* v. *Wright* (10); *Hamilton* v. *Johnston* (11).

R. M. Meredith and Love for the respondent. The

(1) 23 U. C. C. P. 93.
(2) 23 U. C. C. P. 470.
(3) 24 U. C. C. P. 763.
(4) 11 Can. S. C. R. 333.
(5) 13 App. Cas. 446.
(6) Cassels's Dig. 97.
(7) 3 App. Cas. 193.
(8) L. R. 2 P. C. 317.
(9) L. R. 1 C. P. 300.
(10) 11 App. Cas. 156.
(11) 5 Q. B. D. 263.

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question as to the construction of the crossing is one solely for the jury, and a court of appeal will not interfere with their verdict. *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (1).

As to the merits see *Moore* v. *Lambeth Waterworks Co.* (2); *Blackmore* v. *Vestry of Mile End, Old Town* (3); *George* v. *City of Haverhill* (4).

SIR W. J. RITCHIE C.J.—In this case there having been no evidence of either the street or the sidewalk being out of repair, on the contrary, the evidence showing that the sidewalk was in a good state of repair, I think the mere fact of the sidewalk at the street crossing being four inches or less higher than the crossing was no such evidence of neglect or violation of the legal duty on the defendant's part as was proper to be submitted to the jury. To hold that such a liability was intended to be imposed by the legislature on municipal bodies would be most unreasonable and would practically burden municipalities to an extent that could never have been contemplated by the legislature.

Unless we are prepared to hold, which I am not, that municipal bodies are bound by law to make the street crossings meet the sidewalks on the level, and that they are liable if the side-walk rises on the perpendicular four inches or less above the crossing at the point of contact, I cannot see how the plaintiff can recover. While not desiring to relieve municipalities from the duties and responsibilities fairly cast upon them I think we should be careful not to subject them to an action for negligence because, as Chief Justice Wilson says, the edge of the sidewalk happens to be four inches higher than the crossing at the point of contact. I think the appeal should be allowed.

(1) 3 App. Cas. 1155.
(2) 17 Q. B. D. 462.
(3) 9 Q. B. D. 451.
(4) 110 Mass. 506.

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STRONG and FOURNIER JJ. were of opinion that the appeal should be dismissed.

TASCHEREAU J.—I would allow this appeal, and order a non-suit to be entered. I cannot see that any actionable wrong has been proved against this corporation. The street itself and the sidewalk were in a perfect state of repair. That the sidewalk was from two to four inches higher than the street is the only ground of this action.

I agree with the remarks made by the Chief Justice of Ontario and Mr. Justice Burton in the Court of Appeal.

GWYNNE J.—I entirely concur with the judgments in this case of Sir Adam Wilson, late Chief Justice of the Queen's Bench Division, and of the Chief Justice of Ontario and of Mr. Justice Burton in the Court of Appeal of Ontario, that the fact of a sidewalk in the city of London being four inches above the level of the roadway was no evidence proper to be submitted to a jury of neglect by the corporation of any legal duty so as to make them responsible therefor, either in a criminal prosecution or a civil action, and that the plaintiff, therefore, in this case, should have been non-suited. The appeal should be allowed with costs, and a rule for judgment of non-suit be ordered to be issued in the court below.

Appeal allowed with costs.

Solicitors for appellants: *Meredith & Cox.*

Solicitor for respondent. *Francis Love.*

EDWARD OSCAR BICKFORD & THE ERIE & HURON RAILWAY COMPANY (PLAINTIFFS) } APPELLANTS.

AND

THE CORPORATION OF THE TOWN OF CHATHAM (DEFENDANTS) } RESPONDENTS.

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*Jan. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Aid to—By-law granting bonus—Conditions of prior agreement—Performance of conditions—Specific performance—Damages.

By an agreement between the E. & H. Railway Co. and the Town of C. the latter agreed to pass a by-law granting a bonus to the company in aid of the construction of a railway, subject to the performance of certain specified conditions. The by-law subsequently approved by the ratepayers, and passed by the council of the town, did not contain all the conditions of the agreement. In an action against the town to compel the delivery of debentures for the amount of the bonus the defendants pleaded non-performance of the conditions of the agreement as justifying the withholding of the debentures and, by way of counter-claim, prayed specific performance of such conditions by the plaintiffs.

Held—1. Per Ritchie C.J,. Strong, Fournier and Henry JJ., Taschereau and Gwynne JJ. *contra*, that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with the debentures should issue.

2. Per Fournier J., that the debentures should, nevertheless, be withheld until the damages for non-performance of the conditions in the agreement were paid or secured.

3. Per Ritchie C.J., Strong and Henry JJ., Fournier J. *contra*, that specific performance was not an appropriate remedy in such a case and the defendants could only claim damages for non-performance.

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

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4. Per Ritchie C.J., Strong and Fournier JJ., that the claim of defendants for damages could be disposed of in this action under the counterclaim and there should be a reference to assess the same.

5. Per Henry J., that the evidence did not justify a reference and the counterclaim should be dismissed with a reservation of defendant's rights.

One of the conditions in the agreement to be performed by the railway company was "to construct at or near the corner of Colborne and William Streets (in Toronto) a freight and passenger station with all necessary accommodation, connected by switches, sidings or otherwise with said road" upon the council of the town passing a by-law granting a necessary right of way.

Held—1. That such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers such as station master, ticket agent, etc., were not appointed. Strong J. dissenting.

2. Per Strong J., that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station or make any other use of it.

3. The words "all necessary accommodation" in the condition required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.

The act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act.

Held, that such special act was not restrictive of the municipal act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus.

Held also, that all defects of form in the by-law were cured by 44 Vic. ch. 24, sec. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Division (2) in favor of the plaintiff.

The action in this case was brought to compel the delivery by the defendants of debentures to the amount of $30,000 to which the plaintiffs claimed to be entitled under a by-law of the defendant corporation therefor,

(1) 14 Ont. App. R. 32. (2) 10 O. R. 257.

passed in December, 1883. The conditions of the by-law as to what was necessary to be done by plaintiffs to entitle them to the debentures were as follows:—

"The construction and completion for running of the track and road of the Erie & Huron Railway Company from the town of Chatham to the Canada Southern Railway, on or before the 30th day of June, A.D. 1883, or such later date as the council of said town may by resolution from time to time fix; and the construction and completion, within two years from the date on which this by-law takes effect, of the whole track and road of said Erie & Huron Railway Company from the town of Dresden and the village of Wallaceburg to the Rondeau Harbor, laid with steel rails and with stations and freight houses and other necessary accommodation attached and connected therewith, and with a station and freight house and switches or sidings at the crossing of the track of the Canada Southern Railway Company, so that trains can run off the track of the Erie & Huron Railway Company upon, or parallel with and adjacent to, the track of the Canada Southern Railway Company, with a platform 600 feet long adjacent to and parallel with the said last-mentioned track, and 400 feet long and adjacent to and parallel with the track of the Erie & Huron Railway Company; the construction of a bridge over the Thames with an iron or wooden swing, and an adjoining bridge and way for foot passengers over said river not less than four feet in width; the complete construction of said road in other respects, supplied with all necessary rolling stock and materials, so as to connect the said town with Rondeau, Blenheim, the Canada Southern Railway, Dresden and Wallaceburg, to the satisfaction of the Commissioner of Public Works for the time being for Ontario, or an engineer appointed by him; and said company thereafter *bonâ fide* running said road with

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all necessary accommodation for the public, and with connection at the track of the Canada Southern Railway Company for one week."

This by-law was duly registered as provided by 44 Vic., ch. 24, sec 28.

Prior to the passing of the by-law an agreement was entered into between the defendants and the Erie & Huron Railway Company, by which the defendants agreed to pass such by-law on conditions similar to the above, and with the following additional clauses:

"And to construct at or near the corner of Colborne and William streets, in the said town, a freight and passenger station with all necessary accommodation, connected by switches, sidings or otherwise with said road of the company, upon the council of said town, within three months from the final passing of said by-law, passing another by-law empowering the said company to make its roads and lay its rails along a highway or highways in the said town to said corner, from where the said road would be if the construction thereof were completed in a direct line through the said town, or upon the said council procuring for and giving to said company a right of way along the northerly side of McGregor's Creek (one half in the water) for the road of said company to or near said corner and to load from gravel piles, pits or beds purchased by said corporation adjacent to or adjoining the track of said company, and carry gravel over said road to any place required by the said town for the construction, maintenance, and repair of public roads in said town, and for other purposes of the town for a sum and at a rate for loading and carriage not to exceed 3 cents per cubic yard of gravel per mile, for all distances less than ten miles, and 2 cents per mile for all distances of ten miles and over, but under 25 miles,

and one and-a-half cents per mile for all distances of and over 25 miles."

The road was completed and in running order, and carrying freight and passengers, long before the time mentioned in the by-law, and was run continuously thereafter to and from the King street station for a week, and has been running ever since.

On 1st November, 1883, Robert McCallum, a civil engineer, appointed by the Commissioner of Public Works for the province of Ontario, gave a certificate in the following words:—"This is to certify that I have examined the Erie & Huron Railway from Rondeau Harbor to the town of Dresden, and from Dresden to Wallaceburg, and find that the said road is completed and at present supplied with all necessary rolling stock and materials so as to connect Rondeau Harbor with the Canada Southern Railway, Blenheim, Chatham, Dresden and Wallaceburg, and, in my opinion, is ready for the conveyance of freight and passengers."

The same engineer granted a more formal certificate, setting forth that on the 23rd day of December, 1884, he had made an examination and inspection of the Erie & Huron Railway from Rondeau Harbor to the town of Dresden and from Dresden to Wallaceburg, and had in connection with such examination perused the agreement entered into between the Erie & Huron Railway Company and the corporation of the town of Chatham, dated November, 1882; also, the by-law of the town of Chatham, passed in the month of December, 1882, granting a bonus of $30,000 to the railway company upon certain terms and conditions; that he found the said railway was completed and supplied with all necessary rolling stock and materials so as to connect, as arranged, with the Canada Southern Railway Company, Blenheim, Chatham, Dresden and Wallaceburg, and

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was, in his opinion, ready for the conveyance of freight and passengers, and that the railway company had substantially complied with the terms and conditions regarding the work to be performed required by the said agreement and by-law, except as to time, as to which he would give no certificate as he was not aware of the time limited. He also found and certified that the platforms provided for by the said agreement and by-law at the crossings of the Canada Southern Railway were theretofore completed in accordance with the requirements of the said agreement and by-law, but that afterwards a portion thereof was temporarily removed by the Canada Southern Railway for the purpose of enabling the said company to lay a pipe to a water tank, and such portion at the time of inspection had not been restored

No notice was given to the defendants of the appointment of McCallum as the engineer to make the inspection, nor of the time he would make his inspection; and such inspection was made without the presence of any one acting for or on behalf of the town.

After the passing of the bonus by-law the defendants passed another by-law on the 24th of March, 1883, authorizing the railway company to make its road and lay its rails for one single track, or train, along the southerly side of Colborne street, from the main line to William street in said town, and for two tracks, or a double track, between Adelaide and William streets, provided that the said road and tracks should be at least eight feet from the middle line of said street.

The agreement between the Erie & Huron Railway Company and the defendants, and the agreement between the plaintiff, Bickford, and the plaintiffs, the Erie and Huron Railway Company, were made valid and binding by 46 Vic., cap. 52.

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The defence set up by the defendants was, in substance, that the station was not placed at the corner of Colborne and William streets as provided in the agreement; that McCallum was not appointed, and did not make his examination, as the by-law provided; that the road was not completed within the time limited; that the said railway was not constructed and completed on or before the 30th day of September, 1883, with station and freight houses and other necessary accommodation, which they submitted included a freight and passenger station with all necessary accommodation for the defendants, with switches, siding, or otherwise connected with the said road at or near the corner of Colborne and William streets, according to the terms of the alleged by-law and agreements, or either of them; that a platform 600 feet long, adjacent to and parallel with the Canada Southern Railway, and 400 feet long adjacent to and parallel with the Erie and Huron Railway, at the junction of the said two railways was not constructed; that a bridge over the river Thames, with iron or wooden swing, and an adjoining bridge for foot passengers not less than four feet in width, approaches, and other necessaries connected with said bridge, so as to form a way over said river for the public, were not constructed; that a freight and passenger station, with all necessary accommodation, connected by switches, sidings, or otherwise, with said road, was not constructed at or near the corner of Colborne and William streets.

The defendants, by counter claim, set forth the several grounds of defence as causes of action against the plaintiff and prayed that the plaintiff be ordered to construct and maintain a foot-bridge across the Thames with approaches over the flats of the river and lands of the plaintiff on both sides of the river, and perform the other requirements of those agreements and remove

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one of the tracks laid on Colborne street 'and to erect and establish all necessary workshops and repairing houses or sheds within the town and to remove the station on Colborne street off the line of the street, and to cease to use said street as a switch, or siding cars or trains thereon, and that it be referred to the master to ascertain the damages which the defendants have sustained, and that plaintiffs be ordered to pay the same.

The evidence disclosed that the road was completed and in running order and open for general traffic to the King street station within the time mentioned in the by-law, but there was conflicting evidence as to whether passenger trains had been run to the Colborne street station continuously for one week; that when the iron bridge across the Thames was first completed the footbridge across was not quite the required width, but that afterwards the footbridge was made of the requisite width, except that at one point one of the iron wire guy ropes passed through the footway so as to have the footway obstructed by this rope, but such obstruction did not impair or prevent the convenient use of the footway; that the platform at the southern railway junction was of the specified dimensions but not continuous and was amply sufficient for the requirements of the traffic on the road; that there was a double track on Colborne street and that owing to the state of the street by reason of the encroachment of McGregor's Creek the rail was not kept eight feet from the centre of the street as required by the by-law allowing the laying of the track on Colborne street, and the station on Colborne street was not placed at the corner of Colborne and William streets but a block away from William street at or near the corner of Colborne and Adelaide streets.

There was conflicting evidence as to whether the

station could be put nearer to William street so as to be convenient and useful to the public and the company, so there was not a strict compliance with the terms of the plaintiff's agreement unless the distance between the station and William street was not so great as to prevent it coming within reasonable intendment of the meaning of the word "near."

The cause was tried before the Chief Justice of the Common Pleas who held that the plaintiffs' title to the debentures did not depend upon the performance of the requirements of the agreement not provided for in the by-law, and for any breach of the same the defendants' remedy would be under the counter-claim for damages. His Lordship held the plaintiff bound to perform the following conditions of the by-law before he could succeed in this action :

"First. The construction and completion for running of the track and road from Chatham to the Canada Southern Railway on or before the 30th day of June, 1883.

"Secondly. The completion of the whole track and road with stations and freight houses and other necessary accommodations attached and station, freight house and platform of the stipulated dimensions at the Canada Southern crossing.

"Thirdly. The bridge and foot way over the Thames, with the necessary approaches.

Fourthly. The completion of the road in other respects, supplied with all necessary rolling stock and materials so as to connect the town with the places named to the satisfaction of the Commissioner of Public Works, or an engineer appointed by him, and,

Lastly, upon the company *bonâ fide* thereafter running the said road with all necessary accommodation for the public and with connection at the track of the Canada Southern for one week."

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And he held that these conditions were all substantially performed, and that the plaintiff was entitled to the debentures and to a writ of *mandamus* to compel their delivery.

Another ground of defence set up was that the by-law was *ultra vires* for not complying with the provisions of the plaintiffs' charter, which, it was contended, overrides the Municipal Act in respect to aid to railways. His Lordship overruled this contention and held that the special act is not restrictive but only enabling and enlarging the power of municipalities under the Municipal Act, and the latter being complied with the by-law was *intra vires* of the corporation.

The defendants appealed from the judgment of the Chief Justice and the Court of Appeal varied that judgment by decreeing the defendants entitled to specific performance of the agreement as to the station on the corner of Colborne and William streets, with a reference to the master to ascertain the damages to be paid defendants for want of such station to date of judgment. The *mandamus* was stayed until the master should report. In other respects the judgment of the Common Pleas was sustained. Both parties appealed to the Supreme Court of Canada.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellants.

All the judges in the courts below have found that the conditions in the by-law were complied with and those of the agreement were independent of each other. The plaintiffs have therefore performed all the conditions required to entitle them to the debentures. See *Wilson* v. *Northampton & Banbury Junction Ry. Co.* (1); *Jessep* v. *G. T. Ry. Co.* (2); *Mead* v. *Ballan* (3);

(1) 9 Ch. App. 279.
(2) 7 Ont. App. R. 128.
(3) 7 Wall. 290.

Lytton v. *Great Northern Ry. Co.* (1); *Desjardin Canal Co.* v. *Great Western Ry. Co.* (2); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (3); *Blackett* v. *Bates* (4).

Christopher Robinson Q.C. and *Wilson* for the respondents cited *Wallace* v. *Great Western Ry. Co.* (5); Hodges on Railways (6); *Wilson* v. *Furness Ry. Co.* (7); *Rigby* v. *Great Western Ry. Co.* (8); *Hood's Case* (9); *Firth* v. *Midland Ry. Co.* (10); *Green* v. *West Cheshire Ry. Co.* (11); *C. A. Ry. Co.* v. *County of Ottawa* (12).

SIR W. J. RITCHIE C.J.—The statement of this case is to be found at length in the judgment of Chief Justice Cameron (13).

Neither party was satisfied with the decision of the learned Chief Justice and both parties appealed to the Court of Appeal for Ontario; that court decreed in substance as follows (14):—

From this decree both parties also appealed; the plaintiff, however, limited his appeal to that portion of the judgment given upon the counter claim of the defendants construing the covenant in the agreement in reference to the construction of the station at or near the corner of Colborne and William streets and ordering specific performance of such agreement.

The by-law under which the debentures are claimed in this case is as follows (15):—

The agreement dated the 3rd of Nov. 1882, between the Erie and Huron Railway Co. and the Town of Chatham recites that:—

And whereas the said Co. in order to complete its road and pro-

(1) 2 K. & J. 394.
(2) 2 E. & A. 330.
(3) 9 Ch. App. 331.
(4) 1 Ch. App. 117.
(5) 25 Gr. 93; 3 Ont. App. R. 44.
(6) 7 Ed. Vol. 1 pp. 39, 40, 41.
(7) L. R. 9 Eq. 28.
(8) 14 M. & W. 811.
(9) L. R. 8 Eq. 666; 5 Ch. App. 525.
(10) L. R. 20 Eq. 100.
(11) L. R. 13 Eq. 44.
(12) 12 Can. S. C. R. 364.
(13) 10 Ont. R. 257.
(14) See p. 237.
(15) See p. 237.

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vide it with rolling stock and all necessaries, requires a further bonus of $30,000 in debentures from the said town payable on obtaining the certificate of the Government's Engineer of the completion of the said road, according to the terms of a by-law to be submitted to the electors of said town, and the running thereof for one week, and in order to induce the town to submit and pass the said by-law and give such aid, has offered to execute a binding agreement with the town containing the terms and obligations on the part of the Co. hereinafter set forth.

And whereas the town, upon the consideration of such binding agreement, has agreed to read, submit to the electors, and with their consent finally pass, such by-law to give further aid to said company as in the by-law set forth.

This very clearly shows that the by-law and agreement were to be considered as two separate and distinct instruments, and the certificate, on the obtaining of which the debentures were to be issued, was to be of the completion of the road according to the terms of the by-law to be submitted, and not according to the terms of the by-law and to the stipulations contained in the agreement but not inserted in the by-law and forming no part of it.

On the 1st of Nov., 1883, Mr. C. F. Fraser, Commissioner of Public Works for Ontario, appointed Robert McCallum, C.E., "as engineer under the by-law of the Town of Chatham taking effect on the 30th December, 1882, giving a bonus to the Erie and Huron Railway, for the purpose of certifying as by the said by-law is required."

I can discover nothing to impeach this engineer's certificate. I do not think the engineer, McCallum, acted in any way as a judge or arbitrator between the town and the railway company or Bickford; all he had to do was personally to examine and inspect the road and to certify whether or not in the terms of the by-law (section 1) the road, &c., was constructed and supplied, &c, in accordance with the by-law to his satisfaction. I can see nothing in the nature of his

office, or the performance of his duties, that required notice to either party, either of his appointment or of the time he would make his inspection. I do not think the by-law requires the engineer's certificate to say anything outside the by-law which does not refer to nor incorporate with it any agreement; the certificate was to certify as to the completion according to the by-law and not according to any agreement forming no portion of the by-law. The certificate of the engineer is substantially in accordance with the terms of the by-law and the evidence shows that all that the by-law requires had been performed.

If, then, all the conditions contained in the by-law have been complied with, and I think the learned Chief Justice was right in so holding, why should not the debentures issue? It was on these conditions being complied with that the municipality and ratepayers agreed that the debentures should issue; what right have we to go outside of the by-law and say they should not issue? If the town of Chatham or the taxpayers had wished to make the issue of the debentures on other conditions they should have had them inserted in the by-law.

There appears to have been a great diversity of opinion in the town as to the propriety of establishing the station at Colborne Street; might this not have been the reason why nothing was said about it in the by-law as, if mentioned, the passing of the by-law by the ratepayers might thereby have been jeopardized? Otherwise, why was this not inserted in the by-law if the town and the ratepayers intended that the construction of the station at or near the corner of Colborne and William streets was to be a condition precedent and on the fulfilment of which the debentures were to issue? So far, as a matter of fact, from this by-law being passed because of this particular

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stipulation I think the inference from the evidence is that this was rather kept in the background for fear, by reason of the conflict of opinion, the ratepayers might refuse to pass the by-law.

I think all the evidence as to what was said before the submission to the ratepayers, or during the canvass or discussion at any public meeting of ratepayers or others, in the absence of fraud which is not alleged or proved, was wholly irrelevant and, in my opinion, should not have been received as influencing, in any way, the construction that should be placed on either the agreement or by-law, or both.

The municipality not having chosen to insert in the by-law any provision or condition for the constructing and establishing of a station at Colborne street, and the ratepayers, on the 13th December, 1887, having, by their vote, consented to the issuing of the debentures without any such condition, I am of opinion that the provisions in the agreement, but not inserted in the by-law, must be treated and dealt with as separate and distinct from the by-law and as independent covenants, and, as I have said, the conditions of the by-law having been complied with the debentures should issue, and for any breach of the agreement outside of the by-law the municipality and ratepayers, not having made the issue of the debentures dependent on the fulfilment of the agreement, must seek indemnity for any breach of such agreement in damages and not seek to enforce the agreement by withholding the debentures.

I participate in the doubt expressed by Mr. Justice Osler as to the correctness of the finding, as a matter of fact, that at or near the corner of Colborne and William streets may mean at or near the corner of Colborne and Adelaide streets, in another block and with other streets intervening; the evidence satisfies

me that there was no impossibility in erecting or working the station at or near the corner named, though no doubt, it may have been a very inconvenient spot for the working of the railway, but I am not disposed to differ from the learned Chief Justice and I entirely agree with him that this station was not essential to the completion of the road in accordance with the by-law and therefore does not prevent the accruing of the plaintiff's title to the debentures, because I agree with him that this does not depend upon the performance of stipulations in the agreement not provided for by the by-law; that for the breach of plaintiff's agreement not covered by the conditions of the by-law the remedy of the defendants is under their counter-claim for damages for such breach.

The conditions of the by-law, the fulfilment of which are conditions precedent to the right of the plaintiff to the debentures, are (1):—

The Chief Justice then says:—

> There was no dispute as to the completion of the road for running to the Canada Southern by the time stipulated. The evidence satisfies me the second condition was fulfilled, that is to say, the construction of the whole road, with stations, freight houses and other necessary accommodation attached, and platform accommodation stipulated for at the Canada Southern Junction, or crossing. I am also satisfied that the bridge across the Thames was a substantial compliance with the requirements of the by-law in respect thereto. The approaches were sufficient.

In this conclusion, after a very careful perusal of all the evidence in the case, I concur.

I think the construction of the clause of the agreement in relation to the Colborne and William streets station which is as follows (2):—

involves all the necessary accommodation for the continuous and ordinary use by the public of the station when constructed. How can it be that there is all

(1) See p. 243. (2) See p. 238.

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necessary accommodation at a station where there is no station master, ticket officer, baggage master or other servants connected therewith? How can it be said that there is a freight and passenger station with all necessary accommodation connected by switches, sidings or otherwise with said road of the company to which no trains are to be run, or if run then no accommodation for freight or passengers to enable the one or the other to be carried from or to the station? I cannot think that the mere erection of a building called a station, and the abandonment of its use as a station, is a performance of the agreement. It seems to me almost a mockery to say there is a station there with all necessary accommodation to which a train is never run and access to which is impossible by reason of the waiting room and ticket office being closed and no person to attend to passengers or to receive and forward freight. What accommodation is afforded by a room called a waiting room, ticket office and freight room, and a platform, if neither the one nor the other can be used by passengers or for freight? I think the connection by switches, sidings and otherwise with the main road of the company shows that the station to be erected was to be ordinarily worked and used as part and parcel of the road by the company, and I am the more impressed with the correctness of this by reading the by-law which grants to the company the right to make its road and lay its rails "along the southerly side of Colborne street from the main line to William street, &c.," and which the company and Bickford adopted and acted on. It recites that,

> Whereas the said company and Bickford have agreed to construct and establish a station and freight house and other necessary accommodation for said company and the public at the corner of Colborne and William streets upon the council of said corporation passing this by-law; and whereas the council of said corporation desires that such

station and freight house and other accommodation should be erected and established.

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Now, what can be the fair meaning of constructing and establishing a station and freight house with necessary accommodation, not for the company alone but for the said company and the public, if it is not to fix, permanently and unalterably, for the ten years the train was to run, a station and freight house with all necessary accommodation for the use, not only of the company but of the public? And who can say that the erection of a building, not to be used as a station and freight house but locked up, with no necessary accommodation for the public to enable the station to be used as such, is satisfied by a station building where no tickets can be obtained and from which no trains are to come and go? I think it is not. I think the true construction of the contract was to construct and establish a station with all such accommodation for the public as is ordinarily to be found at a station from which trains regularly run, and at which passengers are taken up and freight received and delivered. I think the observations of Chief Justice Hagarty with reference to the provision in the agreement to run the road continuously for at least ten years, and with reference to the clause as to Colborne street station, are conclusive that the whole sense of the words used points to a continuous use, and I agree with him that it would be a monstrous injustice to hold that a company may accept the full consideration as to stations, &c., and refuse to place them in a position to be used.

Assuming that the station was properly located I am of opinion that the station and station accommodations are not sufficient to answer the requirements of the plaintiff's covenant, being deficient in proper accomodation for loading and unloading freight and the absence of all accommodation for the public.

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The majority of the Court of Appeal have considered that the defendants are entitled to specific performance of the agreement in the pleadings mentioned as to the station on Colborne street in the town of Chatham, as claimed by the defendants in their counter-claim. Now, what have they claimed ?

(c) That they may be ordered to construct and maintain a freight and passenger station with switches, sidings and all other necessary accommodation for the defendants upon lands of or to be purchased by the plaintiffs at or near the corner of Colborne and William streets, and to provide and keep a station master, ticket and baggage officer, and other necessary and ordinary servants of the said company thereat, and to stop all ordinary trains thereat, and not to run such trains past said town without going to and staying at said station for the purpose of taking up and setting down passengers or freight, or both, and that they use and establish such station as the principal and main station for Chatham.

This, I think, cannot be so adjudged. This is not the performance of a definite work to be performed once for all. It is clear that the court may exercise a discretion in granting or withholding a decree for specific perfermance, and I think it is equally clear that such a decree will not be made when the terms of the agreement are vague and its effect is to throw on the court the duty of superintending the performance of a series of continuous acts involving the exercise of skill, personal labor and judgment.

I think the case of *Wilson* v. *Northampton & Banbury Junction Railway Co.* (1) very distinguishable from the present. There the station mentioned in the schedule, so far as it related to the station to be erected, was in the following words—" a station to be made on lots Nos. 24, 25 and 26, parish of Wappingham, or some part or parts thereof."

Very different, indeed, from the station which the plaintiff undertook to construct in this case.

(1) 9 Ch. App. 279.

If then, the construction of a freight and passenger station involves the necessity of maintaining it and providing the necessary officers and means of keeping it in a state of accomplishing the purposes of a freight and passenger station, as the Court of Appeal think and as I think it does, then it necessarily involves the keeping of the station open at suitable times for passengers and freight and the carrying on of the business of a freight and passenger station, requiring the performance of personal acts and duties involving the continuous exercise of skill and judgment as well as good faith and diligence in determining the nature and extent of the facilities required at a suitable station. If so would not this constitute the performance to be decreed and if decreed impose on the court the duty of seeing that the performance was within the intent of the contract, and the non-performance of which could only be punished by repeated attachments? (1).

The result of decreeing specific performance in such a case as this would compel the court to superintend the execution of this particular stipulation for, at any rate, the ten years that the agreement provides that trains shall run, which, in my opinion, is contrary to the authorities which, I think, conclusively show that the court will not superintend the performance of such continuous acts.

Nothing can very well be more vague and uncertain than this agreement. Upon what land is this station to be constructed? The defendants claim it is to be on lands of, or to be purchased by, the plaintiff at or near the corner of Colborne and William streets. How is the court to determine the exact site and upon what lands of the plaintiffs or, if they have no suitable lands, what lands are they to be required to purchase?

(1) See *Blackett* v. *Bates* 1 Ch. App. 117.

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Then, as there is no certainty as to where the station is to be placed there is no certainty as to the character of the station, no plans, no specifications, no provision as to dimensions, material or workmanship by which the officer of the court, with the agreement, claim and decree in his hands, could determine whether the agreement had been specifically performed or not.

The English and American authorities seem very clear that courts of equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend. Of the numerous cases to be found in the books I shall notice a very few which seem to me to bear directly on this case.

Marble Company v. *Ripley* (1):

Mr. Justice Strong:

Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of such a kind that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Many of the difficulties in the way of decreeing specific performance of a contract, requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton Railroad Co.* v. *The Cleveland and Toledo Railroad Co.* (2); Fry on Specific Performance (3).

Port Clinton Ry Co. v. *Cleveland & Tol. Ry. Co.* (4):

(1) 10 Wall. 358.
(2) 13 Ohio 544.
(3) Sec. 286.
(4) 13 Ohio 552.

Molson J.:

It is different from the case where the act to be done would produce some tangible result, which could be inspected and compared with the requisitions of the contract. When no such result follows the personal act, but the act involves the continuous exercise of skill, judgment or discretion, the manner and mode of which are, from its very nature, undetermined, the difficulty of a specific performance seems almost insuperable.

Even in cases where there would be a visible and tangible product from the personal act, if the contract does not define and determine the character of that product, the court will not supply that which has been left by the parties as a matter of individual judgment, taste or discretion. Thus, in a class of cases in which there has been a diversity of opinion as to the propriety of a specific performance, the building a house on particular land, the covenant to build must have a definite certainty as to size, materials &c. Story Eq. Jur. (1).

Blanchard v. *Detroit and Lake Mich. Ry. Co.* (2):

Graves C. J.:

If, however, it appears, either that the things to be performed are in their nature incapable of execution by the court, or that needful specifications are omitted, or that material matters are left by the parties so obscure or undefined, or so in want of details, or that the subjects of the agreement are so conflicting or incongruous, that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, the case is not one for specific performance.

As the court does not make contracts for parties so it never undertakes to supply material ingredients which they omit to mention, and which cannot be legitimately considered as having been within their mutual contemplation. And where the party to perform is left by the agreement with an absolute discretion respecting material and substantial details, and these are therefore indeterminate and unincorporated until by his election they are developed, identified, and fixed as constituents of the transaction, the court cannot substitute its own discretion, and so by its own act perfect and round out the contract. If the court were to do this it would be to assume a right not belonging to it, but one which the parties reserved to themselves.

(1) Sections 725–727. (2) 31 Mich. 53.

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P. 54. It is, first, that defendants shall make and maintain on the premises a depot or station house, suitable for the convenience of the public.

Second, that during all future time, when trains run on the road, at least one train each way shall every day stop thereat, and third, that for all future time freight and passengers shall be regularly received and discharged at such depot.

P. 58. Without going further in this view of the case, it is only needful to say that it seems obvious that the very nature of the provision sought to be enforced is such as to render the remedy impracticable. But if this objection were not insuperable there would be still another in the want of details and lack of particularity and specification. The specific location is not given for the building, nor is there anything certain as to the plan, size, shape, materials or arrangement of the building. All this appears to have been left, by the assent of the parties, substantially to the judgment, and discretion of the grantees. The only specification, the only limit upon such judgment and discretion, the parties saw fit to make, was that it should be suitable for the convenience of the public. For many purposes this might be considered definite enough. It would be in a charter in which the end to be obtained would be presented as the object of the legislature, whilst everything in regard to details and means would be rightly and purposely left to the company. But for a building contract or an agreement to be executed by the court, it is not so. If the court were to attempt to decree, what direction could it give as per contract in regard to the plan, size, shape, materials, arrangement and cost? If what would now satisfy the interest of the public were known it might guide as to the present size and arrangement; but it could go no further. What is needful now may be otherwise in time, and future changes in the state of the country or in business may wholly disappoint all present calculations. The public interest may require many alterations. But the reference to the public convenience gives no clue whatever as to the materials, or in regard to other essential matters.

Powell Duffryn Steam Coal Co. v. *Taff Vale Railway Co.* (1).

Mr. *Greene* Q.C. and Mr. *Marten* Q.C. for the appellants:

We have a statutory right to use the railway under the Railway Clauses Consolidation Act, 1845, s. 92, and we seek to have that right

(1) L. R. 9 Ch. App. 334.

protected. In *Bell* v. *Midland Railway Company* (1) the court interfered to protect statutory rights under the act, and in *Green* v. *West Cheshire Railway Company* (2) it interfered, by way of specific performance, to make a railway company construct and maintain a siding.

The Lord Justice James:

I doubt whether this court can give effect to the rights conferred by sect. 92. As far as my experience goes, the court has never ordered anything which involves doing something from day to day for an indefinite period.

The Lord Justice Mellish:

I feel the same doubt, and am disposed to think that a court of common law would feel the same difficulty as to a *mandamus*. A court can only order the doing something which has to be done once for all, so that the court can see to its being done. The Railway Clauses Act was passed at a time when the working of railways was not well understood. The legislature seems to have considered that there was no more difficulty about running over a railway than along a turnpike road. It is found now that the use of points and signals is required: but how can the court see to the defendants working them day after day for a series of years?

Gervais v. *Edwards* (3).

The Lord Chancellor:

If the jurisdiction of this court permitted it, I should willingly grant a specific performance of this agreement, because the merits are altogether on the side of the plaintiff; but I do not see how it is possible specifically to execute this contract. The court acts only, when it can perform the very thing, in the terms specifically agreed upon, but when we come to the execution of a contract, depending upon many particulars, and upon uncertain events, the court must see whether it can be specifically executed; nothing can be left to depend upon chance; the court must itself execute the whole contract.

Waterman on the Specific Performance of Contracts (4). Contracts incapable of being enforced.

Equity will not inforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot

(1) 3 De G. & J. 673.
(2) L. R. 13 Eq. 44.
(3) 2 Dr. & W. 82.
(4) P. 68.

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superintend as the working of points and signals on the line of as railroad requiring constant supervision; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co* (1), or a contract to build and equip a railroad, *Danforth* v. *Philadelphia, etc., Ry. Co.* (2), or to work all the trains on a railroad, and keep the engines and rolling stock in repair; *Johnson* v. *Shrewsbury and B. R. R.* (3), or to use the railroad of another company with engines and trains, which the court cannot regulate and control; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (1), or an agreement by a railroad company to maintain and keep in repair cattle-guards upon the land of the plaintiff; *Columbus, &c., Ry. Co.* v. *Watson* (4), or a covenant in the lease of a coal mine to work the mine efficiently; *Wheatley* v. *Westminster Coal Co.* (5), *Lord Abinger* v. *Askton* (6), or an agreement by a street railroad company to run cars along a particular street daily, "at such regular intervals as may be right and proper," whether the obligation of the company rests in contract, or is derived from the provisions of its charter. *McCanny* v. *South, &c, Ry. Co.* (7).

P. 70 S. granted to a railroad company a right of way through his premises on condition that the company would place beside its road on said premises a pla tform convenientf or loading and unloading cars, take therefrom all produce shipped by S., and bring and place thereon all freight shipped by or for him to that point from any other station on the road provided the company had three days' notice. Held that S. could not compel specific performance. *Atlanta, &c., Ry. Co.* v. *Speer* (8).

P. 70 n. In this case the court said:

We are not asked to compel the plaintiffs in error to transport a particular kind of freight now being on the platform awaiting transportation—we are asked that they shall, in all future time, transport all freight and deliver it as required by defendant in error in the terms of the contract. It is evident that any such decree must be as general and as indefinite in its terms as the contract itself. It cannot specify as to the kind of produce, the quality, the time of performance; nor can the court make a decree, which will be satisfied by any specific act of peformance. After decree made the case must be kept open, and if the defendant in that decree be contumacious, there must be action of the court to enforce it 20, perhaps 50 times a year for all

(1) L. R. 9 Ch. App. 331.
(2) 30 N. J. Eq. 12.
(3) 3 DeG. M. & G., 914.
(4) 26 Ind. 50.
(5) L. R. 9 Eq. 538.
(6) L. R. 17 Eq. 358.
(7) 2 Tenn. Ch. 773.
(8) 32 Ga. 550.

time. Besides in regard to each alleged violation of the contract, the other party is entitled to a hearing. He may insist that the freight in question at one time is not of the description contemplated in the contract; at another that it is not the property of the party complaining; at still another, that notice had not been given in the terms of the contract. We are satisfied that this is not a contract of which performance can be compelled by one sweeping decree embracing all time and all instances demanding performance. The party has an adequate remedy at law, and doubtless would be redressed there. The following clause in a deed to a railroad company is incapable of being specifically enforced; this conveyance is made upon the express condition that said railroad company shall build, erect and maintain a depot or station house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot. *Blanchard* v. *Detroit etc, R. R. Co.* (1). Graves C. J.: Can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice or legitimately and truly ascertain from day to day what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may, with equal propriety, upon a like showing, do the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the state. That any such jurisdiction is impracticable appears plain, and the fault lies in the circumstance that the objects of the parties. as they were written down by them, are, by their very nature, insusceptible of execution by the court. In a suit for specific performance by a landowner against a railroad company it appeared that the company, in consideration for the right of way for their track over the plaintiffs' land, agreed to fence the same, to deliver to the plaintiff certain bonds, and to release him from a subscription to the stock of the company. It was held that the facts alleged entitled the plaintiff to a judgment for damages, but not to specific performance. *Cincinnati and*

(1) 31 Mich. 43.

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Chicago Railroad Company v. *Washburn* (1). A court of Equity as a temporary measure during the pendency of a litigation, may undertake by means of a receiver to operate a railroad. *Coe* v. *Columbus, &c., R. R Co.* (2). But it will only do this when the demand for the exercise of such a jurisdiction is imperative, and the court can make an order of limited duration, and give precise directions as to the manner in which the order shall be carried out. *Port Clinton R.R. Co.* v. *Cleveland & Toledo R.R. Co.* (3); *see Richmond* v. *Dubuque & Sioux City R.R. Co.* (4). A demurrer was sustained to a bill filed for the specific performance of an award which required that the defendant should execute to the plaintiff a lease of the right to such part of a railway made by the plaintiff as was on the defendant's land, and that the defendant should be entitled to run carriages on the whole line on certain terms, and might require the plaintiff to supply engine power, while the latter should have an engine on the road; and that the plaintiff, during the whole time, should keep the entire railroad in good repair. The court remarked that it "had no means of enforcing the performance of daily duties "during the term of the lease; that it could do nothing more than "punish the party by imprisonment or fine in case of failure to per-"form them and might be called on for a number of years to issue "repeated attachments for default." *Blackett* v. *Bates*, (5). Specific performance was refused of a contract concerning the use and enjoyment of a quarry providing for "the delivery of certain kinds of "marble in good sound blocks of a suitable size, shape, and propor-"tion, and to quarry to order, as might be wanted to keep the mill "fully supplied at all times, the amount to be not less than 75,000 "feet per annum, and for so long a time as the said Ripley, his heirs, "executors, administrators and assigns, might want." The court said: "The agreement being for a perpetual supply of marble, no "decree the court can make will end the controversy. If perform-"ance be decreed, the case must remain in court forever, and the "court, to the end of time, may be called on to determine, not only "whether the prescribed quantity of marble has been delivered, but "whether every block was from the right place, whether it was "sound, whether it was of suitable size, or shape, or proportion. "Meanwhile, the parties may be constantly changing. It is mani-"fest that the court cannot superintend the execution of such a "decree. It is quite impracticable. And it is certain that equity "will not interfere to enforce part of a contract, unless that part is

(1) 25 Ind. 259.
(2) 10 Ohio 372.
(3) 13 Ohio 544.
(4) 33 Iowa 422.
(5) 1. Ch. App. 117, per Lord Cranworth.

"clearly severable from the remainder." *Marble Co.* v. *Ripley* (1). In a suit to compel the defendant to convey to the plaintiff certain land, it appeared that the defendant and another person owned the land, and that, being desirous of having it partitioned, the defendant employed the plaintiff to do the business, agreeing that for plaintiffs' services, he would convey to him 320 acres of defendant's share of the land. A bond was given to secure the performance of this agreement, giving to the plaintiff the right of selection, and making it incumbent on the defendant to convey as soon as the selection was made. A partition having been partly effected, further proceedings therein were postponed until the boundaries of the land could be fixed by proper authorities. This was not done until three years afterwards, when the plaintiff proposed to complete the partition; whereupon he made a selection, and demanded a conveyance. It was held that, as the plaintiff could not be compelled to complete the service he had agreed to perform, nor the defendant to accept them, the contract was not one which could be specifically enforced. *Cooper* v. *Pena* (2). Although usually a contract, relating to personal services, will not be specifically enforced, but the party aggrieved will be left to his remedy at law, yet there is an exception to the rule, when by the contract, something is to be done, on a party's own land, of such a nature that the opposite party will be deprived of the benefit of labor and materials bestowed thereon, unless the contract is carried out, and the owner of the land is attempting thus to deprive him. Within this principle, a contract between a waver power company and a city, that the former should construct extensive certain water-works, of a capacity to supply the city daily with a specified quantity of water, the works having been constructed, was enforced against the city. *Columbia Water Power Co* v. *Columbia* (3).

P. 72. But if the work agreed to be done is definite, and there is no remedy at law, specific performance will be decreed; as the construction by a railroad company of an archway under their road pursuant to their contract. *Storer* v. *Great Western Ry. Co.* (4). So specific performance was decreed of a contract between the owner of land and a railroad company that, in consideration of the previous withdrawal by the land owner of a petition to parliament against the company's bill, the company would construct and forever maintain at their expense a siding of a specified length along the line upon the premises of the land owner and set apart by him for that purpose. *Green* v. *West Cheshire Ry. Co.* (5).

(1) 10 Wall. 339.
(2) 21 Cal. 403.
(3) 5 Rich. S. C. 225.
(4) 2 Y. & C. 48.
(5) L. R. 13 Eq. 44.

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As to the order that the *mandamus* should not be enforced until after the report of the master, and the damages, if any, paid or security given, but for the limit by the plaintiffs of their appeal, as at present advised, I am at a loss to discover upon what principle we can withhold the delivery of the debentures and make such delivery dependent upon the payment or security of the damages assessed. If the agreement formed a portion of the by-law, or was to be read as a part of it, and so the erection of the station with all necessary accommodation in the way of buildings, appliances, officers and attendants maintained and used in the regular and continuous running of the road, was a condition precedent, as it was not complied with the plaintiffs claim to the debenture should be dismissed. If it is not to be treated as a condition precedent to the giving of the debentures, I am unable to see what right we have, or upon what principle we can allow the defendants to retain the debentures as decreed. If the defendants were not satisfied with the security of the agreement they, it appears to me, should have stipulated for some better security; not having done so I do not see how the dedentures can be withheld without making an entirely new and different agreement from that entered into by the parties and to which the plaintiffs have never assented and for which the defendants, so far as I can see, in the proceedings have never asked.

But, as the plaintiffs have limited their appeal to the construction of the agreement and the order for specific performance I must assume that the retaining of the debentures until the payment, or security was given for the payment, of the damages was considered by the plaintiffs, under the circumstances, a fair and reasonable provision.

I agree with Chief Justice Cameron that section 559

sub-section 4 of the Municipal Act, R. S. O., cap. 174, the act in force when the by-law was passed, justifies the passing of the by-law; and I also agree that 44 Vic. cap. 24, sec. 28, validates the by-law now in question as passed.

I think there is nothing in the objection that the validating act does not apply when no debentures have been actually issued. By reason of the terms in the validating act "every such by-law so registered and the debentures issued thereunder shall be absolutely valid and binding."

If the by-law is valid by reason of this section 28 of 44 Vic. cap. 24, as I think it was, then the by-law is good and must be acted on, and if the conditions of the by-law have been complied with the debentures must be issued in accordance therewith, the issue of the debentures depending on the validity of the by-law under which they are to be issued.

The Court of Appeal has not passed on the question of the workshops but has, as the learned Chief Justice in the court below did, reserved the right to the defendants to take such action as they may be advised as to them at some future time.

I agree with the Court of Appeal that as to the wrongful continuance of the track upon the street a claim for damages does not seem to be an appropriate remedy.

I do not think the defendants' counter-claim should be dismissed but that they should have damages assessed in this suit for the damages they can show have been sustained by reason of the breach of the contract as to the station. I think there should be a reference on the counter-claim to ascertain the amount of the defendants' damages.

I think the decree in this case should be amended by striking out of the 3rd paragraph the words "that the

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defendants are entitled to a specific performance of the agreement in the pleadings mentioned as to a station on Colborne street, in the said town of Chatham, as claimed by the defendants in their counter-claim" and "up to the date of this judgment," and by striking out the last clause.

STRONG J.—All the learned judges who have pronounced upon this case in the courts below, as well the four judges in the Court of Appeal as the late Chief Justice of the Common Pleas, before whom the action was tried, have determined that the objections to the validity of the by-law were not sustainable. With them and for the reasons given in the judgments of the Chief Justice of the Common Pleas and of Mr. Justice Burton, which I fully adopt and therefore need not repeat, I am of opinion that the special act of incorporation of the company does not take the case out of the operation of the general municipal law, but that the powers conferred on municipalities by the latter act are applicable. This being so the 28th section of the Ontario Act, 44 Vic., ch. 24, is relied upon as covering any objections which might be made to the by-law upon the ground of non-compliance with the requirements of the municipal act as regards recitals or otherwise. The statute in question, 44 Vic. ch. 24, is an act for the amendment of the general municipal law, and sec. 28 is as follows:—

Every by-law passed by any municipality for contracting any debt, by the issue of debentures for a longer term than one year, and for levying rates for the payment of such debts, on the ratable property of the municipality, or any part thereof, shall be registered by the clerk of such municipality, if a county, in the registry office for the county in which the county town is situate, or in case of callo municipalities in the registry office of the registration division in which the local municipality is situate, within the two weeks after the final passing thereof by such municipality; and every such by-law so registered and the debentures issued thereunder shall be ab-

solutely valid and binding upon such municipality according to the terms thereof, and shall not be quashed or set aside on any ground whatever, unless an application or suit to quash or set aside the same be made to some court of competent jurisdiction within three months from the registry thereof.

The Chief Justice of Ontario says in his judgment:

It is conceded that this by-law was registered as directed and no application was made within the three months.

And in the argument at this bar the due registration of the by-law and the omission of any application to set it aside within the prescribed time were conceded as admitted facts by the learned counsel for the respondents. It must therefore now be held that the by-law is valid and binding on the municipality.

The next question to be considered is as to the performance by the railway company of the terms of the by-law which were conditions precedent to the issue of the debentures. In this respect, also, I agree in opinion with the learned judges of the courts below, all of whom considered that the provisions of the contract between the town and the railway company dated the 3rd November, 1882, set out in full in the statement of defence, are not to be imported into or construed as part of the by-law. In the words of the Chief Justice of Ontario I read the covenants in this agreement as independent and not as dependent covenants. Although the agreement was *intra vires* both of the town and the railway company and therefore binding on the latter we are not to consider the stipulations contained in it as avoiding altering or qualifying the express conditions of the by-law, an instrument of later date. An insuperable objection, in my opinion, to a contrary construction is that the assenting and agreeing parties to the two instruments are different. The by-law is assented to by the body of ratepayers, the agreement, so far as the town is concerned, emanates from

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the council alone. If the by-law had been passed first, no one could contend that any alterations in its terms could have been effected by a contract entered into with the town through the mayor and council. Then the fact that the agreement preceded the by-law so far from being a reason for any difference in this respect makes the objection to such a variation still stronger. Authority to issue debentures could only have been conferred by a by-law assented to by the ratepayers who were never called upon to vote upon a by-law incorporating the terms of the agreement. The railway company to entitle itself to the debentures is therefore bound to show performance of the terms and conditions imposed by the ratepayers, but of no others. The by-law and the agreement being then between different parties, the contract is therefore necessarily entirely collateral to and independent of the by-law. As regards the contract of the 4th Dec., 1882, between the railway company and the other plaintiff. Bickford, for making the railway,—I know of no principle upon which that can be said to have any influence upon the construction of the by-law. It was between different parties entirely and the railway company never undertook to come under the same obligations to the town as Bickford by this contract had assumed towards them. To read the provisions of this last contract as if incorporated in the by-law would be, in my opinion, to make a contract for the parties which they never entered into, besides being open to all the objections already taken with reference to the agreement of the railway company with the town that it would be an innovation upon the terms of the by-law which the ratepayers never assented to and were never as much as called upon to consider. I quite agree, therefore, that the courts below were right in the view which they took of the principal action,—

the proceeding instituted by the railway company, and Mr. Bickford claiming under it by assignment, to enforce the delivery of the debentures—viz., that the right of the plaintiffs in this respect depended exclusively on their ability to show that they had performed the conditions precedent set forth in the body of the by-law itself and that they were not bound to go further and show a performance also of the stipulations of the agreement.

Then to consider the plaintiff's right to recover, in this aspect, we find that so much of the by-law as specifies the work to be performed by the railway company as preliminary to the issuing of the debentures is contained in the first clause which is as follows:—

That upon construction and completion for running of the track and road of the Erie and Huron Railway Company from the town of Chatham to the Canada Southern Railway, on or before the 30th day of June, A.D. 1883, or such later date as the Council of said town may by resolution from time to time fix; and upon construction and completion, within two years from the date on which this by-law takes effect, of the whole track and road of said Erie and Huron Railway Company from the town of Dresden and village of Wallaceburg, to the Rondeau Harbor, laid with steel rails and with stations and freight houses and other necessary accommodation attached and connected therewith, and with a station and freight house and switches or sidings at the crossing of the track of the Canada Southern Railway Company, so that trains can run off the track of the Erie and Huron Railway Company upon, or parallel with and adjacent to, the track of the Canada Southern Railway Company, with a platform 600 feet long adjacent to and parallel with the said last mentioned track, and 400 feet long and adjacent to, and parallel with the track of the Erie and Huron Railway Company; and upon the construction of a bridge over the Thames with an iron or wooden swing, and an adjoining bridge and way for foot passengers over said river not less than four feet in width; and upon the complete construction of said road in other respects, supplied with all necessary rolling stock and materials, so as to connect with the said town, with Rondeau, Blenheim, the Canada Southern Railway, Dresden, and Wallaceburg, to the satis-

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faction of the Commissioner of Public Works for the time being for Ontario, or an engineer appointed by him; and upon said company thereafter *bonâ fide* running said road with all necessary accommodation for the public, and with connection at the track of the Canada Southern Railway Company for one week; the mayor or other head and clerk for the time being, &c., shall forthwith, &c., sign and issue the debentures, &c.

Strong J.

The Chief Justice before whom the case was tried found that the requirements as to time had been complied with, that is to say that the railway had been completed to the Canada Southern Railway before the 30th June, 1883, and that the whole line of railway had been completed within the prescribed period of two years, and further that the company had complied with the last condition that it should *bonâ fide* run the road with all necessary accommodation for the public and with connection at the track of the Canada Southern Railway Company for one week. As regards the sufficiency of the work, the provisions that the line should be laid with steel rails, and furnished with stations and freight houses and other necessary accommodation attached and connected therewith, and with a station and freight house and switches or sidings at the crossing of the track of the Canada Southern Railway Company so that trains can run off the track of the Erie and Huron Railway Company, upon or parallel with and adjacent to the track of the Canada Southern Railway Company, and the provision as to the platform at this junction with the Canada Southern Railway, and the complete construction of the road in other respects, supplied with all necessary rolling stock and materials all of which was (as in concurrence with both courts below, I construe the by-law) to be done to the satisfaction of the Commissioner of Public Works for the time being for Ontario or an engineer appointed by him, it is sufficient to say that it is all covered by the certificate or report of Mr.

McCallum the engineer appointed for the purpose by the Commissioner of Public Works. That certificate is as follows :—

This is to certify that on the 23rd day of December, 1884, I made an examination and inspection of the Erie and Huron Railway from Rondeau Harbour to the town of Dresden, and from Dresden to Wallaceburg, and I have in connection with such examination perused the agreement entered into between the Erie and Huron Railway Company and the corporation of the town of Chatham, dated November, 1882, also the by-law of the town of Chatham passed in the month of December, 1882, granting a bonus of $30,000 to the said railway company upon certain terms and conditions.

I find the said railway is completed and at present supplied with all necessary rolling stock and materials, so as to connect as arranged with the Canada Southern Railway Company Blenheim, Chatham, Dresden and Wallaceburgh, and is, in my opinion, ready for the conveyance of freight and passengers.

I also find that the railway company have substantially complied with the terms and conditions regarding work to be performed, required by the said agreement and by-law, except as to the time, as to which I give no certificate as I am not aware of the time limited.

I further find that the platforms provided for by the said agreement and by-law at the crossing of the Canada Southern Railway, were heretofore completed in accordance with the requirements of the said agreement and by-law, but that afterwards a portion thereof was temporarily removed by the Canada Southern Railway for the purpose of enabling the said company to lay a pipe to a water tank and such portion has not yet been restored.

(Signed) ROBT. McCALLUM, C.E.,
Engineer appointed by the Hon. the Commissioner of Public Works for Ontario.

It seems to have been assumed that the bridge for foot passengers adjoining the railway bridge was not within the reference to the engineer. In my opinion it was entirely within his competence just as much as the railway bridge itself, and the other works specified by the by-law, for I read the words "to the satisfac- "faction of the Commissioner of Public Works or an "engineer appointed by him," as applying (as accord-

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ing to the grammatical construction it undoubtedly does) to all that had gone before, and if this is correct it is covered by the certificate which extends to all the work to be performed required by the by-law, but it seems not to have been so considered by the courts below. They, probably for the reason that this foot-bridge was entirely distinct from the railway works and was an independent matter stipulated for by the town for the convenience of the inhabitants, and that the engineer's concern in inspecting the road for the purpose of ascertaining the company's right to receive the provincial bonuses would only be with the railway itself and its appurtenant works, considered the foot bridge an extrinsic matter not coming within the engineer's competence, and therefore dealt with the question of its sufficient completion as one open upon the evidence. The Chief Justice of the Common Pleas had, however, no difficulty in finding that the terms of the by-law and agreement as regards this foot bridge had been sufficiently complied with; indeed he expresses himself in somewhat strong language as to the objections raised by the defendants on this head, for he speaks of them as follows:—

> I am also satisfied that the bridge across the Thames was a substantial compliance with the requirements of the by-law in respect thereto. The approaches were sufficient. The contention of the defendants that the foot bridge should have been continued to Gaol street is not, I think, well founded. Water street if the nearest street to the river and the stairway from the bridge to that street was a sufficient approach, though Water street or a portion of it is sometimes under water, in time of freshet it is a travelled and used highway, and is the street by which the bridge would be ordinarily reached. The contention of the defendants based upon objections to this bridge and the platform at the Southern railway crossing does not appear to me to speak favorably of the business intelligence or honesty of purpose of those who put it forward. It would seem to be an attempt on purely technical grounds to defeat the plaintiff's claim and to deprive them of the aid which the defendants agreed

to give them, although by the recital in the agreement it is expressly stated that without such aid the road could not be completed.

In the Court of Appeal the Chief Justice, referring to this point, says:

I think he (the Chief Justice of the Common Pleas) has taken the right view as to the bridge and the four foot way and the company was not bound to connect the bridge on each side with the high ground at some distance from the river.

And the other members of the Court of Appeal seem to acquiesce in this for they say nothing as to it. Even if I had differed very seriously from their findings considered as inferences drawn from the evidence I should not have deemed it proper to interfere with them, for sitting here in a court exercising appellate jurisdiction in the second degree, the authority of the Privy Council in the case of *Allen* v. *The Quebec Warehouse Co.* (1) would have seemed to me to preclude the propriety of any such interference on a question of fact on which two courts below had been thus unanimous, in a finding not shown to have been grossly erroneous. But I need not rest the decision on that ground, for the reason assigned by the learned Chief Justice in the passage I have quoted from his judgment entirely commends itself to my judgment, as it will I think to that of every person who considers the evidence. To say that the railway company were bound to carry out the approaches to the bridge to the elevated ground beyond the street traversing the flats immediately adjoining the river would have been to require them to do more than they had covenanted to do, and more than the by-law imposed upon them, for the by-law and agreement only call "for a bridge over the Thames," and this they have constructed. What the town now insists upon is a bridge not merely over or across the river, but over and across the adjoining

(1) 12 App. Cas. 101.

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flats also. Such an enlargement of the obligation of the railway company by mere implication is wholly inadmissible, and therefore I agree with the courts below on this ground also.

The sufficiency and propriety of the engineer's certificate has been impugned by the defendants upon the ground of want of impartiality. It is alleged that he did not give the defendants notice of his inspection, and that when he went along the line for the purpose of the examination he was accompanied by the company's engineer. In the first place, this objection is founded on a misconception of the engineer's duties; he was not an arbitrator or a referee to report either after hearing parties or witnesses, but simply an expert to make an ocular inspection and report on what he saw and not on what he heard; it was his duty to inspect and examine with his own eyes the whole of the line, no matter who accompanied him, and it is to be presumed he performed this duty properly; moreover, he swears he did so.

It is sufficient then to say of this point that it entirely fails on the evidence and that such was the judgment of both the judge at the trial and the Court of Appeal. The Chief Justice of the latter court speaking of the certificate of the engineer and the defendant's impeachment of his conduct says,

> On the best consideration I can give to the point, I think the certificate of the engineer of the substantial completion of the works set out in the by-law sufficiently showed a performance by the company to satisfy its requirements coupled with the actual running of the road for the week. This latter requirement the learned Chief Justice finds to have been complied with. I do not think the defendants have succeeded in impeaching the certificate of the engineer and that the defence, as to that ground, fails.

Therefore all the conditions of the by-law having been expressly found by both courts to have been complied with and the opinion being general in con-

formity with the view of the Chief Justice of Appeal who says: "The covenants in the agreements appear to me to be independent and not dependent covenants," I should have thought it ought to have followed, that the judgment of the Common Pleas Division should have been affirmed without qualification or alteration so far as it related to the original action, that is to say, that the first paragraph of that judgment declaring the plaintiff's absolute right to the immediate delivery of the debentures and ordering accordingly, and also the second paragraph awarding a writ of *mandamus* (by which, I, of course understand a *mandamus* by way of private remedy and not the prerogative writ to be intended) should have stood affirmed and the plaintiffs should have been left free to enforce the judgment to that extent, whatever may have been the opinion of the court as to the propriety of the disposition which the judgment made of the counter-claim. This, however, was not the opinion of the Court of Appeal, for, instead of permitting the original judgment to remain intact, as far as it directed an immediate and absolute delivery of the debentures, it varied the judgment as regards the counter-claim, which by the original judgment had been dismissed, by declaring and ordering that the defendants were entitled to relief by way both of damages and specific performance as regards so much of it as related to the Colborne and William street station, but dismissing it as to the other matters of counter-claim, and the court then proceeded to direct that the order for the *mandamus* should not be enforced until after the report of the master on a reference as to damages should have been made, and any damages found to be due should be paid, unless the plaintiffs should in the meantime give security to pay the damages or allow them to be deducted out of the debentures.

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The first observation which it occurs to me to make upon this head, is that this variation of the judgment by withholding the debentures until payment of the unliquidated damages, which it was referred to the master to assess, was hardly consistent with the strongly and clearly expressed opinion of the Chief Justice in the passage already quoted from his judgment, that the covenants in the agreement and the provisions in the by-law were entirely independent. If they were so independent, surely to withhold the debentures in this way was to take from the plaintiffs the benefit of such an independence, and to give relief on the footing of dependent covenants, in other words, modifying by the judgment what according to the unanimous judgment of the court was the clear construction and meaning of the contract contained in the two instruments, the by-law and agreement. It was clearly not a case for set off. There could be nothing of that kind between the two rights of the plaintiffs to the debentures and of the defendant to recover some unliquidated damages in respect of a breach of covenant contained in the agreement of the 3rd November, 1882. I know of no principle either legal or equitable upon which this charging of the prospective damages upon the debentures (for that is what the order of the Court of Appeal really effects) can be supported. No authority has been cited to us either at the bar or in the factum for such a form of judgment or decree and for the reason that it alters the rights of the parties as fixed by contract, I think it cannot be maintained; and I say this irrespective of the proper mode of dealing with the counter-claim, a matter yet to be considered.

As I have said the late Chief Justice of the Common Pleas dismissed the counter-claim, because he thought it could not be conveniently dealt with in conjunction

with the principal action. Although, on a matter of procedure, with which that learned judge was, of course, much more familiar than I can pretend to be, I should be very unwilling to differ from him, I must say that I have searched in vain for any authority for showing an instance of a counter-claim having been so dealt with at the trial after the evidence had all been taken, and save in very exceptional cases I should think on general principles such a proceeding was to say the least fraught with much danger. Provision is certainly made for striking out a counter-claim which is considered embarrassing in the earlier stages of the action, but the rule does not, (in terms at all events), apply to the trial. Assuming, however, that there was the jurisdiction to strike it out, I agree with the Court of Appeal that the present case was not a proper one for the exercise of such a power. The evidence was all before the court and it was desirable in the interests of all the parties that the question should be at once disposed of, and I incline to think it was just as much the strict right of the defendants at the stage which the action had reached, to have it finally disposed of, as it is the right of a plaintiff in an action to insist upon the trial and adjudication of his cause. This appears to have been the view of the Court of Appeal. The Chief Justice says:—

> We can either leave the decree as framed by the learned Chief Justice, or direct a reference on the counter-claim to ascertain the defendant's amount of damages. I do not see that much will be saved. But, on the whole, I think my learned brother should have decided by reference or otherwise the causes of action in the counter claim which he held established. I do not care generally to interfere with the exercise of a judge's discretion in such matters, *Higgins* v. *Tweed*) (1) but there are reasons, I think, in the case before us, requiring the disposal of the claim of the defendants in the pending suit.

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I am of opinion that this was a proper disposition of so much of the appeal as related to the judgment dismissing the counter-claim.

I cannot, however, bring myself into accord with the Court of Appeal, as regards the proper judgment to be pronounced upon the counter-claim. It should here be stated that the Chief Justice at the trial and also the Chief Justice in the Court of Appeal deal with this counter-claim, which sets up a variety of heads on which the defendants seek relief, as confined to the single question of the Chatham station, at or near the corner of Colborne and William streets. All the rest, including that portion of it which complains of a breach of the agreement to erect workshops at Chatham, was dismissed by the Court of Appeal, following in this respect the judgment appealed from which dismissed the counter-claim absolutely as to all matters but this station and the right to continue the double track on Colborne street, as to which latter heads the original dismissal was without prejudice though this proviso was applied to other matters by the Court of Appeal. Now, for this dismissal of the counter-claim by the original judgment, the Court of Appeal have substituted the following directions:—

3. And this court doth further declare that the defendants are entitled to a specfic performance of the agreement in the pleadings mentioned as to a station on Colborne street, in the said town of Chatham, as claimed by the defendants in their counter-claim; and doth further order and adjudge that it be referred to a master, to be hereafter named, to ascertain and state the damages (if any) sustained by the defendants up to the date of this judgment in respect of the breach of the said agreement in not keeping open and equipped with all necessary accommodation a freight and passenger station on Colborne street aforesaid, and that as to all other matters referred to in the defendant's counter-claim, the said counter-claim be and the same is hereby dismissed, without prejudice to any future action or proceedings on the part of the defendants, and that the plaintiffs do pay to the defendants their costs of the said counter claim forthwith after taxation thereof.

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The facts as regards this Colborne and William street station are, if I have rightly apprehended the evidence and the judgment of Chief Justice Cameron, that although it is not placed at the corner of Colborne and William streets it is placed sufficiently near that site to come within the words of the agreement which require it to be placed "at or near the corner of Colborne and William streets." This is so expressly found by Chief Justice Cameron and as the Chief Justice of Appeal says:—

> I do not see any ground for interference with any of the Chief Justice's findings of fact either as to the claim or counter-claim;

and as he afterwards adds:—

> The learned Chief Justice decided that the company had reasonably complied with the contract in placing the Colborne street station where it now stands;

I take it for granted that as regards the site of the station the Court of Appeal agree with the Chief Justice of the Common Pleas that it was within the terms of the covenant contained in the agreement of 3rd November, 1882.

I apprehend, therefore, that the non-performance of the agreement which the Court of Appeal considered proved, and which it was intended to compel the plaintiffs by their judgment to carry into execution may be distributed as follows: first, the non-user of the station including the providing of ticket sellers, station master and proper officers and servants; and secondly, the sufficiency of the accommodations as regards the buildings and station grounds requisite for freight and passenger traffic. It is to be observed that the judgment of the Court of Appeal does not contain any specific directions as to how this contract is to be performed, beyond referring generally to the counter-claim, in fact it does not do more than declare the right to such relief, it being, I suppose, left to the

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Common Pleas Division to prescribe how this right to specific performance is to be carried out in detail. The words of the order, it will be remarked, are that the defendants are entitled to a specific performance (on this head) as claimed by them in their counter-claim Now, turning to the pleadings, we see that these are very large and comprehensive terms, for the counter-claim asks relief in this respect as follows:—

> (*c.*) That they (plaintiffs) may be ordered to construct and maintain a freight and passenger station with switches, sidings and all other necessary accommodation for the defendants upon lands of or to be purchased by the plaintiffs at or near the corner of Colborne and William streets, and to provide and keep a station master, ticket and baggage officer, and other necessary and ordinary servants of the said company thereat, and to stop all ordinary trains thereat, and not to run such trains past said town without going to, staying at said station for the purpose of taking up and setting down passengers or freight, or both, and that they use and establish such station as the principal and main station for Chatham.

The defendants' right to retain, as part of the judgment under appeal, this direction for specific performance, and their rights generally under the agreement relating to the station in Colborne street, may be conveniently considered in the following order: It is essential in the first place to determine the true construction of the covenant to erect the station contained in the agreement between the town and the railway company of the 3rd November, 1882, and to ascertain what, according to the true interpretation of the language in which that stipulation is expressed, are the rights of the defendants and the obligations of the company, whether they extend to any thing more than the erection of a station with proper accommodations, whether the plaintiffs in order to comply with its terms are bound to keep the station open, maintain a staff of officers, and run trains as insisted upon by the defendants in their counter-claim, or whether having

erected a station with all necessary and proper accommodation in the way of buildings and yard room, they are at liberty to use it or not at their own discretion. Next, it is important to inquire how far the contract construed according to its proper legal signification, has been performed and in what respects, if any, it still remains unperformed ; and lastly, should it appear that this covenant has not, according to its proper legal construction, been in all respects performed, what relief the defendants are entitled to in respect of such non-performance, whether they can maintain the judgment directing specific performance, as well as a reference to ascertain damages, or whether they should be restricted to damages.

First, then, as to the proper meaning and construction of the covenant. The clause of the agreement of the 3rd November, 1882, which embodies the terms agreed to respecting the station, is as follows :

And to construct at or near the corner of Colborne and William streets, in the said town, a freight and passenger station with all necessary accommodation, connected by switches, sidings or otherwise with said road of the company, upon the council of said town, within three months from the final passing of said by-law, passing another by-law empowering the said company to make its roads and lay its rails along a highway or highways in the said town to said corner, from where the said road would be if the construction thereof were completed in a direct line through the said town, or upon the said council procuring for and giving to said company a right of way along the northerly side of McGregor's Creek (one half in the water) for the road of said company to or near said corner and to load from gravel piles, pits or beds purchased by said corporation adjacent to or adjoining the track of said company and carry gravel over said road to any place required by the said town for the construction, maintenance and repair of public roads in said town and for other purposes of the town for a sum and at a rate for loading and carriage not to exceed three cents per cubic yard of gravel per mile, for all distances less than ten miles and two cents per mile for all distances of ten miles and over but under twenty-five miles, and one-and-a-half cents per mile for all distances of and over twenty-five miles.

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Does then a covenant to construct a freight and passenger station, at or near a specified site, with all necessary accommodation, involve a liability, on the part of the railway company so covenanting, to run its trains to the proposed station? If the question was not concluded by authority I should with great deference to the learned judges of the Court of Appeal have thought there could as a matter of construction, according to the plain and ordinary meaning of language, be little difficulty in answering it in the negative. The obligation undertaken by the company being "to construct" and no liability beyond that being in terms imposed upon them, if this obligation is to be enlarged beyond the literal meaning of the words used, it can only be by incorporating some wider undertaking by implication—but what warrant either on principle or authority is there for thus supplying terms by implication in such a case. In what respect does it differ from reforming and remodelling the contract, which is, of course, no part of the duty of a court called on to construe it, thus to speculate on what the intention must have been and to arrive at a conclusion by balancing the utility of the literal construction against that contended for by those who seek to enlarge it? Surely such a mode of dealing with a contract is something more than interpreting the mere words in which the parties have expressed themselves, which we are told by the best authorities ought to be the limit which should bound the jurisdiction of a court of construction. The sound policy of holding parties fairly to the meaning of the language they have used, unless they are able to show fraud or error, considerations which, of course, are altogether out of place here, is, I think, obvious, when it is considered that if the courts were once to admit a mode of interpretation which should permit the

addition of terms by showing that without them the contract literally construed would be of little use, the greatest uncertainty would be introduced into transactions, and legal interpretation would soon degenerate into conjecture. I maintain, therefore, that when a railway company covenants to erect a station it is bound to build the station, but not to do more. It may well be that the defendants might reasonably have considered it improbable that the railway company would require more than one station at Chatham, and that they would therefore, if compelled to erect this one on the corner of Colborne and William streets, not incur the expenditure of another but content themselves with this, as their only station at Chatham and use it accordingly. But if they speculated on these probabilities, and trusted to the railway company acting in accordance with what it then appeared would be to their interest, that does not constitute any ground for enlarging the words by construction and giving the defendants the benefit of what they never stipulated for. The case, however, is really concluded by that of *Wilson* v. *Northampton & Banbury Junction Ry. Co.* (1), for with great deference I cannot see the distinction between that case and the present which the learned Chief Justice of Ontario seems to recognise. In the case cited the covenant was "to erect, fit up and construct the station, &c.," and it was distinctly held that no stipulations as to the use of the station were to be implied from such a covenant. The language of the covenant there, it will be observed, is almost identical with that now under consideration. The words "all necessary accommodation" cannot possibly enlarge the scope to the extent contended for as warranting the implication of something not expressed, namely, a covenant to use and

(1) 9 Ch. App. 279.

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run trains to the station, and if these words make no difference the cases are identical. I am of opinion that the interpretation of this covenant contended for by the defendants is inadmissible, and that at the utmost it only bound the railway company to build and erect a station with the necessary buildings and yard room for passenger and freight traffic. Further, that as the company were not bound to run trains to or to make any other use of the station, they are not bound to maintain a staff of officers or servants there.

Next, such being, in my opinion, the proper meaning of the company's stipulations the question remains whether construed in this sense, it has been sufficiently performed. The learned Chief Justice of the Common Pleas in the written opinion with which he accompanied his formal judgment seems to say that in his view the company had failed of performance in two respects, one being that they did not keep a proper staff of officers and servants at the station, viz., station master, ticket agent, freight agent, &c. In the view I take, these are not omissions of any agreement binding on the company, for, as already pointed out, they were not in terms bound to provide such officers, and their employment could only be as incidental to the use of the station, and I hold they were under no obligation to run trains or make any other use of it. But the Chief Justice also considered that proper accommodation had not been provided for loading and unloading freight. The learned judges own words are as follows:—

> I am of opinion on the evidence that the station accommodation on Colborne street is not sufficient to answer the requirements of the plaintiffs' covenants, that that station has not been kept open in the usual manner in which stations are kept open for the convenience of the public, and that there should be kept there a person to sell tickets and check baggage at reasonable times before the arrival and departure of trains.

So far I am unable to agree with the learned judge for the reasons already given, but he proceeds:—

> There is no present accommodation for loading or unloading of freight within the yard or grounds of the company and the use of the street for that purpose is an unauthorized use.

I think the words "all necessary accommodation" do require that in addition to suitable buildings to serve as passenger and freight stations and sheds appropriate station grounds and yards should be provided such as would be reasonably sufficient for all the purposes of freight and passenger traffic if the station were in constant and regular use. These, however, have not, according to the Chief Justice, been provided by the company. The Chief Justice having dismissed the counter-claim, his opinion in this respect is not to to be received as a formal finding, but from the evidence I think it may be gathered that his opinion in this respect, though not formally obligatory upon the parties, may well be adopted as a proper inference from the evidence.

Then what should be the relief in respect of this default of performance by the railway company to provide suitable station grounds? The case of *Wilson* v. *Northampton Ry. Co.* (1) is here again in point, for it shows that the appropriate relief in such a case is not specific performance, but damages. What use would it be to any one to compel the railway company to buy land and acquire station grounds which they could not afterwards be compelled to make use of? It is manifest therefore that just as in *Wilson* v. *Northampton Ry. Co.* (1) a remedy in damages will be more likely to do justice than a decree or judgment for specific performance. All the arguments which Lord Selborne in that case uses in pronouncing for a reference to assess damages in preference to a decree for

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specific performance apply with at least equal force in the present case, and I have therefore no hesitation in following that decision.

In my opinion, the order of the Court of Appeal should be discharged and the judgment of the Common Pleas Division should be varied by striking out the third paragraph and in lieu thereof substituting a declaration of the proper construction of the covenant contained in the indenture of the 3rd November, 1882, respecting the Colborne Street Station in accordance with the opinion regarding the construction before expressed, followed by a direction that it be referred to a master to ascertain what damages had been sustained by the defendants by reason of proper accommodation for the loading and unloading of "freight," not having been provided by the railway company, and directing the master in making such enquiry to have regard to the declarations to be inserted in the judgment respecting the construction of the stipulation in question as before indicated, and by which declaration it will of course be made to appear that the defendants are not entitled to compel the plaintiffs to run trains to the station or to keep up a staff of servants and officers there. Subject to the foregoing directions the counterclaim should be absolutely dismissed.

As to costs, the plaintiffs should recover the costs of the original action up to the first judgment. There should be no costs of the counter claim, for whilst to some extent the defendants succeed on it, they also to a great extent fail. There should be no costs of the appeal to the Court of Appeal as that was rendered necessary by the error in dealing with the counter claim by the judge of first instance. The appellants should recover their costs in this court. The subsequent costs which will be involved in the reference as to damages should be reserved until after the report.

FOURNIER J. concurred in the judgment of the Court of Appeal.

TASCHEREAU J.—I concur with Mr. Justice Gwynne.

HENRY J.—I concur in the judgment of the Chief Justice and Mr. Justice Strong with certain differences. I do not think the evidence sufficient to justify a reference, but the counter claim should be dismissed with a reservation to the defendants of their rights.

GWYNNE J.—Upon the facts appearing in evidence I am of opinion that the by-law—the agreement of the railway company with the corporation of the town of Chatham, of the date of the 3rd November, 1882, and the agreement between the railway company and the plaintiff, Bickford, which now bears date the 4th December, 1882, must be all read together for the purpose of determining the true agreement, the fulfilment of the terms of which constituted conditions precedent to the accruing of the right of the railway Co. to receive the debentures of the town of Chatham, authorized by the by-law.

It is said that the by-law and the agreement of the 3rd November, 1882, must be read as wholly independent instruments. having no connection with each other, upon the ground that, as is contended, the contract in the by-law is made between wholly different parties from the parties to the agreement of November, 1882, the ratepayers of the municipality being, as is contended, the parties to the by-law, and the municipality in its corporate capacity the parties with whom the agreement of November, 1882, is entered into. But there is no foundation for this contention for although the approval of the by-law by a majority of the ratepayers voting thereon must be obtained before the by-law can have any validity yet the by-law itself

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is an act of the corporation. It can only become a by-law by the assent of the council of the municipality. It must have the assent of the council before it can be submitted to the ratepayers, it must be first read in the council, and approved by the council to be submitted to the ratepayers and after being approved by the ratepayers it must be read a third time and passed by the council before it becomes a by-law. The corporation of the municipality is therefore the party with whom the contracts in both instruments were entered into. The agreement of November, 1882, recites that it was entered into for the express purpose of obtaining upon the faith of it the assent of the council of the municipality to the introduction of the by-law and to submitting it to the ratepayers and eventually passing it if approved by a majority of ratepayers voting upon it, and, moreover, the evidence shows that this agreement was used as a special lever by which the assent of the ratepayers to the by-law was obtained. It is, however, the council of the corporation which passes the by-law. Both instruments are entered into with the corporation and the one is expressly based upon the other, so that both must, in my opinion, be construed together as forming one complete agreement.

The agreement between the railway company and Bickford notwithstanding that it now bears date the 4th December, 1882, was, in truth the foundation upon which the agreement of the 3rd November, 1882, and the by-law rest. The object of passing the by-law in fact appears to have been to give effect to this agreement between the railway company and Bickford. The evidence shews that both this agreement and that of the 3rd November, 1882, were printed and distributed among the ratepayers before the by-law was submitted, and that at a public

meeting or public meetings, held in the town for the purpose of inducing the ratepayers to vote for this by-law Mr. Bickford, as indeed he himself admits, assured them that if the bonds should be carried he would perform everything in his agreement with the company (which was then executed conditionally) and in the agreement of the 3rd of November, 1882, and in the by-law. There can, I think, be no doubt that as this was done for the express purpose of influencing the ratepayers in approving the by-law, their approving it is fairly attributable to the matters contained in the agreement, the fulfilment of which was so assured. The by-law referred to in the agreement of the 3rd November was submitted for the consideration of the ratepayers on the 22nd November, 1882, and the day appointed for voting thereon was the 21st December, 1882. A public meeting at which it is established that Mr. Bickford gave the above assurance was held on the 27th November. His agreement with the company which he admits was then already made conditionally was not, it appears, executed under the seal of the company and of Mr. Bickford until the 4th December, of which day it now bears date just seventeen days before the voting on the by-law.

By this agreement, after reciting among other things, that the said Bickford had agreed to commence the completion of the said road, (namely a railway which commenced at Rondeau Harbor in the county of Kent, and running from thence to the village of Blenheim, thence to the town of Chatham, thence to the village of Dresden, with a branch to the village of Wallaceburgh) so soon as the municipalities of Chatham, Blenheim, Dresden and Wallaceburg have voted additional aid to the company to the amount of seventy thousand dollars, and upon the understanding that the company

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should at the time thereinafter mentioned issue and allot to the said Bickford one thousand fully paid up shares of the capital stock of the said company being to the amount of one hundred thousand dollars, and that the said company should agree not to issue any stock beyond the amount then standing in the names of shareholders (but not including that held by Solomon M. Knapp,) and the amount to be issued to the said Bickford as aforesaid without the consent in writing of the said Bickford, and should further agree to hand over to the said Bickford when the same should be received by them, the moneys derived from the government and municipal bonuses or aid, or to authorize the said Bickford to receive the same when payable to the company, and also to deliver first mortgage bonds of the said company to the amount of ten thousand dollars per mile at the time and in the manner thereafter mentioned, the said Bickford covenanted with the company subject to the aforesaid provisions as to the granting of municipal aid and subject to the legislature extending the time as therein provided, that for the consideration therein mentioned he would (among other things) well and truly and in good workmanlike manner, build, construct and finish that portion of the Erie and Huron Railway, commencing at Rondeau and from thence to or near the village of Blenheim, thence *via* the town of Chatham to or in the village of Dresden, with a branch to the village of Wallaceburg, according to plans and profiles of location already prepared and registered to be one continuous road or line, and that he will furnish and provide such right of way for the said railway in width 50 feet as has not already been purchased, and will also provide the requisite station grounds on said railway at Rondeau, Blenheim, Southern Railway crossing, Chatham, Dresden, Wallaceburg and such intermediate

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stations as are requisite for the proper working of the said railway as the traffic may demand. And will also build a strong and substantial pier of timber work or masonry for the bridge crossing the river at Chatham, with all suitable approaches on each side of the river for railway crossing (to include a footway along one side thereof of not less than four feet in width) the bridge to be of iron, steel or wood with all necessary wrought iron stays and braces, &c., &c., and will also build suitable stations at each of the said towns and villages and intermediate places as may be necessary for the traffic of the said railway, with platforms and water closets suitably painted. Also, will build one engine stable and all requisite conveniences for water at Chatham and the company's workshops suitable to its requirements at the same place; also will build two turn-tables and grade over all sidings of stations and station grounds, and will build and fully complete the said road in a good and workmanlike manner, and erect stations equal to those of the Credit Valley railway. The agreement then after the insertion of claims providing for the consideration to be paid by the company, proceeds as follows:—

It is also understood and agreed that notwithstanding anything herein mentioned, the said Bickford shall not be bound to commence the building of the said road or the purchase of the right of way or do anything in connection with this contract unless nor until the additional aid to the amount of $70,000 is granted by the town of Chatham and Dresden and the villages of Blenheim and Wallaceburgh, nor unless the said company shall procure an extension of time until the 1st day of March, 1884, for the completion of that portion of the said road between Rondeau and Dresden, including the Wallaceburgh branch.

It is further provided and agreed that it shall be a condition precedent to the said Bickford entering on and completing the said contract that the corporation of the town of Chatham grant the right of way down McGregor street, in said town, and it is hereby agreed that the station and proper buildings shall be erected at the inter-

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section of the railway with King street in the town of Chatham; provided always that if the corporation of the said town of Chatham desire that said station shall be further up in said town, the station will be so placed if the right to lay the track up Colborne street be granted to the company.

Now, from this agreement it is obvious that but one station in the town of Chatham which should be suitable for all the requirements of traffic in the town was in the contemplation of the parties to this agreement. The company bargained for and Bickford contracted to provide but one station for the town of Chatham, and it was agreed that such station should be equal to the stations on the Credit Valley railway, and that the sidings of the station grounds, and the stations should be graded, and that Bickford should provide the necessary station grounds, and that such station should be erected at the intersection of the railway with King street only in the event of the corporation of the town not desiring that the said station should be further up in the said town and not granting to the company the right to lay their track up Colborne street; but in the event of the corporation of the town requiring the station to be further up in the town than at the intersection of the railway with King street and of their granting to the company the right to lay their track up Colborne street, then their station for the town of Chatham suitable for all the requirements of the traffic at the town should be placed where the corporation of the town should require it to be placed.

[His Lordship then read the recitals and conditions of the agreement between the railway company and the town, the material portions of which are set out on page 238.]

The agreement as to the station being at or near the corner of Colborne and William street is not mentioned

in the by-law, as, indeed, it could not be for the reason pointed out by Mr. Justice Patterson in the Court of Appeal for Ontario, namely, that it rested with the corporation of the town, whether or not they should require the station to be located there, and in case they should, that they had three months after the passing of the by-law within which to pass the necessary by-law granting to the company the right to lay their track up Colborne street for the purpose. But although not in the by-law, it was by the agreement, upon the faith of which the by-law was passed, made an express condition that in case the corporation of the town should grant to the company such right to lay their track up Colborne street, the station should be located there, and by that agreement upon the faith of which the by-law was passed, the location of the station there, in the event aforesaid, became in my opinion as much a condition precedent to the accruing of the company's right to receive the debentures as if it had been inserted in the by-law.

It would, in my opinion, be monstrous if the fulfilment of a covenant entered into for the express purpose of procuring the by-law to be passed should not, on the purpose being obtained, be held to be a condition precedent to the accrual of a right to receive debentures authorized by a by-law which was passed only on the faith of the due fulfilment of the covenant. To say that although the covenant has been broken the corporation of the town has no remedy, but by an action to recover such damages as they may be able to prove that the corporation has sustained would be a mere mockery of justice; for, in such case, such an action could not possibly afford any adequate remedy. All the judges of the courts below are of opinion that the covenant has been broken. The corporation were then entitled to the fulfilment of it, and if entitled to the

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fulfilment of it, the erection of the station with all necessary conveniences, &c., being a part of the work necessary to the completion of the work, it was necessary that it should have been executed within the time specified for the completion of the road with stations, freight houses, and other necessary accommodation attached and connected therewith before the company became entitled to the debentures. The agreement of the 3rd of November entitled the corporation of the town of Chatham to the station at or near the corner of Colborne and William street conditional upon their granting the right to the company to lay their track upon Colborne street. The corporation did grant to the railway company this right and thereupon became entitled to have the station with all necessary conveniences constructed there, notwithstanding any difficulty or expense there might be attending its being located there. The agreement between the company and Mr. Bickford, of the fulfilment of which the corporation and the ratepayers were assured in order to induce them to pass the by-law, shows what kind of a station was contemplated by the agreement of the 3rd November, between the company and the town, namely, that it was to be the one station to be provided for the town, and that it should be sufficient for the requirements of all the traffic at the town, and that it should be equal to the stations on the Credit Valley Railway. There was no uncertainty whatever as to the character of the station, and the necessary conveniences attached and connected therewith which were to be supplied in order to the due fulfilment of the company's covenant. The provision as to the certificate of the Government Engineer has no relation to this part of the agreement: that related to the completion of the road in all other respects than those special-

ly provided for between the company and the town, and plainly related to a completion of the whole line to the satisfaction of the Commissioner of Public Works or as to be capable of being opened for traffic, and to entitle the company to the government subsidy. Now the company in fulfilment of the agreement as to procuring an extension of time for completing the work which Mr. Bickford had in his agreement with the company, made a condition precedent to his undertaking the work, procured an act of the Legislature of Ontario to be passed in the month of February, 1883, granting the required extension of time, 46 Vic., ch. 52.

There is a clause in that act which appears to me to have a material bearing upon the circumstance that the whole of the agreement between the company and the town upon the faith of which the by-law was procured to be passed, namely, that part relating to the location of the Chatham station was not inserted in the by-law. I am unable to understand for what purpose the clause could have been inserted unless with intent to have the bearing I have alluded to.

The 2nd clause of the act enacts that the several agreements entered into between the said company and the different municipalities passing by-laws granting aid by way of bonus to said company before the passing of such by-laws in consideration or in consequence of which agreements the said by-laws were voted upon or passed and the agreement between the said company and Edward Oscar Bickford for the construction of the said railway are hereby declared to be valid and binding upon all parties thereto from the time of execution thereof.

It cannot have been supposed that there was any occasion to pass an act to make valid, agreements between parties competent to enter into the agreements referred to, and it is not suggested that there was anything illegal or *ultra vires* in the agreements

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referred to, which rendered necessary legislative interference to make them valid.

The clause, however, declares all agreements between the company and municipalities for granting bonuses in consideration of which or in consequence of which by-laws granting such bonuses have been passed and voted upon and the agreement between the company and Bickford to be valid and binding on all parties thereto.

Now as it is clear from the evidence that the by-laws of the town of Chatham granting the bonus in question here was submitted to the ratepayers and voted upon and passed by the corporation upon the faith of the agreements of the 3rd November, 1882, and upon the assurance of the plaintiff Bickford that all its provisions as well as all the provisions of his agreement with the railway company should be faithfully fulfilled in every particular if the bonuses should be granted, I think that this clause was inserted for the purpose of assuring municipalities who had passed by-laws upon the faith of such agreements that they should have the same protection as if the provisions of these agreements were inserted in the by-laws.

However that such a clause was at all necessary for such a purpose, I am by no means prepared to admit, for I am of opinion that it is the duty of a court required to administer justice according to equity and good conscience to give effect to all agreements, verbal or written, upon the faith of which the by-law under consideration here was procured to be passed, and but for which it never would have been passed as I think is the true conclusion to draw from the evidence. It is, in fact, the common equity arising out of the fact that the whole agreement is not to be found in one instrument, but in several, or the case of an agreement

induced to be entered into by the assurances and promises of the party claiming the benefit of the agreement, which assurances and promises, if not fulfilled, would operate as a designed fraud upon the other party. So thinking, I am of opinion, that the covenant of the railway company as to the station in the town of Chatham at or near the corner of Colborne and William streets has been clearly broken, and that the fulfilment of it was a condition precedent to the accrual of the right of the company, or Mr. Bickford to receive the debentures sued for, and that this condition not having been fulfilled within the time specified for "the completion of the road with stations "and freight houses and other necessary accommo- "dation attached and connected therewith," all claim "upon the town corporation for the debentures is gone.

I am of opinion, also, that a foot way along side of the bridge over the river Thames has not been supplied within the meaning of the covenant in that behalf. The cutting it short before reaching the high bank of the river and dropping down by steps to flats, which every spring and autumn are covered by the waters of the river is not, in my opinion, a fulfilment of the covenant in respect of a foot way for passengers requiring to cross the river by the bridge. That foot way should, in my opinion, have been made, as is provided in the agreement between the company and Bickford, along the necessary approaches to the bridge as well as along side of the bridge proper.

Our judgment, in my opinion, should be to dismiss the appeal of the plaintiff with costs, and to allow the cross appeal of the defendants with costs and to order

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the claim of the plaintiffs in the court below to be dismissed with costs.

Owing to the difference in opinion among their Lordships the appeal and cross-appeal were dismissed without costs (1).

Solicitors for appellants: *Blake, Lash, Cassels & Holman.*

Solicitors for respondent: *Robinson, Wilson, Rankin, & McKeough.*

(1) The appellants applied to the Privy Council for leave to appeal from the decision in this case which was refused. See *Canadian Gazette*, Vol XIV p. 153.

JOSEPH RODBURN IMPLEADED WITH GEORGE JAMES RICE (DEFENDANT) ..... APPELLANT;

AND

DAWNAY J. C. SWINNEY AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

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*Nov. 8 & 9th
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*April 30.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Mortgagor and mortgagee—Sale of mortgaged lands—Power of attorney—Authority of agent—Sale on credit—Power of sale in mortgage—Application of proceeds—Duty of purchaser.

A power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale, and for the best price that could be gotten for them, and to execute all necessary receipts, &c., which receipts "should effectually exonerate every purchaser or other person taking the same from all liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, mis-application or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted and appropriated the proceeds. The purchaser paid the note to the holders at maturity.

Held, affirming the judgment of the court below, that the power of attorney did not authorize a sale upon credit, and the sale by the agent was, therefore, invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good.

APPEAL from a decision of the Supreme Court of New Brunswick dismissing an appeal from the decree of the judge in equity in favor of the plaintiffs.

This was a suit in equity to set aside a deed to the defendant Rodburn of certain timber lands in New

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

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Brunswick, and to restrain him from disposing of or encumbering the same, or cutting the timber thereon. The facts of the case may be stated, shortly, as follows:

In 1874 one of the plaintiffs mortgaged the lands in question to the others for some $45,000, which sum was payable in six months from the date of the mortgage. There was a power of sale given to the mortgagees in case of non-payment, which was to be exercised after publication for three months in the *Royal Gazette* of notice of intention to sell, and such sale might be made either at public auction or private sale. Provision was made for the application of the proceeds of such sale, but it was declared that the purchaser need not inquire whether they were applied as directed or not, or whether or not proper notice of sale had been given.

When the mortgage was nearly three years over due the mortgagers, who resided in England, gave a power of attorney to the defendant Rice, authorizing him to take possesion of the mortgaged lands and sell them for the best price he could obtain. Rice came to New Brunswick in 1877, took possession of the premises, and published a notice of sale in the *Royal Gazette* for 3rd August, 1877. The sale was postponed several times, but could not be effected at a satisfactory price, and in the fall of 1880 Rice offered the land to the defendant Rodburn at private sale. Rodburn had the land examined and offered to buy it for $6,000—which Rice at first would not accept, but asked $10,000. Rodburn refused to pay more than his offer; and Rice, after making further endeavors to sell, accepted the $6,000 from Rodburn and gave him a deed. Part of the purchase money was paid in cash and the balance by a promissory note in favor of Rice.

The plaintiffs filed their bill to set aside the sale, charging therein fraud on the part of Rice in making the sale; that Rodburn took the deed knowing that Rice had acted fraudulently; that Rodburn paid no

money for the land and that the sale was not *bonâ fide*. The answer of the defendant negatived these charges.

At the hearing, at the request of the plaintiff, a jury was summoned and certain issues were left to them, the finding on which would determine the *bonâ fides* of the sale and the question of fraud. These issues were found in favor of the defendants. A new trial was moved for and the verdict set aside, the learned judge deciding that the sale was invalid, as Rice had exceeded the authority given to him by the power of attorney in two respects—first, in selling some three years after publication of the notice in the *Royal Gazette*, which was really selling without notice; and secondly, in taking a note payable to his own order for a portion of the purchase money.

The Supreme Court of New Brunswick dismissed an appeal from the decision of the judge in equity, and thereupon the defendants appealed to the Supreme Court of Canada.

Gilbert Q.C. for the appellants:

The only ground upon which the plaintiffs could succeed without recouping Rodburn for the money paid Rice is that of collusion between the defendants, and the whole evidence contradicts that position.

There can bo object in requiring a special notice in order to effect a private sale, and the notice given fully complied with the terms of the power of sale.

The following authorities were referred to: *Jenkins* v. *Jones* (1), *Hewitt* v. *Loosemore* (2), *Davey* v. *Durrant* (3).

Barker Q.C. for the respondents:

The evidence is ample to show collusion between the defendants, to enable Rice to appropriate the purchase money to his own use.

The power of sale requires notice as well for a pri-

(1) 6 Jur. N. S. 391. (2) 9 Hare 449.
(3) 1 DeG. & J. 535.

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vate as for a public sale, and the power must be strictly followed *Dicker* v. *Angerstein* (1).

The learned counsel also referred to the following cases: *Parkinson* v. *Hanbury* (2), *Jenkins* v. *Jones* (3), *Jones* v. *Smith* (4).

Sir W. J. RITCHIE C. J.—I am of opinion that the appeal should be dismissed.

STRONG J.—This is a suit in equity instituted by the respondents, who were plaintiffs in the court below, and who are respectively the mortgagor and mortgagees in a certain indenture of mortgage, dated the 29th of January 1874, whereby the respondent, Henry Hoste Swinney, mortgaged the lands in question, situate in New Brunswick, to the other respondents to secure a sum of $35,420, or thereabouts, together with interest. The mortgage contained a power of sale under which the mortgagees were authorized to sell in case of default.

The object of the suit is to set aside and have declared void an alleged sale in pursuance of this power of sale made in December, 1882, by the defendant Rice, assuming to act under a power of attorney from the mortgagees. The sale in question was made to the defendant Rodburn, the present appellant; it is alleged to have been made in November, 1882, and was carried out by a conveyance bearing date the 8th of November, 1882. The alleged consideration for this sale was $6,000, of which the appellant states he paid to Rice, the attorney of the mortgagees, $2,500 in cash and gave him for the balance of $3,500 a promissory note payable two months after date, which note the appellant now produces, swearing that he paid it at maturity to the Chemung Valley Bank, the holders of it. The bill,

(1) 3 Ch. D. 600.
(2) 2 DeG. J. & S. 450. (3) 6 Jur. N. S. 391.
(4) 1 Hare 43.

which offends against well established rules of equity pleading forbidding multifariousness and misjoinder, amalgamates at least two distinct equities,—one that of the mortgagees to have the sale set aside as not having been made in conformity to the terms of the power of sale in the mortgage, a case in which the mortgagor alone is interested; and it further impeaches the sale as having been made by Rice, who was the attorney of the mortgagees only, in excess of the authority conferred upon him by his constituents. No effect was given to this objection to the pleading in the courts below, and it is only noticed now for the purpose of pointing out that there are thus two separate and distinct grounds for relief embraced in the same suit, which must, in considering the case, be kept separate.

The cause having come on to be heard before the judge in equity, *pro confesso* as regards Rice, the defendant Rodburn alone having answered, that learned judge directed certain issues to be tried before himself with a jury. On the trial of these issues a verdict was found for the appellant. On a motion for a new trial this verdict was set aside and a new trial was granted. Subsequently the learned judge discharged the order directing the issues, and the cause again came on before him, when he pronounced the decree which the Supreme Court has affirmed and which is now brought under appeal here. By this decree the conveyance of the 8th of November, 1882, was declared to be fraudulent and void, and was ordered to be set aside. From the order of the Supreme Court sitting in appeal, the present appeal to this court has been taken.

The objection to the sale as an undue exercise of the power conferred upon the mortgagees by the mortgage deed is that the notice required by the terms of the power was not given. The purchaser insists that he was not bound to see to this, and that he is protected against the objection by the express words of the deed.

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The judge in equity appears from his judgment, delivered when deciding the motion for a new trial, to have considered this objection established, and the full court, with the exception of Mr. Justice Tuck, appear to have adopted all the reasons assigned by the judge of first instance. I do not, however, purpose to enter upon this part of the case, as it appears to me the present appeal can be decided in accordance with the views of both the courts below on a much plainer and shorter point.

The ground upon which the mortgagees impeach the sale is that their agent, Rice, and the purchaser, Rodburn, acted fraudulently and collusively in the matter of the sale; and further, that the power of attorney under which Rice acted conferred upon him no authority to make such a sale as he assumed to make. Upon this latter point the judge in equity, Mr. Justice Palmer, is very emphatic and distinct. In his judgment, delivered on the 22nd of September, 1885, that learned judge says upon this head:—

> Fourth.—That Rice had no authority to take a note payable to himself and give time for payment, and the taking of it instead of money was a violation of his duty, and Rodburn was assisting in this and thereby assisting the agent to dispose of his principal's property, not for the benefit of such principal, but for the agent's own benefit.
>
> I have come to the conclusion that the last point is well taken, is unanswerable, and is decisive of the case. I take the law to be that when an agent parts with the property of his principal under such circumstances that the person purchasing it must be taken to know that it was sold, not for the benefit of the principal, but for the purpose of the agent selling it and disposing of it for his own benefit, the result is that the purchaser holds the property as if he himself were the agent of the principal.

This ground of decision was affirmed and acted upon by the Supreme Court on appeal, for Mr. Justice Fraser, in delivering the judgment of the majority, says:

> As the judgment of the learned judge in equity will be printed in the report of the case, I may say without quoting from it that I agree

with the result he has reached and with the reasons therefor given by him.

I agree with Mr. Justice Palmer and the Supreme Court that this objection to the validity of the sale is not susceptible of any answer. The letter of attorney under which Rice acted contains authority to sell, but not to sell upon credit. So much of the instrument as is relevant to the present question is contained in the following extract:—

> To enter and take possession, make sale and absolutely dispose of at any time, or from time to time, either by way of public auction or private contract, or partly in each such mode as he, in his discretion, may think fit, for the best price or prices that can be gotten for the same respectively, all or any part or parts of the freehold and other estates, lands, &c.

It needs no demonstration or argument to show that this authority is insufficient to warrant a sale upon credit such as that which was made by Rice to the appellant.

As to the terms of the sale actually made there can be no doubt, for we have it from the appellant himself that having paid Rice in cash only $2,500,—the latter executed the absolute conveyance which has been put in evidence, dated the 8th of November, 1882, thus purporting to convey the land absolutely and without any real security when less than half the purchase money had been paid—the residue of the price, $3,500, being secured merely by the promissory note of the appellant, payable to the order of Rice himself two months after date. Such a sale as this was entirely unauthorized by the only instrument to which Rice's authority can be referred—the power of attorney of the 5th of April, 1877, already quoted from. It was, in the first place, a sale upon credit instead of for cash; and in the next place, even if there had been authority to sell upon credit, the security given for the unpaid portion of the purchase money was one to Rice himself, and a mere personal security, which, from its form, Rice could easily

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convert to his own use, as he in fact did by discounting it with the bank to whom the appellant afterwards paid it. There is nothing in the power of attorney exonerating a purchaser from seeing that its terms are properly pursued as regards the mode of selling. It does, it is true, contain a clause exonerating the purchaser from seeing to the application of the purchase money, but that is nothing to the purpose as regards the present question. The appellant was bound to see that Rice in selling kept within his powers. This he clearly did not do. It is no answer to this to say that the appellant afterwards in good faith paid the $3,500 which formed the residue of the purchase money to the holder of the promissory note which represented that amount. If the sale was not good as a proper exercise of the powers of agency conferred by the letter of attorney the day after the conveyance by which the sale was carried out was executed, it could not be made good by matter *ex post facto*; so that even if the cash had been paid at the maturity of the note to Rice himself, instead of to the bank with whom he had effected the discount of it, the result would have been just the same—the sale would still have been unauthorized and invalid. Further, it is of no avail to say that the deed of conveyance thus being void is void at law, and therefore the interposition of equity to avoid the sale or to declare the deed a nullity was not requisite. The deed forms a cloud on the respondent's title, which alone justifies the resort to a court of equity to have it removed.

Therefore, upon this ground the appeal ought to be dismissed, though in saying this I am far from meaning to imply any dissent from the other grounds upon which the judge in equity proceeded. As to them, I express no opinion.

The appeal must be dismissed with costs.

FOURNIER J.—Concurred.

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GWYNNE J.—I entirely concur in the judgment prepared by my brother Strong in this case, to which I can add nothing, unless it be to say that there appears to me to be abundance in the evidence to justify the imputation that the conveyance by the defendant Rice to Rodburn was contrived fraudulently and collusively between them to indemnify or compensate Rodburn in respect of some transactions between them, which are only hinted at without the particulars being disclosed or being capable of being discovered. If the transaction had been a *bonâ fide* one it would have been Rodburn's interest to have produced the testimony of Rice which there is no doubt he could have done had he been so minded. In view of the facts which do appear, I do not think that Rodburn could reasonably expect a judgment in his favor, unless Rice should be produced as a witness on his behalf, and should be able to withstand a sifting cross-examination as to his dealings with Rodburn and the precise circumstances attending the execution of the conveyance to him. But instead of Rodburn attempting to support the purchase which he relies upon, by calling Rice as a witness on his own behalf, there seems, upon the evidence which we have, just ground for concluding that Rice's evidence was withheld in Rodburn's interest, in whose house he was when the commission under which Rodburn gave his evidence was being executed.

PATTERSON J.—Concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Gilbert & Straton.*

Solicitors for respondents: *Rainsford & Black.*

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*Nov. 7, 8.
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*Mar. 18.

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

AND

THOMAS W. CHESLEY (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Surety—Execution of bond—Evidence of execution—Weight of evidence—Acceptance of bond—Proximate cause—Estoppel.

In an action by the crown against C. on a bond of suretyship for the faithful discharge by a government official of his duties as such, the defendant, under a plea of *non est factum*, swore that he signed the bond in blank—that he made no affidavit of justification—and that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular and unauthorized. The attesting witness to C.'s execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given.

Held Per Ritchie C. J., Strong, Fournier and Gwynne JJ., reversing the judgment of the court below, that the weight of evidence was in favor of the due execution of the bond by C.

Per Patterson J., that C. was estopped from denying that he had executed the bond.

Held also, Per Patterson J., reversing the judgment of the court below, that the execution of the bond, and not the certificate of the magistrate, was the proximate, or real, cause of its acceptance by the crown.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining a verdict for the defendant at the trial.

The action in this case was on a bond given by one VanBlarcom as principal, and the defendant and another as sureties in the sum of $2,000 each, as security for the faithful discharge by VanBlarcom of

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

(1) 6 Russ. & Geld. 313.

his duties as agent of the government savings bank at Annapolis, N. S.

By 31 V. c. 37, as amended by 33 V. c. 5, certain officers of the Dominion Government are required to give security for the proper discharge of their duties, by means of an approved bond with sureties. The sureties are required to make affidavit that they are respectively possessed of real or personal estate, or both, of double the value of the amount for which they become surety, and the attesting witness to the execution of the bond must make affidavit of such execution before a justice of the peace. The bond, with the affidavits attached, is filed in the department of the Secretary of State.

The defendant, Chesley, gave the following account of the manner in which he executed the bond, having set out the same in one of his pleas:—

"I live in Granville, 18 miles from Annapolis, by way of Bridgetown. In the winter of 1881 I was in Annapolis, and about leaving in the morning. On the previous evening VanBlarcom requested me to become surety on a bond to the extent of $500 or $1,000 with another person and himself. I refused. Next morning early I was in VanBlarcom's office; he again solicited me. Upon further persuasion I consented to his request. He then took from his desk a blank bond and laid it before me, and asked me to sign it, and he would fill it out as he had explained, that I should be responsible with himself and another for $1,000, and I could inspect it when called on to swear the affidavit attached. I placed my name where it is on the bond, hastily, and went by the train. There was no seal on it. There was no date, and nothing but the printed matter in the paper A. W. (affidavit of VanBlarcom for faithful service). VanBlarcom followed with the bond from his office, and said we must get a witness. Mr. Hall was a postal clerk on the train, and

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I said, "Mr. Hall, that is my signature." I put my name to the blank affidavit, and never swore to it, and from the day I put my name there till VanBlarcom absconded I never saw the bond or affidavit. VanBlarcom agreed not to use the bond till filled up and shown to me.

"Cross-examined—I often saw VanBlarcom and never asked him about the bond. I am a barrister of this court. I put the name on the condition that it would be filled up for $1,000. I did not read the printed matter. I may have read the affidavit—the blank. I knew I would be required to swear the affidavit, and then I would have an opportunity of further examination. I am sure there were no seals."

The attesting witness proved his signature to the bond and to the affidavit of its execution, and testified as follows:—

"I swore to the affidavit. I must have been present and saw the execution. I should say so. I should say that the affidavit was made at a time when the facts were fresh. I have no doubt about the matter.

"Cross-examined—I have no recollection and I do not know where I saw Chesley sign. I only know from what I see on the paper. I live at Annapolis, and at the time of bond was mail clerk."

The justice before whom the affidavits were sworn gave the following evidence:—

"These signatures, "A. W. Corbett, J.P.," to the four affidavits, to papers A. W. and B. W. (the affidavit of VanBlarcom and the bond) are mine. It has been so long since the thing was done, and I kept no minute, that I have no recollection, but my name would not be there unless the parties affirmed or swore, and acknowledged their signatures, or made those signatures. I can't tell who wrote the affidavits.

"Cross-examined—I have no recollection of the facts at all, and had none till I saw this paper last night.

Sometimes, if parties came in and acknowledged that they affirmed, that would do. Some parties swore, and some, if they acknowledged that they had sworn, I would sign.

"Re-examined—To my knowledge, I have never so done it without the parties being present. I would not sign unless I saw the signature made, or it was certified that it had been made."

It was agreed at the trial that the question as to whether or not the defendant executed the bond should be first tried, and that of the breach of the conditions and amount due (if any) should be postponed.

On the above evidence the learned judge who tried the case, Mr. Justice Weatherbee, found as follows:—

"That the printed form of bond and affidavit were signed in blank by defendant, the bond being at the time without seals, date or amount; and that the affidavit was never sworn; and that defendant only authorized the filling in of the sum of one thousand dollars."

"That the defendant was negligent in his conduct in so signing, and in neglecting to make enquiries afterwards as to the disposal of those papers."

"That the bond would not have been received by the officers of the crown without the certificate of the justice."

"That from defendant's conduct there is to be implied authority to VanBlarcom to affix a seal to the bond to plaintiff."

"That the careless and illegal act of the justice (though without fraudulent intent) in signing the certificate to the affidavit was promoted by reason of the name of the defendant, a barrister, being attached thereto."

"That the defendant was culpably negligent in not withholding his name from the affidavit till the same

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was ready for attestation, so as to guard against the possibility of illegal or fraudulent use of the affidavit form, especially as there was no object whatever in attaching his name until such attestation could be made before the justice."

Upon these findings, Mr. Justice Weatherbee gave a verdict or judgment for the defendant, deciding that negligence might estop the party from denying that he executed a deed, but that such negligence must be the proximate and not the remote cause of the acceptance by the other party of such deed.

The Supreme Court of Nova Scotia, the Chief Justice dissenting, sustained this verdict. The plaintiff then appealed to the Supreme Court of Canada.

Borden for the appellant referred to *Coventry* v. *The Great Eastern Railway Co.* (1)

Harrington Q.C. for the respondent. The facts have been found in our favor by the trial court and the appeal court of Nova Scotia, and will not be questioned by this court. *Ungley* v. *Ungley* (2); *Gray* v. *Turnbull* (3); *Allen* v. *Quebec Warehouse Co.* (4); *Metropolitan Railway Co.* v. *Wright* (5); *Webster* v. *Friedeberg* (6).

The negligence was not the proximate cause of the bond being accepted. *Swan* v. *North British Australasian Co.* (7).

On the question of estoppel the learned counsel cited *Taylor* v. *The Great Indian Peninsular Ry. Co.* (; *The Bank of Ireland* v. *The Trustees of Evans' Charities* (9).

Borden in reply cited, as to the findings on the facts,

(1) 11 Q. B. D. 776.
(2) 5 Ch. D. 890.
(3) 2 Sc. App. 53.
(4) 12 App. Cas. 101.
(5) 11 App. Cas. 156.
(6) 17 Q. B. D. 736
(7) 7 H. & N. 603; 2 H. & C. 175.
(8) 4 DeG. & J. 559.
(9) 5 H. L. Cas. 410.

Cross v. *Cross* (1); *Bigsby* v. *Dickinson* (2); *Jones* v. *Hough* (3); *The Glannibanta* (4); *Sovereign Fire Insurance Co.* v. *Moir* (5).

As to estoppel. *Re North of England Joint Stock Banking Co.* (6); *Stewart* v. *Boak* (7); *Seton* v. *Lafone* (8); *Easton* v. *London Joint Stock Bank* (9); *Williams* v. *Colonial Bank* (10).

And on the facts see *Hunter* v. *Walters* (11).

SIR W. J. RITCHIE C.J. concurred in the judgments allowing the appeal.

STRONG J.—I am of opinion that we must allow this appeal. The bond is regularly proved by Samuel Hall, the subscribing witness. His evidence is short, and is as follows:—

Samuel Hall—Proves his signature to bond B. and to the affidavit on the back. I swore to the affidavit. I must have been present and saw the execution. I should say so. I should say that the affidavit was made at a time when the facts were fresh. I have no doubt about the matter.

Cross-examined—I have no recollection, and I do not know where I saw Chesley sign. I only know from what I see on the paper. I live at Annapolis, and at the time of bond was mail clerk.

Then the deposition of Mr. Corbett, the justice of the peace whose signature is appended to the jurats of the affidavit of execution purporting to have been sworn to by Hall, and to the affidavit of justification purporting to have been sworn to by the defendant, is to the following effect:—

A. W. Corbett—I reside at Annapolis, and am a justice of the peace. Have been so for twenty years. (Proves the signature of H. H. Van Blarcom to paper A. W.; also signatures of H. H. VanBlarcom, Law-

(1) 3 Sw. & Tr. 292.
(2) 4 Ch. D. 24.
(3) 5 Ex. D. 122.
(4) 1 P. D. 287.
(5) 14 Can. S. C. R. 612.
(6) 1 DeG. M. & G. 576.
(7) N. S. Eq. Rep. 469.
(8) 19 Q. B. D. 68.
(9) 34 Ch. D. 95.
(10) 36 Ch. D. 659; Reversed on appeal 38 Ch. D. 388.
(11) L. R. 11 Eq. 292; 7 Ch. App. 75.

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rence Delap and T. W. Chesley to paper B. W. and the signatures of Lawrence Delap and T. W. Chesley an affidavit annexed to B. W.). These signatures "A. W. Corbett, J. P." to the four affidavits to papers A.W. and B.W. are mine. It has been so long since the thing was done, and I kept no minute, that I have no recollection; but my name would not be there unless the parties affirmed or swore, and acknowledged their signatures or made those signatures. I can't tell who wrote the affidavits.

Cross-examined.—I have no recollection of the facts at all, and had none till I saw this paper last night. Sometimes if parties came in and acknowledged that they affirmed that would do. Some parties swore, and some, if they acknowledged that they had sworn, I would sign.

Re-examined.—To my knowledge I have never so done it without the parties being present. I would not sign unless I saw the signature made, or it was certified that it had been made.

The signatures of the defendant and Hall to the bond and affidavits are thus proved and not disputed. This constituted regular and entirely sufficient proof of the making of the bond on the issue of "*non est factum.*"

Against this we have nothing but the evidence of the defendant himself, who says he signed the bond in blank; that he authorized VanBlarcom to fill it up for $1,000 only, instead of the actual amount of $2,000 now appearing on its face; that the bond was in blank when Hall attested it—and further, that neither of the affidavits were ever sworn to, and that Corbett must consequently have signed the jurats irregularly and have falsely certified that the respective deponents swore to the affidavits before him.

Although the learned judge who tried the case has found for the defendant I am unable to acquiesce in this finding. The defence depends wholly and exclusively on the direct testimony of the defendant himself, and I cannot agree that a party, who admits that his signature appended to a solemn instrument like this bond is in his own handwriting, can discharge himself in the way attempted here in the face of such proof as we have from the subscribing witness and the magistrate who took the affidavit of execution and justification. Had there been any circumstantial evi-

dence confirmatory of the defendant's account the case might have been different but there is no such proof. Are we then, upon the mere denial and statement of the defendant, the party interested, and without the least circumstance confirming it,—to conclude that Mr. Hall, the witness, who swears that he must have been present and have seen the execution, and who says he swore to the execution when the matter was fresh, and Mr. Corbett who says his name would not appear affixed to the affidavits if the parties had not sworn them in his presence, and also either signed or acknowledged their signatures in his presence—are we to conclude on the mere oath of the defendant himself that these two gentlemen, who it is not pretended had any interest in the matter, were each of them parties not merely to what would be a deliberate fraud upon the crown, but also to what would amount, at least in the case of one of them—Mr. Corbett, the magistrate, and probably in the case of both—to an indictable offence? I think sound public policy requires us to say that a party who admits his signature to a deed or bond cannot be permitted to exonerate himself in this way on his own unsupported oath, by swearing to its irregular and insufficient execution, in the face of the evidence of disinterested parties sufficiently proving that execution.

I think it, too, more consistent with probability, and altogether a more just inference from the evidence, to conclude that the defendant is mistaken in his recollection of the circumstances attending the execution of the bond, than that Mr. Hall and Mr. Corbett were guilty of the gross irregularities which the defendant imputes to them. I say nothing about estoppel. I proceed entirely on the weight of evidence, which, in my opinion, is overwhelming.

The appeal must be allowed with costs, and judgment entered in the court below for the crown with costs,

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FOURNIER J.—Concurred.

GWYNNE J.—The proper conclusion to arrive at upon the evidence, in my opinion, is that when the bond was acknowledged by the respondent in the presence of the witness Hall it was in the condition in which it now is. Hall, immediately after such acknowledgment testified upon his oath to the due execution of it by the respondent, and he has no doubt whatever upon the subject—that the bond was originally signed in blank by the respondent, as he swears it was; but, as he admits, VanBlarcom followed him to the train for the express purpose of getting the bond acknowledged in the presence of a witness; for this purpose I can entertain no doubt that VanBlarcom had in the meantime filled in the blanks in the instrument and made it perfect, and followed the respondent to the train to get him to re-execute the bond in the presence of a witness who could swear to such execution, and that thereupon the respondent went before the witness Hall and acknowledged the signature now at the foot of a perfected instrument to be his signature. The time as to which the respondent speaks of the instrument not having been perfected, no doubt must be when he first set his signature to the incompleted instrument, for there would be no sense whatever in acknowledging his signature before a witness unless the instrument was then complete, and the witness before whom he acknowledged the instrument has no doubt that it was. It would be senseless in the extreme that the respondent, himself a lawyer, should go through the form of acknowledging before a person called upon to assume the position of a subscribing witness to the execution of an instrument, that a signature to a paper with a number of blanks in it not filled up, and so utterly defective, was his signature. If the respondent executed the bond, as I have no doubt, upon the evidence, that he did, that is all that is necessary to decide.

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The appeal must be allowed with costs, and judgment be rendered for the crown in the action.

PATTERSON J.—This is an action against the defendant as one of the sureties for one VanBlarcom in a bond dated the 25th day of January, 1881, made in the form given in 35 Vic. ch. 19, to secure the due performance of VanBlarcom's duties as saving's bank agent at Annapolis.

The security was given in pursuance of 31 Vic. ch. 37, the 3rd section of which had been twice amended with regard to the affidavit of execution and the affidavits of justification to be made by the sureties, and the registration and custody of the bond, and was to be read from 43 Vic. ch. 3, at the time of the execution of this bond.

The parties to the bond were VanBlarcom, the principal, and the defendant and one Lawrence Delap as sureties, each of the three parties being bound in the sum of $2,000, for the payment of which sums they bound themselves severally, and not jointly or each for the other.

The statute required the bond to be proved as to the due execution and delivery of the same by an affidavit of an attesting witness made before a justice of the peace, and also required every surety to make an affidavit of justification in the form given or to the effect thereof; and that the bond, with the several affidavits, should be recorded at full length in the department of the Secretary of State of Canada, and the original bond and affidavits to be deposited, after registration, in the same department.

It is the duty of the Secretary of State, under section 15, to cause to be prepared for the information of parliament, within fifteen days after the opening of every session, a detailed statement of all bonds and securities registered at his office, and of any changes and entries

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that have been made in reference to the names and residence of any sureties, and of the amounts in which they have become severally liable, since the period of the previous return submitted to parliament.

The act under which the savings banks were established, 34 Vic. ch. 6, required every agent to promise on oath to faithfully perform his duties.

The bond in this case is on a printed form, which gave also blank affidavits for the principal, subscribing witness and sureties.

The four affidavits purport to have been made on the day of the date of the bond, the 25th of January, 1881, before A. W. Corbett, J.P., at Annapolis.

It is unnecessary to refer to the pleadings, because it was agreed at the trial that the question to be tried was Mr. Chesley's execution of the bond or his liability to pay anything under it in case the breach of the condition should be proved, the trial of that issue being postponed.

For the crown the bond and affidavits were produced. Mr. C. J. Anderson, the chief of the savings bank branch of the Finance department, spoke of the bond only from the entries he looked at and not from recollection of the particular paper. He says he sent the blank form to VanBlarcom and received the bond through the post. He says it was received by him on the 22nd February, 1881, but I do not feel clear, from reading the note of his evidence, whether that, which he read from an indorsement on the bond, was the first receipt of it, or the receipt of it for filing after it had been registered in the department of the Secretary of State. By the act of 1880 it ought to have remained in that department, though I should gather from what Mr. Anderson is reported to have said that the former statutes, which required the securities after registration to be deposited in the finance department continued to be acted on.

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The other witnesses for the crown were Mr. Corbett, the J.P., and Mr. Hall, the attesting witness. I shall read their evidence, which is short:—(See pp. 308 & 309).

Opposed to this there is only the testimony of the defendant himself. The main question is whether it should be taken to rebut the case made for the crown. (His Lordship read defendant's evidence set out on page 307)

The learned judge who tried the issue without a jury gave credence to the defendant's account, and after discussing the question whether the defendant was estopped by his conduct from denying that the bond was his deed, and answering that question in the negative, he gave judgment for the defendant, which judgment was affirmed by a majority of the court, the Chief Justice dissenting.

The following are the trial judge's findings of fact:—(See p. 309).

I do not understand the dissent of the learned Chief Justice to have involved any difference in opinion from the trial judge upon the facts found,—on the contrary, he says the findings were not attacked—but to have turned on the question of estoppel. The majority of the court, whose opinions were expressed by Mr. Justice Smith, appear to have inclined to the opinion that the defendant would be estopped if the negligence imputed to him had been the proximate cause of the acceptance of the bond by the government, but they considered the proximate cause to have been the magistrate's false certificate that the defendant had been sworn before him. The Chief Justice, dissenting from that understanding of the part played by the certificate, and agreeing with the other members of the court on the general doctrine of estoppel, was of opinion against the defendant.

My impression is that, had I been trying the case, I should have given more weight than seems to have

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been given to the intrinsic improbabilities and other considerations, some of which I may allude to further on, which appear to me to tell against the defendant's version of the making of the bond. Still, it is proper to bear in mind that there are sometimes matters of local knowledge understood by the persons concerned in the trial which influence the verdict without finding their way into the notes of the evidence.

For example, the fact stated by the Chief Justice to be admitted that the condition of the bond was violated by the misconduct of the officer does not appear in any formal manner, nor does the fact, freely spoken of, that VanBlarcom absconded. He is alleged in the declaration to have held office till the 12th of May, 1881. Mr. Anderson says that he was at Annapolis in May, 1881, and had the bond there. We may fairly infer that he was there in consequence of the absconding of VanBlarcom, and, that being at so early a date, less than three months from the time the bond first reached his hands, it is somewhat remarkable that we hear nothing of any communication at that time with the defendant, because his repudiation of liability would naturally have led to some reference to Mr. Hall and Mr. Corbett, whose recollection could scarcely have failed them so much as it did when in the witness box three years and a half later. Under all the circumstances it cannot be said that any sufficiently clear ground has been made to appear for disturbing the findings of fact. The decision of the appeal must therefore turn, as did the judgments in the court below, on the question of estoppel.

There are two propositions formulated by Lord Esher in *Carr* v. *London and N. W. Ry. Co.* (1) one or both of which will furnish the test of the application of the doctrine to the facts as found by the judge and as admitted by the defendant.

(1) L. R. 10 C. P. 307.

One proposition, which is found at p. 307, is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented; and the other (1.) that if, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.

See also *The Mayor, Constables and Company of the Merchants of the Staple of England* v. *The Bank of England* (2) for a very late judgment of Lord Esher.

It has to be assumed for the purpose of the branch of the case involved in this appeal, which is, by arrangement, to be decided before the investigation of VanBlarcom's dealings in his office is entered upon, that VanBlarcom is a defaulter, and that the government was prejudiced by accrediting him as agent.

The difference of opinion in the court below arose from the different views taken of what was the proximate cause of that action of the government.

The majority of the court held it to be the affidavits of justification attached to the bond and falsely certified by the magistrate to have been sworn before him, while the Chief Justice considered it was the bond itself, the proof of the pecuniary responsibility of the sureties being a collateral matter not affecting the legal validity of the security, and which might have been dispensed

(1) P. 318. (2) 21 Q.B.D. 160.

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with without prejudicing any remedy on the bond, although the departmental officials would have failed in their duty if they had accepted the bond without the affidavits.

I think the view of the Chief Justice is the correct view. That of the majority of the court seems to have been influenced by attaching too literal a significance to the word "proximate" as used in one of the propositions I have quoted.

Lord Esher explained in *Seton* v. *Lafone* (1) that he had taken the word from the judgment in the case of *Swan* v. *N. B. Australasian Co.* (2), and that the word was there used as meaning the real cause, and he expressed his preference, in which Bowen L. J. joined him, for the word "real" as more accurate than the word "proximate," while Fry L.J. said that he did not feel sure that the term "real" was any more free from difficulty than the word "proximate."

What was to be done here was to obtain from VanBlarcom a bond with two sureties for the prescribed amounts. It might have afforded some assistance upon the issue of fact relating to the actual execution of the bond to have known the terms of the order fixing the amount of security required from VanBlarcom, perhaps as a means of checking the defendant's statement that $500 or $1,000 was the amount named to him.

That is one particular in which there seems to have been slackness in bringing out all that might have thrown light on the investigation. We must for our present purpose assume that the bond required was the bond that was furnished. The real cause of the accrediting of VanBlarcom as agent was the furnishing of that bond, and, taking that to be so, the question is whether under the evidence the defendant can be heard to deny that it is his deed.

(1) 19 Q. B. D. 68. (2) 2 H. & C. 175.

On this form of the question the unanimous opinion of the court below is against him.

I think we should give effect to that opinion by allowing the appeal and reversing the judgment which proceeded upon the erroneous conception of the proximate cause.

I assume of course that the affidavit of execution was untrue as well as the magistrate's certificate to the other affidavit, but I do not assume that Hall did not swear before the magistrate to the execution of the bond. His affidavit as produced to the department conformed to the requirement of the statute respecting proof of the execution, and I take the true effect of the defendant's own statement to be that Hall, in making the affidavit, did precisely what the defendant intended that he should do.

The defendant is a barrister and must be credited with the knowledge of the mode in which these things are done. When he acknowledged his signature before Hall in order that Hall should attest the bond as witness, he did an act which I should, if trying the case, have considered so inconsistent with his statement that there was no seal to the paper as to make a strong demand on my credulity when asked to find that there was no seal. But, at all events, he said in effect to Hall: "I have executed this paper which requires an attesting witness who shall swear to its due execution. You are to be the witness and to make the affidavit."

His signature of the affidavit of justification, at the time and under the circumstances, is nearly as hard to reconcile with his denial, implied if not expressed, of connivance at the irregularity of Corbett's proceeding, or even of procuring Corbett to act as he did. It is true that he says he relied upon having an opportunity of seeing that the blanks had been filled up as he had agreed that they should be filled up, when he should

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have the bond before him for the purpose of swearing to the affidavits. But that theory gives no reasonable explanation of his signing the affidavit, or even of his signing the deed itself, at the time. Confining ourselves, however, to Hall and his affidavit, there can be no other conclusion than that nothing further was intended to be done towards the more complete execution of the deed, in the presence of Hall, and that Hall was intended to make affidavit of the due execution of a completed instrument—in fact to make the affidavit which he did make as the statutable proof of the execution.

The case of *Awde* v. *Dixon* (1) was mentioned during the argument, I think, by one of my learned brothers. In that case an agent had exceeded his authority by filling up a promissory note for too large an amount. The court did not say whether or not a forgery had been committed, but dealt with the case on the question of authority, not, however, ignoring the liability of the principal to be estopped from denying the authority of the agent.

A party who takes such an incomplete instrument, Parke B. observed, "cannot recover upon it unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give."

It was argued for the defendant that the principle of estoppel *in pais* does not apply to preclude a man from denying the execution of a deed.

The argument overlooks the essential principle of estoppel which is to prevent the assertion that the fact is contrary to the party's representation in reliance on which another has changed his position to his preju-

(1) 6 Ex. 869.

dice, and the fact of the execution of a deed does not differ, in view of this principle, from any other fact.

The authority mainly relied upon in support of the argument was *Swan* v. *N. B. Australasian Co.* (1). That case may not inaccurately be said to contain all the law upon the subject, but I understand it to discredit, in place of supporting, the wide proposition for which it is appealed to.

It is undoubted law that authority to execute a deed for another cannot be conferred by parol, and that a deed executed with blanks left for material parts which are afterwards filled up by an agent whose authority has not been conferred by deed is void. But that doctrine must not be confounded, as I think has been done in the argument, with the principle of estoppel. The doctrine was firmly settled by *Hibblewhite* v. *McMorine* (2), which was approved in the House of Lords in the recent case of *Société Générale de Paris* v. *Walker* (3); but when the same deed which was in question in *Hibblewhite* v. *McMorine* was attacked on the same ground of imperfect execution in *Sheffield Railway Co.* v. *Woodcock* (4), which was an action for calls, it was held binding by estoppel. The court refused a rule *nisi* on the point of the invalidity of the deed, Parke B. observing (5):

> The defendant held out false colours to induce the company to register him as a proprietor, and therefore to bring this action against him. It is a universal rule of law, that when a party makes a representation to another whereby the situation of the latter is altered he is bound thereby.

In Everest and Strode on Estoppel (6) Swan's case is discussed at some length, and it is said that the majority of the judges who gave opinions held that the doctrine of estoppel by executing instruments in

(1) 7 H. & N. 603.
(2) 6 M. & W. 200.
(3) 11 App. Cas. 20.
(4) 7 M. & W. 574.
(5) P. 583.
(6) At p. 358.

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blank is confined to negotiable instruments and does not apply to deeds.

The general form in which the learned authors express this proposition may, perhaps, be misleading. The opinions on which it is founded do not go farther than to hold that the fact of executing a deed in blank is not by itself such a representation as will work an estoppel, while all the judges without exception concede that the principle of estoppel applies to deeds.

The case came first before the courts on an application to the Common Pleas to rectify the company's register; *Ex parte Swan* (1). The subject of estoppel was touched upon by all the judges who delivered opinions. Erle C.J. said (2):—

> Now although the deeds of transfer as between Swan and Oliver were null and void, yet as between Swan and a purchaser for value on the faith that they were valid, they may be valid to pass the property, if not directly, yet indirectly by estopping Swan from setting up his right against such purchaser.

Again (3):

> The principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution is universally estopped from denying the authority of the agent.

Further on, referring to the case of the *Bank of Ireland* v. *Evans' Charities* (4), he said:

> Lord Cranworth, in giving judgment, explains the case of *Young* v. *Grote* (5) by the estoppel of a principal from denying his authority to an agent, where his negligence has enabled the agent to cheat a person acting with ordinary caution. In Ireland and in the House of Lords this rule of law was treated as applicable to deeds as well as to negotiable instruments; and the judgment of the House of Lords, holding that the negligence was not proximate, by implication holds that if it had been so between these parties the false deed would have been valid.

Keating J. made observations to the same effect. Williams J. and Willes J. took a different view, but, as

(1) 7 C. B. N. S. 400.
(2) P. 431.
(3) At p. 432.
(4) 5 H. L. Cas. 389.
(5) 4 Bing. 253.

I understand the judgments, only as to the signature in blank being itself sufficient to estop. They thought it would be inconvenient to carry the principle of *Young* v. *Grote* (1) beyond negotiable instruments, Williams J. using this illustration :

If a man were induced to sign, seal, and deliver to his attorney a deed of conveyance with the parcels in blank upon the understanding that it should be filled up by a description of estate A, it would surely be difficult to contend that if the attorney were fraudulently to fill up the blank by a description of estate B, the latter would pass to a *bonâ fide* purchaser who paid for the estate on the supposition that he was buying the latter estate.

Willes J. said :

As a general rule no one can found a title upon a forgery. The doctrine adopted in *Young* v. *Grote* (1) as to negotiable instruments which form part of the currency has never yet been extended to conveyances by deed of land or other property. I am unwilling to be the first to do so.

In the Exchequer in *Swan* v. *N. B. Australasian Co.* (2), Wilde B. said (3) :

It has been further contended by some that the doctrine of estoppel does not apply to the case of instruments under seal. I have great difficulty in appreciating this as applied to the case in hand. Greater effect and more solemn sanction has always been yielded by the law to deeds than to parol instruments—notably so in ancient times. Whether in the present day there is any practical benefit in preserving this distinction I do not stop to inquire, for there is no question here of invalidating or impeaching a deed by estoppel. The case sets out with a deed of transfer by the plaintiff. It is the plaintiff who avers it to be void ; and the doctrine of estoppel, so far as it intervenes at all, is called in aid to support the deed, not to impeach it. Whatever the superior sanction or extra force of a deed may be, the estoppel in this case, so far from coming into conflict with it, is in harmony with it ; and it is difficult to see why, if a man is restrained or estopped from repudiating a parol transfer, he should be less restrained by the same estoppel from repudiating a solemn transfer by deed.

Pollock C.B. concurred with the judgment of Wilde B. Martin B. and Channell B. held that there was no

(1) 4 Bing. 253. (2) 7 H. & N. 603.
(3) P. 634.

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estoppel in the case, but on the ground that it would be worked only by some representation made by statement or by conduct of what was untrue, and not by negligence only. This will appear from a short extract from each of their judgments. Martin B. (1):

> Those are the cases which have been cited, and I think it may be said with certainty that there is not one of them, which is an authority for the proposition, that when a deed is not the deed of the party he may be estopped by negligence or carelessness on his part from being permitted to aver that it is not.

And Channell B. (2):

> In all cases of the kind of estoppel we are now called upon to consider, the party has, I conceive, either himself made, or authorized to be made, a statement of fact, untrue, or he has conducted himself so as to give rise to the belief of a fact not true.

I call attention to this dictum as very closely applicable to the conduct of the present defendant.

In the Exchequer Chamber (3) Mellor J., referring to the judgment delivered by Wilde B. in the court below, said (4):

> There are also cases in which "when a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion." Whilst I and my brother Wilde entirely assent to that proposition, I hesitate as to the next, "that if a man has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist." Assuming for the purposes of this case both these propositions to be true, I agree that they extend to transactions in which a deed is required to transfer an interest or a right, not by validating a void deed, as was supposed on the argument, but by holding that parties shall not be permitted to aver, against equity and good faith, the invalidity of a deed which, either by words or conduct, they have asserted to be valid, and upon which the others have acted: (5)

(1) P. 649.
(2) P. 657.
(3) 2 H. & C. 175.
(4) P. 176.
(5) *Sheffield and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574.

He then examined the facts and held that the judgment below should be affirmed on the ground that negligence in the particular transaction had not been shown to have caused the loss. Keating J. holding that the negligence had been established, said:

> That a party may so estop himself, even in the case of a deed, although denied in the courts below, has not been argued in this court, and I shall therefore content myself by referring to the judgment of the Chief Justice in *ex parte Swan*, and of my brother Wilde in this case in the Court of Exchequer in support of that position, merely adding that I am not aware of any decision which counteracts it.

Blackburn J. held (1) that to preclude a party from denying that a document is his deed, his conduct must

> Come within the limits so carefully laid down by Parke B. in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke* (2).

And Byles J. said (3) that the position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed, is not his deed, is both novel and dangerous. Willes J. merely expressed his concurrence in the judgment of the majority of the court which was against the existence of the negligence relied on in the case. Crompton J. was of opinion that the conduct of the plaintiff was not such as to prevent him from setting up the truth according to the rule laid down in *Freeman* v. *Cooke* (2); and Cockburn C. J. also discussed the subject of the estoppel with reference to the principle of the decisions in *Pickard* v. *Sears* (4) and *Freeman* v. *Cooke* (2) coming to the conclusion that negligence alone, although it may have afforded an opportunity for the perpetration of a forgery by means of which another party has been damnified, is not of itself a ground of estoppel, and being also of opinion that negligence had not been established.

(1) P. 181.
(2) 2 Ex. 654
(3) P. 184.
(4) 6 A. & E. 469.

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I have gone to the trouble of making these extracts, not only for the purpose of demonstrating the consensus of opinion in favor of the appicability of the ordinary doctrine of estoppel to the fact of the execution of a deed in the same way as to any other fact; but also to show that a majority of the judges who took part in the decision cannot with accuracy be said to have held opinions opposed to such estoppel being capable of being worked by culpable negligence.

On that side of the question, there are no doubt the names of Cockburn C.J., of Blackburn J. and of Martin and Channell BB. Perhaps Crompton J. should also be counted. On the other side, we must place Erle C.J., Pollock C.B., Keating and Mellor JJ. and Wilde B. I think we should add to these Williams and Willes JJ. for they went no farther, as I understand their utterances, than to hold that the mere fact of executing a deed in blank is not such negligence as will estop.

Some American cases were also relied on. They could of course have little influence if opposed to what I have shown to be the course of English opinion, but they do not in themselves bring much aid to the defendant's argument.

The case that seems most in point, as far as regards its leading facts, is *United States* v. *Nelson* (1) decided in 1822 by Chief Justice Marshall in Virginia. A surety for a paymaster there had executed his bond in blank, and was held not bound by it though it had been filled up exactly as he intended it to be. The facts are not so strong as in this case, but would nevertheless have been quite sufficient, as one would think, to estop the party who certainly executed the bond with the intention of its being used to procure credit for his principal. The principles of estoppel, though of course familiar at the time, had not been so systema-

(1) 2 Brock. 64.

tically stated as they have been in the series of cases beginning with *Pickard* v. *Sears* (1) which was decided in 1837. The case was not decided by Chief Justice Marshall with reference to those principles, and it is opposed to the judgment of Chief Justice Parsons in the earlier case of *Smith* v. *Crooker* (2.)

Preston v. *Hull* (3) decided in Virginia in 1873, which was also much relied on, was the case of a bond executed with a blank for the name of the obligee which was intended to be filled up with the name of a person from whom the obligor's agent expected to obtain a loan of money for the obligor. He did not get the money from that person, but got it from another and inserted the lender's name in the blank. It was simply a question of authority. Staples J. concluded his judgment by saying :—

> In truth the doctrine of estoppel has no application to the case. The party advancing the money is put on his guard by the face of the paper. He sees that it is not a deed and he is bound at his peril to inquire into the authority of the agent to make it a deed. It cannot be justly said that he has been deceived by the party whose signature is attached to the writing.

The result is that both of the propositions which I have quoted from *Carr* v. *London & N. W. Ry. Co.* (4) apply to the allegation of estoppel with regard to the execution of deeds, and the evidence brings the defendant within them both.

I have not dwelt upon the evidence as establishing culpable negligence, because that aspect of it was fully and properly dealt with in the court below. I add to the observations there made what I have said as to the active conduct of the defendant in procuring, as in effect he did, the attesting witness to make the affidavit of execution. He directly led to

(1) 6 A & E. 469
(2) 5 Mass. 538.
(3) 14 Am. Rep. 153 ; 23 Grattan 600.
(4) L. R. 10 C. P. 307.

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the acceptance of the bond by the department and cannot now be heard to deny its validity.

The appeal should be allowed with costs and the rule made absolute for judgment for the crown on the question debated at the trial.

The costs below, both of the trial and of the proceedings before the court *in banco*, should follow the result of the action, but that result will not be known until the conduct of VanBlarcom has been inquired into.

Appeal allowed with costs.

Solicitor for appellant: *Wallace Graham.*

Solicitor for respondent: *C. S. Harrington.*

PHILIP O'CONNOR (PLAINTIFF)..... ..APPELLANT; 1888

AND *Nov. 14.

THE MERCHANTS MARINE INSURANCE CO. (DEFENDANTS)..... } RESPONDENTS. 1889 *Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Exceptions in policy—Barratry—Proximate cause of loss—Perils of the seas.

Insurance in a marine policy against loss "by perils of the seas" does not cover a loss by barratry.

It is not necessary that barratry should be expressly excepted in a marine policy to relieve the insurers from liability for such a loss.

Per Strong J. dissenting.—If the proximate cause of the loss is a peril of the seas covered by the policy the underwriter is liable though the primary cause may have been a barratrous act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining a verdict on the trial for the defendant.

This was an action on a marine policy brought by the mortgagee of the vessel insured. The defence was that the vessel was wilfully sunk and destroyed by the master, and the evidence on the trial showed that holes had been bored in the vessel by the master's directions which caused her to sink. There was no exception in the policy of loss from barratry, nor was barratry expressly insured against, and the only question raised on the appeal was whether the plaintiff could recover as on a loss by the perils of the seas under the ordinary clause in a marine policy. The judgment in the court below, both on the trial and on appeal, was in favor of the company.

MacMaster Q.C. and *W. B. Ross* for the appellant

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

(1) 20 N. S. Rep. 514.

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(The court intimated that they were concluded by the findings in the court below as to the facts, and the counsel did not press the contention set out in the factum that there was no barratry in point of fact.)

As to whether or not barratry avoids a policy when there is no express exemption see *Hamilton* v. *Pandorf* (1); *Earle* v. *Rowcroft* (2).

Barratry was not the proximate cause of the loss. *Hamilton* v. *Pandorf* (3).

The insured being a mortgagee is in a different position from that of an owner. Merchants Shipping Act R. S. C. ch. 72 s. 36.

MacCoy Q.C. for the respondents. If barratry is not expressly insured against it will relieve the insurers, *Cory* v. *Burr* (4); *Waters* v. *Merchants Louisville Ins. Co.* (5); *Parkhurst* v. *Gloucester Ins. Co.* (6).

As to barratry being the proximate cause, see *Cory* v. *Burr* (4); Arnold on Marine Insurance (7).

The insured being a mortgagee can only recover for a total loss and mere submersion is not such a loss. And see Aspinall's Rep. of Mar. Cas. (8).

SIR W. J. RITCHIE C.J.—The court found barratry committed and, in my opinion, could not find otherwise. Barratry is a peril specially insured against by express words and which was not specially insured against in this case. Mr. Parke, speaking upon insurance upon a ship in any lawful trade says: "If the captain commits barratry by smuggling the underwriters are answerable, othewise the word barratry should be struck out of the policy."

This, in my opinion, was not a loss by perils of the

(1) 12 App. Cas. 518.
(2) 8 East. 134.
(3) 12 App. Cas. 523-4.
(4) 8 App. Cas. 393.
(5) 11 Peters 213.
(6) 100 Mass. 301.
(7) P. 749 of Ed. 6.
(8) P. 26.

sea, but by barratry. The loss, in my opinion, cannot be separated from the barratrous act which was not insured against. Therefore, I think the appeal should be dismissed with costs.

Strong J.

STRONG J.—With much regret, though I cannot say with any doubt, I am compelled to differ not only from the court appealed from, but also from the majority of this court, for I am of opinion that the appeal ought to be allowed. As regards two of the grounds of appeal I am with the respondents. I agree that the evidence, so far as the purposes of the present appeal are concerned, is so strong that the findings of Mr. Justice Smith as to the facts cannot on any recognized principle applicable to the exercise of appellate jurisdiction be now disturbed. I am further of opinion that on authorities which it would be a mere parade of citation to quote the policy sued upon does not cover losses by barratry of the master and crew.

On a third ground, however, very distinctly taken in the appellant's factum, I am compelled to differ as well from the learned judges in Nova Scotia as from the Chief Justice and my brethren in this court.

The learned judge who tried the case found that the vessel was not lost by any of the perils assured against, but was scuttled by direction of the master. This is in substance the effect of the judgment on the 4th, 12th, 13th and 16th paragraphs of the statement of defence as finally entered by the Supreme Court. I am of opinion that this judgment was erroneous; that on the facts in evidence the loss of the vessel was undoubtedly caused by perils insured against.

Perils of the seas are within the express terms of the policy, and the appellant insists that the proximate cause of the loss being certain leaks which caused the vessel to founder and sink, the proximate causes of

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the loss were perils of the seas. It seems to me that whatever may have been the state of the case formerly this identical question is concluded by very high and very recent authority in favor of the appellant. The cases I refer to are those cited by the appellant of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1), and *Wilson & Co.* v. *Owners of Cargo ex Xantho* (2), both decided by the House of Lords on the 14th of July, 1887. By these cases it was decided in the first place that the words "dangers and accidents of the seas," and of course the equivalent expression "perils of the seas," were to receive the same construction, whether used in defining the risks covered by the policy in a contract of marine insurance, or used for the purpose of describing excepted perils in favor of the shipowner in a charter party or a bill of lading. Next it was decided, virtually in both cases but certainly in the case of *Hamilton* v. *Pandorf* (1) that when a court is called upon to determine whether a loss has arisen from a "peril of the sea" it is to regard, not the remote or originating but only the proximate and immediate cause of the loss. Thus, in the case of *Hamilton* v. *Pandorf* (1) it was held that though damage caused to a cargo by rats was not a peril within an exception in favor of the shipowner of dangers and accidents of the seas, yet that when rats had caused a leak the damage thence arising from sea water was within the exception. And in the other case of *Wilson* v. *Owners of Cargo per Xantho* (2), it was in like manner held that though a collision was not *per se* within a similar exception to that before mentioned yet when the collision caused the vessel to founder the loss so occasioned was within the exemption in favor of the shipowner. It follows from these cases, and especially from many passages in the judgments in both of them, that the learned lords who decided them intended

(1) 12 App. Cas. 518. (2) 12 App. Cas. 503.

that their decisions should apply to policies of insurance, in determining what losses came within the words "perils of the seas." Indeed, in the case of *Wilson* v. *The Cargo, &c.*, (1) in the concluding paragraph of Lord Macnaghten's judgment he says this in so many words. It follows that when there is a loss, as in the present case, proximately and immediately resulting from the foundering of the vessel caused by a leak, it is a loss from "perils of the seas," though it may have been barratrously caused by the scuttling of the ship by the master and crew. This, of course, always implies that the assured is free from any complicity in the act of barratry. In such cases it is considered that the immediate cause of damage and loss is the sea, and this is within the contract of the underwriter who has assured against perils caused by the sea.

The plaintiff in the present case is a mortgagee, and it is not pleaded or suggested that he was in any way privy to the wilful destruction of the vessel by the master and mariners composing the crew.

I am of opinion that the appellant is entitled to judgment.

TASCHEREAU J.—I would dismiss this appeal. I think the plaintiff must fail for the reasons given by Mr. Justice McDonald in the court below.

GWYNNE and PATTERSON JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *Otto S. Weeks.*

Solicitor for respondents: *William P. MacCoy.*

(1) 12 App. Cas. 503.

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JACOB R. WINCHESTER (DEFENDANT)..APPELLANT;

AND

WILLIAM L. BUSBY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Ship and shipping—Charter party—Delivery of freight—Payment—Concurrent acts—Tender—Trover for cargo—Lien.

A cargo of coal was consigned to B. and the master of the vessel refused to deliver it unless the freight was pre-paid, which B. in his turn refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon B. tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was also paid. In trover against the master:

Held, affirming the judgment of the court below, Gwynne J. dissenting, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie.

Held, per Patterson J., that trover would lie, but not against the master who was only the servant of the agent and acting under his directions.

Held, also, that an action *ex delicto* for breach of duty in not delivering the coal according to the bill of lading would not lie.

APPEAL from a decision of the Supreme Court of New Brunswick (1) affirming a verdict for the plaintiff entered at the trial by consent, with leave to both parties to move.

The plaintiff was consignee of a cargo of coal carried in plaintiff's vessel from Cape Breton. The charter party required the master of the vessel to deliver the coal on payment of the specified freight, and the consignee refused to pay the freight before delivery, but offered to pay it ton by ton as the cargo was landed.

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

(1) 27 N. B. Rep. 231.

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The customary mode of discharging coal at St. John, N.B., the port of discharge, was by taking it out of the vessel in tubs and loading it into carts in which it was carried away as the consignee should direct.

The agent of the owner of the vessel refused to deliver the coal until the full freight was paid, and after some discussion on both sides the coal was landed and stored by the agent. When it was all in the warehouse the consignee tendered the full amount of the freight, which was refused unless the costs of storage were also paid. The consignee then brought an action against the master of the vessel, his declaration containing three counts on the bill of lading and a count in trover. The defendant demurred to the former and his demurrer was sustained. On the trial on the trover count a verdict was entered by agreement for the plaintiff for damages assented to, with leave to the plaintiff to move to amend his declaration by adding a count for special damages, and to the defendant to move for a new trial or a verdict. The Supreme Court of New Brunswick affirmed the verdict. The defendant then appealed to the Supreme Court of Canada and the plaintiff filed a cross-appeal from the judgment on the demurrer to the declaration.

Weldon Q.C. for the appellant. The English cases show that the two acts, delivery of the goods and payment of the freight, are concurrent acts, and all that is necessary is that the parties shall be ready and willing to perform their respective acts. *Paynter* v. *James* (1); *Kirchner* v. *Venus* (2); *Gilkison* v. *Middleton* (3).

The master could not comply with the proposal to pay the freight on each ton as delivered, as he would lose his entire lien by delivering a part of the goods. *Neill* v. *Reed* (4).

(1) L. R. 2 C. P. 348.
(2) 12 Moo. P. C. 361.
(3) 2 C. B. N. S. 134.
(4) 4 All. (N.B.) 246.

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There was no evidence of conversion, and the plaintiff could not succeed on the count in trover. *Jones* v. *Hough* (1); *Milgate* v. *Kebble* (2).

W. Pugsley and *C. A. Palmer* for the respondent. There is no right in the vessel to pre-payment of freight. *Meyerstein* v. *Barber* (3).

In the English cases referred to the goods were out of the vessel and in a position to be delivered as soon as the freight was paid. *Paynter* v. *James* (4). And the American law is precise on the subject. *Brittan* v. *Barnaby* (5).

The learned counsel also referred to *Brown* v. *Tanner* (6).

Even if the master had a right to retain the goods for his freight he had no lien for the cost of storage. *Kerford* v. *Mondel* (7); *Jones* v. *Tarleton* (8).

Then as to the cross-appeal. By the practice in New Brunswick the form of action in actions *ex contractû* and *ex delicto* is the same (9). And see *Cato* v. *Irving* (10).

SIR W. J. RITCHIE C.J. concurred in dismissing the appeal and affirming the judgment of the court below in every respect.

STRONG J.—I see no inconsistency between the charter party and the bill of lading in any respect which is material in the present action. The appellant was bound to deliver the cargo to the holder of the bill of lading at the port of discharge upon such holder paying the freight, and a refusal by the appellant so to deliver upon a tender of the amount due for freight would *primâ facie* be in law a conversion of the pro-

(1) 5 Ex. D. 115.
(2) 3 M. & G. 100.
(3) L. R. 2 C. P. 50.
(4) L. R. 2 C. P. 348.
(5) 21 How. 527.
(6) 3 Ch. App. 597.
(7) 28 L. J. N. S. (Ex.) 303.
(8) 9 M. & W. 675.
(9) Cons. Stats. N.B. c. 37 s. 46.
(10) 5 De G. & Sm. 224.

perty for which the holder of the bill of lading would be entitled to recover damages. It has never been questioned that the title to, and property in, the cargo had vested in the respondent as the indorsee of the bill of lading. Further there never has been any dispute as to the amount properly payable for freight, this being, as is admitted on all hands, $637.10. And it is not disputed that this sum was duly tendered by the respondent to Schofield (in whose charge the appellant had left the cargo when he went away to Digby) and refused by him Schofield claiming in addition to a lien for freight, a lien also for expenses incurred in landing and warehousing the cargo. It is clear upon authority that, in the absence of any statutory provision similar to that which exists in England, authorising the master to land and warehouse the goods and to retain possession for the expenses of so doing, he has no right to a lien, beyond the freight, for the latter charges, though he may be justified in landing the cargo and depositing it in a suitable place, either in the warehouse of the shipowner or in that of a general warehouseman or wharfinger; in either of which cases, however, the master would himself retain the constructive possession and thus be in a position to answer the demand of the holder of the bill of lading (1). For the charges incidental to such landing and warehousing the master must, however, look to the personal liability of the cargo owner, his right of retention by way of lien being at common law confined strictly to the amount due for freight. The decision of this appeal must therefore depend altogether upon the answer to a single question namely: Was Schofield, whom the appellant placed in charge of the cargo and who also happened to be the managing owner of the vessel, a person for whose acts the appel-

(1) *Meyerstein* v. *Barber* L. R. 2 at P. 55; *Mors-le-Blanch* v. *Wilson* C. P. 38 in a judgment of Willes J. L. R. 8 C. P. 229.

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lant was responsible? For if he was there was plainly a conversion for which the respondent was entitled to recover.

The appellant, according to well established principles of mercantile law for which it would be a mere parade, serving no useful purpose, to cite authorities, having received the goods in pursuance of a contract, evidenced by the bill of lading which he had signed, had no right to deliver the goods specified in it to any person other than a legal holder of that bill of lading. Then what took place between the appellant and Schofield either amounted to a delivery of the cargo to the latter for purposes inconsistent with the rights of the respondent, or Schofield was merely placed in charge as the custodian of it, the constructive possession remaining vested in the appellant. The appellant in his deposition says in so many words that he "delivered up" the cargo to Schofield. If this piece of evidence is literally and strictly construed against the appellant such delivery would of itself have constituted a conversion: the appellant, however, is entitled to a more favorable interpretation of his conduct, and we must therefore regard Schofield as having been placed in possession of the cargo, merely as the agent or caretaker of the appellant who could not lawfully part with the possession of it to any one but the holder of the bill of lading. It follows that the appellant still retained the constructive possession and that he is therefore responsible for the wrongful acts of Schofield, and Schofield having been guilty of a conversion in refusing delivery upon the tender of the freight, the appellant has been rightly held answerable in damages for this wrongful act of his agent. The judgment of the Supreme Court is therefore, in my opinion, in all respects right and should be affirmed with costs.

The cross appeal is entirely unfounded. As the declaration was originally framed in contract, it dis-

closed no cause of action in the respondent, the indorsee of the bill of lading between whom and the appellant there was no privity, and the judgment on demurrer is therefore unimpeachable. The cross appeal must also be dismissed with costs.

TASCHEREAU J.—Concurred in affirming the judgment of the court below.

GWYNNE J.—The only question on the principal appeal (of the defendant) is as to the right of the plaintiff to recover upon the count for trover, and I am clearly of opinion that no case whatever of conversion was made out against the defendant. Upon the arrival of the vessel at her destination in St. John, New Brunswick, the vessel and her cargo were delivered over by the master, the above appellant, to Schofield, managing owner of the vessel and with whom the plaintiff had signed a charter party under which the cargo was conveyed to St. John, and thereafter the master never had any control over or possession of the cargo. At the expiration of a week, the cargo not having been taken by the plaintiff and the freight paid (it is unnecessary to refer to what took place between the plaintiff and Schofield in the interim) the managing owner, Schofield, placed the cargo in a storehouse in St. John. Now, the only evidence of conversion offered was of the tender of the freight made by the plaintiff to the managing owner Schofield and a demand upon him for the cargo, and his refusal to deliver it unless the charges attending the storing the cargo should be paid; for this refusal it is sufficient, in my opinion, for the determination of this case to say that the defendant Winchester, who had at that time no control over or possession of the cargo, and to whom the freight was not tendered and upon whom no demand for delivery of the cargo was then made, and who, consequently, did not refuse to deliver

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what he had not, can not be made responsible. It is idle to say that Schofield, who did make the only refusal of which there was any evidence, and who alone had control over and possession of the cargo, and who, as the person who, as manager and part owner of the vessel, had entered into the charter party with the plaintiff, was acting as the agent of his servant the defendant. The appeal of the defendant must, in my opinion, be allowed, and the cross-appeal of the plaintiff dismissed—both with costs.

PATTERSON J.—The respondent, who is plaintiff in the action, obtained a verdict against the appellant for $1,138.90. The appeal is from the refusal of the court in banc to enter a non-suit, and there is a cross-appeal by the plaintiff from a judgment on demurrer to some counts of his declaration.

The defendant was captain of the brigatine Curlew, and was not owner or part owner.

The managing owner was Mr. Schofield, of St. John. The plaintiff lives at St. John, and desiring to have a cargo of coal brought from Cape Breton to St. John, he made an agreement with Mr. Schofield, which was set out in a charter party in these words:—

> It is this day mutually agreed between Mr. S. Schofield, managing owner of the good ship or vessel called the "Curlew," J. R. Winchester master, of the measurement of 330 tons, or thereabouts, now at Sydney, C.B., and Mr. W. L. Busby, of this city, merchant, and charterer, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall proceed to Little Glace Bay, and there load from charterer or agent a full and complete cargo of coal, under deck, not exceeding what she can reasonably stow or carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to St. John, N.B., or so near thereto as she may safely get, and deliver the same, on being paid freight, as follows: One dollar and fifteen cents per ton, of 2,240 lbs., mine weight, etc.
>
> Dated 2nd September, 1886.

In pursuance of this agreement the Curlew

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received at Little Glace Bay, C.B., on the 9th of the same month of September, from the Caledonian Coal and Railway Company, a cargo of coal.

Donald Carmichael is agent at St. John for the Caledonia Company, and is the person mentioned in the bill of lading signed by the defendant, which reads as follows:—

Shipped by the Caledonia Coal and Railway Company for account of D. Carmichael, Esq., in good order, on board the brigantine "Curlew," whereof the undersigned is master for the present voyage, now lying in Glace Bay, C.B., and bound for St. John, N.B. To say:

Five hundred and fifty-four (554) tons, more or less, of coal from the Caledonia Coal Mine, which I promise to deliver in like good order and condition at the port of St. John, N.B. (the dangers of the seas only excepted) unto D. Carmichael, Esq., or to his assigns, he or they paying freight for the same at the rate of per charter party on the amount so delivered.

In witness whereof, the master of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one being accomplished the others to stand void.

Dated at Glace Bay, C.B., this ninth day of September, 1886.

J. R. WINCHESTER.

The vessel duly arrived with the cargo at St. John, and after her arrival the events happened out of which this action has arisen.

The plaintiff, as is not disputed, was owner of the coal and entitled, as between himself and the Caledonia company, to receive it. He had given his note to Mr. Carmichael, "as usual," as that gentleman says, for the cargo, and Carmichael had indorsed the bill of lading to him either on the day the vessel arrived or the day before.

It will be worth while to glance at the evidence respecting the date of the arrival of the vessel and the transactions that immediately followed, for there is a little confusion in it. The defendant says he arrived on the 16th of September, and that is borne out by other facts. But he also says that he arrived on Friday,

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while by the almanac the 16th was Thursday. The discrepancy does not appear to have been detected at the trial, and it is carried into the appellant's factum.

The defendant further says he hauled to the wharf on the day of his arrival, which he again calls Friday, and that on Saturday about noon he left for Digby, in Nova Scotia, where he remained four weeks. He must have left on Friday, the day after his arrival, and when (giving his evidence eleven months afterwards) he calls it Saturday, he does so from a lapse of memory, intending to say it was the day after his arrival. He tells us that the bill of lading was not presented to him before he left; that he did not know the plaintiff; and that he does not recollect seeing the plaintiff.

The plaintiff, on the other hand, says he saw the captain and mate at the vessel on the Saturday morning and spoke to the captain. If the incident occurred, and occurred on Saturday, the plaintiff must have mistaken some one for the captain; but as Saturday was the 18th and as the plaintiff received a letter, which I shall notice, from Mr. Schofield on the afternoon of Friday the 17th, and had also more than one interview with Mr. Schofield's clerk on that afternoon, it is as plain as possible that his recollection is at fault when he says he asked the captain at the vessel on Saturday morning, when on his way to his office, when the vessel would be ready to discharge.

The matter deserves attention only in connection with the fact that the defendant took no part, personally, in any of the doings on which the plaintiff founds his action.

Whether Schofield's sins of commission, if the plaintiff was sinned against, are to be imputed to the defendant, or whether he is chargeable with sins of omission, will have to be considered.

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When the defendant went to Digby he left the vessel in charge of the managing owner, Mr. Schofield.

These are some of his replies to questions put on re-examination by counsel for the plaintiff, by whom the defendant was called as a witness:—

Q. In whose charge did you leave the vessel? A. Mr. Schofield's.

Q. There must have been some one on board of the vessel in charge? A. The mate had charge, under Mr. Schofield's direction.

Q. And you delivered the cargo up to Mr. Schofield, as you have said? A. Yes.

It had been arranged between the plaintiff and Mr. Schofield, before the arrival of the vessel and before the bill of lading was indorsed to the plaintiff, that she was to go to Magee's wharf, and not to the next wharf which the plaintiff had leased but which had not sufficient length for the vessel. On Friday the 17th Schofield wrote to the plaintiff a letter which the plaintiff received at 4.30 in the afternoon, stating that the Curlew was then in a discharging berth at Magee's wharf and ready to commence discharging the cargo of coal in accordance with the charter party. Later in the same afternoon, Mr. Miller, a clerk of Mr. Schofield's, called on the plaintiff, who showed him the bill of lading which had been indorsed to him. Miller said it would have to be exchanged for the unindorsed bill which Mr. Schofield had, but the plaintiff refused to give up his indorsed bill until he received the cargo. An hour or so afterwards Miller came again and told the plaintiff that if he did not give up the indorsed bill of lading Schofield would demand payment of the freight before the delivery of the coal. At another time, which the plaintiff puts as about 9.30 on Saturday morning, Miller again urged the giving up of the indorsed bill of lading, and the plaintiff still refusing, Miller told him that Schofield might take an indorsed acceptance at ten days for the freight; but that also

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the plaintiff declined to give, saying it would virtually be paying the freight.

Schofield then wrote to the plaintiff the following letter :—

I beg to direct your attention again to the fact that the brigantine 'Curlew' is in a discharging berth at Magee's slip, and ready to deliver the cargo of coal to you in accordance with the charter party.

I enclose a bill of the freight, amounting to $637.10, and have again to request payment of the same from you.

I also hereby give you notice that unless the freight is paid to me by five o'clock this evening I shall then make arrangements to land and store the cargo at your expense and risk.

To this the plaintiff replied on the same afternoon—Saturday the 18th—having in the mean time been verbally informed by Mr. Miller that they were going to store the cargo :—

I am in receipt of your favors of the 17th, and also that of the 18th inst., with enclosure as stated; and in reply beg to say that I am, and have been, ready to receive and take delivery of the cargo per brigantine 'Curlew' since nine o'clock this morning, and to pay freight on same, as delivered, to the master, owners, or other persons entitled to receive the same, but up to the present am without any proof that you are entitled to receive the same.

I now hereby beg to give you notice, that if you land and store the cargo I will hold you and the master and owners of the said vessel answerable for all losses and damages that I, the owner of said cargo, may sustain by your action. And unless the master and owners of the said vessel proceed forthwith to deliver me the said cargo in suitable hours and weather I shall hold them liable for all damages and losses that I may sustain by reason of their failure to deliver me the said cargo in accordance with the terms and conditions of the charter party, dated 2nd September, 1886.

On the morning of Monday the 20th the vessel began discharging the coal which was carted to a store-house under Schofield's directions, and the whole cargo was so discharged and stored by the following Friday. There had been no tender of freight in the mean time, though an oral proposal had been made on the part of the plaintiff, but not acceded to by Schofield, that the coal should be delivered to the plaintiff on his paying

freight for each ton as delivered. That delivery would have been the delivery from the vessel into the plaintiff's carts.

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The only tender of freight was when the last cart load was being removed to the store. The plaintiff then tendered $657.10, the full amount originally claimed, and demanded his coal, but Schofield refused unless a further amount for storage, &c., was paid, and he afterwards sold the coal.

Schofield is not a party to this action which is against Winchester alone.

The declaration originally contained three counts, all of them being upon the bill of lading. The first alleges a promise to the Caledonia Coal and Railway Company to deliver the coal to D. Carmichael or his assigns; the other two allege the promise to have been made to Carmichael, differing from each other only in the statement of the consideration for the promise. Each count of the three avers that Carmichael indorsed the bill of lading to the plaintiff, whereby the property in the coal passed to the plaintiff; and each count concluded by alleging that:—

The delivery of the said goods, as aforesaid, was not prevented by any of the perils or casualties aforesaid. And all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said goods delivered to him at the port of Saint John, N.B., aforesaid, yet the said goods were not delivered to the plaintiff at the port of Saint John, N.B., aforesaid, whereby the same were wholly lost to the plaintiff.

These counts were demurred to on the ground that the contract with Carmichael did not pass to the plaintiff by the indorsement of the bill of lading, as it would do in England under 18 and 19 Vic. ch 111, and were held bad on the law laid down in such cases as *Thompson* v. *Dominy* (1) and *Howard* v. *Shepherd* (2); the principle being that which was thus tersely expressed

(1) 14 M. & W. 403. (2) 9 C. B. 297.

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by Lord Loughborough when giving the judgment of the Exchequer Chamber in *Lickbarrow* v. *Mason* (1):—

> The indorsement of a bill of lading differs from the assignment of a chose in action, that is to say, of an obligation, as much as a debt differs from effects.

One of the learned judges in the court below was of opinion that the counts might be sustained as counts in tort, and that position has been urged before us. Upon this question it is unnecessary to add to what was said in the court below by the learned Chief Justice, who showed, conclusively, that the contention was untenable. It is not a question of the form of the action but of the allegations of fact; and there is nothing that can be construed into an allegation that the defendant failed in any duty except the duty to fulfil his promise to Carmichael to deliver the goods to him or his assigns.

The plaintiff's cross appeal must therefore be dismissed.

A count in trover was added by the plaintiff by leave of the court, and his verdict is upon that count.

The judgment from which the defendant appeals proceeds upon the grounds that the defendant is responsible for the acts of Schofield, as a principal is responsible for the acts of his agent; and that the conduct of Schofield amounted to a conversion of the coal to the use of the defendant.

With great respect for the learned judges whose opinions we have now to review, I think they have been led into a fallacious course of reasoning on the first point from regarding the rights of the parties as depending principally, if not altogether, on the bill of lading, and from not attaching sufficient importance to the circumstance that there was a direct contract between the plaintiff and Schofield created by the

(1) 1 Sm. L. C. 9 ed. 760.

charter party, and that the defendant, when he left for Digby, after having moored the vessel, did not leave Schofield there as his agent, but, as the plaintiff proved by the evidence I have quoted, and as, under the circumstances, would have been sufficiently evident without formal proof, he delivered over the vessel and her cargo to his employers, leaving them to carry out their contract to deliver the coal to the plaintiff. The defendant's connection with and control over the cargo appears to have ceased as completely as if he had died; or if, as for aught that appears in the evidence may have been the case, he had been discharged by his employers. The idea of his continued responsibility must be due to a lingering impression that he was in some way answerable to the plaintiff upon the contract on which the action was launched.

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No authority has been adduced for the proposition that, under such facts as we have, the managing owner became the agent of the master, and I have not met with any in the course of my examination of the matter.

There certainly was no express delegation. If the responsibility exists, it must be because, by some inference of law, the principle *respondeat superior* applies, and very convincing authority would be required to warrant its application as contended for by the plaintiff.

I think that on the ground that no conversion was committed by the defendant, who did nothing with the coal that was in any respect inconsistent with the plaintiff's ownership, or that was out of the direct line of his own duty as captain of the vessel, he is entitled to succeed on this appeal and to have a non-suit entered.

If this were not so, and if the defendant could properly be held answerable for Schofield's acts, then I think the verdict should stand on the ground that there was no lien on the coal for anything beyond the

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freight, and therefore the refusal to deliver from the warehouse on tender of the freight, was not justified, nor, *a fortiori*, was the subsequent sale.

Up to the time of that refusal I think Schofield was in the right and the plaintiff in the wrong.

The only room for argument to the contrary is derived, as it appears to me, from taking the rights of the parties to be governed by the words in the bill of lading, "he or they paying freight for the same at the rate per charter party on the amount so delivered," and taking those words to import a delivery before payment of the freight.

I am not prepared to accede to the contention that that is the true effect of the words, and I do not think the cases of *Paynter* v. *James* (1) or *Black* v. *Rose* (2) which have been so much relied on, go the length required to support that contention.

The suggestion that unloading the coal upon the wharf, or any kind of delivery except hoisting the coal in tubs and delivering it over the ship's side into the plaintiff's carts, was contemplated or would have satisfied the contract to deliver, belongs to the region of imagination and not of reality; and it is opposed to the evidence furnished by the plaintiff himself by his conduct as well as by his examination at the trial. To have landed the coal on Magee's wharf, if that had been practicable, would have been a breach in place of performance of the contract.

It is clear enough upon the evidence that Schofield was always ready and willing to deliver in the ordinary way if the freight had been paid, and that the plaintiff refused to "pay in advance" as he repeatedly calls it in his evidence. Paying in advance means, as he used the term, paying before the coal had reached his possession. This is borne out by the proposal,

(1) L. R. 2 C. P. 348. (2) 2 Moo. P. C. N. S. 277.

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which from his point of view was a concession, to pay for ton by ton as delivered from the vessel into his carts, paying for none while the lien for the freight remained on it. His original refusal was to pay anything before the whole was delivered. Regarding the cargo as a whole, and the delivery contemplated by the contract as one act, the clear effect of the plaintiff's own evidence is that he was not ready and willing to pay the freight. A question might be raised whether the terms of the bill of lading which made the freight payable on the quantity delivered, would not, on the principle of *Black* v. *Rose* (1) where the bill of lading was in similar terms, entitle the consignee to insist on treating each parcel delivered as separable from the bulk. It is not improbable that the question, if raised, would have to be decided adversely to the claim of the consignee, on the ground that the option to have delivery by parcels was with the shipowner and not with the consignee; but we need not trouble ourselves with the question for two reasons.

One, is the insufficiency of the evidence of readiness and willingness to pay for each ton as delivered. The plaintiff says nothing about it himself. The proposal was made by a Mr. Cullinan under instructions from the plaintiff's legal adviser, but, so far as disclosed by the evidence, without authority from the plaintiff. The other and the more important reason is that the contract that governs is that which is expressed in the charter party, and not that imported by the bill of lading. How it would be if the coal had been sold to a stranger and the bill of lading indorsed to him (as in *Chappel* v. *Comfort* (2)) we need not inquire. Here the plaintiff was the real consignee of the coal, the nominal consignment to Carmichael being obviously for the security of the company he represented in

(1) 2 Moo. P. C. N. S. 277. (2) 10 C. B. N. S. 802.

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respect of the purchase money. The coal was carried in pursuance of the plaintiff's personal contract with Schofield, evidenced by the charter party. The plaintiff acted upon a perfectly correct apprehension of the matter when, in his correspondence during the dispute, *e.g.*, in his letter of Saturday the 18th of September already quoted, and in another written the following Monday, he spoke of being prepared to pay freight "in accordance with the conditions of charter party dated September 2nd, 1886," not of the bill of lading signed on the 9th of that month. In his evidence he also uses the same expression.

The doctrine which applies is stated in the following passage which is found in all the editions of Abbott on Shipping. I read from the 12th edition at p. 214 (1):

> When goods are put on board in pursuance of a charter party, the master is to sign for them bills of lading to the effect mentioned in the fourth chapter of this part, the charter party being the instrument and evidence of the contract for the conveyance, and the bill of lading the evidence of the shipping of the particular merchandise to be conveyed in pursuance of the contract.

See also Corner on Shipmasters and Seamen (2).

That the master has no implied authority to vary the contract made by the principals may be said to be an elementary proposition. It will be found in more than one place in Abbott on Shipping, as at p. 89 of the 12th edition, and it is enunciated and illustrated by many recent cases which have turned on the effect of the two documents, the charter party and bill of lading, when read together as they must be when one refers to the other, as is done by the phrase "paying freight as per charter party" or other similar expression.

See the judgment of Sir R. Phillimore in *The Patria* (3); *Chappel* v. *Comfort* (4), particularly the judgment

(1) Pt. 4 ch. 1 s. 7.
(2) Page 152.
(3) L. R. 3 A. & E. 436.
(4) 10 C. B. N. S. 802.

of Willes J.; *Barwick* v. *Burnyeat* (1); *Gray* v. *Carr* (2); *Porteus* v. *Watney* (3); *Gullischen* v. *Stewart* (4); *Gardner* v. *Trechmann* (5); *The San Roman* (6). In the last mentioned case the bill of lading had the words: "The dangers of the seas only excepted," while the charter party excepted other dangers, and amongst them "restraints of princes or rulers." These words were held to be imported by reference into the bill of lading and to justify delay caused by the master remaining in a neutral port for fear of capture by French cruisers, France being at war with Germany, the vessel belonging to Hamburg, and her owners being subjects of the North German Confederation.

By the charter party before us, the agreement is to deliver the coal on being paid freight at $1.15 per ton of 2,240 lbs. mine weight. This differs materially from the bill of lading, if I correctly understand the expression "mine weight," inasmuch as it calls for payment of freight on the amount acknowledged to have been received on board, which payment would not interfere with any claim in respect of short delivery.

That was the freight demanded by Schofield and which the plaintiff refused to "pay in advance," as he phrased it—and it was the amount ultimately tendered after the warehousing of the coal.

There can be no question of the right of the shipowner, in the absence of stipulations which are not contained in this charter party, to retain his lien, or in other words to retain possession of the goods until the freight is paid. He must be ready and willing to deliver the goods before his claim for freight is complete, but the freight must be paid before he can be required to part with his possession.

(1) 36 L. T. 250.
(2) L. R. 6 Q. B. 522.
(3) 3 Q. B. D. 534.
(4) 11 Q. B. D. 186; 13 Q. B. D. 317.
(5) 15 Q. B. D. 155.
(6) L. R. 3 A. & E. 582.

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That doctrine is affirmed by numberless cases and is laid down in every work of authority on the subject. The appellant refers in his factum to passages from judgments delivered in *Cargo ex Argos* (1); *Kirchner* v. *Venus* (2); *Black* v. *Rose* (3); *Duthie* v. *Hilton* (4); *Paynter* v. *James* (5); *Perez* v. *Alsop* (6). Those citations are all in point. The rule is well expressed by the Chief Justice of New South Wales in the judgment which was the subject of appeal in *Black* v. *Rose* (3), in a passage which, as correctly printed at p. 660 of Mr. Carver's treatise, seems to have received the approval of the judicial committee.

> When there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid.

The learned author proceeds (7) to discuss the cases where freight is not payable till complete delivery, one instance being found in *Brown* v. *Tanner* (8); there being in those cases no lien for the freight; and (9) he remarks that

> The shipowner in enforcing his lien for freight may retain possession of all the goods in respect of which it is payable until the whole has been paid.

Citing *Perez* v. *Allsop* (10), and adding, on the authority of *Black* v *Rose* (11):—

> Or be may give delivery by instalments and require the freight on each instalment to be paid concurrently with the delivery of it.

The case in the Supreme Court of the United States, *Brittan* v. *Barnaby* (12) does not lay down any doctrine on this point inconsistent with the English decisions. A great part of the discussion in the case related to a memorandum which had been stamped in red ink on

(1) L. R. 5 P. C. 134.
(2) 12 Moo. P. C. 361.
(3) 2 Moo. P.C. N.S. 284.
(4) L. R. 4 C. P. 144.
(5) L. R. 2 C. P. 356.
(6) 3 F. & F. 190.
(7) At p. 661.
(8) 3 Ch. App. 597.
(9) At p. 662.
(10) 3 F. & F. 188.
(11) 2 Moo. P. C. N. S. 277.
(12) 21 How. 527.

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the back of the bill of lading. That was held not to be incorporated with the bill of lading, which then became simply a contract to carry goods from New York to San Francisco at fixed rates of freight, with primage and average accustomed, with the promise of the shipper to pay the freight. On arrival at San Francisco notice was given to the consignee, in which notice the consignee was required to pay the freight of the goods as they should be landed from the ship on the wharf, with an intimation that if it was not paid and the goods received before four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the consignee. The goods were landed in parcels during three days, and the consignee was ready and willing to pay the freight on each parcel in conformity with the notice, but that was refused, freight on the whole being demanded before delivery of any part. The goods were warehoused and, as in this case, a tender of the whole freight was afterwards refused because no tender was made of the expenses of warehousing, &c.

In deciding against the ship-owner great stress was laid on his having receded from the terms of the notice he had given, and I understand the decision to have really turned on the force given to that notice as settling the rights of the parties. The general law as laid down by the court distinctly affirms the right of the ship-owner to preserve his lien by retaining possession of the whole cargo until the freight is paid or secured.

It asserts the right of the consignee to inspect the goods in order to see that the contract to carry has been fulfilled, before the carrier can demand payment of the full freight, but meets the interference with the right of lien which that process would work by affirming the right to security for the payment.

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The case does not aid the present plaintiff.

It was doubtless a matter of prudence on the part of Schofield to warehouse the coal in place of keeping the vessel idle, particularly as he had not stipulated for the payment of demurrage; but he would not, in the absence of an agreement to that effect, have had a lien on the cargo for demurrage, and he had none for the expense incident to the alternative course of warehousing the coal. His right to recover those charges from the plaintiff by action is a different matter.

This point is dealt with in Maclachlan on Merchant Shipping (1) in the following passage:

"The master may assert his lien for freight by detaining of the goods on board, keeping his ship on demurrage, at all events for a reasonable time. If the port be a British possession where the common law prevails he may discharge the cargo into a warehouse subject to his lien, giving the freighters notice thereof. But as he cannot hold it for the warehouse rent and other charges, he must give it up on payment of the freight and rely on his action for his other demands if not paid. He is, however, under the responsibility, since he assumes the character and functions, of warehouseman. See the elaborate judgment of Willes J. in *Meyerstein* v. *Barber* (2); *Mors-le-Blanch* v. *Wilson* (3)."

The plaintiff thus seems to have a right of action for the conversion of the coal; but, on the ground first discussed, I think he has no right against this defendant, and that the appeal should therefore be allowed with costs and a nonsuit entered.

Appeal and Cross-appeal dismissed with costs.

Solicitors for appellant: *Weldon & McLean.*

Solicitor for respondent: *C. A. Palmer.*

(1) At p. 405, 2nd ed.

(2) L. R. 2 C. P. 38.

(3) L. R. 8 C. P. 227.

CHARLES ALEXANDRE DUBUC (PLAINTIFF) ..... } APPELLANT;

AND

JOHN PEARSON KIDSTON *et al.*, (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 19.

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*Mar. 18.

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

Hypothecary action—Judgment in—Art. 2075 *C.C.—Service of judgment—Art.* 476 *C.C.P. and Cons. Stats. L.C. ch.* 49 *sec.* 15—*Waiver.*

By a judgment *en déclaration d'hypothèque* certain property in the possession and ownership of respondents was declared hypothecated in favor of the appellant in the sum of $5,200 and interest and costs; they were condemned to surrender the same in order that it might be judicially sold to satisfy the judgment, unless they preferred to pay to appellant the amount of the judgment. By the judgment it was also decreed that the option should be made within forty days of the service to be made upon them of the judgment, and in default of their so doing within the said delay that the respondents be condemned to pay to the appellant the amount of the judgment.

This judgment, (the respondents residing in Scotland and having no domicile in Canada) was served at the prothonotary's office and on the respondents' attorneys. After the delay of forty days, no choice or option having been made, the appellant caused a writ of *fi. fa. de terris* to issue against the respondents for the full amount of the judgment. The sheriff first seized the property hypothecated, sold it and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* was then issued and other realty belonging to the respondents was seized. To this second seizure the respondents filed an opposition *à fin d'annuler*, claiming that the judgment had not been served on them and that they were not personally liable for the debt due to appellant.

Held,—1st. Reversing the judgment of the court below, that it is not necessary to serve a judgment *en déclaration d'hypothèque* on a defendant who is absent from the Province and has no domicile. Art. 476 C.C.P. and Cons. Stats. L.C. ch. 49 sec. 15.

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

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2nd. That the respondents, by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment.

3rd. That in an action *en déclaration d'hypothèque* the defendant, may in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the plaintiff's claim. Art. 2075 C.C.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) confirming the judgment of the Superior Court maintaining an opposition *à fin d'annuler* fyled by the respondents to a writ of *pluries fieri facias* issued at the instance of the appellant.

The material facts of the case are as follows :—

By a judgment of the Superior Court, Quebec, reversed by the Court of Queen's Bench, but confirmed by the Supreme Court, Kidston *et al.*, present respondents, were, at the instance of Dubuc, present appellant, condemned to surrender certain immovables, unless they chose to pay Dubuc $5,250. They were also ordered to declare their choice or option to surrender or to pay, within forty days of the service of the said judgment, and in default of their so doing within the said delay the court adjudged and condemned them to pay Dubuc the said sum of $5,250, interest and costs.

The judgments of the Superior and Supreme Courts having been served on Kidston *et al.*, at the prothonotary's office, on the 23rd December, 1884, and on their attorneys on the 27th of the same month, and no choice or option having been made by them as ordered, Dubuc caused a writ of execution to issue against the Kidstons for the full amount of his judgment. The sheriff seized certain immovables mentioned in the judgment, and sold them for $2,270.00. This amount was immediately claimed by an opposition for payment from Kidston *et al.*, as representing

two creditors anterior to Dubuc, whose mortgages they alleged they had paid. Dubuc then issued another writ and seized a number of other immovables belonging to the Kidstons in order to be paid his judgment.

To this second execution the Kidstons fyled an opposition *à fin d'annuler*, praying that the seizure be declared null and the judgment fully satisfied.

The grounds of their opposition were :—

1. That they never had a domicile in the Province of Quebec and that the judgments in question had not been served upon them.

2. That they had paid the costs on the first action.

3. That Dubuc had caused the immovables mentioned in the judgment to be seized, and that they did not oppose their sale.

4. That they had paid two mortgages anterior to that of Dubuc, to wit: the mortgages of O'Sullivan and Hall, amounting to $5,000.00.

5. That by these payments they had been substituted to O'Sullivan and Hall, and had the right to be paid in their stead before Dubuc upon the price of sale.

6. That Dubuc had instituted against them another action for $3,200 for deteriorations caused since the bringing of the first suit to the immovables mortgaged in his favor.

Dubuc met this opposition by a special denial and by a plea of exception, in which he says :

1. That before suing the Kidstons, he had sued his personal debtor, Connolly, who was condemned, notwithstanding a plea of payment, and that this final judgment was *res judicata*.

2. That although this judgment had been produced in the present case, the Kidstons met his action with the same plea of payment which was rejected for the second time.

3. That the judgment in this cause had been served

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upon them and their agents and attorneys; that they had received notice of the service, and were made aware of that fact before the seizure of the first immovables.

4. That they had refused to make the choice or option as ordered by the court, and that they had thereby become his personal debtors.

5. That before and after the seizure the Kidstons had offered him $4,500 in settlement of his judgment and that they became purchasers themselves, *adjudicataires*, of the immovables sold, for $2,270.

6. That they had claimed by opposition, as having paid it to Hall and O'Sullivan, the whole produce of the sale in preference to him.

7. That the suit for deteriorations on these immovables, could not prevent Dubuc from executing his judgment, it being only an additional remedy.

And, after alleging some other facts not material to the issue in the case, he concluded by praying the court to declare that the terms of the judgments are absolute, that they impose upon the Kidstons the obligation to pay him the full amount of the condemnation in default by them of making the option required, and he prayed the dismissal of their opposition.

Blanchet Q. C. for appellant.

8. The judgments have been served according to law. Arts. 223, 570, 605, 852, 906 C.C.P.

Art. 84 C. C. P., applies to two cases (1) when a party has no domicile in Lower Canada, (2) or has left it since the beginning of the suit.

In this case the bailiff swears that he has made all the necessary searches and enquiries to find the Kidstons, and that he could not find them, as he was credibly informed that they then had not and never had any domicile either in the dirtrict or in

the Province of Quebec. This is sufficient. See Doutre Code de Procedure (1). See also Bioche Dic. de Procedure (2).

But even if there is any irregularity, respondents have waived their right to urge it against appellant, by becoming purchasers of the property sold under the first writ of execution. Dalloz Repertoire, (3).

2. Are the Kidstons bound to satisfy the condemnation, having failed to declare their option to surrender or pay, and having remained in possession.

The judgment of the Supreme Court is in conformity with the following articles of our Civil Code, Arts. 2061, 2075, 2079, 2089. See also Guyot, Repertoire (4); Bourjon droit Commun (5); Teulet Codes annotés, Code Napoléon (6); *Société de Construction* v. *Bourassa* (7).

Irvine Q.C. for respondents.

Neither the judgment of the Superior Court of the 8th July, 1882, nor the judgment of the Supreme Court of Canada, of the 23rd June, 1884, was ever legally served upon the respondents. Art. 84, C.C.P.

By law and by the terms of such judgment the only personal condemnation against the respondents was in costs, which it is admitted they have paid. Arts. 2168, 2169, C.N. and commentators thereon. *Belanger* v. *Durocher* (8):

It is established that the judgments in question have been fully satisfied.

By law and by the terms of such judgments, even had the same been duly served, the appellant's recourse was limited to the judicial sale of the property declared to be hypothecated in his favor, against a

(1) 2 Vol. No. 63.
(2) P. 809, No. 429.
(3) Vo. Exception, Vol. 23, No. 338.
(4) Vo. Hypothèque p. 663.
(5) 2 Vol. P. 542, No. VII.
(6) P. 1193, No. 22.
(7) 20 L. C. Jur. 304.
(8) 20 L. C. R. p. 430.

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curator, in the event of a surrender, and against the respondents in the event of no surrender.

Appellant has admitted that the judgments are discharged, and is now exercising recourse by a special suit in damages against the respondents, inconsistent with their being in force, either in whole or in part

The judgment of the court was delivered by TASCHEREAU, J:—

We are of opinion to allow this appeal.

On the first ground of the opposition, based on the irregularity of the service of this judgment, it is sufficient to say that under ch. 49, C. S. L. C., sec. 15, reproduced in Art 476, C. C. Proc., it is not necessary to serve the judgment *en déclaration d'hypothèque* on a defendant who is absent from the Province, or who has no domicile therein The opposition alleges that "The opposants and defendants have not now and never had their domicile in the Province of Quebec, and neither the judgment of the Superior Court of Lower Canada nor the judgment of the Supreme Court of Canada, both hereinbefore set forth, has ever been lawfully signified to or served upon them."

The judgment appealed from adopts this contention as a ground to annul this seizure. I assume that, as the above statute and article of the code were not mentioned by either of the parties at the argument before us, and are no where noticed in the factums, they were not brought to the attention of the courts below; otherwise, I take it for granted this *considérant* of the judgment would have been left out.

On the ground of waiver also, this irregularity, if any exists, cannot now be invoked against this second seizure. Having allowed the seizures and sale on a first *fi fa.*, the opposants are too late now to urge as a ground of nullity of a second seizure, an irregularity

which, if existing, would have made the judgment *non-exécutoire* altogether, till duly served. By allowing the first execution they have admitted that the judgment was *exécutoire*. They have renounced all right to any service at all of the judgment. Now that the mortgaged property has been seized and sold on them, how can they ask that the judgment ordering them to surrender it or pay should now be served on them? The service was a condition precedent to the first execution. How can it now, after the execution, the said execution having been acquiesced in, be contended that the want of service causes the nullity of a second execution?

By the second ground of their opposition the opposants virtually attack the judgment rendered against them. This judgment condemned them in the usual form, in default of surrender of the property mortgaged or of payment of the mortgage, to pay to the plaintiff the amount of his demand. Now they have neither paid, nor surrendered the property, and yet they contend that the plaintiff cannot execute his judgment against them, because he has already caused the mortgaged property to be seized and sold, and if his claim was not paid out of that sale that does not concern them, as they allege, the plaintiff having no further recourse against them.

This contention is untenable. The judgment itself disposes of it, and the judgment as it stands the plaintiff has a right to execute. In law, the opposants could not have demurred to the personal condemnation, in default of payment or option to surrender, asked for by the plaintiff in the conclusion of his declaration.

Articles 2 75 is clear the defendant is condemned "in default of surrendering, to pay to the plaintiff the full amount of his claim."

Such is not the law in France; under the Napo-

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leon Code there is there no article corresponding to our Art. 2075, and "si l'acquereur ne paie ni ne délaisse, les créanciers n'ont pas droit de poursuivre leur paiement contre lui, mais seulement de l'exproprier de l'immeuble." Delvincourt (1), Duranton (2); Tarrible, cité par Troplong (3): Merlin, Repertoire (4):

Under the old law in France, also, I am not prepared to say that, according to the true principles in the matter there could be a personal condemnation against the *Tiers détenteur*.

"Car "(says Loyseau) (5)" peut-on condamner à payer celui qui n'a rien promis, qui n'a point contracté, et qui n'est pas obligé ni héritier de l'obligé." Vide Barguet, des droits de justice (6).

However, it is unnecessary here to investigate this question. It is clear from Pigeau, (7) Guyot, (8) and others, that the opinion had for a long time prevailed amongst many that the defendant who did not surrender the property mortgaged might be personally condemned to pay, and following the universal jurisprudence and practice in the Province of Quebec, where this view had been adopted, the codifiers embodied it in Art. 2075, on which they remark in their report:

The object of the hypothecary action being to have the immovable surrendered and sold, the defendant may make such surrender either before judgment or within the delay prescribed by the judgment, and in default of such surrender the holder is personally bound to the payment of the debt. This personal responsibility may be looked upon as a penalty imposed for contumacy, without however prejudicing in any manner the rights of the prosecuting creditor, who may forthwith seize the hypothecated immovable at the same time as the movables of the debtor and thus obtain satisfaction.

The opposants may have strong grounds to urge that this should not be law, but on that point their

(1) 3 Vol., 369 Sic. II.
(2) II Vol. (Bel. Ed) No. 233.
(3) Priv. and Hyp. No 783.
(4) Vo. Tiers détenteur par VIII, IX, X.
(5) De l'action hyp. P. 89.
(6) P. 174.
(7) Vol. I. 597.
(8) Rep., *v.* Hypothéque 663.

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adversary has not to join issue with them. That such is the law disposes of this contestation.

Then there are good reasons to support the equity of the view adopted by the codifiers. The defendant has only to surrender the property to get rid of the personal condemnation. If he does not choose to do so he cannot complain. He voluntarily and deliberately remains in possession of the property mortgaged, and enjoys rents, profits and revenues thereof, whilst if he had surrendered it the curator for the mortgagees would have been entitled to these profits, rents and revenues. Arts. 535, 536, 537, C. C. Proc. He thus benefits by not surrendering and deprives the mortgagees of what otherwise would have gone to satisfy their claims. To prevent this as much as possible the code enacts that if the defendant does not surrender, if he prefers to retain the possession of the property and to collect and take the benefit of the revenues thereof, he shall then be personally condemned to satisfy the plaintiff's claim.

We are of opinion that the plaintiff's judgment is now executory against all the properties of the opposants, and that the opposition must fail.

The appeal will therefore be allowed, with costs in all the courts, *distraits* to attorneys of record.

Appeal allowed with costs.

Solicitors for appellant: *Blanchet, Amyot & Pelletier.*

Solicitors for respondents: *W. & A. H. Cook.*

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* Oct. 18.
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*Mar. 18.

GEORGE DEMERS (PLAINTIFF).....APPELLANT;

AND

NORBERT L. DUHAIME (DEFENDANT)..RESPONDENT.

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

Action en restitution de deniers —Sale of personal rights without warranty —Sale for a bulk sum—Arts. 1510, 1517 *and* 1518 *C. C.*

N. D. respondent, owner of a cheese factory, made an agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory than to that of N. D. N. D. subsequently sold to G. D. (the appellant) the factory and *sous la simple garantie de ses faits et promesses*, whatever rights he might have under his agreement with the farmers, for the bulk sum of $7,000. G. D. assigned to B. the factory and the same rights, but excluding warranty, *sans garantie aucune*, for $7,500. A company was subsequently formed to whom B. assigned the factory and the rights, and one of the farmers to the original agreement having sold milk to another cheese factory, the company sued him, but the action was dismissed, on the ground that N. D. could not validly assign personal rights he had against the farmers. Thereupon G. D. brought an action against N. D. to recover the price paid for rights which N. D. had no right to assign. At the trial it was proved that although the price mentioned in the deed and paid was a bulk sum for the factory and the rights, the parties at the time valued the rights under the agreement with the farmers at $5,000. G. D. also admitted that the action was taken for the benefit of the present owners of the factory.

Held, affirming the judgment of the court below, Strong and Fournier JJ. dissenting, that, inasmuch as the appellant, by the sale he had made to B., had received full benefit of all that he had bought from respondent and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid.

Per Taschereau J.—If any action lay, it could only have been to set the sale aside, the parties being restored to the *status quo ante* if it were maintained.

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

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming the judgment of the Superior Court sitting at Montmagny.

This was an action brought by the appellant to be reimbursed the sum of $5,000, which he claimed to have paid to respondent without consideration.

The material facts that gave rise to the suit are the following:

In 1881, the respondent being the owner of a newly established cheese factory, in the town of Montmagny, made, with a certain number of farmers, an agreement by which the latter bound themselves not to carry the milk of their cows to any other cheese factory than that of the respondent. The object was to protect respondent's establishment against competition.

Three years after, viz., in 1884, the respondent sold his factory to the appellant, with the ground on which it was erected, and all accessories; and by the same deed specifically transferred to said appellant, all the rights and privileges accruing to him by and in virtue of his agreement of 1881 with the farmers of Montmagny, in the following terms:

"Cède et transporte, sous la simple garantie de ses faits et promesses au dit sieur George Demers, ce acceptant comme susdit, tous ses droits pour le temps qui en reste à courir à compter de ce jour, tous le droits que le dit sieur Norbert Lemaître Duhaime peut avoir avec une certaine partie des habitants de St. Thomas, en vertu d'un acte....."

The whole was sold for a bulk amount of $7,000.00.

Subsequently, the appellant sold to Nazaire Bernatchez, for the price of $7,500.00, the same cheese factory with the rights and privileges derived from the original agreement of the respondent with thé farmers of Montmagny.

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The terms of this last mentioned sale are:

"Et il cède de plus, sans garantie aucune, au dit acquéreur ce acceptant, tous le droits que Norbert Lemaître Duhaime lui a cédés et avait droit de lui céder, par le susdit acte de vente et que le dit Duhaime a acquis de Louis Bélanger et autres.....

And later on, there was a resale by Nazaire Bernatchez to Numa Bernatchez and others for the same price of $7,500.00.

In the mean time, a new cheese factory had been started in Montmagny, to which some of the farmers who had bound themselves towards respondent Duhaime were carrying the milk of their cows, in contravention of their agreement, and Numa Bernatchez, being in possession of respondent's factory, sought to enforce against them their original agreement, by an action before the Superior Court of Montmagny.

The action was sustained by the Superior Court, but dismissed by the Court of Queen's Bench.

The judgment of the Court of Queen's Bench declared that the deed from respondent to appellant had effected no transfer in favor of the latter of respondent's rights against the farmers of Montmagny, that said rights were purely personal to respondent Duhaime, could not be assigned by him, and consequently could not have passed to the appellant or to his ayants cause.

Leave to appeal to the Supreme Court from the judgment of the Court of Queen's Bench was asked and refused, the sum involved being under the appealable amount.

The appellant then brought the present action, praying to be reimbursed a part of the price paid, proportional to the value put upon said rights by the parties at the time of the sale, viz., $5,000.00

The judgment of the Superior Court dismissed

appellant's action, and this judgment the Court of Queen's Bench confirmed

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Irvine Q.C. for appellant and *Casgrain* Q.C. for respondent.

The points relied on and authorities cited are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—I think the appeal should be dismissed. I think the judgments rendered in the Superior Court and Court of Appeal should be confirmed.

STRONG J. concurred with FOURNIER J.

FOURNIER, J.—La question à décider en cette cause, est de savoir si l'appelant a droit de réclamer de l'intimé partie du prix de la vente d'une fromagerie, comportant cession de certains droits appartenant au vendeur, sur le principe que le paiement a été fait sans cause et par une erreur de droit commune aux deux parties contractantes. L'intimé, pour s'assurer l'approvisionnement du lait nécessaire pour l'exploitation de sa fromagerie, avait fait avec un certain nombre de cultivateurs par acte authentique, une convention par laquelle ces derniers s'obligeaient à ne pas fournir leur lait à aucune autre fromagerie que celle de l'intimé, afin de lui permettre de continuer son exploitation pendant 20 ans, à partir du 8 décembre 1881; 2° à se conformer aux règlements qui leur seraient donnés dans l'établissement ou manufacture de fromage.

En 1884, l'intimé vendit sa manufacture avec tous les droits et privilèges qu'il avait acquis des cultivateurs comme susdit. La cession de ces droits est faite en ces termes :

Cède et transporte, sous la simple garantie de ses faits et promesses au dit sieur George Demers, ce acceptant comme susdit, tous ses droits pour le temps qui en reste à courir à compter de ce jour, tous les

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droits que le dit sieur Norbert Lemaître Duhaime peut avoir avec une certaine partie des habitants de St-Thomas, en vertu d'un acte authentique passé à St-Thomas, le 8 décembre 1881, par-devant maître Gendreau, notaire.

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La vente de la manufacture et la cession des droits étaient faites pour une somme totale de $7,000. Plus tard l'appelant revendit à Nazaire Bernatchez pour $7,500, la même manufacture avec cession des droits acquis des cultivateurs signataires de l'acte du 8 décemdre 1881. Dans ce dernier acte la cession des droits est faite en ces termes :

> Cède de plus, sans garantie aucune, au dit acquéreur ce acceptant, tous les droits que Norbert Duhaime lui a cédé et avait droit de lui céder, par le susdit acte de vente et que le dit Duhaime a acquis de Louis Bélanger et autres.

La même fromagerie est ensuite devenu la propriété de Numa Bernatchez, pour le prix de $7,500. Peu de temps après, une nouvelle fromagerie ayant été établie, les cultivateurs qui s'étaient originairement engagés par l'acte du 8 décembre 1881, envers Duhaime, au lieu d'aller porter le lait de leurs vaches à son cessionnaire, allèrent le porter à la nouvelle manufacture. Numa Bernatchez étant alors acquéreur de ces droits, et désirant les exercer poursuivit un des réfractaires et obtint contre lui un jugement de la cour Supérieure, le confirmant dans la possession des droits qu'il avait acquis. Sur appel à la cour du Banc de la Reine ce jugement fut infirmé sur le principe que le contrat de vente de l'intimé n'avait pas eu l'effet de transférer à l'appelant les droits qu'il avait contre les cultivateurs de Montmagny, en vertu de l'acte du 8 décembre 1881 ; que ces droits étant purement personnels à Duhaime, celui-ci n'avait pu les céder et qu'ils n'avaient pu être acquis ni par l'appelant ni par ses ayant-cause. Une demande d'appel à la cour Suprême fut refusée parce que l'action n'était pas d'un montant suffisamment élevé pour le rendre appelable à cette cour.

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Maintenant que l'appelant a obtenu par le jugement de la cour du Banc de la Reine, la certitude que les droits acquis de Duhaime étaient incessibles en droit; que Duhaime n'avait pas le pouvoir de les lui céder, que de fait il ne les a pas cédés, ces droits étant toujours demeurés attachés à sa personne, et, qu'il a encore actuellement contre les cultivateurs, les mêmes droits qu'il avait avant sa cession ; qu'en réalité, il n'a rien cédé à l'appelant qui se trouve à n'avoir reçu aucune considération pour la partie la plus importante du prix de vente, celui-ci en demande la restitution comme ayant été payé sans cause et par erreur de droit.

Les allégations suivantes de sa déclaration donnent une juste idée de la nature des droits d'action que l'appelant entend exercer dans cette cause.

Que la considération entière de l'acte de vente du dit défendeur au demandeur était stipulée être de la somme de sept mille piastres, laquelle le demandeur paya intégralement au défendeur lors de la prise de possession du terrain et de la fromagerie ;

Que pour ce qui est des droits résultant du dit acte du huit décembre mil huit cent quatre-vingt-un, vendus et cédés par le dit défendeur, le demandeur n'a jamais pu s'en faire mettre en possession. Que ces droits n'étaient pas transférables, qu'ils étaient personnels au dit Duhaime défendeur et que ce qui a été payé pour les dits droits l'a été sans cause et est sujet à répétition ;

Que par jugement rendu par la cour du Banc de la Reine, en appel, siégeant à Québec le ou vers le cinq février dernier sur poursuite de Numa Bernatchez et al., cessionnaires du demandeur *vs* O. Beaubien, l'une des parties à l'acte du huit décembre mil huit cent quatre-vingt-un, il a été jugé que le dit acte entre le dit Duhaime et les dits Beaubien et autres n'avaient créé que des obligations personnelles entre eux et que le dit Duhaime n'avait pas le droit de céder les dits droits et que la dite cession était sans effet légal entre le cessionnaire et les dits Beaubien et autres;

Que le dit jugement est final et n'est pas susceptible d'appel ;

Que lors de la passation de l'acte de vente du vingt-huit avril mil huit cent quatre-vingt-quatre, le demandeur était sous l'impression que les dits droits étaient transférables, que la cour de Circuit du district de Montmagny avait décidé plusieurs fois dans ce sens à leur connaissance et que les droits résultant du dit acte constituant une espèce de

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monopole qui assurait l'existence et la prospérité de l'établissement, entraient pour une grande proportion dans la cause et la considération du dit contrat.

Que la valeur du terrain de la fromagerie et des dépendances ne dépasse pas la somme de deux mille piastres courant et que les droits résultant de l'acte du huit décembre mil huit cent quatre-vingt-un et vendus avec la dite fromagerie étaient évalués et valaient la somme de cinq mille piastres courant que le dit demandeur n'aurait pas données et payées, s'il eût cru n'acheter que le terrain, la fromagerie et les dépendances ;

L'appelant se fondant sur ces allégations, réclame une diminution du prix payé, égale à la différence entre le prix et la valeur du terrain, fromagerie et dépendance dont il a eu délivrance et pris possession, savoir, $5,000 ; ces $5,000 ayant été payées sans cause pour des droits illusoires, dont l'intimé n'a pas fait et ne peut pas faire la délivrance à l'appelant.

Il allègue ensuite que l'intimé savait lors de la signature de l'acte de vente que les droits cédés n'étaient pas transferables. Mais il est juste de dire de suite qu'il n'y a aucune preuve de cette dernière allégation, et qu'il n'y a pas lieu de revenir plus tard sur cette partie de la cause.

L'intimé Duhaime a plaidé qu'il n'a fait par l'acte de vente du 28 avril 1884, qu'une cession des droits qu'il pouvait avoir, sans autre garantie que celle de ses faits et promesses, que l'appelant les a acceptés à ses risques et périls, et qu'en conséquence il n'est pas tenu à la restitution du prix de la chose vendue. Il invoque l'exception de l'article 1510.

La vente bien que faite pour un seul prix, n'en est pas moins une vente de choses bien distinctes ; la première est la vente de l'immeuble, et la seconde la cession et transport sous la simple garantie de ses faits et promesses des droits acquis des cultivateurs par l'acte du 8 décembre 1881.

Quoique le prix de vente ne soit pas divisé de

manière à spécifier pour quelle somme chacune des deux choses vendues doit compter pour former la somme totale, il n'en est pas moins établi en preuve que la valeur de chacune a été estimée spécialement et séparément par les deux parties, avant d'arriver à la détermination du prix de vente. Octave Talbot qui représentait l'appelant à l'acte de vente prouve ce fait positivement

C'est moi, dit-il, qui ai comparu comme procureur du demandeur dans l'acte du vingt-huit avril mil huit cent quatre-vingt-quatre. Dans le temps, j'évaluais le terrain, la bâtisse et les accessoires à une valeur de trois mille cinq cents piastres au plus haut, et cela d'après l'inventaire que j'en fis avec le défendeur lui-même.

Q—Quelle était d'après vous la valeur des droits vendus par le dit acte indépendamment de la fromagerie et accessoires?

R—Je considère que ces droits ou privilèges valaient plus que la fromagerie et ses accessoires. L'évaluation que j'ai mise sur ces droits d'après l'inventaire était de trois mille cinq cent à quatre mille piastres, c'est sur cette évaluation qu'a été fixé le prix dans l'acte.

Je suis positif que M. Demers le demandeur n'aurait pas acheté pour le prix qu'il a payé sans la considération de ces privilèges, parceque lui-même m'a dit qu'il attachait plus de prix aux privilèges qu'à la fromagerie.

D'après ce témoignage il est clair que l'intimé vendait la fromagerie, c'est-à-dire l'immeuble, la somme de $3,500.00 et les droits acquis des cultivateurs $3,500.00, faisant la somme totale de $7,000.

La vente faite avec garantie de ses faits et promesses, seulement à l'effet de rendre l'intimé responsable de l'existence de la chose cédée, de même que le cédant de créances ou autres droits incorporels avec la même garantie, ou même sans garantie, n'en n'est pas moins tenu de garantir l'existence de la créance ou des droits cédés. Le code, article 1576, en contient une disposition expresse.

Article 1576: Celui qui vend une créance ou autre droit, doit garantir qu'elle existe et lui est due, quoique la vente soit faite sans garantie, sauf néanmoins l'exemption contenue en l'article 1510.

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Au cas d'éviction des droits cédés, le cédant, il est vrai, n'est pas tenu à des dommages et intérêts envers l'acquéreur, mais il est tenu de rembourser le prix de la chose évincée, comme l'ayant reçu sans cause. Cette obligation est imposée par le code article 1510.

Duranton dit: (1).

Celui qui vend une créance ou autre droit incorporel, doit en garantir l'existence au temps du transport, quoiqu'il soit fait sans garantie, Article 1693.

Numéro 511. La règle que le vendeur d'une créance ou autre droit incorporel est tenu d'en garantir l'existence au temps du transport, quoiqu'il soit fait sans garantie cesse toutefois d'être applicable, lorsque le droit est vendu comme simple prétention, comme droit litigieux, ou aux risques et périls de l'acheteur ou cessionnaire, ou bien aussi lorsque le transport est fait avec stipulation de non garantie, et que le cessionnaire connaissait au temps de la cession, l'incertitude du droit du cédant ou vendeur.

La garantie de l'intimé s'étendant d'après les autorités à l'existence de la créance ou droits incorporels au temps de la cession, il s'ensuit que l'intimé devait nécessairement être propriétaire alors d'un droit cessible. S'il n'avait pas à cette époque un tel droit, il se trouve alors dans le cas d'avoir cédé une chose qui n'existait pas. La loi le rendant au moment de la cession, garant de l'existence du droit cédé, il doit, s'il ne peut en faire la délivrance, indemniser l'acquéreur. Cette garantie ne s'applique pas qu'aux créances seulement, elle s'applique également aux cessions de droits incorporels, comme le font voir les autorités et surtout l'article 1576 de notre code.

Le cas ne serait pas différent s'il n'y avait eu aucune stipulation quelconque de garantie, et même exclusion de garantie car, ajoute Duranton (2).

Du reste, la simple stipulation de non garantie en l'absence de la circonstance que l'acheteur savait que le droit était incertain, n'aurait pas pour effet selon nous, d'affranchir le vendeur de l'obligation de resti-

(1) Volume 16, numéro 510. (2) No. 511.

tuer le prix de cession, s'il était ensuite reconnu que le droit n'existait pas.

Merlin dit sur la même question (2).

Observez aussi que la clause par laquelle on a stipulé que le vendeur ne serait obligé à aucune garantie, suffit bien pour la mettre à l'abri d'une condamnation aux dommages et intérêts de l'acheteur dans le cas d'éviction ; mais qu'il n'est pas moins tenu de rendre le prix de vente. La raison en est que l'acheteur n'ayant payé ce prix que pour avoir la chose que le vendeur avait promise, et celui-ci n'ayant point accompli sa promesse, il se trouve avoir reçu sans objet le prix dont il s'agit et par conséquent il doit le rendre C. N., article 1679.

Cependant il y a un cas ou le vendeur n'est pas même obligé de rendre le prix de la vente, quoique l'acheteur soit évincé. C'est quand il parait que l'objet de la vente a bien moins été la chose vendue, que la prétention incertaine que le vendenr avait à cette chose, " ou (comme le dit l'article 1629 C. N.) quand l'acquéreur a connu le danger de l'éviction ou qu'il a acheté à ses périls et risques." Une telle vente ressemble à un coup de filet.

Cette dernière citation de Merlin fait voir que le droit français à cet égard, est le même que celui de la province de Québec. Notre article 1510 a règlé la question.

D'après ces autorités, l'intimé ayant cédé un droit incorporel n'existant pas comme droit cessible au moment de la cession, est tenu d'indemniser l'acquéreur auquel il n'a pu faire délivrance du droit cédé, à moins qu'il ne fasse preuve des circonstances ayant l'effet de l'exempter de cette responsabilité. Il n'en a pas même tenté la preuve.

Il y a aussi lieu dans le cas de garantie de faits et promesses, comme dans le cas de non garantie, (les deux ayant le même effet en loi), à la restitution du prix de la chose vendue ou cédée, lorsqu'il y a eu éviction ou que la chose n'a pas été ou n'a pu être délivrée.

Dans le cas actuel il ne s'agit pas d'éviction, parce qu'il n'y a pas eu délivrance des droits, et que conséquemment l'appelant n'a pu être évincé d'une chose

(2) Vo. garantie, article 1er, p. 465.

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dont il n'a pas été mis en possession. C'est ce défaut de tradition qui est la base de la présente action. Ce défaut de tradition est constaté par le jugement cité plus haut, de la cour du Banc de la Reine, passé en force de chose jugée, déclarant les droits en question incessibles.

L'intimé est donc légalement tenu à la restitution demandée,

a moins qu'il ne soit prouvé (suivant l'article 1510,) que l'acheteur n'ait connu lors de la vente le danger d'éviction, où qu'il n'ait acheté à ses risques et périls.

Il est important de ne pas perdre de vue que c'est l'exception invoquée par l'intimé, que l'appelant avait accepté cette cession à ses risques et périls. La question se réduit donc à savoir s'il a fait preuve de cette allégation.

L'intimé n'a absolument fait aucune preuve que l'appelant a acheté à ses risques et périls, ni qu'il a connu lors de la cession le caractère incessible des droits cédés. C'était à l'intimé à faire cette preuve comme le veut l'article 1510, et comme le dit positivement l'autorité de Merlin cité ci-dessus.

Loin d'avoir fait cette preuve, il est au contraire prouvé par le témoin Talbot que l'appelant n'aurait pas acheté sans la considération des droits et privilèges cédés, parce qu'il attachait plus de prix aux privilèges qu'à la fromagerie. La même chose est prouvée par Monsieur Bernatchez, qui dit :

Sans ces privilèges l'appelant n'aurait pas acheté d'après ce qu'il m'a dit, il disait qu'il considérait que c'était le succès de l'établissement, je lui ai parlé du prix que j'attachais à ces privilèges, la raison que j'avais et que je lui donnais, c'est que je considérais que les cultivateurs étant liés par l'acte de mil huit cent quatre-vingt-un, vu qu'il y avait un jugement en ce sens là à la cour de Circuit de Montmagny, sans doute que le demandeur Demers croyait acheter un droit utile contre les personnes, au moins il me l'a dit. Dans mon opinion, la fromagerie, avec ses accessoires, au moment de la vente de Demers, valait à peu près deux mille piastres, car le terrain est sujet à charge de rente.

J'évalue à au moins cinq mille piastres les droits ou privilèges si le demandeur pouvait les mettre à effet, sans ces privilèges le reste ne vaut pas deux mille piastres.

Il est évident par ces témoignages que l'appelant ne croyait nullement s'exposer au danger d'éviction, ni encore moins acheter à ses risques des droits dont il savait l'existence confirmé par un jugement de la cour Supérieure.

La somme considérable de $3,500, à laquelle ces droits avaient été évalués au moment de la vente par l'intimé lui-même, et par Talbot le procureur de l'appelant, et réellement payés par ce dernier repousse toute idée que la transaction ait été faite, avec la connaissance du danger d'éviction et l'intention d'encourir les risques. La position de fortune des parties qui sont des cultivateurs de moyens ordinaires, ne permet pas de présumer qu'ils ont voulu faire une transaction aléatoire—un coup de filet—comme dit l'autorité ci-dessus, d'un montant aussi considérable, pouvant entraîner leur ruine ; ils avaient tous deux de justes raisons de croire à la légalité de la cession qui avait été confirmée par un jugement de la cour de Circuit d'abord, ensuite par un autre jugement de la cour Supérieure. Il est vrai que plus tard un jugement de la cour du Banc de la Reine a fait connaître aux parties, mais longtemps après l'acte de cession, que les droits en question étaient incessibles. Ce fait, postérieur de beaucoup à la cession, constate bien que les parties étaient dans l'erreur sur le droit à ce sujet, mais ne milite aucunement contre leur bonne foi lors de la vente. L'appelant croyait bien acheter les droits en question, et l'intimé les lui vendait pour la somme de $3,500.

Il n'y a certainement pas eu vente aux risques et périls de l'acheteur ; d'abord l'acte de cession n'en fait aucune mention, et puis il n'a été fait aucune preuve quelconque à cet égard. C'est une pure asser-

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tion dont la fausseté est évidente. Il n'y a eu dans cette transaction qu'une erreur commune aux deux parties sur le caractère incessible des droits cédés.

Rien dans les circonstances qui ont accompagné cette transaction ne peut faire présumer que la cession avait un caractère aléatoire ; la stipulation de garantie de faits et promesses qui, de sa nature, emporte la garantie de l'existence des droits, contredit absolument toute supposition de ce genre. Les expressions employées pour qualifier les droits cédés, savoir :

> Tous les droits pour le temps qui reste à courir, etc.....
> Tous les droits que le dit sieur Norbert Duhaime peut avoir avec une certaine partie des habitants de St-Thomas, en vertu d'un acte

ne comportent pas l'idée d'incertitude des droits.

L'acte authentique les établissant n'est cité évidemment que pour faire voir que l'existence de ces droits n'a rien d'incertain, mais qu'au contraire ils existent en vertu d'un bon titre en forme authentique. Ce ne sont donc pas des droits incertains qui sont cédés. L'expression " tous les droits qu'il peut avoir " en ce qu'elle a de vague et d'incertain, ne s'applique pas à l'existence des droits mais seulement à leur étendue, et pour signifier que la cession en est faite sans restriction. C'est l'expression ordinairement employée par les notaires, et elle n'a pas d'autre signification que celle que je viens de mentionner.

Indépendamment de l'article 1510 donnant clairement le droit de repéter le prix payé, l'appelant aurait encore un droit non moins certainement établi de se faire rembourser sur le principe qu'il y a eu erreur dans le contrat de cession. Cette erreur, comme il a été dit plus haut est certaine, et repose sur la nature même du contrat intervenu entre les parties, sur la substance de la chose qui en fait l'objet. C'est précisément ce qui est arrivé dans le cas actuel, l'erreur porte sur le caractère des droits cédés qui au lieu d'être ces-

sibles comme on le pensait, étaient au contraire incessibles. L'erreur reposant donc sur la nature même du contrat qui n'est pas du tout une cession de droits comme on a voulu en faire une, puisque la loi ne permet pas une telle cession. Ce serait donc le cas de faire l'application de l'article 992 C. C.

L'erreur n'est une cause de nullité que lorsqu'elle tombe sur la nature même du contrat, sur la substance de la chose qui en fait l'objet, ou sur quelque chose qui soit une considération principale qui ait engagé à le faire.

La cession en question serait donc nulle pour cause d'erreur, mais l'intimé ne pourait faire valoir ce moyen que par un amendement de son action de manière à la faire concorder avec la preuve. La cour peut accorder cet amendement en vertu de la section 63.

Dans tous les cas cette erreur évidente sur la nature du droit cédé, fait voir que les parties avaient l'intention de faire un contrat sérieux, n'ayant aucun caractère aléatoire.

L'intimé se trouve ainsi avoir reçu sans cause ni considération et par erreur de droit, ce qui ne lui était pas dû, il est en conséquence obligé de le restituer d'après l'article 1047 C. C.

Mais l'appelant peut se dispenser d'invoquer le moyen d'erreur, car son droit de repéter les deniers payés, fondé sur l'article 1510, est suffisant pour lui assurer gain de cause.

L'intimé s'est plaint que l'action ne concluait qu'au remboursement du prix payé pour la cession des droits, sans offrir de lui remettre la manufacture ou fromagerie ; il se trouve de cette manière dans l'impossibilité de tirer aucun parti de ses droits. Cependant sa position sous ce rapport est moins difficile que celle de l'appellant qui, de son côté, reste avec la manufacture sans avoir aucun droit de s'assurer le lait nécessaire pour l'exploiter. Cette position a paru faire impression, et

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a été considérée comme donnant à l'appelant un grand avantage sur l'intimé. C'est au contraire la position de l'intimé qui est la plus favorable. Resté en possession des droits qu'il n'a pu céder, leur transaction à ce sujet étant déclarée nulle par la cour du Banc de la Reine, il est nécessairement encore investi de tous ses droits à cet égard. Immédiatement après ce jugement, il aurait pu et peut encore sans danger quelconque, élever une autre bâtisse dans la même ville (Montmagny), à quelques pas de celle de l'appelant, et continuer la jouissance de ses droits. Il est impossible, au contraire, à l'appelant de le faire, car les cultivateurs qui s'étaient engagés envers Duhaime, le sont encore et doivent lui continuer la fourniture du lait. Il a le droit de les y contraindre, ce que ne possède pas l'appelant. Celui-ci d'ailleurs pouvait-il exercer une autre action que celle qu'il a prise ? Dans d'autres circonstances, il pourrait sans doute y avoir lieu, en vertu de l'article 1517, C. C., à l'action en rescision. Mais dans le cas actuel, de quelle utilité pouvait être une demande en rescision d'une cession qui n'a pas eu lieu d'après la cour du Banc de la Reine, et qu'elle a déclarée nulle de plein droit ? Il ne lui restait pas d'autres recours que l'action en répétition que lui reconnait l'article 1518, C. C., et qu'il a exercé par sa présente action pour se faire rembourser le prix de la chose vendue (les droits) qui n'a pas été livrée. C'est à l'appelant seul, comme acheteur, qu'il appartient de faire le choix des actions accordées par les articles 1517 et 1518, C. C., savoir: de demander la rescision de la vente, ou la valeur de la partie de propriété non livrée ou dont il a été évincé, proportionnellement au total du prix.

On a prétendu que la preuve testimoniale faite en cette cause est illégale, comme tendant à contredire l'acte de vente en forme authentique, et contraire à

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l'article 1234 C.C. C'est une ne erreur qui n'a d'autre cause qu'une méprise sur le caractère de l'action dont il s'agit. L'action n'est pas une en garantie découlant du contrat, puisque le contrat n'a pas eu lieu pour la partie dont se plaint l'appelant, et elle n'est pas non plus fondée sur une convention. Elle n'est que la conséquence de l'inexécution du contrat de l'intimé. Il est évident qu'il était impossible à l'appelant de prévoir que l'intimé n'exécuterait pas son contrat, et de se procurer d'avance une preuve écrite pour ce cas. D'après le paragraphe 5 de l'article 1233, dans le cas d'obligations résultant des quasi-contrats, délits et quasi-délits et dans tous les autres cas où la partie réclamante n'a pu se procurer une preuve écrite, la preuve testimoniale est admise. L'action n'étant fondée que sur des faits comme l'erreur et le défaut de tradition qui peuvent toujours se prouver par la preuve testimoniale, la preuve faite est légale. L'objection à cet égard est tout à fait mal fondée.

On a encore soulevé contre l'action la question du défaut d'intérêt, en se fondant sur la maxime que l'intérêt est la mesure des actions. Les intimés ont insisté sur ce moyen dans leur factum et à l'audition, bien que la cour du Banc de la Reine n'en ait fait aucune mention dans son jugement. C'est avec raison qu'elle s'est abstenue d'y faire allusion, car ce moyen n'est nullement fondé.

L'appelant, interrogé comme témoin a dit, il est vrai: "qu'il ne se connaissai pas d'intérêt"—voulant dire qu'il ne se connaissait pas d'intérêt actuel. Mais voyons si son explication confirme ce qu'il croit à tort, sans aucun doute. Il admet qu'après avoir acheté de l'intimé l'immeuble en question, il l'a ensuite revendu, mais sans garantie, à Nazaire Bernatchez. Ne connaissant pas la signification légale des mots "vente sans garantie," il est évident que lorsqu'il a répondu comme il l'a fait, il pensait n'être dans aucun cas tenu de

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rendre le prix reçu, mais on a vu plus haut que les expressions de vente faite sans garantie, ou avec exclusion, ou avec simple garantie de faits et promesses, signifiaient en loi la même chose ; et que dans chacun de ces cas, lorsqu'il y a éviction, le vendeur n'en est pas moins tenu de rendre le prix qu'il a touché. Il est évident que l'appelant est exposé de la part de son acheteur, à une action semblable à celle qu'il exerce en cette cause. Pour éviter le nombre d'actions résultant des ventes successives qui ont été faites, il a consenti à prendre l'initiative en permettant de porter l'action en son nom. Il reconnaît toutefois dans son témoignage que s'il réussit, le bénéfice sera pour les propriétaires actuels, ce qui aurait l'effet d'empêcher des poursuites de la part des différents acheteurs contre leurs vendeurs respectifs, en leur faisant éviter par là même une action de la part de leur acheteur. Il s'exprime ainsi à ce sujet.

R—Le montant du jugement, si jugement est rendu en cette cause, ira je suppose, à satisfaire les présents propriétaires au bénéfice de ceux dont ils ont acheté. Les propriétaires actuels auront le bénéfice du jugement au bénéfice de ceux qui ont vendu. Je leur ai permis de prendre l'action en mon nom, parce qu'on ma dit qu'il y avait eu une injustice de commise de la part de celui de qui j'avais acheté.

Il a évidemment intérêt à porter la présente action, afin d'empêcher son acheteur, Nazaire Bernatchez, d'en porter une semblable contre lui.

Pour intenter une action il n'est pas nécessaire (dit Pigeau (1)) que l'intérêt soit actuel, il suffit qu'il puisse un jour se éaliser et s'effectuer, pour qu'on puisse actionner à l'effet de repousser tout ce qui pourrait nous empêcher de le recueillir.

Cette action en restitution du prix n'appartenant qu'à l'appelant, qui ne peut l'exercer que contre celui avec qui il a contracté. Le conseil privé l'a décidé ainsi dans la cause de *The Chaudière Gold Mining Company of Boston*, vs. *Desbarats et al* (2).

Que le droit à la restitution du prix de vente est indépendant de la garantie, et n'a d'existence qu'entre les parties immédiates.

(1) Vol. 6 p. 61. (2) 4 Rev. Leg. 645.

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De tout ce qui précède je conclus 1° que l'appelant a un intérêt suffisant pour porter la présente action; 2° qu'elle est bien dirigée suivant la décision du Conseil Privé; 3° qu'il y a lieu à la restitution du prix payé pour défaut de considération et pour cause d'erreur de droit. Pour ces motifs je suis d'avis d'accorder l'appel avec dépens.

TASCHEREAU J.—I am of opinion to dismiss this appeal. The appellant's action was rightly dismissed in the courts below.

The very first of his allegations of facts is unfounded. He says that the $7,000, price of the sale by Duhaime to him, were for the factory and the rights that Duhaime had against a certain number of farmers. Now, on the very face of the deed of sale itself that is not so. The sale is of a certain lot of ground and cheese factory, in consideration of which alone seven thousand dollars is agreed upon. It is only by a subsequent clause of the deed that a cession or transfer of Duhaime's rights against certain farmers is agreed upon, without any mention of price.

2nd. Assuming that this transfer of rights formed part of the consideration for the $7,000, the appellant's action also fails. The respondent received the price and is still in possession of what he sold, says the appellant, citing *Iniquum emptorem carere re et pretio.* Now, that is not so. The respondent has not got *rem et pretium.* By the sale of the factory to the appellant the respondent lost all his rights against the farmers under his agreement with them of December, 1881. He got $5,000 for these rights from the appellant, according to appellant's contention, but he lost them by the sale to appellant, so that he did nothing else but to actually sell for $5,000, what to him was worth $8,000. By the sale, however, says the appellant, these rights were extin-

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guished, and I did not get them. That may be or may not be. The Court of Queen's Bench judgment on this is not *res judicata* against Duhaime. But assuming it to be so, the sale, as I have remarked, deprived the respondent thereof, though it may not have vested them in the appellant. Duhaime without the factory has no rights against the farmers. Under these circumstances the only action Demers had against him was one to resiliate the sale altogether, returning him the land and factory. But because Demers has put himself in the impossibility to do so it does not follow that this present action lies. If it did, Duhaime would have lost all his rights against the farmers, without compensation and through Demers' fault.

Then, another consideration is conclusive against the action.

Demers admits that he has no interest in this case, that the action is brought in his name by Numa Bernatchez and others, who have bought from Nazaire Bernatchez, to whom he, Demers, had sold.

Now, Demers sold for $7,500, making a clear profit of $500. And he sold only what Duhaime had a right to sell. So that his vendee has no recourse whatever against him if Duhaime had no right to transfer this agreement with the farmers. Under the circumstances, the courts below were decidedly right in holding that Demers' action could not be maintained. Then, apart from all this, the sale by Nazaire Bernatchez to Numa Bernatchez is not produced. The real plaintiffs have not proven their title.

I am of opinion to dismiss this appeal with costs in all the courts.

GWYNNE J.—There is no foundation whatever, in my opinion, for this appeal.

The respondent sold a cheese factory and a piece of land to the appellant for the sum of seven thousand

dollars, and by the deed conveying it he ceded and transferred to the appellant *sous simple garantie de ses faits et promesses*, all the rights, whatever they might be, which the respondent could have with a certain portion of the inhabitants of St. Thomas, in virtue of a certain deed entered into by and between such persons and the respondent, and bearing date the 8th of December, 1881. What rights the respondent had under such deed, and whether they were capable of passing by assignment to a purchaser of the respondent's cheese factory, was a question of law, the effect and extent of which the appellant was bound to know equally as was the respondent. The respondent did not guarantee the appellant in the actual receipt from the farmers, parties to the deed, of their milk. In the absence of such a guarantee the appellant must be taken to have known that what was ceded to him (in so far as the agreement between the farmers and the respondent as to the milk of the former was concerned), was what the respondent could cede and the appellant could take; and that, therefore, he took an assignment of all the respondent's rights under the deed at his, the appellant's, own risk as to the value to him of such assignment. That it was of value to him and that he got full benefit of all that he bought appears from the fact that he sold what he bought at an advance of $500.

The contention that he is liable to his vendees to the same extent that he seeks in the present action to recover from the respondent is a begging of a question supposed to be possible to arise between him and his vendees, which it will be time enough to determine if, and when, it does arise. As the matter now stands, it appears that appellant received full benefit of all that he bought from the respondent, for he has sold it at an advance, and in such case he has no claim as for reimbursement of a price paid for a thing sold to the appellant, of which he has not received any benefit.

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Moreover, there was no distinct sum which can be said to have been paid by the appellant as the price of the assignment to him of the respondent's rights under the deed in relation to the milk which can be recovered as a price paid for a thing sold but not delivered.

The fact, also, that the appellant admits that he has no interest in this action, and that he has, in fact, allowed his name to be used by and on behalf of a company, who are at present owners of the cheese factory which the respondent sold to the appellant, but whose interest, if any they have in the agreement as to the milk, does not appear, and who are not shown to have been in any manner prejudiced by reason of any thing connected with the contract as to milk, which was entered into between the farmers and the respondent, is sufficient in itself to the determination of the present action adversely to the appellant.

I concur, therefore, in the opinion that the appeal should be dismissed with costs

Appeal dismissed with costs.

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

Solicitor for respondent: *Jos. G. Bossé.*

MOISE MONETTE (PLAINTIFF).....APPELLANT; 1889

AND *Mar. 19.

PHILIZA LEFEBVRE, *et al.* (DEFENDANTS).....RESPONDENTS.

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

Practice—Right of appeal (P.Q.)—Amount in controversy—Supreme and Exchequer Courts Act, sec 29, *construction of—Jurisdiction.*

Where the plaintiff has acquiesced in the judgment of the Court of first instance by not appealing from the same, the measure of value for deter- mining his right of appeal under section 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the court of first instance, and not the amount claimed by his declaration. (*Levi* v. *Reed*, 6 Can. S. C. R. 482, over-ruled; *Allan* v. *Pratt*, 13 App. Cases 780, referred to as over-ruling *Joyce* v. *Hart*, 1 Can. S. C. R. 321.)

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

This was an action of damages for slander contained in certain resolutions adopted by defendants (respondents) as School Commissioners of the parish of St. Constant. The plaintiff (appellant) claimed by his declaration $5,000 damages and prayed that the defendants be ordered to enter in the minute book of the School Commissioners the judgment in the cause, and that the same be read at the church door of St. Philippe two consecutive Sundays. The case was tried before a judge without a jury and the plaintiff was awarded $200 damages. The defendants thereupon appealed to the Court of Queen's Bench (appeal side) and the

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plaintiff did not file any cross-appeal, but contended that the judgment for $200 should be affirmed. The Court of Queen's Bench, setting aside the judgment of the Superior Court, held that a retraction made by the defendants and a tender of $40 for damages and the costs of an action of $40 were sufficient, and dismissed the plaintiff's action for the surplus.

The plaintiff thereupon appealed to the Supreme Court of Canada.

Lacoste Q.C. and *Pagnuelo* Q.C. appeared on behalf of the appellant, and *Geoffrion* Q.C. and *Robidoux* on behalf of the respondents.

At the opening of the argument Taschereau J. raised an objection as to the jurisdiction of the court, the amount in controversy being under $2,000.

Pagnuelo Q.C. argued that the jurisprudence of this court on this question had been settled by the decision of the court in *Joyce* v. *Hart* (1), viz., that in order to ascertain the sum or value of the matter in controversy the court should look to the conclusions of the declaration.

[STRONG J.—According to the decision of the court in *Joyce* v. *Hart* it seems to me that you have a right to be heard, but the recent decision of the Privy Council in *Allan* v. *Pratt* (2) has overruled *Joyce* v. *Hart*.]

[TASCHEREAU J.—You might have filed a cross-appeal in the Court of Queen's Bench, but you acquiesced in the judgment of the Superior Court, and the amount in dispute before the Court of Queen's Bench was $200—nothing more.]

[FOURNIER J.—I am not prepared to say that appellant has renounced the right of claiming $5,000 damages before this court. The whole case is open.]

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

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Lacoste Q.C.—We have a right to have the resolution struck out of the registry.

[STRONG J.—The judgment of the Superior Court is simply a condemnation to pay you $200 damages and costs in this judgment You have acquiesced by not appealing against it.]

[TASCHEREAU J., Mr. Justice GWYNNE and Mr. Justice PATTERSON are also of opinion that we have no jurisdiction.]

STRONG J.—We are of opinion that the appeal should be quashed for want of jurisdiction, the sum or value of the matter in controversy being under $2,000.

Appeal quashed without costs.

Solicitors for appellant: *Pagnuelo, Taillon, Bonin & Gouin.*

Solicitors for respondents: *Robidoux, Fortin & Rocher.*

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*Mar. 22.

*Mar. 23.

CHARLES LABELLE, *et al*.....APPELLANTS;

AND

DAME EMMA BARBEAU.....RESPONDENT.

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

Appeal—Judicial Deposit by Insurance Company—Rival claims as to same—Value of matter in controversy—Jurisdiction—Supreme and Exchequer Courts Act sec. 29.

A life insurance company deposited with the prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of $3,000, being the amount of a life policy issued by the company to one E. L. which by its terms had become payable to those entitled to the same, but to one half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the three thousand dollars, and the respondent *(mise-en-cause* petitioner), the widow of the deceased, by a counter petition claimed as *commune en biens* one half; and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one half, it should be dismissed. After issue joined the Superior Court awarded one half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (appeal side) and that court confirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada.

Held—That the sum or value of the matter in controversy between the parties being only $1,500, the case was not appealable. R. S. C. ch. 135 sec. 29. (Fournier J. *dubitante*).

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

The question raised in this case was as to whether the collateral heirs of a deceased husband were entitled to claim the whole of the monies accruing from

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an insurance effected on his life, as against his widow, who claimed one half of it, as having been *commune en biens* with him.

On the 3rd day of April, 1875, Louis Labelle insured his life at the Ætna Life Insurance Company for the sum of $3,000.00, payable ninety days after his death, to his executors, administrators or assigns. Labelle died intestate and without issue, in December, 1886, and the company, to avoid any responsibility arising out of the conflicting claims on the money, deposited the sum of $3,000.00 in the hands of John S. Honey and others, joint prothonotary of the Superior Court.

The appellants who, in the absence of children, are the collateral heirs of the deceased, demanded by their petition that the prothonotary be ordered to pay them the amount so deposited in their hands.

The respondent, Emma Barbeau, widow of the deceased Louis Labelle, resisted their demand, on the ground that the insurance policy on which the sum now in the hands of the prothonotary has been paid, having been effected during the community which existed between her and her late husband, and the premiums paid by the community, the sum belongs to the community, and she asked for an order on the prothonotary to pay her one half of the said sum of $3,000.00, viz., $1,500.00.

The respondent's claim to the $1,500 having been maintained by the courts below the appellants appealed to the Supreme Court of Canada.

Trenholme for respondent moved to quash the appeal on the ground that the amount claimed, and in controversy between the parties was only half of the $3,000 deposited in court.

Laflamme Q.C. *contra*. The real question is a policy of $3,000, and the court will have to adjudicate upon the whole amount deposited, viz., $3,000. If the com-

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pany had paid the $1,500 to the wife, we would have claimed the $3,000.

[TASCHEREAU J.—The contestation in this case is only as to wife's share, and that is under the $2,000 necessary to give jurisdiction.]

Trenholme.—The respondent does not dispute the heirs' claim to the $1,500, and I cannot see how the case can be brought under section 29 of R. S. C. ch. 135.

STRONG J.—In this case the opinion of the majority of the court is that we have no jurisdiction. We need not rest our decision upon *Allan* v. *Pratt* (1), for it is manifest that the amount in dispute here is $1,500 only. The only doubt is as to costs. The application to quash should have been made at an earlier date to save the cost of printing.

FOURNIER J.—I do not dissent, but there is much to be said in favor of the view taken by Sir A. A. Dorion when he made the order allowing the appeal.

Appeal quashed with costs.

Solicitors for appellants: *Laflamme, Madore & Cross.*

Solicitors for respondent: *Trenholme, Taylor & Buchan.*

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(1) 13 App. Cases 780

JOHN MACFARLANE.....APPELLANT; 1889

AND *Feby. 23.

HER MAJESTY THE QUEEN.....RESPONDENT. *Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Criminal law—Assault on constable in discharge of duty—Serving summons—Trial of indictment—Witness—Competency of wife of defendant—R. S. C., ch. 162, sec. 34—R. S. C., ch. 174, sec. 216.

An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act is an assault on a peace officer in the due execution of his duty and indictable under R. S. C., ch. 162, sec. 34.

On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf.

APPEAL from a decision of the Court of Crown Cases Reserved for the Province of New Brunswick, affirming the conviction of the appellant on an indictment for assaulting a constable in discharge of his duty.

The constable was entrusted with the service of a summons against the appellant for violation of the Canada Temperance Act. Not finding him at his place of business he went to the appellant's house and met him coming out. It was after dark, and the constable asked appellant to return to the house for a light to enable him to pick out the summons from among others, which appellant refused to do, and walked away from the house. The constable followed, and after proceeding some distance appellant threatened to split his head open with a stick which he carried. After making this threat he knocked the constable down, and his wife, who was with him, kicked the constable as he lay on the ground. A person who had accompanied the constable came to his assistance, and

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having procured a light the summons was served. Appellant was indicted for the assault, and convicted. The following questions were reserved for the consideration of the Court of Crown Cases Reserved:

1. Was the service of a duplicate summons a proper service under the Act?

2. Were the appellant and his wife competent witnesses for the defence on the trial of the indictment?

3. Was the constable acting in the discharge of his duty when the assault was committed?

The first question was abandoned at the argument.

The Court of Crown Cases Reserved affirmed the conviction, Palmer J. dissenting, and from their decision the present appeal was brought to the Supreme Court of Canada.

J. A. Vanwart for the appellant.

R. J. Ritchie, Solicitor-General of New Brunswick, for the respondent.

The judgment of the court was delivered by

STRONG J.—I am of opinion that the defendant was properly convicted and that this appeal must fail.

The first point was virtually abandoned on the argument, and very properly so, for there cannot be any doubt that the service of a summons is properly effected by delivering a duplicate or copy to the defendant.

That the constable Jones was in the execution of his duty as a constable or peace officer when he was assaulted by the defendant whom he was endeavouring at the time to serve with the summons must, I think, necessarily result from the provision of the statute, which says that the service may be by a constable or peace officer, inasmuch as by the 14th section of the statute, it was made the imperative duty of the constable to serve a summons delivered to him by the magistrate. Then Jones was endeav-

ouring to serve the summons when he was assaulted by the defendant, and therefore he was assaulted when in the course of the execution of his duty. That this duty being one imposed by statute, and not a common law duty of a peace officer, can make no difference as regards the applicability of the statutory provision creating the special offence for which the defendant was indicted, inasmuch as the duty to serve the summons was imposed upon the prosecutor *ex officio* in his character as a constable or peace officer.

The only remaining question is whether the evidence of Jones and his wife, tendered at the trial on behalf of the defendant, was properly rejected, and I am of opinion that upon this point also the ruling of the learned Chief Justice was entirely right. Such evidence under the statute is only admissible where the defendant is charged with simple assault and battery, which must be taken to mean the old common law misdemeanor answering to that description. The defendant was not indicted for this offence, but for the statutory offence of assaulting a peace officer in the execution of his duty. Upon this point the case of *Reg.* v. *Richardson* (1) is direct authority against the appeal, and I see no answer to it.

In my opinion, there does not exist any reason for doubting that the ruling of the Chief Justice at the trial, and the judgment of the Supreme Court *in banc*, were correct.

The appeal must be dismissed.

Appeal dismissed and conviction affirmed.

Solicitor for appellant: *J. A. Vanwart.*

Solicitor for respondent: *Solicitor-General of New Brunswick.*

(1) 46 U. C. Q. R. 375.

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*Mar. 28.

*April 20.

IN RE MABEL BEATRICE SMART AND OTHERS, INFANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Habeas corpus proceeding—Time for appealing—Commencement of proceedings in appeal.

For the purpose of an appeal to the Supreme Court of Canada in a habeas corpus case the first step is the filing of the case in appeal with the registrar.

The judgment of the Court of Appeal in a habeas corpus proceeding was pronounced on Nov. 13th, 1888. Notice of intention to appeal was immediately given but the case in appeal was not filed in the Supreme Court until Feb. 18th, 1889.

Held—That the appeal was not brought within sixty days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in a proceeding by writ of *habeas corpus*.

The writ was issued by David Smart to obtain the possession of his children from their mother. After the case had been opened before Mr. Justice Ferguson he made an order directing that no further proceedings be taken on the writ but that the matter should be brought before the court by way of petition by the applicant (2). On appeal from this order the Divisional Court varied it by directing that the writ of habeas corpus should remain in force, and that the questions for trial under the return thereto should be tried at the same time and place as the questions under the petition directed by said order to be filed (3). The

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

(1) 12 Ont. P. R. 635. (2) 12 Ont. P. R. 312.
(3) 12 Ont. P. R. 435,

judgment of the Divisional Court was affirmed by the Court of Appeal. The mother of the infant children then appealed to the Supreme Court of Canada, seeking to have the original order of Mr. Justice Ferguson restored.

The judgment of the Court of Appeal was pronounced on Nov. 13th, 1888. Notice of intention to appeal to the Supreme Court of Canada was given by the mother a few days after, but nothing was done in the way of prosecuting the appeal until Feb. 18th, 1889, when the record was filed in the office of the registrar of the Supreme Court. The appellants obtained no order for the allowance of the appeal, and in a *habeas corpus* case no security for costs is required.

On March 19th, 1889, *Gormully* moved that the appeal be quashed for want of jurisdiction, or that an early day be fixed for the hearing. The court directed the registrar to have it placed at the head of the Ontario cases for the February session and the motion to quash to stand until the hearing.

S. H. Blake Q.C. for the appellant.

W. H. Kerr Q.C. and *Scott* Q.C. for the respondent.

The judgment of the court was delivered by

STRONG J.—The court is of opinion that the motion to quash this appeal must be granted. The judgment of the Court of Appeal for Ontario, from which the present appeal is brought, was pronounced on the 13th day of November, 1888. Notice of the appellant's intention to appeal to this court was given within a short time after the judgment, but no actual proceeding in such appeal was taken until the case or record now before us was filed in the office of the registrar of this court, on the 18th day of February, 1889. In appeals in *habeas corpus* proceedings, no security being required, the first proceeding must necessarily be the filing of the

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case in the Supreme Court, and that step must be taken within sixty days from the date on which the judgment appealed from was pronounced, there being nothing in the Act of Parliament (4) which governs the jurisdiction and procedure of the court exempting *habeas corpus* appeals from the operation of the 40th section of the statute. It is therefore impossible to do otherwise than quash the appeal which the court has no jurisdiction to entertain either by enlargement of the time or otherwise.

Appeal quashed with costs.

Solicitors for appellants: *Blake, Lash & Cassels.*

Solicitor for respondent: *H. J. Scott.*

(4) R. S. C. ch. 135.

LES ECCLÉSIASTIQUES DE ST. SULPICE DE MONTREAL (DEFENDANTS)..... } APPELLANTS;

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*Jan. 18.
*Mar. 19.

AND

THE CITY OF MONTREAL (PLAINTIFF) RESPONDENT.

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

Jurisdiction—Future rights—Supreme and Exchequer Courts Act—Sec. 29—Municipal taxes—Special assessments—Exemption—41 Vic. (Q.) ch. 6, sec. 26—Educational institution—Tax.

On an appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) in an action brought to recover $361.90, the amount of a special assessment for a drain along the property of the defendants the respondent moved to quash for want of jurisdiction on the ground that the matter in controversy was under $2,000, and did not come within any of the exceptions in section 29 of the Supreme and Exchequer Courts Act;

Held, that the case came within the words "such like matters or things where the rights in future might be bound," in paragraph 6 of section 29, and was therefore appealable.

By 41 Vic. ch. 6 sec. 26 all educational houses or establishments, which do not receive any subvention from the corporation or municipality in which they are situated, are exempt from municipal and school assessments "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary."

Held, reversing the judgment of the court below, that the exemption from municipal taxes enjoyed by educational establishments under said 41 Vic. ch. 6 sec. 26, extends to taxes imposed for special purposes, *e.g.* the construction of a drain in front of their property. (Sir W. J. Ritchie C.J. dissenting.)

Per Strong J.—Every contribution to a public purpose imposed by superior authority is a "tax."

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

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

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LES ECCLÉSIASTIQUES DE ST. SULPICE DE MONTREAL v. THE CITY OF MONTREAL.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) reversing the judgment of the Superior Court (1). This was an action brought to recover $361.90, the amount of a special assessment for a drain along the property of the defendants.

The amount of the taxes was not contested, but by a special plea the defendants contended that their property was exempt from taxation, because the said property was, at the time of the construction of the drain, as it has since continued to be, an educational institution receiving no grant from the Corporation or Municipality of Montreal, in which it is situated.

The answer to the plea was that the exemption claimed by the defendants did not apply to the taxes and assessments claimed by the action.

The facts of the case were admitted by the parties, and it was agreed that the city's claim was for a special assessment for a local improvement, and that the property was destined to the purposes of education, and received no subsidy from the municipality.

On the 11th October, 1888, *Ethier*, counsel for the respondent moved to quash the appeal, on the ground that the matter in controversy was under $2,000, and did not come within any of the exceptions in sec. 29 of the Supreme and Exchequer Courts Act. *Geoffrion* Q.C. *contra.*

Per Curiam. The case is appealable as coming within the words "such like matters or things where the rights in future might be bound" in par. 6 of sec. 29 of the Supreme and Exchequer Courts Act—If the rate struck was found to be insufficient and another rate imposed, the parties would be bound by the judgment in this case.

(1) M. L. R. 2 S. C. 265.

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On the merits—*Geoffrion* Q.C., for the appellants (defendants) contended that under 41 Vic. ch 6, sec. 26 (P.Q.), every educational institution receiving no grant from the Corporation of the City of Montreal is exempt from all municipal and school taxes, and that the words used in the Act include all taxes, rates or assessments. See Arts. 19, sec. 22, 712 and 713, Mun. C., *Wylie* v. *City of Montreal* (1); *City of Montreal* v. *Christ Church Cathedral* (2).

Ethier for respondent (plaintiff) contended that the exemption did not extend to special assessments for improvements, and that a special assessment levied on an immovable property in proportion to the benefit it derives from a local improvement, is not a tax, in the true sense of the word: it is now acknowledged by the best authorities on municipal taxation that a tax is an impost which is to be borne by all the members of a corporation for the general advantage and in the interest of the public; on the contrary a special assessment is a certain share the proprietors of a limited locality are called upon to contribute according to the increase in value given their properties by a local improvement; numerous decisions based on this distinction have been pronounced by the courts of the neighboring Republic, where, it may be readily conceded, the theory of municipal government is thoroughly understood.

See Maxwell on Statutes (3); Cooley on Taxation (4); Angell on Highways (5); Hilliard on Taxation (6); Burroughs on Taxation (7); Abbott on Law of Corporations (8); Potter on Corporations (9); *Kirby* v. *Shaw* (10); *Wright* v. *Boston* (11); *Hayden* v. *Atlanta* (12);

(1) 12 Can. S.C.R 384.
(2) M. L. R. 4 S. C. 13.
(3) P. 66.
(4) P. 606.
(5) P. 196 nos. 172-173.
(6) P. 72 sec. 5 pp. 74-85.
(7) P. 113 sec. 67.
(8) 2 vol. P. 683 nos. 98-100.
(9) 1 vol. P. 280 sec. 213.
(10) 19 Pa. St. 258.
(11) 9 Cush. 233-241.
(12) 70 Ga. 817.

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Municipal Code L. C. O. (1); Municipal Laws of Montreal, 1865, Glackmeyer (2); Municipal Laws of Montreal, 1870, Glackmeyer (3); *Haynes* v. *Copeland* (4); Dillon on Municipal Corporations (5); Proudhon, Domaine de la Propriété (6); Dalloz, Dict., Vo. "Contributions Directes" (7); *Shaw* v. *Laframboise* (8); C. C. for L. C., arts. 2009 & 2011; See also 46 Vic. ch. 78 sec. 21, (Quebec).

Sir W. J. RITCHIE C.J.—I am of opinion the appeal should be dismissed with costs.

STRONG J.—The enactment upon which the decision of this appeal turns is that contained in Statute 41 Vic. cap. 6, sec. 26, being an amendment or addition to the Common School Act cap. 15 of Con. Stats. of Lower Canada.

It exempts all educational houses or establishments, which do not receive any subvention from the corporation or municipality in which they are situated, from municipal and school assessments (des cotisations) "whatever may be the act in virtue of which such "assessments are imposed, and notwithstanding all "dispositions to the contrary."

What is sought to be recovered from the appellants is a contribution or sum assessed in respect of a drain constructed by the corporation in front of the appellants' property situated in the city of Montreal.

Under the Act of incorporation of the city of Montreal the appellants, like other property owners, would be liable to pay this contribution, unless they can bring themselves within this exemption in 41 Vic.

The appellants receive no subvention or pecuniary aid

(1) Arts. 1-475.
(2) P. 46.
(3) By-law No. 45, sec. 3 p. 179.
(4) 18 U. C. C. P. 150.
(5) 2 Vol. ed. 3 p. 727, 776-77-78.
(6) 3 Vol. p. 101 No. 849.
(7) No. 114 et passim.
(8) 3 Rev. Leg. 451.

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Strong J.

of any kind from the city. Their exemption, therefore, must depend on the single point whether this assessment or charge in respect of a contribution to the drain is or is not a municipal assessment.

With great respect for the Court of Appeal, I think there can be little doubt on this point. The appellants are undoubtedly "assessed" by the city in respect of the contribution which it is sought to compel them to pay, for I understand the word assessment to imply "the assessment of a tax." Then the appellants are taxed for this drain, for every contribution to a public purpose imposed by superior authority is a "tax" and nothing less. The city is therefore seeking to compel the payment of this contribution in direct contravention of the terms of the enactment referred to which clearly exempts the appellants.

For these reasons, which are fully and ably set forth in the dissenting opinion of Mr. Justice Church in the Court of Appeal, and in that of Mr. Justice Loranger in the Superior Court, I am of opinion that we must allow this appeal with costs to the appellants here, as well as in all the courts below.

FOURNIER J.—Par son action en cette cause, l'intimée réclame des appelants la somme de $361 90, pour taxes et cotisations imposées suivant la loi et les règlements de la corporation de la cité de Montréal, pour la contribution des appelants à un égout ou canal, construit en 1878, en face de leur propriété portant le n°1717, dans le quartier Saint-Antoine de la dite cité.

En réponse à cette demande les appelants ont plaidé qu'ils possédaient et occupaient cette propriété aux dates mentionnées en la déclaration, et encore actuellement, comme maison d'éducation et les dépendances d'icelle, —ne recevant aucune subvention de la corporation ou

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municipalité de la dite cité de Montréal où cette propriété est située.

Par sa réponse à ce plaidoyer, l'intimée allègue que la propriété en question n'est pas exemptée des cotisations municipales et scolaires et notamment de celles réclamées en cette cause.

La preuve a été faite au moyen d'une admission couvrant tous les faits qu'il était nécessaire d'établir pour la décision du litige.

Au mérite, l'honorable juge Loranger a rendu jugement, maintenant l'exemption de taxes invoquée par les appelants, mais son jugement a été infirmé par la cour du Banc de la Reine pour la raison que l'intimée avait le droit de faire cet ouvrage et d'en répartir le coût parmi les personnes dont les propriétés devaient en profiter; et aussi parce que l'ouvrage en question étant d'un caractère local, pour des fins tout à fait locales et à l'avantage spécial de la propriété des appelants, la cotisation prélevée pour en défrayer les dépenses n'était pas de la nature d'une taxe municipale conformément à l'acte 41 Vict., ch. 6, sec. 26,—mais qu'elle était au contraire d'une nature purement locale.

La question soulevée par cette contestation est de savoir si l'exemption de taxes municipales et scolaires accordée par le 41ème Vict., ch. 6, sec. 26, comprend aussi l'exemption de cotisations spéciales imposées sur la propriété immobilière pour améliorations dans une localité particulière de la municipalité.

L'exemption dont il s'agit est énoncée dans les termes suivants :

3. Toutes maisons d'éducation qui ne reçoivent aucune subvention de la corporation ou municipalité où elles sont situées, ainsi que les terrains sur lesquels elles sont érigées et leurs dépendances, seront exemptes des cotisations municipales et scolaires, quelque soit l'acte ou charte en vertu duquel les cotisations sont imposées, et ce nonobstant toutes dispositions à ce contraires.

L'effet de cette clause a déjà été considéré par cette

cour dans la cause de Wylie contre la présente intimée (1). La différence entre les deux causes est que dans la première les taxes réclamées, ne comprenaient pas comme celles-ci une cotisation spéciale pour amélioration locale à la propriété immobilière. La question à résoudre se réduit donc à savoir si les expressions de la sec. 26, "cotisations municipales," comprennent aussi les cotisations spéciales d'une nature locale.

Avant l'adoption de la sec. 26, le principe de l'exemption de taxes scolaires en faveur des institutions d'éducation était déjà introduit dans les lois de la province de Québec, et notamment dans le ch. 15 de l'acte des écoles communes, sec. 77, parag. 2. Il est aussi énoncé dans plusieurs autres statuts, entres autres, le ch. 24, statuts revisés, B. C., l'acte municipal et des chemins, dont la sec. 58 met les maisons d'éducation dans la catégorie des propriétés exemptes de toutes taxes ou cotisations imposées en vertu de cet acte. Le code municipal, 34 Vict., ch. 68, art. 712, parag. 3, dans sa longue énumération de propriétés exemptes de taxes, comprend aussi les institutions d'éducation.

Cette exemption de taxes se retrouve encore dans la 40 Vict., ch. 29, concernant les clauses générales d'incorporation des cités et villes, à la sec. 325, parag. 3. Ce principe d'exemption que l'on retrouve dans tant de statuts paraît avoir été adopté systématiquement par la législature comme un moyen d'encouragement pour la cause de l'éducation. Le code municipal ne s'appliquant qu'aux municipalités rurales, n'affecte pas la cité de Montréal dont la charte avant d'avoir été amendée par la 38ème Vict., ch. 73, ne lui imposait aucune exemption ; mais la section 3 de cet amendement a décrété l'exemption des églises, presbytères, palais épiscopaux, de toutes taxes, et exempté de taxes

(1) 12 Can. S. C. R. 384.

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municipales ordinaires et annuelles les établissements occupés pour des fins de charité. Dans cette disposition, les institutions d'éducation n'ont pas été comprises —et elles seraient sans doute soumises aux taxes sans la clause 26 de la 41ème Vict., ch. 6, qui les en a exemptées. L'intention du législateur a été évidemment de faire prévaloir le même système par toute la province. C'est pour cela qu'il s'est prononcé d'une manière si générale qu'il n'est pas possible d'en limiter l'effet. En déclarant que les maisons d'éducation seraient exemptes des cotisations municipales et scolaires, quelque soit l'acte ou charte en vertu duquel les cotisations sont imposées et ce nonobstant toutes dispositions à ce contraire, le but était évidemment d'atteindre la cité de Montréal, qui se trouvait la seule localité de la province qui n'était pas soumise à une semblable disposition. La cité ayant une charte spéciale, on aurait pu peut-être prétendre que la loi qui la régit ne pouvait être amendée par des expressions générales dans une loi étrangère, aux matières municipales. Mais le doute est impossible en présence des expressions employées pour généraliser et spécialiser l'exemption: "quelque soit l'acte ou charte en vertu duquel les cotitions sont imposées, et ce nonobstant toutes dispositions à ce contraires." Il faut nécessairement en conclure que la cité de Montréal est soumise à l'exemption décrétée par la sec. 26 ci-dessus citée et qui est postérieure à sa charte.

La distinction que fait l'intimée entre les taxes ordinaires et annuelles aurait pu être soutenable en vertu de la sec. 3, de l'acte 38 Vic.,—où ces expressions paraissent avoir été ajoutées dans le but de limiter les effets d'exemptions. Les cotisations spéciales pour fins purement locales pourraient être distinguées des taxes ordinaires et annuelles, si la question était soulevée ici à propos d'institutions de charité mentionnées dans

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la sec. 3, et si elle devait être décidée d'après cette loi. La section 26 qui doit servir de règle pour la décision de cette question ne fait aucune distinction quelconque entre les taxes ou spéciales ou générales, elle se sert dans son sens le plus large des mots cotisations municipales, en ajoutant quelque soit l'acte ou charte en vertu duquel elles soient imposées. Il me semble qu'il est tout à fait impossible de trouver dans ces expressions la possibilité de faire la distinction que l'intimée essaie de faire prévaloir. Les termes employés sont d'une généralité si complète et si absolue qu'il n'y a pas à se méprendre sur leur signification—"toutes cotisations municipales" comprend toutes cotisations municipales quelqu'en soient la nature.

TASCHEREAU J.—I am of opinion that appellant's property is free from this tax for the reasons given by Mr. Justice Loranger in the Superior Court (1).

PATTERSON J. concurred with STRONG J.

*Appeal allowed with costs.**

Solicitors for appellants: *Geoffrion, Dorion, Lafleur & Rinfret.*

Solicitors for respondent: *Roy & Ethier.*

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(1) M. L. R. 2. S. C. 265.

* On a motion for leave to appeal made to the Judicial Committee of the Privy Council, the following judgment was delivered on the 27th July, 1889:—

BY LORD WATSON.

This is a petition at the instance of the municipal corporation of the city of Montreal, for leave to appeal from a judgment of the Supreme Court of Canada, by which the Seminary of St. Sulpice, which is within the boundaries of the city, has been exempted from payment of a sum of $361.90, about £70 sterling, being the proportion charged upon it, by the petitioners, of a special assessment made by them for the cost of constructing a main drain which runs in front of its premises. The Supreme Court, by a majority of four to one (Ritchie, C.J., being the dissentient judge), reversed the decision of the Queen's Bench for Lower Canada, which was also pronounced by a majority

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Judgment of the J. C. of Privy Council.

of four to one, and restored the judgment of Loranger, J., the judge of first instance.

In considering applications of this kind, it is necessary to keep in view that the Statute of Canada, 38 Vic., ch. 11, which established the Supreme Court of the Dominion, does not give to unsuccessful litigants a direct right, either absolute or conditional, to appeal from the decisions of that tribunal. Section 47 expressly declares that no appeal shall be brought from any judgment or order of the Supreme Court to any court established by the Parliament of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard; but saves any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative.

It is the duty of their Lordships to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shown that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be *primâ facie* established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon*, (8 App. Cas. 103), their Lordship have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal.

The exemption which the Supreme Court has sustained in the present instance is a statutory one. The petitioners narrate the 77th section of the Consolidated Statutes of Lower Canada, cap. 15, and then proceed to allege that the effect of the judgment will be "to determine the future liability "(meaning apparently non-liabi-"lity) of buildings set apart for "purposes of education, or of "religious worship, parsonage "houses, and charitable and educa-"tional institutions and hospitals, "to contribute to local improve-"ments carried out in their inter-"ests and for the benefit of their

"properties." Had that statement been well founded, it might have been an important element in considering whether leave ought to be given. But it is plainly erroneous. The statute in question, which relates to "public education," exempts the properties above enumerated from educational rates levied for the purposes of the act, and from no other rates.

The clause upon which the judgment of the Supreme Court proceeded is section 26 of the statutes of the Province of Quebec, 41 Vic., ch. 6, which is an act to amend the laws respecting public instruction. "It enacts that: "Every education-"al institution receiving no grant "from the corporation or muni-"cipality in which they are situ-"ated, and the land on which they "are erected, and its dependencies, "shall be exempt from municipal "and school taxes, whatever may "be the act or charter under "which such taxes are imposed, "notwithstanding all provisions to "the contrary."

The Seminary of St. Sulpice admittedly does not receive any grant from the Corporation of the City of Montreal, and is therefore within the benefit of the exemption created by section 6, and the only issue raised between the parties is, whether a district rate for drainage improvements, levied from that portion of the municipal area which directly benefits by its expenditure, is or is not a municipal tax within the meaning of the clause.

The petition does not set forth the sources from which the petitioners derive their authority to execute such improvements as drainage, and to assess for their cost. Powers of that description are entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise. *Primâ facie*, their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes, and at the hearing of the petition their impression was confirmed by a reference to the General Municipal Acts for Lower Canada. The counsel who appeared for the petitioners stated, however, that their powers are derived, not from the General Acts, but from a charter, the terms of which were neither referred to nor explained. If the terms of the charter materially differ from those of the General Acts, that deprives the case of any general importance. But it is quite possible that the concluding words of section 6 may have been purposely introduced by the Legislature in order to secure uniformity of exemption, whatever might be the terms in which the power to assess was conferred; and that, consequently, in construing the clause, the expression "municipal taxes" ought to be interpreted according to its general acceptation, and not according to the meaning which it might be held to bear in some charter or statutes applicable to particular municipalities.

In these circumstances their Lordships are not prepared to advise Her Majesty that the petitioners ought to have leave to appeal. If such questions are, as they say, of frequent occurrence in the city of Montreal, they may have the opportunity of obtaining the decision of this Board in another case, upon appeal from the Court of Queen's Bench for the Province. The petition must therefore be dismissed.

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*Nov. 24.

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*Mar. 18.

THE HON. GEORGE WHITMAN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

THE UNION BANK OF HALIFAX (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment—In trust for creditors—Preference—Fraud against creditors—Statute of Elizabeth—Resulting trust.

A deed of assignment of property in trust for the benefit of creditors provided for the distribution of the assets by the assignee as follows: First, to pay certain named creditors in full.—Secondly, if sufficient assets remained after such payment to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same *pro ratâ* among such second preferred creditors.—Thirdly, to divide the remaining assets among all the creditors not preferred in equal proportions according to their respective claims and—Fourthly, to pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect. In an action to set aside the deed:

Held, affirming the judgment of the court below, Gwynne and Patterson JJ. dissenting, that the deed was one to which it was unreasonable to expect unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favor of the debtor, it was void under the statute, 13 Eliz. ch. 5.

If objection is made to the form of a bond for security for costs on appeal to the Supreme Court it should be by application in chambers to dismiss and if not so made the objection will be held to be waived.

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

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

The action in this case was brought to set aside a deed assigning to the defendant Whitman, in trust for the benefit of their creditors, all the real and personal property of his co-defendants. The deed preferred two sets of creditors who were first to be paid in full; then the remaining assets were to be distributed in equal proportions among the unpreferred creditors and the surplus, if any, was to be returned to the assignors. The deed provided that the execution by each creditor should release and discharge the debtors from all and every claim of such creditor against them, and that the assignee should not be required to account for more money or assets than he should receive, nor be liable for any loss or damage to the trust estate unless the same should be caused by his own wilful neglect.

The trial judge, who tried the case without a jury, gave judgment in favor of the defendants, holding that the deed was not fraudulent under the statute of Elizabeth. The court *in banc* reversed this judgment and ordered the deed to be set aside. The defendants then appealed to the Supreme Court of Canada.

Borden for the respondents took as a preliminary objection to the hearing of the appeal, that the bond given as security for costs is not in the statutory form and does not provide for the prosecution of the appeal. The court considered the bond insufficient, but held that an application to dismiss should have been made in chambers, and not having been so made, it must be taken to be waived.

Harrington Q.C. for the appellants cited *The Toronto*

(1) 20 N. S. Rep. 194.

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Bank v. *Eccles* (1); *Ex parte Games* (2); *Alton* v. *Harrison* (3); *Boldero* v. *London, &c., Loan Co.* (4).

Borden and *W. B. Ritchie* for the respondents referred to *Gallagher* v. *Glass* (5); *Slater* v. *Badenach* (6); *Slater* v. *Spencer* (7); *Cornwall* v. *Gault* (8); *Larpent* v. *Bibby* (9); *D'Ivernois* v. *Leavitt* (10).

Sir W J. RITCHIE C.J.—I am of opinion the appeal should be dismissed with costs.

STRONG J.—I am of opinion that this appeal must be dismissed. It appears to me that the deed of assignment was fraudulent and void under the statute 13 Elizabeth ch. 5, inasmuch as it imposed unreasonable terms on creditors, requiring them either to release their claims if they assented to the deed, and in default of their doing so, not only excluding them from the benefit of the deed, but subjecting any residue of the estate to a resulting trust in favor of the debtor. The concurrence of these provisions in the same deed shows that it was intended to hinder and defeat creditors. I therefore agree in the main with the reasons given in the judgment of the Chief Justice delivered in the court below (11).

TASCHEREAU J.—I would dismiss this appeal upon the ground taken by McDonald C.J. in the court below, that the assignors by their deed retained a portion of the assets of the estate, by making such a provision as diverted assets for their own use that ought to go to all the creditors. I think that this assignment is fraudulent and void under the 13th Elizabeth ch. 5, *Spencer* v. *Slater* (7).

(1) 2 E. & A. (Ont.) 53.
(2) 12 Ch. D. 314.
(3) 4 Ch. App. 622.
(4) 5 Ex. D. 47.
(5) 32 U. C. C. P. 641.
(6) 10 Can. S. C. R. 296.
(7) 4 Q. B. D. 13.
(8) 23 U. C. Q. B. 46.
(9) 5 H. L. Cas. 481.
(10) 23 Barb. at p. 80.
(11) 20 N. S. Rep. p. 194.

GWYNNE J.—The deed assailed in this case is not, in my opinion, void within the statute of Elizabeth as against creditors by reason of any of the objections which have been taken to it nor, so far as I can see, for any reason. It is not, in my opinion, open to the construction that it enables the trustees, who have accepted the burthen of executing the trusts thereof, to withhold at their pleasure any part of the estate conveyed to them from the creditors, or for the benefit of the debtors; their attempt to do anything of the kind would be a plain breach of trust, for which they would be accountable to the creditors. Neither is it at all correct to say that the deed provides, as did the deed in *Spencer* v. *Slater* (1), that a dividend which would be payable to creditors signing shall, in the cases of any not signing, be paid to the debtors; on the contrary, in the event of a creditor refusing to sign his refusal enures to the benefit of those who do sign, and not to the benefit of the debtors. In short between the deed in the present case and that in *Spencer* v. *Slater* (1) there is the greatest possible difference. That the deed makes provision for certain preferred creditors is no valid objection within the statute of Elizabeth. Neither is the clause which requires all creditors receiving benefit under the trusts of the deed to release the debtors. What is called the resulting trust in favor of the debtors, and which is complained of as unjust and as making the deed void within the statute, is the ordinary trust contained in every trust deed in favor of the debtors in respect of any residue, if any there should be, after payment of all creditors in full; and to such a trust provision no reasonable objection can be taken; *Boldero* v. *London & Manchester Loan Co* (2)..

True it is, that if certain creditors should not sign

(1) 4 Q. B. D. 13. (2) 5 Ex. D. 47.

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it might happen, but not necessarily, that there might be a surplus, after all who do sign should be paid in full, which would become payable to the debtors, which would not have become payable to them if all should sign; but that would be a result brought about by the default of the creditors themselves in not signing and not by any act of the debtors whose intention, as expressed in the deed, is that all shall sign and that all shall be paid in full before there shall or can be any residue to be paid to the debtors. If there be nothing in the deed which imposes, or affects to impose, an unjust and unreasonable burthen or condition upon those who do sign, a creditor who is unwilling to sign has no basis upon which to found a complaint that the deed is unjust to him. In such a case it is the fact of his not signing which does him prejudice and he cannot attribute such prejudice to any provision in the deed. Now, this deed imposes no condition upon any creditor who signs except that he shall release the debtors, and as this is not a valid objection within the statute, nor is the clause giving preference to some creditors open to objection, I can see nothing in the deed which, viewed in the light of the numerous decisions upon this subject, can be said to avoid the deed within the statute of Elizabeth.

I am of opinion, therefore, that the appeal should be allowed and the judgment of the court of first instance restored with costs.

PATTERSON J.—A deed of assigment for the benefit of creditors, made by Arthur W. Corbitt and George E. Corbitt, merchants, of Annapolis, in N.S., to the defendant Whitman, has been held to be fraudulent and void under the statute 13 Elizabeth, ch. 5, by the judgment of the Supreme Court of Nova Scotia from which this appeal is brought.

Let us see at the outset what are the precise provisions of the deed.

It bears date the 5th of December, 1884, and purports to be made between Arthur W. Corbitt and George E. Corbitt, formerly doing business under the name, style and firm of A. W. Corbitt & Son, of the first part; the Hon. George Whitman, of the second part, "trustee appointed for the purposes hereinafter mentioned; and the several persons, creditors, indorsers, guarantors, or sureties of or for the said parties of the first part who have or shall hereafter execute or accede to these presents within three months from the date hereof, of the third part"

The deed then recites that the parties of the first part are at present unable to pay immediate demands upon them, and deem it best and resonable to secure, pay and indemnify the several persons parties to these presents in manner hereinafter mentioned, and goes on to convey to the party of the second part, his heirs and assigns, certain specified lands, some of which are described as being subject to mortgages,

But upon trust that the said party of the second part shall, if he deem it fit and expedient, in a reasonable time, sell and dispose of, at public auction or private sale, for cash or on credit, after due advertisement of the same, the above described lots, pieces or parcels of land and premises for the highest price to be obtained therefor, and to convey the same by deed or deeds to the said purchaser or purchasers, and upon receipt of the purchase money arising from the said sale or sales of the said second lot, to apply the same to the payment of the said mortgages above described, which said mortgages cover the said second lot; and then first to apply the balance of the purchase money arising from the sale of the said real estate, after deducting the expenses of this trust, in payment of the several amounts due and to grow due, the following persons in full as creditors, indorsers, guarantors, sureties, or otherwise of the said parties of the first part, that is to say: [naming six creditors]; and secondly, after paying the said creditors hereinbefore named and the expenses of this trust in full, to apply the balance of the said purchase money in payment of the amounts due and to grow due the following persons in full on account, or as creditors, indorsers,

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guarantors, sureties or otherwise of the said parties of the first part, that is to say: [naming 24 creditors]; thirdly, after paying the expenses of this trust and the creditors hereinbefore named as first and second preferential creditors of the said parties of the first part, and in case there shall be any surplus of the said property or funds after fulfilling the said trusts, then that said party of the second part do and shall divide, distribute and pay over to the other creditors of the said parties of the first part, who shall become parties hereto in manner hereinbefore described ratably and in proportion to the amounts due to each of them respectively, without any preference or priority, and if anything shall remain thereafter the said party of the second part shall convey, deliver and pass over the same to the parties of the first part, their executors, administrators and assigns.

Then follows a general assignment of stock-in-trade and all personal effects to the party of the second part upon trust to sell with all reasonable speed and to get in debts or other outstanding interest; and forthwith, after deducting the expenses of executing the trust, the cost of preparing and executing the deed of assignment, and his own charges and commission as assignee, to deal with the fund in the same manner as directed with regard to the proceeds of the real estate. This trust is expressed at length, as in the former case, the only difference being the omission of one name from the list of second preferred creditors. We have then the ordinary power of attorney; power to the trustee to adjust the amounts due to creditors, including power to compound and to arbitrate; proviso that no person shall be entitled to be a creditor under that deed, unless notice shall have been given by him of his debt or demand to the trustee before a final dividend shall have been made of the trust property; a covenant by the trustee with the parties of the first and third parts to execute the trusts to the best of his judgment and discretion,

Provided always and it is hereby agreed, that the said party of the second part, his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damage which he may receive, nor for any loss or damage

which may happen in reference to the said trusts, unless it arise by or through his own wilful neglect.

I may remark, in passing, that this expression "any loss or damage which he may receive," which is not a happy one, looks as if it got there by an error in engrossing the document, perhaps, by erroneously writing in ten words from the word "damage" where it first occurs to and including the second word "damage."—I make this observation assuming the document to be correctly printed in the book before me. I am not sure that the words which seem interpolated are not here owing to a misprint, because I find the passage quoted without them in the judgment, as printed, of Mr. Justice McDonald, when he is made to say:—

> The deed contained a release of all claims against the debtors. together with the following provisions: "And it is hereby agreed that the said party of the second part, his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damages which may happen in reference to the said trusts, unless it shall arise by or through his own wilful neglect."

yet that learned judge in the same judgment treats the clause as if the words were there, and the same reading of it has been made the ground of some argument before us. I apprehend that it makes no difference whatever whether the words are in the original deed or not, because, if they are, they are manifestly governed by the qualification "unless it shall arise by or through his own wilful neglect."

The learned judge seems to have fallen into a misapprehension on this point, as I shall further notice by and by.

The remainder of the deed is the release clause which I quote in full:—

> And the said respective creditors, parties hereto, each and every of them for himself and herself severally and respectively, and for their

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several and respective executors and administrators, do hereby accept and take the estate and effects hereinbefore assigned in full payment, satisfaction and discharge of all their respective debts, demands, and of all loss or damage to be sustained by reason of any liability aforesaid, and do and each of them doth absolutely remise, release, discharge and quit-claim the said parties of the first part. their executors and administrators, of and from all demands which they or any or either of them now have against them.

The issue was tried before Mr. Justice Weatherbee, who found that there was no fraud on the part of the defendants and gave judgment for the defendants.

That judgment was reversed by the court in banc. The judgment, which I understand to express the opinions of all the learned judges who heard the motion, except the Chief Justice, was delivered by Mr. Justice McDonald. The Chief Justice concurred in the conclusion, but limited himself to one of the reasons for which the other members of the court held the deed to be void.

The deed had attached to it certain statements purporting to show the debts and the assets of the assignors. I think the only allusion to it, contained in the deed itself, is in the following passage from the clause relating to the power of the trustee to adjust claims.

> And it is further agreed that the naming of any debt or debts due or owing in any schedule hereto annexed shall not prevent the parties of the first and second part from calling into question or controverting the amount of the same, and if the amount of any creditor shall have been stated as being greater or smaller than it really is, such creditor shall be entitled to the benefits of these presents upon and only upon and for the amount which may be found to be justly due him.

The position of the plaintiffs with reference to the estate is thus correctly stated by Mr. Justice McDonald:

> It appears by the statement attached to the deed of assignment that the plaintiff bank at that time held notes and drafts, indorsed by the debtors, to the amount of $28,500, for which no provision was made except as just mentioned, so that the plaintiff was not only excluded from the list of first and second preferential creditors, but was expected to look for payment of the large sum just named to what appears to be

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a most uncertain source, and even that upon his becoming a party to a document which released the debtors from all further claims, indemnified the assignee, except as we have seen, and provided that if any balance remained after paying those who became parties to the deed as prescribed the same should be paid over by the trustee to the debtor himself, excluding altogether creditors who did not sign the deed.

The decision was that the deed was one which it was unreasonable to expect the plaintiffs to become parties to, and was bad under the statute, by reason of three things: the release clause, the clause that was taken to indemnify the assignee against loss and damages not occasioned by his wilful neglect, and the trust to hand over to the assignors any balance that might remain after paying in full all the creditors who became parties to the deed.

It was upon the last ground alone that the learned Chief Justice rested his concurrence.

No notice is taken in the judgments of reasons outside of the deed itself on which also it was attacked as fraudulent. I do not think it necessary to say more respecting those extraneous matters than that the attention which I gave to the evidence during the argument, when Mr. Ritchie left nothing unsaid that could aid his contention, and a second careful examination of it, have failed to create any doubt in my mind of the correctness of Mr. Justice Weatherbee's finding.

I am satisfied that the deed must be dealt with, as it was by the court in banc, upon the effect of what we find within its four corners.

The three grounds acted upon are reduced to two by the circumstance that the learned judge overlooked for the moment the qualification of the indemnity clause, which clause, properly construed, is merely the ordinary clause found in every trust deed, and which, if it had not been expressed in this deed, would have been imported into it by the statute R.S.N.S. 4th series, ch. 108, sect. 24.

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The other objections require a glance at the operation of the statute of Elizabeth as it is to be gathered from decisions.

We have always to remember that it does not, like a bankrupt act, contemplate an equal distribution of the assets of a debtor among his creditors. This may be almost a truism. Every one will admit it in terms, without hesitation; but it is not unusual to find arguments on the validity of deeds of this class influenced, consciously or unconsciously, by the notion that to prefer one creditor to another is an offence against the statute, if not a fraud at common law.

"All deeds of this sort," as observed by Maule J. during the argument in *Janes* v. *Whitbread* (1), "are within the letter of the 13th Elizabeth, ch. 5, sec. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed, shall be void,—that is, all deeds made to or for any of the intents or purposes mentioned in section 1, viz., 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits and debts, &c.'" He referred to *Pickstock* v. *Lyster* (2), where it was decided that if a man assigns all his property to a trustee simply with the purpose of having it fairly distributed amongst all his creditors, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the spirit of the act, and therefore is not void,—because it does not deprive any of the creditors of his fair share of the debtor's property if he chooses to become a party to the deed. Then he refers to *Owen* v. *Body* (3), in which it was held that creditors could not reasonably be asked to be parties to deeds containing the terms as to carrying on the business which were then in question, and dis-

(1) 11 C. B. 406, 416.
(2) 3 M. & S. 371.
(3) 5 A. & E. 28.

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tinguishes from it the deed in *Janes* v. *Whitbread* (1) which provided for carrying on the business with the object of winding it up, not as in *Owen* v. *Body* (2) for the purpose of making money to pay the creditors who became parties to the deed.

We have a key to the spirit of the statute in the full reading of the language "feigned, covinous, and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, &c."

This is noticed in the very instructive judgment of Sir J. B. Robinson in a case in Upper Canada, *Bank of Toronto* v. *Eccles* (3). That judgment and the judgment of Mr. Justice Burns in the same case, as also the judgment of the present Chief Justice of Ontario, then Mr. Justice Hagarty, when the case was before the Court of Common Pleas (4) will be found to contain an exhaustive discussion of the decisions, English and American, down to the year 1862. The deed in that case, like the deed before us, assigned all the estate of the debtor to trustees for the satisfaction of his debts, preferred some creditors to others, and contained a release by the creditors who should execute, providing that those who did not sign should not receive dividends, and excluding all creditors who did not come in within thirty days. The validity of the assignment was sustained by the Court of Error and Appeal, affirming the judgment of the Common Pleas. Two of the learned judges dissented, considering that it was unreasonable to demand a release when the preferences created by that assignment were given. For my own part, I entirely agree with the reasoning and the conclusions of the majority of the court, and with the greatest respect for the opinions of the late Chief Justice of Ontario, then Vice-Chancellor Spragge,

(1) 11 C. B. 406.
(2) 5 A. & E. 28.
(3) 2 E. & A. Ont. Rep. 53.
(4) 10 U. C. C. P. 282.

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by whom the dissenting judgment was delivered, I am obliged to regard that judgment as an example of the occasional tendency, of which I have spoken, to import into the statute of Elizabeth the idea of equal distribution of assets, which is something outside of its contemplation, although it obtains in the administration of estates in equity, and is a principle of bankruptcy law.

Holbird v. *Anderson* (1) settled the question of the right of a debtor to prefer one creditor to another without offending against the statute of Elizabeth.

Pickstock v. *Lyster* (2) was upon an assignment of all the goods of a debtor for the general benefit of his creditors, which was held to be valid on the principle of *Holbird* v. *Anderson*. There was no release clause in the assignment.

In *The King* v. *Watson* (3) the insolvent assigned all his estate to trustees for creditors, stipulating expressly for a release. Counsel pressed on the court that the deed was void under 13th Elizabeth, and the more strongly "as there was a condition imposed on all who should entitle themselves by signing it, that they should release the debtor from the rest of their demand in consideration of such dividend as they should receive." *Per curiam*—"There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all creditors. * * * This is a very common arrangement which it would be very injurious to disturb where there has been no commission of bankruptcy."

In *Goss* v. *Neale* (4) certain chattels were assigned for the benefit of certain creditors of the assignor for four years; at the expiration of two years, or sooner if the assignor should so direct, the trustees were to

(1) 5 T. R. 235.
(2) 3 M. & S. 371.
(3) 3 Price 6.
(4) 5 Moore 19.

sell and pay the creditors named in the schedule, and there was a covenant that the creditors should not molest the assignor for the space of two years; the deed was held valid against an execution creditor, first by Abbott C.J. and afterwards by the full court.

Wells v. *Greenhill* (1) may be referred to as an early case upon a deed of all a debtor's property conveyed for distribution among his creditors, but not equal distribution, some who were specified by name to be paid in full; then all creditors for less than £10 to be paid in full; then all other creditors named in the schedule to be paid 5s. in the £; then upon the winding-up, respecting which directions were given, the scheduled creditors to be paid the residue of their claims, and the surplus, if any, to be paid over to the debtor. There was a covenant by the creditors to release the debtor at any time after eighteen months if the deed did not become void, under a proviso by which it was to become void if any creditor for over a specified amount should not execute the deed within three months. All the creditors, including the plaintiff who was now attacking the deed under the proviso, executed it within three months with the exception of one of those who were to be paid in full. The decision was that his failure to sign did not avoid the deed. We have nothing to do with the goodness or badness of the reason given, which was that he could not be intended to release the debt which was to be paid to him in full. Still it is not very convincing, because the release, while it discharged the debtor personally, left the creditors' remedy against the assigned estate untouched. See *Ellis* v. *McHenry* (2).

Tatlock v. *Smith* (3) incidentally recognizes the propriety of a debtor, who surrenders all his property for

(1) 5 B. & Ald. 869.
(2) L. R. 6 C. P. 228, 239.
(3) 6 Bing. 339.

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distribution among his creditors, insisting on being released from his debts. There was not in that case any question of preferring one creditor to another. It had been agreed that in order to carry out a scheme of equal distribution the debtor should execute a conveyance to trustees. When the conveyance was tendered for execution he refused to execute it, because it did not contain such a release as he thought he should receive. It was held at the trial at Guildhall of an action by one of the creditors upon a bill of exchange accepted by the debtor, as a defence to which the composition agreement was pleaded, that the defendant's objection to execute the conveyance was reasonable, and *in banc* Chief Justice Tindal said:—

It is unreasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors. Their situation itself seems to preclude the possibility of any such intendment.

The plaintiff was non-suited on the ground that forbearance to sue was involved in the composition agreement, and that nothing had occurred to remit the creditors to their rights.

In *Small* v. *Marwood* (1) which was decided in the same year (1829) as *Tatlock* v. *Smith*, we have another express, though incidental, recognition of the right to insist, as a condition of admission to share in the estate, on the execution of a release within a limited time. This will sufficiently appear from a passage from the considered judgment of the court pronounced by Bayley J. Then came the following proviso:—

Provided that the said parties of the second and third parts shall on or before the first day of February next make such proof, if required, and execute these presents. It was contended that the words "and execute these presents" constitute a condition, and that the deed having been executed by Barr and Hudson only, and not by the other two

(1) 9 B. & C. 300.

trustees, was void for non-performance of that condition; and, being void altogether, that Barr's debt was not extinguished, and therefore was a good petitioning creditor's debt to support the commission. We are of opinion that the effect of those words in the proviso is not to avoid the deed, if the parties therein named shall not execute it, but merely to take away from such parties the right to recover a dividend.

Owen v. *Body* (1), in which there was no question of preferences, is a more indirect recognition of the propriety of the release clause by the circumstance that the opinion that it was unreasonable to insist on the creditors becoming parties to that deed was not placed to any extent upon the release which the deed contained, nor was any objection, founded on the release, made in *Janes* v. *Whitbread* (2) or *Coates* v. *Williams* (3) where the deeds were upheld against objections for which the decision in *Owen* v. *Body* (1) was relied on. We do not find the precise terms of the release mentioned in the reports of either of those two cases. In *Coates* v. *Williams* (3) the deed is said to be "in the usual form," to be precisely in the same terms as that in *Janes* v. *Whitbread*, (2) and to be "a stereotype, and to be had at any law stationer's in London." The statement of the case does not contain the word "release" but it is said that the deed contained a proviso that creditors not signing within three months should be excluded from the benefit of the assignment, and the trust was to pay ratably such creditors as should execute the deed. There can be no doubt that the ordinary release was contained in the deeds. The validity of the clause excluding creditors who do not execute within a certain time is recognized in *re Baber* (4), where Malins V.C. allowed a creditor to come in after the time under special circumstances.

In the much litigated case of *Cox* v. *Hickman* (5)

(1) 5 A. & E. 28.
(2) 11 C. B. 406.
(3) 7 Ex. 205.
(4) 18 W. R. 1131; 40 L. J. Chy. 144.
(5) 8 H. L. Cas. 268.

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in which the House of Lords decided that creditors by joining in a deed such as that in *Owen* v. *Body* (1) did not become partners in the business that was carried on by the trustees under the deed, there was no question of the validity of the deed. The object of the action was to make creditors who had joined in the deed liable as partners for debts incurred in carrying on the business. We see, however, from the report in 18 C. B. 617 that the deed contained a special release clause, and that the creditors were to share rateably and without preferences.

Alton v. *Harrison* (2) was decided in 1869. In that case Lord Justice Giffard, affirming a judgment of Vice-Chancellor Stuart, upheld a mortage made in expectation of the issue of a writ of sequestration, which vested substantially all the property of the debtor in trustees for five of his creditors, and contained a proviso for the debtor remaining in possession for six months, if the sequestration was not issued. It was pointed out that the statute of Elizabeth differed from the bankrupt laws by not having for its object the equal distribution of assets, and that the question was whether the deed was *bonâ fide* and not a mere cloak for retaining a benefit to the grantor. Ten years later similar language was used by Pollock B. delivering the judgment of the divisional court in *Boldero* v. *London & Westminster Discount Co.* (3).

> We are here dealing, he said, not with the bankruptcy law, but with the statute of Elizabeth, and without going back to older cases, as Lord Justice Giffard pointed out in *Alton* v. *Harrison*, (2) the statute of Elizabeth does not touch the question of equal distribution of assets. This assignment, therefore, though it preferred certain creditors and tended to defeat the others, might be good.

The deed which was upheld in that case conveyed the estate to trustees to sell in such manner as

(1) 5 A. & E. 28.
(2) 4 Ch. App. 622.
(3) 5 Ex. D. 47.

they should think proper, and to divide the residue of the proceeds after paying expenses ratably among the creditors parties to the deed, including, if the trustees thought fit but not otherwise, creditors who refused or neglected to execute, and if the trustees thought fit but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. There does not appear to have been a release clause in the ordinary form. The objections to the deed were chiefly on the ground of provisions for carrying on the trade, *Spencer* v. *Slater* (1) being relied on. That case was distinguished by reason of its special circumstances which are described by Pollock B., as being, in the first place, that the deed contained not merely the ordinary resulting trust as to the surplus which would be found in every deed, but a resulting trust under which, at the expiration of twelve months, the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then if the creditors did not within seven days assent or execute, the money was to be paid to the debtor. This, the learned baron said, was much beyond the ordinary resulting trust. Then again the primary trust was to carry on the business, while in Boldero's case the principal object was to sell the business, and it was subsidiary to that object that power was given to carry it on till the sale.

In that case too, he continued, there was a very special and general indemnity, * * * and from all the circumstances of that case taken together the court came to the conclusion that they ought to draw the inference that the assignment was intended to defeat creditors, and was therefore void under the statute of Elizabeth.

But little further reference is necessary to *Spencer* v. *Slater*, which was a good deal relied on in the court below, and that little may be made by quoting from

(1) 4 Q. B. D. 13.

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the judgment of Mellor J., who puts the turning point of the judgment in these words:

> By this scheme the trustees may carry on the business, if they think fit, and the creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law, for the executing or assenting creditors are to indemnify the trustees against personal risk and loss. If any creditor refuses to come in there is a resulting trust in favor of the debtor in respect of the dividend that would otherwise have been due to such creditor.

The effect of the deed is even more strongly put by Manisty J.

The resulting trust in the deed before us would be implied by law, if not expressed in the deed. Nothing results to the grantors until all the creditors entitled to share under the deed are paid in full. If the deed is valid as against the objection founded on the release clause, and the creditors to share under it are therefore only those who execute, it follows that, when they are paid in full and the trust is thus fully executed, the surplus must result to the grantors. The remedy which the non-assenting creditors may have as between themselves and the debtor is an entirely separate consideration.

It does not seem to have been necessary in any English case to pronounce upon the validity, in view of the statute of Elizabeth, of a deed in which the two things co-existed—the preference of some creditors, and the execution of a release from all the creditors who were to share under the deed. To that extent it may be said that there is no English case which, like the Upper Canada case of *Bank of Toronto* v. *Eccles* (1), is on all fours with that before us. But the principles established by the decisions really cover the whole ground.

A debtor whose estate is sufficient to pay only one half of his debts is not hindered by the statute from conveying his whole estate to pay off half his creditors,

(1) 2 E. & A. Ont. 53.

leaving the other half unprovided for. A deed made for the purpose of such payment is safe against any attack by a creditor who is left out, notwithstanding the intention and design to defeat him. That is one well established proposition.

Then it must be held as the result of the numerous cases in which assignments containing the release clause and excluding all creditors who did not execute, or who did not execute within the time prescribed by the debtor, were upheld, and in which the consistent absence of objection to the clause is as significant as a decision against such an objection, that an assignment is not to be pronounced "feigned, covinous and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors of their just and lawful actions, suits and debts," merely because the release is exacted.

These two propositions are in effect but one proposition put in two forms. It is the same thing in principle whether the whole assets are made over in full payment of some of the creditors, or whether they are made over to those creditors who will agree to take them in full satisfaction of their demands.

The proportion which the assets bear to the debts, when the debts exceed the assets, is not, for the present purpose, a material consideration. The rule must apply to an estate that will pay only ten per cent. as well as to one that will pay ninety per cent. of the debts.

Nor can the position be affected by the fact that the attenuated condition of the estate has been produced by applying the assets in the payment of some creditors in full, when such payments are not struck at by the statute. The corollary follows that what may lawfully be done by satisfying some creditors in full to-day, and

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by to-morrow assigning what remains for distribution among such of the other creditors as will accept it in full of their demands, may also be lawfully done by the operation of one instrument such as that with which we are dealing.

The impulse which may be felt to characterise such arrangements as a fraud upon creditors will mislead, so long as the debtor is under no duty to treat all his creditors alike.

For the purpose of bankrutcy laws, where such laws exist, and of laws founded on the same principle, as in Quebec and Ontario, such a duty may be recognised, but, as we have seen, it is not a duty within purview of the statute of Elizabeth.

In every case where it was held that an assignment contained something which, by making it unreasonable to expect a creditor to sign evidenced a design to delay, hinder or defraud, that something imposed a burden on the creditors, as *e.g.*, the danger apprehended in *Owen* v. *Body* (1) of incurring the liability of a partner, or the covenant in *Spencer* v. *Slater* (2) to indemnify the trustees against personal loss; or it has appeared from the deed that the surrender was not for the sole purpose of making the assets available for the payment of the debts. Such was the provision for carrying on the business in *Owen* v. *Body*, (1) and such was the trust in *Spencer* v. *Slater* (2) to pay over to the debtor, in place of distributing among the assenting creditors, the dividends of the creditors who refused to come in. This feature, by the bye, is not peculiar to the deed in *Spencer* v. *Slater* (2), but is found in some others that survived the contest over them. (See *Alton* v. *Harrison* (3).) I believe there is no case, not even *Spencer* v. *Slater* (2) which certainly did not err on the side of undue leniency towards the assignment, but went so far the

(1) 5 A. & E. 28. N.C.

(2) 4 Q. B. D. 13.

(3) 4 Ch. App. 622.

other way as to create doubts of soundness of the decision (1), where the presence of the release clause has been made a reason for avoiding the deed at the instance of a non-assenting creditor.

I may refer, more as a matter of curiosity than for any particulary direct application, to a late case, *in re Stephenson* (2) where it was contended, with more ingenuity than success, that the release contained in a deed of assignment, which had been treated as an act of bankruptcy, remained valid while the conveyance became void, and, by extinguishing the debt of a creditor who had executed the deed, disabled him from proving under the bankruptcy.

In addition to the grounds on which the judgment in the court below proceeded, and in which, for the reasons I have given, I think the court fell into error, some other objections to the deed were urged before us. One of these, and the only one which was founded on anything that appeared in the deed itself, was that the trustee was given power to keep the real estate unsold as long as he pleased. I think the contention went so far as to urge that it was left to his discretion whether it should ever be sold and distributed. It is proved that no such effect was in fact intended, that the discretion intended to be vested in him was merely as to the mode of sale. He did not understand that he had power to defer the sale of the land, and acting on what he supposed to be his duty as trustee, he took steps with reasonable promptitude to make sales, and he sold several parcels, some absolutely, and one subject to the event of this litigation. It must, nevertheless, be held that if, by the legal operation of the deed, the trustee had power to keep from the creditors what the deed seemed to give to them, a creditor could not reasonably be expected to become party to it.

(1) Winslow on arrangements between Debtor and Creditor. p. 114.

(2) 20 Q. B. D. 540.

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The language is "upon trust that the party of the second part shall, if he deem it fit and expedient, in a reasonable time, sell and dispose of, at public auction or private sale, for cash or on credit, after due advertisement of the same, the above described lots, &c."

The expression "if he deem it fit and expedient" is not well chosen, but it would never be interpreted in the sense on which the objection is founded. The creditors are to have the benefit of the property vested in the trustee. By the concluding clause of the deed, which I have already quoted, they accept and take the estate and effects assigned in full payment, &c. They are the beneficial owners to the extent of their claims, and can enforce the execution of the trusts in their favor. No creditor who executed the deed could be met by the objection that defeated the plaintiff's action in *Johns* v. *James* (2) where the trustee was held not to be a trustee for the plaintiff who, though he was to be paid his debt out of money which the trustee was to raise, was not a party to the assignment.

I see no difficulty in the way of understanding the language as giving the trustee a discretion to decide what should be a reasonable time to sell as well as the best mode of selling, just as if the words were "as he shall deem it fit and expedient" in place of "if he deem it fit and expedient."

If this does violence to the language it is violence of a gentle character, and may properly be resorted to in order to carry out the intention manifest from the whole instrument and *ut res magis valeat quam pereat.*

In my opinion the appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *T. D. Ruggles & Sons.*

Solicitors for respondents: *Ritchie & Ritchie.*

(2) 8 Ch. D. 744.

ANGUS JACOBS.....APPELLANT; 1889

AFD

*Mar. 23.

HER MAJESTY THE QUEEN.....RESPONDENT. *April 30.

ON APPEAL FROM THE COURT OF CROWN CASES RESERVED FOR THE PROVINCE OF QUEBEC.

Criminal law—Indictment—Name of third person—Alias dictus—Proof of names—Variance.

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.

J. was indicted for the murder of A. J. otherwise called K. K. On the trial it was proved that the deceased was known by the name of K. K., but there was no evidence that she ever went by the other name.

Held, affirming the judgment of the court below, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter.

APPEAL from a decision of the Court of Crown Cases Reserved for the Province of Quebec, affirming the conviction of the appellant for manslaughter.

The appellant, an Indian, was indicted under the name of Angus Jacobs, otherwise called Skahatati, for the homicide of one Agnes Jacobs, otherwise called Kalwakeri Karonhienhawitha. At the trial the deceased was identified as an Indian woman known by the Indian name laid in the indictment, but there was no evidence that she was ever called by the name of Agnes Jacobs. The appellant was convicted of manslaughter, and his counsel having urged that he was entitled to an acquittal by reason of the variance between the evidence and the indictment, the trial judge reserved the following case for the

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

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consideration of the Court of Crown Cases Reserved :—

"Aux séances de la cour du Banc de la Reine, terme du mois de septembre dernier, pour affaires criminelles, Angus Jacobs, autrement appelé Skahatati a subi son procès sur accusation de meurtre pour avoir tué Agnès Jacobs, autrement appelée Kaowakeri Karonhienhawitha.

"Joseph Jones, coroner, pour le district de Montréal a été le premier témoin produit, et a prouvé à l'enquête qu'il avait tenu sur le corps de la victime qui y est désignée dans le verdict ou rapport du jury sous le nom de Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha. Le second et le principal témoin Karonhïenawi a déposé qu'elle avait connu Kaowakeri Karonhienhawitha, sa sœur et la défunte femme de l'accusé, et qu'elle était présente lors de l'assaut qui a été la cause de sa mort.

"Les autres témoins n'ont pas donné le nom de la victime. Ils l'ont seulement désignée comme étant en son vivant, la femme de l'accusé.

"L'accusé et sa femme étaient dès Indiens demeurant a Caughnawaga. Le témoin Agathe Karonhienawi et plusieurs autres témoins appartenaient aussi à des tribus indiennes et ne parlaient que le langage de leur tribu. Leur témoignage a été traduit aux jurés par un interprête.

"Après que la couronne eut clos son enquête, l'accusé procéda à la sienne et fit entendre plusieurs témoins.

"Avant d'adresser la parole au jury en faveur de son client, l'avocat de l'accusé attira l'attention de la cour sur ce que l'acte d'accusation portait que la défunte s'appelait Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha, et que la preuve faisait voir qu'elle s'appelait Marguerite Monique; au soutien de cette prétention il a référé a un prétendu certificat de baptême, qui n'a pas été prouvé dans la cause.

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"Le jury a trouvé la prisonnier coupable de *Manslaughter* par un verdict qu'il a rapporté le 20 septembre dernier (1888).

"Comme il n'a été fait aucune preuve que la victime des coups infligés par l'accusé s'appelait Marguerite Monique, l'objection faite par le conseil de l'accusé n'était pas fondée. D'un autre côté il n'a pas été prouvé lors du procès, si ce n'est par la production du rapport du jury sur l'enquête faite devant le coroner, que la femme de l'accusé s'appelait Agnès Jacob, ni qu'elle fut connue sous ce nom et comme la variante entre la description donnée dans l'acte d'accusation de la personne qui a été tuée et la preuve qui a été faite du nom de cette personne, m'a parue de quelqu'importance, j'ai cru devoir réserver pour la considération de la cour des cas réservés de la Couronne, la question suivante:

"Le prisonnier Angus Jacob, ayant été accusé d'avoir tué Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha, la preuve qui a été faite, tel que ci-dessus rapporté était-elle suffisante quant à la description de la victime de l'accusé, pour justifier le verdict de *Manslaughter* rapporté par le jury.

"Si la cour est d'opinion que la preuve sur ce point est suffisante le verdict devra être maintenu.

"Si au contraire la Cour est d'opinion qu'il y a une variante fatale entre le nom sous lequel la personne qui a été tuée est désigné dans l'acte d'indictement et la preuve qui en a été faite, le verdict devra être annulé.

"Jacob a été condamné à être detenu pour la vie dans le pénitencier provincial où il est maintenant à subir sa sentence.

"A. A. DORION,
"Juge en chef, B. R

"Montréal, 8 novembre, 1888.

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The Court of Crown Cases Reserved held the evidence sufficient and affirmed the conviction. The prisoner then appealed to the Supreme Court of Canada.

Cornellier Q.C. for appellant and *Trenholme* for the respondent.

STRONG J.—The prisoner, Angus Jacobs otherwise called Skahatati—an Iroquois Indian of the Caugnawaga tribe—was indicted for the murder of his wife, who was described in the indictment as Agnes Jacobs otherwise called Kaowakeri Karonhienhawitha. The prisoner having been found guilty of manslaughter the learned Chief Justice of the Court of Queen's Bench before whom the trial took place reserved this case for the opinion of the Court in banc pursuant to the Statute (1).

The Court of Queen's Bench (Mr. Justice Doherty dissenting) held that the prisoner was properly convicted.

It was not proved that the deceased was known by the name of Marguerite Monique; the objection on that score was therefore properly overruled – and indeed the point reserved by the case does not include any question on that head. The allegation of the name of the deceased in the indictment under an alias was clearly good pleading inasmuch as the names of third persons as well as those of prisoners may be thus laid. In Mr. Justice Stephen's work on Criminal Procedure (2) the rule of pleading is thus stated "The indictment "must state the Christian name or names and the "surname of the Defendant and the person against "whom the offence was committed. If they have gone "by or acknowledged more names than one they may "be described as J. S. otherwise called J. T."

(1) See p. 434. (2) P. 160.

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The deceased being thus properly described in the indictment as "Agnes Jacobs alias Kaowakeri Karonhienhawitha the proof to support the indictment must of course be *secundum allegatum*.

Then it is proved by the sister of the deceased that the latter was known by the Indian name in which under an alias she was described in the indictment, but there is no proof that she was ever known as or called Agnes Jacobs. The sole question is, therefore, whether this proof supports the indictment. On the one hand it is said that when a party is described under an alias it must, in order to support the indictment, be proved that he is known by both names, being called sometimes by the one and sometimes by the other. On the other hand it is contended for the crown that when the name of a person mentioned in an indictment is laid in this way, it is sufficient to shew that he was known by one of the names stated though there may be no proof whatever of his having been called by the other.

I am of opinion that the latter is the correct conclusion. The literal terms of the allegation in the indictment "otherwise called" are covered by such proof which in the case of a prisoner described under an alias has always been held sufficient. I can see no reason why any distinction should be made in this respect between the instance of a prisoner and that of a third person described in this alternative manner. In the one as well as the other it is a literal proof of an averment that his name was A otherwise B, to prove that he was called by the name B and by no other name. I find no English case upon the point for the reason probably that the practice was too plain ever to have given rise to doubt. In Dr. Wharton's work on Criminal Evidence (1), there is the following passage

(1) Ed. 1884 p. 92.

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When the name either of the defendant or a third party is laid with an *alias dictus* proof of either name will be enough.

I also find in the treatise on Criminal Procedure (1) by the same learned writer the following passage containing a reference to the same point speaking however of the defendant's name.

> The surname may be such as the defendant has usually gone by or acknowledged: and if there be a doubt which one of the two names is the real surname the second may be added in the indictment after an *alias dictus* thus "Richard Wilson otherwise called Richard Layer." Proof of either will be enough.

I am of opinion that the decision of the Court of Crown Cases Reserved holding the prisoner properly convicted was entirely right and that this appeal from it should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The appellant, an Indian, was indicted under the name of Angus Jacobs, otherwise called Skahatati, for the homicide of one Agnes Jacobs otherwise called Kaowakeri Karonhienhawîtha, and pleaded not guilty. At the trial evidence was given identifying the deceased as an Indian woman by the Indian name given to her in the indictment, but no evidence was offered to show that she was known by the name of Agnes Jacobs. There does not appear to have been any evidence that she had acquired by marriage or otherwise the name of Jacobs or that she was known by that name, or in fact by any other than her Indian name as above stated. It was objected at the trial upon the part of the now appellant that he could not be convicted of the offence charged in the indictment for want of evidence to shew that the deceased was known by the name of Agnes Jacobs. The objection was overruled and the prisoner was found guilty, by the jury,

(1) Ed. 8, pp. 75 and 76. citing (South Car.) Reports p. 310. *State* v. *Graham* 15 Richardson's

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of manslaughter. In view of the above objection the learned judge who tried the case, reserved for the consideration of the Court of Crown Cases Reserved in the Province of Quebec, where the trial took place, the question whether proof only that the deceased was known by the Indian name given her in the indictment, was sufficient to justify the conviction.

The Court of Crown Cases Reserved for the Province of Quebec decided that it was and from that judgment this appeal is taken.

I am of the opinion that proof of the deceased's Indian name as given was sufficient. In fact, as far as appears, this was her only true name, or that by which she was known. The description as stated in the indictment was just the same as if the Indian name had been stated first, followed by "otherwise called Agnes Jacobs," in which case, on the Indian name being proved the identification would surely be sufficient. No case has been cited in support of the contention that where two or more names are laid under an *alias dictus* all must be proved. Such a contention is at variance with the use of the form *alias dictus*, the object of which is to enable proof of one or other of the names to be sufficient. The contention that the appellant, if again indicted for the homicide of this same person described by a different name, would be unable to plead his conviction in the present case, has no foundation in point of fact, for in the event of such a contingency, remote if possible, occurring, there would be no difficulty whatever in pleading that the person in such an indictment, charged to have been killed, was an Indian woman, known by the name of Kaowakeri Karonhienhawitha of the homicide of whom the accused was convicted on the indictment in the present case This case appears to be quite distinguishable from the case of

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Reg. v. *Frost* (1) in which proof of some only of the christian names as laid in the indictment of a person necessary to be identified was held to be insufficient, it having been proved that the person had other christian names than those proved. Here the whole of the deceased's Indian name has been proved, and so far as appears she had no other name, so that there can not be said to be any uncertainty as to the person for whose homicide the appellant has been convicted.

The appeal must be dismissed.

PATTERSON J.—The prisoner was indicted for the murder of "Agnes Jacobs, otherwise called Kaowakeri Karonhienhawitha," and was convicted of manslaughter and sentenced, the Chief Justice, Sir A. A. Dorion, reserving for the opinion of the Court of Queen's Bench the question whether sufficient evidence was given of the description of the person alleged to have been murdered to justify the verdict of manslaughter.

The Court of Queen's Bench held the evidence sufficient, Mr. Justice Doherty dissenting, and the prisoner has appealed to this court.

The facts stated by the learned Chief Justice are that Angus Jacobs was tried for the murder of "Agnes Jacobs otherwise called Kaowakeri Karonhienhawitha:" That the coroner proved the inquest on the body of the victim, who is described in the verdict or return of the jury under the name of Agnes Jacob, otherwise called Kaowakeri Karonhienhawîtha: That the second and the principal witness, Karonhienawi deposed that she knew Kaowakeri Karonhienhawîtha, her sister, and the deceased wife of the prisoner, and that she was present at the assault which caused her death: That the other witnesses did not give the

(1) Dea. 464 and 1 Jur. N. S. 406.

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name of the deceased, only describing her as being, when alive, the wife of the accused: That the accused and his wife were Indians, living at Caughnawaga: That the witness, Agathe Karonhienawi and several other witnesses belonged also to Indian tribes, and spoke only the language of their tribe, their evidence being given to the jury by means of an interpreter: That after the close of the evidence for the Crown, the accused called several witnesses on his own behalf: That before addressing the jury for his client, the prisoner's counsel called the attention of the court to the fact that the indictment purported that the deceased was called Agnes Jacob, otherwise called Kaowakeri Karonhienhawîtha, and that the evidence was that she was called Marguerite Monique, in support of which proposition he referred to a pretended certificate of baptism which was not proved in the cause: That the jury found the prisoner guilty of manslaughter by a verdict returned on the 20th of September, 1888: That as there was no proof that the victim of the blows inflicted by the accused was called Marguerite Monique, there was no foundation for the objection of his counsel: That on the other hand it was not proved during the proceedings, unless it was by the return of the jury at the coroner's inquest, that the prisoner's wife was called Agnes Jacob, nor that she was known by that name; and that as the variance between the description given in the indictment of the person killed and the proof of the name of that person seemed to him, the Chief Justice, of some importance, he thought it right to reserve for the consideration of the Court of Crown Cases Reserved the question which I have mentioned.

If the court should be of opinion that the proof on the point was sufficient the verdict was to stand.

On the contrary, if the court should think there was

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a fatal variance between the name by which the person killed was described in the indictment and the proof which had been given, the verdict was to be annulled.

The term "variance" is hardly appropriate. There is no variance. The proof in no way differs from the description in the indictment. As far as it goes, it agrees with that description. The question is, does it go far enough?

The evidence is direct that the woman killed by the prisoner was Kaowakeri Karonhienhawitha. It is also directly proved that she was the wife of the convict, whence it follows that her name was Jacobs. Thus the whole description is covered with the exception of the christian name Agnes. It does not appear that Agnes was not her name. If that had been shown there would have been more reason to talk of a variance. Counsel who took the objection would seem, as I gather from the learned Chief Justice's note, to have been alive to the difference between proving a different name from that given in the indictment and failing to prove what the name was, for he based his objection on the name of Marguerite Monique. The objection in that form was not improperly urged as a variance, but it failed for want of proof that Marguerite Monique was the name of the deceased.

I have given as full an examination as has been in my power to the question whether the verdict would have been justified if the evidence had gone no further than to prove that the woman killed by the prisoner was called Kaowakeri Karonhienhawitha, and I have not been able to find authority for holding that it would not be justified. The question is one of identity, and it has been properly so treated by Mr. Cornellier in his able and ingenious argument on behalf of the prisoner.

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The rule, which is well settled as illustrated by decisions many of which were cited to us, and which is usually enforced with strictness, requires the name, whether of the accused or of a third party, to be proved as laid in the indictment, and the mitigation of the harshness incident to the operation of the rule, by the extension of the power of amendment, rather affirms than discredits the rule. But the necessity of proving more than one name when alternative names are laid with an *alias dictus*, is a different thing. I was a good deal impressed by the argument that the substantive description here was Agnes Jacobs, the Indian name being secondary only, and that, whether the latter was proved or not, the identity was not established without proof of the former; but I cannot find authority to support that view with sufficient certainty to warrant an interference with the judgment in appeal.

The deceased is not described in the indictment as the wife of the prisoner. Had she been so described, the proof of identity afforded by this evidence would have been complete, without proving that her name was Agnes. One description would have been established sufficient to identify the person described with the person killed, and no conflict of proof would have arisen from the mere absence of evidence touching the alternative description.

It may be plausibly argued that that illustration is not quite parallel to the description in hand, but I am unable satisfactorily to distinguish them.

But the case is stronger than one where there is no evidence to prove the alternative description. We have, as I have remarked, evidence from the witnesses that the name of the deceased was Jacobs. It was proved before the jury that she was the wife of the prisoner, who therefore knew her real name and who called witnesses, and could by those or some other

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witness have shown, if the fact was so, that the person called Kaowakeri Karonhienhawîtha was not Agnes. The proof of the proceedings before the coroner is to me a new feature in the ordinary evidence at a trial for murder. Whatever was the object of the proof, the effect was that there was before the court and jury a record touching the crime in question, though not an adjudication in any sense binding on the prisoner. In it the deceased was described by both names. That description may be conceded to have been evidence of the faintest kind and of no weight against contradictory evidence adduced at the trial; but the evidence, in place of contradicting, bore out, as far as it went, the allegations of the return; the return itself was put in evidence, without objection, as something relating to the same offence for which the indictment was preferred; and no attempt was made on the part of the prisoner to question, by evidence, the identity.

On the whole I am not prepared to say that a specific finding that the deceased was the person called Agnes Jacobs would have been unsupported by evidence.

In my opinion we should dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Ouimet, Cornellier & Emard.*

Solicitors for respondent: *Trenholme, Taylor & Buchan.*

HENRY U. MILLER (DEFENDANT).....APPELLANT; 1888

AND *Nov. 19,20.

VINCENT S. WHITE (PLAINTIFF)..... RESPONDENT. 1889

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *April 30.

Evidence—Admissibility of—Entries in books—Goods charged to third party—Verdict against evidence—New trial.

McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared on the trial that the goods were ordered by McK. and shipped to the place of business of McK. & M., but were charged in plaintiff's books to C. McK. & Co., which he said was done at McK's. request. McK., called as a witness for plaintiff, corroborated this, and on cross-examination he produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm. A verdict was given for the defendant M.

Held, reversing the judgment of the court below, that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK. and the rule for a new trial should be discharged.

APPEAL from a decision of the Supreme Court of New Brunswick (1) setting aside a verdict for the defendant and ordering a new trial.

The action in this case was for goods sold and delivered, and the defence was that the credit was given to a third party. The facts were briefly as follows:—

The appellant, Miller, and one McKean, who was also a defendant in the suit, carried on a lumbering business in Economy, N.S McKean was also a member of the firm of Carvill, McKean & Co., of St John, N.B.

The goods in question were brought by McKean for

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

(1) 27 N. B. Rep. 143.

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the lumbering business of McKean & Miller. They were charged in the plaintiff's books to Carvill, McKean & Co., and the plaintiff had taken a note of Carvill, McKean & Co, in payment of a portion of them.

When these facts came out on the trial the plaintiff explained that the entries in the books were made in this way at the request of McKean, and the note was taken by the plaintiff also at McKean's request, and for the accommodation of McKean & Miller.

The defendant, McKean, was examined on behalf of the plaintiff, and gave evidence to the effect that he had purchased the goods for himself and Miller. On behalf of the defence the books of Carvill, McKean & Co. were put in evidence, subject to objection, to show that the goods in question were entered in those books as received from the plaintiff and forwarded to Economy.

A verdict was given for the defendant and a new trial was moved for, on the grounds that the evidence of these books, and that of Carvill, McKean & Co.'s book-keeper, were improperly admitted, and that the verdict was against evidence and misdirection. A new trial was granted, the reason for the judgment stating that it was on the ground that the said evidence was improperly admitted. The defendant appealed to the Supreme Court of Canada from the order for a new trial.

Weldon Q.C. and *C. A. Palmer* for the appellant.

McLeod Q.C. and *A. S. White* for the respondent

Sir W. J. RITCHIE C.J.—Was of opinion that the appeal should be allowed.

STRONG J.—Concurred in the judgment of Mr. Justice Patterson.

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TASCHEREAU J.—I concur with Mr. Justice Gwynne, and, for the reasons given by him, I think that this appeal should be allowed.

GWYNNE J.—This case was eminently one for a jury to determine, and the precise point in the case which was submitted to them was stated by the learned Chief Justice who tried the case, in a manner which admitted of no mistake, in a charge as to which no just ground of complaint, in my opinion, has been, or could be, reasonably made.

The jury who tried the case appear to have paid the greatest attention to the trial, so much so as to draw forth this observation from the learned Chief Justice: "I shall not take up a great deal of your time, for I saw that you paid great attention to the evidence as the case progressed. Many of you are, perhaps, commercial men, and so you could apply it" (that is your attention) to the case as it went along.

The action was brought against Henry U. Miller and George McKean for goods alleged by the plaintiff to have been sold and delivered to them. The defendants were partners, in a certain business carried on by them at a place called Economy, in Nova Scotia; the defendants both resided at St. John, New Brunswick, where the defendant McKean was managing partner of a lumbering firm of Carvill, McKean & Co., in which firm Miller had no interest. The goods in question were purchased by McKean, and the firm of Carvill, McKean & Co. having become insolvent a question arose whether the goods had been sold, and credit given, to the firm of Carvill, McKean & Co., or to Miller & McKean. The defendant, Miller, pleaded never indebted and payment; the defendant McKean pleaded never indebted only, but made no defence. The plaintiff gave testimony to the effect that the goods were sold

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to Miller & McKean, although they were invoiced to Carvill, McKean & Co., and entered both in the books of the plaintiff and of Carvill, McKean & Co. as sold to them; and although Carvill, McKean & Co.'s note for the amount was given to the plaintiff, this entry in the plaintiff's books to Carvill, McKean & Co., and the giving of their note by McKean, was stated by the plaintiff to have been an arrangement made at the special request of McKean, although the sale was in fact made to Miller & McKean, and the goods were shipped to their place of business in Nova Scotia. The plaintiff was submitted to a strict cross-examination upon this his evidence. He called also as a witness on his behalf the defendant, McKean, who also swore, in support of the plaintiff's evidence, that the sale had been to Miller & McKean. This witness was also subjected to a strict cross-examination upon certain entries in the books of Carvill, McKean & Co., kept under his direction and control, which were insisted upon as discrediting certain material evidence given by McKean in his oral examination. This reference to the books of Carvill, McKean & Co., and the examination of McKean in relation to such entries therein, was objected to by the plaintiff's counsel as not being properly admissible in evidence, and a verdict having been rendered for the defendant, and that objection renewed, on a motion to set aside the verdict and for a new trial, the court set aside the verdict and ordered a new trial to take place; and from the order granting the new trial this appeal is taken.

There can, I think, be no doubt that the examination of McKean upon the entries in the books of Carvill, McKean & Co. was quite admissible for the purpose for which those entries were used, namely, of testing the proper weight to be attached to McKean's oral testimony upon the main point at issue—which was,

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whether the plaintiff had sold the goods and given credit to Carvill, McKean & Co., or to Miller & McKean. The fact that those entries accorded with entries in the plaintiff's own books purporting to represent the sale as having been made to Carvill, McKean & Co. was one which could not be withheld from the jury; and the learned Chief Justice did not fail to draw their attention to the matter in a manner which was wholly free from objection. The appeal, therefore, in my opinion, must be allowed with costs, and the verdict of the jury restored, and the rule for a new trial be ordered to be discharged with costs.

PATTERSON J.—This appeal is from a rule granting a new trial on the motion of the plaintiff, White. The defendant, Miller, appeals. There are one or two questions raised by way of objection to the charge to the jury, but the principal point, and the one on which the new trial has been ordered, relates to the admissibility of certain evidence.

Miller, the defendant, carried on a lumber business in St. John, under the firm of Miller & Woodman, but that business is not involved in any way in the action. McKean also lived at St. John, where he managed the business, which was that of shippers of lumber, of the English firm of Carvill, McKean & Co., and he was a member of that firm.

Miller and McKean individually carried on at Economy, in Nova Scotia, where they had saw mills, the business of manufacturers of lumber. The establishment at Economy was in charge of James Miller, a son of the defendant. Supplies for the establishment were purchased in St. John from the plaintiff. This action is to recover the price of those supplies. It is not resisted by McKean, but it is resisted by Miller, on the ground that the supplies, which were purchased

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by McKean personally or by clerks of Carvill, McKean & Co., were sold on the credit of Carvill, McKean & Co., and not to Miller & McKean. It is not disputed that the goods were bought for the purpose of being used in the Economy establishment, or that they were actually used there, but the contention of the defendant Miller is that the concern in which he was partner got them from Carvill, McKean & Co., and not directly from the plaintiff. The occasion for the contest arises, as is usually the case, from the insolvency of some one. Carvill, McKean & Co. having failed, it is important for the plaintiff to maintain, if he can, his recourse against Miller. The desire of Miller to escape personal liability needs no explanation. It is apparently a fair contest on both sides, with, perhaps, as part of the evidence seems to indicate, some complication of interests other than those of the nominal parties.

The contention of the defendant that the credit was given to Carvill, McKean & Co. has been upheld by the jury. There is ample evidence to justify that verdict, but it is objected that some of the evidence was not properly admissible.

To render the discussion of that objection intelligible, it may be stated that the general result of the evidence is that the goods (being ordered, as I have said, by McKean personally, or by one of the clerks of Carvill, McKean & Co.), were charged in the plaintiff's books to Carvill, McKean & Co.; that accounts were rendered to that firm for the goods, and notes given for them by McKean in the name of the firm; that in the books of Carvill, McKean & Co. the goods were credited to the plaintiff and debited to an account headed with the name of the defendant Miller; and that on one or two occasions the debit was accompanied by a small charge in the name of commission.

The nature of the evidence which is said to have

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been improperly received, and the way in which the objection was dealt with, will best appear by reading from the judgment of the court as delivered by Mr. Justice King:—

The defendants put in evidence the books of Carvill, McKean & Co. to show that this firm (and therefore McKean) had treated these goods as purchased by them of the plaintiff, and then as resold by them to defendants. Amongst other things, in the account in Carvill, McKean & Co.'s books, they relied on a charge of a small commission as indicating (whether it would do so or not) a transaction of sale as between the firm and defendants. They also (on the cross-examination of McKean and the direct examination of the clerk of Carvill, McKean & Co.), put in evidence entries of other goods, purchased from other parties, which in these books were charged against defendants and on which also commissions were charged. Thus, on p. 73 it is stated that "other items of commission are traced, but none of Mr. White's;" and on p. 94 McIntyre speaks of the way invoices were made out of goods got from Stephenson as well as White; and again, on p. 95, Mr. McIntyre says: "When I bought goods, or any of the young men bought goods, they were billed to Carvill, McKean & Co.; they were then credited to the party from whom bought and charged to wherever they were sent. If sent to McAfee they were charged to McAfee, and if to Economy they were charged to H. U. Miller, and if they were bought for Collins they were billed to Collins."

This evidence seems inadmissible, and it is impossible to say that it might not have had weight with the jury. We therefore think there should be a new trial.

The learned judge has not mentioned the grounds on which the evidence was considered inadmissible. I understand it to have been on the ground that the entries in the books of Carvill, McKean & Co. were *res inter alios acta* as far as the plaintiff was concerned.

The plaintiff depends upon establishing that Miller was a principal for whom McKean acted as agent in buying the goods—not an undisclosed principal, for the evidence is that the plaintiff was given to understand that the goods were for the concern in which Miller was a partner. The fact that their destination was the Economy works is consistent with either an immediate purchase by Miller & McKean or a purchase

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by Carvill, McKean & Co., for the purpose of re-selling to Miller & McKean. It was important evidence for the jury, but not conclusive either way. The plaintiff called McKean to prove that he really purchased for his Economy firm and that the process of charging the goods, as McKean directed them to be charged, to Carvill, McKean & Co., was a mere matter of convenience in connection with the circumstance that he and Miller had not yet opened a set of books; and he gave some other explanations. In answer to this evidence of McKean the defendant Miller was allowed to educe from McKean, and also to examine McKean's bookkeeper with the object of proving, that the transactions appeared in the books of Carvill, McKean & Co., which were the books of McKean, in a form inconsistent with the testimony given by McKean on behalf of the plaintiff, and consistent with the contention of the defence; and further, that that mode of dealing was not peculiar to these purchases from White, but was the system on which the business was conducted by McKean.

This evidence may have had much or little weight, going to the jury, as it did, with whatever explanations were offered. It cannot be said that it had no influence, and it is therefore necessary to decide the question of its admissibility. I do not see that it was improperly received. The question of the agency of McKean in making his purchases was the question at issue. His denial of the purchases being, as the written entries imputed that they were, on account of Carvill, McKean & Co., touched the central fact of the inquiry. To contradict him by direct evidence, whether educed from himself or from another source, which opposed his own acts or statements on other occasions to his testimony in the witness box, was not in violation of any rule of evidence or of *nisi prius* practice.

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The opposing evidence may have been such, and I should say was such, as to be not unlikely to go beyond the office of merely contradicting or nullifying his statement, and may have been capable of being regarded by the jury as affirmative evidence in support of the issue. But that is not a consideration which requires the exclusion of the evidence, so long as the matter is a material and not a collateral one. The case of *Watson* v. *Little* (1) is an authority for that proposition. That was an action of ejectment, in which the question was the legitimacy of the plaintiff. His mother swore that he was born five days after her marriage, namely, on the 13th of March. She denied, in answer to questions put in cross-examination, that she had been before the magistrates about the child, or said to the magistrates that he was born on the 8th of March, or that she had affiliated the child. Evidence was admitted in reply to show that she had affiliated the child as a bastard born on the 8th of March. The most of the argument in the case related to the admissibility, under the circumstances, of the order of bastardy as proof of the facts contained in it. That question does not concern us.

Martin B. said:

The defendant had a right to put in any legal evidence for the purpose of contradicting her in a material matter; and no doubt it was most material, in a question of legitimacy, to show that the mother had been before the Magistrates and stated that the child was born before marriage.

Bramwell B. said:

I cannot say that it would be evidence that the child was born on the 8th March, but it was certainly evidence to contradict the witness; though for that purpose the order must be proved by some evidence of the identity of the parties. Possibly it might operate on the minds of the jury for another purpose; but I cannot help thinking that the order tells the truth, and that the mother when before the magistrates, did say that the child was born before marriage. She might have been able to explain her motives for doing so, but as she denied the fact, the consequences must fall on the party who produced her as a witness.

1) 5 H. & N. 472.

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And Wilde B. said:

I give no opinion as to whether the order would be admissible to prove the bastardy. We cannot reject it, because, if admissible for one purpose, it may have an effect upon the jury as evidence for another. *McEwan* v. *Thornton* (1); *Fowkes* v. *Manchester &c. Insurance Co.* (2); *Reg.* v. *Dennis* (3); and *Attorney General* v. *Hitchcock* (4).

I think the evidence was properly received.

In the respondent's factum the point is taken that McKean had not been asked respecting invoices made by Carvill, McKean & Co. to Miller and McKean, respecting which McIntyre gave evidence, and also that evidence touching purchases of goods from parties other than the plaintiff was irrelevant. These objections are, to my mind, answered by what I have said. The point being the character in which McKean acted in purchasing the goods directly in question, whether as representing Carvill, McKean & Co., or Miller & McKean, and there being no suggestion that in these purchases he departed from the system adopted for carrying on the business, but the contrary appearing from his answers to some questions, particularly as to purchases from De Forest, Burpees, Stephenson, &c., upon which a commission had been charged in the books, the enquiries were relevant. It was the broad question of agency, not one of narrow details.

Objections are taken to the charge for misdirection and for non-direction. They were not noticed in the judgment below, but they were taken in the rule and may of course be insisted on here.

I do not think it necessary to say more respecting them than that they resolve themselves into complaints of too much or too little stress being laid on parts of the evidence, or of expressions of opinion upon its bearing on some particular question of fact. I have care-

(1) 2 F. & F. 594.
(2) 3 F. & F. 440.
(3) 3 F. & F. 502.
(4) 1 Ex. 91.

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fully read the able and lucid charge of the learned Chief Justice. I am not of opinion that any of the complaints are well founded; but they are not matters of misdirection for which a verdict ought to be disturbed, even if the objections had been made at the trial when any supposed omission or oversight could have been remedied.

I think we should allow the appeal, and of course with costs.

Appeal allowed with costs.

Solicitor for appellant: *C. A. Palmer.*

Solicitors for respondent: *E. & R. McLeod.*

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*Nov. 13, 14.
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*Mar. 19.

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA UNDER THE WINDING-UP ACT..... APPELLANTS;

AND

HOWARD D. TROOP.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Bank—Shareholders in—Winding-up—R. S. C. ch. 129—Contributory Calls on—Double liability—Set off—Bank Act R. S. C. ch. 120.

A contributory of an insolvent company, who is also a creditor, cannot set off the debt due to him by the company against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Banking Act, Revised Statutes of Canada, ch. 120.

APPEAL from a decision of the Supreme Court of New Brunswick on a special case.

The respondent Troop was a shareholder and also a creditor of the Maritime Bank doing business at St. John, N.B. The bank became insolvent in 1887 and is being wound up under the Winding-up Act, R. S. C. ch. 129. The respondent was placed on the list of contributories, but claimed to be entitled to set off the indebtedness of the bank to him against the calls on his stock, and that he is only liable for the difference. The facts were all admitted, and the following question was, by the special case, stated for the opinion of the Supreme Court of New Brunswick :—

Has the said Howard D. Troop, under the admitted facts, a right to set off the said $5,330.88 against the amount of $10,300 due by him for the calls made upon him? If not, then the order for the payment of the

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

said call is to remain in full force; but, if the said Howard D. Troop has such right, the amount of $5,330.88 is to be deducted from such call as the several instalments fall due, and the order is to remain in force for the difference.

The Supreme Court of New Brunswick decided this question in the affirmative and ordered the amount due from the bank to be deducted from the calls. The liquidators of the bank appealed from that decision.

Barker Q.C. for the appellants.

The Bank Act provides for the double liability of shareholders. R. S. C. ch. 120 s. 70. This is a liability which does not arise until the commencement of the winding-up proceedings, and is not within the section relating to set off. R. S. C. ch. 129 s. 57. See *Grissell's Case* (1); *Black & Co.'s Case* (2); *Re Whitehouse* (3); *Gill's Case* (4); *Sawyer* v. *Hoag* (5).

The right of set-off is not extended by sec. 57 of ch. 129, but only preserved where it would exist if the bank was not being wound up.

J. A. Vanwart for the respondent.

The right of set-off is expressly provided for by the Winding-up Act, R. S. C. ch. 129 ss. 57 & 73. Secs. 44, 46 and 73 of the Bank Act, R. S. C. ch. 120, show that this applies to the double liability.

The learned counsel cited *In re China Steamship Co.* (6).

His Lordship the Chief Justice took no part in the decision of this case.

STRONG J.—The sole question in this appeal is as to the right of a shareholder in an insolvent bank, in course of being wound up under the Winding-up Act, to set-off a debt due from the bank to himself against calls made upon him by the liquidators in respect of

(1) 1 Ch. App. 528.
(2) 8 Ch. App. 254.
(3) 9 Ch. D. 595.
(4) 12 Ch. D. 755.
(5) 17 Wall. 610.
(6) L. R. 7 Eq. 244.

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the double liability imposed by the 70th section of the Banking Act, Revised Statutes of Canada, ch. 120. This section is as follows:—

> In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, the shareholders of the bank shall be liable for the deficiency so far as that each shareholder shall be so liable to an amount over and above any amount not paid up on his shares equal to the amount of such shares.

It is clear from the wording of this section, and of section 72 of the same act, that the monies to be obtained from calls made in enforcement of this double liability were to form a fund to pay the debts and liabilities of the bank, and that, therefore, if the double liability was one in course of being enforced, not in a proceeding taken under the Winding-up Act, but under the Banking Act, by the directors, pursuant to sections 71 and 72 of the latter act, there could be no set-off by a shareholder upon whom a call of this kind was made. The obvious reason for such a conclusion being that the fund thus constituted being formed expressly to pay debts and liabilities, it would be in law a fund which the directors would hold in trust for the creditors of the bank, and therefore that mutuality between the cross demands, which is an essential requisite in all cases of set-off, would be wanting. The money which the shareholder would be called on to pay would, in this case, be payable into the hands of the bank or its directors, but it would be so paid to them as trustees for distribution amongst persons who were under no cross liability whatever to the shareholders—namely, the body of creditors of the insolvent bank.

Such being, in my opinion, the solution which this question would receive if there had been no winding-up, the question we have to decide is narrowed to this: Does anything contained in the Winding-up Act remove this objection to a set-off proceeding on the ground of want of mutuality?

The material section of the Winding-up Act is the 57th, which is in these words:—

> The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this act.

I quite agree that the question of set off is regulated by this section, and that all we have to do is to apply the provision contained in it to the state of things as regards the nature of the liability existing under the Banking Act. As I have already shown, the debt due by the shareholders in respect of a call under the double liability clause is, in equity and in substance, a debt due, not to the bank, but to the creditors of the bank—whilst the debt which the shareholder seeks to set-off is a debt due, not from the creditors of the bank—but from the banking corporation itself; consequently they are not in any sense "mutual debts." Then what section 57 requires us to do is to apply "the law of set-off, as administered by courts of law or equity," to this state of things. Now, as regards the statutory right of set-off, which in the province of New Brunswick prevails in courts of law, it is by an express provision (1) of the Consolidated Statutes of that province restricted to "mutual debts," and the doctrine of set-off, as applied by courts of equity according to the general principles of equity, is also invariably restricted to cross debts or demands which are "mutual." Therefore, applying "the law of set-off," which sec. 57 requires us to do, no set-off is admissible in the present case.

To put it in another form: "mutuality" was and always had been an essential of the law of set-off up to the time of the passing of the Winding-up Act—

(1) Ch. 37 Sec. 71 Con. Stats., N. B.

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and there is nothing in the latter act in any way derogating from this universal principle.

I have not felt called on to write at greater length, as Mr. Justice King has, in the opinion delivered by him in the court below, stated what I consider to be the correct view of the law with great fulness and accuracy, and I refer to what he has said if any amplification is required.

The appeal should be allowed with costs to the liquidators, both here and in the court below.

TASCHEREAU and GWYNNE JJ. concurred.

PATTERSON J.—The question on this appeal is whether a stockholder of the bank who has been placed on the list of contributories under the provisions of the Winding-up Act (1), in respect of his double liability under the Banking Act (2), can set off against calls for that double liability an independent debt due to him by the bank.

The question is important, and, having regard to the form of some of the provisions of the Winding-up Act, it is not a matter of surprise that two arguments in the court below failed to secure a unanimous judgment, or that one of the learned judges receded on the second argument from the view of the statute which he entertained after the first.

The opinion of the majority of the court was in favor of allowing the set-off, and from that decision the liquidators appeal.

It will be convenient in the first place to examine the provisions of the Winding-up Act which bear upon the matter in hand, before referring particularly to those of the Banking Act, although it is under the latter act that the double liability arises.

The sections of chapter 129 more directly operative

(1) R. S. C. ch. 129. (2) R. S. C. ch. 120.

are 44, 46 and 57; others, and especially 73, may have to be also taken into account.

Section 44 is as follows:—

Every shareholder or member of the company, or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors as the case may be, under the act, charter or instrument of incorporation of the company, or otherwise; and the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this act.

And section 46:—

The liability of any person to contribute to the assets of a company under this act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and in the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate.

These sections evidently include the double liability of shareholders in a bank. It is covered by the words of section 44 as a

Liability to the company, or to its members or creditors as the case may be, under the act, charter or instrument of incorporation or otherwise.

And it is therefore, under section 46, a

Liability to contribute to the assets of a company under this act, in the event of the business of the same being wound up.

And it creates

A debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made.

Whether for all purposes of this statute it stands on the same footing as an amount unpaid on shares of capital may have to be considered further on.

A shareholder in a joint stock company incorporated under our general acts has an undoubted right to set off any debt due him by the company against a call upon his unpaid stock made in the ordinary conduct

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of the business of the company. In England the sam right exists, but there it is well settled that under the clauses 38 and 75 of the Companies' Act, 1862 (1), which are essentially like our sections 44 and 46, no set-off against calls can be allowed in a limited company after liquidation has commenced, a different rule obtaining under section 101 when the liability is unlimited. And the same rule is applied whether the calls are made before or after the liquidation proceedings have begun; *Grissel's Case* (2); *Calisher's Case* (3); *Black & Co.'s Case* (4); *Barnett's Case* (5); *Re Whitehouse* (6).

One provision of section 133 of the Companies' Act, 1862, is that the property of the company shall (upon a voluntary winding-up) be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. Our section 58 has an equivalent provision, not confined, however, to the case of a voluntary winding-up. It does not contain the words *pari passu*, the language being:—

> The property of the company shall be applied in satisfaction of its liabilities and the charges incurred in winding up its affairs.

But the principle of ratable distribution must be intended, the words *pari passu* being omitted as unnecessary. "Property" here includes unpaid capital as well as other assets; *Webb* v. *Whiffin* (7).

In *Grissel's Case* (2) Lord Chelmsford more than once referred to section 133. In one passage he said (8):—

> The act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing executions against individual members. It removes the rights and liabilities of parties out of the

(1) 25 & 26 Vic. ch. 89.
(2) 1 Ch. App. 528.
(3) L. R. 5 Eq. 214.
(4) 8 Ch. App. 254.
(5) L. R. 19 Eq. 449.
(6) 9 Ch. D. 595.
(7) L. R. 5 H. L. 711.
(8) P. 535.

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sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the act as a whole, the call is to come into the assets of the company in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the act. In support of this view it will be sufficient to refer again to the 133rd section as to the satisfaction of the liabilities of the company *pari passu*. And the argument against the allowance of a set off, addressed to the court on behalf of the official liquidators, is extremely strong—that if a debt due from the company to one of its members should happen to be exactly equal to the call made upon him he would in this way be paid twenty shillings in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all.

Section 133 referred in terms only to a voluntary winding up, and the winding up in connection with which *Grissel's Case* (1) arose was not of that character. That circumstance was referred to as detracting from the force of the remarks of Lord Chelmsford in *Brighton Arcade Co.* v. *Dowling* (2), where a different rule as to set-off was held to apply when the winding up was voluntary—a decision which would probably not now be followed; see *Re Whitehouse & Co.* (3); but the criticism leaves the argument apposite to our section 58, which applies to compulsory winding-up proceedings.

The English decisions on the construction of the cognate provisions of the Companies' Act, 1862, are conclusive against the claim to set off a debt against calls on unpaid stock under our statute, unless the right is given by section 57. Let us note the exact terms of the section :—

> The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up, in the same manner and to the same extent as if the business of the company was not being wound up under this act.

It is impossible to reconcile the construction of this section contended for by the respondent with the other provisions to which I have referred Thus,

(1) 1 Ch. App. 528. (2) L. R. 3 C. P. 175.
(3) 9 Ch. D. 595.

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reading sections 44, 46 and 58 together, they declare that unpaid capital is an asset of the company and a debt due to the company, accruing due when the shareholder's liability commenced but payable when calls are made, and shall be applied in satisfaction of the liabilities of the company and the charges incurred in winding up its affairs, and what remains shall be distributed among the members or shareholders.

A shareholder who is a creditor occupies the same position in respect of his debt as a creditor who is not a shareholder, and no better position. That was so held in *Grissel's Case* (1). The property of the company is, under section 58, to be applied towards the satisfaction of the company's liability to him, just in the same way as if he were not a shareholder. But, accede to the contention of the respondent, and as pointed out by Lord Chelmsford, he may be paid in full while others get nothing.

Section 57 does not extend the law of set off to any class of debts to which the statute of George II, or the New Brunswick law, would not apply. The debts must still be mutual debts and in the same right. It preserves the right that would have existed if the business of the company was not being wound up under the act, and in that respect it declares the law as it had been held by Lord Hatherley under the Companies' Act, 1862, in *re Agra & Masterman's Bank* (2); but it limits that effect to proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up.

The argument for the respondent makes the two contiguous sections, 57 and 58, inconsistent with each other, because the property of the company, or that part of it which consists of unpaid stock, cannot be applied in payment of the liabilities generally if it goes to satisfy debts due to individual members without regard to the claims of others.

(1) 1 Ch. App. 528. (2) L. R. 3 Eq. 337.

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The construction we are urged to put upon section 57 is so much at variance with the general scheme of the measure that it cannot be taken to interpret fairly the intention of the legislature. I believe the true understanding to be that the section has no reference to calls made upon shareholders after the commencement of the winding-up.

The original statute was 45 Vic. ch. 23 passed in 1882.

The provisions now found in the first part of section 56 of the revised statute and section 57 formed together section 60 of the act of 1882, the subject of the section being the proof of debts and claims against the company. The two sections must be read together as in their original connection. What is interposed between them in the revision, as a second part or sub-section of section 56 is a provision introduced in 1886 in favor of clerks, &c., by 49 Vic. ch. 46. By that act it was made a third sub-section to section 60 of the act of 1882, leaving the present section 57 to retain its position as the second sub-section. If any change was proper in making the revision, it would have been more correct to make a separate section of the new clause, which is not on the same subject as the others, relating as it does to the dividend sheet and not to the proof of debts, and to let section 56 truly represent the original section 60 by embracing the provisions which, as section 57, are occasioning so much perplexity.

Section 60 enacted that:—

> When the business of a company is being wound up under this act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company,—a just estimate being made, as far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

All this computation was obviously to have refer-

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ence to the date of the commencement of the winding up proceedings. Then the section went on to enact "2. The law of set off, &c.," as in the present section 57. The law was to apply to all claims upon the estate of the company. I call attention in passing to this form of expression, as I shall have to refer to it again by-and-by. The provision had immediate reference to the adjustment of claims for proof, and to the date of the commencement of the winding up, as of which date the claims were to be proved, and the express mention of that date in the latter portion of the clause indicates that the debts there spoken of do not include the liability, consequent upon the winding up, to be called on for payment of stock, but only debts ascertained and capable of computation at the commencement of the winding up.

No question of the accuracy of this construction would be suggested if it does not conflict as it was considered to do in the court below, and as the respondent now contends that it does, with sections 44 and 46. But if we read those sections, having in mind the scope and policy of the act, which look to the distribution of the assets amongst the creditors without preferring one to another further than, as in the case of clerks and servants, special preferences are given, we shall find no insuperable difficulty created by them.

Section 44 declares the amount for which a shareholder is liable to be placed on the list of contributories after the commencement of the winding up to be an asset of the company, and section 58 requires the assets to be applied towards the satisfaction of the creditors generally. Section 46 does not describe the debt which it declares the liability to create, in the terms of section 57, as a debt due or accruing due at the commencement of the winding up, but as accruing

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due when the liability commenced. The whole reliance of the respondent is, and must be, on maintaining that the liability commenced before the winding up, and thus supplying by inference or implication what is not directly stated in the section, so as to give literal application to the language of section 57. I do not think that he can maintain that proposition; but he would also have to maintain that the debt is a mutual debt, and in the same right as that against which it is sought to set it off. The whole argument on which the English decisions against the right of set off proceed, going the length, as in *Black & Co.'s Case*, (1) of denying the power of the company to give a right of set off by contract with the shareholder, applies against the contention.

But we have in the very statutes before us direct proof that the reading contended for would misinterpret the intention of the legislature.

The Bank Act (2) under section 70 of which the double liability arises in the event of the property and assets of the bank being insufficient to pay its debts and liabilities, provides in section 72 for the making of calls for the double liability, and by section 74 enacts that:—

> Any failure on the part of any shareholder liable to any such call to pay the same when due shall operate as a forfeiture by such shareholder of all claim in or to any part of the assets of the bank—such call and any further call thereafter being nevertheless recoverable from him as if no such forfeiture had been incurred.

The "claims upon the estate of the company" which, under section 57 of the Winding-up Act, are brought under the law of set off are, in other words, debts owed by the company; and the "claim in or to any part of the assets of the bank" under section 74 of the Bank Act—the statutes being *in pari materia*—denotes,

(1) 8 Ch. App. 254.

(2) R. S. C. ch. 120.

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or includes, a debt owed by the bank to the shareholder who has failed to pay his call. Is the debt to be set off against the call? Section 74 says no. It declares the debt forfeited, and the logical consequence is that, in a proceeding like this for the recovery of the debt for the call, the shareholder has no debt to set off against it. At all events, and this is as far as it is necessary at present to go, the intention is perfectly clear that the call is to be paid without respect to the shareholder's claim in or to the assets of the bank—or, to vary the expression, the one debt cannot be set off against the other.

The direct operation of section 74 does not touch calls for unpaid stock, but only for the double liability, which is what in the present case is in question; but the influence of the section is, as I apprehend, more extensive. There is no distinction made in sections 44 and 46 of the Winding-up Act between the double liability of shareholders in banks and the unpaid capital in banks or other companies. The sections apply to unpaid liabilities, however they arise.

When, therefore, section 46 is relied on as leading to the conclusion that the liability for calls attaches *as a debt* as soon as one becomes a shareholder, and that that is a debt to which the law of set-off is, by section 57, to apply, the effect of section 74 is to add another consideration to those already adverted to in favor of construing section 46 so as to harmonize and not to conflict with the general purpose of the act.

The object of section 74 is to impose the penalty of forfeiture if calls for the double liability are not punctually paid. So far, they are treated differently from calls for unpaid capital. But, in recognising the obligation to pay them without regard to counter claims, it does not profess to regard them as an exception from the general range of such liabilities. On

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the contrary, the calls are, by section 73, to be made as prescribed in the Winding-up Act, where there is no distinction indicated.

It matters but little, if it matters at all, in which way these debts are kept away from the operation of the law of set-off—whether by not being due or accruing due at the commencement of the winding up, or by not being mutual debts and in the same right as an ordinary debt due by the company to one of its members.

I see no reason why the considerations which governed the English decisions against the right claimed are not equally applicable under our law and equally conclusive against the debts being of the character to which the law of set-off applies, or why we should not assume that to have been the opinion of the Legislature, as evinced by section 74 of the Bank Act, and otherwise. Great stress has been laid on section 73 of the Winding-up Act as opposed to this view, and as, in fact, opposed to denying the right of set-off for any reason.

That section reads as follows:—

> When a debt due or owing by the company has been transferred within the time and under the circumstances in the next preceding section mentioned, or at any time afterwards, to a contributory who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory to set up by way of compensation or set-off the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory.

There is no doubt that it is here assumed that a contributory may set off an independent debt against a claim upon him as contributory; all that the clause enacts, however, is that in the specified circumstances the debt transferred to the contributory shall not be set off, and whatever may have been in the mind of

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the draftsman when he introduced the word "contributory," it will be found that no inference is necessarily to be drawn, or, one might say, none can properly be drawn, from it to affect the conclusions so far arrived at.

We need not enter on an exhaustive inquiry as to the force of the word "contributory." It would probably be found only to apply, in strictness, to persons liable to contribute in respect of unpaid capital, or, in the case of a bank, for double liability. But no such limitation of its meaning appears in section 44 where it is made in terms to relate to any liability to the company or to its members or creditors. The same vagueness may attach to the use of the word in this section 73. It is only in connection with section 57 that any force is sought to be given to the section. If section 57 were not in the statute no one would venture to argue that the policy and purpose apparent from the general provisions could be controlled by any inference to be drawn from section 73. But section 57 says nothing of contributories. It is only by argument from the alleged effect of section 46 that it is attempted to bring contributories within the terms of section 57, and I have shown why, in my understanding of the legislation, that section was never meant to apply to contributories, as such, but only to such adjustments of account as would be proper or possible at the commencement of the winding up. I am satisfied that no inference can legitimately be drawn from section 73 opposed to the conclusion that only mutual debts and debts in the same right can be set off under section 57, and that the debts now in question are not of that character.

Whether the debt created under section 46 by the liability to contribute is to be referred back to the original taking of shares in the company, or should be

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deemed to have accrued only after the winding up began, is a point of more difficulty. There are some cases which were noticed in the judgment of the learned Chief Justice in the court below that assume the earlier date. *Ex parte Canwell* (1); *Ex parte Hatcher* (2). The questions that turned on the date of the accruing of the debt in those cases were not allied to those in debate on the present appeal. On the other hand, there is an opinion of Lord Romilly in *Ex parte Mackenzie* (3), cited by Mr. Justice King, to the effect that the call refers back to the commencement of the winding up, and the same view forms the basis of part of the argument of Lord Chelmsford in *Grissel's Case* (4), and of Sir George Jessel in *Re Whitehouse & Co.* (5).

The weight of authority, so far as the particular point has been discussed, does not strike me as being so much in favor of dating the commencement of the liability further back than the winding-up proceedings, as to make the conjecture unreasonable that our legislature did not regard the statutable debt created by section 46 as due or accruing due at the commencement of the winding up, within the meaning of section 57.

But whatever may have been the views held by the legislature on these points, I am satisfied that the intention to be gathered from the statutes is that a contributory cannot set off against calls made in the course of the winding up, either for capital or double liability, an independent debt owed to him by the company.

I say nothing of calls for capital which may have been made but not paid before the winding up. It

(1) 4 DeG. J. & S. 539.
(2) 12 Ch. D. 284.
(3) L. R. 7 Eq. 240.
(4) 1 Ch. App. 528.
(5) 9 Ch. D. 595.

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may be open to question whether they are not covered by section 57, and so taken out of the English rule which classes them with calls made under the direction of the court.

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I agree with the conclusions of Mr. Justice King, who dissented in the court below, and think the appeal should be allowed.

Appeal allowed with costs.

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

Solicitor for respondent: *J. A. Vanwart.*

JAMES MUIR, *es qual. et al.* (OPPOSANTS)..... } APPELLANTS;

AND

JOHN THORALD CARTER (CONTESTANT)..... } RESPONDENT.

DAME ELIZA ANN HOLMES, *et vir* (OPPOSANTS IN THE SUPERIOR COURT) } APPELLANTS;

AND

JOHN T. CARTER (PLAINTIFF CONTESTING OPPOSITION IN THE SUPERIOR COURT)..... } RESPONDENT.

DAME ELIZA ANN HOLMES, *et vir* (INTERVENANTS IN THE SUPERIOR COURT)..... } APPELLANTS;

AND

JOHN T. CARTER (PLAINTIFF CONTESTING INTERVENTION IN THE SUPERIOR COURT)..... } RESPONDENT.

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* Oct. 11.

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*Jan. 15.
*June 14.

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

Appeal—Matter in controversy—Bank shares—Actual value—Opposition—Shares held "in trust"—Substitution—Onus probandi—Res judicata—Art. 1241 *C. C.*

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under section 29 Supreme and Exchequer Courts Act, and the actual value of such shares may be shown by affidavit.

The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available

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

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to satisfy the demand of his creditors. *Sweeny* v. *Bank of Montreal* 12 App. Cas. 617 followed.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the *corpus* of said shares nor as to the dividends of other shares claimed under a different title. Art. 1241 C. C.

Strong J. was of opinion, in the cases of *Holmes* v. *Carter*, that upon the facts shown the judgment of the Court of Queen's Bench should be affirmed.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada (Appeal Side) confirming the judgments of the Superior Court:—1. In *Muir* v *Carter* dismissing an opposition fyled by James Muir in his quality of curator to the substitution created by the will of the late Hon. John Molson; 2. In *Holmes et vir* v. *Carter* (No. 28) dismissing an opposition fyled by E. A. Holmes *et vir*; and 3, in *Holmes et vir* v. *Carter* (No. 29), dismissing an intervention fyled by E. A. Holmes *et vir*.

Tha material facts which gave rise to the proceedings in the case of *Muir* v. *Carter* are as follows:—

The respondent Carter having obtained a judgment against A. Molson issued an attachment by garnishment in the hands of the Molson's Bank, who declared that they held 148 shares standing in the name of A. Molson "in trust for B. A. M. *et al.*" upon which certain dividends were then payable. The defendant, Molson, contested the attachment, as did his wife by an intervention. The contestation and intervention were both dismissed. This judgment was confirmed by the Privy Council in July, 1885. Thereupon the plaintiff issued a rule *nisi*, calling on the bank to declare what dividends had since fallen due: and also seized the stock itself under execution. The defendant, assisted by Muir, appellant, who was appointed curator to the substitution in place of the defendant,

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opposed the seizure of 33 of the shares, and the sale of the remainder was opposed by defendant's wife, who also intervened again in the attachment proceedings and contested the declaration of the bank as to the 115 shares. At the trial it was shown the 33 shares were made up of two blocks, the larger of which consisted of 30 shares transferred by E. Ford, a stock broker, on the 19th of October, 1875, to the account of Alex. Molson, in trust for E. A. Molson *et al.* Mr. Ford had advanced the defendant money on 1,110 shares, 840 shares belonging to the defendant individually and 270 held by him in trust, transferred to Mr. Ford on 18th April, 1874. His advances not being repaid, Mr. Ford sold most of the shares pledged to him, 30 being left, being the shares in question in the present suit. Mr. Ford in his evidence stated that it was trust shares he transferred, and that he sold first Mr. Molson's own stock, then what was required of trust stock to recoup himself. Mr. Ford explained he had to get the money he lent from financial institutions or capitalists and transfer to them the shares transferred to him, and so long as he transferred the same number of shares in the same institution that was all that could be required of him, but the shares re-transferred were either the same as those he received or represented and replaced them.

It was also proved that these shares had been purchased, when A. Molson was solvent, with moneys belonging to the substitution, and had been originally entered in the books of the bank as shares belonging to "A. Molson, Esq., in trust."

In the case of *Holmes et vir.* v. *Carter* (No. 28) E. A Holmes fyled an opposition to the seizure of the 115 shares of the capital stock of the Molson's Bank, standing in the name of Alex. Molson in trust for E. A. M. *et. al.*, claming them as her property.

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In the case of *Holmes et vir* v. *Carter*, (No. 29) E. A. Holmes fyled an intervention to the seizure of the said 115 shares claiming the *corpus* and dividends of said shares as her property. The evidence showing the dealings with these particular 115 shares is reviewed at length in the judgment of Patterson J. hereinafter given.

The evidence and documents of record having been made common to the three cases, it is only necessary to report the argument of counsel in the first case.

R. Laflamme, Q.C ; and *Robertson*, Q.C. for appellant.

The first question for consideration is whether or not the issues raised in the present cause have been already adjudicated upon. A reference to respondent's exhibits, viz., copies of the contestation by the said Alex. Molson of the former *saisie-arrêt*, of the present respondent's answer thereto and the judgments rendered thereon, shows that the conditions necessary to support a plea of *chose jugée* are not to be found in the present case, even on the issue with Mr. Molson in which the parties are the same. On the contestation of the former *saisie-arrêt* only the dividends were in question ; now it is the *corpus* of the shares themselves. In the former case dividends were claimed, not on the general ground that they were revenues of shares belonging to the substitution, but on the special ground that they were revenues of the balance of 640 shares belonging to the estate of the late Hon. John Molson, and referred to in an exhibit of respondent as standing in the acccunt of Alex. Molson individually. All that that Mr. Molson ever claimed was that the shares in question, under seizure, formed part of these 640 shares, and consequently all that was or could possibly have been decided against him was that they did not form part of these 640 shares. But there can be nothing in this to prevent Mr. Molson from making a new claim to the

shares on another ground, viz., that they are shares purchased with money belonging to the substitution, which appellants submit is proved by the evidence. Still less can the decision heretofore rendered be any bar to such a claim on the part of the appellant Muir.

In support of their position in this issue appellants refer to the words of the Privy Council in the former case (1). "It is not said that any judgment in this suit "can possibly enable the creditor to attach the estates "which they may eventually take, assuming the "substitution in their favor to be valid, nor is it "suggested that anything decided in this suit, between "the judgment debtor and creditor, with regard to "the validity of these substitutions, would be binding "upon them as *res judicata*."

There remains the one question of fact now raised for the first time, viz., do the thirty-three shares seized belong to the substitution created by the will of the Hon John Molson, as claimed by opposants, or do they not? The account in which the shares in question are found being on its face a trust account, the burden of proof was on respondent to establish that it was not. But the proof of the ownership and origin of the shares is as clear as it could be made under the circumstances.

But apart from the question of fact, we submit that in law Mr. Molson having pledged his own and trust shares for advances to himself, any balance remaining up to the full number of the trust shares transferred would be considered trust shares. A man must for his own debts dispose of his own property before he disposes of that in which others have an interest. *Sweeny* v. *Bank of Montreal* (2).

It being established that the 270 shares transferred to Mr. Ford, and of which he re-transferred the 30 in

(1) 10 App. Cas. 674. (2) 12 App. Cas. 617.

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question, were trust stock, it remains only to be proved what the trust represented and to whom the stock really belonged. The parties most capable of showing this are manifestly the trustee and such of his employees as acted for him in dealing with the stock. The trustee was Mr. Molson, one of the appellants, and his evidence is clear and satisfactory, and shows that the shares are an investment made with moneys of the substitution made by Mr. Molson in a natural and legal manner long before he had any transaction with Carter. As institute he had control of the moneys of the substitution, and was by his position the legal trustee for the substitution. The law gives the institute full control of the substituted property, subject to his duty to invest the capital, and account for it at the termination of his use (1). Consequently there, was no need of any specific appointment as trustee; the common law provides for that.

Abbott Q.C. for respondent.

The judgment of the Privy Council in the case of *Molson* v. *Carter* (2) constitutes *chose jugée* against the appellants.

It will be seen from the copies of the contestation or plea fyled by the defendant to the original writ of attachment and the answer thereto, and the judgments which have been rendered, that the whole question as to the ownership of this stock has been fully gone into and decided by the courts. All the pretensions now made by the opposants were made and adjudicated upon under the previous contestation. The proof which has been attempted to be made under the present contestation, namely, that these 33 shares belong to and form part of the substition, was made under the previous contestation, with the only difference that whereas the defendant in his first opposition said that they formed part of the 640 shares, originally trans-

(1) C. C. art. 947.

(2) 10 App. Cas 674.

ferred to him as his share in the estate, he now says they are part of 270 shares he bought with the money of the estate. In both the oppositions the object is the same, viz., to have the stocks declared to belong to and form part of the substitution; the reasons, or *moyens*, alone are different.

On the question of fact, the learned counsel, after reviewing the evidence, contended that the whole of the shares in question had been accounted for, and had been shown without doubt to be the property of the defendant, and always had been treated by him as such: while he had entirely failed to prove by any satisfactory evidence that any portion of the stock seized belongs to the substitution.

He contended, also, the case of *Sweeny* v. *Bank of Montreal* (1) did not apply to the facts of this case.

The following judgments were delivered in *Muir* v. *Carter*:—

SIR W. J. RITCHIE C.J.—We all think that this is a case in which the appeal should be allowed.

The evidence in this case establishes very clearly the fact that in November, 1871, Alexander Molson, when he was perfectly solvent, invested $15,000 of the money belonging to the estate of the late Hon. Mr. Molson, and that out of these moneys he lawfully purchased for the substitution two hundred and twenty shares in Molson's Bank. We think that the evidence of the fact sworn to by Mr. Molson is entirely corroborated by the evidence of Mr. Varey, and is also corroborated by the manner in which the property was dealt with.

It appears that when Mr. Molson transferred these shares, rightly or wrongly, to Mr. Ford as collateral, he gave instructions that when it became necessary to realize upon these shares Mr. Ford should first sell those shares of Mr. Molson's about which there was no

(1) 12 App. Cas. 617.

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question, and then if there was any deficiency to sell the shares held "in trust," and if there was any surplus they should be transferred back to the account "in trust." Mr. Ford appears to have acted upon that principle, for he did sell first the stock belonging to Mr. Molson and then he sold the shares "in trust," and there being still thirty-three shares left he transferred them back to Mr. Molson "in trust" as the property belonging to the substitution, and Mr. Ford thus repaired, at any rate, whatever wrong might have been done originally as regards these thirty-three shares, by putting them back to Mr. Molson's account "in trust."

With reference to the plea of *chose jugée*—the matter in controversy before the Privy Council was not in reference to the *corpus* of the shares, but with reference to the dividends; it is not the same subject matter and not between the same parties and, therefore, I do not see the attributes necessary to enable the respondent to succeed on his plea of *chose jugée*.

Under all these circumstances, the appeal must be allowed.

STRONG J.—It is proved beyond all doubt that these thirty-three shares belong to the substitution. These identical shares were bought by Mr. Molson with the monies of the substitution and for the substitution, and at a time when he was perfectly solvent. Therefore, this opposition to the sale of the *corpus* of these shares is well founded.

As regards *chose jugée*, it is out of the question here. The case in appeal before the Privy Council did not relate to the same thing and did not arise between the same parties. The curator to the substitution, in which character the present appellant has formed this opposition, was no party in that quality to the former action appealed to the Privy Council, and therefore the plea of *res judicata* cannot avail the respondent.

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Indeed, the learned judge in the court below did not found his judgment upon that, but upon the other ground, which, in my opinion, the evidence fails to support, namely, that these shares did not belong to the substitution, but were the property of Mr. Molson himself, and so available to satisfy the demands of his creditors.

The appeal should be allowed with costs.

FOURNIER J.—I am also of opinion that this appeal should be allowed. The evidence is plain that these thirty shares belonged to the substitution, and that the requisites to sustain the plea of *res judicata* are wanting.

TASCHEREAU J.—I am of the same opinion.

PATTERSON J.—I think that in whatever respect the evidence of Mr. Molson might be criticised, it is got over by what must be borne in mind, that these shares, if they were transferred, should have been put back to the account "in trust," and the evidence being quite consistent with this fact,—the appeal must be allowed with costs.

Appeal allowed with costs.

In the two cases of *Holmes et vir.* v. *Carter* the following judgments were delivered :—

SIR W. J. RITCHIE C.J.—I have been favored with a perusal of the notes of my brothers Taschereau and Patterson in this case, and I entirely concur in the conclusion arrived at. At the close of the argument I would have been prepared to give judgment if the other members of the court had been so disposed.

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STRONG J. was of opinion that the judgments of the Court of Queen's Bench were in all respects correct and that the present appeals should be dismissed with costs.

FOURNIER J. concurred with TASCHEREAU J.

TASCHEREAU J.—In execution of a judgment against Alexander Molson the respondent seized 148 shares of the stock of the Molson's Bank. It appears that these shares were not registered as Molson's at all, but as Molson's in trust for E.A.M. *et al.*, which is established to be, and has always been understood to be, the appellant's name.

To this seizure the appellant filed an opposition claiming 115 of these shares as her property, and alleged that at the time the bank was founded, in 1855, she was proprietor of twenty shares; that she has since acquired other shares, and on the 6th October, 1873, she owned 115 shares, which, up to the 6th October, 1875, stood in her own name and in the name of Alex. Molson in trust for E. A. Molson (meaning appellant), and were on the last-mentioned date transferred to the account "Alex. Molson in trust for E. A. M *et al.*"

Respondent contested the opposition by three contestations, pleading:

1. *Chose jugée.*

2. That the shares seized never belonged to Mrs. Molson; that the twenty shares originally subscribed for in her name were subscribed for by the defendant, who had no authority to act for her.

That the shares in the name of Alex. Molson in trust for E. A. Molson and E. A. M. *et al.*, were his own, and so placed for his own benefit, and to prevent his creditors having any remedy against the said stock.

That about the 2nd October, 1878, plaintiff, in execu-

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tion of his judgment against defendant, took a writ of attachment by garnishment in the hands of the Molson's Bank. That the bank declared they held the shares in question among others; that appellant intervened and claimed that said shares belonged to the estate of the late Honorable John Molson, and were *insaisissables*, and by reason of said claim she is estopped from now claiming the shares as her own.

3. A general denial.

It is settled by *Sweeny* v. *The Bank of Montreal* (1) that the shares in question apparently and declaredly belonging, not to Alexander Molson individually, but being held by him for others, the burden of proof is on respondent to show that they are really Molson's. And if Molson ever admitted, while solvent, that the shares were not his, but Mrs. Molson's, such an admission would be for ever binding on him, and consequently on his general creditors, who can have no further rights than himself, in favor of his wife, unless error or fraud be clearly and positively established.

Such an admission is made both in the entries in the books of the bank and Molson's own books, as proved by Mr. Varey. Molson's evidence in *Muir* v. *Carter* forms also part of the present case.

But apart from the force of such an admission, appellant's title to the 115 shares is clearly proved.

1. The marriage contract proves her separate as to property in eighteen hundred and fifty-five, and that she had means of her own.

2. Her ownership of twenty shares at the date of the opening of the Molson's Bank is proved by Elliot and Exhibit B. of case.

3. Elliot proves, by statement A. of case, that the shares seized were standing in the name of Alexander Molson in trust for E. A. M. *et al.* That one hundred and

(1) 12 App. Cas. 617.

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fifteen of these were on the 6th of October, 1875, transferred from the account, Alexander Molson in trust for E. A. Molson. This account, produced as Exhibit B., shows shares standing in the bank for this account, back to 1860; that there were, on the 30th June, 1870, seventy-seven shares to the credit of this account, and these were increased by allotment to one hundred and fifteen, the other thirty-eight having been alloted to Mrs. Molson and transferred when paid up from the allotment account. That these shares were looked on as held for Mrs. Molson and understood to be hers. That Mrs. Molson had shares in another account, Exhibit B., in her own name. He proves also Mr. Molson's authority to act for his wife under a power of attorney. Elliot's evidence is corroborated by that of George Varey, Molson's confidential book-keeper and clerk. He shows clearly that Mrs. Molson was looked on and treated as the owner of stock which her husband used for her, and that as far back as eighteen hundred and sixty-six she was owner of seventy-seven shares. He also proves that Molson was very wealthy up to eighteen hundred and seventy-five, in fact up to the suspension of the Mechanics Bank in the fall of 1875, long after the account of Alexander Molson in trust for E. A. Molson was opened.

All this shows clearly that the the stock in the accounts "Eliza Ann Molson" and "Alexander Molson in trust for E. A. Molson" belonged to appellant and was treated as and looked on as hers, and must therefore be considered as hers until some proof is made to the contrary. No such proof has been made. The two accounts shown by Exhibit B. ran parallel for five years, and the irresistible conclusion is that the stock gradually worked from one to the other for convenience in dealing with it. The analysis of the two accounts together annexed to appellant's factum illustrates how the two

accounts were treated as one, the way in which shares coming from one account were returned to the other, for instance 25th April, 1861, eight shares were transferred to W. Molson from one account (E. A. M.); the same day twelve shares from the account A. M. in trust for E. A. M; the 1st April, 1869, W. Molson re-transferred forty shares, evidently made up of these two accounts. The evidence shows that the shares were transferred as pledges, and not as sales, and returned to one or other of the accounts upon repayment of the advance, the accounts thus nominally closed being really open, the shares being merely in the hands of pledgees.

As to plaintiff's pleas:

1. *Chose jugée.* That on the attachment of the 2nd October, 1878, in the hands of the Molson's Bank above referred to, the present appellant intervened and set up all her rights in said shares as in the present opposition; that her intervention was dismissed and consequently she cannot raise the same questions again in her present opposition. This plea is not borne out by the facts, and a comparison of the pleadings and judgments on the attachment and intervention referred to with the pleadings in the present cause, will show that the requisites of a plea of *chose jugée* are entirely wanting. Art. 1241 C. C. establishes these requisites:

"1. The authority of a final judgment applies only to that which has been the object of the judgment." We must therefore look to the judgment of the Superior Court rendered 30th June, 1881, and the judgment of the Court of Queen's Bench and Privy Council, which simply confirmed it. Read in the light of intervenant's claims in that case, it appears that the only thing decided by the judgment was that the present appellant was not entitled under the will of the Hon. John

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Molson to claim a privilege on the revenue of the shares seized for alimony nor to rank on her husband's estate as a creditor on the ground of his insolvency.

It will be seen on reference to the copies of pleadings, filed as plaintiff's exhibits Nos. 1, 2, 3 and 4, printed in the case in the intervention appeal, that the cause of the demand in intervention made in 1878 by the now appellant was the bequest under the Hon. John Molson's will. She claimed that the shares seized formed part of the estate and were *insaisissables* and affected to her under the will, for alimony.

The cause on which her present demand is founded is her acquisition of the shares as her own property. No such cause and nothing in any way similar thereto was ever set up by her before. In fact, Mr. Justice Papineau, by his judgment of the 30th June, 1881, specially rejected all proof of such a claim on the ground that the allegations of the intervention did not justify it.

"2. Between the same parties acting in the same qualities."

"3. For the same thing." This requisite too is wanting. By her intervention of the 5th April, 1880, appellant claimed that the dividends on the stock seized, not the stock itself, were affected for her support as being part of the estate of the late Hon. John Molson. She claimed an alimentary right in the dividends and nothing more. By the present opposition she claims the stock, the shares themselves, as her own personal property. She never asked for the shares before; she never even asked for the dividends, but merely a limited and subsidiary interest in the latter. The judgment decided simply that she had no real existing interest to make such a claim. The only possible ground for maintaining that there is *chose jugée* in this respect would be that, having failed in a

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claim for the revenues, appellant cannot in effect renew her claim by now making a demand for the principal. But appellant in reality never claimed the dividends or revenues, or any right of property in them, but merely that while they belonged to her husband she had a right as depending on them for alimony to oppose their seizure by her husband's creditors. The authorities are clear that in such cases a judgment refusing the revenue is a bar to a claim for the principal only when the claim for revenue has been founded in a pretended right of property in the principal and (this being a second indispensable requisite) the claim for revenue has been rejected on the ground that the claimant had no right or title to the principal. A reference to respondent's exhibits 1, 2, 3 and 4 shows appellant's claim was not met in this way nor does the judgment of the Superior Court show any such ground: the question was never even raised.

The two courts below have not supported the respondent's plea of *res judicata* and the authorities cited under Art. 1241 C. C. are clear that it is utterly unfounded.

Next comes respondent's second contestation, which is in effect, that the shares in the name of Alex. Molson in trust for E. A. M., were his own shares, so placed to defraud his creditors and especially to prevent respondent's having any remedy against the said stock. It is to be noticed that the account Alex. Molson in trust for E. A. Molson was open in 1860, fifteen years before the date of respondent's mortgage. So that clearly there could have been no intention at the time of defrauding respondent.

The whole proof establishes, moreover, that the stock in both accounts "E. A. Molson" and "Alexander Molson in trust for E. A. Molson" was appellant's stock. Being separate as to property she could own stock and the

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stock was in her name from the date on which the bank opened its doors. It is true that the respondent shows that the subscription to the original twenty shares was in Molson's handwriting but he does not show that Molson's money paid for them. There is nothing either unnatural or illegal in Molson's subscribing for his wife, more particularly as he had the full management of her affairs. It is not proved that Molson paid for the shares, and at this late date—thirty years after the purchase—appellant cannot be called on to point out what particular moneys of hers paid for them. She makes the best proof possible considering the lapse of time, viz. :—that she had a right to hold shares in her own name and that until the seizure made by the respondent her ownership of them was never questioned. If a ratification of her husband's act in subscribing for her was required it is found in the power of attorney, in the handwriting of one of the officers of the bank and witnessed by another. The court below admitted these shares to have been appellant's, but held that her account was closed in 1866 and that the power of attorney applied only to the stock in the account in appellant's own name,"E. A. Molson." This is true in a sense ; the power of attorney is dated in 1859, when only one account was in existence, but its terms are full, including the right to transfer. The account in Mrs. Molson's own name was nominally closed in 1866, the fact being that the shares transferred from her account were held by those who had made advances on them ; but the account in the name of Alex. Molson in trust for E. A. Molson had been opened five years before and both accounts had always been treated by Molson and his book-keeper, and had always been considered by the bank, as appellant's. The evidence of Varey and Elliot is clear on this point. Varey's evidence goes further. He proves that Molson carried

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on an extensive banking business on his own account; that in addition he carried on an entirely different business, and one which was kept separate and distinct in his books, by dealing in stock for and on account of his wife. He had control of her stock and he used his power of transfer to borrow money on it but all along he kept the stock, dividends and profits separate. The stock was transferred as security for loans but was always repaid and in the course of the transfers and re-transfers found its way finally to the account "Alex. Molson in trust for E. A. Molson" where on the 1st January, 1871, was a balance to the credit of the account of 77 shares, increased by allotment to 115 shares. This balance of 115 shares in this account appears as standing in the name of Alexander Molson in trust for E. A. M. in the published lists of shareholders for the years 1872, 1873, 1874, 1875, which lists are filed as opposant's Exhibit G. There was nothing illegal in all this. Mrs. Molson had a perfect right to carry on operations in stock and she had a pefect right to employ her husband as her agent and he would be bound to her in the same way as any third party who had been employed by her. Between her and her husband, even had there been no power of attorney, admissions found in his books or in his course of dealing, would have been binding against him, and his creditors can have no better rights than he has. On this point see Laurent (1):

Peut-on opposer l'aveu aux créanciers de celui qui l'a fait? L'affirmative n'est pas douteuse. Quand les créanciers exercent un droit de leur débiteur, ils agissent en son nom, et on peut leur opposer toutes ces exceptions qui peuvent être opposées au débiteur. Sauf aux créanciers à attaquer l'aveu comme fait en fraude de leurs droits. La jurisprudence est en ce sens.

Dalloz (2):

(1) L'aveu fait foi non-seulement contre celui de qui il émane,

(1) Vol. 20, No. 180, p. 208 et note p. 209.

(2) Jurisprudence Générale Oblig. 5104.

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mais aussi contre ses héritiers et ayants cause, et notamment contre ses créanciers agissant en vertu de l'art. 1166. Ceux-ci ne pourraient repousser cet aveu qu'au cas seulement où ils l'attaqueraient comme fait au préjudice de leurs droits. Il a été jugé en ce sens que l'aveu fait par le débiteur ou par ses hériters qu'il n'est que propriétaire apparent des titres dont la restitution lui est réclamée, peut être opposé à ses créanciers intervenant dans l'instance ; s'ils ne rapportent point la preuve d'un concert frauduleux entre les parties contendantes.

And it is to be noticed that Carter, the respondent, is a subsequent creditor. These shares were treated as Mrs. Molson's in 1871, on the books of the bank, and as far back as 1866, Molson admitted in his books that seventy-seven shares, the number claimed by the present opposition (together with the 38 allotted her, one for every two held at the date of the allotment as explained by Mr. Elliott), were appellant's. The date of Carter's mortgage is 9th February, 1875, so that the declaration in Molson's books that the stock was the property of his wife, the appellant, could not possibly have been made with any intent to defraud respondent. Nor could there have been any intention of defrauding his creditors generally, for two years afterwards he was worth from two to three hundred thousand dollars. The learned judge of the Superior Court has come to the conclusion that the shares in question were the property of defendant, on the ground that the account in appellant's name was closed in 1866, and that the defendant treated the stock in the other account as his own, and controlled it as such. Mr. Molson had power to sell and transfer, he exercised that power and did transfer and re-transfer the stock, but as the evidence shows, and as he was bound to do as an agent, he kept appellant's business separate from his own and her stock where it could always be traced, in effect marked it with appellant's name. Mrs. Molson had stock from the opening of the bank ; her

husband up to 1873, at least, carried on a large and profitable business both for himself and as agent for her. Is it to be supposed under these circumstances that in 1871 her stock had vanished, or is it not much more reasonable to suppose that the apparent state of affairs is the true state, and that the stock marked as appellant's, considered by the officials of the bank as hers, treated as hers by her husband—her authorized agent, and by his confidential clerk—and admitted by her husband in his books to be hers (and all this long before respondent was a creditor and while Mr. Molson was still wealthy) is in reality hers? To hold this stock to be Mr. Molson's would be not only to presume fraud, contrary to law, but to presume fraud committed without any definite or immediate object. Moreover, if Molson, at any time, had acted illegally with these shares, how could this affect the appellant's rights.

In his second contestation, respondent raises another ground against appellant, namely a plea of estoppel, to which the Superior Court in one of the *considérants* of the judgment appears to attach some weight. The allegation is that appellant in her intervention in the former case, alleged that the shares now claimed by her formed part of the estate of the late Hon. John Molson. She did make such a claim, but the judgment of the court rendered 30th June, 1881, was against her and decided that the shares in question did not belong to the said estate.

There it was decided that the shares did not belong to the estate of the Hon. John Molson. The question to be decided now is a question raised for the first time, viz: Who is the owner of the shares under seizure? The authorities on Art. 1351 C. N. (1241 C.C.) are in point on this question of estoppel and show beyond a doubt that a party to a suit who has failed

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to substantiate his claim under one title may do so under another.

I resume by saying that both the object and grounds of appellant's present claim are altogether different from the object and grounds of her former claim; therefore the plea of *chose jugée* cannot avail against her. On the facts in issue, respondent as a creditor of Alex. Molson can stand in no better position than his debtor, can exercise only his rights and is bound by his admissions unless he proves that such admissions were made in fraud of his rights. Molson admitted the shares claimed by appellant to be her property previous to the date of respondent's claim and under circumstances that negative all suspicion of fraud. Moreover, the burden of proof is on respondent to show fraud. And he has made none. The acts of Molson on which he relies are acts that in themselves are perfectly legal and easily accounted for. Against the appellant herself there is no proof whatsoever. And, even if Molson had acted fraudulently, she, surely, should not thereby be deprived of her property. She is shown to have been the nominal and reputed owner of the shares from the beginning and her hus band's control over them is fully explained by his position as her agent.

What is the position of the respondent here? He seizes shares which are registered, as "in trust." Now *Sweeny* v. *The Bank of Montreal*, in this court (1) and in the Privy Council, (2) is a clear authority, that these words "in trust" mean "not for himself, but for others." They mean that Molson did not possess these shares *animo domini*. Now, a seizure cannot be had but against goods in possession of the party seized *animo domini*. Leaving this view of the case aside, what are the respondent's contentions? Does he claim to exercise the action of his debtor, Molson, under Art.

(1) 12 Can. S. C. R. 661. (2) 12 App. Cas 117.

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1031 C. C.? If so, he must fail, for the simple reason that Molson, it is clear, could not question his wife's title to those shares. Does he profess to exercise the action *Pauliana* under arts. 1932 *et seq.*? He must there also clearly fail. He has not proved fraud, then, under Art 1039, being a subsequent creditor, he has not got that action. Moreover, the conclusions of his pleas do not ask for the rescision of any contract. He then must fall back on the proof he attempted to make that, as a matter of fact, these shares do not belong to the appellant. On him was the burden of proof, as per *Sweeny* v. *Bank of Montreal*, and that proof, in my opinion, he has failed to make. The facts themselves are not disputed. Inferences of facts, from the evidence adduced, are, here, what we have to determine upon.

I would allow this appeal with costs *distraits*. On the intervention, for the same reasons, I would also dismiss the appeal.

PATTERSON J.—These two appeals, which have been argued together, raise the question of the ownership of 115 shares of the capital stock of the Molsons Bank, the contest in one case relating to the shares themselves which have been seized by Carter under an execution issued upon a judgment against Alexander Molson, and the other case relating to the dividends on the shares which have been garnished under the same judgment.

Mr. Carter's claim against Alexander Molson is for a sum of $30,000 lent to him on a mortgage of real estate on the 9th of February, 1875. He recovered the judgment, which is for $31,125, on the 17th of April, 1878, on the covenant to pay contained in the mortgage deed.

The history of the 115 shares, so far as material, may be said to be entirely connected with dates much earlier than the loan from Carter to Molson.

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According to the evidence before us, Mr. Molson was in good circumstances until late in the year 1875.

In 1873 he is said to have been worth from $250,000 to $300,000, and his insolvency is attributed by Mr Varey his confidential clerk, either wholly or to a great extent, to his connection with the Mechanics Bank which failed in or about the year 1875.

We are not told of any debt or liability, or of anything tendering to cast doubt on the perfect solvency of Mr. Molson, until after the loan from Mr. Carter.

The appellant Eliza Ann Holmes, or Eliza Ann Molson, is the wife of Alexander Molson, duly separate as to property.

Much of the evidence touching the 115 shares in question is derived from the books of the Molsons Bank, where there are several accounts which have been put in evidence showing dealings with the stock of the bank.

The earliest of these accounts is in the name of Eliza Ann Molson. It begins on the 1st of October, 1855, with a credit of twenty shares "by subscription." That was, as I understand, the date of the opening of the bank. The subscription is said to be in the handwriting of Mr. Molson, the husband of the appellant, and there is evidence that he acted for his wife in her business transactions. The account contains in all eleven credits of shares acquired and six debits of shares parted with, the last debit, which bears date the 3rd of April, 1866, closing the account.

This account, which is not shown to include any transaction that was not strictly a transaction of Mrs. Molson's, is referred to chiefly because a connection is apparent between it and another account through which the 115 shares are directly traced.

That is an account headed "Alex. Molson in trust for E. A. M." the initials being those of the appellant.

It begins with a credit, on the 9th of August, 1860,

of ten shares, followed on the 13th of the following September by another credit of two shares, and on the 16th of January, 1861, by another of twenty shares. These three credits make thirty-two shares. The first debit entry is of thirty-two shares transferred on the 25th of April, 1861, to W. Molson, and some years later, but before any other entry appears in the account, viz., on the 1st of April, 1869, W. Molson transfers to the credit of this account forty shares. Now, in the account first referred to, which was in Mrs. Molson's own name, we find eight shares transferred to W. Molson on the 25th of April, 1861, the same day of the transfer of the thirty-two shares from the trust account. The explanation suggested, and apparently borne out by the books, is that forty shares were on that day pledged to W. Molson, eight from the one account and thirty-two from the other, and that those are the forty shares retransferred on the 1st of April, 1869, on the repayment of the loan for which they were pledged. The whole forty going then into the trust account, we perceive the connection between the two accounts. The effect of the entry was to place at the credit of A. Molson in trust for his wife, forty shares, eight of which had stood in the name of the wife herself, but the other thirty-two of which were as fully hers as the eight. That is what the account indicates and no evidence is given to cast doubt upon the matter. This is the only purpose, as I have before said, in referring to these figures, namely to confirm the inference that what is noted as held in trust for Mrs. Molson was really her property, because no part of the forty shares are seized or are now in question. They are apparently all gone. But the same trust account contains, on the same date as the retransfer of the forty shares, viz. the first of April, 1869, a credit of seventy-seven shares transferred from an account kept in the name of "Alex Molson in trust."

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We arrive, when we reach this entry of seventy-seven shares, at what I understand to be the essential proof of the title of the appellant to the 115 shares, as I now proceed to explain.

The account "Alex Molson, in trust," is, like the others, a short account, with eight or ten items on each side. It begins on the 12th of May, 1863; represents transactions with one hundred and eighty-eight shares; and is closed, for the time, by a debit of seventy-seven shares on the 1st of April, 1869, to "A. Molson, in trust for E. A. M."

We have seen the corresponding credit in the account so designated Now, these seventy-seven shares, so transferred from the general trust account, in April, 1869, to the specific trust for E. A. M., appear to have been at the credit of the general trust account, as early as April, 1866, but thirty-five of them were parted with in 1867, doubtless by way of pledge, and reacquired in March, 1868.

Connect with this the testimony of Mr. Varey, who shows that Alexander Molson employed the shares belonging to his wife, as he did those of others, in speculations, and who kept a memorandum, which was put in evidence of stock held up to and before the 1st of September, 1866, by his employer, in trust, which memorandum includes seventy-seven shares in trust for E. A. M.

The right of the appellant to these seventy-seven shares, dating back to April, 1866, is thus very satisfactorily established.

It is sufficient to say that it is *primâ facie* established, for it would of course be open to rebuttal by proof that the reality was not what this evidence indicated. But there has been no such proof, nor any attempt to adduce evidence in that direction. Nor is there anything in the further examination of the books to discredit the *primâ facie* inference. It is true that in the

account in trust for E. A. M. there appear a few further entries after the 1st of April, 1869, indicating dealings by way of sale or pledge with the forty shares and the seventy-seven shares, or some of them ; but the result was the restoration of the whole of the seventy-seven shares, that number remaining at the credit of the account on the 13th of June, 1870. There is nothing to indicate that these were to any extent bought with the money of Alexander Molson, or that they were not always the separate property of his wife. Had this been otherwise, the result would, I apprehend, have nevertheless been the same, for Alexander Molson was in affluent circumstances, without debts and without apprehension of falling into adversity, and could have made a valid gift to his wife, who was separate as to property. However this may be, the onus of proving that the shares were his and liable to seizure for his debts is clearly on those who assert that proposition, and no such proof has been made.

I have so far traced only seventy-seven of the shares. The other thirty-eight of the 115 are the increment of the seventy-seven, being new stock issued, one share for every two, and placed to the credit of the trust account for E. A. M. on the 31st of May, 1873.

Whatever foothold there has been for the contention against the appellant seems to have arisen from something to which it is proper to advert, if only for the purpose of showing that it does not affect the question before us.

On the 1st of October, 1875, another account was opened in the stock register of the bank, headed : " Alex. Molson in trust for E. A. M. *et al.*" It contained three items only, viz. :—

1875, Oct. 1,	By A. Molson	Shares 3
" 6, "	" in trust E. A. M.	115
" 19, "	E. Ford	30
		148

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The first and last items, making thirty-three shares, are not in question at present. We have had to deal with them in another appeal.

The 115 shares ought not to have been transferred to this account. The addition "*et al.*" indicates the children of Mr. and Mrs. Molson. But the transfer from the trust for Mrs. Molson alone to the trust for her and her children does not in any way alter the position so as to let in the judgment creditors of Alexander Molson.

Having traced the 115 shares as we have done, it will suffice to touch briefly on some other matters formally placed on the record, and discussed on the argument before us.

The Hon. John Molson died on the 12th of July, 1860. His will directed his trustees to manage his estate for ten years, and then to divide the residue among his five sons, of whom Alexander was one. They were to take their respective shares for life only. After the death of each son his share was to go to his children, subject to the right of his widow, if he should leave a widow, to the usufruct during her widowhood.

The distribution took place on the 25th of March, 1871, when, amongst other things, 640 shares of Molson's Bank stock were allotted to Alexander.

Alexander was appointed curator of the substitution of the shares of which he was institute, and tutor of his minor children.

The 640 shares were transferred to an account opened in his name in the stock register of the bank, on the 5th of April, 1871, and the result of transactions, in apparent breach of his duty as trustee, was that on the 1st of April, 1875, three shares only remained to the credit of that account. Those were the three shares transferred on the 1st of October, 1875, to the account

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"Alex. Molson, in trust for E. A. M. *et. al.*" They undoubtedly belonged to that particular trust, though the 115 shares did not.

We are not told why Mr. Molson assumed to transfer the 115 from the trust for his wife to that for his wife and children. From what we have seen, it is apparent that he could not properly do so. But if we were to assume, as the respondent invites us to do, that the 115 shares were his and not his wife's, it is plain that his substitution of them for so many of the 640 that had been lost in his speculations would have been an act of duty and honesty and not a fraud.

Mr. Carter, the respondent, attached on a former occasion the rents of certain premises in Montreal which were part of Alexander Molson's share of his father's estate, and also the dividends on the 148 bank shares.

The present appellant intervened in that proceeding and claimed that the shares were part of the estate in which she was interesed as substitute.

It appeared, as it appears from what I have said, that the 115 shares never formed part of the estate, and it was pointed out in the judgment of the Judicial Committee of the Privy Council, on appeal from the Court of Queen's Bench, *Carter* v *Molson* (1), that if they had been part of the estate the dividends, which alone were in question, would belong to Alexander and be attachable for his debts; and further, or as a consequence of that holding, that the present appellant had not the right to intervene, not being interested in the event of the suit which touched only the dividends (2). That decision of the Privy Council has been pleaded and relied on as affording a conclusive answer of *res judicata* to the present contention of the

(1) 10 App. Cas. 664.

(2) C. C. P. Art. 154.

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appellant. It is obvious from what I have just said, and without going more at large into the subject, that the matter is not *res judicata*.

In my opinion, the judgment of the court below should be reversed and the appeals allowed with costs.

Appeals allowed with costs.

Solicitors for appellants: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Abbotts & Campbell.*

ALEXANDER E. ALEXANDER (DEFENDANT)..... } APPELLANT; 1889

*Feby.20,21.

*April 30.

AND

GEORGE A. VYE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Evidence—Lost writing—Proof of handwriting—Subsequently acquired knowledge—Change of signature.

That a document not in existence was written by a particular individual may be proved by a person who has had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. Gwynne J. dissenting.

In an action for a written libel the defendant was asked, on cross-examination, if he had not changed his signature since the action begun, which he denied.

Held, Gwynne and Patterson JJ. dissenting, that documentary evidence was admissible to show that the signature had been changed.

Per Patterson J.—The witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be satisfied with his answer, and could not go further and give affirmative evidence of the fact.

APPEAL from a decision of the Supreme Court of New Brunswick refusing a non-suit or new trial to the defendant.

This was an action for a libel alleged to have been published by the defendant in a newspaper at Moncton, N.B. The publication was proved by the editor of the newspaper, who swore that he received the original manuscript, which had been destroyed, from Campbellton, N.B., where both plaintiff and defendant

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

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resided, accompanied by a letter requesting its publication; that on the plaintiff complaining of such publication he had written to defendant and received an answer; and that from the signature and writing of this last letter he, the editor, believed the original manuscript to have been written by defendant. This was the only evidence of publication.

Evidence was also admitted of the defendant's signature in a hotel register and on other occasions, to show that he had altered his usual signature in order to mislead the plaintiff and affect the trial.

The jury found a verdict for the plaintiff which the court *in banc* refused to set aside. The defendant then appealed to the Supreme Court of Canada.

The only questions to be decided on the appeal is as to the admissibility of the above evidence.

Weldon Q.C. and *Gregory* for the appellant cited *Doe Mudd* v. *Suckermore* (1); Greenleaf on Evidence (2); *Arbon* v. *Fussell* (3); *Tennant* v. *Hamilton* (4).

Hanington Q.C. for the respondent referred to Folkard's Starkie on Libel (5); Odgen on Libel (6); *Fryer* v. *Gathercole* (7).

STRONG J.—At the conclusion of the argument I had formed and was prepared to express the opinion that the appellant had not succeeded in establishing error in the judgment of the court below. Subsequent consideration of the case has not led me to alter this opinion. It seems to me that there was no improper admission of evidence, and the other objections do not, in my judgment, call for any observation. Therefore, without writing more fully which I could only do by repeating, quite unnecessarily, the same reasons as

(1) 5 A. & E. 705.
(2) 14 Ed. pp. 576-7, 579.
(3) 3 F. & F. 152.
(4) 7 C. & F. 122.
(5) Ed. pp. 318-9.
(6) P. 560.
(7) 4 Ex. 262.

have been already given in the well considered and able judgments delivered in the court below, I may at once state my conclusion to be that the appeal must be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The question which has arisen in this case is one of a very novel character; indeed, it would seem to be one of the first impression, for the industry of the learned counsel has found no reported case directly in point, nor does the precise point appear to have been referred to in any treatise. The action is one of libel. The plaintiff in his declaration alleges that the defendant falsely and maliciously composed and wrote of and concerning the plaintiff, and printed and published, and caused to be printed and published in a certain public newspaper called "The Daily Transcript," published at Moncton, in the county of Westmoreland, in the province of New Brunswick, a certain false, scandalous, malicious and defamatory libel of and concerning the plaintiff, set out at length in two counts of the declaration. The defendant pleaded not guilty, and the sole question was as to the admissibility of the evidence, by which it was sought to be established that the defendant was the author of the article containing the libel and had caused its publication.

One Robert McConnell was the editor and publisher of the "Daily Transcript," published at Moncton. In his paper of the 1st April, 1887, he published the article complained of. The plaintiff's name did not appear in the article, but he had no difficulty, from the matters treated of, in recognizing himself as the person alluded to. He received the paper containing the article complained of on the 2nd April, 1887, at

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Campbellton, in the province of New Brunswick, where he resided; and in about ten or twelve days thereafter he went to Moncton to see McConnell, the publisher of the paper in which the article appeared. In a conversation then had with him, McConnell stated that the defendant was the author of the article, and the plaintiff told him that unless an apology was made by the party who wrote the article, and published as publicly as the article had been, he would proceed against him, McConnell; to which McConnell replied that he would publish the retraction if the writer would agree to it. No retraction having been published, the plaintiff brought two actions for the publication of the libel, one against McConnell and the other against the defendant, and both were entered for trial at the same court, but that against the defendant was the only one tried, the action against McConnell having been withdrawn upon a verdict being rendered against the defendant. In this latter action McConnell was called for the purpose of connecting the defendant with the article, and it is as to the admissibility of McConnell's evidence for that purpose that the question arises.

His testimony in substance was, that upon the 31st of March or the 1st of April, 1887, he received by post a paper as coming from Campbellton, having on it the Campbellton post mark. Upon opening it he found in manuscript, in six or seven sheets, the article in question, and he published it in his paper of the 1st of April. After the type was set and he had read the proof he threw the MSS. away into the waste basket, and he stated that in the ordinary course of things it would go into the stove, and be destroyed. He had a distinct recollection of throwing it into the waste basket, and he had never seen it since Upon the last sheet, or the back, there was, as he said, a request that he should publish

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the article, and assuring him that the facts could be proved, under which was subscribed the name, "A. E. Alexander." McConnell swore that he did not know the defendant; that he had never, to his knowledge, seen him until he seen him in court upon the trial of the present action; that he had never seen him write; and that he had never had any communication from him until the beginning of May, 1887, when he received from him a letter in answer to one written by McConnell to him in relation to the subject matter of this suit, and except from that letter he had no knowledge whatever of the defendant's handwriting. McConnell's letter to the defendant was written for the plain purpose of endeavouring to obtain from the defendant some admission of his having been the author of the article, so as to relieve himself from responsibility to the plaintiff. He had written a previous letter in April to the defendant, to which he had received no answer, and so upon the 4th May he wrote to him the following letter:

Mr. A. E. ALEXANDER, Campbellton:—

Dear Sir,—You have not replied to my request either to produce proof in support of the statement about Mr. Vye contained in your letter signed "Facts that can be proved," or to publish a disclaimer. If one or other is not done I shall be obliged to give your name and the manuscript of your letter to Mr. Vye, as I do not intend standing in the gap of a libel suit. Please answer at once.

That this letter was, to say the least, disingenuous, appears from the fact that the writer had already, as we have seen, named the defendant to the plaintiff as being the author of the article, and had destroyed the manuscript which he threatens in his letter to give up in case the defendant should not come forward and accept the responsibility of the publication. The defendant appears to have known that McConnell had already accused him of being the author of the article and had given his name as such to the plaintiff, and

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as the letter threatens also to give up the manuscript, of the destruction of which the defendant had no knowledge, he challenges McConnell to proof of his accusation in his reply, dated the 5th May, as follows:

Campbelltown, May 5, 1887.

On the 16th April you gave Vye's lawyer my name. Lately you have shown the document you claim I wrote; all that now remains is for you to prove it if you can.

A. E. ALEXANDER.

It is under these circumstances that McConnell, with an action pending against himself in case he should fail to fix the responsibility for the article upon the defendant, is called as the sole witness to prove that the defendant was the person who wrote and sent to him for publication the article containing the libel complained of; and the question is: Was the knowledge which McConnell could have obtained of the defendant's handwriting by his receipt of this letter sufficient to justify his being received as a witness competent to prove that the manuscript of the article, so as aforesaid published by him (and which he said he had thrown away, and that it had become destroyed immediately after the manuscript was put in type, on the day of its receipt, and therefore could not be produced before the jury), was in the defendant's handwriting? for the learned judge who tried the case received the evidence against the protest of the defendant's counsel, and it was submitted to the jury, notwithstanding the most emphatic denial of the defendant upon his oath that he had written the article, or that he knew anything about it, and that if the writing in it looked like his it was a forgery; and the jury rendered thereon a verdict for the plaintiff, with $400 damages. Upon a motion having been made in the Supreme Court of New Brunswick to set aside this verdict, and for a rule to enter a non-suit for the reception of this evidence, and of other evidence which was also objected to and

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to which I shall refer later; or for a new trial upon the ground, among others, of misdirection in the learned judge who tried the case telling the jury that it was quite possible that McConnell might be able to carry in his mind the impression produced on him by the character of the handwriting in the communication or note received on 1st April, and so to be able to speak of its similarity to the defendant's handwriting contained in his letter of 5th May, and that McConnell's evidence was sufficient to go to them, for them to exercise their judgment upon it in determining the question in issue before them, namely, whether or not the defendant was the author of and responsible for the libel published in McConnell's paper of the 1st of April; the court refused a rule and maintained the verdict. From the judgment of the court refusing a rule this appeal is taken.

Bentham in his "Rationale of Judicial Evidence" (1) calls proof of a document, the execution of which is the point in issue, authentication by circumstantial evidence, of which there are three modes:—

1st. When the handwriting is proved by similitude of hands, asserted by the testimony of a witness, who, on other occasions, has observed the characters traced by the party in question while in the act of writing. This he calls presumption *ex visu scriptionis* or presumption from similitude of hands established by view of the act of writing.

2nd. When the handwriting is proved by similitude of hands, asserted by a witness, who, without having ever seen the party write, is sufficiently acquainted with his hand by correspondence, or by having seen other writings, which, by indications sufficiently permissive appeared to have been written with his hand. This he calls presumption *ex scriptis olim visis;* and

(1) Vol. 3 p. 598.

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3rd. When the handwriting is proved by similitude of hands, asserted by a witness, who, without such previous acquaintance with the handwriting of the party, pronounces the handwriting in question to be the handwriting of the party, on a comparison made of it with other specimens of his handwriting now, for the purpose of comparison, produced to him for the first time. This he calls presumption *ex comparatione scriptorum* or *ex scripto nunc viso*—or presumption from comparison of hands.

In *Doe ex dem Mudd* v. *Suckermore* (1) the rule as to the proof of handwriting, where the witness has not seen the party write the document in question, is laid down by Coleridge J. thus:

> Either the witness has seen the party write on some former occasion, or he has corresponded with him, and transactions have taken place between them, upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances as of the general character of his handwriting, and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen, but of the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit or other permanent causes, and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times, when his manner of writing is not in question, or by engaging with him in correspondence, either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

Patteson J. states the rule in somewhat similar language, and referring to the two modes recognized of acquiring knowledge of handwriting, namely, by having seen the person, as to whose handwriting the same is raised, write; or, by having received letters from him. He says:

(1) 5 A. & E. 703.

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The knowledge (that is, of the character of the person's handwriting) is usually, and especially in the latter mode, acquired incidentally and, if I may say so, unintentionally, without reference to any particular object, person or document.

That the rule was as stated by Coleridge and Patteson JJ. was not disputed by the learned judges who differred from them on the point then in judgment. Indeed it was admitted to be well established beyond all controversy, and this same rule is still laid down in all text-books as the prevailing rule, subject to the additional mode of proof since authorised by law, namely, by comparison of the handwriting of the document in question with authentic handwriting of the party whose handwriting the document in question is alleged by his adversary and denied by him to be, by persons skilled in discerning the character of handwriting, although they have never seen the party write, nor had acquired any previous knowledge of the character of his handwriting, being the third mode of authentication mentioned by Bentham.

Now, the rule in question and its application have hitherto been limited to the case of knowledge of the handwriting of a party, acquired by a witness in one or other of the two modes above described, and applied to the enquiry as to the handwriting of a document produced before the court and jury in respect of which an issue is joined upon the question whether the document so produced is or is not in the handwriting of the person, of whose handwriting the witness had previously acquired the knowledge from which he is asked to give his testimony upon the point so in issue. In no other case than one calling in question the handwiting of a document produced before the court or jury engaged in the trial of an issue in which the handwriting of *such* document is disputed has the rule hitherto been applied; but it is now, apparently for the

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first time, contended, and it has been in effect held by the Supreme Court of New Brunswick, that the rule is equally applicable to the case of an issue joined as to the handwriting of a document necessary to be proved, but not at all produced, before the court trying such issue; and of which handwriting the only evidence offered or capable of being offered is that of a witness who says that he had destroyed the document almost immediately after its receipt; and who, although he admits that he had no knowledge whatever of the person or of the handwriting of the writer, nor of the defendant or of his handwriting, save that some time subsequently to the destruction of the document in question, he had received from the defendant a letter, which he produces in court, undertakes to say that the destroyed document was, in his opinion, in the same handwriting as is this letter so received from the defendant. But, as it appears to me, it is of the very essence of the rule, and reason and justice require, that it should be confined to these cases for which it was established, and to which alone it has hitherto been applied, namely, the application of the witness's acquired knowledge of the handwriting of the party charged with having written a document produced before the court trying an issue joined in an action wherein the handwriting of such document is necessary to be proved. To extend the application of the rule to cases similar to that now under consideration would result in opening a ready way to the greatest abuse, and in effectually closing the door to all reasonable and intelligent inquiry into the truth of the matter in issue. In every action wherein the plaintiff asserts and the defendant denies that the document upon which an action depends is in the handwriting of the defendant, it is of the utmost importance, in the interest of truth and justice, that the

defendant should have the most ample opportunity afforded him of convincing the tribunal charged with the trial of the issue, by persons well acquainted with his handwriting, that the document in question is not in his handwriting. Every such issue may involve a question of forgery; and it is, therefore, essential to the due administration of justice that the defendant should not be prevented from having the fullest opportunity given him to have the question tried under such circumstances that the truth may be reasonably expected to be arrived at, by enabling him to have the disputed document submitted to the strictest scrutiny of persons well acquainted with his handwriting. He has a right to call, and may possibly be able to call, a vast number of witnesses who have had infinitely superior means of acquiring knowledge of his handwriting than had the single witness who, upon such slender means as that possessed by McConnell, undertakes to testify against him. This, it is obvious, would be absolutely impossible unless the document to be proved should be produced in court. If produced it might appear that the handwriting in it did not bear the slightest resemblance to that in the letter which McConnell received from the defendant, and with which he undertook to compare the destroyed document. Without the production of the document in a case like the present, where the document was never seen by any one but McConnell, who had no knowledge whatever of the defendant nor had ever seen his handwriting until some five weeks after the receipt and destruction of the document by him, it is impossible that the issue joined between the parties could be intelligently tried, for no evidence whatever could be adduced to test the truth of McConnell's evidence or the accuracy of his opinion. He was, in fact, free without fear of contradiction to endeavor to

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shift to the shoulders of another the burthen to which he himself was subjected by reason of his having published in his paper an article transmitted, as he says, to him in a handwriting unknown to him, and subscribed with the name of a person whom he did not know, and which, as soon as published, he destroyed. To apply the rule in question to a case like the present would be to provide means best calculated to prevent rather than to promote the discovery of the truth upon the question in issue. It was agreed that if it may be assumed that a witness who had only once seen a person write may have such an impression formed in his mind of the character of the handwriting of the writer that he may at any distance of time be admitted as a witness to speak as to the handwriting of a document alleged to be in the handwriting of the same person, so likewise an impression may be assumed to be formed in the mind of a person upon his once seeing a written paper of the character of the writing, without knowing any thing of the writer, or who he is, so that he could, at a subsequent time, upon seeing another document under such circumstances as to enable him to know it to be in the writing of a particular individual wholly unknown to him, pronounce the former document to be in the same handwriting as the latter; and that, therefore, his evidence in the latter case should be equally as admissible as that of the witness in the former case. The assumption in the former case may be, and perhaps is, an extravagant one; but it does not in any manner prejudice the party whose handwriting is in question, who is given ample opportunity to test the accuracy of the opinion of the witness who, with only such means of acquiring knowledge of his handwriting, testifies against him; but the assumption in the latter case is more extravagant, and as its necessary effect

would be to deprive the party affected of all means of testing the accuracy of the opinion of the witness, there is good reason why it should not be accepted in practice. Between the two cases there appears to be this difference: that in the former case the witness speaks from a knowledge supposed to have been acquired by him of the general character of the handwriting of the person as to whose handwriting he subsequently undertakes to speak; and in the latter case he speaks, not from a knowledge supposed to have been acquired of the general character of the handwriting of any person, but from a knowledge which he assumes to have been acquired of the formation of the letters in the first document, and a comparison of the impression on his mind of such formation of the letters with the subsequently written document; and without any knowledge of the writer of either, he pronounces both to be written by the same person. This, as stated by Coleridge J. in *Doe ex dem Mudd* v. *Suckermore* is not the proper test in the authentication of handwriting *ex scriptis olim visis*, but is simply Bentham's third mode of authentication—namely, mere comparison of handwriting, but very imperfectly instituted, in the absence of the principal document the handwriting in which is the subject of enquiry. McConnell, after receipt of the letter of the 5th May from the defendant, would be an admissible witness to give his opinion as to the handwriting of a document produced in court upon the trial of an issue raising a question whether it was or was not in the handwriting of the defendant. In that case, as already pointed out, the defendant would have ample opportunity to test the accuracy of the opinion and to secure an intelligent trial of the issue; but, for the reasons already given, the interests of truth and justice require that evidence of the nature of that given by McConnell should not

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be received upon the trial of an issue involving a question as to the handwriting of a document not produced, and which the defendant denies to be his. Reference has been made to the case of an action upon a lost note, but from such a case no argument can be adduced in favor of the plaintiff's contention (1). Although upon a plea of *non-fecit* in such an action the defendant cannot insist that the plaintiff cannot recover without producing the note sued upon, if he should prove it to have existed and to have been lost or destroyed; still, the proof of the former existence of the lost or destroyed note in order to admit secondary evidence of its contents, if the substantial defence be that, in point of fact, the note never was made by the defendant, must be equally as sufficient to show it to have been made by the defendant as if the note were before the court and the defendant was *bonâ fide* insisting that he had never made it. In such a case, if the evidence offered by the plaintiff should be only of the same nature as that of McConnell in the present case, then, no doubt, the cases would be identical and the same reasoning would be applicable to both. But no such case has as yet arisen in the case of an action upon a lost note, and so no argument in favor of the plaintiff's contention can be founded on the fact that in the case of a lost note the law, notwithstanding the loss or destruction of the note, provides a remedy against the maker. Suppose that, in the present case, the witness had said that the document received by him on the 1st of April contained a promise by the writer to pay for the insertion of the article in his paper, can it be held that he could have recovered in an action against the defendant upon the evidence as given? And again, inasmuch as the evidence in

(1) *Blackie* v. *Pidding*, 6 C. B. 196; *Clarnley* v. *Grundy*, 14 C. B. 608.

question would have been as admissible and as sufficient in a criminal as in a civil action, does not one's sense of justice revolt at the idea of a conviction on an indictment for libel being sustained upon the evidence of the witness McConnell in the present case?

The other question, as to evidence which was objected to but received, arose in this manner: Upon the defendant having been called, and having emphatically denied upon oath that he ever wrote the article in question or that he knew anything about it, the plaintiff's counsel cross-examined him, and he answered as follows:—

Q. It was the 16th of last April that you knew you were charged with being the author of this communication? A. Yes.

Q. Then, why have you changed your signature since? A. I have not changed my signature since.

Q. You got a letter from me or from our firm, did you not? A. Yes.

A letter is shown to witness and he is asked:

Q. Is that your signature? A. Yes.

Q. Tell me why you changed that "A" from an "A" of that shape to a capital A? A. I don't make any difference.

Q. Have you not since this thing was charged home to you made all your signatures different? A. No.

Q. Have you not written your signature like a school boy in the hotel register here? A. If I have, I always do.

Here an affidavit is shown to witness, and he is asked:

Q. You made an affidavit to get this trial put off? A. Yes.

Q. Are not the signatures in answer to our letter and to this affidavit here entirely different from what you swore was your ordinary signature? A. I don't think so.

Upon this, it appears that the learned counsel for the plaintiff was proceeding to show these documents to the jury—to which counsel for the defendant objected. The learned counsel for the plaintiff then stated his object in submitting the signatures to the jury, thus:

I offered the account made out by him, which he swore was in his

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ordinary handwriting, and I offered the signatures of the other two. I don't hesitate to say that since he knew he was accused of writing this communication he has changed his signature.

The court allowed the evidence, subject to the objection, and the cross-examination of the defendant proceeded, thus:

Q. You say that you wrote this letter to McConnell hurriedly in the post office? A. I did not say hurriedly.

Q. Did you not say you wrote it with a lead pencil? A. Yes, because I had no pen.

Q. Then, you did not write hurriedly at all; will your swear you did not write it hurriedly in the post office? A. I don't think I did.

Q. It is perfectly clear that these two signatures (indicating them) are different? A. With reference to that one, Mr. Vye wanted his account right away, and I picked up a pen, which I did not usually write with, and wrote it. In regard to this affidavit, I wrote my name in full, because the commissioner told me to do so, and I make no difference as to the use of the capital and small A.

There can, I think, be no doubt that this question, as to the suggested change in the defendant's mode of signing his name, was not a proper one to have been submitted to the jury upon the only issue they had to try. The theory upon which the right to submit the question to the jury was rested was plainly stated by the learned counsel for the plaintiff to be: that since the defendant, on the 16th April, knew he was accused of writing the article which was the foundation of the action, he had changed the character of his signature, for the purpose of insisting, when the document should be produced on the trial of this action, that the signature to it was not in his handwriting. The document not having been produced, the plaintiff, in order to cast discredit on the defendant's denial upon oath that he was the writer of the article, or that he knew anything about it, suggests through his counsel the alteration in the defendant's signatures, and the purpose for which the alteration was adopted, which purpose assumes the defendant to have been the writer of the

article in question, and the sender of it to McConnell for publication; and having made this assumption in order to get the question of alteration raised he asks the jury to find the fact of alteration from their own inspection of the documents shown to the defendant and admitted to have his signature, that therefrom they may conclude that defendant did write the article which, in order to institute the enquiry as to alteration of signatures, he was assumed to have written.

The singularity of this theory appears further, from this, that the signature to the letter of the 5th May to McConnell, from which alone McConnell spoke as to the handwriting in the document destroyed by him, is one of the signatures which is suggested to have been written, not in defendant's ordinary handwriting, but in a handwritting altered for the purpose suggested. But the question whether the defendant's mode of signing his name was or not different in the documents produced raised a different issue from the only one the jury had to try, and the defendant's answers to the questions put to him upon that subject must be taken as conclusive. The submission of the documents to the jury for them to form their opinion by comparison of handwriting upon the question of the suggested difference was improper, so that for this reason also the appeal must be allowed; but as, in my opinion, McConnell's evidence was inadmissible, the proper order I think to make will be to allow the appeal with costs and to order a rule to enter a non-suit to be issued in the court below.

PATTERSON J.—The court below was, in my opinion, right in holding that there was evidence to go to the jury of publication of the libel by the defendant.

It has been urged on his behalf that in admitting the evidence of McConnell, as evidence of the communica-

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tion to the newspaper being in the handwriting of the defendant, the court went further than any decided case to be found in the reports had gone, because the witness had no knowledge of the defendant's handwriting until after the destruction of the paper which, he says, from his recollection of it, was written by the defendant, or at all events accompanied by a letter or memorandum signed by the defendant. It seems to be true that in no reported case was the position precisely like this; but the principle on which the evidence is admissible is affirmed in many cases, including *Doe Mudd* v. *Suckermore* (1), on which the appellant has based a good deal of his argument. The principles there laid down by Coleridge J. and Patteson J., and usually found stated in the text books in the words of the last named judge, as in the passage quoted by the appellant from Greenleaf on Evidence (2), make it proper to hold that such knowledge of the defendant's handwriting as the witness McConnell acquired from the correspondence he had with the defendant after the publication, and after the asserted destruction of the libellous communication, was legally sufficient to enable the witness to say that he knew the handwriting, although he had seen only one or, at most, two specimens of it.

That handwriting may be proved in the absence of the paper containing it is established by *Sayer* v. *Glossop* (3).

In ordinary cases the witness has to compare two things—one existing only in his mind and the other being before him. The mental entity is his recollection of the handwriting of the party, the other is the writing before him. He finds that they correspond, and therefore concludes that the writing before him

(1) 5 A. & E. 730. (2) Sec. 576.
(3) 2 Ex. 409.

is by the same person whose hand-writing is the exemplar in his mind.

The present case is nearly the converse. There are two things, one mental, being the recollection of the writing the witness threw into the basket after reading the proof, the other before him in the letter from which he became acquainted with the defendant's handwriting. He compares them, and finds that they correspond, concluding therefrom that the same person wrote both manuscripts.

There is no difference, that I can perceive, in the principle of evidence as applied to one case or the other.

In *Sayer* v. *Glossop* (1) Lord Cranworth, then Rolfe B., illustrates the point by the case of a treasonable announcement chalked upon a wall, being thus incapable of being produced in court, and a person recognising the handwriting and giving evidence of it.

The case he puts is that of one who recognizes the writing from previous acquaintance with it.

It must be the same thing if, after stopping to read the words on the wall as he passed on his way to his place of business, but not knowing in whose handwriting they were, he found awaiting him a letter or other document, and recognised in it the same hand that wrote the words on the wall.

The time that elapsed between receiving the mental impression from the one writing and seeing the other, whether ten or fifteen minutes, as we may suppose in the case put for illustration, or a month, as in the present case, touches the value of the evidence not its principle. In any case, the evidence must be weaker and less satisfactory than when the writing to be proved can be produced, but that, as pointed out by Pollock C.B. in *Sayer* v. *Glossop*,(1) is a matter of degree, not of principle.

(1) 2 Ex. 409.

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Along with this evidence of the handwriting the jury could properly consider the correspondence between McConnell and the defendant. It is, no doubt, susceptible of being regarded as weakening, or at least of not strengthening, the inference that the defendant was the author of the libel, but it may be looked at as having an opposite effect, and it was proper evidence for the jury.

There could not, therefore, have been a non-suit. The case had to go to the jury; and, going with the express denial by the defendant under his oath of all concern with the libel, that oath being opposed to evidence which was indirect and by no means of the most convincing character, the jury might have been expected to find for the defendant, unless led to form an unfavorable opinion of his veracity and candor.

The plaintiff, of course, directed his efforts at the trial to produce that unfavorable impression. He was probably assisted by the manner in which the defendant gave his evidence, but in the use of certain signatures I think he overstepped the recognised limits.

The point avowedly aimed at was to show that after the defendant became aware that he was charged with having written the libel, and while he supposed the manuscript to be in existence, and while, in fact, it was in existence, if McConnell's letter to the defendant, and not his oath at the trial, stated the truth, he prepared to baffle any attempt to prove his handwriting by comparison by changing the character of his signature. For this purpose the plaintiff had provided himself with two or three later signatures of the defendant, which it was urged differed in some particular from something or other, I do not very well know from what, for there was no pretence, as far as I can observe, of proving what was the usual style of the signature, much less of proving anything respecting the general

handwriting, apart from the ordinary signature, of the defendant.

These papers could not have been given in evidence as part of the plaintiff's case. It is not contended that they could. The case was not proved by comparison by experts of one writing with another, and if that had been the mode of proof attempted it is obvious that the production of several different styles of writing would have embarrassed rather than assisted the proof. And, besides, the avowed purpose in producing these papers was foreign to the issue.

Nor could they have been produced, or the fact that the defendant had, on several occasions since the middle of April, adopted a changed style of signature, have been proved, in reply to the defendant's denial that he wrote the libel. To do that would have been to do what, if admissible, should have been done at first.

But it was allowable and regular, for the purpose of affecting the defendant's credibility, to educe from him the fact that he had changed his signature. He stood, however, in the position of any other witness for the defence, as far as the rules of evidence were concerned; and while the questions could not be objected to, the answers had to be taken as he gave them. He denied that he had changed his signature, and denied that those produced differed from his ordinary signature or were intended to differ.

The plaintiff could not, upon that, raise a side issue and prove what he could not, either as part of his case or as independent evidence in reply, have been allowed to prove. Yet that is what he was allowed to do when the signatures were submitted to the jury.

These propositions are so well established as not to require the citation of authority in support of them. I may, however, refer to *Attorney-General* v. *Hitchcock*(1)

(1) 1 Ex. 91.

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where the general rules are very fully discussed, and to *Palmer* v. *Trower* (1) where the witness was also the defendant; and to three cases where the rule was acted on at *nisi prius*—*McKewan* v. *Thornton* (2); *Fowkes* v. *Manchester and London Insurance Co.* (3); *Regina* v. *Dennis* (4).

It is said, and the court below seems to have acted on the idea, that the objection to the reception of the evidence was made too late. I do not so read the notes before us.

> Q. Are not the signatures in answer to our letter and to this affidavit here entirely different from what you swore was your ordinary signature? A. I don't think so.
>
> Mr. Weldon objects to Mr. Hanington showing the papers to the jury till he has put them in evidence.
>
> Mr. Hanington—I offered the account made out by him, which he swore was in his ordinary handwriting, and I offered the signatures of the other two. I don't hesitate to say that since he knew he was accused of writing this communication he has changed his signature.
>
> Court—I will allow it, subject to objection.

The question here put was, as I have said, a question which could not have been objected to on the cross-examination of the witness. But the plaintiff had to be content with his answer. The irregularity was in putting in the documents in order to contradict the witness or to make substantive evidence of them. That was promptly objected to, and allowed subject to the objection, the plaintiff choosing to take the risk of it.

I have no doubt that the objection ought to prevail.

I might adopt the language of Patteson J. in *Melhuish* v. *Collier* (5) as almost literally applicable, where he said: "I think that the point in *Winter* v. *Butt* (6) was taken too early; and that the learned judge

(1) 8 Ex. 247.
(2) 2 F. & F. 594.
(3) 3 F. & F. 440.
(4) 3 F. & F. 502.
(5) 15 Q. B. 878, 888.
(6) 2 M. & Rob. 357.

should have allowed the question, but stopped the enquiry when evidence was called to contradict the witness. Indeed, the question seems to have been put with the view of offering such evidence; and probably both the judge and counsel knew that, and treated the point accordingly."

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The improper reception of evidence does not in all cases necessitate a new trial. It will not have that effect where it is evident it cannot have affected the verdict. Here the object was to discredit the defendant who had directly denied what the plaintiff had given rather slender evidence to prove. The jury did disbelieve the defendant. It may be that they would have done so if this evidence had not been given, but it is impossible for us to say that it did not influence the verdict; and the plaintiff, who pressed it for the purpose of producing that influence, cannot, with a good grace, ask us to hold that it did not accomplish that purpose.

The defendant is therefore, in my opinion, entitled to a new trial without costs, and to have the appeal allowed with costs; but as the majority of the court think the appeal should be dismissed, I may add that I should not look upon a new trial as likely to be of much advantage to the defendant.

*Appeal dismissed with costs.**

Solicitor for appellant: *Theophilus Desbrisay.*

Solicitors for respondent: *Hanington, Teed & Hewson.*

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*Application was made for leave to appeal to the Judicial Committee of the Privy Council but was refused.

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*Nov. 17,19.
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*April 30.

GEORGE W. GEROW (PLAINTIFF).....APPELLANT;

AND

THE BRITISH AMERICAN ASSURANCE COMPANY (DEFENDANTS).....RESPODNENTS.

GEORGE W. GEROW (PLAINTIFF).....APPELLANT;

AND

THE ROYAL CANADIAN INSURANCE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine Insurance—Constructive total loss—Liability of company—Cost of repairs—One-third new for old—Construction of condition when vessel not repaired.

A policy of insurance on a ship contained the following clause:—

"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made.

Held, affirming the judgment of the court below, Patterson J. dissenting, that the "cost of repairs" in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in adjusting a partial

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

loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value.

APPEAL from a decision of the Supreme Court of New Brunswick in favor of the defendants on a special case.

The policies sued on in these cases were precisely similar, and they came before the court below on the same special case, which was as follows:—

1. On the 7th day of September, A. D. 1883, the plaintiff effected a policy of insurance with the defendants on the ship "Minnie H. Gerow" (of which he is part owner), of which policy the facts material to this case are as follows:—

2. The ship, laden with guano, was disabled at sea on her voyage from Labos to Falmouth, England, for orders, and put into Valparaiso for repairs.

3. The cost of repairs and expenses connected therewith at Valparaiso would exceed more than one-half of the value declared in the policy, if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made.

4. If such deduction is made, then the cost of repairs after such deduction would not exceed one-half of the value as declared in the policy.

5. The said ship, after notice of abandonment, was sold at Valparaiso under circumstances such that a prudent owner, uninsured, would not have repaired her; but the defendants claim that, under the policy, that fact is immaterial.

6. The defendants contend that under the terms of the policy there is not such a constructive total loss of the vessel as would render them liable to pay for a total loss.

7. It is admitted that more than six months had

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elapsed from the date of her first registration when the damage occurred.

8. The policy in question contained the following clause:

"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

9. Either party to be at liberty to refer to the policy of insurance on the argument.

10. Should the court be of opinion that the contention of the defendant is correct, then a non-suit is to be entered; but if the court is of opinion that under the terms and conditions of the policy and the admitted facts the defendants are liable to pay for a total loss, then the judgment to be entered for the plaintiff for the sum of $2,500, with interest from the first day of January, A.D., 1885, less the amount of premium note and interest, and any other amount due by the plaintiff to the defendants.

The decision of the Supreme Court of New Brunswick on this special case was in favor of the insurance companies. The plaintiff then appealed in each case to the Supreme Court of Canada.

Weldon Q. C. for the appellants. The former law in the United States was in favor of the plaintiffs' contention here: *Peele* v. *The Merchants' Ins. Co.* (1).

This was a decision of Judge Strong, and in consequence of it a form of policy was adopted, making the amount in such case only what the insurers would

(1) 3 Mason 27.

have to pay. Parson on Insurance (1), *Potter* v. *The Ocean Ins. Co.* (2), *Bradlie* v. *The Maryland Ins. Co.* (3).

The adjustment is only to ascertain the cost of repairs and distribute it, and the deduction is not made until after the adjustment.

The matter is fully discussed in the case of *Aitchison* v. *Lohre* (4).

Barker Q.C. for the respondents, referred to *Smith* v. *Bell* (5), *Pezant* v. *The National Ins. Co.* (6), *Orrok* v. *The Commonwealth Ins. Co.* (7), *Allen* v. *The Commercial Ins. Co.* (8).

Sir W. J. RITCHIE C.J.—The only point involved in this case is the construction to be put upon a clause in the policy set out in section 8 of the special case, and which is as follows: "In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration; but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel, in case of abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

It is obvious the cost of repairing must be as under an adjustment as of partial loss according to the terms of the policy.

And in case of loss, such loss shall be adjusted in accordance with English practice and the usage of Lloyds (except where otherwise provided for by the conditions of this policy), and authenticated by the agents of the company, if there be one at the place

(1) Vol. 2, p. 130.
(2) 3 Sum. 27.
(3) 12 Peters 378.
(4) 4 App. Cas. 755.
(5) 2 Caine (N.Y.) 155.
(6) 15 Wend. 453.
(7) 21 Pick. 467.
(8) 1 Gray 157.

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where such proofs are taken, and paid in sixty days after the company shall receive proof and adjustment thereof and proof of interest.

I think effect must be given to the words "in case of repairs the usual deduction of one-third after six months," from which date the deduction will be made. It is clear the cost of repairing under an adjustment in case of abandonment or otherwise as a partial loss is to be according to the terms of the policy which recognizes the deduction of one-third. If so, how can an adjustment be made up unless one-third new for old be calculated in ascertaining the partial loss?

I think the construction put on the clause in the court below was the correct one, and the appeal should be dismissed.

STRONG J.—These causes, which were argued together both here and in the Supreme Court of New Brunswick, involve a question as to the proper legal construction of a particular clause contained in two separate policies of marine insurance. The question was submitted for the opinion of the court below upon a special case stated in each cause by agreement between the parties.

This special case was in the following words:

1. On the seventh day of September, A.D. 1883, the plaintiff effected a policy of insurance with the defendants on the ship "Minnie H. Gerow" (of which he is part owner) of which policy the facts material to this case are as follows:

2. The ship, laden with guano, was disabled at sea on her voyage from Lobos to Falmouth, England, for orders, and put into Valparaiso for repairs.

3. The costs of repairs and expenses connected therewith at Valparaiso would exceed more than one-half of the value declared in the policy, if the usual deduc-

tion of one-third allowed in adjusting a partial loss under the terms of the policy was not made.

4. If such deduction is made, then the cost of repairs after such deduction would not exceed one-half of the value as declared in the policy.

5. The said ship, after notice of abandonment, was sold at Valparaiso under circumstances such that a prudent owner, uninsured, would not have repaired her: but the defendants claim that, under the policy, that fact is immaterial.

6. The defendants contend that under the terms of the policy there is not such a constructive total loss of the vessel as would render them liable to pay for a total loss.

7. It is admitted that more than six months had elapsed from the date of her first registration when the damage occurred.

8. The policy in question contained the following clause: "In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

9 Either party to be at liberty to refer to the policy of insurance on the argument.

10. Should the court be of opinion that the contention of the defendant is correct, then a non-suit to be entered: but if the court is of opinion that under the terms and conditions of the policy and the admitted facts the defendants are liable to pay for a total loss, then the judgment to be entered for the plaintiff for the sum of $2,500, with interest from the 1st day of

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January, A.D. 1885, less the amount of premium note and interest, and any other amount due by the plaintiff to the defendants.

After argument, the Supreme Court of New Brunswick gave judgment in favor of the defendants, directing non-suits to be entered. From this judgment Mr. Justice Palmer dissented, holding that the plaintiff was entitled to judgment for the amount agreed upon. The judgment of the majority of the court was delivered by Mr. Justice King, and Mr. Justice Palmer has also expressed the reasons for his dissent in a written judgment. In these well-considered judgments the reasons and arguments relied on in support of the opposite views entertained on the question in dispute are set forth in a very full and exhaustive manner. The statement of the case already given shows that no question of law is involved in the appeal, the matter in contest being purely one as to the proper legal construction of the clause relating to the estimation of the cost of repairs in case of loss, as set forth in the case already stated. In other words, the question is, whether under the terms of this provision one-third of the gross amount required to be expended for repairs, in the case (which happened) of a loss, is, upon the principle of "one-third new for old," to be deducted in determining whether there has been a loss amounting to more than one-half of the value of the vessel, as declared by the policy, so as to entitle the assured to claim for a constructive total loss. The point really in controversy may be still further narrowed, for, in fact, it is confined entirely to the meaning to be placed on the words "cost of repairing" contained in this stipulation limiting the right of the assured to claim for a constructive total loss. This expression, "cost of repairing the vessel" is construed by Mr. Justice Palmer as meaning the estimated amount of the gross cost of the repairs which would form the basis upon which an

average adjuster would, if a claim were made for a partial loss, arrive at a final estimate or adjustment of the loss by the deduction of one-third of the amount in respect of the substitution of new for old, and not as meaning the net amount of the loss after that deduction should have been made.

On the other hand, Mr. Justice King and the majority of the court hold that, having regard to the context, these words are intended to denote the net amount which would be the result of an adjustment according to the usual rule followed in adjusting a partial loss, that is, by allowing one-third off the actual cost of the repairs in respect of new for old, and that consequently the words "cost of repairing the vessel" are to be read and construed as synonymous with "the amount of the loss."

I am of opinion the latter is the correct construction.

Mr. Justice Palmer asserts and Mr. Justice King concedes that in construing these policies we must give the assured the benefit of the rule that a provision of this kind is to be interpreted most strongly in favor of the assured and against the underwriters; and entirely admitting the soundness of this principle, I have, in arriving at the conclusion stated, endeavored to give the appellant the full benefit of it.

Although, as I have before said, no question of law is involved in this appeal, yet a reference to some general and elementary principles of the law of marine insurance will aid us to solve the question we are called upon to decide.

The test resorted to in English law to determine if the assured has a right to abandon and claim for a constructive total loss is well established to be that described in the case of *Irving* v. *Manning* (1), cited by Mr. Justice King, namely: "To consider the policy as altogether out of the question, and to enquire what a

(1) 1 H. L. Cas. 287.

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prudent, uninsured owner would have done in the state in which the vessel was placed by the perils insured against."

This rule does not prevail in the United States. There, by a long-established usage, an insured owner claiming to recover in respect of a constructive total loss has to show that the costs of repairing the vessel would exceed half its value, before the loss, as the same may be ascertained either by the policy, if it is a valued policy, or by actual estimation, if the policy should be an open one. This usage is said by Chancellor Kent in his commentaries to have been derived from the law of Continental Europe. Whatever may have been its origin it suffices to say that it has long formed the rule according to which, in the United States, it is determined whether or not an assured has a right to abandon to the underwriters and to claim for a constructive total loss, and that irrespective altogether of any express provision to that effect in the policy. It is thus seen that the English and American law of marine insurance are in this particular of the conditions of a constructive total loss entirely different.

The policies now under consideration were executed in New Brunswick by underwriters who are Canadian corporations ; they are therefore, of course, to be construed according to English law as prevailing in New Brunswick. It follows that the right of the assured to abandon as for a total loss would, but for the clause now under consideration, have had to be determined according to the established English rule before stated. These special provisions have, however, introduced into these particular contracts of insurance a rule identical with the general rule of American law as applicable for that purpose.

As regards the ascertainment of a partial or particular average loss, the rule, so far as it is material for the present purpose, is identical in England and the United

States, the adjustment in both countries involving a deduction from the cost of repairs of one-third new for old (at least, in the case of wooden ships of a prescribed age) as a mode of approximating to an amount which should form a sufficient indemnity to the assured without placing him, at the expense of the underwriters, in a better position than he would have been in if no loss had happened.

These elementary and familiar principles of insurance law are stated here, not because they have any direct application to the question for decision, but for the reason that both the rules themselves and the language in which they are habitually stated by courts and text-writers have, as it seems to me, a strong, and indeed a conclusive, influence on the interpretation of the clause we are called upon to expound.

In applying the same American rule which by these policies the parties have adopted as forming the "law of their contracts," requiring a loss of over fifty per cent. to authorize a claim for a total loss, a judicial controversy early arose regarding the principle on which the costs of repairs should be calculated, for the purpose of ascertaining whether the loss amounted to fifty per cent. or not. On the one hand it was held by the Court of Errors of the State of New York, in *American Insurance Co.* v. *Ogden* (1) and by the Supreme Court of Massachussetts, in *Hall* v. *Ocean Insurance Co.* (2) that in estimating the cost of repairs for the purpose the rule applied in adjusting a partial loss of deducting one-third new for old should be adopted; whilst, on the other hand, Mr. Justice Story presiding, in the Circuit Court of the United States, in *Peele* v. *Merchants Insurance Co.* (3), and the Supreme Court of the United States also, in the case of *Bradlie* v. *Maryland Ins. Co.* (4), decided in 1838,

(1) 20 Wend. 297; Kent's Commentaries, vol. 3, p. 443, ed. 12.
(2) 21 Pick. 472.
(3) 3 Mason 27.
(4) 12 Peters 378.

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held that the deduction ought not to be made. The arguments upon which these conflicting decisions were based have no relevancy here, for what we have to determine is not any question concerning the scope and effect of the rule itself, but the proper legal effect of a clause introduced, as it appears to me, and as I shall endeavor to demonstrate, for the purpose of solving by an express provision the disputed point which, when left to implication, had given rise to the conflict of decision already mentioned. In order to meet the difficulty which the decision of Mr. Justice Story in *Peele* v. *The Merchants Ins. Co.* (1) and the other cases agreeing with it had given rise to, it is said by Mr. Parsons' Treatise on Marine Insurance (2) that it became the practice in Massachusetts to insert in the policy a clause worded as follows:

> It is agreed that the insured shall not have the right to abandon for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured.

The same clause is also stated by Mr. Phillips in his Treatise on Insurance (3) as being in general use for the purpose of obviating the effect of the decision in *Peele* v. *Merchants Ins. Co.* (1)

Then, considering that the history and derivation of this clause in its general terms, and apart from any reference to a partial loss, is such as before stated, and also that the law in the United States, from whence it is derived, remains still unsettled, the latest decisions of courts of high authority being in direct conflict as to its effect, is it not a reasonable presumption that these words referring to an adjustment as of a partial loss, the meaning of which form the only subject for decision here, were introduced into these policies for the same purpose for which a clause in words almost identical had been inserted in American policies, viz.,

(1) 3 Mason 27. (2) Vol. 2, p. 130 *(n)*.
(3) 5 Ed. vol. 1, p. 264

to meet the difficulty which had arisen as to the mode of calculating the fifty per cent., and in order to control and explain the provision in such a way as to obviate the ambiguity which would be caused by the conflicting American decisions on the general law as applied in the United States? In other words, is it not fair and reasonable that, finding the parties to have contracted themselves out of the rule of English law, which affords a test for ascertaining whether there has been a constructive total loss, and to have subjected themselves by express agreement to the general rule of the American law, that we should in construing this conventional rule, adopted by the parties, infer that the reference to the adjustment of a partial loss as a guide in the calculation of fifty per cent. was intended to serve the same purpose as that for which a clause, almost identical in its terms, had been introduced into American policies, viz., to anticipate and determine the doubts and disputes which had arisen in applying the rule in the country of its origin? Surely there can be no difficulty in holding that these words:

> Unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half its value—

are in all respects the equivalent of, and have no larger nor lesser meaning than the corresponding clause in the American policies:

> Unless the amount which the insurer would be liable to pay under an adjustment of a partial loss shall exceed one-half the amount insured.

I can find no substantial or sensible distinction between the words "cost of repairs," in our Canadian policies now under consideration, and "the amount which the insurer would be liable to pay" in the American clause. Both expressions are subject to the condition immediately following "under an adjustment of a partial loss."

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It is not admissible to say that the words "cost of repairs" mean the estimate of the gross expenditure for repairs, upon which the adjustment is based; for it is expressly said that what it is intended to refer to is the expense of repairing "under the adjustment," which can only mean as determined, ascertained or settled by the adjustment, and so necessarily after all deductions usual in the case of a partial loss have been made, which deductions of course include that of "one-third new for old." Thus, the cost of repairs so ascertained by adjustment is the exact equivalent of the amount of a partial loss which the underwriter has to pay. So that whether we consider this clause, derogating from the general law, which the parties have thought fit to import into their contract, in the abstract, and subject it to close verbal criticism and analysis, or whether we investigate its history and construe it in the light thrown upon it by the decisions of courts and the writings of lawyers in the country from which it has been borrowed, we arrive either way at an identical conclusion—that adopted in the judgment under appeal. This alone ought to be conclusive.

Apart, however, from any rigid literal interpretation of the language, I agree with Mr. Justice King that any mercantile man or average adjuster reading these policies with a view to adjusting a claim for a constructive total loss would, as a matter of course, consider the proper mode of proceeding to be to treat the loss in the first instance as a partial loss, and calculate it upon the principle universally applicable to such losses; and this is a consideration which would be of weight, even if the arguments for and against the suggested construction were much more evenly balanced than they are. The argument for the appellant is that we are to ascribe the adoption of these stipulations to an intention to exclude such particular subjects of loss as either under the general law of insurance or under the par-

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ticular terms of these policies would be excluded altogether, and not brought into account in calculating the amount of a partial loss. The plain answer to this, besides what has been already stated, is that if we were to confine the meaning in this way we should not be giving due and proper effect to the term "adjustment of partial loss," an expression which, taken in its primary signification, clearly imports a completed calculation of the amount due for a partial loss, made according to the general principles of insurance law, which require the deduction of one-third "new for old."

The appeals should be dismissed with costs.

TASCHEREAU J.—I am of opinion that these appeals should be dismissed. I concur in Mr. Justice King's opinion.

GWYNNE J.—I am of opinion that these appeals should be dismissed for the reasons stated in the judgment of the majority of the court below, and in that of my brother Strong in this court. The construction thus put upon the clause in question seems to me to be that which the language used naturally requires.

PATTERSON J.—This controversy turns on the interpretation to be given to certain words in the policies issued by the defendant companies.

In searching for their meaning and effect as terms of the contracts, we have no direct assistance from decisions of our own or other courts. The plaintiffs claim the right to abandon the vessel to the underwriters as a total loss, and the defendants, who are underwriters, deny that right.

The vessel was in fact abandoned and sold, as stated in the special case, under circumstances such that a prudent owner, uninsured, would not have repaired her. The ordinary law of marine insurance, apart from

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these particular contracts, warranted the abandonment as a constructive total loss. But the contracts provided that " the insurers will not be liable for a constructive total loss of the vessel in case of, abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half its value as declared by this policy."

The value stated in the policies was $28,000. To repair the vessel would have cost more than half of the amount; but if a deduction was made of one-third new for old, the amount would be reduced to less than half of the valued amount.

The defendants insist that the " cost of repairing the vessel " must be with the deduction of the one-third, and the court below has sustained that contention, Mr. Justice Palmer dissenting.

The words " cost of repairing," &c., are those for which we have to find the appropriate meaning and force.

The policy, after specifying in the ordinary way the perils insured against, provides that the insurers shall not be liable for any loss or claim arising from a number of causes which are specified in detail—

> Nor for any partial loss or particular average, unless it amounts to five per cent., exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss.

Then follows this passage :

> Warranted by the assured free from any claim for charge, damage or loss which may arise from jettison, or loss of deck cargo. In case of repairs the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date deduction will be made. Each passage subject to separate average. And the insurers will not be liable for a constructive total loss of the vessel, in case of abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy. The assurers are not liable for copper, metal or other sheathing after it has been on forty months ; and not liable

for wages and provisions, except in general average, when customary at the port of destination.

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Whenever the cost of repairing a vessel under an adjustment of partial loss, according to the terms of the policy, had to be ascertained, one essential inquiry would be whether the repairs were of damage for which the insurers were liable. Damage from the excepted perils, which might be damage to the hull, tackle or apparel of the ship, must be excluded. So also must repairs to copper, metal or other sheathing, if it had been on for forty months. Those particulars give operation to the words "under an adjustment as of partial loss according to the terms of this policy," and limit the estimate of the cost of repairs as between the underwriters and the insured. On a total loss, actual or constructive, the full value of $28,000 would be the basis of the computation of what each underwriter was to pay. A partial loss would of course be adjusted with regard to the damage only which, under the terms of the policy, was to be made good. Such an adjustment might fall short of half the stated value, while the repairs of all the damage, including that class of damage for which the underwriters were not bound, might exceed the half. In such a case, the estimate on which the right to abandon depended being made "under an adjustment as of a partial loss," there would be no right to abandon. The adjustment or estimate in the present case, which exceeds $14,000, we must, on this special case, understand not to include any subjects of the insurance for which the underwriters are not liable, under the policies, on a partial loss.

The view of the dissentient judge in the court below was, as I gather from his judgment, that the clause in question was satisfied by an adjustment on the principle to which I have adverted, and that the full sum arrived at was, within the true meaning of the clause—"the cost of repairing the vessel under an adjustment

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as of a partial loss according to the terms of this policy." wherefore, he held the condition to be fulfilled upon which the plaintiff was entitled to treat the loss as a constructive total loss. In the judgment of the majority of the court, which was delivered by Mr. Justice King, those provisions of the policies which exclude certain subjects from the liability of the underwriters for particular average are not noticed, and the deduction of one-third, as new for old, is treated as if it were the only matter to which the phrase—

> Under an adjustment as for partial loss under the terms of this policy

could refer. If that had been so, the conclusion arrived at would follow almost of necessity.

The deduction of one-third was to be made only after six months from the registration of the vessel, and the special case happens to omit the essential statement that that time had elapsed. We must, however, assume, as no doubt the fact is, that the time had elapsed.

The question whether the words—

> The cost of repairing the vessel, under, &c.—

are to be read as meaning

> The amount which would be payable to the insured if the loss were treated as a partial loss"

is the question to be decided.

Why should the language be read as anything but what the companies have themselves employed?

"Cost of repairing" might, it is true, without much violence, be read as signifying the cost to the underwriters as what they would be liable to pay for repairing, which would be only two-thirds of the cost of repairing. If necessary, in order to give effect to the provision, and *ut res magis valeat quam pereat*, it might be the duty of the court so to assist the expressed idea by intendment. But when the words in their natural and literal force have full operation, it does not appear consonant with sound principles to extend their meaning in favor of the parties whose language they are.

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My view may, I think, be supported by a legitimate argument from what we learn of the practice of Insurance in the United States from works of authority, such as those of Parsons and Phillips.

A clause, cognate with the one before us, has for many years been common in American policies, having been introduced for the purpose of settling or avoiding questions on which there was a conflict of opinion, namely, whether or not the one-third for new in place of old ought to be deducted in computing the amount of damage which would justify an abandonment as for total loss; and whether, if one-third was deducted, the fifty per cent. ought not to be computed on the actual value of the vessel at the time of the loss, irrespective of the value named in the policy (1).

The weight of authority seems to have been for either computing the full cost of the requisite repairs without deduction of the one-third, or if the one-third were deducted, then for taking the actual and not the stated value of the vessel as the basis for computation of the fifty per cent.

The clause adopted and in use in American policies reads thus:

It is agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed one-half the amount insured.

We may safely assume that our insurance companies adopted the clause we have now to construe for the same reasons, and in order to avoid the same questions as the American authorities. But what do they say? Where in the United States *the amount which the insurer would be liable to pay*, or in other words, two thirds of the cost of repairing, is to determine the right to abandon, our policies expressly say the *cost of repairing*. With the American precedent before them, they have deliberately used different language. Why should we construe the language as if it were the same, and not different?

(1) 2 Parsons 129; 2 Phillips 265.

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The more reasonable understanding, as it strikes me, is that while the American insurers, choosing between the opposing opinions which existed, adopted the rule that the one-third should be deducted, these companies of ours adhered to the other view, and said that the cost should govern, in both cases the stated value of the vessel, being that on which the fifty per cent. was to be computed.

There is another view of the subject which, with me, bears in the same direction upon this question of construction.

The right to abandon ordinarily arises when the damage is such that the vessel, if repaired, would not be worth the cost of the repairs, and does not, in principle, depend on the cost of repairing bearing any defined proportion to the value stated in the policy, or even to the actual value.

The statement in this special case respecting the sale of the vessel sets forth facts that would seem to justify the abandonment, unless the policy requires something more. The clause in question is a restriction in favor of the insurer. It is not material to consider closely whether its effect might be to *entitle* the insured to abandon a vessel as a constructive total loss whenever the cost of repairing her would exceed the specified proportion of her stated value. In its form, it is not an entitling provision in favor of the insured, but a restriction which may be to his prejudice, and which would be notably so under the facts before us, if interpreted as contended for by the companies.

For this reason, as well as on the principle of the maxim *verba chartarum fortius accipiuntur contra proferentem*, it should be construed strictly.

On these grounds, I agree in opinion with Mr. Justice Palmer, and think the appeal ought to be allowed.

Appeal dismissed with costs.

Solicitors for appellant: *Weldon & McLean.*

Solicitors for respondents: *Barker & Belyea.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, (DEFENDANTS) ..... APPELLANTS.

AND

ROBERT McMILLAN (PLAINTIFF) .....RESPONDENT.

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*Mar. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Carriage of goods—Contract for—Carriage beyond terminus of line—Exemption from liability—Construction of contract—Statutory liability—Joint tort feasors—Release to one—Effects of.

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose line they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. *Bristol & Exeter Railway Co.* v. *Collins* (7 H. L. Cas. 194) followed.

Such a contract being one which a railway company might refuse to enter into, sec. 104 of the Railway Act (R. S. C. c. 109) does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in *Vogel* v. *G. T. R. Co.* (11 Can. S. C. R. 612) does not govern such a contract.

One of the conditions in a contract by the G. T. R. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, mis-delivery, damage or detention that might happen to goods sent by them, if such loss, mis-delivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits."

Held,—That this condition would not relieve the company from liability for loss or damage occurring during the transit even if such loss occurred beyond the limits of the company's own line.

Held per Strong and Taschereau JJ., that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in

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

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custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. (Fournier and Gwynne JJ. dissenting.)

Another condition of the contract provided that no claim for damage to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made.

Held,—Per Strong J. that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment over-ruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*.

Held also,—Per Strong J., Gwynne J. *contra*, that part of the consignment having been lost such notice should have been given in respect to the same within thirty-six hours after the delivery of the goods which arrived safely.

Quaere—In the present state of the law is a release to, or satisfaction from, one of several joint tort-feasors, a bar to an action against the others?

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2), by which a judgment for the defendants (appellants) at the trial was set aside, and judgment entered for the plaintiff.

This was an action against the Grand Trunk Railway Co. and the Canadian Pacific Railway Co. jointly for damages occasioned by injury to the plaintiff's goods shipped on the Grand Trunk for carriage from Toronto to Manitoba. The goods were only carried by the Grand Trunk over a portion of the route and by the Canadian Pacific from Winnipeg to the place of consignment, and they were in the actual possession of the latter company when injured.

The damage to the goods was not disputed, but the defendants claimed that they were carried under a special contract, by the terms of which they were relieved from liability. The clauses of the special contract particularly relied on are as follows :—

10. That all goods addressed to consignees at points

(1) 15 Ont. App. R 14. (2) 12 O. R. 103.

beyond the place at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises, or to be placed in shed or warehouse (if there be such convenience for receiving the same), pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsiblity of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance ; and it is expressly declared and agreed, that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations, or places on their line nearest to the points or places which they are consigned to, or beyond their said limits.

11. That all property contracted for at a through rate, or otherwise. to or from places beyond the line of the Grand Trunk Railway, if shipped by water, shall, while not on the company's railway, or in their sheds or warehouses, be entirely at the owner's risk. In case of loss or damage to any goods for which this company or connecting lines may be liable, it is agreed that the company or line so liable shall have the benefit of any insurance effected by or for account of the owner of said goods, and the company so liable shall be subro-

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gated in such rights before any demand shall be made on them.

12. That no claim for damage to, loss of, or detention of any goods for which this company is accountable, shall be allowed unless notice in writing, and the particulars of the claim for said loss, damage or detention, are given to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods, in respect of which said claim is made, are delivered.

The Canadian Pacific Railway Company were made defendants to the action and while the proceedings were pending the plaintiff accepted a sum of money in satisfaction of his claim against them which the defendants alleged operated as a release of the whole cause of action and a bar to any further proceedings by the plaintiff in the suit.

The plaintiff gave no notice of claim for loss or damage as required by the 12th condition above set out.

The plaintiff claimed that the goods were not carried on the special contract, but on a verbal agreement, and on the trial the jury so found, the defendants, in their opinion, having failed to prove the delivery and acceptance of the bill of lading from which the above extracts are taken and the release.

The trial judge disregarded the finding of the jury on this point and holding that there was a special contract and that under it the defendants were not liable, gave judgment in their favor.

The divisional court reversed this decision, on the ground that although the goods were carried under the special contract, the defendants were precluded from exonerating themselves from liability under it as held in *Vogel* v. *The Grand Trunk Ry. Co.* (1). The Court

(1) 11 Can. S. C. R. 612.

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of Appeal affirmed the latter decision, though on different grounds. The defendants then appealed to this court.

McCarthy Q.C. and *Nesbitt* for the appellants. The evidence shows that the damage to the goods was covered by the consideration of the special contract. *Czech* v. *General Steam Navigation Co.* (1); mentioned in *Coggs* v. *Bernard* (2); *Lewis* v. *The Great Western Ry. Co.* (3); *Webb* v. *The Great Western Ry. Co.* (4); *Phillips* v. *Clark* (5); *Bristol Ry. Co.* v. *Collins* (6).

Relying on the other clauses of the contract the learned counsel cited *Mason* v. *The Grand Trunk Ry. Co* (7); *Moore* v. *Harris* (8);

As to the action being barred by the release to the C. P. Ry. Co., see *Wilcocks* v. *Howell* (9), where all the cases are collected; Pigott on Torts (10).

Robinson Q.C. and *Galt* for the respondent. If there was a special contract, it is no defence as a railway company cannot so protect themselves from liability. *Grand Trunk Ry. Co.* v. *Vogel* (11); *Zunz* v. *The South Eastern Ry. Co.* (12); *Doolan* v. *The Midland Ry. Co.* (13); *Machu* v. *London & South Western Ry. Co.* (14); *Dickson* v. *The Great Northern Ry. Co.* (15).

As to the third condition, the answer is that it does not expressly provide for exempton on account of negligence, which is necessary. *The Grand Trunk Ry. Co.* v. *Fitzgerald* (16); *Dixon* v. *The Richelieu Navigation Co.* (17); *Trainor* v *The Black Diamond S. S. Co* (18).

(1) L. R. 3 C. P. 14.
(2) 1 Smith L. C. 8 ed. 253.
(3) 3 Q. B. D. 195.
(4) 26 W. R. 111.
(5) 2 C. B. N. S. 156.
(6) 7 H. L. Cas. 194.
(7) 37 U. C. Q. B. 163.
(8) 1 App. Cas. 318.
(9) 8 O. R. 576.
(10) P. 51.
(11) 11 Can. S. C. R. 612.
(12) L. R. 4 Q. B. 539.
(13) 2 App. Cas. 792.
(14) 2 Ex. 415.
(15) 56 L. J. Q. B. 111; 18 Q. B. D. 176.
(16) 5 Can. S. C. R. 204.
(17) 15 Ont. App. R. 647.
(18) 16 Can. S. C. R. 156.

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The learned counsel also referred to *Oakes* v. *Turquand* (1); *Kent* v. *The Midland Ry. Co.* (2); *The Peter Des Grosse* (3); *Peek* v. *The North Staffordshire Ry. Co.* (4); *O'Rorke* v. *The Great Western Ry. Co.* (5); *Hamilton* v. *The Grand Trunk Ry. Co.* (6); *Railroad Company* v. *Lockwood* (7); *Railroad Company* v. *Manufacturing Co.* (8).

McCarthy Q.C. in reply referred to *Pontifex* v. *The Midland Ry. Co.* (9).

SIR W. J. RITCHIE C. J.—(His Lordship was absent when judgment was pronounced but sent a memorandum of his conclusion, that the appeal should be allowed with costs, but giving no reasons.)

STRONG J.—The facts material to the present appeal are fully stated in the report of the judgment of Mr. Justice Rose, who tried the action, and of that of the Divisional Court of Queen's Bench (10), and also, in the report of the case in appeal (11) and need not be repeated here.

I am of opinion that the appellants are entitled to our judgment.

I do not discuss the question which was principally in controversy at the trial viz: that as to whether the goods were carried on a verbal contract made by John McMillan with some of the clerks or officers of the Grand Trunk Railway Company at their offices in Toronto, or whether they were carried under the written contract produced at the trial. I agree with the court of appeal that for the reasons given by Mr. Justice Burton and Mr. Justice Patterson the document called a shipping bill or bill of lading, partly written

(1) L. R. 2 H. L. 325.
(2) L. R. 10 Q. B. 1.
(3) 1 P. D. 414.
(4) 10 H. L. Cas. 495.
(5) 23 U. C. Q. B. 427.
(6) 23 U. C. Q. B. 600.
(7) 17 Wall. 357.
(8) 16 Wall. 327.
(9) 3 Q. B. D. 23.
(10) 12 O. R. 103.
(11) 15 Ont. App. R. 14

and partly printed, marked as Exhibit D., was that under which the goods were received to be carried by the appellants, as was held by Mr. Justice Rose at the trial.

The questions we have to decide arise principally on the construction of certain clauses and conditions contained in this instrument; in addition to which we have to determine what effect is to be attributed to the plaintiff's acceptance *pendente lite* of $650 from the defendants, the Canadian Pacific Railway Company, in satisfaction and discharge of his claim and right of action against the last named defendants, and of the release executed by the plaintiff in their favor.

The first point which we may consider is that which principally engaged the attention of the Court of Appeal, viz: the effect of the 10th condition

That condition is in the following words:

10. That all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communications with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance, aud it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits.

The case of *The Bristol & Exeter Railway Co.* v.

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Collins (1) is an authority which, as regards the general construction of this condition, applies in the respondent's favor. Upon the authority of that case we must reject the appellants' contention that this condition restricts their liability to damage or loss happening on their own line and exonerates them from loss occurring after the goods should have left the line of the Grand Trunk Railway Company and been transferred to the hands of other railway companies over whose lines the transit had to be completed, a liability which the appellants must *primâ facie* and apart from any condition or special terms in the contract be deemed to have undertaken simply by contracting to carry to McGregor or Portage Station. We must then hold the Grand Trunk Railway Company to have contracted for the carriage of the goods to their ultimate destination of McGregor (for which Portage la Prairie was afterwards substituted), that is for the whole *transitus*, so far as it could be completed by railway, and the other companies, on whose lines the goods were to be carried after they left the appellant's own line, must be considered as mere agents of the Grand Trunk Railway Company, between whom and the respondent there was no direct privity of contract. So far, but no further, this case of the *Bristol & Exeter Railway Company* v *Collins* (1) is no doubt an authority for the respondent.

The Divisional Court of Queen's Bench held that the construction of the condition to the extent already indicated being thus to carry the whole distance to McGregor, *Vogel's case* (1) applied so as to make the restriction contained in the 104th section of the R. S. C. ch. 109 applicable, and thus to incapacitate the Grand Trunk Railway Company from entering into any contract or exacting any condition limiting its liability

(1) 7 H. L. Cas. 194. (2) 11 Can. S. C. R. 612.

for negligence or omission, and this not merely as regards its own line, over which the same statute imposed upon it the duty of carrying, but also with reference to losses occurring on other lines over which the goods were to be carried by other railway companies acting as agents of the Grand Trunk Railway Company.

I entirely agree with the Court of Appeal that this view was erroneous, and that according to the plain construction of the language of the 104th section, and without any reference to the English authority relied on (1), which arose upon a statute different in its terms, the prohibition of any limitation of liability therein contained is only co-extensive with the former part of the same section, which imposes upon railway companies the duties and obligations of common carriers. The literal meaning of the words "every person aggrieved by any neglect or refusal in the premises," it is obvious requires this construction and makes any other impossible. Then these duties and obligations were clearly prescribed in respect of a railway company's own line, and not with respect to other lines over which it might, if it chose, undertake to forward or carry, but in respect of which services its choice to undertake them or not was free and unaffected by any statutory duty whatever. From this it follows that in so far as the contract of carriage here beyond the terminus of their own line was one which the Grand Trunk Railway Company might have declined altogether, there was no statutory or other legal impediment to a contract by them limiting their liability either as carriers or otherwise in respect of the goods to be carried after they had left that company's own line.

Next, it is material to enquire whether this 10th con-

(1) *Zunz* v. *S. E. Ry. Co.* L. R. 4 Q. B. 439.

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dition does contain any dispensation of liability in favor of the Grand Trunk Railway Company. I have already said that in common with the learned judges of the Court of Appeal, I am of opinion that so far as this condition is identical in its terms with the 10th condition of the receipt note which was in question in *Bristol & Exeter Railway Company* v. *Collins* (1), it has not the effect of restricting the responsibility of the Grand Trunk Railway Company to its own line.

The 10th condition in the present case, however, contains a clause not to be found in that which was under consideration in the case of the *Bristol & Exeter Ry. Co.* v. *Collins* (1). It is at the end of the condition, and is in these words:

> And it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to the goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to or beyond their said limits.

The words "after the said goods arrive at said stations or places nearest to the points or places which they are consigned to," which we find in the condition before us, but which are not found in that which was in question in the *Bristol & Exeter Ry. Co.* v. *Collins* (1), are in my opinion most material, and entirely distinguish the bill of lading in the present case from the receipt note which the House of Lords were called on to construe in the case referred to.

Further, in the case of the *Bristol & Exeter Ry. Co.* v. *Collins* (1) the goods were destroyed whilst *in transitu* and during the continuance of the carriers' liability, but in the present case it is contended that the respondent's goods were not lost or damaged until after completion of the *transitus*, when the contract for carriage had come to an end, and when the liability of the

(1) 7 H. L. Cas. 194.

appellants, either as carriers or as bailees, had entirely ceased.

Now in the event which happened, of "Portage Station" being substituted for "McGregor," the original destination by agreement between the respondent and the station agent of the Canadian Pacific Railway Company at Portage, the station or place on the appellants' line, on the arrival at which their responsibility was to terminate, according to this condition was undoubtedly that at Portage, for according to the established construction the line of the appellants' agents, the Canadian Pacific Railway Company must, for the purposes of this condition, be considered as the appellants' own line. That it was free to the appellants to enter into any contract or to prescribe any condition they might think fit limiting their responsibility as carriers or otherwise beyond their own line has already been demonstrated. It is, therefore, a consequence of this entire freedom of contracting that the Grand Trunk Railway Company might have limited their liability *ultra* their own line, not only so as to relieve them from all liability from that onerous responsibility which the law has imposed on common carriers as insurers of goods against all losses, except those proceeding from "the act of God or the Queen's enemies," or inherent vice in the goods themselves, but further and beyond this, from all losses imputable to the negligence of the appellants' own agents and servants, the subsidiary railway companies who, as agents for the Grand Trunk Railway Company were to complete the carriage from the terminus of their own line to Portage. To exonerate from liability for the negligence of agents and servants, however, so long as the goods should, in fact, remain in the appellants' own hands as carriers during the transitus, express terms would have been requisite; and,

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entirely agreeing with what Mr. Justice Patterson has said on this head in connection with the 3rd condition, I do not think the language of this last clause of the 10th condition is sufficient to relieve the appellants from liability for any negligence which may have occurred before the goods arrived at Portage Station, though after they left the appellants' own line.

Whilst, however, the appellants might thus have contracted themselves out of their *primâ facie* liability not only as common carriers, but also in respect of negligence, which latter, however, it appears, as just shown, they have not done, they were not confined to this mode of restricting their liability, for it was open to them to limit it another way, viz, as respects time and place, by providing they should not be liable in any way after the goods arrived at a certain point. Thus, for example, there was nothing to prevent them from excluding all responsibility on their part, after the goods should have come into the hands of the Canadian Pacific Railway Company, provided they did it in clear unequivocal terms. This they have not done. But, then, *a fortiori* there was no legal hindrance to their providing for such a cesser of liability immediately upon the termination of the transitus and when the contract of carriage would, in fact, have been completed. The question is, have the appellants not done this when they stipulate, as they in effect do, that they, "shall not be responsible for any loss, mis-delivery, damage or detention that may happen to the goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at Portage Station."

I read this condition just as if Portage Station had been actually inserted instead of the general description of the terminus in fact contained in the conditions, inasmuch as beyond all doubt Portage Station is by

agreement of the parties to be considered as the "station or place" on the appellants' line nearest to "the point or place to which the goods were consigned."

Then, what meaning must we attribute to this clause? And what was, if any, the extent of the appellants' liability after the goods arrived at Portage Station, as the evidence shows they did on the 25th of July, 1882.

It is well established by incontrovertible authority that the liability of carriers by railways *quâ* carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time afterwards for their delivery. *Chapman* v. *G. W Ry. Co.* (1). What is a reasonable time must be determined with a due regard to surrounding circumstances. In the case just cited it was held that the railway company were not liable for goods which had arrived at a station on the 25th March, and were destroyed by fire on the morning of the 27th. What would be a reasonable time would, however, be probably held to vary according to the surrounding circumstances; but, making every allowance for that it is not too much to say that by the 28th July, when the respondent for the first time inquired for the goods the liability of the appellants as carriers would, irrespective of condition or special contract, have ceased, and the goods would then, according to the general law, have been held by the Canadian Pacific Railway Company, acting either as agents for the appellants, the Grand Trunk Railway Company, or in the quality of principals acting on their own behalf, as warehousemen only, and consequently under a responsibility reduced from that of insurers to one of bailees liable only for neglect of duty

What then, on this, the state of things which would

(1) 5 Q. B. D. 278.

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have resulted, apart from contract or special condition, was the effect of the provision contained in the latter clause of the 10th condition which I have already set forth? I must unhesitatingly answer that it can only be construed as an express contract between the parties that all liability on the part of the Grand Trunk Railway Company should cease when the goods arrived at their destination and the contract for carriage was thus terminated. It appears to me very clear that when the contracts and agreements of the parties are free from legislative interference it is quite competent for a railway company to stipulate that the extended liability which the common law imposes upon carriers beyond that which ordinary bailees have to bear shall cease contemporaneously with the goods carried being deposited at the station to which they are destined, thus relieving the railway company from that time from all liability, save that of ordinary bailees, viz., a liability for negligence. Then that is precisely what was done in the present case. The agreement is that there shall be no liability for loss, damage or detention after the goods arrive at the station, which in this instance is to be read as Portage Station. This to my mind is as clear as words could express it, to show that the intention of the parties was that there was to be no liability as carriers after the goods arrive at the station. To this it may be answered that there would still remain the liability for negligence as warehousemen. The clause in question has, however, a continuing operation, and not only cuts down the contract of carriage to one of mere bailment so soon as the goods arrive, but also exempts the appellants from liability as warehousemen. The goods must consequently be considered from that date as remaining in the possession and custody of the Canadian Pacific Railway Company.

Then, as regards the subsequent possession of the Canadian Pacific Railway Company, if it is to be regarded as that of the last named company as agents for the appellants, the only liability it involved was responsibility for negligence. So that, if the clause in question had a continuing operation, as I maintain it had, and as it must have had to give it due effect, there was no liability on which it could operate, save the liability for the negligence of their servants and agents, and consequently it must be taken as exonerating the appellants from any liability whatever as regards the respondent, leaving him, however, to look to the Canadian Pacific Railway Company who, even if not in privity with the respondent, were actual and *de facto* bailees, and as such bound by an obligation, irrespective of contract, to take care of the goods in their hands.

There is nothing in this construction of the provision in question at variance with *Fitzgerald* v. *Grand Trunk Ry. Co.* (1) and cases of that class. There the clause of exemption was not altogether rejected, but in those cases full scope for its operation was afforded by attributing it to an intention to relieve the railway company from the onerous liability of carriers at common law, leaving them liable only for negligence. Here it is impossible to give the clause any operation whatever, unless it is construed as exempting the appellants, who had become mere wharehousemen, from liability for negligence, and as it is impossible to reject altogether a stipulation of this kind which the parties were free to enter into it must receive this interpretation

Another and, perhaps, more correct way of interpreting this clause and giving it the same practical effect is to consider it as putting an end to all liability on the part of the appellants, either as carriers or ware-

(1) 4 Ont. App. R. 60.

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housemen after the actual arrival of the goods at Portage, in which case the appellants would be considered, as the agents of the respondent, to hand the goods over upon their reaching that point to the Canadian Pacific Railway Company, who would thenceforward have the custody of them as warehousemen and bailees for the respondent

The result is that so soon as the goods were warehoused at Portage Station, or within a reasonable time thereafter, which reasonable time had elapsed before the respondent called for them, either the appellants ceasing to be liable as carriers held them through their agents the Canada Pacific Railway Company as mere bailees for the respondent, but as bailees exonerated from liability for the negligence of their agents and servants or they ceased from that time to have any possession of the goods at all and thenceforward the possession was in the Canada Pacific Railway Company alone as bailees directly for the respondent, the appellants being in the last case considered as the agents of the respondent to hand the goods over to the other railway company. Either one or the other of these alternative constructions, it matters not which, must be attributed to this 10th condition in order to give due effect to the words in which it is expressed.

Construed in either way, this 10th condition seems to be most reasonable since it relieves the appellants from liability, not in respect of goods in transit, but in respect of goods which might remain for an indefinite time deposited with bailees at a great distance from the appellants, and over whom they could possibly have no control, whilst the respondent would have every security for the safe-keeping of the property which he could reasonably require, and an efficient remedy in the liability which the Canadian Pacific

Railway Company would incur by the mere receipt of the goods as bailees.

This conclusion, however, would, it is manifest, have no practical result, if it were not that the evidence, or at least a fair inference from it, shows that the loss of a portion of the goods and the damage to the residue occurred not *in transitu*, but after the arrival at Portage Station. This appears to have been the view of the Court of Appeal, for Mr. Justice Patterson, who delivered the leading judgment there, says (1):

> There is nothing in the evidence to suggest that the goods did not all arrive at Portage, the date being given as the 25th July, and were not all at that time in good order.

And again, at page 26 of the report, the same learned judge says:

> The conclusion of fact indicated by this evidence is that the injury occurred and the missing packages were lost during these two months, and no account of the goods is given to rebut that inference. The negligence and resulting injury therefore, happened after the transit was over, and when but for the default of the company, the goods would have been in their possession.

No dissent from these statements was expressed by any other members of the court, and as they entirely accord with the result of my own consideration of the depositions, which I have read several times, I do not hesitate to accept them as correct conclusions of fact.

I am, therefore, of opinion that the motion for judgment made on behalf of the appellants was properly granted by the learned judge who presided at the trial, although the view I take of the 10th condition is not quite the same as his.

Secondly. The 12th condition, independently of any other consideration, appears to me conclusive in favor of the appellants. That condition is in the following words:

> 12. That no claim for damage to, loss of, or detention of any goods

(1) 15 Ont. App. R. at p. 25.

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for which this company is accountable shall be allowed unless notice in writing, and the particulars of the claim for said loss, damage or detention, are given to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods, in respect of which said claim is made, are delivered.

This condition was duly pleaded by the appellants, and this portion of their statement of defence was demurred to as constituting no answer in law. Upon argument, however, the demurrer was over-ruled and the plaintiff was allowed to amend and take issue upon it, which he did by a general denial of its allegations.

The result is, that as regards the sufficiency of this defence as an answer in law to the plaintiff's demand, that question must be taken as concluded and as *res judicata* between the parties, the plaintiff not having taken any cross-appeal against the decision or demurrer either here or in the Court of Appeal. Then in point of fact the plaintiff has failed to prove that he gave the notice which this 12th condition required, so that the defence set up by paragraph 4 of the statement of claim is completely sustained both in law and in fact. The wording of this condition is not very accurate. It clearly, however, covers the damage to the packages which were delivered. As regards the claim for loss, I think it also applies to that, as the only sensible construction which can be placed upon it with reference to lost goods is that when goods, part of a consignment, are lost, the notice is to be given thirty-six hours after the delivery of those which arrive safely and are delivered. Unless we are to make a new contract for the parties, I am at a loss to conceive any answer to the defence founded on this condition.

Lastly. The appellants rely on the accord and satisfaction, which took place between the respondent and the Canadian Pacific Railway Company *pendente lite*, and the release executed by the appellants of all

causes of action in respect of the loss and damage to the goods in question against the last named company.

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Although it appears to me very clear that these two railway companies are sued as joint tort feasors, and that the old law was that a release to, or acceptance of satisfaction from one of several joint tort feasors, was a bar to the action against the others, it has been suggested by text writers that the law in this respect has undergone a change (1), and that a release of one wrong doer is not now a defence for the others, except in cases when the release or satisfaction is expressly given or accepted in bar of the cause of action against all, which certainly does not appear to have been the case here, the intention being manifestly to release the Canadian Pacific Railway Company only; and although this new doctrine does not seem to me altogether consistent with such cases as *King* v. *Hoare* (2) and *Brinsmead* v. *Harrison* (3), cases which have quite recently been approved of by the House of Lords (4), I do not think it necessary to enter into a fuller consideration of it, as the two first points seem to me quite sufficient to warrant my judgment, which must be for the appellants, thus restoring the judgment pronounced by Mr. Justice Rose at the trial, with costs to the appellants in all the courts.

FOURNIER J.—Was of opinion that the appeal should be dismissed, for the reasons given by Mr. Justice Gwynne.

TASCHEREAU J.—I agree with Mr. Justice Strong, and would allow the appeal, for the reasons stated in his judgment.

GWYNNE J.—This appeal should, in my opinion, be

(1) Bullen and Leake on Pleadings, 4 Ed. p. 464.
(2) 13 M. & W. 504.
(3) L. R. 7 C. P. 547.
(4) *Kendall* v. *Hamilton* 4 App. Cas. 504.

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dismissed with costs, upon the grounds on which the Court of Appeal for Ontario proceeded. It is unnecessary to allude to the facts of the case, further than to say, that unless the defendants are exempted from liability by reason of the condition endorsed on the shipping bill which was relied upon, there can be no doubt that they are responsible to make good to the plaintiff all damages by him sustained, as well by the unwarrantable delay which occurred in the conveyance and delivery of what was delivered, and by reason of the ruinous condition in which a large portion was, as by the loss of that portion which never was, delivered.

The case of *Bristol & Exeter Railway Co.* v. *Collins*, in the House of Lords (1) is, in my judgment, conclusive upon the present case. The Court of Queen's Bench by their judgment in *Zunz* v. *The South Eastern Railway Co.* (2) never intended, even if it had been competent for them, to qualify in any respect the judgment of the House of Lords in the *Bristol & Exeter Railway Co.* v. *Collins* (1) and the condition relied upon in the present case is less favorable to the support of the exemption from liability relied upon by the defendants than was the condition under consideration in that case, while that upon which *Zunz* v. *S. E. Ry. Co.* (2) proceeded was framed apparently with the intention of adopting the suggestion made by some of the learned judges in the *Bristol & Exeter Ry. Co.* v. *Collins*, (1) to the effect that a railway company receiving goods to be conveyed to the place to which they are consigned over another railway, or other railways, extending beyond the line of the receiving company, and wishing to limit their liability to the period of transit upon their own line should frame the condition upon which

(1) 7 H. L. Cas. 194; 5 Jur. N. S. 1367. (2) L. R. 4 Q. B. 539.

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they should rely for exemption from liability while the goods should be in transit upon such other railway in very different language from that used in the condition relied upon in *Bristol & Exeter Railway Co.*, v. *Collins* (1) and in fact in such language as should be incapable of being misunderstood by any person dealing with a railway company as a common carrier of goods.

The plaintiff's statement of claim is:—

That he delivered to the G.T.R'y Co.—who were a company doing business as common carriers in Canada and elsewhere, certain goods belonging to the plaintiff, to be safely carried for reward to them in that behalf from the city of Toronto, in the county of York and Province of Ontario to the village of McGregor in the Province of Manitoba, and there to be delivered to the plaintiff within a reasonable time: that the said G.T. Ry. Co. duly received the said goods for the purpose aforesaid, and the plaintiff duly paid them their charges therefor, amounting to $17.20. Yet the said defendants, the said company, did not deliver the said goods to the plaintiff within a reasonable time, nor did they take due and proper care thereof but wholly neglected so to do; and so carelessly, negligently and improperly carried the same and took such bad care thereof, that by their negligence, carelessness and improper conduct in that behalf the said goods were delayed for a long and unreasonable time in transit, and a large portion thereof was greatly damaged and the remainder never delivered at all to the plaintiff.

Now the statement of defence, which sets up the condition which is relied upon as exempting the defendant's from liability, is as follows:—

The defendants say that the said goods were delivered to them, and they received the same for carriage and delivery upon and subject to the terms of a special contract made by and between the plaintiff and defendants respecting the carriage and delivery thereof; that one of the said conditions was and is, "that all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at these stations, will be forwarded to their destination by public carrier or otherwise as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or

(1) 7 H. L. Cas. 194.

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they may, at the discretion of the company, be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of the company shall cease when such other carrier shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods so sent by them if such loss, mis-delivery, damage or detention occur after said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

The above condition varies little from that in *The Bristol & Exeter Ry.* v. *Collins*, (1) from which it appears to have been taken. The only difference, indeed, appears to lie in an alteration in the first sentence which renders obscure what is clearly enough expressed in that under consideration in *The Bristol & Exeter Ry.* v. *Collins* (1); with this ambiguity, however, we are not at present concerned, and need not dwell upon it; and in omitting a paragraph which is in the latter condition, namely :—

And the company hereby further give notice that any money which may be received by them as payment for the conveyance of goods by other carriers beyond their said limits will be so received only for the convenience of the consignor, for the purpose of being paid to such other carriers, and will not be received as a charge made by the company upon the goods in the capacity of carriers beyond the extent of their own Railway.

It is clear, therefore, that if the condition endorsed on the shipping bill in *The Bristol & Exeter Railway Co.* v. *Collins* (1) had no application to qualify the contract in that case, although it was a contract for carriage of goods to a point on another railway remote from the terminus of the railway of the contracting company, the condition now under consideration can have no

(1) 7 H. L. Cas. 194.

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application to the contract in the present case, which in all substantial particulars is identical with that in *The Bristol & Exeter Railway* v. *Collins* (1). By the shipping bill upon which the defendants rely, (I am assuming that the goods were received by them to be carried under that shipping bill), it appears that the contract the defendants entered into was one entire contract to carry the goods the whole distance from Toronto to McGregor station, Manitoba, for one entire sum, which they received as payment in full for such carriage. This shipping bill, with the conditions endorsed thereon, is the form which has always been and still is in use for shipping goods for transit between any two stations upon the Grand Trunk Railway of Canada, which extends from Portland, in the State of Maine, and from Quebec in the east, to Sarnia, in the Province of Ontario, in the west. Since the present contract was entered into the company appears to have adopted a new form for the transit of goods through the United States west of Sarnia; but the contract under consideration was drawn up on a shipping bill then and still in use for the carriage of goods upon the Grand Trunk Railway proper—as above defined. Now, in executing this contract it appears that from Sarnia, in the Province of Ontario, or Fort Gratiot, across the River St. Clair in the State of Michigan, whichever may be said to be the western terminus of the Grand Trunk Railway proper, the company had two routes, being part of what is called the Grand Trunk railway system, by which the goods could have been forwarded as far as Chicago, in the State of Illinois. From Chicago to St. Pauls there were three railway routes by which the goods could have been forwarded; and from St. Paul's to St. Vincent one; but whether these routes were, or any of them was, part of the Grand Trunk Railway

(1) 7 H. L. Cas. 194

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system did not appear; and from St. Vincent to McGregor station, to which the defendants contracted for the carriage of the goods, there was the Canada Pacific Railway. Now, by the statutes affecting the company they had, prior to the entering into the contract under consideration—

> Power to make working arrangements with any railway company in the United States, or to agree for running powers over the line or lines of any such company, or to lease any such lines of railway, or to make agreements and arrangements with any such company as well as with any railway company in Canada, for the interchange of traffic passing to and from their railways respectively, and for the division and apportionment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and workings of the railways or any part thereof, and of any railway in connection therewith for any term not exceeding twenty-one years.

It may be that on the whole route from Fort Gratiot to Manitoba the defendants had agreements or arrangements with railway companies in the United States of the nature of some of those thus authorized, and the arrangements may have been such as to make the whole route by which the goods of the plaintiff were conveyed from the River St. Clair to the Canada Pacific Railway in Manitoba part of which is called the Grand Trunk Railway system. Of this we know nothing, nor does the plaintiff appear to have known anything further than that the defendant had power to make such arrangements. That was information which the G. T. Ry. Co. kept to themselves. The plaintiff knew nothing, so far as appears, as to the route by which the defendants should convey his goods, as they had undertaken to do from Toronto to Manitoba.

Now if this condition applies, as contended for by the defendants, the plaintiff can have no cause of action against anyone, unless he can show precisely in what part of this long route from Toronto to Manitoba the loss or damage occurred. He could have no action against

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the defendants unless he could prove that it occurred between Toronto and Fort Gratiot, and he would be deprived of all benefit of the contract he had made with the defendants to carry the goods to McGregor, and for which he had paid, and he might look for redress as best he could from companies in the United States or elsewhere with whom he had entered into no contract, but with whom, no doubt, the defendants had, for the purpose of enabling them to execute their contracts. To my mind it is difficult to conceive anything more preposterous than that the defendants having, as carriers of goods, received payment from the plaintiff for the transport of his goods to McGregor station could relieve themselves from all responsibility by taking the goods to Fort Gratiot, and there putting them in warehouse until they should communicate with the plaintiff at McGregor station, and receive orders from him, or by notifying some of the railway companies having railway communication with Chicago that they might take them to Chicago and forward them from thence as best they could. Whether under the circumstances any condition could be so framed as to have such effect it is unnecessary to inquire; but in order to be construed to have such effect it ought at least, to use the language used in the *Bristol & Exeter Ry. Co.* v. *Collins*, (1) to be expressed in terms as to which no person dealing with a railway company as a common carrier could fall into any misapprehension or mistake. Now in *Zunz* v. *The S. E. Ry. Co* (2), the ticket which the defendants had sold to the plaintiff was in three coupons, one, from London to Dover by the defendants' railway, two, from Dover to Calais by water, and three, from Calais to Paris by the Great Northern and France railway. Whether this was a divisible contract, or one entire contract which

(1) 7 H. L. Cas. 194. (2) L. R. 4 Q. B. 539.

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was not determined, it is plain that the plaintiff knew he was about to travel to his destination by three distinct routes, precisely determined, so that he could have no difficulty in understanding what was meant by the expression: "While the passenger is travelling by the South Eastern Railway Company's trains and boats," in connection with that contract. Upon the back of the ticket was printed a condition which expressed in very unmistakable language that the defendants assumed no liability for anything which should happen to the plaintiff on his route, except while the plaintiff should be travelling on the South Eastern Railway Company's trains and boats. The condition was as follows :—

> The South Eastern Railway Company is not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket except while the passenger is travelling by the South Eastern Ry. Co's. trains and boats ; and in this latter case only when the passenger complies with the by-laws and regulations of the company ; and in no case for luggage of greater value than £6. The South Eastern Railway Company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats in conveyance of passengers being booked to travel over the railways of other companies, such through booking being only for the convenience of the passenger, nor will the South Eastern Company be responsible for the trains and boats whether of this or the other companies over whose lines the ticket extends, being delayed, or not meeting the trains shown in correspondence ; nor for any consequence which may result to a passenger thereby.

This condition as well as the subject matter to which it relates are very different from the condition and the subject matter to which it related in *The Bristol & Exeter Ry. Co.* v. *Collins* (1) and between the two cases there is no conflict.

Fowles v. *G. W. Ry. Co.* (2) was prior to *The Bristol & Exeter Ry. Co.* v. *Collins* (1) and is quite consistent

(1) 7 H. L. Cas. 194. (2) 7 Ex. 699.

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with it. The plaintiff declared as upon a contract by the defendants as common carriers to convey plaintiff's goods from Bristol to Brompton. The delivery note showed that the contract was to convey the goods from Bristol station of the Great Western Ry. Co. to Paddington Station, although the address of the consignee was entered thereon as at Brompton, and the plaintiff had paid for the whole carriage to Brompton under a condition endorsed on the delivery note similar to that in *The Bristol and Exeter Ry. Co.* v. *Collins* (1) as to any money received by the defendants, as payment for the conveyance of the goods by carriers beyond the defendants' railway would be received only for the convenience of the consignors for the purpose of being paid to such carriers, and would not be received as a charge made by the company upon the goods in the capacity of carriers beyond the extent of their own railway; and it was held quite in accord with the subsequent judgment of the House of Lords in the *Britsol and Exeter Ry. Co.* v. *Collins* (1), that this was just the case to which such a condition applied, and that the defendants were not liable for anything which took place beyond the station to which they had contracted to convey the goods, namely, their Paddington station.

Kent v. *The Midland Ry. Co.* (2) was a case quite different from the present. The question there was as to the construction of the words "off its lines" in the following sentence:—

> The company does not hold itself responsible for any delay, detention, or other loss or injury arising off its lines.

And it was held that the luggage of a passenger who was travelling to his destination upon two lines of railway under a through ticket, issued by the defendants company was not "off the line" of the defendants until it was delivered into the possession of the other

(1) 7 H. L. Cas. 194. (2) L. R. 10 Q. B. 1.

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company running in connection with the first. This decision it is obvious has no bearing upon the condition at present under consideration.

In *Aldridge* v. *Great Western Ry. Co.* (1) the goods had been delivered at the defendants at Hereford to be conveyed to Tiverton, a point on the Midland Railway or its system. The person by whom they were delivered to the Great Western Ry. Co. signed a printed note containing the condition that the company will not be responsible:

> In respect of goods destined beyond the limits of the company's railway, and as respects the company their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance.

Nothing had been received by the company for the carriage of the goods. The goods were conveyed by the Great Western Railway Company to Gloucester and there delivered to the Midland Railway and it was held that the Great Western Railway Company were exempt from responsibility, their contract, in effect, terminating at Gloucester, where they were delivered to the Midland Railway Company.

Williams J. in pronouncing the judgment of the court says:—

> We are of opinion the second condition is reasonable, and does protect the defendants; the railway company do not attempt to protect themselves from injuries or delays happening on their own line or through the negligence of themselves or of their own servants, or even on a further line, where they have received any compensation for carriage on that further line.

As was the case in *Collins* v. *Bristol & Exeter Railway Company* (2), and is the case here. In *Rennie* v. *Northern Railway Company* (3) the special contract which was set up by way of defence to an action of trover was held to be a contract of the defendants

(1) 15 C. B. N. S. 582.
(2) 7 H. L. Cas. 194.
(3) 27 U. C. C. P. 153.

limited to their carrying to Duluth and delivering the goods there to the Northern Pacific Railway to forward to Fort Garry, and that having done so they had fulfilled their contract and were not liable for anything which took place subsequent to such delivery to the Northern Pacific Railway Company.

None of these cases affect, nor has any case been cited which does affect to call in question the soundness of the judgment of the House of Lords in the *Bristol & Exeter Railway Company* v. *Collins* (1), which, in so far as this 10th condition is concerned, governs the present case.

A defence under another condition was pleaded, but does not seem to have been relied upon at the trial, nor to have been alluded to in the Divisional Court, nor in the reasons of appeal from the judgment therein to the Court of Appeal for Ontario, nor in the argument before the latter court, and for this reason alone it should not now be entertained: but, in my opinion, the condition in question has no application to the present case, any more than has the 10th condition. The condition is No. 12

> That no claim for damage to, loss of, or detention of, any goods for which this company is accountable shall be allowed unless notice in writing and the particulars of the claim for said loss, damage or detention are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which the claim is made are delivered.

Now the "station freight agent" alluded to in this condition is, in my opinion, clearly to be understood to be a station freight agent on the defendants' own line proper, not a station freight agent of another unknown company upon another unknown railway in the United States for example, with whom the defendants may have connection and traffic arrangements, it

(1) 7 H. L. Cas. 194.

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may be at San Francisco or New Orleans, or any other remote place, nor a station freight agent of the Canada Pacific Railway Company at New Westminster or Vancouver or some other place in British Columbia, to which places or stations the defendants may as carriers have received payment in advance for the transportation of goods and may have contracted to convey and deliver them; and this is the construction which the defendants themselves by their statement of defence insist upon, for they allege in breach of the condition that the plaintiff did not give the notice required by the condition to the defendant's station freight agent at Fort Gratiot, in the State of Michigan, and that this Fort Gratiot is the station on the defendants' line of railway nearest to the point or place to which said goods were consigned, and that the said village of McGregor is a point or place beyond any place where the defendants have stations, which the plaintiff well knew.

Anything so absurd as that upon loss or damage appearing to goods received by the defendants as carriers to be carried to, and delivered, it may be, at or near San Francisco or New Orleans or at any other remote place in the United States upon or near a railway with the company owning which the defendants have traffic arrangements of the nature hereinbefore referred to, and which they have power to make, or at New Westminster, or Vancouver, or at any other remote place in British Columbia or elsewhere, and for which carriage throughout the defendants had as such carriers received payment in advance, a consignee should be required as in obedience to this condition to give to the defendants' station freight agent at Fort Gratiot or Sarnia the notice therein referred to, cannot, in my opinion, well be conceived.

The condition, plainly, in my opinion, applies only

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to the case of goods which have reached a station on the defendants' own line which by the contract for carriage is designated as the terminus of the contract for carriage by railway and as being the place most convenient for that purpose as the station nearest to the place off the line which is the ultimate destination of the goods—precisely as the 10th condition in *Collins* v. *The Bristol & Exeter Railway* (1) was construed.

This construction is sensible, while that contended for is the contrary, and impracticable.

There remains only the point as to a new trial upon the grounds of the payment made by the Canada Pacific Railway Company, which for all we know may be their fair share of the plaintiff's loss, which may not have been all sustained while the goods were in their possession. I certainly agree with the view taken on this point by the learned Chief Justice of the Divisional Court of Queen's Bench, and other learned judges of that court.

Three weeks before the trial took place the defendants had full notice of this payment, and that it was made upon the basis of a proposal for settlement made to the defendants by the plaintiff's solicitor about five or six months previously. Yet the defendants never alluded to it at the trial, and they got the benefit of it in reduction of the amount originally claimed by the plaintiff, and in support of which evidence had been taken on commission. Moreover the receipt by the plaintiff of this sum from the Canada Pacific Railway Company could never be set up as a bar to the plaintiffs' action against the Grand Trunk Railway Company, nor can it in any manner embarrass them in any claim they may have against any of the railway companies whose railways the defendants' selected as the route by which they should fulfil their contract with the plaintiff.

(1) 7 H. L. Cas. 194,

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Gwynne J.

The plaintiff's claim against the Grand Trunk Railway Company is under his contract with them, while the defendant's claim against any of the other railway companies must depend upon a contract between the defendants and such other railway companies, as appearing in their traffic arrangements or elsewhere.

I am of opinion, therefore, that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellants: *John Bell.*

Solicitor for respondent: *A. C. Galt.*

DAVID WEIR (PLAINTIFF).....APPELLANT, 1889

AND *Jan. 18, 19.
*Mar. 18.

PIERRE CLAUDE (DEFENDANT).....RESPONDENT.

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

Pollution of running stream—Long established Industry—Nuisance—Injunction.

W. acquired a lot adjoining a small stream at Côte-des-Neiges, Montreal, and finding the water polluted from certain noxious substances thrown into the stream brought an action in damages against C. the owner of a tannery situated 15 *arpents* higher up the stream, and asked for an injunction. At the trial it was proved that C. and his predecessors had from time immemorial carried on the business of tanning leather there, using the water for tanning purposes, to the knowledge of all the inhabitants without complaint on their part; that it was the principal industry of the village; that the stream was partly used as a drain by the other proprietors of the land adjoining the stream and manure and filth were thrown in, but that every precaution was taken by C. to prevent any solid matter from falling into the creek. W. only acquired the property since C. had been using the stream for the purpose of his tannery, and there was no evidence that the property had depreciated in value by the use C. made of the stream.

Held—Affirming the judgment of the court below, that W., under the circumstances proved in this case, was not entitled to an injunction to restrain C. from using the stream as he did.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) which reversed the judgment of the Superior Court granting an injunction (2).

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

(1) M. L. R. 4 Q. B. 197. (2) M. L. R. 2 S. C. 326.

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The appellant, who was plaintiff in the Superior Court alleged in his declaration:—

That he owned a house and property at the village of Côte-des-Neiges, where he passed the summer months. This property was traversed by a small stream known as the Ruisseau de la Côte-des-Neiges, a verbalized municipal water course. The plaintiff's *auteurs* had used this stream for culinary and domestic purposes. The defendant owned a large tannery, built upon this stream, about a quarter of a mile above the plaintiff's house. For five years past, the defendant and his employees had made an illegal use of this stream, to the damage of plaintiff. The defendant in the course of his tanning and dyeing operations, threw into the stream at frequent intervals, various poisonous and noxious matters, used by him in his business. The water in which hides had been washed was also constantly emptied into the stream. The defendant also dammed the stream at intervals, so as to obtain a greater quantity of water in which to empty his vats of offensive matter. The effect of this abuse of the stream by defendant was to deprive plaintiff of his lawful use of the water, to render the water, in fact, unfit for any use whatever; to seriously depreciate the value of plaintiff's property; and to endanger his health and that of his family, one of his children having already had typhoid fever in consequence of the state of the water.

By his conclusions, the plaintiff asked for $2,000 damages, and for a restraining order compelling defendant to carry on his tanning operations in such a way as not to render the neighborhood unhealthy, and not to interfere with the plaintiff's lawful use of the stream.

The defendant pleaded that he and his predecessors had from time immemorial carried on business of tan-

ning in Côte-des-Neiges with the consent of the inhabitants of Côte-des-Neiges, that the tanneries supplied a large part of the population with their livelihood, and that the inhabitants had consented to the inconveniences resulting from the tanneries, in view of the advantages resulting therefrom. He also pleaded that the stream was more polluted by others than by himself.

To this plea the plaintiff demurred, on the ground that it alleged the acquisition of a servitude, without invoking any title. The plaintiff also answered generally.

The issues were closed by defendant's replications. The demurrer was argued before Mr. Justice Taschereau, but was reserved for the final hearing. The final judgment condemned the defendant to pay $500 damages, and granted a restraining order in the terms of the declaration.

The defendant appealed from this decision, and the Court of Queen's Bench reversed the judgment and dismissed the plaintiff's action.

The evidence is reviewed at length in the judgments of the courts below (1).

Lafleur and Rielle appeared on behalf of the appellant and *Laflamme* Q. C. and *David* appeared on behalf of the respondent.

In addition to the points relied on and authorities cited in the courts below and which are reported at length (2), the learned counsel for the appellant cited Championnière, Propriété des eaux courantes (3); Larombière Obligations (4); *Blair* v. *Deakin* (5); *Thorpe* v. *Brumfitt* (6); *Ball* v. *Ray* (7); and Kerr on

(1) M. L. B. 4 Q. B. 197.
(2) See M. L. R. 2 S. C. 329, M. L. R. 4 Q. B. 197, 31 L. C. Jur. 39 and 32 L. C. Jur. 213.
(3) P. 757.
(4) Vol. 5, p. 693, s. 12.
(5) 57 L. T. N. S. 522.
(6) L. R. 8 Ch. App. 650.
(7) L. R. 8 Ch. 467.

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Injunctions (1); and the learned counsel for the respondent referred to Campbell Law of Negligence (2), *Brown* v. *Gugy* (3), *McGibbon* v. *Bedard* (4) and Laurent (5).

TASCHEREAU J.—We are of opinion that this appeal should be dismissed with costs entirely adopting the reasoning of Chief Justice Dorion in the court below.

Appeal dismissed with costs.

Solicitors for appellant: *Lafleur & Rielle.*

Solicitors for respondent: *David, Demers & Gervais.*

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(1) 2 Ed. p. 208.
(2) P. 15.
(3) 14 L. C. R. p. 216.
(4) 30 L. C. Jur. 282.
(5) 6 Vol. p. 194.

MAGLOIRE C. GALARNEAU *et al*.....APPELLANTS ; 1889

AND

LOUIS GUILBAULT.....RESPONDENT.

*Jan. 19, 21.
*Mar. 28.

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

Toll Bridge—Ferry—Appeal R. S. C. ch. 135, *sec.* 29 (*b*), 38 *Vic. ch.* 97—*Interference—Damages.*

By 38 Vic., ch. 97, the plaintiffs were authorized to build and maintain a toll bridge on the River L'Assomption at a place called "Portage," and "if the said bridge should by accident or otherwise be destroyed, become unsafe or impassable, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving way of said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable they were bound to maintain a ferry across the said river, for which they might recover the tolls."

The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of the plaintiffs' franchise and allowed it to be used by parties crossing the river.

In an action brought by the plaintiffs, claiming $1,000 damages, and praying that defendant be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was

Held,—1st, that as rights in future might be bound, the case was appealable under R. S. C., ch. 135, sec. 29 (*b*).

2nd—Reversing the judgment of the court below Ritchie C. J. and Patterson J. dissenting.—That the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but as the bridge had since been demolished the court would merely award nominal damages and costs.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), affirming the

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

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judgment of the Superior Court, by which the appellants' action was dismissed with costs.

The appellants sued the respondent in the Superior Court, alleging in substance, by their declaration, certain powers, privileges, immunities unto them granted under and by virtue of 38 Vic., ch. 97, and that under said statute they built a bridge over the river L'Assomption and kept it in good order; that in the course of the month of April, 1885, the said bridge was partly carried away by the ice; that they repaired it within the delay fixed by the Act and had it again opened for circulation on the first of November of the same year, they having during the interval accommodated the public with a sufficient ferry across the said river; that respondent, in the course of May, 1885, erected another toll bridge, which was opened for public circulation on the 1st of June, 1885, within the limits prohibited by the said Act as being within the appellants' privilege, thereby encroaching and infringing upon their said privileges; the appellants praying, by their conclusions, amongst others, that the respondent be ordered to demolish his said bridge, that he be prohibited from further troubling appellants in the exercise of their privilege, and that, on his default of so doing, the appellants be allowed to demolish respondent's said bridge, and the respondent be condemned to pay to appellants the sum of one thousand dollars damages and costs.

The respondent answered the said suit, first, by a *défense au fonds en fait*, and further, by another plea, stating that his bridge was built only for his own use, and for such time only as appellants' bridge would remain impassable; that he allowed no stranger to pass thereon, and if any one did pass, it was without his consent and without remuneration; and that he

thereby did in no way infringe upon any of the appellants' privileges.

The appellants specially replied that the respondent by constructing his bridge, had illegally acted and, moreover, violated the privileges of the appellants: that the respondent had built his bridge not only for his personal utility, but even for that of a great number of persons who continued to use it, to his knowledge and with his consent, and that he was personally profiting by it.

At the trial it was proved that the bridge had been accidentally carried away by ice, but rebuilt and open for traffic within fifteen months, during which time appellants maintained a ferry across the river, and that the respondents' bridge was a temporary bridge within the limits of the appellant's franchise, upon which he allowed the public to cross the river, and the bridge was subsequently taken away.

The material sections of the statute 35 Vic., ch. 97, are the following :—

"Sec. 5.—At all times, so long as the said bridge is kept in good repair and open for the use of the public, no person whatever shall erect any bridge or bridges, or shall use, for purposes of ferriage, boats of any description whatever, for the passage of any person, cattle or vehicle whatsoever, for hire, across the said river, within the distance of half a mile from the said river in the direction of the flow of the river, and within the distance of two miles in the other direction, such distance being measured along the banks of the said river and following its windings, and any person who shall build any toll-bridge or toll-bridges over the said river within the limits aforesaid, or shall ferry for hire within the limits aforesaid shall, without prejudice to any proceedings which may be instituted against him by the said François Xavier Galarneau and Magloire Cléophas

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Galarneau before any court, to cause the said bridge to be destroyed, and to cause their privileges to be otherwise respected, pay to the said François Xavier Galarneau and Magloire Cléophas Galarneau treble the tolls hereby imposed for all persons, cattle, horses and carriages passing over such bridge or crossing by means of such ferry or ferries."

"Sec. 6.—The said François Xavier Galarneau and Magloire Cléophas Galarneau, to entitle themselves to the benefits and advantages to them by this act granted, shall be bound to put the said bridge into a safe and convenient condition for the passage of travellers, cattle or vehicles, and if the said bridge should, by accident or otherwise, be destroyed, become unsafe or impassable, the said François Xavier Galarneau and Magloire Cléophas Galarneau shall be bound to rebuild the said bridge within the fifteen months next following the giving away of the said bridge, under penalty of forfeiture of the advantages to them by this act granted; and during any time that the said bridge shall be unsafe or impassable they shall maintain a ferry across the said river, for which they may recover the tolls aforesaid."

McConville for respondent, on the motion to quash the appeal for want of jurisdiction.

The amount claimed, one thousand ($1,000), does not make the case appealable.

The case does not involve the validity of any of the acts mentioned in paragraph (*a*) of section 29 of the Supreme and Exchequer Courts Act.

It does not relate to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, nor to any title to lands.

Does it relate to any title to a tenement?

I believe not, because the franchise granted to the appellants, being for the limited period of 25 years

(section 9, ch. 97, 38 Vic.) is rather a chattel than a tenement which must be permanent. Blackstone, Kerr's edition (1); Abbott's Dictionary (2); Brown's New Law Dictionary (3); Tomlin's Law Dictionary (4); Bouvier's Law Dictionary (5); Maxwell Interpretation of Statutes (6).

Is there any annual rent or such like matter or thing where the rights in future might be bound ? I respectfully submit that there is no such thing.

If the view I have above expressed as to the true construction of the statute 38 Vic., ch. 97, is correct, it remains clear that appellants never had in the past, have not actually, and will never have the right by them claimed. Until they obtain another act from Parliament they will have no right that might hereafter be bound by the decisions of the courts below.

Laflamme Q.C. for appellants *contra* contended that the case came within the sub-section (*c*) of section 29 of R. S. C.

The decision of the court on the question of jurisdiction being reserved the case was then argued on the merits.

Laflamme Q.C. and *Charpentier* for appellants contended that the charter or privilege granted by the general statute 38 Vic., chap 97, is a contract between the public and the grantee, which warrants to the latter, the exclusive right to build a bridge over the River L'Assomption within the limits indicated, and that according to the 5th section of the statute there is an absolute prohibition to construct any other bridge th the limits of the privilege, in favor of the grantees, at all times provided the grantee executes

(1) P. 14.
(2) Vbo. Tenement.
(3) Vbo. Tenement.
(4) Vbo. Tenement.
(5) Vbo. Tenement.
(6) P. 301.

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the obligations mentioned in his grant. See *Lessee* v. *Douglass* (1); *Girard* v. *Belanger* (2).

As to the damages, they contended that although it would be difficult to strictly determine the amount, it appeared however by the evidence that a great number of travellers had eluded the toll which the appellants had the right to claim, by using the ferry constructed by respondent, which was open to the free circulation of the public. In such a case, the court must consider the determined violation of the law, and grant to the injured party exemplary damages, or at least sufficient to cover the probable loss that the party may have suffered, and the sum of two hundred dollars would be an extremely moderate amount.

McConville for respondent contended that the only reasonable construction to be put upon sections 5 and 6 of the statute was that in case of accident the benefits and privileges granted to appellants are suspended during the fifteen months allowed for repairs. During that time they can claim none of such benefits and privileges; and the public, of which respondent is one, may protect themselves in any manner that suits them, if they are not satisfied with the appellants' ferry.

Grants of this kind are always strictly construed, are always taken in a most favorable sense for the King and the public, and against the grantee. They are valid only as to what is therein precisely mentioned, are not to be extended beyond the terms expressly used. Blackstone, Kerr Edition (3).

SIR W. J. RITCHIE C.J.—I am of opinion the appeal should be dismissed with costs.

STRONG and TASCHEREAU JJ. concurred with FOURNIER J.

(1) 3 Cranch Rep. 70.

(2) Ramsay's App. Cas. 550.

(3) P. 350.

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FOURNIER J.—En vertu du statut 38 Vict., ch. 97, les appelants ont obtenu du parlement du Canada le privilège de construire un pont de péage sur la rivière L'Assomption, dans la paroisse de L'Assomption, à l'endroit appelé "portage," où cette rivière est navigable.

Le statut en leur accordant le droit de construire un pont solide et suffisant, à la charge de le maintenir et réparer à leurs frais, les autorise à recevoir et exiger les taux de péages spécifiés dans le dit acte en se conformant aux conditions y mentionnées.

Le privilège accordé est énoncé dans les termes suivants :

En tout temps, tant que "le dit pont sera tenu en bon état de réparation, et ouvert pour l'usage du public, dès lors aucune personne quelconque ne pourra ériger aucun pont ou ponts, ni ne pourra faire usage, comme moyens de traverse, de bateaux d'aucune espèce pour le passage d'aucune personne, bestiaux ou voitures quelconques, moyennant rétribution, sur la distance d'un demi-mille du pont dans la direction du cours de la rivière, et sur la distance de deux milles dans l'autre direction,... et toute personne qui construira un pont de péage ou des ponts de péage sur la dite rivière dans les dites limites, ou qui traversera des passagers moyennant rétribution dans les limites susdites, paiera, en outre des procédés que pourront adopter contre lui les dits François-Xavier Galarneau et Magloire Cléophas Galarneau, devant les tribunaux pour faire détruire les dits ponts et faire autrement respecter leur privilége, aux dits François-Xavier Galarneau et Magloire Cléophas Galarneau, trois fois la valeur des taux, etc., etc.... Et s'il arrivait que le dit pont s'écroulât par accident ou autrement, qu'il fut détruit, que sa traversée devint dangereuse, ou qu'il devint impraticable, les dits François-Xavier Galarneau et Magloire Cléophas Galarneau, seront tenus de rétablir le dit pont dans les quinze mois à dater du jour de l'écroulement du pont, à peine d'être déchus des avantages à eux accordés par le présent acte, et pendant le temps que le dit pont sera impraticable et que sa traversée sera dangereuse, ils devront entretenir un passage sur la dite rivière, à raison duquel ils pourront exiger les péages susdits.

En 1883, les appelants ont, conformément aux dispositions de ce statut, construit sur la dite rivière L'Assomption, à l'endroit appelé "portage," un pont, qui fut emporté par les glaces.

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Ce pont ayant été reconstruit la même année et entretenu conformément à la loi fut de nouveau endommagé par la glace dans le printemps de 1885, de manière à le rendre impraticable. Dans le but de conserver leur privilège de reconstruire le dit pont dans le délai que leur accorde le statut, les appelants s'empressèrent de se conformer à la condition d'entretenir un passage sur la rivière, dans le cas où le pont est devenu impraticable, et l'ont entretenu jusqu'à ce que le dit pont eût été complètement réparé et mis en état d'être ouvert au public, ce qui eut lieu longtemps avant l'expiration du délai de quinze mois accordé par le statut pour la reconstruction.

Dans le mois de juin 1885, pendant que les appelants entretenaient, conformément au dit statut, une traverse suffisante pour les besoins du public, en attendant la reconstruction du pont endommagé, l'intimé a illégalement érigé un pont sur la dite rivière dans les limites du privilège des appelants et a ouvert ce pont au public, en exigeant des péages pour le passage des personnes, voitures et bestiaux, au détriment des appelants et en violation de leur privilège exclusif de percevoir des péages dans les limites sus-mentionnées.

Pour obtenir réparation du tort que leur causait l'intimé, et faire reconnaître leur privilège exclusif, les appelants intentèrent leur action en cette cause pour faire ordonner la démolition du pont construit par l'intimé et lui faire défense de troubler les appelants dans l'exercice de leur privilège et aussi pour faire condamner l'intimé à leur payer $100.00 de dommages.

A cette action l'intimé a plaidé qu'étant résident au village de L'Assomption et propriétaire d'une terre sur la dite rivière, il est obligé de la traverser souvent et d'y faire traverser ses animaux; qu'après la destruction du pont des appelants, il a construit vis-à-vis sa terre,

à ses propres frais, un pont temporaire, pour son utilité personnelle, dont il s'est servi jusqu'au mois de novembre suivant.

Après enquête et audition la cour Supérieure a donné gain de cause à l'intimé, et son jugement a été confirmé par la majorité de la cour du Banc de la Reine.

Les raisons de ce jugement ne se trouvent que dans les considérants du jugement de la cour Supérieure, qui sont à l'effet que l'intimé avait droit de construire un pont temporaire, et sont une négation directe et formelle de l'existence du privilège des appelants pendant la reconstruction de leur pont.

La preuve a établi d'une manière certaine qu'aussitôt après l'accident les appelants se sont conformés à la condition qui leur est imposée d'entretenir une traverse suffisante pendant la reconstruction, qu'à part des accidents causés par force majeure leur pont a toujours été tenu en bon état de réparation et ouvert pour l'usage du public. Ils ont aussi prouvé que l'intimé a reçu des profits pécuniaires, sous forme de péage, de l'exploitation de son pont. La négation de ces faits a été positivement contredite. La seule question qui s'élève en cette cause est de savoir : si pendant les 15 mois de délai accordé par le statut pour la reconstruction du pont dans le cas d'accidents, les appelants ont encore le privilège d'empêcher la construction d'aucun pont, dans les limites qui leur sont assignées par le statut, en se conformant toutefois à la condition de maintenir une traverse tel que le veut le statut, en attendant que le pont soit rendu à la circulation.

Le jugement dont est appel a nié formellement cette proposition—ainsi que la défense—ce qui a eu l'effet de mettre en question le titre des appelants et, partant, de rendre la cause appelable comme soulevant une question de titre à un immeuble. Cette cause tombe évidemment sous la section déclarant :

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In any matter which relates to any title to lands or tenements where the rights in future might be bound—

et est, partant, appelable à cette cour.

La question de droit à décider repose entièrement sur l'interprétation du statut conférant le privilége dont il est question.

D'après la cinquième section, ce privilège doit exister tant que le pont sera en bon état de réparation et ouvert au public, et pendant tout ce temps personne ne pourra ériger aucun pont ni ne pourra faire usage, comme moyen de traverse, de bateaux d'aucune espèce pour le passage des personnes, voitures et bestiaux, moyennant rétribution, sur la distance d'un demi mille du pont dans la direction du cours de la rivière, et sur la distance de deux milles dans l'autre direction. Ce privilège est transmissible aux héritiers et ayants-cause, et doit durer pendant vingt-cinq ans. Ce privilège, qui n'est accordé que dans l'intérêt du public, est protégé par l'interdiction de construire aucun pont dans les limites accordées et par l'imposition de pénalités de trois fois la valeur du taux de péage contre ceux qui traverseraient des passagers moyennant rétribution. Le statut leur donne en outre le droit de poursuivre devant les tribunaux pour faire détruire les ponts qui seraient construits en violation de leur privilège et de faire autrement respecter le dit privilège.

La sixième section pourvoit au cas où la communication serait interrompue par accident au pont et déclare que dans ce cas les appelants—

Shall be bound to rebuild the said bridge within fifteen months next following the giving away of the said bridge, under penalty of forfeiture of the advantages to them by this article granted, and during the time that the said bridge shall be unsafe or impassable, they shall maintain a ferry across the said river for which they may recover the tolls aforesaid.

Cette clause loin d'autoriser l'interprétation de l cour Supérieure qui justifie la construction temporaire

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d'un pont par l'intimé, pourvoit, au contraire, à la continuation du privilège pendant la construction du pont, en obligeant les appelants à le reconstruire dans les quinze mois qui suivront l'accident qui l'aura rendu impassable, sous peine de perdre tous les privilèges et avantages qui lui sont accordés par le statut. Elle l'oblige aussi, pour remédier à l'interruption des communications, à maintenir une traverse pour laquelle elle l'autorise à exiger les mêmes taux que pour le passage sur le pont. Les appelants s'étant conformés à cette condition, leur privilége d'empêcher la construction d'un pont dans leurs limites n'a pas cessé un seul instant. Il doit, d'après le statut, durer vingt-cinq ans, pourvu que les appelants remplissent les obligations qui leur sont imposées. Ils ont fait une preuve complète de l'accomplissement de ces conditions. Si l'intimé avait même temporairement le droit de construire un pont, ce serait une négation du droit absolu et exclusif des appelants pendant toute la durée qui leur a été accordée.

En supposant que l'intimé n'aurait pas exigé de péages sur son pont, il n'en aurait pas moins porté atteinte au privilège des appelants, qui auraient tout de même le droit d'en demander la démolition pour faire respecter leur privilège.

Ce principe a été approuvé par la cour du Banc de la Reine en appel, en 1874, par un jugement unanime, infirmant celui de la cour Supérieure dans la cause de *Girard* v. *Bélanger et al.*

Il ne paraît pas y avoir de rapport régulier de cette cause, mais on trouve la substance du jugement de la cour d'Appel dans l'ouvrage de feu l'honorable juge Ramsay (Ramsay Appeal Cases) (1), où l'honorable juge fait les observations suivantes :

Where a statutory privilege is accorded to construct a toll bridge,

(1) P. 550 et seq.

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and where by the statute according such power it was enacted "that after said bridge should be open for the public no person should erect or cause to be erected any bridge or bridges, or maintain or cause to be maintained any means of communication for the carriage of any person, cattle or carriage whatsoever for hire, across the said branch of the river Yamaska, at the place above mentioned, anywhere within one mile above and one mile and a half below the said bridge, under the penalty of a fine of forty shillings currency for each person, animal or carriage conveyed across the said river on any bridge or means of communication constructed and maintained for hire, provided nothing in said act should be constructed to deprive the public of the right of crossing the said river within the limits aforesaid, by fording or in canoes or otherwise without payment." A large number of people built a subscription bridge within the limits of the said statutory privilege avowedly with the object of avoiding the use of the toll bridge and depriving the owner of the privilege of his custom. *Held*, that this was an indirect mode of defeating the privilege aforesaid, and that the defendants should be condemned to demolish the bridge by them constructed. *Girard* v. *Bélanger et al.* Judgment reversing, September, 1874.—Monk, Taschereau, Ramsay, Sanborn, Belanger, JJ.

La doctrine énoncée dans cette décision est certainement légale et son application à la cause actuelle est évidente.

Les appelants sont entrés dans une savante dissertation et ont cité un grand nombre d'autorités pour établir qu'ils avaient droit pour la protection de leur privilège, d'empêcher tout empiètement sur la propriété publique dans les limites qui leur sont assignées, et qu'ils avaient droit de les faire disparaître au moyen de l'action populaire, ou en obtenant un bref de prohibition. Il n'était guère utile de referer à toutes ces autorités, car le statut leur donne toute la protection nécessaire contre quiconque enfreindrait leurs droits, en décrétant ce qui suit:

And any person who shall build toll bridge or toll bridges over the said river within the limits aforesaid, or shall ferry for hire within the limits aforesaid, shall, without prejudice to any proceeding which may be instituted against him by the said (the appellants) before any court, to cause the said bridge to be destroyed, and to cause their privilege to be otherwise respected.

Cette clause leur ouvre tous les moyens de droit pour la protection de leur propriété.

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Fournier J.

Bien que la preuve ait établi qu'un grand nombre de personnes ait passé sur le pont du défendeur, au préjudice des appelants, et qu'en conséquence ceux-ci ont dû souffrir des dommages ; cependant le montant n'en a pas été déterminé, l'action ayant pour but principal de faire reconaître le privilège exclusif des appelants, il ne saurait, dans ces circonstances, être accordé que des dommages nominaux.

En conséquence, le jugement de cette cour devrait accorder aux appelants les conclusions de leur déclaration, moins la démolition du pont que le défendeur a fait enlever dans l'automne de 1885, et le dit défendeur, en outre, condamné à la somme de $50 de dommages avec intérêt et les dépens dans les deux causes *distraits* en faveur du procureur des appelants.

PATTERSON J.—I am unable to understand the statute 38 Vic., chap. 97, in the same way as some of my learned brethren, nor can I see that it ought to mean what they interpret it to mean.

The exclusive privilege of maintaining a toll bridge across the River l'Assomption is given to Galarneau, who is protected by the prohibition of all other persons from transporting persons vehicles, &c., across the river for hire, either by bridge or ferry, within the specified limits, so long as the bridge is kept in good repair and open for the use of the public. If the bridge is destroyed or becomes unsafe or impassable Galarneau is bound to restore it within fifteen months on pain of the forfeiture of his privileges, and in the meantime to maintain a ferry.

Now his exclusive privileges are in terms extended only to such times as the bridge is in good repair and open for use to the public. He is bound, it is true, to maintain a ferry while the bridge is not available, but I find no exclusive privilege attached to that, nor do I perceive on what public principle there should be such an exclusive privilege.

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Patterson J.

The object of the monopoly is the bridge. The consideration for it is the providing a bridge, not a ferry. The privilege connected with the bridge being preserved to the grantee during the time, not exceeding fifteen months, when there is no bridge there, it is reasonable that he should during the time furnish the public with a ferry which, though not so useful as a bridge, is the best temporary substitute. That is the price of the maintenance of the monopoly given in respect of the bridge, which monopoly, by the terms of the statute as I read them, is suspended while the bridge is not available, but becomes again operative when the bridge is restored.

That seems to me the plain reading of the statute, and I do not see why it should be otherwise, or why as soon as the bridge is gone, any one should not be at liberty to build another and use it until the toll bridge is restored. The public was to have a bridge. That was the object and excuse of the monopoly, and I should be surprised to find the statute fordidding the temporary use of another bridge, which temporary use might become permanent if the fifteen months elapsed without the other being restored.

I think this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellants: *M. E. Charpentier.*

Solicitors for respondent: *McConville & Renaud.*

WALTER J. SCAMMELL AND CHAS. E. SCAMMELL (PLAINTIFFS)..... } APPELLANTS; 1889

*Oct. 28.

AND

STEPHEN K. F. JAMES (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Security for costs—Right to benefit of—Interest of third party—Practice—Discretion of court below—Jurisdiction.

S. brought an action against J. and issued a writ of capias. Bail was given and special bail entered in due course but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a judge in chambers an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside such order. An appeal was brought to the Supreme Court of Canada entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J.

Held,—That as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed for want of proper security.

Held also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to rescind an order made by a judge in chambers ordering an *exoneretur* to be entered on the bail-piece and the bail discharged.

An action by Scammell Bros. against James was commenced by writ of *capias* and defendant appeared, gave bail, and entered special bail in due course. The condition of the bail bond was that the judgment should be satisfied or the defendant would not leave or be absent from the Province within six months after judgment without leave of the court or a judge. No defence was offered to the action, and judgment was

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

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signed but not for some months after the entry of special bail. Application was made to a judge in chambers to have the bail discharged for delay in entering up judgment which was granted. The plaintiffs moved the full court to have the judge's order rescinded, which was refused, and an appeal was brought to the Supreme Court of Canada. Such appeal was brought as in the original suit against J. and the bond for security for costs was given to J.

McLeod Q.C. and *C. A. Palmer* for the appellants cited, on the question of jurisdiction, *Kandick* v. *Morrison* (1), *Gladwin* v. *Cummings* (2), *Jones* v. *Tuck* (3), and offered, if necessary, to procure another bond in favor of the bail.

Jack for the respondent was not called on.

Sir W. J. RITCHIE C.J.—The majority of the court are of opinion that the case is not appealable. As for myself I cannot get over the difficulty as to the bond. We have no evidence that the bail knew anything of the proceedings in this appeal or took any part in them. The factum is signed by counsel for the respondent and all the proceedings are in his name. The parties really interested are not before us and have no security for costs.

STRONG J.—I think the want of security is fatal to this appeal. The bail have never had a word of notice. The respondent is the defendant in the original action, the bond is given to him and he is the only person who can avail himself of it. The factum, too, is signed by the counsel for the respondent. The proceeding, therefore, is one in which the real parties are not before us. As to substituting a proper bond in favor of the bail for the one given, that is out of the question, as the time for giving security has elapsed.

(1) 2 Can. S. C. R. 12. (2) Cassels's Dig. 245.
(3) 11 Can. S. C. R. 197.

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Strong J.

I also doubt whether the judgment appealed from is a final judgment. I am inclined to consider it a mere matter of practice in which the decision of the court below should be binding. We have in this court to deal with different systems of practice with which the judges of the court below are much more familiar than we can possibly be. In refusing to consider such matters we simply obey the provision of the statute requiring us to follow the practice of the Privy Council when no rule is laid down by the statute itself.

TASCHEREAU J. concurred.

GWYNNE J.—I am not prepared to hold that this is not a final judgment. I think it is conclusive, and as to the bond I should be glad if it could be rectified. If the bail knew of it, and accepted it, and came here to argue it, I do not see why we might not hear them.

PATTERSON J.—I agree with what has been said as to our not having jurisdiction and cannot see that this is an appealable case. An appeal only lies from a final judgment, which is defined as "any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded." I do not see how we can read these words "or other judicial proceeding" so as to include a collateral matter in some other action. There may be no other remedy, but the court below must have control of its own practice and have full power to deal with such cases as these (1).

Appeal quashed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitor for respondent: *H. G. Betts.*

(1) See *Blakey* v. *Latham*, 43 Ch. D. 23.

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*Feby.20,21.
*April 30.

JOSEPH M. DUFRESNE *at al*, (PLAINTIFFS)..... } APPELLANTS;

AND

DAME MARIA DIXON, (PETITIONER)...RESPONDENT.

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

Petition en nullité de décret—Seizure super non possidente—Art. 632 *C. C. P.—Registration of real rights—Art.* 2091 *C. C.*

D. (respondent) proprietor of a lot in Montreal sold it to C. *et al.* In 1879, C., who had acquired the interests of his co-owners retroceded the lot in question to D. In July, 1884, the sheriff of the district at the instance of J. M. D. *et al.*, (appellants) judgment creditors of C. seized, sold and adjudicated the lot in question to G. *et al*, who paid the adjudication and obtained a sheriff's title to the lot in question. D. did not register her deed of retrocession until 3rd October, 1884, being a date subsequent to the seizure and sale by the sheriff, but prior to the registration of the deed from the sheriff.

Thereupon D. by a petition *en nullité en décret* prayed that the seizure, sale, adjudication and sheriff's title be set aside and declared null as having been made *super non domino*. At the trial it was proven that from the date of the deed of retrocession D. had been assessed for the lot in question and paid taxes thereon, and that it was in the possession of one McA. as her tenant at the time of the seizure.

Held,—Affirming the judgment of the court below, that the seizure and sale in the present instance having been made *super non domino et non possidente*, the sheriff's title was null. Art. 632 C. C. P.

Per Taschereau J.—The provisions of Arts. 2090 and 2091 C. C. refer to a valid seizure and sale, and cannot be invoked against the registration of the deed of retrocession by the respondent.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court by which the appellants' contestation of respondent's petition *en nullité de décret* was dismissed.

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

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This case originated out of a judicial sale of a lot of land, situate in the city of Montreal, belonging to respondent, under a judgment in favor of the appellants against the vacant estate of one Campbell for the sum of $8,388.60.

The lot of land in question was sold by the Sheriff of Montreal at the instance of appellants who represented the same, as belonging to the vacant estate of said Campbell, to which one Benjamin Clement had been appointed curator.

The resp dent by petition to the Superior Court sitting at Montreal, prayed for and obtained the setting aside of the sheriff's decree.

The circumstances under which the petition to annul the decree was granted are as follows:

Respondent acquired in February, 1859, by good and valid title a lot of land fronting on Papineau road, subsequently entered upon the cadastre (official plan and book of reference) of St. Mary's Ward of the City of Montreal, under the No. 857.

On the 19th of November 1874, respondent sold this lot of land to William A. Campbell, Joseph Moïse Dufresne and Siméon Pagnuelo, who acquired the same, jointly and severally, for the sum of $7,000.00, on which she received $3,000.00, in cash, said purchasers binding themselves to pay the balance of $4,000 00, with interest, within ten years from the date of the deed.

On the 22nd December, 1875, with the consent of Siméon Pagnuelo, Joseph Moïse Dufresne in first instance, and later, on the 1st August, 1877, of the said Siméon Pagnuelo, sold their respective shares in the said lot of land to their co-purchaser William A. Campbell, who undertook to satisfy all the conditions and undertakings of their deed of the 19th November, 1874, and more particularly to pay for them to the

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respondent their share of the balance of the purchase money ($4,000 00).

On the same day (1st August, 1877) that the said Siméon Pagnuelo thus sold his rights in the said lot of land respondent, by another deed executed between her and the said William A. Campbell, agreed to reduce in his favor the said balance of $4,000.00 to the sum of $3,000.00 of which last amount the lot of land was to remain mortgaged in favor of respondent.

Subsequently, on the 22nd April, 1879, William A. Campbell being unable to pay the balance of $3,000.00, and wishing to relieve himself, as well as Dufresne and Pagnuelo, from their liability for said amount, executed another deed in favor of respondent, whereby he retroceded the lot of land in question to respondent, who immediately took possession thereof and continued to occupy and enjoy the same. This deed was duly registered on the 28th of November, 1884.

On the 27th of June, 1884, the appellants (who are the identical Joseph Moïse Dufresne and Siméon Pagnuelo, above referred to) obtained against one Benjamin Clément, in his quality of curator to the vacant estate of the said William A Campbell, who had recently died, a judgment for the sum of $8,388.00, and proceeded to issue execution under said judgment by order of their attorneys, of whom Mr. Pagnuelo, above mentioned, was one. They instructed the Sheriff of Montreal to accept from B. Clément, ès-qualité, a return of *nulla bona* and ordered him to proceed to the seizure of several immovables, and amongst others the lot of land now in question, which had been retroceded, by W. A. Campbell to respondent, on the 22nd April, 1879, as well for his benefit as in the interest of the appellants.

On the 25th of July, 1884, the sheriff seized the lot of land in question but failed to furnish the registrar

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of the Registration Division of Montreal-East, wherein said lot of land is situate, with the legal notification required by the Statute 43-44 Vict. ch. 25, sects. 3, 5 and 14.

On the 3rd of October, 1884, date of the sheriff's sale, said lot of land was adjudicated to Siméon Pagnuelo, already referred to, for the sum of $1,400.00; but he having declared, as appears by the procès-verbal of the sale, that there was an error in his bid, the property was adjudged to one George W. Parent, for the sum of $1,350.00.

Seven months after this adjudication, on the 4th of May, 1885, George W. Parent transferred his right of adjudication to the *mis-en-cause* Alphonse Racine, Thomas Gauthier and Cléophas Beausoleil, who paid the sheriff the adjudication price and obtained their title; and then for the first time respondent was informed that her property had been seized, sold and adjudicated at the instance of Joseph Moïse Dufresne and Siméon Pagnuelo.

The respondent by her petition to the Superior Court prayed that she be declared to be the true and lawful proprietor of the lot of land in question, and that the seizure, sale, adjudication and sheriff's title granted under the circumstances above mentioned, be set aside and declared null; that the decree be quashed as having been made *super non domino*, and respondent maintained in her possession and proprietorship of the lot of land in question notwithstanding said decree.

Pagnuelo Q.C. for appellant contended,—that an unregistered sale of real estate, such as the deed of retrocession by Campbell to respondent in this case, is incomplete, without effect, and confers no right of ownership to the buyer against a seizing creditor of the vendor, and that the registration of the deed of sale of such real estate after seizure has no effect when the seizure

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is followed by judicial expropriation, and cited and commented on Art. 2090, 2091, 2082 C.C. ; Arts. 644, 646, 597, 652 C. C. P. ; Pothier, Vente (1) ; Mourlon, Transcription (2) ; Laurent (3) ; Troplong, Transcription (4); *Lefebvre* v. *Branchaud* (5); Pothier, Substitutions (6); *Charlebois* v. *Sauvé* (7) ; *Farmer* v. *Devlin* (8) ; *Les Ecclésiastiques du Séminaire de Montréal* v. *La Société de Construction* (9) : *Adam* v. *Flanders* (10) ; *Charland* v. *Faucher* (11) ; see also Aubry et Rau (12) ; Bravard Veyrières, Droit Commercial (13) ; Nancy, 27th December, 1879 (14); *Rhéaume* v. *Bourdon* (15) ; *La Société de Construction Métropolitaine* v. *Beauchamp et David opposant* (16).

Geofrion Q. C. followed on behalf of the appellants and contended: that the respondent had been guilty of laches, and that under art. 2083 C.C. she could not claim any right to the property against Campbell's creditors until she registered her title, and submitted that under art. 632 C. C. P. the seizure was good, as Campbell's estate had remained in possession, towards third parties, and was in possession *animo domino* at the time of the seizure.

The learned counsel also contended that the judgment of the Court of Queen's Bench should be reversed because, supposing respondent to have been proprietor and in possession of the said lot of land, she should have opposed the sale within the time fixed by law ; and in default of so doing, her rights of ownership resolve themselves into a privileged claim upon the

(1) No. 318.
(2) Vol. 2 No. 445.
(3) 29 Vol. No. 159.
(4) No. 22.
(5) 22 L. C. J. 73.
(6) Bugnet's Ed., vol. 8 No. 35.
(7) 15 Rev. Lég. 653.
(8) 15 Rev. Lég. 621.
(9) 28 L. C. J. 23.
(10) 3 Legal News 5.
(11) 9 Legal News, 61.
(12) 2 Vol. sec. 209 and note 80.
(13) 5, p. 295, note 1.
(14) S. V. 80, 2, 174.
(15) 31 L. C. J. 170.
(16) 3 Legal News 135.

proceeds of the sale; 1st, because W. A. Campbell's vacant succession was bankrupt, and registration of a deed of sale after bankruptcy was illegal and has no effect; 2nd, because appellants, by registering a demand of *separation de patrimoine*, secured a privilege on the real estate in question, which rendered ineffective the subsequent registration of the respondent's deed of sale, and which could not be affected by such subsequent registration; 3rd, because, supposing that respondent secured against the appellants a right of ownership by registering her deed of sale after the sheriff's sale she should at least pay the costs of the seizure and sale by the sheriff, and all damages caused to appellants by such tardy and late registration.

Lacoste Q. C. and *Grenier* for respondent contended; 1st, that the evidence in the case already established the fact that the seizure had been made *super non domino et non possidente*, and consequently was a nullity. Arts. 632 C. C. P., Pothier, Civil Procedure (1); Pigeau (2); Guyot (3); *Tessier* v. *Bienjonetti* (4); *Wilson* v. *Caldwell* (5); *Consolidated Bank of Canada* v. *Town of St. Henri* (6); Guyot (7); *Re Tempest* v. *Baby* (8); arts. 637, 638 C. C. P.

And 2nd, that the registration by the respondent of her title (the deed of retrocession by Campbell) subsequent to the seizure and sale by the sheriff, but prior to the emission of the sheriff's title, and consequently to its registration, is valid as against the claims of the purchasers at sheriff's sale. Citing arts. 2089, 2098 C. C.; Verdier, Transcription Hypothécaire (9); Troplong, Transcription Hypothécaire (10); Mourlon de la Trans-

(1) Nos. 525, 526.
(2) 1 Vol. 779.
(3) Vol 5, Vo. Décret p. 307.
(4) 16 L. C. R. 152.
(5) 3 Rev. de Lég. 476.
(6) 5 Legal News, p. 231.
(7) Vo. Décret 307.
(8) 2 Dor. Q. B. 371.
(9) Vol. 2, No. 927, Nos. 298, 299, 301, 302.
(10) Nos. 143, 144, 153.

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cription (1); Troplong, Vente (2); Aubry et Rau (3); *Re Caya* v. *Pellerin* (4); *Re Dallaible* v. *Gravel* (5); *Re Adam* v. *Flanders* (6); *Re Begin* (7); and that moreover the question of registration could not arise in this case if the sale was *super non domino*.

FOURNIER J.—Les faits au sujet desquels s'élèvent les questions de droit soumises à la considération de cette cour sont comme suit:—

En 1859, la Requérante, Mme Dixon, acquit l'immeuble en question, situé dans le quartier Ste-Marie de Montréal.

En 1874, elle vendit cet immeuble à Messieurs Campbell, Dufresne et Pagnuelo. Par des actes de 1875 et de 1877, Messieurs Dufresne et Pagnuelo vendirent leur part à leur co-propriétaire Campbell, à la charge par ce dernier de payer à Madame Dixon, l'Intimée, la balance du prix de vente originaire, $4,000.

Le 1er août 1877, par une transaction entre Campbell et Mme Dixon, cette dernière consentit à réduire cette balance de $4,000 à $3,000, en conservant son hypothèque pour cette somme sur l'immeuble en question.

En 1879, Campbell, se trouvant incapable de payer à Madame Dixon la balance de $3,000, a fait acte de rétrocession de l'immeuble à la condition de libérer Messieurs Campbell, Pagnuelo et Dufresne, les appelants en cette cause, de la dette en question.

Campbell est décédé plus tard et Benjamin Clément a été nommé curateur à sa succession vacante.

En 1884, les appelants, Dufresne et Pagnuelo, ayant obtenu jugement contre le curateur Clément, firent saisir l'immeuble en question qui fut adjugé, le 3 octobre 1884, à M. Pagnuelo, et par déclaration d'erreur

(1) Nos. 78, 79, 455, 559, 486.
(2) P. 231.
(3) 2 Vol. pp. 312, 313, 315.
(4) 2 Rev. Lég. 44.
(5) 22 L. C. J. 286.
(6) 3 Legal News, p. 5.
(7) 6 Q. L. R. 52.

dans l'enchère, Geo. W. Parent, le précédent enchérisseur, fut déclaré adjudicataire.

Parent n'ayant pas payé l'adjudication, sept mois après, savoir, le 4 mai 1885, transporta son droit d'adjudication aux adjudicataires actuels, MM. Racine, Gauthier et Beausoleil, qui ont payé alors le prix d'adjudication, et auxquels le shérif accorda un titre.

La preuve a établi de la manière la plus positive que pendant les cinq années qui ont précédé la saisie, l'intimée (Maria Dixon) a été seule ouvertement et publiquement en possession de l'immeuble en question en cette cause. C'est elle dont le nom est porté sur le rôle de cotisation de la cité de Montréal comme propriétaire, et c'est aussi elle qui en a acquitté toutes les taxes pendant cette période.

Pendant ces cinq années, le témoin McAvoy a prouvé qu'il avait occupé cette propriété comme locataire de l'intimée.

Le curateur, interrogé comme témoin, a déclaré qu'il n'avait jamais fait aucun acte de possession de cette propriété ni d'aucune autre appartenant à Campbell.

Cette preuve, qui n'a été nullement contredite, établit comme une certitude le fait que le curateur à la succession n'a jamais été en possession de cet immeuble, qui n'est pas sorti de celle de l'intimée depuis qu'elle en est redevenue propriétaire par l'acte de rétrocession que Campbell lui en avait consenti en 1879.

L'article 632, C. P. C., est évidemment fait pour rencontrer ce cas :

On ne peut, dit cet article, saisir les immeubles que sur la personne condamnée qui les possède ou est réputée les posséder *animo domini*.

La cour a été unanime à déclarer la saisie en cette cause nulle, comme faite contrairement à la disposition de cet article.

A l'appui de cette décision, l'autorité suivante de Verdier (1) a été citée :

(1) Vol. 2, Transcription hypothécaire, nº 299.

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Fournier J.

Par conséquent, si l'on suppose que la vente a précédé la saisie, il est certain que celle-ci est radicalement nulle, puisqu'elle porte sur un bien qui n'était plus dans le patrimoine du débiteur. La transcription qui surviendrait ne saurait donner la vie à un acte qui est mort-né, selon l'expression de M. Dalloz. Elle ne saurait avoir aucune efficacité. La saisie, nulle dans l'origine, est comme non avenue. Si la saisie a précédé la vente la position est la même, et les résultats sont identiques. Tant que la saisie n'a pas été transcrite, elle n'enlève pas au saisi le droit de vendre. Dès lors, s'il a usé de cette faculté, la vente a pour effet immédiat de le désinvestir, ainsi que ses ayant-cause. Or, le saisissant, n'ayant aucun droit réel qui lui soit propre et indépendant de celui du saisi, n'est qu'un ayant-cause ; il est bien obligé de subir la vente. La saisie, dit M. Dalloz, a été frappée de mort par cette vente ; son objet lui a échappé ; dès lors, la transcription n'a pu lui rendre ultérieurement la vie qu'elle a perdue.

Je suis d'avis de confirmer le jugement de la cour du Banc de la Reine avec dépens.

TASCHEREAU J.—The Superior Court in Montreal granted this petition and annulled the sale thereof on the ground *inter alia* that the seizure and sale had been made *super non domino*. The Court of Queen's Bench confirmed that judgment.

I am of opinion that these judgments were right. There can be no question as to the law. "The seizure of immovables" says Art. 632 C.C.P. "can only be made against the judgment debtor" and "he must be or be reputed to be in possession of the same *animo domini*.

Pothier, Civil Procedure, says (1).

On ne peut saisir réellement que sur la personne qui s'est obligée par l'acte ou qui a été condamnée par le jugement en vertu duquel on saisit, car toute exécution cesse par la mort de l'obligé ou condamné.

La saisie réelle doit se faire sur le propriétaire de l'héritage, une saisie faite *super non domino* est nulle. Observez néanmoins qu'on entend par propriétaire, non pas seulement celui qui l'est dans la vérité, mais encore celui qui possède l'héritage *animo domini*, soit qu'il en soit véritablement propriétaire, soit qu'il ne le soit pas, car il est réputé l'être, lorsque le véritable propriétaire ne réclame point.

(1) Nos. 525, 526.

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Taschereau J.

Bugnet in a note on above, says (1) :

Contre le propriétaire apparent. sauf le droit de revendication de la part du propriétaire véritable, qui pourra même, en règle générale, demander la nullité de l'adjudication. L'adjudicataire (sur saisie immobilière) ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi.

Pigeau (2) and D'Héricourt (3) are also in support of respondent's contention ; and Guyot (4) says :

Lorsqu'un immeuble a été saisi réellement sur celui qui n'en était pas propriétaire et que celui à qui il appartenait en est resté paisible possesseur jusqu'à l'adjudication, la saisie réelle, les criées et l'adjudication ne peuvent faire aucun préjudice au véritable propriétaire, car pour qu'un bien puisse être valablement adjugé par décret, il faut qu'il soit devenu le gage de la justice et des créanciers de la partie saisie.

Now as to the evidence in this case the two courts below have found as a matter of fact that the curator to the estate, Campbell, upon whom the sale was made, was not then in possession of the immovable in question ; and the evidence fully supports that finding of fact. The curator himself, examined as a witness, admits that he never made any act of possession of that property.

I would dismiss this appeal with costs.

I do not allude to the question of registration raised by the appellant as, in my opinion, it cannot affect this case. Even if Mrs. Dixon had never registered the deed of retrocession, she would be entitled to get this seizure and sale set aside. Art. 2091 C C. refers to a valid seizure—a lawful sale. Here we hold that there has been no sale, that the so-called sale is a nullity.

Appeal dismissed with costs.

Solicitors for appellants: *Pagnuelo, Taillon, Bonin & Duffault.*

Solicitors for respondent: *Curran & Grenier.*

(1) 10 Vol. 243.
(2) Vol. 1, p. 779.
(3) P. 49,
(4) Vol. 5 ; Vo Décret, p. 307.

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*June 14.
*Oct. 11.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPELLANTS

AND

THE LITTLE SEMINARY OF STE. THÉRÈSE..... } RESPONDENTS.

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

Appeal—Expropriation of land—Order by judge in chambers as to moneys deposited—R.S.C. ch. 135 *sec.* 28—43 *Vic. ch.* 9, *sec.* 9, *sub-sec.* 31—*Persona designata—R.S.C. ch.* 109 *sec.* 88 *sub-secs.* 26 *and* 31.

The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a judge of the Superior Court in chambers after formal answer and hearing of the parties granted the order under the Railway Act, R. S. C. ch. 109, sec. 8 sub-sec. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal Side) and that court affirmed the decision of the judge of the Superior Court.

Held, that the order in question having been made by a judge sitting in chambers, and, further, acting under the statute as a *persona designata*, the proceedings had not originated in a Superior Court within the meaning of section 28 of the Supreme and Exchequer Courts Act, and the case was therefore not appealable.

Per Gwynne and Patterson JJ. That an abandonment of a notice to take lands for railway purposes must take place while the notice is still a notice and before the intention has been exercised by taking the lands. R. S. C. ch. 109, sec. 8 sub-sec. 26.

That the proper mode of enforcing an award of compensation made under the Railway Act is by an order from the judge.

Quære—Whether sub-sec. 34 of sec. 8 of ch. 109 R.S.C. permits possession to be given before the price is fixed and paid of any land except land on which some work of construction is to be at once proceeded with.

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

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THE CANADIAN PACIFIC RAILWAY COMPANY v. THE LITTLE SEMINARY OF STE. THÉRÈSE.

APPEAL from a judgment of the Court of Queen's Bench confirming a judgment of the Superior Court at Terrebonne, granting a petition of the respondents for the payment to them of a deposit of $4,000, made by the appellants in the Bank of Montreal, under the provisions of the Railway Act R. S. C. ch. 109, the petitioners claiming the right to be paid under an award of arbitrators rendered in certain expropriation proceedings between the parties under the said act.

The litigation in question in this case arose out of proceedings taken by the railway company to expropriate a piece of land to be used as a gravel pit. The company gave a notice of expropriation on the 18th August, 1886, expropriating the piece of land in question, and subsequently applied to the court under section 9, sub-section 38 of the Consolidated Railway Act, 1879 (sec. 9 Revised Statutes of Canada ch. 109) for a warrant of possession, and deposited, in accordance with the order of the judge granting the warrant, the sum of $4,000 in the Bank of Montreal, as security under the provisions of the last mentioned section. Arbitrators were appointed on both sides, and a third arbitrator chosen, and the arbitration proceedings went on; and the proprietors, respondents here, seemed to have closed their evidence, when, on the 11th Oct. 1887, a notice of discontinuance was served upon the proprietors and upon the arbitrators, under the provisions of sub-section 26 of section 8, by which notice the appellants declared they abandoned and desisted from the notice of expropriation, and from all proceedings for the expropriation of the property mentioned therein, declaring their willingness to pay to the respondents all damages and costs by them incurred in consequence of such notice and abandonment; and on the 14th of October the railway company served a notarial notice upon the respondents setting out the

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fact of their discontinuance, and that the railway company were removing from the property of the respondents their rails, plant and other materials, in order to restore the possession to them, and notifying the respondents that the railway company abandoned the possession and occupation of the land in question, and offering to pay all damages together with the value of the use and occupation of the property while in possession of the company, and all costs incurred in the expropriation proceedings. The company took possession, but on account of a verbal error made in the first notice of abandonment, as to the date of the notice of expropriation, a second notice of abandonment was served upon the proprietors and the arbitrators on the 22nd October, and on the same day a second notarial notification and protest was served upon the proprietors, respondents here, setting out all the facts in connection with the case, and tendering to the respondents, in full payment of all damages and costs incurred by them, $2,500.

On the 25th October, the appellants' instituted an action setting out all the facts in connection with the expropriation proceedings, whereby they declared their willingness to pay the costs and damages incurred by the proprietors, and renewed their tender of $2,500, further praying that it be declared that the functions of the arbitrators had ceased by the service of the notice of abandonment, and that they be prohibited and enjoined from further proceeding with the arbitration. Notwithstanding these proceedings, the arbitrators proceeded to and did render their award on the 27th October, by which they gave to the seminary, respondents here, $7,500 as indemnity for the land taken by the company and for all loss and damage resulting from its expropriation. Immediately thereafter the company, appellants, fyled an incidental or supplementary demand

to their action already taken, by which they asked that their award should be declared illegal and invalid, and be set aside.

The respondents subsequently presented the petition praying that an order should issue to the Bank of Montreal to pay to them the said sum of $4,000, in accordance with the terms and in part payment of the award. It is from the judgment granting this petition that the appeal was taken.

H. Abbott Q.C. for appellants.

[The learned counsel having stated the nature of the appeal the court raised a question as to their jurisdiction, for the reasons—1st, that the original cause of action did not arise in a Superior Court; 2nd, that it was not a final judgment; 3rd, that it was a matter within the judicial discretion of the judge; and counsel was requested to argue the question of jurisdiction.]

The statute requires the order to be made by a judge of a Superior Court, and in the Province of Quebec the judicial act of a judge in chambers is the act of the court. Then, as an appeal lies to the Court of Appeal in the Province of Quebec, it will lie to this court. *Wilkins* v. *Geddes* (1); *Shields* v. *Peak* (2); *Chevallier* v. *Cuvillier* (3); *Philbrick* v. *Ont. & Quebec Ry. Co.* (4); *McKinnon* v. *Kerouack* (5).

This order finally disposes of the right to the money in the bank which is a substantial matter between the parties, and it is a final judgment as to that money under the Supreme Court Act. *Herring* v. *Napanee & Tamworth Ry. Co.* (6); *Re* Leach (7); *Horton* v. *The Canada Central Ry. Co.* (8).

This is not a matter of judicial discretion. The judge

(1) 3 Can. S. C. R. 203.
(2) 8 Can. S. C. R. 579.
(3) 4 Can S. C. R. 579.
(4) 11 P. R. Ont. 373.
(5) 15 Can. S. C. R. 111.
(6) 5 O. R. 354.
(7) 8 O. R. 222.
(8) 45 U. C. Q. B. 143.

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must either make or refuse the order. He could not make a conditional order or impose terms.

Then as to the merits. The statute expressly gives a right to abandon the expropriation, and reading sections eight and nine together, it is clear that it applies as well in case of land taken for materials as for a road bed, and as well after taking possession as before it. *Grimshaw* v. *G. T. R. Co* (1); *Moore* v. *Central Ontario Ry. Co.* (2); *Cawthra* v. *Hamilton & Erie Ry. Co.* (3). At common law appellants had a right to discontinue their proceedings in expropriation without regard to the provisions of the Railway Act, *Foisy & Déry* (4); Dillon's Municipal Corporations (5); *Hudson R. R. Co.* v. *Outwater* (6); *in re Anthony Street* (7); *in re Wall Street* (8); *in re Commissioners of Washington Park* (9); *People* v. *Trustees of Brooklyn* (10); *Mayor* v. *Musgrave* (11); Cripps on Compensation (12).

S. Pagnuelo Q.C. for respondent.

The order as to the money in the bank is to be made by a judge as *persona designata*. The statute might have directed any person to make the order and the fact of the person being a judge cannot make his act the act of the court.

The judge in making the order must exercise his discretion and sec. 27 of the Supreme Court Act therefore prohibits an appeal from his decision.

This is not a final judgment, for if the award should be set aside, the court would then rescind the order and direct re-payment of the money.

On the merits we contend the order was properly made. It is only in extra judicial awards, that is,

(1) 15 U. C. Q. B. 224.
(2) 2 Ont. Rep. 647.
(3) 35 U. C. Q. B. 581.
(4) Ramsay's Appeal Cases, p. 59.
(5) P. 473 and note 1, 474–5.
(6) 3 Sandford's N. Y. 689.
(7) 20 Wendell, 618.
(8) 17 Barbour 618.
(9) 56 N. Y., 144.
(10) 1 Wendell 318.
(11) 30 Am. Rep., 459.
(12) P. 235.

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where the submission is voluntary, that an action is required, here no action on the award was necessary. Arts. 341, 345, 1343, C. C. P.

Under the statute only the notice, and not the expropriation itself, can be abandoned, and, moreover, the abandonment contemplated is only in case of the land being required for a road bed and not when it is for material, otherwise the land might be made valueless and the owner have no redress.

The owner has a right to compensation in the manner prescribed by the statute for what he has virtually sold, and cannot be deprived of such right by a mere notice of intention to abandon. Art. 1472 C. C. and Pothier *Vente* (1).

SIR W. J. RITCHIE, C.J.—I think this appeal should be quashed on the ground that a judge in chambers in Quebec, before whom the proceedings originated, is not a Superior Court, and therefore the case is not appealable. And I also think that under the Railway Act the judge is a *persona designata.*

FOURNIER J. was of the same opinion.

TASCHEREAU J.—This appeal must be quashed on two distinct grounds :—

1. The so-called judgment rendered in first instance was merely an order by a judge in chambers. Now, no appeal lies to this court but from a judgment rendered in first instance by a court. A judge in chambers does not constitute a court.

2. Under the Railway Act, the judge and not the court has exclusive jurisdiction in the matters now in contestation.

GWYNNE J. concurs with PATTERSON J.

(1) No. 25.

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THE CANADIAN PACIFIC RAILWAY COMPANY v. THE LITTLE SEMINARY OF STE. THÉRÈSE.

PATTERSON J.—On the 17th of August, 1886, the company gave notice, under sub-section 38 of the 9th section of the Consolidated Railway Act, 1879, (which sub-section forms section 9 of the Railway Act in R.S. C. ch. 109) of intention to take land of the respondent for the purpose of obtaining gravel, &c., mentioning the price of $100 an acre, and naming an arbitrator to act in case the offer was not accepted. That arbitrator resigned and the company appointed another in his place. On the first of October following, the company obtained an order to enable possession to be at once taken, and on the same day took possession, paying into a bank $4,000 as security in pursuance of the order.

On the 28th of October, 1886, the two arbitrators appointed by the parties being unable to agree upon a third, an order was made by a judge appointing a third arbitrator.

Nearly a year later, namely on the 11th of October, 1887, the company, who had in the meantime exhausted the deposit of gravel and found it less in quantity than had been supposed, gave notice of abandonment of the notice of August, 1886, following up that step by a formal notice given through the agency of a notary, on the 14th of October, and by a tender, also made by the notary, on the 22nd of October, of $2,500, as compensation for damages sustained. The arbitrators had not yet made their award. They, or rather a majority of them, made an award on the 27th of October, 1887, assessing $7,000 as the price to be paid by the company.

The company had three days earlier, viz., on the 24th of October, 1887, instituted proceedings to restrain the arbitrators from making an award, on the ground of the abandonment of the notice, and those proceedings were afterwards made to include a prayer to have the award declared void.

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The plaintiff, on the 2nd of December, 1887, petitioned for an order for payment to him of the $4,000 deposit and, after formal answer by the company and hearing the parties, the order asked for was made by a judge, and an appeal against it to the Court of Queen's Bench was dismissed.

From that decision the company appeals to this court.

It is argued on the part of the respondent that the provision authorizing the abandonment of the notice of intention to expropriate lands applies only to lands intended to be used for the railway, and not to lands required for gravel, sand, earth or water under section 9, or the former sub-section 38, and the court below seems to have adopted that construction of the statute.

The soundness of that view is seriously questioned, but leaving the discussion of that aspect of the question aside for the present, it is in my judgment very clear that under the circumstances of the transaction before us, the abandonment of the original notice was unauthorized and was entirely nugatory. The fallacy of the argument to the contrary, and as I respectfully venture to submit, of opinions expressed in one or two cases in Upper Canada which have been cited to us, arises from want of sufficiently close attention to the language of the statute, which is essentially and almost literally the same as in the General Railway Act of the late Province of Canada, 14 and 15 Vic., ch. 51, Con. Stats. Can., ch. 66, and in the Railway Act of Ontario.

What is the notice that the statutes require? It is in the first place and principally a notice of the intention of the company to take land or to exercise some power. Subsidiary to this main object there is the offer to pay for it a certain price, with further intimation, conditional on the non-acceptance of the price offered, of the appointment of an arbitrator. The arbi-

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tration which may follow does so by virtue of the statutory mandate.

The notice is not correctly styled, as I find it styled in some of the papers before us, a notice to arbitrate. It is a notice of intention to expropriate land or to exercise some power of the company. The rule of the statute, when no special reason for taking the land at an earlier day exists, is that the land cannot be taken until the price has been fixed either by agreement or by arbitration and paid. Upon such payment "the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon." Sec. 8, subs. 30 R. S. C. ch. 109.

When all this has been done and the land taken, the intention of which notice was given being carried out, the notice disappears. It has served its purpose and is effete.

Subs. 26: "Any such notice for lands as aforesaid—(mark the expression; it is notice for lands, not notice to arbitrate)—may be abandoned and a new notice given with regard to the same or other lands and to the same or any other person; but in any case the liability to the person first notified for all damages or costs by him incurred in consequence of such first notice and abandonment shall subsist."

This abandonment of the notice for lands, or notice of intention to take lands, must take place while the notice is still a notice and before the intention has been executed by taking the lands.

The abandonment is of the notice, not of the lands, and the damages and costs to which the company remain liable are those consequent on the notice and the abandonment of the notice. Mark again the language—There is not an allusion to damages caused by

taking and holding possession of lands that are afterwards abandoned.

When the company becomes entitled, by performance of the condition precedent of paying the price, to take the land, a judge may, if necessary, issue a warrant to a bailiff to put the company in possession.

Sec. 31:

Such warrant may also be granted by the judge, without such award or agreement, on affidavit to his satisfaction that immediate possession of the lands, or of the power to do the thing mentioned in the notice, is necessary to carry on some part of the railway with which the company is ready to proceed.

Then follow provisions for paying money as security into a bank, under direction of the judge, which is not to be repaid to the company or paid to the landowner without an order from the judge, which he may make in accordance with the terms of the award.

When land is taken under this provision in anticipation of the award, but only after payment of a sum supposed to be sufficient to cover the price ultimately awarded, the effect upon the right to abandon the notice appears to me to be precisely the same as in the ordinary case where the land is not taken until after the award.

The warrant can be issued only when the land is required for immediate use in carrying on some part of the railway with which the company is ready to proceed. The intention to take it, to "do the thing mentioned in the notice," as it is expressed with careful adherence to the main object of the notice, is carried out, and the notice ceases in this, as in the other case, to exist as a notice. The money may turn out less or more than the price fixed by the award. That contingency touches only the skill in estimating the amount ordered to be deposited. The principle is that the land is to be paid for before it is taken, and that principle

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is acted on when possession is given under these provisions before the award as well as when the award precedes the taking of possession. The right to abandon the notice after possession is taken, cannot, in the one case any more than in the other, be found either in the reading of sub-section 26 or the reason of the enactment. "The thing mentioned in the notice," has been done.

The cases referred to in which a difference of opinion was intimated are *Grimshaw* v. *The Grand Trunk Ry. Co.* (1), and *Moore* v. *Central Ontario Ry. Co.* (2). The latter of these was decided on the authorit of the former, which apart from the respect due to the eminent judges whose decision it was, would be followed as a matter of course in any court of first instance in the province.

In both cases, as I understand the reports, possession had been taken by the railway company whose right to desist from its notice before the making of the award was nevertheless affirmed. But I do not understand that in either of the cases possession had been taken under the statutory title acquired by force of the provisions of the provincial acts corresponding to those now in discussion, after paying or securing the price and obtaining the judge's warrant.

There is certainly reason to infer from the language of Sir J. B. Robinson in Grimshaw's case, that in his opinion possession, even if taken in pursuance of the statutable permission, would not destroy the right to desist from the notice, and that opinion appears to have been assented to by Sir M. C. Cameron in Moore's case. I may say, however, without at all impugning the correctness of the judgment of the court in either of those cases, that the considerations on which I have dwelt and which seem to me to show the fallacy of

(1) 15 U. C. Q. B. 224. (2) 2 Ont. 647.

the views expressed upon the particular point cannot, as I apprehend, have been brought to the attention of the learned judges, and that the construction which appears to me to give proper effect to the provision touching " desisting " from the notice, as it was originally called, or " abandoning " the notice, which is the equivalent expression in the Dominion Statute, would possibly have been adopted, if the point had been so material as to call for the closer examination of the statute which this case has required.

In this case the company went far beyond merely taking possession. A considerable part of the property has been deported and distributed as ballast along the line, so that restoration of possession is impossible. Trees have also been cut down and destroyed.

These are striking changes in the character of land taken, but they are strictly of the nature contemplated by the statute when it confines the right to this early possession to cases where the land is necessary for immediate use in some work of construction which the company is ready to proceed with, and which may be a cutting which removes the land or an embankment which buries it. This palpable contemplation of a speedy change, which will make it impossible for the company by retiring from possession to restore what was taken in its former condition, strongly confirms the construction of sub-section 26 as applying only when the notice has not been acted on by taking possession.

The company must therefore fail on the fundamental point of the right, under the circumstances, to abandon the notice, and the judgment of the court below must be affirmed, if the judgment is appealable to this court.

In my opinion it is more than doubtful whether the matter was properly before the Court of Queen's Bench or is properly before us.

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The complaint is of the action of a judge of the Superior Court of the Province of Quebec in making the order for the payment to the land owner of $4,000 deposited as security under section 9, sub-section 31. which sum is less than the amount awarded by the arbitrators as compensation for the land and damages.

The question as to jurisdiction is whether the proceeding is in the Superior Court or merely the act of the judge as one of a class of persons designated by the statute for the particular duty.

Sec. 8 defines the expression "court" in that section as meaning a superior court of the district or province in which the lands are situate, and the expression "judge" as meaning a judge of such superior court. By the general Interpretation Act (1) the expression "superior court" means in the Province of Ontario, the Court of Appeal for Ontario and the High Court of Justice for Ontario; in the Province of Quebec, the Court of Queen's Bench and the Superior Court in and for the said Province," and so on.

In section 8 various functions are assigned to "the judge." He may appoint a surveyor (2), or an arbitrator (3); issue a warrant to give possession to the company of land paid for according to the terms of an award (4); grant a warrant for immediate possession to the company before award of compensation (4); fix fix the amount to be paid in by way of security (4); and after award make an order for payment out of the money (5).

All these functions may be exercised by any judge of any of the courts embraced by the definition of the expression "superior courts." They are functions which from their nature and object must be

(1) R. S. C. Ch. 1, S. 7 (31).
(2) R. S. C. Ch. 109, sec. 8 Sub-section. 18.
(3) Sub-sections 19, 25.
(4) Sub-section 30.
(5) Sub-section 31.

intended to be exercised in a summary manner and not liable to the delay incident to the appeals from court to court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the court to which he is attached. See *Re Sheffield Waterworks* (1). It will be noticed that section 8 assigns to "the court" certain duties connected with adjudicating upon questions of title (2). "The court" there meant is, in the Provimce of Quebec, the Superior Court and not the Queen's Bench, as appears from subsection 37. Whether an appeal would lie to the Queen's Bench from a decision of the Superior Court under these provisions we need not now consider. It is enough to notice the distinction preserved throughout section 8 between "the judge" and "the court."

In this view of the question of jurisdiction the present appeal should be quashed, even if the asserted right to abandon the notice had been well founded.

There are one or two other topics which were dwelt on in the argument before us which may be alluded to, but which it would be useless to discuss at much length.

One is the proper mode of enforcing an award of compensation made under the 8th section. The contention of the company, which was urged somewhat strenuously and on which the appeal was to a great extent based, being that a judgment of the court establishing the validity of the award is an essential preliminary to the power of the judge to make an order for the payment of the money awarded. The contention confounds together two things which are entirely distinct, namely, the effect of the award in determining the rights of the parties, and the enforcement of the

(1) L. R. 1 Exch. 54, 4 H. & C. 74. (2) Sub-section 33 *et seq.*

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rights which are determined by the award. An award determines the rights of the parties, but it can ordinarily be enforced only by an action or other equivalent proceeding. That rule applies to the awards in question, but the proceeding to give effect to them is that which the section provides, namely, the order of the judge.

The Railway Act of 1888, section 161, provides for an appeal from future awards exceeding $400, in addition to whatever mode of setting aside awards exists under the law or practice of any province. If proceedings to set aside an award are taken in good faith there must be a method, either by the assent of the judge or by the interference of a court, to stay the payment over of money pending the proceedings, but that is a different thing from such an appeal as is attempted in this instance, and inasmuch as it would involve merely an exercise of judicial discretion, could not be made the subject of appeal to this court.

I do not propose to discuss the grounds on which, in the court below, it was considered that sub-section 26, which authorises the abandonment of the notice for lands does not apply, under section 9, to lands required for gravel, &c. There would be no useful object served by doing so at present. I am sensible of the force of the argument presented by Mr. Abbott in favor of the more liberal reading of the section in cases when possession has not been taken. If the question should again arise it will be necessary to consider whether sub-section 31 permits possession to be given before the price is fixed and paid of any land except land on which some work of construction is to be at once proceeded with. It is not necessary now to enter upon that discussion. Mr. Abbott ingeniously argued that if section 9 has the more limited effect, the respondent can have no right to the order for payment of the $4,000. But the company is the appellant, and cannot reasonably ask

the active interference of the court on the ground that the state of affairs which in its own interest it has brought about is unauthorised and unreal.

I think the appeal should be quashed.

Appeal quashed without costs.

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

Solicitor for respondents: *S. Pagnuelo.*

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*Nov. 19, 20.

THE MONTREAL STREET RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

WILLIAM FREDERICK RITCHIE, (DEFENDANT)..... } RESPONDENT.

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

Injunction—41 Vic., ch. 14, sec. 4, P. Q.—Action for damages—Want of probable cause—Damages other than costs.

Where a registered shareholder of a company finding the annual reports of the company misleading applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in gettingthe injunction dissolved, has no right of action for damages resulting from the issue of the injunction.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) which confirmed a judgment of the Superior Court dismissing the plaintiffs' action.

The plaintiffs (now appellants) sued the defendant for damages, alleged to have been suffered by them in consequence of a writ of injunction issued against them, at his instance, to restrain them from declaring their yearly dividend. The declaration set forth, that on the 7th October, 1886, the defendant presented a petition supported by his affidavit, to the Superior Court at Montreal, alleging that the capital of the Montreal Street Railway Company was impaired, that their financial statement for the preceding year (1885) was at variance with the true state of the company's affairs,

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

exhibiting grossly exaggerated values of the company's property in the attempt to make the capital appear intact, and containing large items of assets which were wholly fictitious, and calculated to deceive the stockholders ; that the directors intended to declare a dividend wholly unjustified by the condition of the company's affairs, and only based on the expectation of future profits; and praying that the company and its directors should be restrained from declaring and paying any dividend or bonus for the financial year 1886, or any other dividend or bonus, so long as their capital remained impaired. The declaration further set forth that on the 9th October, 1886, His Honor Mr. Justice H T. Taschereau, after hearing the parties by their respective counsel, ordered a writ of injunction to issue as prayed, provided the petitioner gave security to the extent of $10,000 ; that security was duly lodged, and a writ issued against the company ; that after issue joined on said petition the parties went to trial, and the same judge eventually dismissed the said petition, and dissolved the temporary injunction previously granted by him, holding that the company's capital was not impaired, and that the directors were justified in declaring a dividend for the year 1886. The plaintiffs further charged that the defendant only became the holder of shares in the plaintiffs' company shortly before the institution of said proceedings, and for the sole purpose of taking them ; that the said proceedings were unfounded and vexatory, malicious, and taken without probable cause, and that the defendant acted in collusion with other parties interested in the depreciation of the company's assets, with intent to injure its credit and financial reputation. Damages were laid at the sum of $20,000 for injury to credit, and for various sums alleged to have been paid to counsel,

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accountants, and other experts, in order to obtain the dissolution of the injunction.

The affidavit filed by the manager Mr. Lusher in answer to the affidavit and petition for the issue of the writ of injunction was as follows:—

"That the said petitioner only became as hareholder in said company of respondents on the fourteenth day of September, now last past, by having twenty-three shares of the capital stock of said company transferred to his name on that day, and that he, Petitioner, was never previous to that date a registered holder of shares in said company.

"That the statement of account for the past financial year of the said company, which the directors have to consider and examine before deciding whether or not a dividend shall be declared, have not yet been prepared, nor have the directors been informed of the probable results of said year's business."

The proceedings were based on the following financial statement of 1885:

"General statement of the affairs of the Montreal City Passenger Railway Company on 30th September, 1885.

ASSETS.

Construction account of railway	$297,320 60	
Real estate and buildings (as valued in 1877)	159,290 37	
Rails and track material, stores, &c.	31,046 56	
Equipments—Cars, sleighs, horses, &c	133,081 49	
Cash on hand and in bank	1,298 45	
This amount charged off assets left in suspense since 1877	165,216 77	
		$787,254 24

LIABILITIES.

Capital stock	$600,000 00	
Unclaimed dividends	2,296 17	
Mortgages	1,050 00	
Reserved for law, &c.	5,550 00	
Due sundry creditors	19,432 50	
Reconstruction reserve account	89,600 15	
Profit and loss account	69,325 42	
		$787,254 24

Verified,

JNO. McDONALD, *Auditor.*

Profit and loss account, 30th September, 1885.

By balance at credit 30th September, 1884...		$63,632 43	
Less, 6th November, 1884, Dividend of $1¾ per share		21,000 00	
			$42,632 43
By earnings of the road for the year ended 30th September, 1885		61,758 78	
By sales of manure		623 53	
By advertising in cars		135 50	
		62,517 81	
Less—Paid Auditor	$ 150 00		
Vote to directors	3,000 00		
Interest account	1,579 59		
Loss an horses	2,071 00		
Credited reconstruction reserve account	7,024 23		
Credited law account	1,000 00		
		14,824 82	
			47,692 99
			90,325 42
Less dividend 6th May, 1885			21,000 00
Balance at credit 30th September, 1885			$69,325 42

Verified,

JOHN McDONALD, *Auditor.*

E. LUSHER, *Manager and Sec'g.*

The two items of assets alleged to have been misleading were, the 1st, the construction account of 30 miles of street railway at $297,320.60, and the last item of $165,216.17.

The defendant (now respondent) pleaded to this action that he had taken the proceedings referred to in good faith and without malice, believing the same to be in the interest of the shareholders generally, and without any intent to injure the credit or financial reputation of the company, but in the hope of improving the same, and placing it on a more stable basis; that the defendant shared the widespread suspicion existing among business men in the city of Montreal at the time of said proceedings as to the soundness of the company's affairs, and believed that a thorough investigation thereof would be beneficial to the share-

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holders; that all the allegations made by him in his petition for a writ of injunction were made with reasonable and probable cause, and were based on public records, and more especially on the financial statement submitted by the directors of the said company to their shareholders, at the annual meeting in 1885, which statement was misleading, and justified the defendant in taking his proceedings; that the plaintiffs themselves admitted the misleading and incorrect nature of said statement, by publishing a new and altered statement of their affairs during the pendency of the injunction proceedings; that the injunction in question was obtained by defendant after due notice to the company, after an exhaustive argument by their counsel, and upon his making out a *primâ facie* case to the satisfaction of the judge who afterwards dissolved the injunction. The defendant further averred that the company had suffered no damage in consequence of his proceedings, but that on the contrary the result had been to establish its financial credit and standing on a more secure basis than before.

The issues were closed in the usual way, and the case was tried before Mr. Justice Johnston who, immediately after hearing the proof, dismissed the action with costs.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side), the judgment of the Superior Court was unanimously confirmed.

Geoffrion Q. C. and *H. Abbott* Q. C. for appellants contended that the allegations contained in respondent's petition for an injunction constituted a libel upon the company, and cited Morawetz on Private Corporations (1); *Williams* v. *Beaumont* (2); *Trenton Mutual Ins. Co.* v. *Perrin* (3); *Metropolitan Omnibus Co.* v. *Hawkins* (4);

(1) 2 Ed. 358.
(2) 10 Bing. N. C. 26.
(3) 3 Zabriskie 403.
(4) 4 H. & N. 87.

Knickerbocker Ins. Co. v. *Ecahesine* (1); 2nd, that courts England while not refusing the right of action to a in person who buys stock for the purpose of taking an injunction, have always looked most unfavorably and animadverted strongly upon such proceedings as were taken by the respondent in the present case, and referred to *Seaton* v. *Grant* (2); *Bloxam* v. *Metropolitan Ry. Co.* (3); *Robson* v. *Dobbs* (4); *Forest* v. *Manchester Ry. Co.* (5); 3rd, that the reports issued by the company were not misleading and that as there was want of reasonable and probable cause, the present action was sustainable under the civil law of the Province of Quebec; 4th, that under the Provincial statute, 41 Vic., ch. 14, sec. 4, P. Q., the respondent was responsible for any extra expense the appellants were put to by reason of the issue of the writ of injunction.

Lafleur and *Lonergan* for respondent contended that the rule which has always been recognized under the French Law, as applicable to actions of damages for vexatory proceedings, whether civil or criminal, is that it is not enough to establish that the proceedings complained of were unsuccessful, but that they were rashly and maliciously instituted.

Ancien Denizart (6); Nouveau Denizart (7); Guyot, Répertoire (8); Merlin, Répertoire (9); Ferrière Dict. de Droit (10); Dalloz, Répertoire (11); Pigeau, Procédure (12); Domat (13); Carré et Chauveau (14); Bédarride (15).

(1) 34 N. Y. S. C. 76.
(2) L. R. 2 Ch. 459.
(3) L. R. 3 Ch. 337.
(4) L. R. 8 Eq. 301.
(5) 7 Jur. N. S. 887.
(6) Vo Dommages et Intérêts, No. 4.
(7) Vo. Dommages et Intérêts, No. 9.
(8) Vo. Accusateur, vol. 1, p. 115.
(9) Vo. Accusation, vol. 1, p. 44.
(10) Vo. Calomniateur, vol. 1, p. 223.
(11) Vo. Dénonciation Calomnieuse, No. 142.
(12) T. I. pp. 421 et seq., Liv. 2, part 3, Tit. 2, ch. 4.
(13) Liv. 3, Tit. 5, Sect. 2, No. 14, p. 271.
(14) T. I, p. 641, sur. art. 128, quest. 544.
(15) Dol et Fraude, vol. 1, p. 316, No. 319.

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The learned counsel then reviewed the evidence, contending that there were misleading statements published in the annual statements of 1888 which were sufficient and probable cause for a shareholder applying for a writ of injunction to restrain the company from paying a dividend until these statements were explained.

They referred more particularly to items showing, as alleged, an over-valuation of the property and to an item entered merely for the purpose of book-keeping.

They contended further that, as a matter of fact, the application for the injunction was made upon notice and no answer or explanation was given by the company. Joyce on Injunctions (1). Moreover, that the appellants recognized and admitted the justice of the respondent's principle ground of complaint, by altering their financial statements during the pendency of the injunction suit, so as to accord with his pretensions.

That as to extra expenses, the bill of costs paid by the respondent included all that the appellants had a right to recover by law: *Quartz Hill Gold Mining Co.* v. *Eyre* (2); *Cox* v. *Turner* (3).

Sir W. J. RITCHIE C. J.—I have listened very attentively to this case, and I was impressed very much with the able argument of Mr. Geoffrion and Mr. Abbott on behalf of the appellant, but since hearing the counsel for the respondent I have come to the conclusion that there is no evidence in this case that any damage was occasioned to the appellant company by reason of the issue of the writ of injunction.

I think that where a party has notice of an application for the issue of a writ of injunction and does not choose to avail himself of the opportunity to repudiate

(1) Vol. 2, p. 1309. (2) 11 Q. B. D. 682.
(3) M. L. R. 2 Q. B. 278.

the statements in the petition and affidavits but leaves them all unanswered, if he afterwards suffers damage by the issuing of a writ he brings it on himself. As regards the other count of the action, viz., damages resulting from the statement and charges contained in the petition, assuming that a party has a right to bring an action of damages against another for having taken civil proceedings, in such a case appellant's counsel admits it is necessary to show malice and want of reasonable and probable cause and I should be very sorry to come to a different conclusion from that of the judges of all the courts below; and I am not constrained to do so, as, so far as I can judge of this case, there was ample cause for the respondent, a registered shareholder of the company, to seek an investigation into all the matters connected with the affairs of the company. The over-valuation of the property and the item of $165,000 in the statement entered, as it is admitted, for the purpose of book-keeping, challenged enquiry. If parties choose to make such entries in their books surely any shareholder has a right to ask for an explanation. I think, therefore, there is ample evidence to sustain the finding of the courts below that there was no want of reasonable and probable cause. Upon both branches of the case the respondent must succeed, and the appeal will therefore be dismissed with costs.

STRONG J.—I am of the same opinion. I assume all questions of law in favor of the appellants and especially I agree that by the law of the Province of Quebec an action can be maintained by a defendant, who has succeeded in a civil action, against one who maliciously and without reasonable and probable cause, or, in other words, against one who having no real interest has, in bad faith and with the malicious intention of harassing his adversary, unsuccessfully prosecuted the

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action. The law of the Province of Quebec in this respect differs from the law of England, according to which such an action will not lie, unless there has been by means of civil process some unwarrantable interference with the person or property of the party defendant in the original action. Admitting then that the appellants can maintain their action if they can show that the respondent was a *plaideur téméraire* who sued without reasonable cause in bad faith and with malice, the question we have now to decide becomes one of evidence solely. Now, do the appellants establish by their proofs that the injunction proceedings were instituted by the respondent maliciously or without probable cause? I am of opinion that this question of fact, as to which all the learned judges of the courts below, before whom, in its different stages, this cause has come, are of accord, admits of no doubt. That there was reasonable and probable cause for the proceedings in the injunction action is apparent when we read the deposition of the principal witness for the appellants, their manager and secretary, Mr. Lusher, who admits that in the general statement of the affairs of the company appended to the directors' report and, upon the basis of which the directors were about to declare and pay a dividend, a certain amount, which had been previously put in a suspense account as an amount by which the assets had been over-estimated, was included in the list of assets. This amounted to the large sum of $165,216.77. There can be no mistake about this, for besides Mr. Lusher's statement in his deposition we have the accounts which were appended to the report, filed amongst the exhibits, showing distinctly that this large item was included and dealt with as an asset. It is true Mr. Lusher afterwards says it was a mere matter of book-keeping, and that the amount which was thus made to appear

as an asset, was afterwards so charged in the profit and loss account, that it was in reality written off, but all this does not appear on the face of the report made by the directors to the shareholders or in the schedules annexed to it. There remains therefore, notwithstanding the manager's explanation for the respondent's justification the fact that this large sum, previously deducted for over-valuation, was included as an asset in the statement of the affairs of the company made by the directors to the shareholders. There could be no possible mistake about the matter for, not only is it apparent on the face of the directors' report, but the witness Lusher being asked "Do you find in that exhibit B an item of this amount charged of assets left in suspense since 1877 ; $165.216.77 included in the assets?" answers "Yes, I see it there." The witness does indeed add to this explanation as to how this item had been manipulated in the book-keeping, which Mr. Justice Taschereau ultimately considered sufficient ground for dissolving the injunction, but these explanations do not appear in the directors' report and were not even given on the original motion for the injunction. On that motion the appellants did not in the affidavits which they produced and read in opposition to the motion oppose to the allegations of the respondent as much as a general denial of their truth, much less did they then give the explanation now put forward by Mr. Lusher in his deposition in the present cause respecting this item of over-valuation, but they contented themselves with attacking the respondent's qualification as a shareholder and impugning his motives for insituting the action. In the face of such evidence as this the respondent cannot surely be said to have acted vexatiously and without reasonable and probable cause; on the contrary, he had, as a shareholder, a direct and legitimate interest to have the

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appellants restrained from paying dividends based on a false and exaggerated estimation of the assets, as *primâ facie*, and according to the admission of their principal officer it appeared from their report they were about to do.

As regards the status of the plantiff as a shareholder, I am of opinion that as the shares in respect of which he qualified himself to institute the action had been regularly transferred into his name, it matters not whether he held them in his own right or as a trustee or *prête-nom* for others, and his motives in acquiring the shares are not a relevant subject of enquiry. This latter proposition has been frequently affirmed in England, and I see no reason why the same rule of law should not be applied to the province of Quebec. Moreover, the respondent's quality as a shareholder having a sufficient *locus standi* to maintain the action for the injunction is *res judicata*, having been determined in the respondent's favour by Mr. Justice Taschereau in his judgment in the original action.

As regards the expense to which the appellants were put in having their accounts investigated by expert accountants, that by itself would constitute no independent ground of action if there was probable cause, and any claim on this head is also conclusively answered by the consideration that the appellants ought to have recorded their transactions and kept their books of account in such clear and regular form as to have enabled them at once and without any prolonged investigation to give any information which a shareholder might reasonably ask for.

The appeal appears to be entirely without foundation and must be dismissed with costs.

TASCHEREAU J.—I concur. The general rule is "*Les frais sont la peine, et la seule peine du plaideur*

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téméraire." But if any one institutes or carries on legal proceedings in bad faith, vexatiously and maliciously he is liable to an action of damages. *Brown* v. *Gugy*, (1) reported on another incident, is an authority upon this point. There Gugy's action had been dismissed on demurrer by the Superior Court, but on appeal this judgment was reversed and the right of action recognized. I refer also to *Cayer* v. *Labrecque* (2); *Poutré* v. *Lazure* (3); Laurent (4); Bédarride (5); Sirey (6); and Dalloz (7) citing *Compagnie d'Assurance c. Cochet.*

In the present case, however, as a matter of fact found by the two courts below, and upon which there can be no doubt, there is no evidence of bad faith or malice in Ritchie's proceedings against the company. But it has been strenuously contended on the part of the appellant that a party taking an injunction does it at his risk, and that if the injunction is eventually dissolved he is liable to the damages ensuing therefrom, whether he acted maliciously or in bad faith or not. There is certainly ample ground for that contention as a general principle, and the security for damages required by the statute supports it. But in the present case we find that the company's own acts and returns justified Ritchie's demand for an injunction.

The company brought on these proceedings by its course of dealings. There are no damages proved resulting from the injunction, and upon that ground the appeal must be dismissed, but, were there any, the company itself is the primary cause of them.

GWYNNE J.—I am of opinion that the plaintiff's action is devoid of any foundation, notwithstanding the very able argument of the learned counsel for the

(1) 16 L. C. Jur. 265.
(2) 15 L. C. R. 130.
(3) 12 R. L. 405.
(4) 20 Vol., par. 412 et seq.
(5) Dol et Fraude Nos. 319 et seq.
(6) 1883, vol. 1st, part p. 147; reporter's note & p. 92 2nd part same vol.; and 85, 1, 61, 209.
(7) 1888, 5th part, page 286.

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appellant which, I must confess, was leading my mind to take the worse to be the better part.

As to any damages having been sustained which could be recoverable under the statute 41 Vic., ch. 14, as sustained by reason of the issue of the writ of injunction no evidence was, in my opinion, offered; and as to the action for malicious institution of the injunction action which, in the unanimous opinion of all the judges before whom this case has been, is unsustainable by reason of the failure of the plaintiff to prove malice in the defendant and want of probable cause, it is impossible for us, consistently with the principles upon which we proceed in such a case to pronounce such a judgment upon a mere matter of fact to be erroneous even if we differed from it. For my part I entirely concur in it. It is unnecessary, therefore, to inquire whether the law of the Province of Quebec authorises such an action in a case like the present if the plaintiffs could have succeeded in establishing malice and want of probable cause in the defendant for having taken the proceedings which he did take in the injunction suit. The defendant has already suffered so much by the impounding in court of the $10,000.00 lodged by him in lieu of bail on the writ of injunction issuing that we should not add to his loss by delaying the delivery of judgment on this appeal, which in my opinion should be dismissed with costs.

PATTERSON J.—Concurred in dismissing the appeal and mentioned the case of *Williams* v. *Crow* (1) decided in Ontario, where in an action upon a replevin bond, the plaintiff claimed, as part of his damages by reason of the issue of the writ of replevin, his costs between solicitor and client over and above the costs taxed to him in the action of replevin, but the claim was dis-

(1) 10 Ont. App. R. 301.

allowed. The case was not cited as directly applicable to proceedings in the Province of Quebec, but as containing a reference to English cases which might be found to proceed on principles applicable to the construction of the statute 41 Vict. ch. 14.

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Appeal dismissed with costs.

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

Solicitor for respondent: *M. S. Lonergan.*

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*Jan. 19, 21.

*Mar. 28.

DENNIS AMBROSE O'SULLIVAN (PLAINTIFF) ..... } APPELLANT;

AND

JOHN N. LAKE (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Motion for New trial—Jurisdiction—R. S. C. ch. 135 sec. 24 (d).

The defendant in an action against whom a verdict has passed at the trial moved for a new trial before the Divisional Court on the grounds of misdirection, surprise and the discovery of further evidence, and the motion was granted on the ground of misdirection (15 O. R. 544). The plaintiff appealed and the Court of Appeal held that there was no misdirection, but that the order of the Divisional Court directing the case to be submitted to another jury had better not be interfered with, the circumstances of the case being peculiar.

Held, that as the judgment of the Court of Appeal did not proceed upon the ground that the trial judge had not ruled according to law, no appeal would lie to the Supreme Court of Canada from its decision (1).

In the factum of the respondents no objection was made to the jurisdiction of the Supreme Court, but it was urged that the appeal should not be entertained and that the court should not interfere with the discretion in favor of a new trial exercised by the two lower courts, the circumstances, it was contended, being stronger than those in the *Eureka Woolen Mills Co.* v. *Moss* (11 Can. S. C. R. 91) (2). As the appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash.

Appeal quashed with costs.

Solicitors for appellant: *O'Sullivan & Anglin.*

Solicitors for respondent: *MacLaren. MacDonald, Merritt & Shepley.*

(1) By the Supreme and Exchequer Courts Act, R. S. C. ch. 135 sec. 24 (*d*), an appeal shall lie to the Supreme Court from the judgment upon any motion for a new trial on the ground that the judge has not ruled according to law.

(2) In *Eureka Woolen Mills Co.* v. *Moss* the court said: "We must not encourage appeals to this court in such cases, and we wish it understood that where a court below has ordered a new trial on the ground that the verdict is against the weight of evidence this court will not interfere."

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

WILLIAM S. EVANS (PLAINTIFF).....APPELLANT; 1889

AND *Jan. 18, 19.

*Mar. 18.

LESLIE J. SKELTON *et al* (DEFENDANTS)..... ..... } RESPONDENTS.

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

Landlord and Tenant—Lease—Accident by fire—Arts. 1053, 1627, 1629, *C.C.*

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, &c., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted."

Subsequently, the appellant (alleging the fire had been caused by the negligence of the respondents) brought an action against them for the amount of the cost of reconstructing the premises and restoring them in good order and condition, less the amount received from insurance.

Held,—affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), Ritchie C.J. and Taschereau J. dissenting, that the respondents were not responsible for the loss, as the fire in the present case was an accident by fire within the terms of the exception contained in the lease, and therefore articles 1053, 1627 and 1629 C. C. were not applicable.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) reversing a judgment of the Superior Court, by which the present respondents were condemned jointly and severally to pay to the present appellant the sum of $2,675.

In his action the present appellant alleged :—

"That on the 10th of January, 1882, the appellant was the owner of a certain store and factory, known

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

(1) 31 L. C. Jur. 307; M. L. R. 3 Q. B. 325.

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as numbers 52 and 54 St. Henri street, in the city of Montreal.

"That on the said 10th of January, 1882, the appellant leased the said premises to the respondents, present and accepting, for the term of ten years from the 1st of May, 1882, at a rental of $2,000 per year for the first five years of the said term, and at a rental of $2,400 per year for the remainder of the said term, and all taxes and assessments which might be levied on the said premises during the said term;

"That by the said lease the respondents agreed and bound themselves to deliver the said premises to the appellant at the expiration of said lease in as good order, state and condition, as they were at the commencement of the said lease, reasonable wear and tear and accidents by fire excepted;

"That the said premises at the commencement of the said lease were in good order and condition and in a thorough state of repair;

"That on the 22nd of June, 1884, the premises so leased were totally destroyed by fire, which originated in the said leased premises, while the same were occupied by the said respondents as tenants under the said lease, and said fire was due to and caused by the fault and negligence of the said respondents;

"That in consequence of the said premises being totally destroyed, the said lease was terminated at the time of the said fire;

"That said respondents, at Montreal aforesaid, were indebted to the said appellant in the sum of $288.05, for the rental of said leased premises from the 1st day of May, 1884, up to the 22nd of June, 1884, and in the further sum of $84.00, being the amount of taxes and assessments due by said respondents on said leased premises for the year, from the 1st day of May, 1884, up to the 1st day of May, 1885, and which became due

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and payable on the 1st day of November, 1884; and in the further sum of $1,211.95, for damages due the appellant, estimated at an amount equal to the rental of said premises, from the 22nd of June, 1884, to the 1st day of February, 1885; and in a further sum of $7,500, being the balance of the estimated cost of constructing the said premises, after deducting the amount of insurance thereon realized by the appellant, making in all a sum of $9,084;

"That the total estimated value of reconstructing said premises, and necessary to replace and put the said buildings in the same order, state and condition as they were before said fire, and at the commencement of said lease, was $17,500, and it was reasonably worth said sum to reconstruct said buildings, and replace said leased premises in good order and condition; that the said buildings and premises were insured by appellant against loss by fire to the extent of $10,000, which said sum has been paid to said appellant since the occurring of said fire;

"That the appellant, on the 1st of August, 1884, through the ministry of Phillips, notary, protested said respondents, and declared his willingness to allow said respondents to reconstruct said buildings and to restore said premises to the state and condition they were in before said fire, the same to be done within a reasonable delay, and to furnish the said respondents with the plans and specifications upon which said buildings were originally constructed, and to give credit to the said respondents for the amount of insurance on said premises, and should the said respondents elect so to do, such reconstruction and restoration to be in lieu of the estimated cost of said reconstruction as aforesaid;

"That said respondents did not elect to reconstruct and restore said premises to their former state and

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condition, and the said respondents refused and neglected to reconstruct said buildings, and to restore said premises to the state and condition in which they were before said fire, and at the commencement of said lease, though thereto often requested by the said appellant."

To this action the respondents pleaded, that it is true the respondents leased the said premises from the appellant; that the said lease was terminated on or about the 22nd June, 1884, by the total destruction of the premises, but not by fire, that the respondents, through the ministry of Marler, notary, tendered to appellant the rent of said premises up to the termination of said lease, and respondents declared their willingness to pay the taxes for so much of the current year as had expired, when the same became due, and on the 9th January, 1885, tendered the said rent and taxes, in all the sum of $321.78.

By a second plea, respondents further alleged:—"That as lessees of said premises they at all times used the same as prudent administrators, and exercised the greatest possible care in their use and conservation, according to the purposes for which they were leased; that it is true a fire broke out in the said premises on or about the 22nd day of June, 1884, but respondents deny that the said fire was caused by their fault or by any person in their employ, and also deny that the said fire was the cause of the destruction of the premises; that the said building was defective, and appellant failed and neglected to maintain the same in a fit condition for the use for which it was intended under said lease; that the said building was imperfectly and improperly built and constructed, as the said appellant well new, and had been frequently notified both by the city authorities and by respondents, and that its destruction, on the date aforesaid, was caused by its faulty and imperfect

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construction, and not by fire, which might easily have been extinguished had said building been properly and substantially built; that the chimney on the north-west side of said building was faulty and defective and imperfectly built, and was not properly joined to the wall against which it was built, as appellant well knew and had been notified; that by the terms of said lease the said respondents were relieved from liability for loss resulting from accident by fire, and that the fire in question was the result of accident, and could not have been caused by the fault of respondents."

By a third plea respondents say:—"That the loss occasioned by said fire was amply covered by the insurance on said building effected by appellant, and which he collected; that if there was any further or other loss in excess of the amount of said insurance, the same was not caused by the said fire, but by the faulty and imperfect manner in which said building was built; that the appellant failed to keep said premises in a proper state of repair."

By a fourth plea respondents say:—"That by the terms of said lease the respondents obliged themselves to pay any and all extra premiums of insurance which the appellant might have to pay by reason of the nature of the business carried on by said respondents, that by law and the terms of the said lease, the appellant thereby undertook to insure the said premises against loss by fire and to relieve the respondents from any such risk; that during all the term of said lease, the respondents regularly paid said extra premiums of insurance to appellant, who, from time to time, accepted the same."

By a fifth plea respondents reiterated the allegations contained in their preceding four pleas.

The appellant answered generally to the first plea, and further that the rent and taxes for which the

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respondents were liable under said lease up to the time of said fire, amounted to $372.05; that the total destruction of the said premises was caused by the fire while the respondents used and occupied said premises under said lease

To the second plea appellant answered generally, and further specially denied that the said buildings so leased were improperly built, but, on the contrary, alleged that the said buildings were well and strongly built, and were in a good state of repair at the time of the said fire; that previous to the date of the said lease—10th January, 1882—the said respondents had been in possession of the said premises, and used and occupied the same for a period of about nine years immediately preceding the date of said lease, and were well aware at the date of said lease, as well as the time of the said fire, that the said buildings were well and strongly built and in a good state of repair; that the chimney mentioned in said plea had been taken down some months before said fire and rebuilt, and was well built, and in a good state of repair at the time of said fire; that the respondents had the said leased buildings completely filled with goods, packed up in paper boxes, both goods and boxes being of a very inflammable material, and the consequence was, that when the said fire broke out the whole building was rapidly destroyed, and said respondents are by law, and the terms of said lease, responsible for the loss suffered by appellant, caused by the said fire.

To the third plea appellant answered, that the said buildings leased were well and strongly built and were in a good state of repair; that the said buildings were destroyed by fire while the respondents used and occupied the same under said lease; that respondents' alleged tender was illegal and insufficient.

To the fourth plea appellant answered that the said

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respondents did not at any time pay, or agree to pay, the ordinary insurance on said buildings, but only the extra insurance on said buildings which the insurance company in which said buildings were insured might charge, by reason of the hazardous nature of the business carried on by the said respondents, and the nature of the material stored in said buildings by the said respondents; that there was no undertaking between said parties by which appellant was obliged to insure said buildings for any fixed amount, nor was appellant obliged to insure said buildings at all under said lease.

To the fifth plea appellant answered that the allegations of said plea were false; that the buildings leased were strongly built, and in a good state of repair; that it was not true that respondents used the greatest possible care in and about said premises, but, on the contrary, respondents stored and completely filled said premises with immense quantities of goods of an inflammable material, packed in paper boxes; and, moreover, said respondents had a fire and machinery in operation on the third and fourth flats of the said buildings at the time of said fire; and appellant prayed *acte* of the admission of respondents that they had a fire in said premises at the time of the destruction of the said buildings, although it was in the month of June that said fire occurred; and said respondents did not take proper and sufficient care and precaution in regard to the fire they were using at the said time in said buildings; and respondents were not justified in using a fire at the time on said third and fourth flats of said buildings, in close proximity to goods the material of which was of an inflammable nature.

On these pleadings the issues were joined.

The evidence taken at the trial as to the origin of the fire is reviewed in the judgments hereinafter given.

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The principal provisions of the lease referred to by the counsel at the argument of this appeal are the following :—

"And further, that the said lessees shall furnish the said leased premises with a sufficient quantity of household furniture or goods to secure the payment of said rent, pay the cost of the present lease, keep the premises in repairs, *reparations locatives*, during the said term, and deliver the same at the expiration of the present lease, in as good order, state and condition, as the same may be found in at the commencement hereof, reasonable wear and tear and accidents by fire excepted * * *

"The said lessees shall pay all extra premium of assurance that the company, at which the premises now leased may be insured, shall exact in consequence of the business or work done and carried on therein by the said lessees.

"And further, to keep the premises generally, during said lease, and leave the same at the expiration thereof, free from all ashes, dirt and snow, in accordance with the regulations of police and of the board of health, for the said city of Montreal."

McMaster, Q. C. and *Hutchison* for appellants, contended that no amount of care that a lessee may prove to have bestowed upon the premises leased by him can alone relieve him from the legal presumption in favor of the lessor that the loss by fire of the premises was caused by the fault of the lessee, or of the persons for whom he is responsible; and unless he proves the contrary, he is answerable to the lessor for such loss; citing Arts. 1627, 1628, 1629, C.C.; *Belanger* v. *McArthur* (1); *Rapin* v. *McKinnon* (2); *The Seminary of Quebec*

(1) 19 L.C.J. 181.

(2) 17 L.C.J. 54.

v. *Poitras* (1); *Allis* v. *Foster* (2); *Pilon* v. *Brunette* (3); *DeSola* v. *Stephens* (4); and after reviewing the evidence contended that the proof showed there was no defect in the building, and that there had been negligence on the part of the respondents by keeping ashes from four stoves in an ordinary flour barrel in the upper part of the building, and without any other protection than that afforded by a piece of zinc beneath it, resting upon the wooden floor. The learned counsel also cited *Byrne* v. *Boadle* (5); *Lloyd* v. *General Iron Screw Collier Co.* (6); *Phillips* v. *Clark* (7).

Lacoste Q. C. and *Atwater* for respondents, contended that the cases relied on by appellant's counsel ignored such a provision in the contract of lease existing between the parties as that contained in the lease existing in the present case, namely, that loss resulting from accidents by fire were excepted from the tenant's liability.

The insertion of such a provision clearly indicates the intention of the lessor to relieve the tenant from such loss as is the result of an accident, and if the lessee use all the care of a prudent administrator in accordance with his obligations under article 1626 of the Civil Code, and if in spite of this a fire breaks out, it is clearly accident. Such words in a contract must be interpreted in a sense which will have some effect rather than in one which will have none.

By article 1626 of the Civil Code of Lower Canada it is provided that the principal obligations of the lessee are:

1. To use the thing leased as a prudent administrator for the purposes for which it was designed and according to the terms and intention of the lease.

(1) 1 Q.L.R. 185.
(2) 15 L.C.J. 13.
(3) 12 Rev. Lég. 74.
(4) 7 Leg. N. 172.
(5) 2 H. & C. 722.
(6) 3 H. & C. 284.
(7) 2 C. B. N. S. 156.

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2 To pay the rent or hire of the thing leased.

Articles 1627, 1628 and 1629 C. C. provide that if the lessee does not use the thing leased as a prudent administrator, and is thereby guilty of *faute*, he is liable for all damages to the building.

The word *faute* occurring in Articles 1627 and 1629 evidently has reference to duty imposed upon the lessee by article 1626, and virtually means default in that duty. The onus of proving that there was no default in his duty is cast by Articles 1627 and 1629 upon the lessee; consequently, all that he has to show is that he used the premises as a prudent administrator.

The presumption against him arises, from the fire, that he has neglected his duty as a prudent administrator, but if he shows that he has not so neglected his duty the presumption is destroyed, because the contrary to that which is presumed is proved.

In France, in face of the wording of Article 1733, C. N. which is more precise and severe than that of our article, it is permitted to the tenant to contradict the presumption created by the law by other presumption, and to prove that he exercised the care of a prudent administrator. Marcadé (1); Laurent (2); Troplong, Louage (3); Demante (4)

On the question of negligence the learned counsel contended that every possible care was taken by the defendants as was shown by the evidence; that the theory of the fire originating through a defective chimney was supported by the evidence; and that the lessor, having stipulated to receive extra premiums, tacitly agreed to assume the extra risk or to insure.

MacMaster Q.C. in reply.

(1) 6 Vol. Art. 1733, Par. 2, pp. 472-3, Note 1.
(2) 25 Vol. Nos. 279 and 280, pp. 305 to 311.
(3) Nos. 376, 383-386 and 389.
(4) No. 179 *bis*.

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Sir W. J. RITCHIE C. J.—I am of opinion the appeal should be allowed with costs. I agree withMr. Justice Taschereau in this case.

STRONG J.—The law imposes upon a lessee the obligation of restoring the thing let to the lessor in as good condition as it was in at the date of the lease, ordinary wear and tear excepted; in other words, and in the terms of articles 1627 and 1628 of the Civil Code, the lessee is responsible for injuries and loss which may happen to the thing leased during his enjoyment of it, unless he proves that the loss was not occasioned by his fault or by the acts of persons of his family or of his sub-tenants. In case of the destruction of the subject of the lease by fire the lessee does not relieve himself from the responsibility which the law thus imposes on him by shewing that the fire was accidental in the sense that its origin is unknown, for article 1629 expressly declares that in cases of loss by fire there is a legal presumption that it was caused by the fault of the lessee or of those for whom he is responsible and that the lessee must answer for the loss unless he proves the contrary. This article 1629 is said, though differently worded, to be in legal effect the same as the article 1733 of the French Code. A question has arisen under both codes whether a lessee seeking to exonerate himself from responsibility by bringing himself within the terms of the exceptions in the articles in question, is bound to prove affirmatively how the fire occurred, or if it is sufficient that he should prove facts and circumstances shewing that it did not happen through his fault or by the acts of his family or servants. In both France and the province of Quebec the jurisprudence on this point has varied and the opinions of legal treatise writers are also far from being uniform (1).

(1) See Guillouard Louage, (Ed. 2,) vol. I, Nos. 249 to 308; also Laurent Vol. 25, No. 276 *et seq*; Aubry and Rau Ed. 4, Vol. 4, p. 484 *et seq*.

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This question, however, although much discussed upon the argument, does not seem to me to be at all involved in the decision of the present appeal. The provision of article 1629 is not a law of public order, it is merely declaratory of one of the obligations which the law implies in a contract of lease, and it is therefore quite competent to a lessor to renounce the benefit which it confers upon him.

It being thus open to the parties by their conventions to restrict the responsibility imposed upon lessees by the general law, the primary question we have to decide is whether they have done this effectually by the stipulations contained in the lease now before us. The majority of the court of Queen's Bench considered that they have so done by the exception contained in the clause bearing "that the lessees should keep the premises in repair during the said term and deliver the same at the expiration of the present lease in as good order, state and condition as the same may be found in at the commencement hereof, reasonable tear and wear and accidents by fire excepted." I am of opinion that this was a correct conclusion. The expression "accidents by fire," according to the ordinary meaning and interpretation of the words used, includes all losses by fire the origin of which is not ascertainable. It is reasonable to suppose, as the learned Chief Justice of the Court of Queen's Bench has pointed out, that the parties meant by this clause to exempt the lessees from the responsibility in respect of fires which the law ordinarily attaches to lessees and this is done by attributing to the word "accidents" any one of its ordinary and general significations as meaning "an event that happens when unlooked for," "an unforeseen and undesigned injury," or a "mishap." Accepting any of these meanings of the expression "accidents," it was beyond all doubt established that the loss in the present case

arose from an "accident by fire," and the lessees therefore bring themselves within the terms of the exception of responsibility contained in the clause before set forth.

Article 1629 can consequently have nothing to do with a case like the present where the common law is controlled by the convention of the parties. The parties having thus derogated from the ordinary responsibility of lessees, which in the case of destruction by fire throws upon them the burden of exonerating themselves from a presumption of fault, the only remedy open to the appellant was that general one of the action given by article 1053, by which every one is made responsible for the damage caused to another by his positive act, imprudence, neglect or want of skill. We must therefore consider this action in every respect as one founded on the article last referred to. Then in such an action, according to the ordinary principles of evidence, there is no presumption against the defendant, but the onus of establishing his case rests upon the plaintiff and it is for him to prove the fault of the defendant to which he attributes the damage he has suffered. The enquiry in the present case is thus narrowed to the question of the sufficiency of proof, and all we have to decide is whether the evidence established that the fire was occasioned by the negligence, imprudence, or other fault of the respondents.

The pretensions of the appellant in this aspect of the case are that he has succeeded in proving negligence on the part of the respondents in two respects: First, it is said that the respondents were guilty of neglect inasmuch as they placed the ashes taken from the stoves in a barrel which was an unsafe receptacle for them. Secondly, it is contended that they should be held responsible for the loss because they imprudently omitted to keep a watchman on the premises at night.

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As regards the first of these positions, it is conclusively answered in the way in which it has been met by the learned Chief Justice of the Queen's Bench. To establish the respondents' liability it is not sufficient to prove that they were on some occasions or in some particular respect guilty of positive acts or omissions which would, if they had been found to have caused damage to the appellant, have amounted to actionable fault, but these acts or omissions must be so connected by proof, direct or circumstantial, with the actual damage complained of as to be fairly considered to have been the causes of the loss the appellant seeks to be indemnified for. Then it is quite out of the question to say that the record before us contains any evidence which would warrant such a conclusion; the utmost which could be said is that the proofs give rise to a conjecture that the cause of the loss may have been ashes in the barrel: but the same may be said of numberless other possible causes of the fire, and it would be quite out of the question to act judicially on such suspicions, or to treat such hypotheses as sufficient legal proof. Further, if we were compelled on the proofs before us to attribute the fire to the most probable cause to which it has been suggested its origin may be traced, I should certainly say that the probability was in favor of the respondents' theory that it was to be attributed to the defective construction of the chimney, a cause for which the appellant was alone responsible. This, however, would also be mere speculation, and I do not desire to rest my judgment upon it. It is sufficient to say that it was incumbent on the appellant to prove that the loss was caused by the respondents' negligence and fault, and that he has entirely failed to do so.

The omission to maintain a watchman on the premises at night and on Sundays and holidays cannot by itself and in the absence of any evidence of usage

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be regarded as such imprudence on the part of the respondents as to make them liable. If the lessor had required such extreme vigilance he should have stipulated for it and have had a clause to that effect inserted in the lease.

The appeal must be dismissed with costs.

FOURNIER J.—L'appelant Evans a poursuivi les intimés pour les faire condamner à l'indemniser des dommages qui lui ont été causés par l'incendie d'une maison qu'il leur avait louée, et qu'ils occupaient comme locataires au moment de l'incendie. La maison a été complètement détruite. L'appelant se fondant sur l'article 1529, C. C., pretend que les intimés sont responsables des conséquences de cet incendie, et réclame d'eux la somme de $9,084 comme valeur des dommages qui lui ont été ainsi causés. L'article 1529 s'exprime ainsi :

Lorsqu'il arrive un incendie dans les lieux loués, il y a présomption légale en faveur du locateur, qu'il a été causé par la faute du locataire ou des personnes dont il est responsable et à moins qu'il ne prouve le contraire, il répond envers le propriétaire de la perte soufferte.

Les intimés ont plaidé que la présomption légale établie par cet article a été détruite par la preuve qu'ils ont faites, que l'incendie en question n'avait été causé par aucune faute ou négligence de leur part, qu'au contraire, ils avaient toujours pris les précautions nécessaires pour se garantir contre les accidents par le feu, que la plus grande partie des dommages avait été causée par la construction défectueuse de la bâtisse, qui l'exposait particulièrement au danger du feu, plutôt que par l'incendie même—la bâtisse s'était écroulée peu de temps après le commencement de l'incendie—tandis que si la dite bâtisse eut été solidement construite, le feu aurait pu être éteint avant qu'il n'eut causé de grands dommages, que la dite bâtisse étant assurée, le propriétaire appelant avait retiré en vertu de sa police

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d'assurance tout le montant des dommages causés, qu'enfin il avait été convenu par le bail passé entre les parties que les intimés locataires rendraient à l'expiration du bail, les lieux loués en aussi bon état qu'il les avaient reçus, en tenant raisonnablement compte de l'usage qui en aurait été fait, et en exceptant les accidents par le feu, *reasonable wear and tear and accidents by fire excepted.* Il fut aussi convenu que la bâtisse louée serait assurée, et que dans le cas où un taux plus élevé d'assurance serait exigé en conséquence des risques plus considérables auxquels l'industrie particulière des intimés pouvaient exposer la bâtisse, ceux-ci s'obligeaient à en payer la différence, ce qu'ils firent, qu'il était particulièrement du devoir d'Evans, le propriétaire, d'assurer sa propriété pour sa pleine valeur, et que s'il lui résulte une perte en conséquence de l'insuffisance de son assurance, lui seul est tenu de la supporter.

La preuve a établi que la bâtisse était défectueuse dans une certaine mesure, et surtout en ce qui concernait la cheminée qui n'avait qu'une seule brique d'épaisseur, au lieu de deux qu'elle aurait dû avoir pour le mur de derrière, de plus elle n'était pas liée au mur, les joints n'en avaient pas été tirés. Il y avait entre un des murs de côté et celui de derrière une crevasse laissant un espace de quatre pouces au troisième étage —crevasse qui se prolongeait dans trois étages. On pouvait voir d'un côté à l'autre entre le mur et la cheminée. On voyait monter la fumée.

L'attention de l'appelant ayant été plusieurs fois attiré sur l'état de la cheminée, et ayant même été protesté par les autorités civiques, il fit quelques réparations en 1874 et en 1883, mais tout à fait insuffisantes d'après le témoignage de Duplessis, qui avait été employé pour ces ouvrages. L'ouvrier chargé de l'ouvrage en plâtre, ainsi que l'intimé protestaient contre l'insuffisance de

ces réparations, qui ne s'étendaient qu'à une partie endommagée de la cheminée, le reste fut laissé dans le même état qu'auparavant. Les planchers s'étaient retirés de la bâtisse adjoignante d'environ un pouce à un pouce et quart, laissant entre les planchers et les plafonds dans les différents étages, un espace dans lequel les étincelles montant dans le cheminée pouvaient facilement se loger et y brûler lentement avant d'éclater.

Les flammes ne furent d'abord aperçues que du côté de Shorey, par les fenêtres des troisième et quatrième étages. Après la chute de la bâtisse on pouvait voir la partie réparée de la cheminée qui adhérait au mur de Shorey, tandis que celle qui ne l'avait pas été était toute tombée et laissait voir des briques noircies et brulées sur le mur de Shorey autour de la cheminée indiquant que le feu avait dû originer à cet endroit. Cairns, un membre expérimenté de la brigade du feu, auquel est faite la question suivante :

Did you notice anything in the debris or on the walls which would indicate to you where and how the fire had commenced?

A. There was; round where the remaining part of the chimney, round the wall, there were indications on the building, as I would say, that the fire had originated close to that wall, by the blackened and charred color of the brick just around that part.

Q. Near the chimney?

A. Yes, just in the vicinity of the chimney, below it was not blackened.

Ce témoignage est corroboré par ceux de Cowan, Mann et Nolan, tous compétents dans cette matière, qui laissent peu de doute que la cheminée défectueuse a été la cause de l'incendie.

Si la bâtisse eut été construite plus solidement, le feu aurait pu être éteint avant d'en avoir causé la destruction entière. C'est l'opinion positive d'un autre membre de la brigade du feu, Harris :

Q. From your experience of fires, if the building had not fallen, could the brigade have put that fire out?

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A. I have no hesitation in saying so. We should have saved the two flats, if it had not fallen; we have done it with other buildings, and we surely could have done it with this.

Indépendamment des vices de construction de la cheminée, il est prouvé que les supports de la bâtisse étaient insuffisants, qu'elle tremblait chaque fois qu'on y remuait des articles pesants, et aussi à chaque mouvement dans la rue. Les murs de derrière et de côté avaient considérablement surplombé. L'inspecteur des bâtisses de la cité avait déjà, en 1874, ordonné la démolition de la cheminée en question—

As being in a dangerous condition, or repaired and made secured as regards fire. At present such chimney is in such state that it endangers public safety, &c., &c.

Il est vrai que c'est longtemps après cet avis que les réparations dont il a été question plus haut ont été faites, mais on a vu aussi qu'elles l'avaient été d'une manière si insuffisante que la cheminée n'avait pas cessé d'être un danger pour la sécurité publique, et qu'il n'y avait qu'une démolition et une reconstruction totale, comme le disait l'inspecteur, qui pouvait mettre cette cheminée dans un état de sécurité conforme aux règlements de la cité. La bâtisse était connue comme dangereuse par les hommes de la brigade du feu, qui sont unanimes à dire qu'ils n'ont jamais vu une bâtisse s'écrouler de cette manière. Le toit n'était pas même brûlé, et ils sont d'accord à dire qu'ils auraient pu éteindre le feu si la bâtisse ne se fût pas écroulée aussi promptement. Dans ces circonstances, si l'appelant avait quelque recours contre les intimés, il ne pourrait réclamer le montant entier de sa perte, car si la bâtisse avait été solidement construite, les dommages eussent été moins considérables et le montant de son assurance aurait été parfaitement suffisant pour l'indemniser.

L'appelant prétend que la manière dont les cendres étaient gardées dans la bâtisse constitue un acte de

négligence qui a l'effet de rendre les intimés responsables de l'incendie. Le témoignage de Donaldson prouve que les cendres après avoir été déposées dans un baril placé sur un plancher recouvert en zinc, étaient toujours éteintes avec de l'eau. Il jure positivement qu'il en a agi ainsi le matin du 21 juin 1884. On déposait aussi dans ce baril les restes d'emploi délayé dont on s'était servi la veille, ainsi que les feuilles de thé mouillées. Donaldson dit de plus que lorsqu'il enlevait les cendres des poëles et fournaises le matin, elles étaient refroidies et il pouvait les prendre avec les mains. Le matin même de l'incendie, à 7½ heures, près de 24 heures avant que le feu se fut déclaré, il y avait mis un plein seau d'eau dans le baril aux cendres. D'après toutes précautions prises et rapportées par Donaldson, il est impossible que le feu ait pris par les cendres.

Les intimés ne se sont pas rendus coupables d'infraction aux règlements de la cité en déposant les cendres comme ils l'ont fait. L'inteprétation que l'appelant a donnée au règlement n'est point correcte, le règlement défend bien de garder les cendres de bois enlevées des poëles dans des boîtes de bois, mais ne fait pas mention des cendres de charbon qui se refroidissent beaucoup plus promptement et sont beaucoup moins dangereuses pour le feu, ainsi qu'il est prouvé par plusieurs témoins. Il a complètement failli dans sa tentative de prouver que les cendres avaient été la cause du feu. D'après la preuve le feu ne peut guère être considéré autrement que comme un accident, dont les intimés ne peuvent être tenus responsables, parcequ'en vertu de leur bail, ils se sont, par convention spéciale, mis à l'abri de la présomption légale établie par l'article 1629, en stipulant qu'ils ne seraient pas responsables des accidents causés par le feu. Cette stipulation n'ayant rien de contraire à l'ordre public ni à la morale est parfaite-

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ment légitime et doit recevoir son exécution. Appel renvoyé avec dépends.

TASCHEREAU J.—I would allow this appeal. The law of the case is clear.

Art. 1053.—Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Art. 1627.—The lessee is responsible for injuries and loss which happen to the thing leased during his enjoyment of it, unless he proves that he is without fault.

Art. 1628.—He is answerable also for the injuries and losses which happen from the acts of persons of his family or of his sub-tenants.

Art. 1629.—When loss by fire occurs in the premises leased, there is a legal presumption in favour of the lessor that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.

This fire, therefore, is presumed to have been caused by the respondents' fault. The words "accidents by fire excepted" in this lease have not the effect to destroy this presumption of law that the fire was caused by the lessee's fault. On him rested the onus to plead and to prove that the fire was caused by an accident. This proof he has failed to make. The contention that I remark in his factum, that the word "accident" may be defined to be an event which is not the result of intention, is untenable. Nothing but a criminal and wilful setting on fire of these premises would make this lessee liable according to this contention. Such is not the law. The word "fault" in Arts. 1627 and 1629 C. C. means, as in Art. 1053, not only a positive act, but also acts of imprudence or negligence.

The respondents seem to think that if they have proved that the cause of the fire is unknown they have proved that it was an accidental fire. But the law is exactly to the contrary. If the cause of the fire is unknown, the presumption is that it was due to the

lessee's fault. Bourjon (1); Pothier (2); Domat, Lois Civiles (3); Dalloz (4). Bretonnier (5) justly remarks, that if the burden of proving that the fire was caused by the lessee's fault or negligence was on the lessor, the lessees would hardly ever be liable, because it would be generally impossible for him to get at the evidence as in the house there is generally only the lessee and his family.

In Ancien Denizart (6) a case of Aug. 22, 1793, is cited, where a proprietor who had himself lost his house by a fire was obliged to indemnify his neighbors to whose property the fire had extended, upon the only ground that the fire had originated in the defendant's house. This judgment, says Denizart, is based on the principle, that in the event of a fire, the *cas fortuit* is not presumed, if not proved.

In another case, *loc. cit.* (*Quentin's*) the defendant was condemned, because the fire had originated on his premises in an unknown manner, *sans qu'on pût savoir comment.*

I need not refer specially to the authorities under Art. 1733 C.N. They may easily almost all be found under the article in Sirey, Codes annotés.

"Accidents by fire excepted" in this lease means "fire not by or through his fault," so that, for instance, if an incendiary had caused the fire the lessee would not have been responsible. Or, if the fire had been caused by a coal oil lamp accidentally falling from any one's hands, or by a rocket or fire-cracker fired from the street, or anything of that kind, then on the proof of any such fact the respondents would have been exonerated. But otherwise they are liable; the pre-

(1) 2 Vol. P. 47.
(2) Louage, 194.
(3) C. P. 181.
(4) 85, 2, 140; 81, 2 111.
(5) 2 Henrys, 140.
(6) Vo. Incendie.

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sumption, as I have already remarked, is that they were in fault. They had to rebut that presumption by proving that they were not in fault, that is to say, by proving that the fire was caused by an accident, by a *vice de construction* or *force majeure*, or by an incendiary. They do not prove an accident when they prove that the cause is unknown, or no negligence on their part. They, in fact, contend that the words "accidents by fire excepted" mean "loss by fire excepted." That construction is untenable.

As to the defective chimney, there is nothing to help the respondents. It was a very far-fetched defence. If the chimney was really defective, they should have informed their landlord of it. Then there had been no fire for over twenty-four hours in any of the stoves communicating with it.

As to the extra premium clause, I cannot see that it can in any way be read as removing in any degree from the respondents the liability which, as tenants, the law imposed upon them. The appellants were not even bound to insure at all (1).

The evidence in the case, as to the hot ashes in a wooden barrel, shows the grossest negligence possible on the part of the respondents, and I concur fully with Church J. when he said in the Court of Appeal:

> The plaintiff has shown more than he was bound to do, for, in my opinion, he has shown gross negligence of the commonest prudence on the part of his tenant, and has afforded satisfactory presumptive evidence of the cause of the fire in the absence of any countervailing proof.

The absence of a watchman on the premises, considering the danger that the extreme heat required in the business involved, is also evidence of negligence. It is proved that the premises must have been on fire for a long time before any alarm was given, and that

(1) See cases cited in No. 58, in note under Art. 1733. Sirey Codes annotés and Dalloz 85, 2, 137.

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consequently the fire brigade's services were of no use to save the building. Now, had there been a watchman there, not only could the brigade have been called out in time to save the building and, perhaps, confine the damage to a few dollars, but the watchman himself it may be would have checked the fire at its origin with a bucket of water. Merlin Répertoire (1); Arrêts de Louet (2); Marcadé (3).

On peut d'ailleurs, en certains cas, imputer au locataire d'avoir laisse les lieux sans gardien (4).

The jurisprudence supports entirely the appellant's case:—

A tenant, in order to free himself from the responsibility of the burning of the leased premises, must show satisfactorily that the fire was not caused by his fault, or the fault of those for whom he is answerable. *Belanger* v. *McArthur* (5).

Where the leased premises have been injured or destroyed by fire, the legal presumption is that the fire is caused by neglect or default on the part of the tenant or those for whom he is responsible, unless the contrary is proved. *Rapin* v. *McKinnon* (6).

In order to destroy the presumption declared in Article 1629 of the Civil Code, it is not sufficient for the tenant to show that he acted with the care of a prudent administrator, and if the fire which destroyed the premises leased could not be accounted for, he must show how the fire originated, and that it originated without his fault. *The Seminary of Quebec* v. *Poitras* (7) confirmed unanimously in appeal.

The tenant is responsible for the destruction by fire of leased premises from the neglect of his servants, &c. *Allis* v. *Foster* (8).

And in such case the *onus probandi* is on the tenant to prove that the fire was not the result of neglect on the part of his servants when the premises are burnt while in their occupation. *Ib.* (9).

An unreported case of *Pouliot* v. *Turcotte*, Superior Court, Kamouraska, June, 1875, confirmed in Review, is in the same sense.

With the hardship of the law we have nothing to do.

(1) Vo. Incendie par. 9.
(2) Page 29.
(3) Vol. 6 Page 464.
(4) Boiteux, 77.
(5) 19 L. C J. 181.
(6) 17 L. C. J. 54
(7) 1 Q. L. R. 185.
(8) 15 L. C. J. 13.
(9) See also *Pilon* v. *Brunette*, 12 R. L. 74, and *De Sola* v. *Stephens*, 7 L. N. 172.

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Taschereau J.

The Code gives no new law on the subject. It does nothing but to re-enact the principles of the Roman law, universally adopted in France, and always held to have been the law of the Province of Quebec. With a constant and uniform jurisprudence as to its construction before their eyes, the Legislature of Quebec has not seen fit to in any way alter the article. Under these circumstances, can we be asked to modify or deviate from that jurisprudence?

Then, if there is any hardship on the tenant in that law, would there be no hardship in making the landlord bear the loss in case of the destruction of his premises when occupied by his tenant, or in putting on him the burden of proving facts which necessarily must be in the intimate knowledge of his tenant.

La loi ne peut balancer entre celui qui se trompe, et celui qui souffre, (says Bertrand de Grenille). Partout ou elle aperçoit qu'un citoyen a essuyé une perte, elle examine s'il a été possible à l'auteur de cette perte de ne pas la causer, et si elle trouve en lui de la légèreté ou de l'imprudence, elle doit le condamner a la réparation du mal qu'il a fait.

I think the appeal should be allowed with costs.

GWYNNE J.—Whatever might be the result upon the construction of article 1629, C.C., and whether that article is or is not to be read in connection with article 1626, I am of opinion that under the terms of the lease entered into between the parties the defendants are relieved from liability to reinstate the damage done by the fire in the present case which destroyed the leased house. The fire in the present case was clearly, in my judgment, an accident, or casualty by fire, which is the same thing, within the terms of exception in the lease.

Appeal dismissed with costs.

Solicitors for appellant: *Macmaster, Hutchinson, Weir & MacLennan.*

Solicitors for respondents: *Atwater & Mackie.*

WILLIAM CHAGNON (DEFENDANT).....APPELLANT; 1889

AND *Dec. 4.

ALPHONSE NORMAND (PLAINTIFF)...RESPONDENT.

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

Appeal—Province of Quebec—R. S. C. c. 135 s. 29 (b)—Future Rights—Fee of Office—Collateral Matter—Action for penalties—Effect of judgment—Disqualification.

To give the Supreme Court jurisdiction to hear an appeal in a case from the Province of Quebec by virtue of sec. 29 (*b*) of the Supreme and Exchequer Courts Act (R. S. C. c. 135) the matter relating to a fee of office where the rights in future might be bound must be the matter really in controversy in the suit in which the appeal is sought and not something merely collateral thereto.

This clause will not give jurisdiction in a case in which the action was brought to recover penalties for bribery under the Quebec Election Act (R. S. Q., Art. 429), even assuming that the effect of the judgment may be to disqualify the appellant from holding office under the crown for seven years.

MOTION to quash appeal from a decision of the Court of Queen's Bench, (Appeal Side) for Lower Canada, for want of jurisdiction.

The action in this case was brought to recover penalties for bribery at an election in the Province of Quebec, and resulted in the Court of Review ordering the defendant to pay $400. The defendant was not a candidate at the election. The Court of Queen's Bench affirmed the judgment and the defendant appealed to the Supreme Court of Canada, basing his right to appeal on the ground: 1st. That the judgment had the effect of disqualifying him for seven years from holding office under the Crown in Quebec, and that his

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

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rights in future were, therefore, bound. 2nd. That the matter related to a fee of office as a consequence of the disability to hold office, as to which an appeal is granted by sec. 29 (*b*) of the Supreme Court Act.

Gormully moved to quash the appeal.

Christopher Robinson Q.C. contra.

SIR W. J. RITCHIE C.J.—We do not think this appeal can be entertained. The matter of disqualification was not in question in the action for penalties, and if it had been there are no words in the statute which would give this court jurisdiction to hear the appeal. We think that an appeal, which is unknown to the common law, must be given by statute in such clear and explicit language that the right to appeal cannot be doubted.

We will not determine on this motion whether or not the appellant is disqualified for seven years by the judgment rendered against him. We will assume that this is so. But, even if that is so, this does not make his case appealable to this court. The fact that in the future, for seven years, he may be incapable of holding any office does not render the case appealable. We have already held that the words "where the rights in future might be bound" in sec. 29 of the Supreme Court Act do not mean "all cases where rights in future might be bound," but must be read in connection with the words that precede "such like matters or things."

Neither is the case appealable as relating to a fee of office where the rights in future might be bound. The appellant may be deprived of a fee of office for seven years, but, if that be so, that is the consequence of the judgment merely, but there is no controversy in the case relating to a fee of office where the rights in

future might be bound, as required by said section 29 of the act.

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Appeal quashed with costs.

Solicitor for appellant : *A. E. Gervais.*

Solicitor for respondent : *C. Fitzpatrick.*

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*Mar. 18.
*Nov. 19, 20.

STEPHEN HAMILTON THOMPSON, (PLAINTIFF)..... } APPELLANT.

AND

THE MOLSONS BANK, (DEFENDANTS)..RESPONDENTS.

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

The Banking Act—R. S. C. ch. 120 *secs.* 53 *et seq.—Warehouse receipts —Parol agreement as to surplus—Arts.* 1031, 1981. *C. C.*

The Molsons Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. & Co. H. & Co. having become insolvent T., as one of the creditors, brought an action against the bank, claiming that the surplus must be distributed ratably among the general body of creditors H. & Co. were not made parties to the suit.

Held,—affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, R. S. C. ch. 120, and that after the goods were lawfully sold the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. (Ritchie C. J. doubting and Fournier J. dissenting).

Per Taschereau J.—That H. & Co. ought to have been made parties to the suit.

APPEAL from a judgment of the Queen's Bench for Lower Canada (Appeal Side) confirming a judgment of the Superior Court in favor of respondents, the defendants in that court.

Appellant sued as creditor of H. Haswell & Co., of

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

which firm Haldane Haswell is sole surviving partner, and alleged substantially:

That that firm owed him over $13,000 for goods sold and money lent in 1884, and on June 10th, 1884, made a voluntary assignment to A. W. Stevenson, with the acquiescence and express consent of appellant and respondents, and that by this insolvency all the property of the said firm became the common gage and pledge of the creditors, who were entitled to share ratably in the proceeds.

That respondents made advances to the firm on various dates, for which notes were taken and warehouse receipts given as collateral security.

That the firm becoming insolvent the respondents disposed of the collateral, and realized a surplus alleged to amount to $2708.27.

That demands had been made on the respondents to account and to pay over the balance to Stevenson, the assignee, the appellant, or such other person as might be entitled thereto, to the end that it might be divided ratably amongst the creditors, but that respondents in order to obtain an illegal preference had refused to account or to pay over the balance.

The respondents pleaded:

That they had for a long time previous, been dealing with H. Haswell & Co., and in the ordinary course of their banking business made not only the advances mentioned in appellant's declaration, but others upon collateral security of warehouse receipts; but they specially denied that such advances were made upon any understanding that such collateral was only to be held as against each particular advance, but that on the contrary it was agreed before and at the time of making the advances, and at all times during which the firm and the bank were doing business, that should the advances not be repaid the bank should have the

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right to sell the collateral securities and apply the surplus to any other debt the firm might owe, or hold the same as security for their current advances.

That the firm failed to repay the advances, and the bank realized on the sale of the collateral securities mentioned, more than the direct advances, but not sufficient to cover other advances upon collateral security not mentioned in the appellant's declaration. In these cases also the collateral had to be sold, leaving a deficit.

That in addition the bank made other advances to the firm, to the amount of $3981.62, which was obtained on a distinct understanding that any surplus, arising from the sale of security held by the bank, should be applied towards payment of these advances; that the advances were made in consideration and on the faith of this agreement, and respondents applied the surplus accordingly as they had a right to do.

By their second plea the respondents said:

That the $2780.27 referred to in plaintiff's declaration had been compensated and extinguished by the balance due on the secured loans, and the $3981.62 mentioned above.

The respondents also demurred to the action on the following grounds:

1. No privity of contract between them, and, if any one entitled to an account, it would be H. Haswell & Co., and it did not appear that appellant was their legal representative or stood in their right.

2. The alleged insolvency and voluntary assignment did not affect the right of the firm to sue for an account or give appellant any greater rights in that connection than he had before.

3. It did not appear by the declaration that the transactions between the respondents and H. Ha well

& Co., were fraudulent, or that the creditors were entitled to have the same set aside, and the action was in fact a direct action by a creditor for an account of dealings between his debtor and a third party.

It was proved at the trial that the bank had for a long time been discounting the business paper of Haswell & Co. on collateral, and that in March, 1883, long before the insolvency, on being asked to discount accommodation paper, Mr. Thomas, general manager, refused, except on condition that the surplus of all collateral security held or to be held should be applicable on any and all indebtedness to the bank.

The following is the form of the collateral security held by the bank:

"Montreal, 11th February, 1884.

"Manager of

"THE MOLSON BANK.

"In consideration of the Molsons Bank having discounted for us the undermentioned promissory note, viz:

"Note dated 11th February, 1884, falling due 14th June, 1884 for $1900, amounting in all to nineteen hundred dollars, we herewith deposit with you as manager, as collateral security for the due payment of the said note at maturity.

D. Campbell & Sons' warehouse receipt No. 1207.

45 bls. Raw Linseed Oil, average 49¾ galls., 2339¾ @ 54	$1225.86
50 bls. Raw Linseed Oil, average 40 galls., 2000 @ 54	1080.00
	$2305.86

in favor of ourselves, and endorsed with insurance of the Phœnix of Brooklyn Insurance Company for $3000, to 29th May, 1884.

"Should the above named note not be duly paid at

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maturity, the said the Molsons Bank is hereby authorized to dispose of the goods specified in the said warehouse receipts, in such a manner as it may deem advisable and to appropriate the proceeds so far as may be necessary towards the payment of said note. The whole without prejudice to the ordinary legal remedies upon the said note."

"H. HASWELL & Co.,

"*per pro.* C. J. Binmore."

Robertson Q.C., and *Falconer* for appellants.

The firm of Haswell & Co, our debtors, being notoriously insolvent under art. 1981 C.C. appellant has a right of action in his own name. The case of *Boisseau* v. *Thibaudeau* (1) supports this view.

The firm of Haswell & Co. have not been put *en cause*, but no exception has been taken to this in the pleadings, and in addition no injury can be done to defendants, inasmuch as Haswell & Co. are admittedly insolvent and therefore have no claim on their own estate. In addition, Mr. Haswell has signed a declaration declaring he puts himself before the court to abide the judgment to be rendered. Such a declaration has been held sufficient by the Court of Queen's Bench in an unreported case:—*Johnson* v. *The Consolidated Bank*, judgment rendered the 25th September, 1885.

The judgment of the Court of Queen's Bench in effect turns on a technicality, a mere question of procedure. It cannot be denied that in the absence of any special privilege appellant and respondents are entitled to share alike in all the assets of their common debtor. It is evident also that if the respondents are allowed to retain the moneys in question they will obtain more than their share. There must, therefore, be some remedy. An action by Haswell & Co. would be defeated, as against them the respondents have a

(1) 7 L. N. p. 274.

good defence, viz., compensation. The assignee cannot succeed, for he, holding under a voluntary assignment, is a transferee of the debtor only, and is in no way vested with the rights of the creditors; and, moreover, plaintiff has not abandoned his rights to the assignee. The right to an equitable distribution of the assets is a right belonging to the creditors only and to each of them, and they, therefore, are the proper parties to bring suit. The rights of creditors are not limited by Art. 1031 of the Civil Code referred to in the judgment of the Court of Queen's Bench, nor is that article applicable to the present case. It provides a means for creditors to increase their debtor's estate by bringing into it assets which the debtor neglects to secure, and has nothing to do with the distribution of the assets actually belonging to him, as in the present action which is brought not to deprive respondents of their rights in Haswell & Co.'s estate, but to secure an equitable distribution.

As to the conditions of the advances and respondents' rights to hold the surplus, the written contract between the parties shows clearly that the intention was that each advance should have its own security to apply to it alone. Any attempt to vary the terms of a valid written contract and to extend its stipulations is illegal—Art. 1234 C.C.—and contrary to section 46 of 34 Vic., ch. 5, of the Banking Act. See also Grant on Banking (1); *Adams* v *Claxton* (2); *Vandersee* v *Willis* (3); and especially *Talbot* v *Frere* (4); Taylor on Evidence (5).

In reply to respondents' third plea of compensation, appellant submits that an examination of respondents' claims, and a careful comparison of dates clearly shows

(1) 4th ed., p. 183.
(2) 6 Vesey 229.
(3) 3 Brown C.C. 22.
(4) 9 Ch. D. 568.
(5) 8 ed., secs. 1144–1158.

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that the plea of compensation cannot be maintained, inasmuch as the requisites for compensation as set forth in Art. 1188 C.C. (and in connection therewith Art. 1196), are wanting because—

1st. The debts were not equally liquidated and demandable.

2nd The right of compensation must have existed previous to the debtors' insolvency to avail against his other creditors, and the evidence shows that up to, and at the time of, such insolvency the debts did not have each for object a sum of money of a certain quantity of indeterminate things of the same kind and quality. *Perkins* v. *Ross* (1).

Geoffrion Q. C. and *H. Abbott* Q. C. for respondents. The appellant's action is apparently taken as representing his debtors, H. Haswell & Co., and such action is only justified by articles 1031 and 1032 C. C. A comparison of the former article with the corresponding articles of the Code Napoleon (2092, 2093), will show that our codifiers have adopted the view of those commentators on the Code Napoleon, who hold that the neglect or refusal of the debtor is an essential condition precedent to the exercise of his rights by the creditor (2).

The case of *Boisseau* v. *Thibaudeau* (3) is clearly distinguishable from this. There the payments were made directly by the insolvent to one of the creditors and to a creditor who had access to their books before the insolvency. The guilty knowledge of the creditor was proved and the case came clearly under art. 1036. The question of putting the insolvent debtor in default to exercise the action was not raised. Nor does it appear that there was any vesting by consent of the rights of the insolvent in the assignee, which would have estop-

(1) 6 Q. L. R. 65.
(2) 25 Demolombe, Nos. 48, 1026 and 186.
(3) 7 L. N. 275.

ped the plaintiffs, and, moreover, the assignment in this case is a mere voluntary assignment.

The agreement as alleged is proved, and apart from the points raised by the demurrer three questions remain:—

1. Is the agreement proved?

2. Was this agreement legal, and has the bank a right to retain the money?

3. If illegal, has the bank, having the money actually in hand, a right to set it off against the balance due?

As to the proof, we submit that the evidence is sufficient, and that verbal proof is admissible in all commercial matters unless expressly prohibited by law. Between individuals it would undoubtedly be perfectly legal.

The Bank Act, R.S.C. chap. 120, sec. 53 s.s. 4, provides in effect that the bank shall not acquire or hold a warehouse receipt as collateral for a debt, unless the debt is negotiated or contracted at the time, or upon promise that a warehouse receipt would be transferred.

The bank by law, to carry out the objects of its existence, has a right to engage in such trade as generally appertains to the business of banking (s. 45).

And by the law, the bank has a general lien on all securities for an unpaid balance of account.

The general lien of bankers is part of the law merchant to be judicially noticed, etc.

Unless there be an express contract, or circumstances showing an implied contract inconsistent with the principle of lien, the bankers have a general lien on all securities deposited with them as bankers by their customers. Grant on law relating to bankers, &c. (1). *Bank of Hamilton* v. *Noye Manufacturing Co.* (2).

The case of *Perkins* v. *Ross* (3) is also distinguishable.

(1) 4 edit. p. 244.

(2) 9 Ont. Rep. 631.

(3) 6 Q. L. R. 65.

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There the agreement gave no privilege on the goods pledged (1).

The creditor therefore only had a right under the agreement to set off the balance of the proceeds against an unsecured claim. The money never came into his hands until after the abandonment, when by the Insolvent Act it vested in the assignee, and the creditors had to deal with him. The assignee was a party to the suit, exercising his own rights and claiming the money.

Apart from these considerations the money actually came into the hands of the bank, no demand for it by the assignee has ever been made and the balance was still due the bank, and under these circumstances compensation took place.

Robertson Q.C. in reply referred to Larombière (2).

Sir W. J. RITCHIE C.J.—In this case I have had very considerable doubt, but as the majority of the court are of the opinion that the appeal should be dismissed, and as my judgment would not alter the result, I do not think it advisable to delay the judgment.

STRONG J. concurred in dismissing the appeal.

FOURNIER J.—L'appelant, créancier pour une forte somme de la société insolvable de M. Haswell & Co, maintenant représentée par M. Haswell seul, a poursuivi l'intimée, la banque Molson, en se fondant sur l'article 1981 du Code civil, déclarant les biens du débiteur le gage commun de ses créanciers, dont le prix doit se distribuer par contribution entre eux. Il allègue que l'insolvabilité de Haswell & Co., qui remonte à la date du 10 juin 1884, était à la connaissance de l'in-

(1) See Dorion, C.J. S.C. p. 78. (2) 3 vol. No. 27, p. 666.

timée qui savait aussi qu'ils avaient fait cession à A. W. Stevenson pour le bénéfice de leurs créanciers. La banque leur avait fait les avances suivantes :

Février 11 1884	$1900
Avril 1er 1884	2600
Mai 21 1884	3000
" " "	3000
Mai 23 1884	2200

Elle avait lors de chacune de ces avances, en particulier et à leurs dates respectives, exigé des sûretés collatérales de ses débiteurs, qui lui avaient transporté des reçus de marchandises en entrepôt leur appartenant, avec la condition spéciale que chaque sûreté délivrée ne serait une garantie que du remboursement du prêt particulier auquel elle était affectée ; que dans le cas de défaut de paiement des dites avances, les sûretés données pour chacune d'elles, seraient réalisées, et après remboursement des dites avances, la balance en serait remise à la dite société. Cette dernière ayant fait défaut, les sûretés données ont été réalisées et ont rapporté un surplus sur le montant de chacune des avances, produisant en totalité la somme de $2,708.27. Ce surplus, vu l'insolvabilité des dits Haswell & Co., devrait être partagé au marc la livre entre leurs créanciers, mais l'intimée retient illégalement cette somme dans le but de s'assurer au détriment des autres créanciers une préférence pour le paiement d'une balance de compte courant qu'elle réclame des dits Haswell & Co. L'action est à l'effet d'amener cette somme à distribution entre tous les créanciers.

L'intimée a plaidé par défense au droit que l'appelant n'était pas partie à la transaction entre elle et la société, Haswell & Co., et ne représentant pas légalement cette dernière, il n'avait aucun droit d'action, que l'insolvabilité de la dite société ne lui conférait pas plus de droit qu'il n'en avait auparavant, et qu'il

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n'avait pas allégué fraude. Cette défense en droit a été renvoyée.

Par un autre plaidoyer elle allègue qu'en vertu d'une convention spéciale avec Haswell & Co., le surplus qui pouvait résulter de la vente des sûretés devait être employé au paiement de la balance de leur compte courant, que ce surplus se trouve compensé par la balance du dit compte courant et d'autres avances non remboursées.

Le jugement de la cour Supérieure a considéré cette convention spéciale relativement à l'emploi du surplus comme prouvée, et renvoyé l'action en conséquence. La majorité de la cour d'Appel ne s'est pas prononcée sur ce point, mais elle a confirmé ce jugement sur le principe que l'appelant n'avait pas droit d'action à moins d'avoir préalablement mis son débiteur en demeure. C'est de ce jugement qu'il y a appel en cette cour.

Les deux seules questions qui s'élèvent sont, 1° l'appelant a-t-il droit d'action d'après les faits allégués dans sa déclaration; 2° la convention verbale que le surplus du produit des sûretés serait affecté au paiement de la balance du compte courant, est-elle légale et a-t-elle été légalement prouvée.

Quand au premier point sur le droit d'action, quoiqu'il y ait eu divergence d'opinion à cet égard, il me semble que cette question ne peut souffrir difficulté. L'appelant se fonde principalement sur l'article 1981, C. C., déclarant que:

> Les biens du débiteur sont le gage commun de ses créanciers, et, dans le cas de concours, le prix s'en distribue par contribution, à moins qu'il n'y ait entre eux des causes légitimes de préférence.

L'intimée, en retenant le surplus en question, agit en contravention à cet article et viole le droit de l'appelant d'être admis à la distribution de cette somme par contribution. De cette violation du droit conféré

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à tout créancier par cet article, naît le droit d'action de l'appelant. C'est moins le droit de ses débiteurs, Haswell & Co., qu'il exerce en vertu de l'article 1031, C. C., que celui que l'article 1981, assure à tout créancier sur les biens de son débiteur.

La faillite de Haswell & Co. a eu aussi l'effet légal de mettre au même rang tous leurs créanciers qui n'avaient ni privilège, ni hypothèque et de faire acquérir à ceux-ci le droit d'être appelés à la distribution des biens de leurs débiteurs au *pro rata* de leurs créances respectives. Cet état de faillite, malgré la révocation des lois à ce sujet, n'en est pas moins reconnu dans la province de Québec en vertu de l'article 17 C. C., paragraphe 23, qui le définit ainsi: "La faillite est l'état d'un commerçant qui a cessé ses paiements." Il est encore admis par l'article 1036, C. C., qui déclare nul le paiement fait par un débiteur à un créancier qui connaît son insolvabilité, et par l'article 2090, déclarant nuls les enrégistrements faits dans les trente jours qui précèdent la faillite. Cet état de faillite rend le débiteur incapable de disposer de ses biens au détriment de ses créanciers qui ont acquis de ce moment le droit d'être payés par contribution. Le droit que veut exercer l'appelant existe non seulement en vertu de l'article 1981, mais il est aussi la conséquence légale de la faillite. A cette époque, le 10 juin 1884, date de la faillite, l'appelant avait donc un droit acquis d'être admis à la distribution des biens de Haswell & Co., par contribution, et en particulier sur la somme de $2708.00 montant du surplus.

L'intimée prétend que du moment qu'elle est devenue débitrice de ce surplus envers Haswell & Co., il s'est alors opéré de plein droit compensation de cette somme jusqu'à concurrence d'autant avec la balance du compte courant qui lui était due par Haswell & Co. Mais elle n'a pu devenir débitrice de cette somme que par la

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réalisation qui seule a constitué Haswell & Co., ses créanciers d'une somme ainsi devenue claire et liquide et partant compensable, tandis que jusque là les dits Haswell & Co., n'avaient qu'un droit de se faire rendre compte des valeurs données comme sûreté collatérale, droit qui n'était pas susceptible de compensation. Ce n'est qu'après la faillite que la réalisation a eu lieu Ce fait important est prouvé par le témoignage de James Elliott. Avant cette réalisation l'appelant avait déjà acquis le droit à la contribution, et la réalisation subséquente en établissant une créance claire et liquide en faveur de Haswell & Co., n'a pu donner à l'intimée le droit d'invoquer la compensation au détriment du droit déjà acquis de l'appelant. Le Code civil, article 1196, contient une disposition à cet effet.

La compensation n'a pas lieu au préjudice du droit acquis à un tiers.

Dans ces circonstances l'intimée n'a pas le droit, sous prétexte de compensation, de retenir le montant entier du surplus; elle n'a, comme les autres créanciers, que le droit d'être admise à la distribution de cette somme entre eux au *pro rata* de leurs créances respectives. Autrement l'intimée obtiendrait une injuste préférence contre les autres créanciers.

Puisque la loi reconnaît à l'appelant ce droit à la distribution, elle doit certainement lui offrir un moyen de le faire valoir. Bien que le jugement de la cour du Banc de la Reine ait renvoyé l'action, la cour n'a cependant pas nié le droit d'action. C'est sur une omission de formalité qu'elle a fondé son jugement qui est motivé comme suit:

That the appellant failed to comply with the necessary requirements according to article 1031 of the Civil Code, to entitle him to exercise the action of his debtor who was not put in default before the institution of this action by a demand on him or his representatives.

Ce motif est-il fondé? Pour répondre à cette question je ne crois pouvoir mieux faire que de citer la réponse

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donnée par Sir A. A. Dorion dans ses notes sur cette cause :

As to the contention that the appellant had no right to bring this action unless he had previously summoned Haswell & Co., his debtors, to do so, it has no foundation whatsoever. The law does not require it, for article 1031 of the Civil Code, which authorises such an action, provides that : "creditors may exercise the rights and actions of their debtors, when to their prejudice he refuses or neglects to do so." The mere neglect is sufficient to authorise the bringing of the action, and it is neither necessary to allege nor to prove such neglect. If a prior summons were required, it would be necessary to establish a refusal in every case and no action could lie for mere neglect on the part of the debtor to sue although the article of the code expressly authorises it in such case.

The jurisprudence is well established in France on that point as is shown by Larombière (1). This writer, at No. 21, says :—"Hors de "là, aucune autre condition n'est exigée pour qu'ils (les créanciers) "puissent exercer les droits et actions de leurs débiteurs.—Il suffit "qu'ils soient créanciers et que celui-ci néglige de les exercer, sans "qu'ils aient préalablement à le mettre en demeure d'agir.

This jurisprudence has always been followed here, and the fact that a debtor has a right which he does not enforce has been considered as a neglect to perform a duty towards his creditors which authorises them to sue in his stead.

Le droit d'action exercé en cette cause a été reconnu par la cour du Banc de la Reine dans la cause de *Boisseau* v. *Thibaudeau et al.* (1).

Dans cette cause il s'agissait de faire prononcer la nullité du paiement fait en contravention de l'article 1036 C. C., par un débiteur à l'un de ses créanciers qui reconnaissait son insolvabilité. La cour a reconnu à un autre créancier lésé par ce paiement le droit de poursuivre en son nom le créancier illégalement préféré, et de demander que la somme ainsi reçue fut déposé en cour pour le bénéfice commun des créanciers suivant leurs droits respectifs. Alors comme à présent les lois de faillite avaient cessé d'être en force. Le principe admis par ce jugement doit recevoir son ap-

(1) Vol. 1, p. 699, Nos. 21, 22 and following. (2) 7 Leg. N. 274.

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plication dans cette cause, car les faits sont parfaitement analogues. Comme l'a fait observer l'honorable juge Ramsay, dans ses notes sur cette cause, il y a dans notre système de droit basé sur l'équité aucune règle expresse enlevant le droit d'exercer une semblable action.

L'objection fondée sur le défaut d'allégation de fraude ne peut avoir aucune force dans une action où il s'agit de faire rapporter à la masse des biens du failli, une somme que l'intimée veut s'approprier illégalement au détriment des autres créanciers; la préférence que l'intimée veut s'attribuer est évidemment en fraude de la loi qui règle la distribution des biens du débiteur, et cela suffit pour donner lieu a l'action du créancier lésé.

Quant à la deuxième question au sujet de la prétendue convention verbale, indiquée par l'intimée comme lui donnant droit de s'approprier le surplus, cette convention, si elle a eu lieu est illégale, et n'est pas prouvée.

La convention entre l'intimée et Haswell & Co., réglant les conditions des avances a été faite par écrit. Pour chaque avance faite pour garantir le paiement des divers billets, il existe une convention écrite contenant la condition suivante:

Should the above-named note not be paid at muturity the said Molson's Bank is hereby authorized to dispose of the goods specified in the said warehouse receipt, in such manner as it may deem advisable, and to appropriate the proceeds so far as may be necessary towards the payment of said note, and the goods are described as "collateral security for the due payment of the said note at maturity."

Ce contrat fait voir clairement que pour chaque avance il y avait une sûreté qui ne s'appliquait qu'à cette avance même, et que le surplus, après réalisation, demeurait la propriété de Haswell & Co., sans aucune appropriation particulière. Le surplus, arrivant la faillite, devenait le gage commun de tous les créanciers

et l'intimée n'y pouvait prétendre plus de droit que les autres créanciers. Aussi, pour soutenir sa prétention, l'intimée est-elle obligée d'invoquer une prétendue convention verbale qui aurait été faite avant l'écrit, comme lui donnant droit à ce surplus. M. Thomas, le gérant de la banque, est produit comme témoin pour prouver une telle convention ; mais il ne dit pas que cette convention a été faite après le contrat écrit. Haswell reconnaît dans son témoignage qu'une convention semblable à celle plaidée a été faite en 1883 au sujet d'une avance particulière de $5,000, fait en mars 1883, mais il en limite l'effet à cette avance particulière. M. Thomas a évidemment fait une erreur en parlant de cette convention, dont il ne donne pas la date, comme si elle avait eu lieu en même temps ou après la convention écrite. Son témoignage seul contre l'écrit qui prouve le contraire, ne peut suffire pour prouver cette convention. D'ailleurs cette preuve est illégale et contraire à l'article 1234 C. C. Si elle était admise, elle aurait l'effet de modifier un contrat par écrit qui dit que les sûretés devront être appliquées au paiement de chaque billet (*said note*) en particulier, tandis que la convention verbale en ferait l'application à d'autres créances que celles pour lesquelles les billets ont été donnés. Les conversations qui ont pu avoir lieu à ce sujet avant les écrits doivent être considérées comme non avenues, puisque les parties ont mis leur convention par écrit.

Bien plus, cette convention, même si elle était prouvée, serait illégale, comme contraire à l'acte des Banques, 34 Vic., ch. 5, sec. 46, tel qu'amendé par la 43e Vict., ch. 22, sec. 7, déclarant:

That the bank shall not hold any warehouse receipt to secure the payment of any note or debt, unless such note or debt be negotiated or contracted at the time of the acquisition thereof by the bank.

La preuve fait clairement voir que les sûretés ont été

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données pour une autre dette que celle de la balance du compte courant, pour laquelle il n'en a été donné aucune. L'intimée ne s'étant pas conformée aux dispositions de l'acte des banques, elle n'a pu acquérir aucun privilège sur le surplus, et elle le retient évidemment en violation de l'acte des Banques.

Par tous ces motifs, je suis d'avis d'allouer l'appel.

TASCHEREAU, J.—It seems to me that Haswell and Company should be a party in this case. The writing fyled in the record signed by Haswell, is irregular and cannot be looked at; and moreover Haswell does not legally represent the firm. I have no difficulty however in satisfying myself that the judgment of the Superior Court is perfectly right, and that the defendants have fully established the agreement with Haswell & Co. by which they were entitled to keep these monies in payment of their claim. I do not see in this agreement anything against the provisions of the Banking Act.

PATTERSON, J.—The judgment from which this appeal is brought is that of three of the learned judges of the Queen's Bench, from whose opinion the Chief Justice and Mr. Justice Tessier dissented. I think the decision of the majority should be affirmed, but at the same time I agree with some views expressed by the dissenting judges.

The objections taken to the *locus standi* of the plaintiff and given effect to in the judgment of the court do not seem to me to be well founded. The construction put upon article 1031 of the Civil Code by the dissenting judges commends itself to my judgment as more reasonable than that which requires some formal demand by the creditor, or some express refusal by the debtor, before the debtor can be said, within the

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meaning of the article, to refuse or neglect, to the prejudice of his creditor, to exercise his rights and actions. So far I go with the minority of the court below. I am further prepared to adopt the opinion which I understand to have been held by the minority, that the plaintiff's right of action exists independently of article 1031. But I agree with the conclusion that the plaintiff has failed to sustain his action for the reasons on which the judgment of the Superior Court, as given by Mr. Justice Taschereau, proceeded.

We have no complicated or disputed facts to deal with.

The bank having taken from Haswell several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claims to hold that surplus in payment of other debts due by Haswell, while Haswell having become insolvent the plaintiff insists that the surplus must be distributed ratably among the creditors generally.

With each warehouse receipt the bank took from Haswell a memorandum of the deposit of the receipt as collectual security for the particular note, each memorandum containing these words:

> Should the above named note not be duly paid at maturity, the said The Molsons Bank is hereby authorized to dispose of the goods specified in the said warehouse receipt, in such manner as it may deem advisable and to appropriate the proceeds so far as may be necessary towards the payment of the said note. The whole without prejudice to the ordinary legal remedies upon the said note.

The documents say nothing of the surplus that might remain after a sale of any of the goods, nor was it necessary that they should do so. The surplus must, of course, be accounted for to Haswell or to some one entitled through him, and, being outside of the

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written memoranda, could be made the subject of any other agreement or be disposed of by Haswell as he pleased. The argument to the effect that an oral agreement respecting these surplus moneys, such as the agreement proved to have been verbally made between Haswell and the general manager of the bank that the bank might retain the surplus, if a surplus there should be, towards the payment of other debts of Haswell, was in violation of the rule against varying a written instrument by parol, is founded on a misconception. That agreement in no way varied the agreements evidenced by the writings, but was perfectly consistent with them.

It was urged that these surplus moneys having come to the hands of the bank through the medium of warehouse receipts, and the agreement respecting them being made while the bank held the receipts and before the sales under them, and the power of the bank in relation to warehouse receipts being defined and limited by the Banking Act, the agreement was illegal and beyond the power of the bank.

I have not the advantage of knowing the views of any of the learned judges in the courts below upon this contention, except the learned Chief Justice and the learned judges who dissented with him from the judgment of the court. It is with some diffidence that I feel myself unable to assent, as they appear to have done, to the contention, but, with great respect, I venture the opinion that the views adopted are founded on a misconception of the effect of the statute.

The provisions are now found in the Bank Act, R S.C., chap. 120, sec. 53, the material parts of which I shall read—

"The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business——"

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Pausing here for a moment let us see in what respect the common law is changed. The warehouse receipt is a receipt by a warehouseman for goods in his warehouse. The goods themselves could always have been pledged as security for debts. Whatever was the mode of effecting the transfer of property or possession by which the pledge was made, whether by actual delivery of the goods, or under the English system by deed, the goods could by some mode of conveyance be effectually pledged. But the process was cumbrous and slow, and the statute aims at providing a simpler and speedier way of doing the same thing in connection with the business of banking. We are of course aware that, though this Dominion statute deals only with banks, which are within the exclusive legislative jurisdiction of the Dominion, the principle is made of more general application by provincial legislation. The principle is indicated by the passage which I have read, but the practical enactment follows. The clause proceeds:

> And the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisitiou thereof, all the rlght and title of the previous holder or owner thereof, or of the person from whom such goods, wares or merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank instead of to the previous holder or owner of such goods, wares or merchandise.

In other words, the warehouse receipt acquired by the bank operates as a conveyance of the goods to the bank. What is done is not so much to create a new right as to provide a new mode of conveyance. I say nothing of bills of lading which need not enter into the present discussion, and which hold a position different from warehouse receipts under the law merchant.

I shall read only one other passage, which is quoted by one of the learned judges in the court below:

> The bank shall not acquire or hold any warehouse receipt or bill of

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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,—or, &c.

I do not doubt that if Haswell had paid up his notes the effect of what I have just read would have been to annul the title of the bank to the goods held under the warehouse receipts, and to disable the bank from insisting on holding the goods or the receipts as security for the current account. The bank would not have handled or received actual possession of the goods, and the title under the receipts would have become effete. This was probably the history of the earlier transactions of the kind between Haswell and the bank. But, under events as they have happened, the title to the goods was vested in the bank; the goods were lawfully sold; and the money that remained after applying the proceeds of each sale to its proper note was simply money held to the use of Haswell. It was not held under the warehouse receipts, and it had to be accounted for like the excess over the mortgage moneys in the case of *Talbot* v. *Frere* (1) which the appellant cites in his factum.

The plaintiff insists that it must go for ratable distribution among the creditors. The defendants maintain that they have a right to apply it on account of what Haswell owes them, by reason of his agreement that it should be so applied.

The testimony of Mr. Haswell and Mr. Thomas establishes an agreement that the surplus moneys from securities, such as the warehouse receipts which we have been discussing, should be security for any debts Haswell owed or should owe the bank. The agreement went further than that, for it embraced the advances made on the security of the warehouse receipts, which would not have been made if the disposition of

(1) 9 Ch. D. 568.

the surplus which might have come into the hands of the bank had not been agreed to. The making of those advances was part of the consideration for the agreement as to the surplus. The accounts given by Haldane Haswell and by Mr. Thomas are substantially alike. I shall read that given by Mr. Thomas.

Question—Have you had any conversation with him (Mr. Haswell) with reference to the application of surpluses which might arise from the realization of collateral security held by the bank towards the payment of other advances that were made by the bank to him, and if so, will you state what such conversations were, and when they occurred?

Answer—Yes, I had one, and I imagine it was about the time Mr. Haldane mentioned, in March, eighteen hundred and eighty-three, and I objected to making the advance. Mr. Haldane was in very great need of receiving a certain sum of money, and he asked me to make him an advance on collaterals. I demurred to making the advance as our advances on collaterals were pretty large then at the time, and we had other advances unsecured, the unsecured advances being certain notes, the amount of which I do not remember now, certain notes signed by the firm, and indorsed by the two brothers individually. I wanted, in fact, to get the whole of those notes entirely covered, but he said he was unable to give collaterals and did not feel inclined also to give collaterals enough to cover them, and then I asked him if I made him the advance if he would agree that any surplus arising from that advance or any other collateral existing, or that we might take in the same way, should be applied to the payment of these notes of the firm, indorsed by the partners individually, or any other paper, and in fact to apply to any advance as the bank liked, and he agreed to it, and unless he had agreed to it I would not allow the advances to be made. That was one occasion, but there were several occasions. Mr. Haldane forgets, I believe, two or three occasions in which a somewhat similar conversation occurred. I did it believing at the time, that is in March, 1883, that I could have enforced payment by suit.

It was only to help him that I agreed to take transfer, it was a verbal one, a transfer of any surplus.

Question—And by those said notes you mean the notes signed, similar to the ones, Exhibits 4 and 7?

Answer—Yes, those notes indorsed by Haldane Haswell and his brother Charles. I think there were more than these running. I think the amount originally was about six thousand dollars.

Question—But they were notes of which Exhibits 4 and 7 are renewals?

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Answer—Yes.

Question—Has the bank account of Haswell & Co. been carried on under that understanding ever since?

Answer—Yes.

These exhibits 4 and 7 are promissory notes dated the 6th of February and the 5th of March, 1884, for the amounts respectively of $1,375 and $1,500, portions of Haswell's debt to the bank.

The date given for the first conversation out of which the verbal agreement arose, March 1883, is a year earlier than any of the warehouse receipts now in question, which run from the 11th of February to the 24th of May, 1884, but the agreement, as stated, was a continuing agreement applying to any surplus which should come into the hands of the bank. The insolvency of Haswell appears to have occurred, or at all events to have first become notorious, in June 1884.

I see no good reason to differ from the decision of Mr. Justice Taschereau in the court of first instance concerning the agreement respecting these surplus moneys. That judgment was affirmed in appeal on the same grounds, although in the appellate court greater weight seems to have been accorded to the view taken by the majority of the incapacity of the plaintiff to maintain the action; and the judges who would have reversed the decision treated this particular point only with reference to the Bank Act.

I think we should dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Abbotts & Campbell.*

JAMES M. MITCHELL (DEFENDANT).....APPELLANT ; 1889

AND

*May 16.

*June 14.

CHARLES HOLLAND, *ès-qual.* (PLAINTIFF)..... .....RESPONDENT.

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

Estoppel—Art. 19 *C.C.P.—Right of suit by trustees—Promissory notes given as collateral for price of sale—Prescription.*

C.H. (the respondent) as trustee for certain creditors of the firm of R. M. and sons, sued J.M.M. (the appellant), a member of the firm, for $4,720, alleging : 1. A registered notarial transfer from one J.R.M. to him, as trustee, of a similar sum with all rights, mortgages, &c., thereunto appertaining, due by the said appellant to J.R.M. for the price of certain real estate in Montreal ; 2. A transfer of certain promissory notes signed by the appellant for the same amount and representing the price of sale of said property, but which were to be in payment thereof only if paid at maturity. The appellant was a party and intervened to the deed of transfer and declared himself satisfied and subject to its conditions.

The appellant pleaded that the respondent had no action as trustee under article 19, C.C.P. and that the price had been paid by the two promissory notes which were now prescribed.

Held, 1, affirming the judgment of the court below, that article 19 C.C.P. was not applicable. The appellant having become a party to the registered transfer, which gave the respondent as trustee all mortgagee's rights, was estopped from denying the efficacy of such deed or of the right of the plaintiff to sue thereunder in his quality of trustee. *Burland* v. *Moffatt* 11 Can. S.C.R. 76 and *Browne* v. *Pinsoneault* 3 Can. S.C.R. 103 distinguished.

2. That the notes in question having been given as collateral for the price of sale of the property, and the property not having been paid for, the plea of prescription as to the notes could not avail against an action for the price.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the

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

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judgment of the Superior Court, which dismissed the action of the respondent.

The suit in this case arose out of a deed of settlement made between the defendant and the plaintiff as trustee for the defendant's creditors, and bearing date 31st October, 1877.

On the 1st December, 1877, J. R. Mitchell transferred, for value received to the plaintiff in his said quality of trustee a sum of $4,720.20, with all hypothecary rights, due to him the said J. R. Mitchell by the defendant as the price of certain real estate in Montreal and to secure which sum the defendant had hypothecated the property purchased (*bailleur de fonds*) as stated in a deed of sale dated 5th January, 1877.

By the deed of transfer of the 1st December, 1877, J. R. Mitchell also delivered up to the plaintiff two promissory notes amounting to $4,720.20 which had been given by the defendant in payment of the purchase price of the property, provided they were paid at maturity, and produced to be attached to the deed, but not otherwise, as appears by the following clause in the deed:

"Provided always, however, and it is hereby expressly declared, agreed and understood by and between the said parties hereto, that the consideration sum of $4,720.20, or any part thereof, shall not be held to be paid or discharged unless both said promissory notes are fully paid at maturity, and the said two promissory notes being so paid shall be produced by the said purchaser, his heirs, or assignees, and cancelled and annexed to these presents: when, if required by the purchaser, a discharge therefor in notarial form will be granted."

It was agreed also in this deed of transfer that if a certain sum of $6,000, of which the said sum of $4,720.20 formed part should be paid as set forth in a

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deed of settlement; recited in the deed of transfer, the plaintiff should re-transfer the amount transferred to J. R. Mitchell, together with the hypothec.

And to this deed of transfer intervened the defendant, who declared that he had taken communication of the deed and understood it, and was content and satisfied and accepted signification.

On the 8th of January, 1879, when the two promissory notes became due and payable, they were duly presented to the bank, and payment was demanded but was refused.

On the 25th September, 1885, the plaintiff in his said quality of trustee, sued the defendant, alleging in substance the above facts. He concluded by praying *acte* of his declaration, that he was ready to restore the notes, and asked for judgment for the said sum of $4,720.20, with interest and costs.

The defendant pleaded *inter alia*:—1, that the plaintiff had no right to sue in his quality of trustee, having no right or standing to appear as such before the court, being merely the mandatary or attorney of the creditors; 2, that the promissory notes which had been given in payment of the purchase price were prescribed.

McCord for appellant: The plaintiff had no right to sue in the quality of trustee, having no right or standing to appear as such before the court, being merely the mandatary or attorney of the creditors named, Arts. 13 and 19 C. C. P.; *Browne* v. *Pinsoneault* (1); *Burland* v. *Moffatt* (2).

And although it might appear, at first sight, that these decisions as bearing on this case have been questioned in a manner by the Privy Council in the case of *Porteous* v. *Reynar*, (3) I contend that this case of *Porteous* v. *Reynar* (3) is totally dissimilar to the present one, and

(1) 3 Can. S. C. R. 102. (2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.

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that plaintiff's action was rightly dismissed by the Superior Court. He is not an assignee appointed by any court, or with any status which a court can recognize. The agreement *sous seing privé*, is the only basis on which he could presume to sue. There was no assignment by the insolvent firm to him. There was no necessity for a private assignment, for the Insolvent Act of 1875 was in force. The creditors of the firm of Robert Mitchell & Sons are individually parties to the deed; they accepted a composition, accepted notes in payment thereof, on which each individual could sue, and they appointed the plaintiff as their agent to hold the collateral security received from Dame Eliza Lane Mitchell. In the case of *Porteous* v. *Reynar*, the plaintiffs, as trustees, derived their title from the official assignee; in this case plaintiff had no authority, except as agent for the creditors, who could have urged their own rights, and cannot plead *avec nom d'autrui*. See also *Huot. Dubeau* (1); *Nesbitt* v. *Turgeon* (2); *May* v. *Fournier* (3).

I also contend that the plaintiff's action must fail also for the $6,000, the amount of the composition agreed to, and the notes given, must be taken as paid or prescribed. It was clearly the duty of the creditors, if they had wished so to do, to have themselves sued on the composition notes. They did not do so—and may never have had the intention of doing so. They allowed the notes to be prescribed. The notes were never even produced in this case, and it is to be borne in mind they were never even placed in plaintiff's hands. His whole function was the passive holding of the collateral notes received by him from Mrs. Mitchell under the deed *sous seing privé*. Once the composition notes were

(1) 10 Q. L. R. 92. (2) 2 Rev. de Lég. 43.
(3) M. L. R. 1 S. C. 389.

prescribed or paid, viz., on the 8th January, 1884, his functions ceased and he was bound at that date to hand back to Mrs. Mitchell the collateral received by him from her and return the *bailleur de fonds* or mortgage to James M. Mitchell. It cannot be held for a moment that the composition notes are not merchantable; no class of security could be more so.

The collateral received for the security of these mercantile notes was likewise mercantile, and is governed by the prescription of five years.

As to the accessory character of the collateral security and of rights of hypothec, the learned counsel referred to Laurent (1) and Pothier (2).

H. Abbott Q.C., and *Lonergan* with him for respondent.

The defendant is estopped by his own acts and deeds.

He was a party to the deed by which the plaintiff acquired these hypothecary rights upon which this action is based. The plaintiff in his capacity is fully described there, and it is stipulated that:

> The said Charles Holland is hereby authorized to prosecute the recovery of the hereby assigned sums of money, in capital and interest, either in his name or in the name of said John Ross Mitchell, who, &c.

To this deed the defendant intervened and declared:

> That he has had and taken communication of these presents, and that he understood the same, and is content and satisfied therewith, and he did, and doth hereby accept signification thereof, subject to all the conditions and stipulations thereof.

He was also a party to the deed *sous seing privé*, produced by himself.

Can he be heard to deny his deed or oppose its provisions without showing that such an agreement was contrary to public order or the policy of the law?

In France, clearly, the plaintiff's action would be maintainable, apart from any question of estoppel on

(1) Vol. 31 Nos. 357 *et seq*, 369. (2) Vol. 1 p. 578.

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a variety of grounds, and it is difficult to see in what way our law can differ, unless by gradual growth of judicial decision, as there is no legislation which can account for such a difference. *Starke* v. *Henderson* (1); S. V. (2); *Carpenter* v. *Buller* (3); Best on Evidence (4); Taylor on Evidence (5).

In France under the *Ordonnance de Commerce* and prior to it, a similar number of creditors might have formed a *Union de Créanciers* and appointed a Syndic, or representative, as was done in this case, and this, it is submitted, is still the common law of this country.

In France, too, associations of persons not incorporated may appoint a person to exercise rights of action belonging to them all. See S. V. (6).

It has also been held that a *prête-nom* may sue especially persons who have contracted with him knowing him to be a *prête-nom*: that *quoad* such persons he is owner and mandatory only as regards mandator. See S.V. (7); Laurent (8); Aubry et Rau (9).

The decisions of the courts in this country are found in the following cases: *Allsopp* v. *Huot* (10); *Nesbitt* v. *Turgeon* (11); *Crémazie* v. *Cauchon* (12); *Robillard* v. *The Société de Construction* (13); *Valières* v. *Drapeau* (14); *Browne* v. *Pinsoneault* (15); *Moffatt* v. *Burland* (16).

In *Browne* v. *Pinsoneault* (15) the decision was practically the same as in *Alsopp* v. *Huot* (10) above cited, viz., that because an agent, or attorney, concluded a contract, as agent, it did not follow that he could sue upon it as agent. Judge Taschereau's remarks (17) make this perfectly clear.

(1) 9 L.C.J. 238.
(2) 52, 2, 303 : S. 80. 1. 56 & 89.
(3) 8 M. & W. 212.
(4) Par. 542 & 544.
(5) Par. 97.
(6) 66,1,358; 76,1,166; 80, 1,56.
(7) 54, 5, 14; 64, 1, 105.
(8) Vol. 28, No. 76, p. 82.
(9) Vol. 4, p. 635.
(10) 2 Rev. de Lég. 79.
(11) 2 Rev. de Lég. 43.
(12) 16 L.C.R. 482.
(13) 2 L.N. 181.
(14) 6 L.N. 154.
(15) 3 Can. S.C.R. 102.
(16) 11 Can. S.C.R. 76.
(17) 3 Can. S.C.R. 114.

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The next point raised by the pleadings is the question of prescription.

Has a five year's prescription destroyed the original claims of the creditors, or are the notes given in connection with the sale presumed to be paid.

On the first question the plaintiff submits that the law is clear; that where a debt exists, and the debtor gives the creditor, or any one on his behalf, a pledge or security the debt can never be prescribed so long as the pledge or security is not redeemed. The reason is simple. Prescription is founded on a legal presumption of payment. Hence, a presumption cannot exist in the case given, because if payment had been made the debtor would, without doubt, have redeemed the pledge or security, and his allowing it to continue in the creditor's possession is considered a perpetual and recurrent acknowledgement of the indebtedness.

The justice of the rule is apparent. The creditors cannot acquire the pledge by prescription without inversion of title, nor should the debtor be allowed to lull the creditor into a feeling of security by the possession of the pledge and then take advantage of his own conduct to claim a discharge by prescription. Duranton (1); Troplong, Nantissement (2); Troplong, Prescription (3); Pont, Petits Contrats (4).

SIR W. J. RITCHIE C. J.—This was an action for the price of land in which two notes were taken as security. The defence was that the notes were prescribed. Mr. Justice Taschereau has permitted me to read his reasons for judgment, in which he has gone fully into the matter, and I can only say that I think the notes were taken merely as collateral, and that this action was for the purchase money to which the defence cannot be maintained.

(1) 18 vol. s. 553; vol. 21, s. 253.
(2) Sec. 474, 478, 551, 552.
(3) Sec. 534, 618.
(4) 2 vol., 1166.

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

TASCHEREAU J.—I would dismiss the appeal.

The action, it appears, was instituted by the respondent, Holland, in his capacity of trustee for certain named creditors of the insolvent firm, Robert Mitchell & Sons.

The declaration is rather diffusedly drawn, but, however, alleges sufficiently that the respondent claims from the appellant a sum of $4,720, being the price of a sale of certain real estate by one John Ross Mitchell to the appellant, by deed dated the 5th January, with mortgage in the usual form, which sum, still due by the appellant, has, by deed of 1st December, 1877, been transferred and assigned to the respondent. The defendant bases his defence to the action, partly on the ground that the plaintiff has no action as trustee under article 19, C. C. P. 2nd. On the ground that he has paid the said price of sale, by two promissory notes, which said promissory notes are now prescribed, and, in law, now presumed to have been duly paid.

As to this last ground, which I shall dispose of first, a simple reference to the deed of sale proves it to be utterly unfounded. It is expressly stipulated in the said deed, that the said two notes shall be in discharge of the price of sale only *when paid*, and, in another clause of this deed, it is further agreed that:

> Provided, always, however, and it is hereby expressly declared, agreed and understood by, and between the said parties, hereto, that the consideration sum of $4720.20, or any part thereof, shall not be held to be paid or discharged unless both said promissory notes are fully paid at maturity, and the said two promissory notes being so paid shall be produced by the said purchaser, his heirs or assignees and cancelled and annexed to these presents: when, if required by the purchaser, a discharge therefor in notarial form will be granted.

Now, not only were these notes not paid at maturity, but they have never been paid at all. The price of

sale consequently remains unsatisfied and the mortgage on that property is in full force and effect. The transfer of that mortgage to Eliza Lane Mitchell relied upon for this defence by endorsement on these promissory notes is invalid and ineffectual. It has not, and could not be registered, whilst the transfer to the plaintiff was registered on the 29th April, 1878. The deed *sous seing privé* of the 31st October, 1878, was also never registered. Then these promissory notes are produced in court by the plaintiff, with a declaration of his willingness to hand them over to the defendant upon payment of the price of sale. Upon these facts, I cannot see how the defendant can ask the dismissal of the action. They certainly have never paid for this property. The mortgage given in the deed of January 5th, 1877, has certainly never been discharged. It stands in the Registry Office in the plaintiff's name. and can be radiated only by him, or a *quittance* from him.

Now, as to the defendant's contention, that the plaintiff as trustee has no action against him. On this plea, also, I think that the defence fails. The plaintiff was appointed trustee by the *sous seing privé* deed of 31st October, 1877. To this deed the defendant was a party. Moreover, he, the defendant, was a party to the deed of transfer by which the respondent acquired these hypothecary rights upon which this action is based. The respondent in his capacity as trustee is fully described there, and it is stipulated that "the said Charles Hol-"land as trustee is hereby authorized to prosecute the "recovery of the hereby assigned sums of money, in "capital and interest, either in his name or in the name "of said John Ross Mitchell."

To this deed the defendant intervened and declared, "That he has had and taken communication of these presents, and that he understood the same and is content and satisfied therewith, and he did, and doth

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hereby accept signification thereof, subject to all the conditions and stipulations thereof."

The respondent replied to this plea "that defendant has no right or interest to deny his capacity to bring the action, and further that defendant having intervened in the deed of transfer, as set forth above, is estopped from denying the efficacy of the same and the plaintiff's quality as set forth therein."

The respondent's replication, it seems to me, is unanswerable. If the appellant was satisfied and contented with a deed which gave the respondent the right to sue him, and intervened to that deed expressly to say so, he must remain contented and satisfied when he is sued accordingly. Moreover, as I have already noticed, this deed of transfer has been registered, and of course registered in favor of the respondent as trustee and that registration is specially alleged in the declaration. He, as trustee, has the mortgagee's rights and hypothec.

The appellant relied, in support of this plea, on the cases of *Browne* v. *Pinsoneault* (1) and *Burland* v. *Moffatt* (2). But as reference to these cases will show that they have just as much application to this case, as they had to *Porteous* v. *Reynar*, in the Privy Council (3) where their Lordships say, after mentioning the fact, that the Court of Queen's Bench had based their judgment, in that case, on the cases of *Browne* v. *Pinsoneault* (1) and *Burland* v. *Moffatt* (2):

> Their attention does not appear to have been directed to the totally different circumstances of the present case.

And, later on,

> The case before their Lordships is so different, that even if the two preceding decisions were untouched, they would not necessarily affect the decision of their Lordships on the present appeal.

The appellant here has also failed to see the distinc-

(1) 3 Can. S. C. R. 102. (2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.

tion between this case and those cases. In the present case, he was a party to the assignment by John Ross Mitchell to the respondent as trustee, and expressly ratified the agreement contained therein, that the respondent would, in default of payment, have a right to sue the appellant. There was nothing of that kind in *Browne* v. *Pinsoneault* (1), still less, in *Burland* v. *Moffatt* (2), where the gist of the decision of this Court is that the assignee (not under an Insolvency Act) has no more rights than the assignor had. Art. 19 of the C. C. P. *Nul ne peut plaider par procureur*, was perhaps unnecessarily referred to in that case.

That an assignee, or a *cessionaire*, has the rights and actions of the assignor, as held by the Privy Council in *Porteous* v. *Reynar* (3), this court had expressly recognized in the case of *Burland* v. *Moffatt* (2). Referring to the case of *Starke* v. *Henderson* (4) where the action taken by the assignee was purely and simply the assignor's action, in *Burland* v. *Moffatt* (2), far from questioning the right of the assignee to sue under these circumstances I remarked (5):

> Of course, in exercising the assignor's action, and claiming the assignor's rights and debts, the assignee does it in the interest of the creditors as well as of the assignor, but that is quite different. It is then, as any *cessionnaire* may do, the actions pertaining to the assignor, the actions that before the assignment or without it, the assignor would himself have had which he (the assignee) then brings, whilst here the assignee claims rights pertaining to the creditors alone, and to which his assignor could never have had any claim.

Then the case of *Prevost* v. *Drolet* (6) is referred to by me and distinguished (7).

> As the plaintiff there also claimed purely and solely as *locum tenens* of the assignor a debt due to the assignor.

This, it seems to me, is all that *Porteous* v. *Reynar* (3) in the Privy Council determines. There, clearly, the plaintiffs exercised nothing but an action that clearly

(1) 3 Can. S. C. R. 102.
(2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.
(4) 9 L.C. Jur. 238.
(5) 11 Can. S.C.R. at p. 85.
(6) 18 L.C. Jur. 300.
(7) 11 Can. S.C.R. at p. 86.

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belonged, before the assignment, to their assignor, Walker, an official assignee under the Insolvent Act. And the privity of contract that, in that case, so clearly existed between the assignees and the defendant, rendered the case still less doubtful.

Appeal dismissed with costs.

Solicitor for appellant: *David R. McCord.*

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

BEVERLY WHITE (DEFENDANT).....APPELLANT; 1889

*Oct. 26.

AND

MARIA PARKER, ADMINISTRATRIX OF THE ESTATE AND EFFECTS OF DAVID M. PARKER, DECEASED (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—New trial—Abatement of action—Death of plaintiff—Actio personalis moritur cum personâ—Railway accident—Lord Campbell's act.

P. brought an action against a conductor of the I.C.R. for injuries received in attempting to board a train and alleged to be caused by the negligence of the conductor in not bringing the train to a stand still. On the trial P. was non-suited and on motion to the full court the non-suit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial P. died and a suggestion of his death was entered on the record. On appeal to the Supreme Court of Canada from the order of the full court:

Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (C.S. N.B. ch. 86) an entirely new cause of action arose on the death of P. and the original action was entirely gone and could not be revived.

There being no cause before the court the appeal was quashed without costs.

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

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THOMAS McDONALD AND ALBERT EDWARD KEMP (DEFENDANTS).... } APPELLANTS;

AND

ROBERT J. GILBERT (PLAINTIFF).....RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Action for small amount—Propriety of—Partnership—Evidence of—Names of partners on letter heads.

Although the court cannot refuse to hear an appeal in a case in which only twenty-two dollars is involved, yet the bringing of appeals for such trifling amounts is objectionable and should not be encouraged.

The representation of an agent that his principals are a firm in a distant Province, and that such firm is composed of A. and B., coupled with evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such person, is *primâ facie* evidence that A. and B. constitute said firm.

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

The plaintiff, Gilbert, met in St. John, N.B., one Eddy, who represented himself to be the agent of the firm of McDonald, Kemp & Co., of Toronto, and as such agent sold the plaintiff a quantity of metallic shingles, to be delivered at St. John at certain prices, freight free. At the time of this transaction the agent informed the plaintiff that the defendants (appellants) composed the said firm of McDonald, Kemp & Co.

The plaintiff immediately wrote to the defendants stating the terms of his agreement with the agent.

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

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The defendants shipped the shingles and drew on plaintiff for the price; he paid the draft and went to the railway station for the shingles when he found that the freight, some $22, had not been paid and he was obliged to pay it; he drew on the defendants for the amount but they refused to accept the draft and this action was brought to recover the $22.

The only question raised in the case which was dealt with on the appeal was whether or not there was sufficient evidence of the defendants composing the firm of McDonald, Kemp & Co. In addition to the statement of the agent that they were the members of that firm, the plaintiff put in evidence letters received by him in answer to letters written to said firm and similar letters received by his solicitors in the course of correspondence about plaintiff's claim. All these letters were written on paper with printed headings containing the firm name and the name "Thomas McDonald" in one corner and "A. E. Kemp" in the other.

The learned judge who presided at the trial thought the evidence of partnership insufficient and on that and other grounds of motion therefor non-suited the plaintiff. On motion to the full court pursuant to leave reserved at the trial the non-suit was set aside and judgment entered for the plaintiff for $22.68. From that judgment the defendants appealed to the Supreme Court of Canada.

Weldon Q.C. for the appellants.

Barker Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—(His Lordship during the argument stated that while the court could not refuse to hear an appeal in which such a trifling sum was involved, yet the bringing of such appeals was highly objectionable and to be in every way discouraged. He

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hoped it would be the last instance of the kind in this court).

We have no doubt at all in this case. Eddy was authorised to sell the singles. The purchaser very properly inquired who were the members of the firm from whom he purchased, and was informed by the agent who they were. He then corresponded with the firm and received replies written on paper containing the names of the different partners. I think the evidence most conclusive, particularly when the defendants did not attempt to deny the partnership.

The other judges concurred.

Appeal dismissed with costs.

Solicitors for appellants : *Weldon & McLean.*

Solicitors for respondent : *G. C. & C. J. Coster.*

CHARLES A. E. SHAW (PLAINTIFF).....APPELLANT; 1889

AND *Dec. 9.

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

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Appeal—Jurisdiction—Final judgment—Judgment on demurrer to replication to plea.

The judgment of a provincial court allowing a demurrer to the plaintiff's replication to one of several pleas by the defendants, which does not operate to put an end to the whole or any part of the action or defence, is not a final judgment from which an appeal will lie to the Supreme Court of Canada.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1) affirming the judgment of Mr. Justice Killam, by which a demurrer to the plaintiff's replication to one of the pleas was allowed.

The action in this case was for an alleged breach of contract by the railway company to carry the plaintiff's goods safely over a portion of their line and deliver them to the plaintiff. The defendants pleaded a number of pleas, one being that they undertook to carry the goods under a special contract by the terms of which their liability was to be limited to wearing appared not exceeding in value $100; that they were nder no liability as to the goods which were not wearing apparel; and they paid into court $100 as all they were chargeable with under such special contract.

The plaintiff made two replications to this plea, the second of which was that the special contract did not

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

(1) 5 Man. L. R. 334.

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relieve the company from liability as the alleged loss and damage arose from the negligence of the defendants within the meaning of the Consolidated Railway Act of 1879 sec. 25, sub-sec. 4.

The defendants demurred to this replication on the grounds, among others, that it was a departure from the declaration which was in contract while the replication was in tort, and that the statute did not prevent them showing the terms of the special contract. The demurrer was argued before Mr. Justice Killam and allowed, and on appeal to the full court his judgment was affirmed. The plaintiff then appealed to the Supreme Court of Canada. The respondents, in their factum, took the objection that the judgment appealed from was not a final judgment from which an appeal would lie to the Supreme Court.

McCarthy Q.C. for the appellant referred, on the question of jurisdiction, to the cases of the *Bank of British North America* v. *Walker* (1) and *Reid* v. *Ramsay* (2).

A. Ferguson for the respondents, was not called upon.

By the court. The appeal must be quashed.

Appeal quashed with costs.

Solicitors for Appellant: *Ewart, Fisher & Wilson.*

Solicitors for Respondent: *Aikins, Culver & Co.*

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(1) Cassels's Dig. 244.

(2) Cassels's Dig. 238.

APPENDIX.

UNREPORTED CASES DECIDED SINCE THE ISSUE

OF

VOL. XIV.

APPENDIX.

UNREPORTED CASES DECIDED SINCE THE ISSUE OF VOL. XIV.

THE ATTORNEY GENERAL OF CANADA *v.* FLINT.

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* Oct. 31.
1884
*Jan. 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Parliament of Canada—Powers of—Imperial Court in Canada—Conferring jurisdiction on—Inland Revenue Act, 31 *V. c.* 8 *s.* 156.

So much of s. 156 of the Inland Revenue Act, 1867, (31 *V. c.* 8) as gives the Court of Vice-Admiralty jurisdiction in prosecutions for penalties and forfeitures incurred thereunder, is *intra vires*, notwithstanding such court is established in Canada by Imperial authority. *Valin* v. *Langlois* (3 Can. S.C.R. 1 ; 5 App. Cas. 115) discussed and followed.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) directing a writ of prohibition to issue against the Court of Vice-Admiralty at Halifax, prohibiting such court from exercising jurisdiction in the matter of a plaint instituted in the Court of Vice-Admiralty of Halifax, between the Attorney-General of Canada and Joseph Flint, Oswald Hornsby, James Philip Flavin and Ronald McDonald.

The facts of the case are fully stated in the following judgments :

SEDGEWICK Q.C., and BURBIDGE Q.C., Deputy Minister of Justice, for the appellant.

No counsel appeared for the respondent.

Sir W. J. RITCHIE C.J.—Proceedings were taken in the Vice-Admiralty Court at Halifax, N.S., on an information of Her Majesty's Attorney General of Canada on behalf of Her Majesty against the defendant to enforce the payment of penalities for breaches of the Inland Revenue Act, and particularly of sections 127, 128, 130, 137 of said act.

To the monition issued the defendant Flint appeared under protest and alleged that the court had no jurisdiction in the premises.

The Vice-Admiralty Court held that it had jurisdiction, whereupon

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

(1) 3 Russ. & Geld. 453.

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defendant Flint applied to the Supreme Court at Halifax for an order for a writ of prohibition to stay further proceedings in the Vice-Admiralty Court, and the Supreme Court ordered "that a writ of prohibition do forthwith issue out of this court, directed to the Honorable James McDonald, Judge and Commissary of the Vice-Admiralty Court at Halifax," to prohibit the said court from further proceeding in the said plaint or action against the said Jos. Flint.

From this order the Attorney General of Canada has appealed to this court.

It appears from the judgment of the Vice-Admiralty Court that "in May, 1879, as appears by the affidavit on which the monition was issued on the 21st May last, the machinery and apparatus for the illegal distilling of spirits were seized on the premises in Halifax, owned and occupied by Flint, and on his information against McDonald, Hornsby and Flavin, as concerned therein, a large quantity of spirits, mash and apparatus for distilling were seized on the premises occupied by the two latter. No claim having been made by either party, pursuant to the Dominion Inland Revenue Act of 1867, 31 V. c. 8, all the goods so seized were condemned under the 163rd section, and the present action was brought against the four defendants for the penalties imposed by this act. Three of them have not appeared—Hornsby and Flavin not having been served—but Flint appeared on the 2nd inst., under protest, denying the jurisdiction of this court; on which the crown, by the Attorney General, has taken issue, and the case has been argued before me at the instance of both parties, though the question, strictly speaking, should have been raised by plea."

The penalties sought to be recovered were: under sec. 127 for exercising a business subject to excise, without license; under 128 the additional penalty; under 130 the penalty for having in his possession apparatus for carrying on a business subject to excise without having made a return thereof; and under sec. 137 for not making proper returns of premises, &c.

The 156th section of the act respecting the Inland Revenue provides:—

"156. All penalties and forfeitures incurred under this act or any other law relating to excise may be prosecuted, sued for and recovered in the Superior Courts of Law or Court of Vice-Admiralty having jurisdiction in that province in Canada where the cause of prosecution arises or wherein the defendant is served with process, etc."

The parliament of Canada has the sole exclusive power to legislate on the subject of the Inland Revenue of the Dominion, and in the exercise of that power the unquestioned right to impose the penalties prescribed by sections 127, 128, 130 and 137 before referred to, and de-

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clare how and in what courts in the Dominion such penalties may be prosecuted, sued for and recovered, and in selecting the Court of Vice-Admiralty as having jurisdiction in the Province of Nova Scotia, where the cause of prosecution arises, and where the defendant is served with process, the parliament of Canada in no way exceeded its exclusive legislative power. The principles which are entirely applicable to and must govern the case have been so fully discussed in the case of *Valin* v. *Langlois* in this court (1), and in the Privy Council (2), that it is unnecessary to discuss them now. The fact of the Admiralty Court exercising jurisdiction in the Dominion being an Imperial Court in no way, in my opinion, interferes with the application of the principles enunciated in *Valin* v. *Langlois* (2) or with the conclusion arrived at in that case.

Whether, as has been suggested, the Dominion parliament could compel the Vice-Admiralty Court to assume, or the judge thereof to act on, the jurisdiction conferred is a point it will be quite time enough to determine when such question arises. It is clear in this case the Imperial Government has not intervened, and the judge of the Vice-Admiralty has assumed and acted on the jurisdiction, as I cannot doubt will always be the case when his judicial services are invoked.

The appeal should be allowed with costs.

STRONG J.—By the 156th sec. of the Inland Revenue Act, 31 V. c. 8, parliament has conferred jurisdiction to entertain suits and prosecutions for the recovery of penalties and forfeitures imposed by the act on the Superior Courts of Law (meaning of course the Superior Courts of the Provinces) and the Court of Vice-Admiralty. Since the decision of this court in *Valin* v. *Langlois* (1), and the delivery of the judgment of the Privy Council in the same (2), it cannot be denied that this enactment was within the legislative powers given to parliament by the British North America Act of 1867. The Lord Chancellor, in delivering the judgment of the Privy Council, expressly recognises the power of parliament to confer a new jurisdiction on provincial courts. The Court of Vice-Admiralty is a court deriving its authority, originally, from the Lord High Admiral or the Commissioners appointed for exercising that office, and the office of judge of that court was formerly only created by warrant and letters patent under the great seal of the High Court of Admiralty of England. Now, by the imperial statute 26–27 V. c. 24, it is enacted that when the office of judge in a Vice-Admiralty Court shall become vacant in any British possession the Chief Justice, or the principal judicial officer of such possession, or the person for the time being lawfully

(1) 3 Can. S. C. R. 1. (2) 5 App. Cas. 115.

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authorised to act as such, shall be *ex officio* judge of the Vice-Admiralty Court until a notification is received that a formal appointment to the office has been made to the Admiralty. By section 7 of the same act it is provided that nothing in that act shall affect the powers of the Admiralty to appoint any judge of a Vice-Admiralty Court as heretofore by warrant from the Admiralty and by letters patent issued under the seal of the High Court of Admiralty of England.

The Courts of Vice-Admiralty were originally tribunals for administering the jurisdiction incident to the judicial department of the office of the Admiral, but to these, their original functions, the Imperial Parliament has superadded a statutory jurisdiction not confined to maritime causes, but extending in many instances to revenue suits.

If a Court of Vice-Admiralty thought fit to decline a jurisdiction conferred upon it by the legislature of the Dominion, I should be of opinion that its right to do so could not be questioned, for as it is a court created for the purpose of executing the judicial powers vested in the office of the Admiral it is subject to no legislative power except that of the Imperial Parliament. If, however, the judge of a Vice-Admiralty Court thinks fit to exercise the jurisdiction conferred by a statute of the Dominion, I see no ground for making any distinction between the case of such a court and that of provincial courts, as to which *Valin* v *Langlois* (2), as I understand the judgment of the Privy Council, has decisively determined that jurisdiction so conferred may be lawfully assumed.

For this reason I am of opinion that the writ of prohibition should be quashed and the rule *nisi* in the court below discharged.

FOURNIER J.—La seule question qui s'élève en cette cause est de savoir si la cour de Vice-Amirauté a juridiction en matière de poursuite pour infractions aux dispositions de la loi concernant le revenu de l'intérieur. Cette juridiction lui est conférée en ces termes par la section 156 de 31 V. c. 8 :—

"All penalties and forfeitures incurred under this act or any other law relating to excise may be prosecuted, sued for and recovered in the .....Court of Vice-Admiralty having jurisdiction in that province in Canada where the cause of prosecution arises or wherein the defendant is served with process."

Cette disposition a été déclarée illégale par la cour Suprême de la Nouvelle-Ecosse, comme étant un excès de juridiction de la part du parlement fédéral, et un ordre a été en conséquence adressé à la cour de Vice-Amirauté pour l'empêcher d'exercer la juridiction conférée par a clause ci-dessus citée. Ce jugement est évidemment erroné, d'abord

(1) 3 Can. S.C.R. 1. (2) 5 App. Cas. 115.

comme contraire au principe, incontesté jusqu'ici, que toutes les cours sont ouvertes à la Couronne par la poursuite de ses droits.

"Though his subjects are in many instances under the necessity of suing in particular courts, the king has the undoubted privilege of suing in any court he pleases." Chitty on Prerogative (1) ; Bacon's Abridgment (2) ; *Attorney-General* v. *Mayor of Galway* (3).

Cette doctrine, appuyée par de nombreuses autorités, a été maintenue par le jugement de l'honorable V. C. Blake dans la cause de l'*Attorney-general* v. *Walker* (4).

Ces autorités démontrent clairement que ce jugement est contraire au principe bien reconnu que Sa Majesté a le privilège de choisir le tribunal qui lui convient pour la poursuite de ses droits.

Il est encore erroné en ce qu'il déclare que le parlement fédéral n'avait pas le pouvoir de conférer à la cour de Vice-Amirauté la juridiction qui lui a été attribuée par la section 156, déjà citée. C'est, avec la différence que la cour de Vice-Amirauté est instituée par les autorités impériales, la même question que celle qui a déjà été soulevée dans plusieurs causes au sujet du pouvoir du parlement fédéral d'imposer par ses lois de nouveaux devoirs aux tribunaux provinciaux. Quant à ceux-ci la question a été réglée par la décision du Conseil Privé dans la cause de *Valin* v. *Langlois* (5).

Mais dans cette cause la question s'élevant par rapport à la cour de Vice-Amirauté, qui dérive sa juridiction du parlement impérial, peut-on se servir des mêmes raisonnements pour arriver à la même conclusion que dans la cause de *Valin* v. *Langlois*? (5) Sur les sujets qui sont de sa compétence, le pouvoir du parlement fédéral est souverain et s'étend sur tous les résidants de la Puissance. Les lois concernant le revenu de l'Intérieur étant, à n'en pas douter, un des sujets sur lesquels il a une juridiction exclusive, leurs dispositions ne devraient-elles pas être obligatoires, même pour la cour de Vice-Amirauté ? Cette cour est de création impériale, mais exerçant sa juridiction dans toute la province de la Nouvelle-Ecosse, n'est-elle pas vis-à-vis de la Puissance dans une position tout à fait analogue à celle de la cour Suprême de cette même province ? Chacune de ces cours ne doit-elle pas son existence, à un pouvoir qui dans les matières de sa compétence, comme l'organisation des tribunaux provinciaux, est indépendant du parlement fédéral ? On a cependant reconnu à ce dernier le droit de conférer de nouvelles attributions à la cour Suprême, bien qu'elle soit tout particulièrement sous le contrôle du gouvernement local. Pour quelle raison le parlement fédéral ne pourrait-il pas exercer le même pouvoir à l'égard de la

(1) P. 244.
(2) Title Prerogative, 472.
(3) 1 Molloy 95.
(4) 25 Gr. 233.
(5) 5 App. Cas. 115.

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THE ATTORNEY GENERAL OF CANADA v. FLINT.

Fournier J.

cour de Vice-Amirauté ? Puisqu'il y a parfaite analogie dans la position des deux cours, le raisonnement qui a prévalu dans la cause de *Valin* v. *Langlois* (1) ne devrait-il pas nous faire adopter les mêmes conclusions ?

A l'appui de cette opinion, on peut encore invoquer le raisonnement de Sir Aimé Dorion C.J. dans la cause de *Bruneau* v. *Massue* (2) :—

"Judges as citizens were bound to perform all the duties which are imposed upon them, by either the Dominion or Local Legislature."

Le juge de la cour de Vice-Amirauté, qui est en même temps le juge en chef de la Nouvelle-Ecosse, ne doit-il pas se considérer comme obligé d'exécuter les devoirs qui lui sont imposés par cette loi de la Puissance, surtout lorsque non-seulement aucune disposition des lois impériales au sujet des cours d'amirauté ne s'y oppose, mais que, bien au contraire, on en trouve qui admettent l'existence d'une législation coloniale sur ce sujet à la condition qu'elle ne soit pas en conflit *(repugnant)* avec la première.

En effet l'acte impérial 28 et 29 Vict., ch. 63 (1865), reconnaît ce droit dans les termes suivants :—

"Any colonial law which is, or shall be, in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

Cette disposition qui s'applique à la législation future aussi bien qu'à celle alors existante, ne reconnaît-elle pas positivement aux autorités coloniale le pouvoir d'ajouter aux dispositions des lois impériales. Ne déclare-t-elle pas aussi que telles dispositions devront recevoir leur effet à la seule condition de n'être pas en contradiction avec les lois impériales. A l'énumération des pouvoirs contenus dans l'acte impérial de 1868, le parlement fédéral a ajouté un autre sujet de juridiction en adoptant la section 156. Mais cette disposition ne venant en conflit avec aucune de celles de l'acte impérial et n'en altérant ni modifiant aucune d'elles, droit être, en vertu de la disposition ci-dessus citée de la 28 et 29 Vict., chap. 63, considérée comme de la compétence du parlement fédéral.

Appel alloué.

HENRY J.—I concur in the view which has just been expressed and for the same reason. It is clearly understood by the judgment in *Valin* v *Langlois* (1) that the parliament of Canada has the power of

(1) 3 Can. S.C.R. 1 ; 5 App.Cas. 115. (2) 23 L. C. Jur. 60.

1884

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conferring jurisdiction upon the judges of the Supreme Courts and other higher courts of the several provinces. The same principle would apply to any court that sits within the Dominion. Although the Vice-Admiralty Court is established by the authority of England, still I see nothing to prevent the Parliament of Canada, inasmuch as that court sits within the jurisdiction of that Parliament, to give it power and authority to try Inland Revenue cases, or cases connected with the customs. I would say, however, I do not think that court could be obliged to perform such duty, and that it is a court that could very well wrap itself up in its authority and say, "our other duties prevent us from assuming the functions assigned to us by the Parliament of Canada," but it is ready to adopt the duty, and I see no reason why the Parliament of Canada should not have the power to impose it. I think, therefore, the appeal should be allowed with costs.

GWYNNE J. was also of opinion that the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellant : *Robert Sedgewick.*

Solicitors for respondent : *J. N. & T. Ritchie.*

GRAND TRUNK RAILWAY *v.* BECKETT.

1886

Nov. 15.

1887

June 20.

Railway Co.—Negligence—Death caused by—Running through town—Contributory negligence—Insurance on life of deceased—Reduction of damages for.

In an action against the G. T. R. Co. for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy ; that it was going at a rate of over thirty miles an hour ; and that no bell was rung or whistle sounded until a few seconds before the accident.

Held, affirming the judgment of the Court of Appeal, (13 Ont. App. R. 174) that the company was liable in damages.

For the defence it was shown that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavored to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence.

Held, per Ritchie C.J. and Fournier and Henry JJ., that the finding of the jury should not be disturbed. Strong, Taschereau and Gwynne JJ. *contra*.

The life of the deceased was insured, and on the trial the learned judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled this, and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal.

Held, that the judgment in this respect should be affirmed.

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

1887

GREENE *v.* HARRIS.

May 3.
June 22.

Practice—Set off—Not pleaded in action—Right to set off judgment—Equitable assignment.

G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which were granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to L. all his interest in the suit against H. and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

Held, reversing the judgment of the court below (25 N. B. Rep. 451) Strong J. dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to L.

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

1888

HARVEY v BANK OF HAMILTON.

Mar. 16, 17.
June 14.

Promissory Note—Non-negotiable—Indorsement—Liability of maker.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favor of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Hamilton Bank who discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the Hamilton Bank against H.

Held, affirming the judgment of the Court of Appeal, and that of the Divisional Court (9 O.R. 655), Strong J. dissenting, that although, in fact, the note was not negotiable, the bank, in equity, was entitled to recover, it being shown that the note was intended by

the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payees.

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

WYMAN *v.* IMPERIAL INSURANCE CO.

1888

Oct. 8, 9.

Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an endorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885 when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T. to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. endorsed thereon and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorized by the office at St. John, N.B., and signed by the general agent there. The company having refused payment an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada.

Held, reversing the judgment of the court below (20 N.S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete.

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

1888

Oct. 25.

ANGUS *v.* CALGARY SCHOOL TRUSTEES.

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

Appeal—Judgment of Supreme Court of North-West Territories—Court of first instance—Origin of proceedings—R.S.C. c. 135 *s.* 24—51 *Vic. c.* 37 *s.* 3 (*D*).

By an ordinance of the North-West Territories an appeal lies from the decision of the Court of Revision for adjudicating upon assessments for school rates to the district court of the school district; on such appeal being brought the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court when the appeal is heard. The district is now merged in the Supreme Court of the Territories.

Held, that an appeal will not lie from the judgment of the Supreme Court affirming a decision of the Court of Revision in such case, as the proceedings do not originate in a Superior Court. R.S.C. c. 135 s. 24.

An appeal in such case will lie since the passing of 51 Vic. c. 37 s. 5, which allows an appeal from the decision of the Supreme Court of the Territories although the matter may not have originated in a superior court.

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

THE QUEEN *v.* PARADIS.
THE QUEEN *v.* BEAULIEU. *

1888

Mar. 29.

1889

Jan. 15.

Expropriation—Award of Official Arbitrators—Compensation for land taken—Duty of appellate court.

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial Railway.

Held, reversing the judgment of the Exchequer Court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative an appellate 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 official arbitrators, and upon the evidence in this case this court refused to interfere with the amount of compensation awarded by the official arbitrators.

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

*The decision of the Exchequer Court and the judgments of the Supreme Court in these cases will be found in Vol. I. of the Exchequer Court Reports shortly to be published.

WALLACE *v* SOUTHER.

1888
Nov. 10, 12, 13.
1889
Mar. 18.

Promissory note—Identity of payee—Double stamping.

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.

Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover.

It is no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency," when the note is payable in the United States.

If a note is insufficiently stamped, the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it.

The appellant claimed that he was only a surety for his co-defendant, and that he was discharged by time being given to the principal to pay the note.

Held, that the fact of time being so given being negatived by the evidence, it was immaterial whether appellant was principal or surety.

The judgment of the Supreme Court of Nova Scotia (20 N. S. Rep. 509) affirmed.

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

CONFEDERATION LIFE ASSOCIATION *v.* O'DONNELL.

1888
Nov. 13.
1889
Mar. 18.

Life insurance—Policy—Memo. on margin—Want of countersignature—Effect of—Admissibility of evidence.

A policy of life insurance sued on had in the margin the following printed memo; "This policy is not valid unless countersigned by agent at . Countersigned this day of Agent." This memo. was not filled up, and the policy was not, in fact, countersigned by the agent. Evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment of the court below, (21 N.S. Rep. 169) Sir W. J. Ritchie C.J. and Gwynne J. dissenting, that the necessity of countersigning by the agent was not a condition precedent to

the validity of the policy, and the jury having found that the premium was paid their verdict should stand.

The judgment on the former appeals in this case was, on this point, substantially adhered to. See 10 Can. S.C.R. 92, and 13 Can. S.C.R. 218.

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

1888

Nov. 14.

1889

Mar. 18.

TUPPER *v* ANNAND.

Contract—Mining land—Speculation in—Agreement with third party—Renewal—Effect of.

T., being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation, A. agreed, and advanced money towards paying T's expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but failing to effect a sale within that time the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally, T. effected a sale of the mine at a profit and had the necessary transfers made for the purpose, keeping the matter of the sale secret from A. On an action by A. for his share of the profit under the original agreement.

Held, affirming the judgment of the court below, that the sale related back, as between T. and A., to the date of the first agreement, and A. could recover.

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

1888

Nov. 23, 24.

1889

Mar. 18.

MUTUAL RELIEF SOCIETY OF N.S. *v* WEBSTER.

Life insurance—Mutual company—Bond of membership—Warranty—Concealment of facts—Mis-statement.

On an application for insurance in a mutual assessment insurance society the applicant declared and warranted that if in any of the answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shown that the insured had mis-stated the date of his birth, giving the 19th instead of the 23rd of February, 1835, as such date; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in

"perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose—and that the attack of apoplexy which he had admitted occurred five years before the application, when the fact was that it had occurred within four years. The trial judge found that the mis-statement as to date of birth was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose to which the insured was subject, was not a disease, and not dangerous to his health; but that the mis-statement as to the time of the occurrence of the attack of apoplexy was material, and on this last issue he fonnd for the society, and on all the others for the plaintiff. The court *en banc* reversed this decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society there was a variance between the plea and the application which prevented the society from taking advantage of the mis-statement. On appeal to the Supreme Court of Canada:

Held, Gwynne and Patterson JJ. dissenting, that the decision of the Court *en banc* (20 N.S. Rep. 347) was right, and should be affirmed.

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

SNOWBALL *v.* NEILSON.

1889

Feb. 20.

Mar. 18.

Action to set aside judgment—Collusion.

S., a judgment creditor of J. N., sr., applied to the Supreme Court of New Brunswick on affidavits, to have a judgment of J. N., jr., against said J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to cover up assets of the said J. N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., sr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum; and that on an examination of the father for disclosure he would not swear that he owed his son the amount and that he had no settlement of accounts. The affidavits in answer stated how the debts had accrued, giving the details; that

there was no collusion between the father and son; that the son frequently asked his father for a settlement but could not get it; and that he had never been a party to, or authorized any settlement. The court below held that the applicant had failed to show fraud and refused to set aside the judgment.

Held, that the decision of the court below should be affirmed.

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

1888
Oct. 29.
1889
Mar. 19.

ROBERTSON *v.* WIGLE.—THE ST. MAGNUS.

Maritime Court—Collision—Damages—Party in fault—Answering signals.

The owners of the tug "B.H." sued the owners of the steam propellor "St. M." for damages occasioned by the tug being run down by the propellor in the River Detroit.

Held, reversing the judgment of the Maritime Court of Ontario, that as the evidence showed the master of the tug to have misunderstood the signals of the propellor, and to have directed his vessel on the wrong course when the two were in proximity, the owners of the propellor were not liable and the petition in the Maritime Court should be dismissed.

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

1889
April 6.

WARNER *v.* MURRAY.

Insolvent estate—Claim by wife of insolvent—Money given to husband—Loan or gift—Questions of facts—Finding of court below.

M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Held, confirming the judgment of the Court of Appeal, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favor of the wife and confirmed by the Court of Appeal, this, the second appellate court, would not interfere with such finding.

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

VIRTUE *v.* HAYES. *In re* CLARKE.

1889
April 9.

Appeal—Final judgment—Jurisdiction—Discretion of court or judge.

Judgment was recovered in the suit of *Virtue* v. *Hayes*, brought to realize Mechanic's liens, and C., the owner of the land on which the mechanic's work was done, applied by petition in the Chancery Division to have such judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada.

Held, that the judgment appealed from was not a final judgment within the meaning of section 24 (a) of the S. & E. C. Act or, if it was, it was a matter in the judicial discretion of the court, from which by sec. 27 no appeal lies to this court.

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

HALIFAX BANKING CO. *v.* MATTHEW.

1888
Nov. 10.
1889
April 30.

Chattel mortgage—Action to set aside—Fraudulent as against creditors—13 *Eliz. c. 5—Right of creditor of mortgagor to redeem.*

Plaintiffs having recovered judgment against one H. issued execution under which the sheriff professed to sell certain goods of H. and gave a deed to plaintiffs conveying all the "share and interest" of H. in the goods. Six months before the recovery of the plaintiffs' judgment, H. had made a mortgage covering all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under the statute of Eliz. and fraudulent in fact. The court below held the mortgage good and dismissed the bill.

Held, affirming this judgment, that no fraud being shown and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed.

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

THE QUEEN *v* CHARLAND. *

1889
Feb. 12.
April 30.

Award of Arbitrators increased by the Exchequer Court—Hearing of additional witness—Appreciation of the evidence—Appeal to Supreme Court—Weight of evidence.

In a matter of expropriation of land for the Intercolonial railway, the award of the arbitrators was increased by the judge of the Ex-

*The decision of the Exchequer Court and the judgments of the Supreme Court in this case will be found in Vol. I of the Exchequer Courts Reports shortly to be published.

chequer Court from $4,155 to $10,824.25, after additional witnesses had been examined by the judge. On an appeal to the Supreme Court it was

Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. Gwynne J. dissenting.

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

1889

MITCHELL *v.* MITCHELL.

Mar. 22, 23.

Removal of executor—Arts. 282, 285, 917 C.C.

April 30.

Held, affirming the judgment of the Queen's Bench for Lower Canada (appeal side) (M.L.R. 3 Q.B. 191) that Art. 282 C.C. does not apply to executors chosen by the testator, and that in an action for the removal of one executor when there are several executors, the existence of a law-suit between such executor and the estate he represents, and the evidence of irregularities in his administration but not exhibiting any incapacity or dishonesty, are not a sufficient cause for his removal. Arts. 285, 917 C.C. (Strong J. dissenting.)

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

1888

MILLER *v.* STEPHENSON.

Nov. 20.

Evidence—Goods sold and delivered—Credit—Direction to jury—Withdrawal of evidence from jury—New trial.

1889

June 14.

In an action against McK. & M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants and on their credit, and his evidence was corroborated by the defendant McK. The defence showed that the goods were charged in plaintiff's books to C. McK. & Co. (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co's. books, and that the notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co.

The trial judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say as to whom credit was given for the goods.

Held, affirming the judgment of the Supreme Court of New Brunswick, (27 N.B. Rep. 42) Strong and Patterson JJ. dissenting,

that the case was properly left to the jury and a new trial was refused.

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

HOOD *v* SANGSTER.

1889

Nov. 12.

Appeal—Action for partition and licitation of property—Partnership—Plaintiff's interest less than $2000*—R.S.C. c.* 135 *s.* 29.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under $2000, the appellant in answer to the respondent's affidavit filed another affidavit showing that the total value of the property was $3000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property it was

Held, that the matter in controversy, and claimed by the respondent, not amounting to the sum or value of $2000, the appeal should be quashed with costs.

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

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INSURANCE, FIRE—*Insurable interest—Mortgagee—Assignment of policy.*] In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an indorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an indorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886. The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. endorsed thereon, and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorized by the office at St. John, N.B., and signed by the general agent there. The company having refused payment an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action and ordered a new trial, on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada—*Held*, reversing the judgment of the court below (20 N.S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete. Wyman *v.* Imperial Insurance Co. — — — — — 715