REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, BARRISTER AT LAW.

ASSISTANT REPORTER

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

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. REGISTRAR OF THE COURT.

VOL. 25.

OTTAWA:
PRINTED BY S. E. DAWSON, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.
1896.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honourable Sir Henry Strong, Knight C. J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Robert Sedgewick J.

" " George Edwin King J.

" " Désiré Girouard J.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

The Honourable Sir Charles Hibbert Tupper, K. C. M. G., Q. C., &c.

" " Arthur Rupert Dickie, Q. C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

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

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

T.

V.

W.

Y.

TABLE OF CASES CITED.

A.

B.

C.

Q.

R.

S.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

HENRY ARCHBALD *et al.*, *ès qual.* (PLAINTIFFS) ..... } APPELLANTS ; 1895

AND *Feb. 26,28.

M. NOLAN DELISLE *et al.* (DEFENDANTS)..... } RESPONDENTS. *June 26.

JOEL C. BAKER *et al.* (DEFENDANTS IN WARRANTY) ..... } APPELLANTS ;

AND

M. NOLAN DELISLE *et al.* (PLAINTIFFS IN WARRANTY). ..... } RESPONDENTS.

WILLIAM MOWAT *et al.* (INTERVENANTS) ..... } APPELLANTS ;

AND

M. NOLAN DELISLE *et al.* (CONTESTANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Costs, appeal for, when it lies—Action in warranty—Proceedings taken by warrantee before judgment on principal demand—Joint speculation—Partnership or ownership par indivis.

Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle,

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

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M.N.D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J.C.B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses.

Held, affirming the judgment of the Superior Court, and of the Superior Court sitting in review, that the facts did not establish

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them.

Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made.

APPEAL from the judgment of the Superior Court for Lower Canada, District of Montreal (in Review) (composed of Ouimet, Davidson and deLorimier JJ.) affirming the judgment of Jetté J. in the Superior Court.

In 1864 the late William Workman and A. M. deLisle of Montreal, entered into a joint adventure under the name of the Workman and deLisle syndicate, on several occasions purchasing considerable real estate for purposes of speculation, the profits being divided equally from time to time as made. The business was managed by William Workman up to the time of his death in February, 1878.

Upon the death of William Workman, A. M. deLisle and the executors of William Workman (Joel C. Baker, Robert Moat and John Moat) continued the business of the syndicate.

On the 17th February, 1880, A. M. deLisle died, and M. Nolan deLisle *et al.* (the respondents) are his legal representatives. The business of the syndicate still continued to be managed by the representatives of the original parties.

The executors of the late William Workman, finding it necessary to realize the interest of their testator in the joint property in order to settle certain bequests made by the will, offered such interest for sale by public auction in March, 1882, and it was purchased for the greatest part by Thomas Workman, brother of William Workman. The transfer to Thomas Workman was executed on the 24th July, 1882, but not registered, to avoid difficulties as to titles, and a *contre*

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

lettre of that date, executed by Thomas Workman, Robert Moat, as tutor to his son William (a grand-nephew of Thomas Workman and a legatee under the will of William Workman) and Mrs. J. C. Baker (a daughter of William Workman and also a legatee under his will), set forth that the said purchase was made and paid for to the extent of five elevenths in favour of William Moat, and to a like extent in favour of Mrs. Baker, leaving Thomas Workman interested to the extent of one eleventh.

The William Workman estate was still left with large undivided interests in *bailleur de fonds* and mortgage claims.

The business which represented the interest of the estate William Workman and the deLisles was then known as the Syndicate Workman and deLisle, and that represented by the interest between Thomas Workman and the deLisles was known for the purpose of distinction and had separate books under the name of deLisle and Workman syndicate.

In 1881 the deLisle and Workman syndicate engaged a man called Cotté as book-keeper. He kept the books of the William Workman private estate and the books of the Syndicate Workman and deLisle, and the Syndicate deLisle and Workman. The usual course of business was for the representatives of the Workman interest, who for this purpose acted through Mr. J. C. Baker, and the representative of the deLisle interest, who acted through Mr. Nolan deLisle, to look after their respective interests, and for Cotté, from time to time, as profits were made, to deliver to Mr. Nolan deLisle cheques or cash, as the case might be, for the deLisle share, and to deposit with Moat & Co. the bankers of the Workman estate, the cheques and cash for the other share. No power of attorney was given by one to the other. Cotté continued to act as book-

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

keeper until the 24th May, 1888, when he fled the country on its being discovered that he had in the course of his duties embezzled from all the estates.

In 1889 Thomas Workman died, leaving as executors Henry Archbald, John Murray Smith, and Walter Norton Evans, the appellants in the principal suit under consideration in the present appeal.

This suit was brought by the said executors against the representatives of the late A. M. deLisle to recover the sum of $2,743, part of the defalcations of Cotté, which represented moneys which should have been received by the representatives of Workman and for which the plaintiffs alleged they had a right to make the defendants responsible.

The defendants, besides pleading to the principal action, brought an action in warranty against J. C. Baker *et al.*, the representatives of the William Workman estate, claiming that, in so far as the principal plaintiffs had suffered any loss for which they might have a recourse, such loss had been suffered by the negligence of the William Workman estate represented by Baker in the common office, in not looking after Cotté.

Further, the defendants having asserted in the principal action that the said Thomas Workman was merely a *prête-nom* for others, William Moat and J. C. Baker, as well personally as executor of his wife, in whose interest the late Thomas Workman had purchased the share of the syndicate property, as before mentioned, intervened to ratify and support the proceedings taken by Thomas Workman's executors to the extent of ten elevenths of the sum claimed.

The facts of the case and the nature of the proceedings will be more fully understood from the judgment of Mr. Justice Taschereau hereinafter given.

Geoffrion Q.C. and *Abbott* Q.C. for appellants.

Beïque Q.C. and *Lafleur* for respondents.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

The judgment of the court was delivered by

TASCHEREAU J.—This is a case of a rather complicated nature, and the fact that the voluminous evidence, oral and documentary, submitted to our consideration, is partly taken in reference to another case, not before us upon this appeal, has made the investigation of the evidence adduced more than usually difficult.

The principal action, *Archibald* v. *deLisle*, which I shall consider first, is one by the Thomas Workman estate against the deLisle estate. The plaintiffs, now appellants, are the testamentary executors of the late Thomas Workman. It is necessary, for a proper understanding of my remarks, that I should, *in limine*, state the precise nature of the controversy between the parties.

The plaintiffs, appellants, allege by their declaration:

1. That they are the legal representatives of the late Thomas Workman.

2. That at all the times hereinafter mentioned, the said Thomas Workman, or the plaintiffs as his legal representatives, were interested jointly and in equal shares with the defendants, in certain real estate in the district of Montreal, in a joint adventure which was carried on by them together, and the returns from which were equally divided from time to time between them.

3. That the said Thomas Workman departed this life on the ninth day of October, one thousand eight hundred and eighty-nine.

4. That during all the times and periods hereinafter mentioned one Honoré Cotté was the book-keeper and kept the accounts of the said joint adventure, and received the cash of the said joint account.

5. That whilst acting as such book-keeper the said Cotté received from time to time large sums of money, which he did not credit in the books showing the transactions and receipts made on behalf of the plaintiffs and defendants on such account, but embezzled the same.

6. That heretofore, to wit, on or about the twenty-third day of May, eighteen hundred and eighty-eight, the said Cotté absconded, and that thereupon an inquiry was made into the transactions of the said joint account, whereby it appears that large sums of money had been so embezzled by the said Cotté.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

7. That by agreement between the parties the course of business between them under which the said joint account was conducted, was that all sums of money received by the said Cotté for the said joint account, and available from time to time for division between the said co-adventurers, were deposited in the bank, to the credit of a certain adventure carried on by the representatives of the late William Workman and the defendants and known as the Workman and deLisle syndicate, and thereupon cheques were drawn for the amounts to which the said Thomas Workman, or the plaintiffs or defendants, were entitled according to their share in the said amounts so deposited, or so received by the said Cotté for the purposes of the said joint account, and available for division, and the same were charged in the books of the said joint account as moneys paid to the respective co-adventurers.

8. That the cheques for the amounts to which the said Thomas Workman became entitled were always drawn to the order of his bankers, Messrs. R. Moat & Co., and in the ordinary course of business should have been handed by the said Cotté to the said firm in exchange for their receipts.

9. That during the year eighteen hundred and eighty-five cheques to the order of R. Moat & Co. were drawn and signed by the representatives of the Workman and deLisle syndicate on the second of November, the third of November and the fifth of November, for the sums respectively of two hundred dollars, one hundred and twenty dollars, and five hundred dollars, forming a total of eight hundred and twenty dollars currency, being parts of amounts received by the said Cotté, and available for division, and to which the said Thomas Workman was entitled; and the said cheques having been so drawn, the said amounts were charged in the books of the said joint account by the said Cotté as cash paid to the said Thomas Workman.

10. That the said Cotté did not deposit the said cheques with the said R. Moat & Co., in accordance with the agreement between the said parties, and the usual conduct of the said business, but retained the same in his possession, although the amount thereof had been charged as having been received by the said Thomas Workman or the plaintiffs, whereby the balance of cash at the credit of the said joint account was made to appear greater than it actually was, and the amount of the shortage of the said Cotté was made to appear less and the fraud and embezzlement of the said Cotté were concealed to the extent of the amount of the said cheques.

11. That the facts of the said transaction were only discovered by the plaintiffs and the said Thomas Workman after the absconding of the said Cotté.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

12. That the said cheques, having been so retained by the said Cotté, were never presented for payment, but remained and are now in the possession of the said Workman and deLisle syndicate, and the funds available therefor from time to time in the said bank account have been drawn out upon other cheques for the uses of the said joint adventurers and went into and became part of the funds of the said joint adventurers.

13. That by reason of the premises the plaintiffs have sustained damage to the extent of eight hundred and twenty dollars, and the defendants were benefited to that extent.

14. That during the year eighteen hundred and eighty-seven the said Cotté charged in the books of the said joint account as cash payments made to or on behalf of the said Thomas Workman, the following sums, namely :

On the first of September, eighteen hundred and eighty-seven, four hundred dollars.

On the second of November, six hundred dollars.

On the sixteenth of November, three hundred dollars.

On the thirtieth of November, two hundred dollars, none of which sums were ever paid by him, or received by the said Thomas Workman.

15. That the said Cotté further received from one Morin at different times sums amounting to four hundred and twenty-three dollars and ten cents, which sums were payable by the said Morin entirely to the said Thomas Workman, the said defendants having no interest therein whatever.

16. That, notwithstanding, the said Cotté received the said sums of money, and credited them to the joint account of the said business, and wrongfully paid them into the funds of the said joint account, by reason whereof the said defendants were benefited to the extent of the said sum of four hundred and twenty-three dollars and ten cents, and the said plaintiff and the said Thomas Workman were damaged to the extent thereof.

17. That on the discovery of the said transactions the plaintiffs required the defendants to allow an entry to be made in the books of the said joint account, crediting them with the amount of said sums charged against the account of Thomas Workman, and of moneys belonging to him received by the said Cotté which went into the funds of the said joint account, to the end that the plaintiffs might be credited and receive from the funds of the said joint account the said amounts, as by law they are entitled to do.

18. That the defendants refused to pay the said amount, or to allow the said entries to be made.

19. That the plaintiffs declare that they are willing that the said cheques should be cancelled, upon payment by the said defendants to

them of the said sums, or upon their receiving credit therefor in the books of the said joint account.

20. That the said sums united form a total sum of two thousand seven hundred and forty-three dollars and ten cents, which the plaintiffs now claim from the defendants.

The defendants pleaded to this action that they and the plaintiffs were joint owners and not partners: that from lands sold each party received his share and neither is responsible to the other; that while they had an office and books in common the respective parties attended to their own interests; that defendants took care Cotté paid them their share and it was through plaintiffs' gross negligence that he embezzled the latter's share; that especially did this occur through the fault of Baker, who persisted in employing Cotté even after his intemperate and untrustworthy habits had been pointed out by the defendants; that the four cash items charged were amounts received by Cotté for plaintiffs, which they should have immediately demanded and received from Cotté as the defendants immediately demanded and received the similar amounts by him collected for them; that with regard to the cheques, the defendants obtained at the same time similar cheques for similar amounts received by Cotté or plaintiffs; that Cotté, knowing defendants would immediately present their cheques, took care to provide funds, but relying on the negligence of Baker kept plaintiffs' cheques in his own possession, and they were found in his drawer after he had fled from the country; that with regard to the Morin collections the money belonged exclusively to plaintiffs, and through the like negligence Cotté, who made the collection, was permitted to embezzle it; that the defendants never were the agents of the plaintiffs for collections or responsible therefor, or for the dishonesty of Cotté, who was the agent of Thomas Workman alone; that defendants have never, in any shape, benefited by

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the Morin moneys so belonging to Thomas Workman, and any entries to the contrary are erroneous.

By consent the action was taken for a specific sum instead of an action *pro socio* or *communi dividendo*, so that no question arises as to its nature and form.

By the judgment of the Superior Court the action was dismissed. That judgment was confirmed in the Court of Review, Mr. Justice Davidson dissenting.

I will refer immediately to a question of law, arising from the facts in evidence, which was argued before us as it had been in the two courts below. The plaintiffs contend that they and the defendants were partners in the speculation in question, and that the rules applying to partnerships should govern the present controversy. The defendants, on the other hand, take the position that there was no partnership between themselves and the plaintiffs, but a mere ownership *par indivis*, and that what Cotté embezzled was the plaintiffs' moneys, they, the defendants, having got their half and nothing more.

On this point the appellants have failed to convince me that the Superior Court, Jetté J., and the majority of the Court of Review, who held that there was no partnership between the parties, were wrong, though, it must be conceded, that there is room for the appellants' contention to the contrary (1). The considérants of the formal judgment of the Superior Court on this point are, however, to my mind unanswerable, and I would adopt them without further remarks. Nolan deLisle, I may further remark, had clearly not the power to form a partnership between his principals and the plaintiffs.

I do not see, however, that the plaintiffs' case would at all be strengthened if they had succeeded in establishing that there was a partnership in the matter. If,

(1) Troplong, Société, nos. 19 *et seq.*

as found in the courts below, the loss of the plaintiffs' share by Cotté's frauds was after a division between them and the defendants, or rather, I should say, that it was exclusively the plaintiffs' share that was embezzled by Cotté, and by their negligence, or the negligence of their agent, their case fails whether there was a partnership or a mere joint ownership *par indivis* between them and the defendants. It is unquestionable law that partners may stipulate that the profits of the concern will be divided at fixed periods before the end of the partnership (1). And that is what, expressly or tacitly, took place between the plaintiffs and the defendants. Art. 1844 of the Civil Code has therefore no application here, as after each such division the partnership, as it were, is at an end, *quoad* the sums or things divided. Each of the partners then becomes individually the owner of the sums or things divided. Then the plaintiffs themselves, in their declaration, allege that the sums they claim is their share. Now that is a clear admission that there must have been a division, for otherwise these sums would belong to the partnership.

I now pass to the evidence. It would be perfectly useless for me to give the details of it here. There are two facts, I may remark, upon which there is no room for controversy The first is, that no fraud whatever is charged or proved against the defendants or their agent, Nolan deLisle. That was conceded at the argument. And the second, that the defendants received no benefit whatever from the moneys embezzled by Cotté. They did not receive a cent more than they were entitled to. They escaped from Cotté's frauds by being more vigilant than the plaintiffs. That is what, as a matter of fact, the two courts below have found to be the result of the evidence, and that find-

(1) 7 Pont no. 430 ; 26 Laurent, nos. 440 *et seq.*

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

ing is, to my mind, entirely supported, assuming that to be a matter of inference from the facts proved upon which we could interfere. The plaintiffs, had they acted as the defendants or their agent did, would not have been the victims of Cotté's frauds. Cotté was in fact, it seems to me unquestionable, enabled to pursue his systematic fraudulent dealings by the plaintiffs' negligence. He calculated on their dilatoriness to conceal his plundering. Had the deLisle estate followed the plaintiffs' ways of doing business Cotté would have robbed them as he did the plaintiffs. That is the whole case, and that being established the plaintiffs are out of court. *Vigilantibus non dormientibus subvenit lex.*

I entirely agree in the elaborate judgment delivered by Mr. Justice Ouimet in that sense in the Court of Review, and in the carefully drawn *motifs* of Mr. Justice Jetté in his formal judgment in first instance.

I should add that, as to the Morin item, $423.10 claimed by the action, for the reasons given by the two courts below, the plaintiffs' claim must also fail. Nolan deLisle swears that as a matter of fact this sum was never paid to the concern, and consequently that the defendants never received the half of it. Upon contradictory evidence the two courts below have come to the conclusion that this was so, and that conclusion must stand.

I would dismiss the principal appeal with costs *distraits* to the attorneys of the respondents.

Now, as to the appeal on the action in warranty, deLisle *et al* v. Baker *et al.* The deLisles, upon being sued by the Thomas Workman estate in the action I have considered as above, took an action in warranty against Baker *et al.* the appellants on this issue, as executors of the William Workman estate. They set

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

forth by their declaration the issues on the principal action, and allege that the transfer to Thomas Workman was mainly to serve the interests of the principal parties interested in the estate of William Workman, and on the understanding between the transferors and transferees that the business should continue to be managed, as it had previously been, on behalf of the William Workman's estate, to wit, by Baker who employed Cotté; that the said estate deLisle never undertook to manage the business of Thomas Workman or the parties to whom he lent his name, but it was to be looked after by the William Workman estate, through the negligence of which any loss suffered has arisen. Wherefore it is prayed that Baker *et al.* as executors of the William Workman estate, be condemned to indemnify deLisle *et al* from any condemnation obtained against the latter.

The defendants in warranty, now appellants, denying these allegations, pleaded that it was arranged that all moneys should be paid direct to Moat & Co. as the bankers of Thomas Workman; that the executors of William Workman had no power to make the alleged arrangements, which however, did not exist; and they had no interest in the new joint account.

The judgment *a quo* declares that the executors of the William Workman estate, the present appellants, were rightly sued in warranty by the deLisles, and maintains the action in warranty, but concludes that as the principal action against the deLisles had been dismissed the court could condemn them, the appellants, only to the costs of the action.

An objection has been taken by the respondents, deLisle *et al.*, that this is upon this issue an appeal merely for costs, which, in accordance with the jurisprudence of this court, following the rule laid down

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

by the Privy Council and other courts in England, we should not entertain (1).

But this case is not governed by that rule. In *Yeo* v. *Tatem* (2), the Privy Council held that although an appeal will not lie in respect of costs only, yet, where there has been a mistake upon some matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. I refer also to *Attenborough* v. *Kemp* (3); and to *Inglis* v. *Mansfield* (4), where Lord Brougham said:

> In the House of Lords, as well as in the Privy Council and Court of Chancery, you cannot appeal for costs alone, but you can bring an appeal on the merits, and if that is not a colourable ground of appeal for the purpose of introducing the question of costs, the Court of Review will treat that not as an appeal for costs, but will consider the question of costs as fairly raised.

The present appeal falls under the rule laid down in these cases.

Here, what the appellants complain of is that, in law, the action in warranty against them should have been dismissed, and that there is an error, in law, in the judgment appealed from, which maintains it. And under the cases above cited this is not, in my opinion, an appeal merely for costs, though the result of the error in law which they complain of was, under the circumstances, by the judgment of the court *a quo*, merely to make them liable for the costs.

The case is quite distinguishable from those of *Moir* v. *Huntingdon* (5); and *McKay* v. *The Township of Hinchinbrooke* (6). What we held in those cases is, that where the state of facts upon which a litigation went through the lower courts has ceased to exist, so that

(1) *Witt* v. *Corcoran*, 2 Ch. D. 69; *Richards* v. *Birley*, 2 Moo. P. C. (N. S.) 96; McQueen's Practice, 769; *Crédit Foncier* v. *Paturau*, 35 L. T. N. S. 869; Cases cited in 14 Canada Law Journal, 283; *Levien* v. *The Queen*, L. R. 1 P. C. 536.
(2) L. R. 3 P. C. 696.
(3) 14 Moo. P. C. 351.
(4) 3 Cl. & F. 371.
(5) 19 Can. S.C.R. 363.
(6) 24 Can. S.C.R. 55.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the party appealing has no actual interest whatsoever upon the appeal but an interest as to costs, and where the judgment upon the appeal, whatever it may be, cannot be executed or have any effect between the parties except as to costs, this court will not decide abstract propositions of law merely to determine the liability as to costs, where these were in the discretion of the courts below, for it might well be that the condemnation to such costs would have been the same though the party appealing had succeeded on the merits of the case; the condemnation as to costs in such a case by the court appealed from is not a necessary legal consequence of the judgment on the merits. It is not sufficient that a matter of law or of principle is involved; the party seeking to appeal must have an actual interest to have that question reviewed. Such was the course followed by the Privy Council in *Martley* v. *Carson* (1), to which I referred in *McKay*

(1) 20 Can. S. C. R 694. The judgment of the Privy Council is as follows:

Whereas there was this day read at the board a report from the judicial committee of the Privy Council dated the 4th July instant, in the words following, viz.:

Your Majesty having been pleased, by your general order in council of the 22nd November, 1890, to refer unto this committee a humble petition of Robert Carson in the matter of an appeal from the Supreme Court of Canada between Truman Celah Clark, appellant, and the said Robert Carson, respondent, setting forth that the above named appellant, alleging that he felt aggrieved by a judgment of the Supreme Court of Canada of the 30th April, 1889, petitioned Your Majesty in Council for leave to appeal from the said judgment to Your Majesty in Council, which leave was granted by an order of Your Majesty in Council of the 8th February, 1890; that the appellant duly lodged his petition of appeal in the Privy Council office on the 1st December, 1890; that the appellant, when he petitioned Your Majesty in Council as aforesaid, did not disclose the fact that by a deed poll dated the 13th October, 1885, duly executed by him and registered in the Land Registry Office, in the city of Victoria, British Columbia, he conveyed to his wife, Barbara Clark, all his right, title and interest in and to all the real estate owned by him, together with all easements enjoyed therewith, which said real estate and easements claimed are set forth in the statement of defence and counter-claim of the

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

v. *The Township of Hinchinbrooke* (1). But here the case is quite different. By the judgment against which the appellants, defendants in warranty, now appeal, they have been declared to be the warrantors of the plaintiffs in warranty. And as the plaintiffs on the principal action have appealed from the judgment dismissing their action, they might have obtained here a reversal of that judgment and obtained a condemnation against the defendants deLisle, plaintiffs in warranty. That condemnation would then have reflected on the appellants, defendants in warranty, as it is *res judicata* between them and the plaintiffs in warranty, so long as that judgment stands, that they are their warrantors against the condemnations on the principal action. (In what form, and by what means, the plaintiffs in warranty could then have obtained a judgment against the defendants in warranty we are here not concerned with). It follows clearly that the appellants Baker *et al.*, have an interest upon this appeal distinct and separate altogether from the condemnation to costs. They are, or were when they took this appeal, exposed to suffer from the consequences of the judgment which declares them to be warrantors of the plaintiffs in warranty, and are consequently entitled to be heard upon their appeal asking to be relieved from that judgment.

Now, as to the legality of that judgment. The only point it determines, as I have previously remarked, is that the estate William Workman is the warrantor of

appellant in the action, and humbly praying that Your Majesty in Council will be pleased to rescind the said order in council of the 8th February, 1890, giving leave to appeal as aforesaid, and to dismiss the appeal with costs.

The Lords of the Committee, in obedience to Your Majesty's said general order of reference, have taken the said humble petition into consideration, and having heard counsel for the parties on both sides, their Lordships do this day agree humbly to report to Your Majesty as their opinion that this appeal ought to be dismissed.

(1) 24 Can. S. C. R. 55.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the deLisle estate on the action instituted against the latter by the Thomas Workman estate. As I have said, it is the testamentary executors of the William Workman estate who are accused of negligence by the plaintiffs in warranty, and it is for that negligence that the plaintiffs in warranty ask that the estate itself of William Workman be held liable. It seems to me doubtful, if, in such a case, it is not only the executors personally, and not *qua* executors, against whom the action should have been brought. I refer on this to what we held in this court in *Ferrier* v. *Trepannier* (1). However, in the view I take of the case I will assume that the estate of William Workman was rightly brought into the case through its executors. I may also assume in favour of the plaintiffs in warranty, present respondents, that their action in warranty could be brought as it has been, and that they were not obliged to wait till a condemnation was obtained to then proceed against their warrantors by a principal action. That seems to me a mere matter of form, and a question which obviously may give rise to many difficulties in the procedure under certain circumstances, but which, as I view it, cannot affect a case where the principal action and the action in warranty are both *en état*, and together submitted for judgment. I refer to the authorities cited in *Gauthier* v. *Darche* (2). The authorities cited in *Central Vermont* v. *La Compagnie d'Assurance* (3), from the modern jurisprudence in France, evidently relate to controversies as to procedure or jurisdiction, and the Court of Queen's Bench, in that case, would perhaps have hesitated to dismiss the action in warranty had they found that the accident there in question had been caused by the negligence of the defendant in warranty.

(1) 24 Can. S. C. R. 86. (2) 1 L. C. Jur. 291.
(3) Q. R. 2 Q. B. 450.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

There are a number of reported cases in France where, for instance, the return by a bailiff being impugned, the bailiff is sued in warranty, and called in the case to defend his acts and indemnify the party who employed him for all condemnations and damages that he may be liable to or suffer, in consequence of the illegality of said acts. Bioche (1) refers to many cases of that nature.

It is, after all, a mere question of words and of the name of the proceeding. For it is only as regards the principal action that the action in warranty is an incidental demand; between the warrantee and the warrantor it is a principal action (2); and that action may be brought only after the judgment on the principal action. The plaintiff in the principal action may object to the delay which might result from the defendant's action in warranty, but if he does not I do not see that the defendant in warranty has any interest to object to the manner in which he is called in, where no question of jurisdiction arises or he does not suffer any prejudice thereby.

In a recent case of *Compagnie l'Abeille*, in the Court of Appeal of Paris (3), a common carrier, sued in damages for an accident to one of his passengers, brought an action in warranty against a third party whose negligence had been the immediate cause of the accident.

And the books are full of such instances, where two actions *en responsabilité* are joined under the name of warranty.

In another class of cases, an instance of which is *re Granier* v. *Cambard* (4), before the Court of Cassation, a third party is brought in as warrantor *en garantie*

(1) Vol. 4 Verbo "garantie."

(2) 2 Berriat Saint-Prix, procédure, page 485; Cases cited in Sirey, Table gén. v. garant. no. 48.

(3) Pandectes Françaises, receuil mensuel, 95, 2, 36.

(4) Pand. Fran. rec. men. 95, 1, 86.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

simple et responsabilité in an action *en déclaration d'hypothèque* (1).

The case of *The Royal Electric* Co. v. *Leonard* (2) is distinguishable. There the action in warranty had been taken by the plaintiff on the principal action, and the action was based on a contract with a third party. Moreover, the conclusions of the action in warranty, as shown by the judgment of my brother Fournier who delivered the judgment of the court, were absolutely untenable.

The appellants' contentions on this point would not seem to me well founded.

I would, however, allow the appeal, on the ground that the dismissal of the principal action was, under the circumstances of the case, fatal to the action in warranty. The court having held on the first action that the defendants deLisle were not liable to the Thomas Workman estate, it follows that the William Workman estate is not liable towards them, the deLisles. The declaration in warranty is based on the essential allegation that "in so far as the said principal plaintiffs have suffered any loss in the premises for which they have any recourse against the said estate deDisle, such loss has been suffered by the negligence of the said William Workman estate, represented in the said common office by the said Joel C. Baker in not looking after the said Cotté, and preventing him, which they could easily have done with common care and prudence, from robbing the said Thomas Workman or those he represented."

Now, it being determined that the principal plaintiffs have not suffered any loss for which they have any recourse against the estate deLisle, the estate deLisle, upon their own allegations, have no action in warranty against the William Workman estate.

(1) See also *re Geoffroy* v. *Raffaillat*, Pand. Fran. rec. men. 95,2, 62; and Chauveau's annotation to a case of *Santel* v. *Brocard*, 44 Journal des Avoués, p. 270.

(2) 23 Can. S.C.R. 298.

1895

ARCHBALD v. DELISLE.

BAKER ve DELISLE.

MOWAT v. DELISLE.

Taschereau J.

Mais je dois supposer, says Boncenne, (vol. 3, p. 419) ce qui d'ailleurs est le plus ordinaire, que les deux causes réunies sont parvenues jusqu'à leur terme commun, avec le demandeur originaire, avec le défendeur qui s'est, à son tour, constitué demandeur en garantie, et le tiers qu'il a fait assigné pour y répondre. Le premier perd-il son procès? Les deux autres le gagnent a la fois, et il est condamné envers eux à tous les dépens; car son action avait rendu nécessaire le recours en garantie.

That is, of course, when the defendant in warranty was a warrantor of the principal defendant. If he is not a warrantor, and has wrongly been called in as such, the action in warranty is dismissed with costs against the plaintiff in warranty. But in both cases it must be dismissed. No question of that kind as to costs arises iu the present case; none were asked against the principal plaintiffs (1).

The action in warranty consequently fails, in my opinion, whether the William Workman estate were warrantors of the deLisle estate or not. If they are not warrantors, *cadit questio*? If they are warrantors it is only of condemnations that might have been given against the warrantee, not of all false accusations or unfounded complaints that the warrantee might be subject to.

The plaintiffs in warranty might very well have postponed the bringing of the action in warranty till after the judgment on the principal action. They elected to take proceedings against their warrantors before they had themselves been condemned; they have done so at their own risks. They based their action upon an eventuality, and that never happening they alone must bear the consequences thereof, for the defendants, appellants on this issue, if at all their warrantors, were warrantors of their damages and condemnations, not of their fears of damages, nor of con-

(1) Comp. Bioche, procéd. vo. désistement, nos. 54, 157, and Sirey, 32, 1, 492, and 37, 1, 401; also Brusseau-Laisney, procéd. vol. 4, and no. 278.

tingent liabilities. It is not their fault if an unfounded action has been taken against the warrantee. And it is likewise not their fault if the warrantee did not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiffs.

In the case I previously referred to of *La Compagnie l'Abeille* (1), the principal action was dismissed in appeal, and the court declared consequently "qu'il n'y a lieu de statuer sur la demande en garantie," and condemned the plaintiff in warranty to the costs on his action. We should perhaps adopt that course here. For, to use the words of the Cour de Cassation, in another case of 8th January, 1894 (2): "Il n'y a plus en effet de garantie à exercer, lorsque sur la défense du garantie, la demande originaire tombe."

In a previous case, a *considérant* of a Court of Appeal was as follows:

Attendu que l'action en garantie a été soumise aux premiers juges, que s'ils n'y ont pas statué, c'est que, en écartant la demande principale, ils n'avaient pas besoin de s'occuper de la demande en garantie (3).

And the Cour de Cassation, in an action *en garantie formelle*, held that:

Attendu que l'action principale étant écartée, il ne peut pas y avoir lieu à garantie (4).

And, said the same court in the same sense, in another case:

Le demandeur qui succombe au principal peut être condamné aux frais de l'action en garantie, sur le seul motif qu'elle a eu pour cause la demande principale, sans que la Cour soit tenue d'apprécier le mérite de cette action en garantie (5).

I have already remarked that here no costs were asked against the principal plaintiffs.

(1) Pandectes Françaises, 95, 2, 36.
(2) Pand. Fran. rec. men. 95, 1, 63.
(3) Sirey 41, 2, 20.
(4) Sirey, 36, 1, 251.
(5) Sirey, 68, 1, 217; 68, 1, 41 67, 1, 109.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

In the province of Quebec, in apposite cases of *Peck* v. *Harris* (1) and *Lyman* v. *Peck* (2), on appeal, the principal action having been dismissed, the action *en garantie*, was also dismissed with costs against the plaintiff *en garantie*.

In a case of *Aylwin* v. *Judah* (3), the court having dismissed the principal action, held on the action *en garantie formelle* that the court could not consequently adjudicate upon it, and ordered the costs thereof to be paid by the plaintiff in the principal action.

In an action of *Fraser* v. *St. Jorre*, and *St. Jorre, plaintiff in warranty* v. *Dumais, defendant in warranty*, Mr. Justice Casault, in 1877, at Kamouraska, having dismissed the principal action adjudicated as follows on the action in warranty:

> Considérant que le défendeur en garantie était le garant formel du demandeur en garantie, qu'il aurait dû prendre son fait et cause et que les moyens qu'il a invoqués dans ses défenses à la demande en garantie n'étaient pas une réponse à la dite demande en garantie, les dites défenses du défendeur en garantie sont renvoyées avec dépens, et vu le renvoi de l'action principale, l'action en garantie est renvoyée sans frais.

I would allow the appeal of the defendants in warranty and declare that the principal action having been dismissed, a decision on the merits of the action in warranty has become unnecessary, with an order that the costs on that issue be paid by the plaintiff in warranty to the defendants in warranty, *distraits* to their attorneys.

There remains the appeal on the intervention *Moat et al.* v. *deLisle et al.*

In consequence of the pretension set forth by the defendants in an amended plea to the principal action, that the late Thomas Workman was only a *prête-nom*, William Moat and Joel C. Baker, the latter both per-

(1) 6 L. C. Jur. 206. (2) 6 L. C. Jur. 214.
(3) 7 L. R. C. 128.

sonally and in his capacity of executor under the will of his wife Louisa Frothingham Workman, became intervenants, as representing ten elevenths of the amount sued for by the Workman estate in the principal action, and prayed *acte* of their concurrence and approval of the conclusions taken in the principal demand for one eleventh.

The defendants in pleading to the intervention practically repeated their defences to the principal action and again concluded for its dismissal.

The principal action have been dismissed, the courts below dismissed the intervention. No other judgment was possible; having espoused the cause of the plaintiffs, their joint owners, the intervenants must bear the consequences of the defeat of the action. Consequently, the principal appeal being dismissed, the appeal on the intervention must likewise be dismissed with costs *distraits* to the attorneys of the respondents in that appeal.

A good many irregularities appear in connection with the proceedings on this issue. They, however, affect questions of practice, or matters in the discretion of the court of first instance, with which we cannot interfere.

Appeals in the principal action and the intervention dismissed with costs.

Appeal in the action in warranty allowed with costs.

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

Solicitors for the respondents: *Barnard & Barnard.*

1895

*Mar. 30.

*June 26.

THE TORONTO RAILWAY COMPANY (PLAINTIFF)..... } APPELLANT;

AND

HER MAJESTY THE QUEEN (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duties—50 & 51 V. c. 39, items 88 and 173 — Exemption from duty—Steel rails for use on railways—Application to street railways.

The exemption from duty in 50 & 51 V. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form" under item 88. Strong C.J. and King J. dissenting.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the Crown in an action for repayment of duties paid under protest by the plaintiff company.

The Customs Tariff Act, 1888 (50 & 51 Vic. ch. 39), by item 88 imposes a duty of $6 per ton on iron or steel railway bars and rails for railways and tramways of any form, not elsewhere specified, and by item 173 "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," are exempted from duty.

The only question for decision on this appeal was, whether steel rails weighing more than twenty-five pounds per lineal yard, imported by the plaintiff company for the construction of street railway tracks in Toronto, were exempted from duty under item 173, or

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

(1) 4 Ex. C. R. 262.

subject to duty under item 88. The learned Judge of the Exchequer Court held that the exemption did not apply to steel rails for street railways. The company appealed.

Robinson Q.C. and *Osler* Q.C. for the appellant. The learned judge of the Exchequer Court held that the construction of the statute should be in favour of the railway company, but he decided the case outside of the wording of the act and on the general policy of the legislation.

A street railway is not a tramway. The distinction between them is recognized in the Tariff Act of 1888.

This question arose in New Brunswick in *Ex parte Zebley* (1); and see also *Grinnell* v. *The Queen* (2); *Ayer* v. *The Queen* (3).

The course of tariff legislation shows that rails for street railways were intended to be included in the exemption.

Newcombe Q.C. Deputy Minister of Justice, and *Hodgins* for the respondent. Street railway and tramway are synonomous terms.

The exempting item does not use the word tramway and the taxing item does.

The intention of the legislature was to encourage the building of long distance railways and not of those for the convenience of municipalities.

The learned counsel referred to *Attorney General* v. *Bailey* (4).

THE CHIEF JUSTICE.—The appellant is a railway company incorporated under an Act of the Legislature of the province of Ontario passed in 1892, which gave it power—

To acquire, construct, complete, maintain and operate a double or single track street railway in the city of Toronto and * * * * *

(1) 30 N.B. Rep. 130.
(2) 16 Can. S.C.R. 119.
(3) 1 Ex. C.R. 270.
(4) 1 Ex. 281.

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

The Chief Justice.

To acquire privileges to build and operate surface railways within the limits of any municipal corporation in the county of York over roads within the same.

In exercise of these powers the appellant acquired an existing street railway worked by horse power in the city of Toronto, and proceeded to make large extensions to the same, and to alter the motive power to electricity.

For the purpose of this railway, and to be laid down in its tracks or permanent way, the appellant imported a quantity of steel rails.

Upon these rails the customs officers of the Dominion levied a duty of $6 per ton.

This was done contrary to the protests of the appellant, who insisted that the rails, which weighed 69 pounds per lineal yard, ought, under the Customs Act of 1887, in force at the date of importation, to have been admitted free of duty.

The duties so imposed were paid under protest, and the present proceeding has been taken to recover back the amount so paid.

The provisions of the Customs Tariff Act 1887, (50 & 51 Vic. ch. 39) on which the decision of the question thus raised must depend are as follows:—

The duty is imposed by

Item 88. Iron or steel railway bars, and rails for railways and tramways of any form, punched or not punched, not elsewhere specified, $6 per ton.

By item 173, steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks are exempted from duty.

The appellant contends that the rails in question are covered by this exemption of item 173.

The learned judge of the Exchequer Court says in his judgment, that he would have held these rails to have been free but for a series of Acts by which par-

liament has made grants of money in aid of certain lines of railway being long line railways, connecting distant points within the Dominion, but confined to that class of railways, and in no case including street railways, which are local works confined to particular cities, towns or municipalities. The learned judge thought that this indicated the policy of the legislature underlying the provisions of the Tariff Act to be to admit free only rails designed for use in the same class of railways as that which had been favoured by parliamentary grants of money. The learned judge says:—

> As the matter stands, however, and if there were no legitimate aids to assist in discovering the intention of the legislature other than the language used in the Acts of 1885 and 1887, I should think the question to be, to say the least, so involved in doubt that the plaintiff should succeed in his action.

The learned judge then adverts to what are called the bonus acts, and from the practice of subsidising railways, other than street railways, by these grants, he infers that proprietors of this class of railways were alone intended to be benefited by the exemption of steel rails of the prescribed weight for "use in railway tracks."

I am unable to assent to this as a sufficient reason for depriving the appellant of the benefit of the exemption.

In construing an Act of Parliament it is of course perfectly legitimate, and it is the constant practice of the courts, to call in aid the language and expressions used by the legislature in, and the intention indicated by, other statutes which are in *pari materiâ*. The bonus acts are, however, not in *pari materiâ* with the customs acts. Further, the circumstance that the legislature had limited its subsidies to a particular class of railways, does not in any way indicate an intention to confine the benefit of a customs exemption to the same

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

The Chief Justice.

class as that which had been thus favoured by money grants. At the utmost it warrants nothing but a conjecture of what may or may not have been the intention of the legislature. Then a mere supposition of this kind ought to have no influence on the construction of a legislative act, in either widening the language imposing duties, or in restricting that authorizing exceptions. If we are to look outside the statute to ascertain the intention of the legislature in exempting "steel rails above 25 pounds per lineal yard for use in railway tracks," I think, as was suggested by my brother King during the argument, that we find a key to that intention when we consider the general fiscal policy of the Dominion at the time this Act was passed to have been that which is stated in the factum of the Crown and which is colloquially known as "The National Policy;" in other words, a system of duties imposed for the protection and encouragement of the manufactures of the Dominion. And this becomes still more apparent when we find it stated in the deposition of Mr. Gartshore, that at the date of this legislation steel rails a little under 25 pounds were being manufactured in the Dominion.

These considerations, however, are of little moment if the plain language of the Act itself does not exempt the rails now in question.

The argument for the Crown is, that the appellant's railway is a "tramway," that the rails are therefore subjected to the duty by item 88 as rails for "tramways" and not as rails for "railways," and that the exemption of rails "for use in railways tracks" does not include rails for use in tramway tracks.

I am compelled to deny the correctness of these propositions. A great deal of evidence has been given by engineers and other skilled witnesses to explain the meaning of the word "tramway" used in the 88th

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

The Chief Justice.

item by which the duties are imposed. This evidence, taking the term to be a word of art, was, I take it, strictly admissible. At all events, it was admitted without objection. The conclusion I draw from the depositions of the expert witnesses who have thus given their opinions is, that the word "tramway" was not designed as a description of such railways as that of the appellant. I take, as a fair type of the whole of this evidence, the deposition of Mr. Keefer, an engineer of very long practice, extending over some fifty years, of the highest professional reputation, and who had formerly conjoined to his professional experience practical experience in the management of a street railway company in which he was formerly interested, and had been for a series of years president of. He tells us, moreover, that he had been an officer of the American Street Railway Association and was familiar with the working of these lines of transit, not only in Canada but in the United States. This witness clearly and accurately points out the distinction between the terms "tramway" and "street railway," as those expressions are used on this side of the Atlantic, where street railways were first constructed and used, and shows that this distinction is well understood, and in what it consists. A tramway is, as the witness describes it, a line of railway laid down upon the surface of a street or common road with a rail adapted for use by ordinary vehicles. An electric railway is not intended for such use and could not with safety be so used. The tramway is constructed with a rail of a peculiar design, having a flange to prevent the wheels of an ordinary vehicle slipping off, which these rails, a section of one of which was produced to the witness, have not got. It is also shown that these rails are in all respects identical with those used for long line steam railways. The witness says "a street railway may be a tram and

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

The Chief Justice.

it may not," and he says the railway he was formerly the president of had no tram, whilst the former horse railway in Toronto had. The whole of Mr. Keefer's deposition goes to show, that according to the scientific meaning of the term, as used and understood by railway engineers, the appellant's railway was not a tramway but a street railway in the strictest application of the term. And this evidence is corroborated by several other professional witnesses called by the appellant. Then, the evidence also shows, that in popular language the term "tramway" is not in Canada or the United States ever applied to these street or surface railways used for rapid transit in cities or towns, but that they are always colloquially referred to as street railways. Further, the evidence shows that in this country there are a class of railways well known and in common use, to which the description tramway is applicable and to which it is always applied, namely, short lines of rails connected with mills, manufactories and mines, and used for lumbering operations.

In addition to this evidence the enactments of the same legislature which passed the Act under consideration indicate that the difference between a street railway and a tramway was well understood, for in the Tariff Act of 1885 we find them expressly providing "that steel rails or bars not including tram or street rails" should be admitted free. Therefore, when I add to this my own common experience of the non use of the term tramway as applied to street railways, which it is impossible to exclude in a case like the present, I cannot hesitate in holding that if the word "tramways" had been wholly omitted from item 88, and if that section had read "steel bars and rails for railways of any form" the duty of $6 per ton would have been sufficiently laid upon the rails now in question. And if this is so, the exemption in section 173 of steel rails weigh-

ing not less than 25 pounds for use in railway tracks would in that case have included the rails in question and they would have been free.

It follows that the duty in the present case must be taken to be imposed by the words "for railways" in section 88 and not by the words "for tramways," and the exception of item 173 must therefore apply to rails to be used in the tracks of a railway such as the appellant's, provided they are not less than 25 pounds in weight. But even supposing that we must regard the duty as imposed by the word "tramways" and that the appellant's lines are tramways, I should still think that the exemption applied in their favour. The word "railway" is a generic word including both long lines and street and surface lines—tramways as the Crown insists they should be called—and there is no reason why the exemption may not be conferred by general words less specific than those imposing the duty. Then, finding the reason of the exemption to be that before indicated, viz., a policy of protection to domestic manufactures, a reason equally applicable to rails for street railways or tramways, if such street railways or tramways were intended to be included in the term "tramways," there is no reason why steel rails above the prescribed weight should not be exempted from duty by the terms "for use in railway tracks."

For these reasons I am of opinion that the appellant is entitled to the relief prayed.

FOURNIER J.—I concur with Mr. Justice Taschereau that this appeal should be dismissed.

TASCHEREAU J.—I would dismiss this appeal. I agree with my brother Gwynne's reasoning. In my opinion the appellant's contentions are untenable. They would call the Grand Trunk Railway or the

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

Taschereau J.

Canadian Pacific Railway tramways, or call themselves a railway company in the sense that these companies are so called. I would not have thought it possible to contend that when, for instance, one speaks of the system of railways of Canada, or of the railways in Canada, the city passenger railways or street railways, or tramways, are included. These tramways do certainly not fall under the general railway acts of the Dominion or of the provinces.

And if by section 18 of the appellant's own charter certain sections of the Ontario General Act are incorporated therein, it is because, in the opinion of the legislature, the appellant would not, without those special enactments, fall under that general Railway Act.

And the federal legislation does not give more assistance to the appellant's case. For instance, the railways generally are empowered to purchase, lease and work other lines competing or connecting with them. Now, could the Grand Trunk Railway or the Canadian Pacific Railway under that clause acquire and work the city passenger railways of Toronto, Winnipeg and Montreal? I should think it impossible so to contend. It would be *ultra vires* of these railway companies to hold and work a street railway or tramway, yet that would be the result if the appellant's contentions prevailed.

Then, by the course of the legislation of the Dominion, the difference between a tramway and a railway is constantly recognized.

For instance, the Criminal Code (sec. 330) punishes the stealing of any tramway, railway or steamboat ticket, the forgery (sec. 423) of any carriage, tramway or railway ticket, and the obtaining by false tickets (sec. 362) of a passage on any carriage, tramway or railway. By sec. 90 of 51 Vic (D.), 1888, power is given to cross any railway or tramway. And when, by sec.

203 of the Criminal Code, it is enacted that a copy of the section against gambling must be posted in every railway car under a penalty of one hundred dollars, I would not think that such an enactment applies to a tramway car, or that sec. 499, punishing by imprisonment for life the damaging of a railway, would apply to a street railway.

Then, upon the evidence on this record, it is clear that street railways, in common parlance, are tramways. In fact, by the modern meaning of the term tramway hardly anything else but a street railway is meant.

And how can this company be entitled to claim an exemption which, in its very terms, is limited to rails for use in railway tracks, when, as appears by the evidence, and found as a fact by the Exchequer Court, their rails are not at all like those that are used for railway tracks ?

Moreover, this statute extends of course to all parts of the country, and must receive the same construction all through the Dominion. Now, if the street railway in Montreal had ever thought of raising this question, they would have been met by the French version of the statute, which is as much law as the English version, and under that version, items 79 and 178, there would not be the least room for doubt. A *chemin de fer* could never be called *un tramway*, or *un tramway* be called a *chemin de fer*, and a street railway is nothing else in French but *un tramway*.

That the company appellant is a tramway company, or that their road is a tramway, requires in fact no demonstration. They are, in fact, nothing else but a tramway company ; if not, there are no tramways in Toronto, Montreal, London, Paris, New York, a proposition that needs not be refuted.

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

Taschereau J.

And their own contract for these rails is for "steel girder tramway rails."

I cannot see that the appellant's case is at all aided by the fact insisted upon at the argument, that it is called the Toronto Railway Company. It is clearly incorporated for the purpose of acquiring and working a surface street railway, and nothing else,, as the Toronto Street Railway Company previously had been; it is in fact the Toronto Street Railway acquired by the city under 52 Vic. ch. 73, sec. 13, that the appellant is the continuation of.

Then in this very Customs Act itself, 50 & 51 Vic. ch. 39, Parliament has made the distinction between railways and tramways; after taxing both railways and tramways in express terms in item 88, it exempts, by item 173, rails (of not less than 25 lbs. per lineal yard) for use in railway tracks, omitting tramway tracks. Need we go further to find the clear intention of Parliament? To my mind it is not a matter of construction, there is no room for it. It says but the one thing; tax both in item 88, exempt but one in item 173. *Quod voluit dixit.*

GWYNNE J.—The point raised by this appeal is as to the construction of two items, viz., 88 and 173 of the Duties of Customs Act 50 & 51 Vic. ch. 39. By the item 88, a duty of $6 per ton is imposed upon:

> Iron or steel railway bars, and rails for railways and tramways, of any form, punched or not punched, not elsewhere specified.

By item 173 the Act authorizes to be imported into Canada free of duty:

> Steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks.

The suppliant is a company incorporated by an Act of the province of Ontario, 55 Vic. ch. 99, for the purpose of acquiring and taking over from the peti-

tioners for the Act a contract and agreement made by and between the city of Toronto and the petitioners, set out in full in the Act, for the purchase of the street railways and the properties, and street railway privileges of, and belonging to the city of Toronto, and for completing, maintaining and operating a double or single track street railway upon or along any of the streets of the city of Toronto subject to certain exceptions and qualifications in the Act specified.

The company is essentially a street railway company. In the month of December, 1892, it entered into a contract with a firm in England for delivery in Toronto of 3,000 tons of new, perfect, steel girder tramway rails for use upon the railways in the streets of the city of Toronto; this contract was fulfilled by the delivery of the rails at Toronto accompanied with invoices wherein they were described as in the contract for their purchase, viz., "steel girder tramway rails."

The company also imported from Antwerp certain other rails called in the invoices accompanying them "steel grooved rails and fish plates," also for use upon its railways in the streets of the city of Toronto. All these rails were respectively entered by the suppliant precisely as described in the above invoices and upon them was charged to the suppliant the sum of six dollars per ton in virtue of the above item 88 of the statute.

The contention of the suppliant now is that this imposition of duty was unwarranted upon the ground that the rails having been, as they in fact were, of much greater weight than 25 lbs. per lineal yard, they came within the item 173 and were therefore free of duty.

The effect of this contention, if successful, must be that items 88 and 173 of the Act must be read together as follows, that is to say, as imposing a

1895

THE TORONTO RAILWAY COMPANY v. THE QUEEN.

Gwynne J.

duty of six dollars a ton upon iron or steel railway bars, and rails for railways and tramways, of any form, punched or not punched, except upon steel rails weighing not less than 25 lbs. per lineal yard (which are declared to be free), for all "steel rails for railways" when laid upon the ground constitute the railway tracks. This construction, thus limiting the duty upon steel rails for railways to such as are under the weight of 25 lbs. per lineal yard must not be adopted if another construction can be put upon the Act which will give full effect and a reasonable construction to both items. This I think can very clearly be done. Parliament by item 88 intended, I think, to refer to all rails whether of iron or steel imported for railways and tramways, that is to say, by using the word "railways" in such connection with "tramways" they meant railways *ejusdem generis* with tramways which street railways, I think, undoubtedly are. They are very commonly, and not unfrequently even in Acts of Parliament authorizing their construction, spoken of indifferently as tramways or street railways, and in commerce it is evident from the contract under which the particular rails in question were purchased and imported that they are known as tramway rails. Now item 173 is not, I think, to be construed as exempting from duty some part of the particular thing which by item 88 had been subjected to duty, but as providing for a different article altogether from anything intended to be covered by item 88, namely, for steel rails for use in the tracks in those great arterial commercial undertakings (for the transport by interconnection with each other throughout the continent not only of passengers but of goods, wares, merchandise, chattels and cattle of every description) which are denominated "railways" without any qualifying prefix, and for the construction and management of which acts have been passed for

many years back both by the late province of Canada and by the Parliament of the Dominion since Confederation, and by the legislatures of several provinces of the Dominion under the title of "The Railway Act" of the Dominion, or of the province passing the act. The rails in question are proved to be of such a construction that they could not be used at all upon any of these latter railways, but are constructed specially for use upon street railways or tramways. The rails were, I think, clearly liable to the duty charged and the appeal must therefore be dismissed with costs.

KING J.—I am of opinion that this appeal should be allowed with costs and judgment entered for the suppliant in the Exchequer Court, for the reasons stated in the judgment of the Chief Justice.

**Appeal dismissed with costs.*

Solicitors for the appellant: *Kingsmill, Saunders & Torrance.*

Solicitor for the respondent: *Frank E. Hodgins.*

---

*The Toronto Railway Co. obtained leave to appeal to the Judicial Committee of the Privy Council from this decision.

1895

*Mar. 29, 30.

*June 26.

THE NORTH-WEST TRANSPORTATION COMPANY (DEFENDANTS) } APPELLANTS;

AND

F. B. McKENZIE (PLAINTIFF).... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Correspondence—Carriage of goods—Transportation Co.—Carriage over connecting lines—Bill of lading.

Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. *Hussey* v. *Horne Payne* (4 App. Cas. 311) followed.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed and the bill of lading so received is not a record of the terms on which the goods are shipped.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent.

Taschereau J. dissented on the ground that the correspondence in the case did not contain the contract relied on and that the injury to the goods for which the action was brought took place while they were not under the control of the company.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The action in this case was for damages by reason of the defendant company having allowed plaintiff's wheat, while being carried for plaintiff from Duluth,

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

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

Minneapolis, to certain points in Ontario, to become mixed with other wheat of an inferior quality during the transit. The contract between the parties was made by correspondence, telegrams and letters, and after the wheat was delivered from an elevator into a steamer of the defendant company, and the steamer had sailed, a document called a bill of lading, though not signed by the master or any one for him, was handed by an agent of the company to the elevator company, who were agents of plaintiff under the contract. This bill of lading varied the original agreement for carriage by changing the rate of freight and providing that defendant company should only be liable as carriers over its own line, and for the rest of the transit should be merely forwarders of the wheat. It was afterwards sent to plaintiff who, without reading it, attached to it a draft which he had negotiated with a bank.

At the trial plaintiff obtained a verdict, which was sustained by the Divisional Court and the court of Appeal.

Osler Q.C. and *Lister* Q.C. for the appellants.

Laidlaw Q.C. and *Kappele* for the respondent.

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

KING J.—This is an action to recover damages for the non-delivery of a lot of wheat on a contract of carriage, and the principal questions raised are as to what was the contract, and whether the confusion with inferior wheat which took place was in the course of the carriage. Upon the first of these points, the question was whether there was a through contract from Duluth, in the State of Minnesota, to Montreal or points west, in the option of the shipper, or whether, as contended by the appellant, the contract was merely from Duluth

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

King J.

to Sarnia. All the judges before whom the matter has come, with exception of Mr. Justice Burton, are of opinion that there was a through contract.

In October, 1891, the plaintiff, a dealer in wheat, residing at Brandon, Manitoba, was sending forward to the Ontario markets for sale a lot of wheat, and it was on its way to Duluth by the Northern Pacific Railroad. From there he proposed sending it by water to Sarnia (or Point Edward, the terminus of the Grand Trunk Railway there) for orders, and began a correspondence with defendants, a Canadian company, with head office at Sarnia, owning a line of freighting steamers running between Duluth and other grain ports on the west shore of Lake Superior, and Sarnia or Point Edward. The parties had had no previous dealings. The correspondence resulted in the shipment of the grain, and the contract is to be found in this correspondence, or in certain shipping papers, or in both together.

In *Hussey* v. *Horne Payne* (1) it was held that where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. Accordingly in that case, although the first two letters of a correspondence seemed to constitute a complete contract, it was adjudged that upon the whole of what had passed in letters and conversation no concluded and complete contract had been established. We are therefore to consider everything separately and together and draw a conclusion upon the whole transaction.

On 20th October plaintiff telegraphed from Brandon to the agent of the company at Sarnia:

(1) 4 App. Cas. 311.

Quote freight from eight to ten thousand bushels wheat Duluth to Point Edward for orders. Shipment inside of three weeks.

So far this was a bare inquiry for a rate.

The defendants, who had an agreement with the Grand Trunk Railway Company relating to through rates, but which, so far as appears, was not known to plaintiff, replied the same day by telegraph:

Cannot quote local rate Sarnia for orders. Rate to Guelph and points west eight cents, east of Guelph to Montreal (not export) nine cents. Reply if accepted.

This is something more than an answer to an inquiry. It is a proposal of carriage to which plaintiff's assent is sought. Freight is the price of, or remuneration for, safe carriage and delivery, and the natural meaning of defendants' proposition is a proposal of carriage from Duluth to Guelph, and points west of it, for eight cents, and to east of Guelph, as far as Montreal, for nine cents, in the option of the shipper of course.

To this plaintiff replied on the same day:

Accept your offer for freight eight to ten thousand, writing.

The letter so referred to is not in evidence, but presumably it merely confirmed the telegram as in ordinary course.

Upon the next day defendants wrote:

Re your telegram yesterday regarding a shipment of eight to ten thousand bushels from Duluth within three weeks, I note your acceptance of our rates. We could bring this lot by the SS. U. Empire in Duluth about the 29th or 30th. We would prefer the amount to be ten thousand bushels. Please let us know if you would have it ready so that we can arrange definitely by that steamer * * *

On the 23rd they telegraphed:

Empire thirtieth might not have room your ten thousand wheat Duluth, would take Monarch about 4th November,

i.e. would take the wheat by Monarch about date named.

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

King J

To which plaintiff telegraphed on the 26th :

Fourth will suit. (Can you take another eight thousand fifteenth) ; will make both lots ten if possible.

On same day defendants replied by telegraph :

Your telegram to-day. Will keep space for ten thousand Monarch fourth (and for ten thousand Monarch about 14th. Rates for latter nine cents, Toronto west-east to Montreal ten cents, not export.) Cannot take eight thousand lots, see letter.

The letter was as follows :

Referring to your telegram to-day relative to wheat shipments, would say that we cannot take lots of eight thousand bushels. We must load our steamers, and can only do so by having the holds full. The spaces in Monarch are 10,000, 11,000, 10,000 12,000 and 6,000 bushels * * We will therefore expect you to make the lot via Monarch about 4th, 10,000 bushels. We could take 10,000 bushels in Monarch about 14th November, at nine cents per bushel to Toronto and west, and ten cents east of Toronto to Montreal, not for export. Please say if these will be satisfactory, so that we can book them definitely.

No further correspondence took place respecting the first shipment. I draw attention to defendants' attempted variation of the terms respecting the quantity of the first shipment, merely to say that the circumstance has not been treated by either party as having any bearing upon the questions in this case. In point of fact the shipment approximated closely to ten thousand bushels, falling short of that quantity by only about three hundred bushels.

Following upon this correspondence, the wheat was shipped at Duluth on board the Monarch on the 10th November, through the Lake Superior Elevator Company, who had the storage of it, and a document called a freight contract, signed by Hurdon, the Duluth agent of defendants, was afterwards handed to the elevator company, but the precise time when this was done does not appear. It was, however, dated on the 11th November, and the master states in his evidence that the vessel sailed from Duluth on the 10th November. This docu-

ment is in the body of it referred to as a bill of lading, but it is not signed by the master, or by any one as his agent, or on his behalf.

Another paper, dated 10th November, was handed by Hurdon to the purser of the ship. This is in form a bill of lading, but differs from the freight contract and is not signed at all.

Deferring for the present a consideration of these documents, let us consider separately the effect of that which (apart from the bare receipt of the goods) was, at the time of the commencement of the voyage, the only evidence of any agreement for carriage at all.

Upon the correspondence taken by itself is it doubtful that there was a contract for carriage? Suppose that plaintiff had failed to supply cargo, or that defendants had declined to receive it, is there any doubt that an action would have lain in the one case by the defendants, and in the other by plaintiff? Then, if a contract, is it doubtful that what was contemplated was the carriage (by *some* carrier at least) to a point to be designated by the shipper, not farther east than Montreal, at a certain single rate? Such contract, as being made in this country, and to be performed upon a British vessel and on Canadian railways, is to be governed by the law of this country, under which a carrier accepting goods directed to a destination beyond its ordinary terminus assumes, in the absence of stipulation to the contrary, an obligation to transport them to the ultimate and designated destination. In point of reason, an executory contract should be interpreted in light of such principle of law. *Primâ facie* all that is to be done on the one side is the consideration for all that is to be done on the other. Here there was an agreement for a single payment of freight covering the whole transit, and no suggestion of an understanding that, as to one part of the journey, there

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

King J.

was to be a contract of carriage, and as to the rest of it an agreement to forward by connecting carriers upon contracts of carriage to be entered into with them by defendants as agents for the shipper. Such an agreement is often made, but it requires apt words to raise it.

It does not follow from this that, in addition to common law and statutory limitations, such usual exceptions from liability as might amount to usage in the particular trade might not attach to the contract as an implied term, or that it would not be subject to implications arising from a course of business between the parties, if there had been such.

We are, however, now to consider as a part of the transaction the so-called freight contract, or bill of lading, given by Hurdon to the Lake Superior Elevator Co.

This expressed that the goods had been received on board to be transported by Lake to Sarnia, Ont. (dangers of navigation, fire, explosion and collision excepted) to order Imperial Bank of Canada, Point Edward for orders, and (*inter alia*) contained the following clauses:

Cancelled by new bill of lading issued for cars as per back.

Rates from Duluth to Toronto and points west nine cents. East Toronto to Montreal, 100 lbs., ten cents per bushel.

To be transported by them and forwarding lines with which they connect until the said goods have reached the point named in this bill of lading, (*i.e.*, the point east of Sarnia to which the goods might be ordered.)

* * * * * * * *

It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and that the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

King J.

The contract is executed and accomplished, and the liability of the company, limited as a common carrier thereunder, terminates, on the arrival of the goods or property at the station or depots of delivery (and the companies will be liable as warehousemen only thereafter), and unless removed by the consignee from the station or depots of delivery within twenty-four hours of their said arrival, they may be removed and stored by the company at the owner's expense and risk.

Notice.—In accepting this bill of lading the shipper or the agent of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions.

Upon this instrument the defendants would be carriers from Duluth to Sarnia, and forwarders beyond, their obligation being to carry to Sarnia and there deliver (if directed) to the connecting carrier upon a contract to be made by them as plaintiff's agent with such connecting carrier, but involving, beyond Sarnia, no obligation as carriers.

A bill of lading is ordinarily both a receipt and a contract. In certain cases it operates only as a receipt. Such is the case where there is a charter party. A charter party is a formal instrument containing usual terms of a contract of carriage, and where it exists it is not to be supposed that there is an intention to supersede it by the bill of lading. In some cases both are to be construed together.

But, where there is only an informal contract by correspondence, the formal bill of lading, when given, would ordinarily be treated as containing the concluded contract unless an intention to the contrary appears.

And if in the case before us the bill of lading had been regular it would be difficult to resist the conclusion that, upon the whole transaction, the completed and concluded contract was to be looked for in it. But the circumstances of this case interpose a difficulty.

In *Bostwick* v. *Baltimore and Ohio Railroad Co.* (1) the plaintiff had made a verbal contract to transport cotton

(1) 45 N.Y. 712.

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. McKENZIE.

King J.

by "all rail" from Cincinnati to New York, at "all rail rates." Under this agreement he delivered the cotton at the company's depot and its transportation was immediately commenced. One or two days afterwards the company's agent sent to the plaintiff a bill of lading which, by its terms, reserved to the company the right to forward in part by water. When the cotton reached Baltimore it was shipped on steamer to New York, and a portion was lost on the passage. It was held that:

After the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine its printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped.

It is contended that the Lake Superior Elevator Co., being plaintiff's agent for shipment at Duluth, he was bound by the formal contract, on the terms of which alone the defendants consented to receive the goods. And this might indeed be so if the bill of lading had been a record of such terms; but a so-called bill of lading, or other like instrument, tendered after the vessel has sailed, is not such a record, and the shipping agent's authority is limited to what is usual, and he has ordinarily no authority to bind his principal by receipt of a bill of lading after the vessel has sailed.

It is clear that if, by the tender of a bill of lading before the sailing of the vessel, it appeared that the defendant had refused to carry except upon the terms of it, the plaintiff would be put to other remedies than that resorted to in this action. But in this case there is nothing to show that defendants, prior to the sailing of the vessel, signified any refusal to receive the goods and carry them according to the terms of the prior correspondence.

Next, as to the action of the plaintiff. It is clear that he expected that a bill of lading would be given,

and we find him writing, on the 14th, that it had not been received. It did not reach him until after the vessel reached Sarnia, and he says that when received he simply attached it to a draft negotiated with a bank at Brandon, without reading it. He was not cross-examined as to this, and the fact that the mistake in the terminal points and the higher rate of freight were not noticed appears to corroborate his evidence. It is further to be borne in mind that plaintiff was not aware of the irregularity attending the giving and receiving of the document. When a party to a transaction receives a customary document under circumstances which, by the ordinary usages of business would ordinarily lead him to infer that it forms a record of the contract, he cannot very well, in ordinary circumstances, escape from its binding operation (in the absence of fraud or mistake) merely upon the ground that he did not read it.

But the like conclusion does not follow where it is sought to vary terms of a prior mutual assent by a formal document given out of the usual course of business. In such case there is wanting the presumption that usually attends transactions in ordinary course of business, and the party against whom it is set up may prove want of actual assent. The proper conclusion then, upon the whole, is that the wheat was shipped upon the terms agreed upon in the correspondence that had taken place.

This conclusion is not affected by what took place respecting the change from Point Edward to Port Huron. The defendants were to carry to Point Edward for orders, and without plaintiff's consent they could not deviate from the specified route. So far as plaintiff is affected by it it was a mere substitution of one point for orders for another, and there was in it no taking delivery by him. Then, as to the action of

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. McKENZIE.

King J.

Plewes & Co. in getting fresh shipping papers from the Grand Trunk Railway Co., the goods being subject to plaintiff's orders directions for their continued transit were necessary, and upon the theory of a through contract by defendants the Grand Trunk Railway Co. were defendants' agents for completing the transportation.

The action of Plewes was as consistent with a through contract as with that contained in defendants' freight contract, for under the latter all duty of defendants would not cease with the discharge of the goods at Point Edward, or Port Huron. They would still be bound, as forwarders, to deliver to the next connecting carrier, and to make, on plaintiff's behalf, a contract of carriage with such carrier. *Moore* v. *Harris* (1).

But it is by no means clear that defendants are not liable for the mixing of the wheat even upon the contract they rely upon. The goods were to be carried to Point Edward "for orders." These words import a further duty on defendants' part after the arrival at Sarnia, *i.e.* to hold the goods a reasonable time at Point Edward for orders, and upon receiving such orders to deliver them according to the stipulations of the freight contract to the connecting carrier upon a contract of carriage on plaintiff's behalf. The course of the grain business is to discharge into elevators in such case. The mere discharge did not necessarily effect delivery. The agreement in evidence between the defendants, the Railway Company and the Elevator Company, seems to treat the latter company as agents for the defendants and the railroad in the handling and storage of wheat in course of transportation by them as connecting lines. There is also evidence that Mr. Beatty, the manager of the defendant

(1) 45 L.J.P.C. 55.

company, interfered in the delivery of this cargo of grain. Mr. Johnston, the secretary treasurer of the Elevator Company, says that he was told by Mr. Beatty that if there was a shortage in any lot of wheat the order should be filled out of like grade of wheat from any other lot. This is not denied. As warehousemen defendants would not be responsible for the safety of the wheat, but they would be liable for want of care in delivery.

Next, as to the place where the mixing took place. It is clearly proved by several witnesses that the Elevator Company, at Port Huron, treated the plaintiff's wheat and the Crowe wheat as one lot

Johnston, the witness already referred to, says that "for some cause between the purser and my foreman, it was considered as one grade of wheat, and it was so treated," and we know that the mischief was caused by the mixing of the "no grade" and "rejected" Crowe wheat with the high grade wheat belonging to plaintiff. The attempt to trace the mixing to the delivery from the Lake Superior Elevator Co. at Duluth, while receiving colour from one of the accounts in evidence, afforded at best a very partial and inadequate explanation of the proved facts and was rightly deemed to have failed by the learned judges who have very fully and conclusively dealt with the case.

It was further argued, as affecting the amount of the damages, that the wheat was not, in point of fact, Manitoba no. 2 hard.

But, apart entirely from the evidence as to Mr. Goldie's contract for a lot of this wheat, and assuming that he might have rejected it even in its original condition as not within his contract, there is evidence that a car load that had not appreciably suffered by the admixture of the Crowe wheat was sold to the Tavistock Milling Company at the like price of $1.03 and

1895

THE NORTH-WEST TRANSPORTATION COMPANY v. MCKENZIE.

King J.

was accepted by them without objection. This corroborates the testimony of the government inspector and others that upon the market it was equal to no. 2 hard by reason of the bulk of it being such, and of the quantity of no. 3 hard in it being off-set by the presence of a quantity of no. 1 hard.

The result is that the appeal should be dismissed.

TASCHEREAU J.—I dissent. I would allow this appeal upon the grounds taken by Mr. Justice Burton in the Court of Appeal. There was no through contract between these parties. A mere quotation of rates cannot constitute one, and whatever mixing of this wheat happened took place when it was not under the appellant's control.

Appeal dismissed with costs.

Solicitors for the appellants: *Lister, Cowan & Mackenzie.*

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

LOWENBURG, HARRIS & CO. (DEFENDANTS) ..... } APPELLANTS;

AND

CLIVE PHILLIPS WOLLEY (PLAINTIFF..... } RESPONDENT.

1895

*May 13.

*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Principal and agent—Negligence of agent—Lending money for principal—Financial brokers—Liability for loss—Measure of damages.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest though their remuneration may come from the borrower.

An agent who invests moneys for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby.

The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land. Taschereau and Gwynne JJ. dissenting.

APPEAL from the decision of the Supreme Court of British Columbia affirming the judgment for plaintiff at the trial.

The facts of this case, which are fully set out in the judgments delivered on this appeal, may be briefly stated as follows:

The plaintiff, Wolley, having money to invest, took the advice of one of the members of defendants' firm who offered him an investment, which was described as "gilt-edged and first-class." The security offered was a mortgage on farm property at some distance from Victoria, British Columbia, where the brokers carried on business. The member of the firm with

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

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

whom plaintiff dealt was not personally acquainted with the borrower and knew nothing of the property, but he acted on the valuation made by two business men of Victoria who did not appear to be experts in valuing land.

The plaintiff lent $5,500 on this property and received only one year's interest from the borrower who proved to be a very unreliable person, and in endeavouring to realize on the security he was unable to sell it. He therefore brought an action against the brokers alleging in his statement of claim that he was induced to lend his money on the representation of one of them that the borrower was a steady, thrifty farmer and the property worth over $7,000, both of which representations were untrue. He obtained judgment in this action for the amount loaned with interest. The defendants appealed.

Robinson Q.C. for the appellants.

Moss Q.C. for the respondent.

THE CHIEF JUSTICE:—Three questions are raised by this appeal. First, was there sufficient evidence for the consideration of the jury that the appellants were the agents of the respondent in the mortgage transaction which has given rise to this litigation? Secondly, were the appellants, as such agents, guilty of negligence? Thirdly, did the respondent by reason of such negligence suffer loss and to what amount?

In answer to the first and tenth questions submitted to them by the learned judge, the jury have found the agency to be established. That there was sufficient evidence for the consideration of the jury on this head cannot be doubted. Mr. Snowden, the member of the appellants' firm by whom the business was managed, being examined as a witness for himself and his com-

pany at the trial, upon cross-examination gave the following evidence:

Q. Then do you think that as the agent of Mr. Wolley you were justified in advising him to make that investment? A. Yes, I do at that time.

Q. Why do you think so? A. Because I considered the property fully worth it at that time.

Q. I will put the question in this way. Do you think that as a financial agent you would be justified in advising a client to make that investment then? A. Yes.

Q. You do. And that would be the way upon which you would have advised Mr. Wolley if you had been acting for him, that would have been the basis upon which you would have given him the advice? A. I would recommend him to take the loan, I did recommend him to take it.

Q. You did recommend him to take it? A. Yes.

Q. How did you recommend him to take it? A. I thought it was a good loan.

Q. You thought it was in his interest? A. Yes, from the valuation I thought it was a good loan.

Q. You thought it was in his interest to take it? A. He had the same opportunity of judging as I had.

Q. No, but a minute ago you said you recommended him to take it. Would you have recommended him to take it if you had not thought it was in his interest? Would you? Do you mean to say that you would deliberately recommend him to do a thing that you thought he would make a loss on? A. No, of course I wouldn't.

Q. Then, if you did recommend him to do it, didn't you hold yourself out to him as acting for him and his interest?—A. I suppose I did at the time.

Q. Of course you did.

In the face of this clear, unequivocal admission by Mr. Snowden, it is quite out of the question to say that the learned judge could have withdrawn the case from the jury and nonsuited the respondent.

There is nothing inconsistent with this admission of the existence of the relationship of principal and agents, in the fact that Hodge, the borrower, paid the appellants their commission of one per cent, for it is proved that the usual practice in carrying out loans at

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

The Chief Justice.

Victoria was, that the borrower paid the commission of the lender's agents. Again, the circumstance that the respondent paid the appellants nothing does not negative the existence of agency, for it is shown, as I have just said, that their commission was paid by the mortgagor. Moreover, the attitude of Mr. Snowden in the controversy which arose as to whether the interest should be paid annually or otherwise, was adverse to the borrower and entirely in the interest of the respondent, shewing that he was at all events acting for him, if not for him exclusively. Then, as the appellants through Snowden well knew, the respondent was relying on them alone to protect his interests, making no inquiries himself and employing no other broker or agent. All these circumstances go to show, by the admission of Mr. Snowden, that his firm were acting as the respondent's agents, and in my opinion were not only proper matters for the consideration of the jury, but entirely justify their findings as expressed in the answers to the first and tenth questions put to them by the learned judge.

That there was ample proof of negligence by the appellants in the performance of their duties as agents is equally clear. Mr. Snowden was content to assume that this parcel of land situate in the Delta of the Fraser River, consisting of eighty acres, with a house and barn, was worth $7,000 upon the mere production of a certificate to that effect, procured by Hodge, the borrower, signed by Messrs. Shotbolt and Baker, two gentlemen living at Victoria, one a druggist, the other a grain dealer, who are not shown to have had any experience as valuers of land, or to have been in any way competent to make the estimate they did. Satisfied with this valuation the appellants made no independent or further inquiry, but acting on it advanced the loan of $5,500. They might, in my opinion, just

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

The Chief Justice.

as well have acted on the mere bare statement of the mortgagor himself. Then the evidence shows that this property, the assessed value of which was only some $2,000, was at the time of the loan not worth more than $40 per acre, the buildings, consisting of a house and barn, being at the utmost of the value of some $1,500. Now this being, as I think, what the evidence establishes as a fair valuation, what amount would any prudent investor advance upon such a security? The rule which the Court of Chancery has laid down as governing investments by trustees on loans on real security, is that on agricultural lands not more than two-thirds, and on buildings not more than one-half, of the actual value should be advanced. This, I think, is the proper test to ascertain what a prudent owner would have advanced in the present instance. And what a prudent owner would have advanced, and no more than that, it was the duty of the appellants in the present case to have advised the respondent to advance. Then, on the basis of the valuation I have mentioned, this property on which the appellants induced the respondent to lend $5,500, was not a good security for more than $2,900. It is plain, therefore, that there was evidence of negligence, and I should say very gross negligence, to go to the jury.

Then, it is urged that the learned judge at the trial misdirected the jury and assumed the decision of the question of agency, as well as the fact of negligence, himself. This ground of appeal is, in my opinion, entirely unfounded. No doubt the learned judge, in his long and exhaustive charge, did strongly comment on the evidence, but that he had a perfect right to do, and I must add, considering the nature of the case and of the evidence adduced, I should have been surprised if the learned judge had not spoken forcibly, but that he either directed the jury absolutely to find for the re-

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

The Chief Justice.

spondent on these questions of fact, or in any way sought to impose his view of the evidence upon them, is a proposition to which I cannot agree. In the course of his charge the learned judge most distinctly told the jury that these questions were for them; thus we find him saying:

> Now, if you find—because I do not decide it, it is for you to decide it—if you find that there was an agency, the next thing you have to find is: Were they negligent? Now the word "negligent" is a harsh word. The proper term to use in a case of this kind, and it comes to the same thing, is this—or the proper question to put to you, is this—and you will answer it according to the evidence: Was there due skill, or were there due skill and diligence used by the defendants, if you find that they were agents for the plaintiff in making this loan?

Upon the heads I have already dealt with, I am therefore entirely of accord with the Divisional Court in refusing a new trial.

There remains, however, another objection to which Mr. Justice McCreight, dissenting from the other members of the court, thought effect should be given. The jury were not called upon to assess the damages as they must have been in an ordinary common law action for negligence under the old practice, and the judgment entered by Mr. Justice Walkem upon the findings of the jury did not pronounce for any definite sum to be recovered by way of damages, but ordered the appellants to repay to the respondent the full amount of his advance with interest at eight and a half per cent from 28th October, 1891, (the first year's interest having been paid to the respondent by the mortgagor) until judgment, and it further directed that upon payment of this sum the respondent should assign the mortgage to the appellants. I am of opinion that this was not a correct disposition of the case. The effect of this judgment would be to make the appellants not only responsible for such damages as were caused by the negligent performance of their duty as the respondent's

agents, in over-valuing the mortgaged property, but also for any depreciation (if any there has been) in the actual value of the property subsequent to the loan. It is manifest that any loss in this respect should be borne by the respondent himself inasmuch as it cannot be attributed to the neglect of the appellants. All that the appellants can possibly be liable for is the loss occasioned by the over-valuation adopted and acted on by them. The damages should have been assessed in the regular way, and that not having been done, the cause must be remitted to the Supreme Court of British Columbia to have the error in this respect rectified. This was the view of Mr. Justice McCreight and I concur in his conclusion. Under the British Columbia Rule, 436, the court is empowered to direct a new trial as to part only of the matter in controversy. This rule should, I think, be acted upon in the present case. It would be open to this court, under British Columbia Rule 446, itself to assess the damages, but I think this can be more satisfactorily done by the court below, which may in its discretion either assess the damages itself, send it down for trial before another jury for that purpose only, or direct a reference to ascertain the amount the respondent was entitled to recover. The judgment should be confirmed as to the general liability of the appellants, but varied in the way I have mentioned as regards the damages. This point was not specifically taken either in the notice of motion for a new trial or in the notice of motion to discharge the judgment, though it is to be presumed that it was discussed on the argument in the court below, since Mr. Justice McCreight's judgment proceeds upon it. The appellants, having been compelled to appeal to have the judgment set right in this respect, and having succeeded in part of their contention, ought not to be ordered to pay costs, though,

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

having failed in other respects, they are not entitled to recover any. There should, therefore, be no costs of this appeal and the cause must be remitted to the court below with the directions already indicated.

The Chief Justice.

TASCHEREAU J.—On the question of agency, as well as on the question of negligence, there was, in my opinion, sufficient evidence to support the verdict; and that verdict having been approved of by the learned judge who presided at the trial, and by the learned judges before whom the case was heard in banco, I do not see that we would be justified in interfering. I would dismiss the appeal.

GWYNNE J.—It must be admitted that the learned judge before whom this case was tried, in his exhaustive charge to the jury, in plain terms expressed his own opinion upon the evidence, but it must also, I think, be admitted that while he did so, he also told the jury, (a special jury of mercantile men) that they were to render their verdict upon their own opinion of the facts in evidence uninfluenced by his opinion, for that they were the judges of the facts and not he.

Moreover, after the long discussion at the end of his charge upon the several points upon which the learned counsel for the defendants took objection to his charge, and before the questions which he submitted to the jury were submitted, it must be admitted, I think, upon the report which we have of what then took place, that the learned judge took pains to impress upon the jury that it was their duty to determine the case and to answer the questions he was about to submit to them upon their own unbiassed opinion of the evidence discarding from consideration what he had said as to his views of the evidence.

Under these circumstances, and inasmuch as the evidence in support of the plaintiff's contention, if

believed, and that it was believed by the jury there can be no doubt, was abundantly sufficient to support the findings of the jury upon the questions submitted to them, I do not think that we should be justified in remitting the case to another trial.

The main point urged on behalf of the defendants at the trial was, that the defendant Snowden was employed by the borrower Hodge as his agent to effect a loan for him, and that he as Hodge's agent and only in that capacity applied to the plaintiff for the loan, and that he did not give the plaintiff any reason for thinking that he was acting as his agent in the matter, but I think this is not the correct view to take of the evidence, and that the view taken by the jury is the correct one, namely, that the defendants, of which firm Snowden was a partner, were acting in the matter as the plaintiff's agents. The evidence is that Hodge applied to a Mr. Pooley not to employ him as Hodge's agent to procure a loan for him, but as a person who acting for others, his clients, had before lent him money on mortgage asking him to lend a further sum to Hodge upon the land already held by him under a mortgage. Mr. Pooley informed Hodge that he had no money to lend, and Mr. Pooley says that he does not recollect whether he told him to go to the defendants, that they might have money to lend, but he says that he was in the habit when he had no money himself to lend, to send persons applying to him for loans to the defendants, and in point of fact it appears that Hodge did go to the defendants and saw the defendant Snowden, and told him that Mr. Pooley had sent him to the defendants and that he wanted to obtain a loan of $5,500. It is plain that Hodge's application to the defendants was as brokers who were in the habit of investing their own or their clients' money, as Mr. Pooley was, on mortgage. Snow-

1895

LOWENBURG, HARRIS & COMPANY v. WOLLEY.

Gwynne J.

den then applied to the plaintiff, for whom he had on previous occasions invested money, and obtained from him a cheque payable to the order of the defendants, authorizing him to lend the money to Hodge upon the security, as it was represented by Snowden, to be a first-class or "gilt edged security," upon Mr. Pooley being satisfied as to the legal sufficiency of the title; this being done, the defendants handed the money to Mr. Pooley, who handed to Hodge what remained after paying the mortgages already on the land, a commission of 1 per cent paid to the defendants, and the costs of preparing the mortgage. Much was tried to be made of the commission of 1 per cent paid to the defendants, as being a commission paid to them by Hodge for their services as his agents, but in truth that commission was that which is paid ordinarily by every borrower to the lender's agent through whom the loan is effected, the practice being, in all such cases, to charge all expenses, including the commission of the lender's agent, to the borrower.

I can see no ground for finding fault with the findings of the jury, and under the circumstances I do not think the parties should be put to the expense of another trial.

As to the amount of the judgment of the court below I can see no just ground of interference with it, except as to the amount of interest allowed. I did not understand the learned counsel for the appellants to complain of the amount if we should be of opinion that the plaintiff was entitled to recover in the action. However, it is established, I think, that the plaintiff was betrayed into advancing the money which the defendants loaned upon the security of the mortgages taken in the plaintiff's name by representations, which were untrue in point of fact, made to him by the defendant Snowden, who had no justification for making

them, and since the discovery by the plaintiff of the deception so practised upon him he has repudiated the mortgage so taken as one which, under the circumstances, was never authorized by him; his true measure of damages is therefore, in my opinion, the amount which he was so wrongfully induced by Snowden to advance, together with interest thereon at six per cent, he transferring all interest vested in him by force of the mortgage; whatever may be the real value of the security can only with certainty be ascertained upon a sale of the premises to realize the amount purported to be secured by the mortgage. I can see no justice whatever in compelling the plaintiff to adopt any such proceedings, or in putting him to the delay and expense incident upon any proceeding for determining the real value of premises comprised in a mortgage, all interest in which he repudiates as having been imposed upon him by the false representations of the defendants.

The defendants, having procured the plaintiff to advance his money upon such representations, must reimburse him to the full amount of the principal advanced and six per cent interest, and must themselves look to the mortgage security for their indemnity. The wrong to be redressed was theirs, and the burthen to reinstate the plaintiff in the position in which, but for their wrong he would be, lies upon them. The judgment being varied as to the interest the appeal should, in my opinion, be dismissed with costs.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

Appeal dismissed with costs, but judgment varied.

Solicitor for the appellants: *Robert Cassidy.*

Solicitors for the respondent: *Bodwell & Irving.*

1895

*May 13.

*Dec. 9.

THE CORPORATION OF THE CITY OF VANCOUVER ..... } APPELLANT;

AND

WILLIAM BAILEY ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Construction of statute—Special Act—Repeal of by general Act—Repeal by implication.

A general later statute, (and *a fortiori* a statute passed at the same time) does not abrogate an earlier special Act by mere implication.

The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment of Mr. Justice Drake and quashing a by-law of the Corporation of the City of Vancouver which authorized a sum of money to be raised by debentures for supplying electric light in the city.

The by-law was voted on by the ratepayers of the City of Vancouver on 3rd October, 1894, and reconsidered and finally passed by the council on 8th October, 1894.

At the polling a majority of the ratepayers voted in favour of the by-law, but the total votes cast for the by-law did not amount to three-fifths of the number of votes polled.

The special Act incorporating the City of Vancouver (the "Vancouver Incorporation Act, 1886,") sub-sec. 8 of section 127, was amended by the British

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

Columbia statutes 1893, ch. 63, s. 7, so as to read as follows:

"Upon receiving the returns for the several wards the city clerk shall add up the names; and if it shall appear from such returns that the total number of votes cast for such by-law be three-fifths of the votes polled, the city clerk shall forthwith declare such by-law carried, otherwise he will declare the by-law lost."

Prior to the passing of the above amendment a majority of votes polled had been sufficient to carry such a by-law, but in 1893 the change was made by the provincial legislature on petition of the city council, the original Act being amended by striking out the words "a majority" in the subsection referred to and inserting the words "three-fifths" in lieu thereof.

During the same session of the British Columbia Legislature (1893) an Act was passed amending the "Municipal Act, 1892," which is a general Act applying to cities and other municipalities indiscriminately, and contains provisions granting to municipal councils powers *inter alia* to pass by-laws with the assent of the electors of a nature similar to the by-law in question. Sec. 33 of this statute (ch. 30 of 1893) amended sec. 119 of the "Municipal Act, 1892," so as to read as follows:

"No by-law to which the assent of the electors is necessary before the final passing thereof, shall be valid or of any effect unless the vote polled in favour thereof be that of a majority of the persons who shall vote upon such by-law.

This amendment changed the former statute by substituting the words "a majority" instead of the words "at least three-fifths" which were struck out of the clause previously in force.

1895

THE CITY OF VANCOUVER v. BAILEY.

The 104th section of the "Municipal Act, 1892," was amended by adding a new subsection conferring the powers granted by this section and its subsections upon the municipal councils of the cities of Vancouver and New Westminster, notwithstanding anything in the special Acts relating to said cities inconsistent with or repugnant to the provisions of the said sub-sections.

The 4th section of the "Municipal Act, 1892," limits its application to the City of Vancouver, as follows: "This Act shall be construed as applying to the cities of New Westminster and of Vancouver only so far as it is not repugnant to or inconsistent with their Acts of incorporation, or any amendments thereto, or any Acts or proclamations applicable to either of them, but nothing contained in this section shall be construed into restricting or modifying the power of the Executive Council or the Legislative Assembly with reference to those municipalities or the Acts relating to them," &c., &c.

The appellants contended that the by-law required only a majority vote and that the "Municipal Act, 1892," as amended in 1893, overruled the provisions as to a three-fifths vote contained in sub-section 8, of sec. 127 of the "Vancouver Incorporation Act" as amended by sec. 7 of ch. 63 of 1893.

McCarthy Q.C. for the appellant.

Robinson Q C. for the respondent.

THE CHIEF JUSTICE.—I agree with the judgment prepared by Mr. Justice Sedgewick in this case.

TASCHEREAU J.—I would dismiss this appeal. Mr. Justice McCreight's reasoning in the court below seems to me unanswerable.

1895

THE CITY OF VANCOUVER v. BAILEY.

Gwynne J.

GWYNNE J.—I am of opinion that this appeal must be dismissed for the reasons stated in the judgment of Mr. Justice McCreight. The language of the legislature in respect of the matter under consideration is certainly very equivocal, but the true solution of the ambiguity created by that language is to hold that the action of the city of Vancouver as to the obtaining the assent of the ratepayers to by-laws is governed by sec. 7 of ch. 63 of the Acts of 1893 of the province, and that therefore the assent of the majority of three-fifths of the votes thereon is necessary to the validity of the by-law in question.

SEDGEWICK J.—This is a proceeding instituted in the Supreme Court of British Columbia to quash a certain by-law, by which the mayor of the city of Vancouver was authorized to raise a certain sum of money for the purpose of constructing and operating a system of electric light. The ground upon which it was sought to have the by-law declared invalid was, that it had not received the assent of three-fifths, but only of a majority, of the ratepayers of the city. Mr. Justice Drake, before whom the matter first came, refused to quash. Upon appeal to the Divisional Court his judgment was reversed, and it is from that judgment this appeal is taken.

The city of Vancouver was incorporated by the Vancouver Incorporation Act, 1886. Subsection 8 of section 127 of that Act enacted, in reference to proceedings for the purpose of giving effect to money by-laws of the city, that:

> Upon receiving the returns for the several wards the city clerk shall add up the names, and if it shall appear from such returns that the total number of votes cast for such by-law be a majority of the votes polled, the city clerk shall forthwith declare such by-law carried; otherwise he will declare the by-law lost.

1895

THE CITY OF VANCOUVER v. BAILEY.

Sedgewick J.

By an Act passed in 1893 this section was amended by substituting for the words "a majority" the words "three-fifths." It would follow, therefore, that if there is no other statute law upon the subject the judgment of the court appealed from is right, and that the by-law should be quashed inasmuch as it did not receive three-fifths of the votes polled in its favour when it was submitted to the ratepayers of Vancouver. Now, upon what additional statutes is based the contention that the by-law in question only required a majority of the votes polled? The Municipal Act of 1892, which is a general Municipal Act applying to the city of Vancouver as well as to other cities and townships indiscriminately, by section 104 gave municipal councils power to make by-laws for the constructing and operating of works for supplying the municipality with electric light. Section 119 provided that the by-law, in order to be valid, should receive the votes of three-fifths of the persons who voted upon it, and it was by virtue of the general provisions of this Act that the city of Vancouver purported to enact the by-law in question. Now, in 1893, section 119, just cited, was amended by substituting for the words "three-fifths" the words "a majority," so that this somewhat unusual event, unexampled in the history of legislation, occurred. Prior to 1893 a by-law in Vancouver, enacted for electric light purposes, required the assent of a majority of the voters, whereas a similar by-law elsewhere in the province required the assent of three-fifths of the voters, and that, upon the passing of the two Acts of 1893, in Vancouver the assent of three-fifths was necessary, whereas elsewhere in the province only a majority was necessary.

The contention of the appellants is that the Act of 1893, amending the general Municipal Act, controls and in effect absolutely nullifies the Vancouver Act,

relying on section 21 of the Municipal Act, 1892, Amendment Act, 1893:

> The powers granted by this section 104, and its subsections, are hereby conferred upon the municipal councils of the cities of Vancouver and New Westminster, and the said section and its subsections shall apply to the said cities, notwithstanding anything in the special Acts relating to the said cities which may be inconsistent with, or repugnant to, the provisions of the said subsections.

The two Acts of 1893, above referred to, ch. 30 and ch. 63, were both passed at the same time, the 12th April of that year, and the sole question to be considered is whether the section just quoted must be read as in effect repealing section 7 of chapter 63. In my view every effort must be made to prevent such a result, and I think in the present case that effort was successfully made in the Divisional Court, before which this appeal was heard. Now, it is clear from the Amending Act of 1893, in relation to Vancouver, that it was passed at the instance and upon the petition of the municipality itself. The City Council had apparently, in specific terms, requested the legislature to enact that, in order to the validity of the money by-law, it should receive the assent of three-fifths of the voters interested as theretofore. The legislature had apparently acceded to the request of the city, and had, in the exact terms of their request, enacted the amending statute. Is that amending statute to have no effect because, in a general Act passed in the same session, made applicable throughout the province, there was an express provision that by-laws of that character should require the assent of only a majority of the voters. I cannot hold that such an intent can be imputed to the legislature. The principle contained in the maxim *generalia specialibus non derogant*, forcibly applies here. A general later statute (and *a fortiori* a statute passed at the same time), does not abrogate an earlier special one by mere implication;

1895

THE CITY OF VANCOUVER v. BAILEY.

Sedgewick J.

the law does not allow an interpretation that would have the effect of revoking or altering, by the construction of general words, any particular statute where the words may have their proper operation without it. As Maxwell says (1):

> Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.

Roberts v. *Bury Commissioners* (2); *Thorpe* v. *Adams* (3). For this reason I am of opinion that the by-law in question, not having been carried as required by the specific provisions of the Vancouver charter, as amended by the Act of 1893, is invalid, and that the judgment of the court appealed from must be sustained.

The appeal should be dismissed with costs.

KING J. concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *A. St. G. Hammersley.*

Solicitor for the respondent: *E. P. Davis.*

---

(1) 2 ed. p. 213.

(2) L.R. 4 C.P. 760.

(3) L.R. 6 C.P. 125.

WILLIAM LAW AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

GUSTAV CONRAD HANSEN (PLAINTIFF) ..... } RESPONDENT.

1895

*May 8.

*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Bar to—Foreign judgment—Estoppel—Res judicata—Judgment obtained after action begun—R. S. N. S. 5 ser. c. 104, s. 12 s.s. 7; orders 24 and 70 rule 2; order 35 rule 38.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.

Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393) distinguished. The combined effect of orders 24 and 70 rule 2, and s. 12, s.s. 7 of c. 104 R. S. N. S. 5 ser. will permit this to be done in Nova Scotia.

The provision of R. S. N. S. 5 ser. c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming the judgment of the plaintiff at the trial.

The action was brought by Hansen for damages occasioned by a collision between his ship "The Rolf" and defendants' barque "The Emilie L. Boyd." Prior to the commencement of this action the defendants had taken proceedings against "The Rolf" in the District Court of the United States for the Eastern District of New York, which resulted in a decision that "The

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

1895

LAW
v.
HANSEN.

Boyd" was solely in fault for the collision, and this decision was affirmed by the United States Circuit Court of Appeal, the court of final resort in such cases. The present action was begun before judgment was given by the District Court, and the defendants pleaded thereto that the collision was solely due to the negligence of those in charge of "The Rolf." The plaintiff did not reply to this plea until the action in New York was concluded, when he set up the judgment therein as a conclusive answer. On the trial, before Mr. Justice Townshend, plaintiff had judgment, the learned judge holding that defendants were estopped by the foreign judgment from contesting the question as to whose negligence caused the collision, although he was of opinion, upon the evidence, that "The Rolf" was to blame. The judgment of the trial judge was affirmed by the full court, and the defendants then appealed to this court.

Borden Q.C. for the appellants. Under the authorities there is a distinction both between a foreign and domestic judgment and between a foreign and domestic *lis pendens* as to the effect on subsequent proceedings. Westlake on Private International Law (1).

A foreign *lis pendens* gives no right to a party to have the second action stayed. Westlake on Private International Law (2); *McHenry* v. *Lewis* (3); *Peruaian Guano Co.* v. *Bockwoldt* (4); Marsden on Collisions (5).

In Nova Scotia a foreign judgment is not an estoppel. R.S N.S. 5 ser. ch. 104. Order 35, Rule 38 of Judicature Act Rules.

Plaintiff was bound to elect whether he would rely on estoppel or on the merits. Bigelow on Estoppel (6); *Scarf* v. *Jardine* (7).

(1) 3 ed. p. 354.
(2) 3 ed. pp. 357–8.
(3) 22 Ch. D. 397.
(4) 23 Ch. D. 225.
(5) 3 ed. p. 224.
(6) 5 ed. p. 103.
(7) 7 App. Cas. 345.

1895

LAW v. HANSEN.

Newcombe Q.C. and *Drysdale* for the respondent. A judgment as a plea is a bar, and as evidence conclusive between the parties. *Duchess of Kingston's Case* (1), per DeGrey C.J.; and Lord Westbury applied this remark of Chief Justice DeGrey to a foreign judgment in *Hunter* v. *Stewart* (2).

The foreign judgment is conclusive though obtained after the institution of the domestic action. *Marble* v. *Keyes* (3); *Memphis &c. Railroad Co.* v. *Grayson* (4); *Schuler* v. *Israel* (5).

The judgment of the court was delivered by:

KING J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia in favour of the plaintiff, the present respondent.

The action was brought for damages occasioned by a collision on the high seas between respondent's ship "Rolf," and the appellants' barque "Emilie C. Boyd," which resulted in the total loss of "The Boyd" and in considerable damage to "The Rolf."

The appellants are domiciled in the province of Nova Scotia and the respondent in Norway. Prior to the commencement of this action the defendants in it began proceedings in the District Court of the United States for the Eastern District of New York, against "The Rolf" in respect of the collision. The vessel was arrested and afterwards released on bail, the owner of "The Rolf" appearing and defending the action. The libel charged generally that the collision was not due to any fault or negligence on the part of the owners of "The Boyd," or of those in charge of her, but was wholly due to the negligence of those in charge of "The Rolf" specifying various negligent acts and omissions. To this the owner of "The Rolf" replied, admitting the

(1) 2 Sm. L.C. 9 ed. 812
(2) 31 L.J. Ch. 346; 4 DeG. F. & J. 178.
(3) 9 Gray (Mass.) 221.
(4) 88 Ala. 572; 16 Am. St. Rep. 69.
(5) 120 U.S.R. 506.

1895

LAW
v.
HANSEN.

King J.

jurisdiction of the court, but denying that the collision was due to the fault or negligence of those in charge of "The Rolf," and charging that it was wholly due to the fault or negligence of those in charge of "The Boyd."

The cause came on for trial before Benedict J., and on the 5th August, 1891, it was adjudged and decreed that the collision was due solely to the fault of those navigating "The Boyd," and that the libel should be dismissed with costs. This judgment was, on the 5th March, 1892, affirmed on appeal by the United States Circuit Court of Appeal, the court of final resort.

Prior to the judgment of the District Court a statement of claim had been delivered by the owner of "The Rolf," and a statement of defence and also a counter claim had been filed by the owners of "The Boyd," but nothing further was done until the conclusion of the action in New York when the defendant in that action, and the plaintiff in this, filed a reply and answer to the statement of defence and counter-claim respectively setting up the foreign judgment as a conclusive answer. Upon trial before Mr. Justice Townshend the defendants were held to be precluded from again contesting the question of their negligence and judgment was rendered against them, although the learned judge expressed the opinion that, if free to do so, he should have arrived at a different conclusion upon the merits. This judgment was affirmed by the Supreme Court of Nova Scotia, Mr. Justice Weatherbe dissenting.

It is now established in English law that a judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England. *Bank of Australasia* v. *Nias* (1); *Bank of Australasia* v. *Harding* (2); *De Cosse Brissac* v. *Rathbone* (3); *Godard* v. *Gray* (4).

(1) 16 Q. B. 717.
(2) 9 C. B. 661.
(3) 6 H. & N. 301.
(4) L. R. 6 Q. B. 139.

Before the conclusive character of foreign judgments in proceedings actively brought for the enforcement of their obligations was definitely settled, it was established that a judgment for the defendant in the foreign court was a conclusive bar to any attempt to re-open the matter in the English courts.

The *exceptio rei judicatae* under such circumstances, says Story (1), is entitled to universal conclusiveness and respect. This distinction has been very frequently recognized as having a just foundation in international justice * * We think it clear upon principle that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. *Schibsby* v. *Westenholz* (2).

Next, as to the extent to which the judgment concludes. Judgments *in rem* are conclusive against all the world, not only as to the *rem* itself but also as to the ground on which the tribunal professes to decide, or may be presumed to have decided. As to what constitutes proceedings *in rem* see *Castrique* v. *Imrie* (3). Judgments *in personam* bind parties and privies, and, generally speaking, are conclusive at least upon the material issues tendered by the plaintiff's complaint.

The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other.

Per Miller J. in *Aurora City* v. *West* (4).

The very object of instituting courts of justice is that litigation should be decided, and decided finally. That has been felt by all jurists.

Per Willes J. in *Great Northern Railroad Co* v. *Mossop* (5).

In the present case the appellants, as the plaintiffs in the District Court of the United States, distinctly ten-

(1) Conflict of Laws s. 578.
(2) L.R. 6 Q.B. 155.
(3) L.R. 4 H.L., per Blackburn J. p. 429.
(4) 7 Wall. 105.
(5) 17 C.B. 140.

1895

LAW
v.
HANSEN.

King J.

dered the material issue that "The Rolf" was solely, and "The Boyd" not at all, to blame. Issue was joined upon this, and it was decided against the then plaintiffs.

In the present action they raise the precise issue again by their statement of defence and counter-claim. The evidence is, that by the law of New York the decision upon the issue in the first action is deemed *res judicata* in the second. Its effect, therefore, would be to preclude defendants from again agitating the matter.

This conclusion, however, is as yet premature, for the defendants have several contentions remaining.

First, that as the foreign judgment was obtained after the present action was begun it has not the force of *res judicata*. *The Delta* (1) is cited in support. One of the grounds of decision in that case was that the foreign judgments not having been given on the merits of the case, but on matters of form only, they could not be set up as a bar to a decision on the merits. It was also expressed to be doubtful whether the evidence showed that the judgments would have the force of *res judicata* in the foreign countries.

In these circumstances, although the principal ground of the judgment was expressed to be that at the time of action brought there was no *res judicata* but only a *lis alibi pendens*, there was no foundation for the application at all.

The case was one of collision between "The Delta" and "The Foscolo." An action and a cross action were first begun in the foreign country. Afterwards an action and a cross action were brought in England. Subsequent to the bringing of the English action by "The Foscolo" against "The Delta," judgment was rendered in both the foreign actions against "The Foscolo," in the one suit for want of appearance, and in the other for want of prosecution. Then "The Delta" sought to set up

(1) 1 P.D. 393.

these judgments as conclusive against "The Foscolo" in the English actions.

Assuming that the foreign judgments had been on the merits, and had the force of *res judicata* abroad, the reasons of the learned judge are as follows:

If the owners of "The Delta" had wished to escape from having two suits against them for the same matter brought to a hearing they should have put the owners of "The Foscolo" to their election, compelling them to abandon one or the other of the suits.

That is a rule of procedure entirely inapplicable in the case before us, where there are not two suits against the respondent and therefore no case for election at all.

The next reason is as follows:

As regards the suit against "The Foscolo" (*i.e.* the English cross suit) that was brought by the owners of "The Delta" while the foreign *lis* was pending; they cannot be heard therefore to object that that *lis* is a bar to a decision on the merits in this suit.

As a matter of fact the cross suit brought in England by "The Delta" against "The Foscolo" was not brought until after the judgments were obtained in the foreign suits; (see p. 403 near foot). It was, as to the cross action, a case, therefore, of waiver of the foreign judgment and of suing on the original cause of action.

Apart from technical rules of pleading there would not seem to be satisfactory reason, upon principle, for declining to give effect to a foreign judgment merely because it was obtained after the beginning of the action in which it is sought to be made available. The considerations of justice and public policy which dictate the rule of *res judicata* as applied to foreign judgments operate to prevent the defeat of the rule by technical considerations. Why should a plaintiff in a foreign action, by commencing fresh proceedings in another country on the eve of judgment rendered, become entitled to litigate the matter anew?

1895

LAW
v.
HANSEN.

King J.

Again, a person in the position of respondent, by discontinuing his suit and beginning again, may avail himself of the effect of the foreign judgment. It would result merely in a question of costs. No substantial objection therefore can be said to lie against the bringing forward of a defence based upon a judgment recovered after action brought.

In the United States courts it is held that when a matter is once adjudicated it is conclusively determined as between the parties and privies, and this determination is binding as an estoppel in all other actions whether commenced before or after the action in which the adjudication was made. *Finley* v. *Hanbest* (1); *Schuler* v. *Israel* (2). If the judgment is conclusive in its character in an action to be begun to-morrow, it ought to be possible, upon appropriate terms, to make it available in an action for the identical matter begun yesterday.

It is said that the rules of pleading do not admit of this being done, but I agree with the learned judges forming the majority of the Nova Scotia Court that the combined effect of orders 24 and 70 rule 2, and sec. 12, subsec. 7 of ch. 104 R.S. N.S., is sufficient to enable the essential rights of the parties to be brought in course of adjudication.

It is, however, further urged for the appellant, that by virtue of the provisions of ch. 104, order 35, rule 38 of R.S. N.S., the foreign judgment in this case cannot be relied upon as an estoppel.

The enactment is as follows:—

> The record or other evidence of a judgment recovered in any other province or country against any person domiciled in Nova Scotia, shall not be conclusive evidence in any action brought on such judgment in any court of this province of the correctness of such judgment, but the defendant may controvert all or any of the facts on which such judgment is founded, or the cause of action in the suit in

(1) 30 Penn. 190. (2) 120 U. S. 506.

which such judgment was given, and may raise the same defence in such suit on such judgment as he could have done as fully as if such suit had been brought for the original cause of action.

1895

LAW v. HANSEN.

King J.

This is an enactment available only by persons domiciled in Nova Scotia. It is intended as a weapon of defence, and not of offence. It is not lightly to be supposed that the legislature, while leaving the foreign subject to be proceeded against in Nova Scotia upon the judgment obtained abroad by the person of Nova Scotia domicile, intended that the latter should be protected against the consequences of his own unsuccessful incursions into the foreign field. The closing words of the clause seem to show that nothing of this kind was intended. The domiciled defendant in the Nova Scotia action is to be free to open up the foreign judgment sought to be enforced against him "as fully as if such suit (in Nova Scotia) had been brought for the original cause of action." The defendant in the foreign suit cannot be said to have had an original cause of action in the proceedings abroad.

I therefore think the Act cannot be invoked for the appellant.

Further, it appears to me that the judgment should be sustained upon the merits. The reasons of the District Court of the United States seem satisfactory to my mind.

The result is that the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Drysdale & McInnes.*

1895
*Oct. 1.
*Dec. 9.

THE CORPORATION OF THE CITY OF STE. CUNÉGONDE DE MONTREAL (DEFENDANT).. ..... } APPELLANT;

AND

J. A. GOUGEON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Appeal—By-law—Petition to quash—Appeal to Court of Queen's Bench—40 V. c. 29 (P.Q.)—53 V. c. 70 (P.Q.)—Judgment quashing—Appeal to Supreme Court from—R.S.C. c. 135, s. 24 (g).

Sec. 439 of the Town Corporations Act (40 Vic. c. 29 P.Q.) not having been excluded from the charter of the city of Ste. Cunégonde (53 Vic. c. 70) is to be read as forming a part of it and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under sec. 310 of said charter.

Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) quashing for want of jurisdiction an appeal by the corporation of Ste. Cunégonde from a judgment of the Superior Court on a petition to quash a by-law of the city.

The proceedings in this case were taken by the respondents who presented a petition to the Superior Court, under sec. 310 of the charter of the city of Ste. Cunégonde, asking to have a by-law of the city annulled so far as it affected the petitioners. The Superior Court granted the prayer of the petition and the corporation took an appeal to the Court of Queen's Bench which

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

appeal was quashed by the court which held that sec. 439 of the Town Corporations Act (40 Vic. ch. 29, R.S. Q. art. 4614) not having been excluded from the charter of the city must be read as forming a part of it and such section prohibited an appeal from any judgment of the Superior Court respecting municipal matters. The corporation then appealed to this court.

Charbonneau for the respondent moved to have the appeal quashed.

There being no judgment of the Court of Queen's Bench, the court of final resort in the province, on the merits of the case no appeal lies to this court. R.S.C. ch. 135 sec. 24 (*g*). *Danjou* v. *Marquis* (1).

This case is not similar to *Webster* v. *The City of Sherbrooke* (2), where the proceedings were to quash the by-law *in toto* but comes rather within *Bell Telephone Co.* v. *The City of Quebec* (3), and *City of Sherbrooke* v. *McManamy* (4).

Under the statute law of Quebec the Court of Queen's Bench clearly had no jurisdiction to entertain an appeal.

Beïque Q.C., for the appellant, contra. The Court of Queen's Bench should have heard the appeal. The provisions of the charter of Ste. Cunégonde cannot be controlled by a general municipal act except by express words. *Rolfe* v. *The Corporation of Stoke* (5).

We cannot be deprived of our appeal because the court of final resort wrongfully held that it was without jurisdiction. In *Danjou* v. *Marquis* (1), the case never went to the Court of Queen's Bench.

The judgment of the court was delivered by:

THE CHIEF JUSTICE:—The respondents, who are municipal electors of the City of Ste. Cunégonde, by a

(1) 3 Can. S.C.R. 251.
(2) 24 Can. S.C.R. 52.
(3) 20 Can. S.C.R. 230.
(4) 18 Can. S.C.R. 594.
(5) 24 L.C. Jur. 213.

1895

THE CITY OF STE. CUNÉGONDE v. GOUGEON.

The Chief Justice.

petition to the Superior Court ask to have annulled by-law 73 passed by the City Council in regard to the imposition of taxes for the construction of a certain drain, so far as it affects the petitioners and their properties.

This petition was presented pursuant to article 310 of the city's special Act of incorporation (53 Vic. ch. 70) which is as follows:

> Any municipal elector may, in his own name, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annulment is prescribed by two months from the date of the passing or completion of such by-law, resolution, assessment roll, or apportionment in the terms of article 8; and after that delay every such by-law, resolution, assessment roll or apportionment shall be considered valid and binding for all purposes whatsoever, provided the subject matter thereof be within the competence of the corporation.

The Superior Court (Doherty J.) annulled the by-law upon certain grounds which, in view of the way in which the matter comes before this court, it is unnecessary to specify.

The City of Ste. Cunégonde then appealed to the Court of Queen's Bench and that court, holding that it had no jurisdiction to entertain the appeal, quashed it with costs. The *considérants* of the judgment of the court are as follows:

> Considering that the procedure in this cause was commenced by petition to the Superior Court under the special provision of section 310 of the charter of the said City of Ste. Cunégonde, 53 Vic. ch. 70 (Que.).
>
> And considering that section 439 of the Town Corporations Act, 40 Vic. ch. 29, which is applicable to the said special Act of incorporation of the said City of Ste. Cunégonde, expressly prohibits any appeal from a judgment of a judge of the Superior Court in procedure taken under said Act.

The appellants thereupon applied to the registrar in chambers for leave to give security in appeal under

section 46 of the Supreme and Exchequer Courts Act, which application was granted, the registrar being of opinion that the nature of the proceeding was similar to the one taken in *Webster* v. *Sherbrooke* (1), and not to be distinguished from it, the petition in that case having been filed under sec. 4389 R. S. P. Q. which is identical in words with the first part of sec. 310 of the Act of incorporation of the appellants, and that therefore, so far as the mere right of appealing to the Supreme Court was concerned, the case came within sec. 24 (*g*) of ch. 135 R. S. C.

Sec. 4389 R. S. P. Q. is as follows:

Any municipal elector may, in his own name, by a petition presented to the Superior Court or to one of the judges thereof, demand and obtain, on the ground of illegality, the annulment of any by-law of the Council, with costs against the corporation.

But the respondents have now moved to quash the appeal, 1st. because the appeal will not lie under sec. 24 (*g*) of the Supreme and Exchequer Courts Act, and 2nd, because the Court of Queen's Bench was correct in holding that it had no jurisdiction, and that therefore no appeal would lie to this court, inasmuch as all appeals from the province of Quebec must, with the exception only of certain appeals from the Court of Review specially provided for, come to this court from the Court of Queen's Bench, and be appeals in which that court at least entertained jurisdiction, and not in which, upon good and valid grounds, it has declined jurisdiction.

I think the motion should be granted upon this second ground, which was one with which the registrar very properly did not deal.

The question to be decided is: Was the Court of Queen's Bench right in holding article 439 of 40 Vic. ch. 29 applicable to the special Act of incorporation of the appellants?

(1) 24 Can. S. C. R. 52.

1895

THE CITY OF STE. CUNÉGONDE v. GOUGEON.

The Chief Justice.

That article is as follows:

No appeal shall lie under the provisions of this Act from any judgment rendered by any judge of the Superior Court, respecting municipal matters.

Section 1 of that Act provides as follows:

The provisions of this Act shall apply to every town, corporation or municipality which shall hereafter be established by the legislature of this province, and they shall constitute part of the special Act relative to such town, so as to form with it one and the same Act, unless they be expressly modified or excepted.

And section 441 says:

This Act may apply to city corporations which shall in future be incorporated; and in such case the word "town" shall be replaced by the word "city" every time that the meaning of this Act, thus applied, shall require it.

These provisions were re-enacted in the Revised Statutes of the province of Quebec as follows:

Art. 4178. The provisions of this chapter apply to every town corporation or municipality, established by the legislature of this province, and unless expressly modified or excepted they constitute part of its charter.

The provisions thereof may also be applied to city corporations; and in such case the word "town" shall be replaced by the word "city," whenever the meaning of this chapter, thus rendered applicable, shall require it.

4179. For any of the provisions of this chapter not to be incorporated in the charter, it must be expressly declared that such provisions, specifying them by their numbers, shall not form part thereof.

Art. 4614 (the article respecting appeals) is as follows:

No appeal lies under the provisions of this chapter, from any judgment respecting municipal matters rendered by any judge of the Superior Court.

Mr. Justice Hall, in delivering the judgment of the Court of Queen's Bench says:

Section 439 of that Act (The Town Corporations Act 4614 R.S.P.Q.) not having been excluded from the Ste. Cunégonde charter is therefore to be read as forming a part of it. The procedure in this case, viz., the petition to the Superior Court by municipal electors, is not a com-

1895

THE CITY OF STE. CUNÉGONDE v. GOUGEON.

The Chief Justice.

mon law procedure commenced by an ordinary writ of summons, but is peculiar to the special charter to the city, and must be governed therefore by the clause of the same charter which formally and unequivocally prohibits a right of appeal from a judgment of the Superior Court rendered in a procedure thus commenced.

This I adopt as a correct statement of the law applicable to the case. As has been correctly contended by the counsel for the respondents, inasmuch as under the Supreme and Exchequer Courts Act and amendments thereof, no appeals can be brought to the Supreme Court from any court in the province other than the Court of Queen's Bench, with the exception of appeals from the Court of Review in certain cases, which do not include the present, and as the appeal in the present case did not lie to the Court of Queen's Bench, and that court properly refused to entertain jurisdiction therein, it follows that no appeal will lie to this court.

That the provincial legislature may limit appeals to the Court of Appeal of the province must be admitted, although the effect of so doing may be take away in such cases a further appeal to the Supreme Court. And if called upon to express any opinion on the point, I should say that it is not to be regretted that a limit should be placed on appeals in municipal matters of the kind in question here.

The motion to quash is granted with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Adam & Plourde.*

Solicitor for the respondents: *N. Charbonneau.*

1895
*Oct. 2, 3.
Dec. 9.

THE JACQUES-CARTIER BANK (PLAINTIFF) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN (DEFENDANT) ..... RESPONDENT.

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

Constitutional law—Powers of Executive Councillors—"Letter of credit"—Ratification by Legislature—Obligations binding on the province—Discretion of the Government as to the expenditures—Petition of Right—Negotiable instrument—"Bills of Exchange Act, 1890 "—"*The Bank Act*," *R.S.C. c.* 120.

The Provincial Secretary of Quebec wrote the following letter to D. with the assent of his colleagues, but not being authorized by order in council:

J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'acompte sur l'impression de la "Liste des terres de la Couronne, concédés depuis 1763 jusqu'au 31 décembre 1890," dont je vous ai confié l'impression dans une lettre en date du 14 janvier 1891."

"Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement."

D. indorsed the letter to a bank as security for advance to enable him to do the work.

Held, affirming the judgment of the Court of Queen's Bench, that the letter constituted no contract between D. and the Government; that the Prov. Sec. had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D. the Government not being obliged to expend the money though authorized to do so and the vote containing no reference to the contract with D. nor to the said letter of credit.

---

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

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

Held also, that a bank cannot deal in such securities as the said letter of credit which is dependent on the vote of the legislature and therefore not a negotiable instrument within the Bills of Exchange Act of 1890 or The Bank Act, R.S.C. ch. 120 secs. 45 and 60.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming a judgment of the Superior Court, District of Quebec, by which the appellant's petition of right was dismissed.

The facts appear fully in the judgment of Mr. Justice Girouard, the questions to be decided being shortly, whether the Provincial Secretary had power to bind the province by the letter to Dussault, set out in the above head-note, and if not, whether the subsequent vote of the amount by the legislature ratified his action in such a manner as to make the payment of the money obligatory upon the Goverment. Incidentally the questions were raised as to whether the "Letter of Credit" was a negotiable instrument, and if it could be accepted as a security under the provisions of the Bills of Exchange Act of 1890 and "The Bank Act."

Langelier Q.C. and *Mackay* for the appellant. The plaintiff's claim is not founded on the letter of credit alone, but on the contract contained in it, coupled with the vote of the legislature to pay for the work.

The Crown has had the benefit of Dussault's work, and is liable even if the contract entered into by the provincial secretary was not authorized.

After the legislature had ratified the contract made by the provincial secretary and the money was voted, Dussault had a vested right in such money and the plaintiff, as his assignee, is in the same position.

To say that this right is to be denied for want of an order in council, is to put the lieutenant-governor in council above the legislature.

Casgrain Q.C., Attorney-General for Quebec, and *Darveau* Q.C. for the respondent. A member of the

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

executive council cannot bind the Crown by a mere undertaking that money will be voted to pay for work to be done. R.S.Q., art. 707, provides for the powers and duties of the provincial secretary and shows that this letter of credit, so-called, was a nullity.

Then if the letter was a nullity it could not be ratified or confirmed. Art. 1214 C.C.; Dal. (1); Aubry & Rau (2); Brice on *Ultra Vires* (3); *Banque Jacques-Cartier* v. *La Banque d'Epargne* (4).

Whatever value the letter might have had the plaintiff has no *locus standi* to enforce it. It was not a negotiable instrument, and the indorsement to the bank had no effect. The Bank Act of 1890 (5), specifies what securities can be transferred to a bank, and this letter is not negotiable under that section.

Even if it could have been ratified the legislature was not in possession of all the facts, without which there could be no acquiescence or ratification.

The vote of the legislature authorized the government to expend the money, but did not oblige them to do so. *Hereford Railway Co.* v. *The Queen* (6).

THE CHIEF JUSTICE.—I concur in the judgment prepared by Mr. Justice Girouard in this case.

TASCHEREAU J.—I also concur in the opinion of Mr. Justice Girouard.

GWYNNE J.—There exists, in my opinion, no ground whatever upon which this appeal can be maintained. The letter of Mr. Langelier of the 14th January, 1891, to Mr. Dussault, constituted no contract between Mr. Dussault and the provincial government; so neither

(1) Rep. vo. Obligation p. 947, no. 4470.
(2) Vol. 4, pp. 262, 266.
(3) 3 ed. p. 627.
(4) 13 App. Cas. 111.
(5) 53 Vic. c. 31, s. 64.
(6) 24 Can. S.C.R. 1.

did Mr. Langelier's letter of the 24th January, 1891. This letter contained a promise which, inasmuch as it does not appear to have been made by, or by the authority of, the provincial government had no obligation or effect, further than as the promise of Mr. Langelier himself to the effect that if the provincial legislature should, in the estimates of 1891-2, vote the sum of $6,000 for printing the list of Crown lands granted since 1763 up to the 31st December, 1890, of which work the letter adds,

je vous ai confié l'impression dans une lettre en date du 14 Janvier 1891,

such sum should be paid to Mr. Dussault immediately after the session. This letter also contained the words following:

Cette somme de six mille piastres sera payée au porteur de la présente lettre revêtue de votre endossement.

Dussault indorsed this letter in manner following:

Payé au Porteur.

JOSEPH DUSSAULT.

and handed it to the bank, the now appellants. Now the provincial government, not having been bound by anything contained in these letters, could not, and indeed it is admitted that Dussault did not, by the above indorsement thereon, vest in the bank any claim enforceable in law against the provincial government in virtue of the so-called letter of credit, and that was conceded by the appellant. However, by an Act of the legislature of the province of Quebec passed upon the 24th day of June, 1892, that legislature granted to Her Majesty, in the supply bill of that year, the sum of $9,872.65, in the terms following:

For various works of Canadian authors, collection de monnaies et médailles; account for printing liste des terres de la couronne depuis 1763 jusqu'au 31 Déc. 1890, and other accounts for sundry expenditure.

And now it is contended that the effect of this

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

Gwynne J.

vote was to make the letter of the 24th January, 1891, a contract binding upon the Government of the province of Quebec, although that letter by itself had no such effect, and to vest in Dussault an absolute right to demand and recover from the Government the said sum of $6,000, and further that as the bank upon the 30th day of June, 1892, six days after the close of the session, caused an authorized notarial protest and signification of the transfer by Dussault to the bank of the said letter of the 24th January, 1891, by indorsement thereon to be served upon the Government, the bank thereby became entitled to demand and recover from the Government the said sum of $6,000; in short that we must assume that by this vote the legislature contemplated imposing upon the Provincial Government an obligation which had never been incurred by the Government, and so in effect to relieve the Government of the province from its constitutional responsibility for the application of so much of the $9,872.65 as related to the purpose of printing the list mentioned in the item which contained the grant. If the legislature had entertained any such singular, if not unconstitutional, intention they should have expressed themselves in language clear and express beyond all controversy; from the language which they have used no such intention can be inferred. The plain and natural construction of the item containing the grant of the $9,872.68, is that this sum is granted to Her Majesty to be expended for the purposes named in the grant, at the discretion of the Provincial Government, but subject to the ordinary control of Parliament over the manner in which all moneys granted to the Crown for specific purposes shall be expended, and did not divest the Government of its duty to see to the proper application of the moneys, or impose upon the Government a contract it had never entered into nor authorized.

The appeal must be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

Girouard J.

GIROUARD J.—The appellants, by their petition of right, claim from the province of Quebec the sum of $6,000 and interest from the 29th June, 1892, being the amount due on a certain letter, commonly styled a letter of credit, signed by the honourable Charles Langelier, provincial secretary, payable to Joseph Dussault, or order, and indorsed by Dussault to the appellants.

It appears that on the 29th December, 1890, the legislative assembly of Quebec passed the following resolution:

That there be laid before this House an alphabetical index of the concessions of land made by the Crown since 1763 as far as December 1st, 1890, county by county and township by township.

On the 14th of January, 1891, the provincial secretary wrote the following letter to Joseph Dussault, printer, of Quebec:

Bureau du Secrétaire de la Province de Québec.
CABINET DU MINISTRE,
QUEBEC, 14 Janvier 1891.

Monsieur JOSEPH DUSSAULT, Québec.

MONSIEUR,—A la dernière session, l'Assemblée Législative a voté une adresse demandant la production d'une "Liste comté par comté, canton par canton, de toutes les terres de la Couronne concédées depuis 1763, jusqu'au 31 décembre 1890.

Plusieurs personnes, notamment des registrateurs, ayant déjà demandé la publication de ce document, j'ai décidé de la faire imprimer, et je vous en confie par la présente l'impression, dans les deux langues, et cela aux prix et conditions actuellement en force pour les contrats d'impression de la législature.

La copie vous sera fournie par M. le député-régistraire dont vous devrez suivre les directions quant à la confection de l'ouvrage, au format du volume et au nombre d'exemplaires à tirer, en français et en anglais.

J'ai l'honneur d'être, Monsieur,
Votre obéissant serviteur,
CHS. LANGELIER,
Secrétaire de la Province.

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

Girouard J.

On the 24th January, 1891, the provincial secretary issued the following so-called letter of credit:

QUEBEC, 24 Janvier 1891.

M. JOSEPH DUSSAULT, Imprimeur, Québec.

MONSIEUR,—J'ai l'honneur de vous informer que le Gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'acompte sur l'impression de la "Liste des terres de la Couronne, concédées depuis 1763 jusqu'au 31 décembre 1890," dont je vous ai confié l'impression dans une lettre en date du 14 Janvier 1891.

Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement.

Croyez-moi bien sincèrement

Votre tout dévoué,

CHS. LANGELIER,

Secrétaire de la province.

This letter of credit as well as the contract, were made without the authority of an order in council.

An appropriation was voted by the Legislature of Quebec, at the session held in 1892, which will be found as item 15, schedule A of the statutes of the province of Quebec, 55 & 56 Vic. ch. 1, in the following words:—

15. For various works of Canadian authors, collection des monnaies et médailles, account for printing liste des terres de la Couronne concédées depuis 1763 jusqu'au 31 décembre 1890, and other documents for sundry expenditure, $9,872.65.

From the evidence of Mr. Verret, provincial auditor, it appears that the amount of the "letter of credit" was included in the sum of $9,872.65, but this information was not communicated to the House, nor was the contract with Dussault or the letter of credit made known.

The appellants fyled their petition of right on the 21st April 1893, alleging that the letter of credit had been transferred to them to enable Dussault to commence the work of printing. The action is based upon the letter of credit only, and not upon the transfer of

moneys that might become due under the contract; in fact such an action could not be taken as the work was only about half done when the petition of right was fyled and not even commenced when the letter of credit was signed.

The respondents met this action by what may be termed a general denegation, coupled with a general averment that all these transactions and dealings were *ultra vires* and illegal.

The action was dismissed by the Superior Court (Andrews J.), and his judgment was confirmed by the Court of Appeal on the 3rd May 1895, Blanchet J. dissenting. We have not before us the remarks of the learned judges who formed the majority of the Court of Appeal, and we must assume that they agreed in the reasons given by the learned judge of the Superior Court. Mr. Justice Blanchet has sent the notes of his dissent.

Mr. Justice Andrews had no hesitation in declaring that no power exists in a member of the executive to bind the province by his signature to a document such as that claimed on by the appellants, and such is also the opinion of Mr. Justice Blanchet; in fact this point was conceded by counsel for the appellant at the bar of this court. The order of the Assembly in 1890 was only to the effect that the "alphabetical index" should be laid before the House. No authority was ever given to print the same, and it does not appear that the index ever was laid before the House. With regard to the printing of old papers, manuscripts and archives, art. 718 R.S.Q. entrusts the lieutenant-governor in council with the printing of the same, in whole or in part. Therefore the alphabetical index in question could not have been printed upon the mere order of a minister.

Mr. Justice Blanchet and the appellants relied upon the appropriation by the legislature as a sufficient rati-

1895

THE JACQUES-CARTIER BANK v. THE QUEEN.

Girouard J.

fication. Mr. Justice Andrews entertains a different view, which was affirmed on appeal. He says;—

> The question therefore arises: Is this a ratification of the issue of the letter of credit sued on, and of a character such as to make of it a document obligatory on the province and giving rise to a right of action in favour of the bank, as holding it? I do not think so. It certainly put it in the power of the executive to pay the amount, but it did not force them to do so. Mr. Todd, vol. 2, page 43, says:
>
> "A vote in Committee of Supply is in the nature of a maximum. It is not imperative on the Government to spend the whole or any part of the amount granted, but it is a matter of discretion."

It is very hard to understand how a ratification can result from the vote of the Assembly worded as it is, viz:

> Liste des terres de la Couronne concédées depuis 1763 jusqu'au 31 décembre, 1890, and other documents.

No reference is made to the contract with Dussault, nor to the letter of credit, and it is a well settled jurisprudence that acquiescence and ratification must be founded on the full knowledge of the facts. *La Banque Jacques-Cartier* v. *La Banque d'Epargne* (1); Dalloz (2); Art. 1214 C.C.

The appellants have relied upon the opinion of Chief Justice Lacoste in *The Queen* v. *Waterous Engine Works Co.* (2); but the learned Chief Justice was also of the opinion that the minister had no power to bind the Crown by a contract similar to the one in question in this cause without an order in council, and he merely dissented in view of the fact, proved in the case, that the work had been done, delivered and accepted by the Government. His remarks, therefore, do not apply to the present case. It will be time to examine whether Dussault, or the appellants as his transferees, are entitled to anything at all from the

(1) 13 App. Cas. 118. (2) Rep. no. 4504 et seq.
(3) Q. R. 3 Q. B. 223.

Government for work and labour when a proper suit has been brought therefor. The present action is for money lent by a bank upon an alleged guarantee of the province, and I have no hesitation in saying that the province is not liable.

Finally, it seems to me that the bank could not deal in such securities as the one sued upon in the present instance. The letter of credit is conditional, viz: it is dependent upon the vote of the legislature, and therefore, it cannot be held to be a negotiable instrument either within the Bills of Exchange Act of 1890, or within the Bank Act then in force, R. S. C. ch. 120, ss. 45, 60. Banks dealing with Governments, or in Government securities, should carefully examine not only the powers of the persons acting on their behalf, but also the paper offered by them, and if they fail to do so it is at their risk and peril. They have only themselves to blame if ultimately they are without a legal remedy, especially in a case like the present where the transaction on its face is stamped with illegality. The only recourse left to them is a political one, but it is hardly necessary to say that that is beyond the province of a court of justice.

For these reasons, I am of opinion that the appeal should be dismissed with costs, and the judgment appealed from affirmed.

Appeal dismissed with costs.

Solicitor for the appellant: *P. Mackay.*

Solicitor for the respondent: *Chs. Darveau.*

1895

*Oct. 1, 2.

*Dec. 9.

DAME MARIE CAROLINE MERCIER, ET VIR (PLAINTIFFS)..... } APPELLANTS;

AND

EDOUARD BARRETTE (DEFENDANT)...RESPONDENT.

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

Title to land—Action en bornage—Surveyor's report—Judgment on—Acquiescence in judgment—Chose jugée.

In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review but that his measurements showed that the line indicated was not in the line of the old fence and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence.

Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point.

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

1895

MERCIER v. BARRETTE.

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

The material facts of the case are set out in the above head-note.

Belleau Q.C. for the appellants.

Lane for the respondent.

The judgment of the court was delivered by.

TASCHEREAU J.—It is *chose jugée* between the parties by the judgment of the Court of Review of September 30, 1893, not only that the division line between their respective properties must be located on the line of the old fence C.L.H., but also that this line of the old fence is a line starting at point C. 30 feet, 4 inches from point B. as indicated in Bignell's plan and report. Roy therefore, could do nothing else than start his line, and place his boundary post as he did at point C, at a spot 30 feet, 4 inches from point B, and the Court of Review's judgment of November 30th 1894 was right in so determining. The judgment of the Court of Appeal should therefore, in my opinion, be reversed, and the judgment of the Court of Review of November 30th 1894 restored. If deemed necessary, a special judgment in the same sense should be entered with the special direction that the post at point C. should be on a spot 30 feet, 4 inches from point B. as the starting point for the line C.L.H.

Appeal allowed with costs.

Solicitors for the appellants: *Belleau, Stafford & Belleau.*

Solicitors for the respondent: *Lemieux & Lane.*

1895

*May 20.

*Dec. 9.

E. R. C. CLARKSON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

McMASTER & CO. (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—55 V. c. 26, ss. 2 and 4 (O.)—Chattel mortgage—Agreement not to register—Void mortgage—Possession by creditor.

By the act relating to chattel mortgages (R.S.O. [1887] c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 V. c. 26, s. 2 (O.) that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the act respecting assignments and preferences" (R.S.O. [1887] c. 124). By sec. 4 of 55 V. c. 26 a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors * * before such taking of possession."

Held, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void as against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set it aside and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession.

Held, per Strong C.J., that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession such mortgage is, on grounds of public policy, void *ab initio*.

---

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

1895

CLARKSON v. McMASTER & Co.

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

On October 10th, 1893, one Davis executed a mortgage of all his stock in trade and other personal property to the defendants, McMaster & Co., one of the terms of which mortgage was that if Davis should pay fifty dollars per week to defendants on account of his indebtedness it would not be registered and upon failure of Davis to make such payment at any time defendants could take immediate possession. The mortgagor having made default defendants took possession, on Nov. 7th, 1893, of the property mortgaged and on Nov. 13th, Davis made an assignment under the Ontario Act to the plaintiff Clarkson for the benefit of all his creditors.

A writ was issued by the assignee and by a simple contract creditor of the insolvent on behalf of all the creditors against McMaster & Co. to have the mortgage set aside. On the trial before Mr. Justice MacMahon judgment was given for the plaintiffs, the trial judge holding that the mortgage was given in good faith, but that it was void for want of registration. The Court of Appeal reversed this judgment holding that under 55 Vic. ch. 26, which amended the Act relating to chattel mortgages, R. S. O. [1887] ch. 125, the mortgage could only be void as against execution creditors or simple contract creditors who had commenced proceedings to set it aside, or an assignee in the same position, and that the plaintiffs in this case did not come within the statute. The plaintiffs appealed from that decision.

S. H. Blake Q.C. for the appellants. Under 55 Vic. ch. 26 s. 4, if a mortgage is void for want of registra-

(1) 22 Ont. App. R. 138.

1895

CLARKSON v. McMASTER & Co.

tion the taking of possession by the mortgagee is of no avail.

The obvious intention of this amending Act was to make the mortgage void against all simple contract creditors as well as those having execution.

The agreement not to register the mortgage was a fraud on the creditors; *Jones* v. *Kinney* (1); *Ex parte Fisher* (2); *Clarkson* v. *Sterling* (3); and such agreement, in connection with the other facts of the case, shows that a fraudulent preference was intended.

Thompson Q.C. for the respondents. The finding of the trial judge that the mortgage was given in good faith should not be disturbed. *Grasett* v. *Carter* (4).

Prior to 55 Vic. ch. 26 a mortgage not registered was void as against execution creditors only. *Parkes* v. *St. George* (5).

The plaintiffs other than the assignee have no *locus standi* to impeach the transaction after the assignment; R. S. O. (1887) ch. 124, sec. 7, subsec. 1; nor after the mortgaged goods are sold; *Ross* v. *Dunn* (6); *Gillard* v. *Bollert* (7); *Meriden Britannia Co.* v. *Braden* (8).

The assignee, not having been appointed until after the mortgagee took possession, is not within the provisions of sec. 2 of 55 Vic. ch. 26.

THE CHIEF JUSTICE.—In the view which I take of this case it is not necessary that I should express any positive opinion as to the validity and *bona fides* of the mortgage so far as it is impeached upon the grounds of the mortgagor's insolvency and as a fraudulent preference, and therefore I refrain from doing so. I may say, however, that upon facts disclosed by the evidence,

(1) 11 Can. S. C. R. 708.
(2) 7 Ch. App. 636.
(3) 15 Ont. App. R. 234.
(4) 10 Can. S. C. R. 105.
(5) 10 Ont. App. R. 496.
(6) 16 Ont. App. R. 552.
(7) 24 O. R. 147.
(8) 21 Ont. App. R. 352.

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

which are undisputed, and which are therefore open for consideration by an appellate court, I should entertain grave doubts as to the validity of the transaction as against the creditors of the mortgagor, apart altogether from the non-delivery of possession, the want of registration, and the express agreement not to register the mortgage, questions which I propose to consider.

Under the statute law regulating chattel mortgages in the province of Ontario, applicable to the mortgage now in question, I am of opinion that the appellants were entitled to attack the transaction, thus differing from the majority of the Court of Appeal, and agreeing in the conclusion of the learned Chief Justice of Ontario.

The general Act relating to mortgages of chattels (1) was amended and extended by Ontario statute 55 Vic. c. 26. By the second section of that act it was enacted as follows:

In the application of the said act, and of this act extending and amending the same, the words "void as against creditors" in said act shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences by Insolvent Persons, and amendments thereto, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer.

And section 4 of the same act provides:

A mortgage or sale declared by said act to be void as against creditors and subsequent purchasers or mortgagees shall not, by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee, be thereby made valid as against persons who became creditors, or purchasers, or mortgagees, before such taking of possession.

These enactments were undoubtedly intended by the legislature to obviate the construction which the courts had put upon the provisions embodied in the chapter

(1) R.S.O. c. 125.

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

125 of the Revised Statutes of Ontario. Section 1 of that act provides that:

> Every mortgage of goods and chattels, not accompanied by immediate delivery, &c., shall within five days from the execution thereof be registered, &c.

And section 4 of the same act provides that:

> In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

The mortgage now in question was not registered within the prescribed time, nor was there any immediate delivery of the mortgaged goods. A line of decisions in the courts of the province had, previously to the passing of the Act of 1892, established that in the construction of the first section of the Chattel Mortgage Act just set forth, the word "creditors" was to be construed as meaning "judgment creditors," and the words "null and void" as meaning "voidable." It was also held that the mortgagee might at any time validate a mortgage invalid for want of possession or registration by taking possession of the mortgaged property. If it were necessary now to determine whether this construction was or was not correct I am compelled to say, with great respect for the opinions referred to, that I should find great difficulty in agreeing with these decisions. First, I see no reason why the word "creditors" should be restricted to a particular class of creditors, viz., judgment creditors. Why should the same word receive a different construction in this Act from that which it has received as used in the statute of the 13th Elizabeth? I see no reason for any such distinction. It is true that equitable execution as consequential on the avoidance of a transaction under the 13th Elizabeth could not, under the old system of separate jurisdictions for law and equity,

have been obtained by any but judgment creditors (1), but the deed was nevertheless held to be void as against simple contract creditors. In *Reese River Mining Co.* v. *Atwell* (2), it was held by Lord Romilly M.R. that simple contract creditors were entitled to a decree declaring a deed void under the Statute of Elizabeth, though not having obtained a judgment at law they could not have had equitable execution, and, as is pointed out in May on Fraudulent Conveyances (2 ed. p. 528), this was only carrying out what is said in the judgment of Lord Hardwicke in *Higgins* v. *York Buildings Co.* (3), where occurs the following passage:

> I do not know in the case of fraudulent conveyances that this court has ever done anything more than remove fraudulent conveyances out of the way * * * nor any instance of a decree for sale, but equity follows the law and leaves them to their remedy by elegit without interfering one way or the other.

And that an instrument fraudulent under the statute was void against all creditors, was also demonstrated by the well established practice of courts of equity in administering assets, which was not to require a judgment at law, but to treat deeds fraudulent under the statute as void against all creditors, and to deal with the property purported to be conveyed by such instruments as assets for the payment of simple contract as well as all other creditors. Then, there are reasons which, in my opinion, require a liberal construction of the word "creditors," derived from the manifest policy of the Chattel Mortgage Act. Registration or possession were required manifestly for the protection, not only of actual creditors, but of those who might become creditors, relying on the visible possession of property by their debtor, and the absence from the appropriate registry of any charge upon that property; and this for

(1) *Colman* v. *Croker* 1 Ves. 161; *Lister* v. *Turner* 5 Hare 281.

(2) L. R. 7 Eq. 347; see also cases collected in May on Fraudulent Conveyances 2 ed. p. 528.

(3) 2 Atk. 107.

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

the protection of those who had not had the opportunity of recovering judgment, creditors payment of whose claims might be deferred, or who had not had time to get judgment.

Again, I am not impressed with the soundness of the construction which reads the terms "absolutely null and void" as "voidable." So to cut down the words of the Act is, I venture to say, in direct conflict with the manifest policy of the legislature, and is not justified by the consideration that creditors could not have the mortgaged chattels applied in payment of their debts until they had recovered judgment. The rule requiring a judgment at law to entitle a party to equitable execution is to be ascribed to the reluctance of the equity courts in former times to entertain legal questions; such questions were always sent to a court of law to be determined. The creditor's right to recover his debt was a purely legal question, and therefore he had to establish it by a judgment at law. This, however, by no means involved the necessity of saying that a deed was not void under the Statute of Elizabeth as against simple contract creditors. The authorities I have already referred to show that this proposition must be correct. Then, for these reasons, deduced from the Statute of Elizabeth and the decisions on that Act, and on the policy which led to the legislation embodied in the Chattel Mortgage Act, I should have thought the word "creditors" in the latter act ought to be construed as embracing all creditors. It follows from this that there was no sound reason for cutting down the expression "absolutely null and void" to "voidable."

Lastly, if a chattel mortgage not registered within the limited time, and where no possession had been taken, was absolutely null and void at the expiration of five days as against all creditors, I am unable to see

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

how such a void security could be revived by the creditor simply taking possession of the goods. In the case of *Barker* v. *Leeson* (1), the learned Chancellor of Ontario delivered a judgment which, in my opinion, contains, not only a correct construction of the statute, but also a sound exposition of the policy of the law and the intent of the legislature in enacting it.

The Act of 1892 was, however, passed by way of altering and amending the law as established by the authorities referred to, and it impliedly recognizes the construction thus placed upon the first statute as being, at the time of the passing of the later act, the existing law. I do not, therefore, intend to decide this case upon my own view as to the proper interpretation of the original act, but assuming that the previous decisions are binding authorities, I propose to place the decision of this appeal entirely upon the amending Act 55 Vic. ch. 26, thus following the course of the learned Chief Justice of Ontario, who did not conceive himself in any way precluded by the state of the authorities from so doing. And doing this I come to the same conclusion as the learned Chief Justice.

The second section of the Act announces that it is the intention of the legislature thereby "to extend and amend" the existing law. How any extending or amending effect can be attributed to the act consistently with the judgment now under appeal I am unable to see. Nothing can be more explicit and distinct than the declaration of the legislature, that mortgages in relation to which the requirements of the original act have not been complied with shall be void as against simple contract creditors. I do not construe this declaration as in any way fettered with any condition as to the form of suit; all I understand to have been meant by the words "suing on behalf of them-

(1) 1 O. R. 114.

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

selves and other creditors," was just this, that the mortgage, being void as to all, any action which might be brought to obtain the benefit of the nullity enacted by the statute should be on behalf of all creditors, so that all, and not merely those suing, might obtain the benefit of the Act. Then, applying this in the present case, this mortgage became absolutely null and void at the expiration of the five days allowed for registration. Then, the same second section provides that this avoidance shall enure to the benefit, not only of creditors who may sue on behalf of themselves and others, but also to the benefit of all creditors suing by their representative the statutory assignee for the benefit of creditors, who undoubtedly represents the creditors just as much as does in England an assignee in bankruptcy; and we constantly find cases reported in which such last mentioned assignees maintain actions to set aside deeds executed before their appointment. That being so, this mortgage being thus absolutely void under the Act of 1892, when the term for registration had elapsed, whatever the law may have been before, the assignee was entitled to maintain this action so soon as the assignment to him was completed, and I should be prepared so to hold even if there was not now a single creditor whose debt existed at the date of the mortgage, but only creditors whose debts had been contracted subsequently, for I think in construing these Acts (the Revised Statutes and the amending Act together) we ought not to restrict the avoidance of the mortgage to actual creditors at its date, but to extend its benefits to subsequent creditors, and that not only for the reasons stated in the judgment of the Chancellor before referred to, but on the very words of the fourth section of 55 Vic. ch. 26. This fourth section, in my opinion, very clearly indicates that creditors subsequent to the mortgage were intended to

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

be included, for it expressly provides that taking possession under a mortgage void as against creditors shall not validate it against creditors who became such before taking possession.

Then, did the subsequent taking possession validate this mortgage if it was, at the time possession was taken, absolutely "null and void"? If the foregoing reasons and conclusions are correct this may be answered in the very words of section four itself, which says in so many words that a mortgage declared to be void as against creditors and subsequent purchasers or mortgagees shall not, by the subsequent taking of possession of the things mortgaged, be thereby made valid as against persons who became creditors before such taking of possession. Creditors now represented by the assignee became creditors before the taking of possession, and, therefore, upon the express words of the Act which require no construing, since what is already plain and explicit does not bear interpretation, the possession did not set up this mortgage against the assignee nor against the creditors suing conjointly with him.

Lastly, I am of opinion that this mortgage ought to be avoided on a ground altogether distinct from that before considered. Not only was there a non-compliance with the conditions of the Act in respect of registration and taking possession, but there was a distinct agreement between the mortgagor and mortgagee that there should be neither registration nor immediate possession; in other words, that a transaction which the law required should be open and notorious, to be made so either by registering the mortgage or taking possession of the goods, should be concealed from subsequent creditors, purchasers and mortgagees. This mortgage was therefore given in pursuance of an agreement to contravene the statute and was, therefore, on

1895

CLARKSON v. McMASTER & Co.

The Chief Justice.

grounds of public policy void *ab initio*. Whether the mortgagor was, or was not, insolvent at the date of the mortgage, this agreement, in my opinion, constituted what has been called a fraud upon the statute, and this upon the authority of the cases of *Jones* v. *Kinney* (1), *Ex parte Fisher* (2), and *Clarkson* v. *Sterling* (3), cited in the appellant's factum, in itself constitutes a distinct ground for holding the mortgage to have been a nullity as against creditors from the beginning and therefore void as against such persons even before the expiration of the term allowed for registration had expired.

I have seen the case of *Morris* v. *Morris* (4), but I find nothing in that authority to alter the opinion I had previously formed. The statute there under consideration differed in important respects from that which applies to the present case.

The appeal must be allowed with costs in this court and in the Court of Appeal, and the judgment of Mr. Justice MacMahon must be restored.

TASCHEREAU J.—I concur in the judgment of Mr. Justice Gwynne.

GWYNNE J.—Prior to the amendment of ch. 125 R.S.O. by sec. 2 of ch. 26 of 55 Vic., it had been held by the courts in Ontario that the words "creditors of the mortgagor" in sec. 1 of the said ch. 125, meant only "execution creditors," and that if a chattel mortgage not accompanied by immediate possession of the chattels mortgaged should not be registered as required by the statute, and the mortgagee should take possession of the chattels mentioned in the mortgage at any time before there should be a creditor of the mortgagor in

(1) 11 Can. S. C. R. 708.
(2) 7 Ch. App. 636.
(3) 15 Ont. App. R. 234.
(4) [1895] A. C. 625.

1895

CLARKSON v. McMASTER & Co.

Gwynne J.

existence having an execution, he should hold the chattels under the mortgage, notwithstanding that it had not been registered as required by the statute, and I cannot entertain a doubt that the amendment made by 55 Vic. ch. 26, sec. 2, was for the express purpose of remedying the effect of this construction which had been put upon the statute by the courts, and that the effect of such amendment was to provide that the words "creditors of the mortgagor" in ch. 125, should no longer be construed as applying only to "execution creditors," but to all simple creditors as well, the words "suing upon behalf of themselves and other creditors" being inserted merely as indicating the proceeding in which the mortgage not registered as required by the statute should be adjudged to be fraudulent and void as against simple contract creditors. Then the 4th sec. of 55 Vic. ch. 26, enacts that a mortgage void by the act as against creditors, that is to say, against all creditors of the mortgagor, including simple contract creditors as well as execution creditors, shall not be made valid as against persons becoming creditors, whether by simple contract or execution, after the execution of the mortgage, but before the taking possession by the mortgagee of the chattels mortgaged; thus legislatively overruling wholly in the future the construction which the courts had put upon ch. 125. To confine sec. 4 to execution creditors only would be inconsistent both with the letter and with the spirit of the enactment, which was to place simple contract creditors upon the same footing as execution creditors.

In the present case, it appears to be clear that the intention of the parties to the mortgage was to endeavour to evade the provision of the Chattel Mortgage Act as to registration, for it was expressly agreed that the mortgage was not to be registered unless nor until default should be made by the mortgagor in payment

1895

CLARKSON v. McMASTER & Co.

Gwynne J.

of some one of the instalments mentioned in the mortgage. Such an agreement, whatever may have been the actual intent of the parties, was calculated, if it should be sustained, to defraud creditors who might sell to the mortgagor goods upon credit upon the faith that there was no mortgage in existence, none being registered, and thus would be effected the very thing which the statute was intended to prevent, namely, a transaction which should have the effect of defrauding other persons being or becoming creditors of the mortgagor upon the faith that his property was not mortgaged. Upon the 10th of October, 1893, the mortgage was executed subject to the above agreement as to non-registration. On the 7th November, 1893, the mortgagee took possession of the chattels mentioned in the mortgage, which by reason of its non-registration was, by the statute 55 Vic. ch. 26, declared to be void as against all persons who were then creditors of the mortgagor within the meaning of the statute, that is to say, whether by simple contract or by having execution. On the 10th November, 1893, the mortgagor made an assignment for the benefit of all his creditors to the appellant, who thereby represented all the creditors and who is entitled to all the relief which such creditors would, in the absence of such assignment, have been entitled to in a suit instituted by any one on behalf of himself and the other creditors. The act as amended by 55 Vic. ch. 26 in effect enacts that a mortgage of chattels not accompanied by immediate delivery shall, within five days from the execution thereof, be registered, &c., and that in case it be not so registered it shall be absolutely void as against all creditors of the mortgagor, including simple contract creditors, and against any assignee for the benefit of creditors within the meaning of the act respecting assignments and preferences by insolvent persons, and

1895

CLARKSON v. McMASTER & Co.

Gwynne J.

the amendments thereto. That the plaintiff is such an assignee cannot, I think, admit of a doubt. It is impossible, in my opinion, to construe the act as amended as applying only to an assignee in existence prior to the mortgagee taking possession, without defeating what appears to have been the plain intent of the statute 55 Vic. ch. 26, namely, to make an unregistered mortgage fraudulent and void as against all creditors of the mortgagor in existence at the time of the mortgagee taking possession of the chattels mortgaged, whether the remedy should be sought by an assignee for the benefit of all the creditors whenever made such assignee, or by any of the creditors suing on behalf of all. The appeal must, in my opinion, be allowed with costs, and judgment be ordered to be entered for the plaintiff in the court below with costs.

SEDGEWICK and KING JJ. were also of opinion that the appeal should be allowed and the judgment of MacMahon J. restored.

Appeal allowed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondents: *Thompson, Henderson & Bell.*

1895

*May 14.

*Dec. 9.

F. H. FRANCIS AND S. A. D. BERTRAND (DEFENDANTS)..... APPELLANTS;

AND

JAMES L. TURNER AND DANIEL NAISMITH, JR (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Debtor and creditor—Agreement—Conditional license to take possession of goods—Creditor's opinion of debtor's incapacity bona fides of—Replevin—Conversion.

F., a trader, having become insolvent, and being indebted, among others, to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent of their claims, T. M. & Co. indorsing his notes for securing such payment, they to be paid in full but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co. should at once become due and they could take possession of the stock in trade, book debts and property of F. and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable; and that on a change in the firm of T. M. & Co. the agreement should enure to the benefit of the firm as changed if it assumed the liabilities of, and took over T.'s indebtedness to, the old firm.

This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co., then consisting of T. and N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co. until a certain day after, and resumed possession, but when T. M. & Co. returned on said day he disputed their right and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee.

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

1895

FRANCIS v. TURNER.

Held, affirming the decision of the Court of Queen's Bench, Gwynne J. dissenting, that F. and the assignee were guilty of a joint conversion of the property replevined. Gwynne J. held that there was no conversion by either.

Held, also, affirming said decision, Gwynne J. dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable such opinion must govern, though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing, from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with did not necessarily show *mala fides*; and that the change in the firm of T. M. & Co. did not vitiate the notice as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F.

APPEAL from a decision of the Court of Queen's Bench for Manitoba (1) affirming the judgment at the trial against the defendant Francis, but reversing such judgment in favour of the defendant Bertrand.

The material facts of the case are sufficiently stated in the above head-note and fully set out in the judgments given on this appeal. On the trial of the action of replevin judgment was given for the plaintiff against the defendant Francis, but the learned trial judge held that Bertrand, the official assignee, was not guilty of a conversion of the goods. On appeal to the full court the plaintiff had judgment against both defendants.

Ewart Q.C. for the appellants. Only the original members of the firm of Turner, McKeand & Co. could take advantage of the agreement and enforce it. *Dedrick* v. *Ashdown* (2); *Doe d. Stephens* v. *Lord* (3).

The Chief Justice at the trial held that there was no general conversion, and his finding should be upheld.

(1) 10 Man. L. R. 340. (2) 15 Can. S.C.R. 227.
(3) 7 A. & E. 610.

1895

FRANCIS v. TURNER.

Replevin would not have lain in such a case as this at common law. Then as the property was in Francis he had a right to transfer it, and the statute law of Manitoba does not authorize this action.

Nicoll v. *Glennie* (1) is very similar to this case on the question of conversion.

Howell Q.C. and *Darby* for the respondents. If Turner did in fact form the opinion that Francis was incapacitated the court will not inquire as to the grounds on which it was based. *Allcroft* v. *The Bishop of London* (2).

As to plaintiffs' title to the property, see *Knights* v. *Wiffen* (3); *White* v. *Nelles* (4).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice King.

TASCHEREAU J.—I would dismiss the appeal for the reasons given in the courts below. The appellant took a new point before us under the third clause of the agreement, but he cannot be allowed to do so because, if that point had been taken in the court below, evidence might have been brought upon it. *Owners of Ship Tasmania* v. *Smith* (5).

GWYNNE J.—This action was instituted by a writ of replevin issued out of the Court of Queen's Bench for the province of Manitoba, upon the 22nd day of September, 1893, by the plaintiffs Turner and Naismith, trading under the name, style and firm of Turner, McKeand & Co. against the defendant Francis and the defendant Bertrand, the former of whom by an indenture bearing date and executed upon the 28th day of August, 1893,

(1) 1 M. & S. 588.
(2) 24 Q.B.D. 231 sub nom. *The Queen* v. *Bishop of London*; [1891] A.C. 678.
(3) L.R. 5 Q B. 660.
(4) 11 Can. S.C.R. 587.
(5) 15 App. Cas. 223.

conveyed and assigned to the latter all the goods, chattels, credits and effects, which are the subject of this action, in trust for the benefit of the creditors of the defendant Francis.

The plaintiffs, as constituting now the firm of Turner, McKeand & Co., claim the said goods and chattels, credits and effects to be their property and to have been wrongfully taken from their possession by the defendants.

The plaintiffs in their statement of claim allege that the defendants took the goods of the plaintiffs, that is to say, all the stock in trade consisting of dry goods, &c., and general merchandise contained in the store or building, situate on the north side of the main highway at Headingly in Manitoba, lately occupied by F. H. Francis (the defendant of that name) and also a certain book of accounts called Journal No. 1, lately kept by the said F. H. Francis in his business as a retail trader and unjustly detained the same, &c., until, &c.

To this statement of claim the defendants have pleaded:

1st. That they did not take the said goods as alleged; and

2nd. That the said goods were the goods of the defendants and not of the plaintiffs.

The plaintiffs joined issue upon the pleas. As to the first of them it may be here observed, that if the goods were ever taken by any one from the possession of the plaintiffs, they were so taken, as indeed is the contention of the plaintiffs, on the 24th August, 1893, by the defendant Francis alone who by indenture upon the 28th of the same month, while the goods were in his actual possession as apparent owner, assigned them to the defendant Bertrand, in trust for the benefit of the creditors of Francis. Bertrand never in any manner

1895

FRANCIS v. TURNER.

Gwynne J.

took or was a party to any taking of the goods out of the possession of the plaintiffs.

This action was instituted in the form of an action of replevin instead of conversion for the purpose no doubt of the plaintiffs thereby obtaining possession of the book called the journal no. 1, which contained as they allege an assignment by Francis of his book debts to the plaintiffs for their exclusive benefit. Certainly, as was contended by the defendants in the court below, there was no joint taking, but that does not conclude the action, for the second plea of the defendants and upon which the plaintiffs have joined issue has raised the question of property in the goods, which issue, if found in the defendants' favour, entitled them to the goods. That plea admits a taking and the issue joined upon it is: Did the property in the goods which, it is not questioned, did originally belong to Francis, pass to the defendant Bertrand under the indenture of assignment for the benefit of the creditors of Francis, or, on the contrary, had the plaintiffs then, as they claim to have had, prior title to and property in the goods by title from Francis superior to the title professed to be passed by the deed of assignment to Bertrand, by reason whereof, as the plaintiffs contend, nothing passed to Bertrand, and that the goods, or the monies realized from the sale thereof (for they have been sold by arrangement between the parties to abide the result of this action) are the property of the plaintiffs.

The plaintiffs have produced in evidence an instrument bearing date the 10th Sept., 1891, executed under the hands and seals of the defendant Francis of the first part, and by the plaintiff Turner and one John Chetwood Martindale, then trading as wholesale grocers under the name, style and firm of Turner, McKeand & Co. of the second part, as the foundation of the title which the plaintiffs set up to maintain

1895

FRANCIS v. TURNER.

Gwynne J.

their assertion that the goods in question are their property. It is unnecessary to set out that instrument in full, though I shall have to refer to it and some of its provisions. For the purposes of this suit it is sufficient to say that we are concerned only with the instrument in so far as it relates to an old debt amounting to the sum of $5,259 due by Francis to Turner and Martindale, constituting the then firm of McKeand & Co., which that instrument was executed to secure; for although the instrument operated also as security for a further sum of $3,600 due by Francis to other persons for which sum Turner & Martindale became security, yet that sum has either been paid in full by Francis to the persons to whom it was due, or settled by compromise with them, so that, as I have said, we are concerned only with the old debt of $5,259, or as much thereof as still remains unpaid. Of this debt there remained due in 1893 the sum of about $4,800, for which sum, as the plaintiff Turner says in his evidence, judgment was entered against Francis in August of that year. The old firm was dissolved on the 30th June, 1893, by the retirement therefrom of Martindale. Upon this dissolution the plaintiff Turner entered into partnership with the plaintiff Naismith and they have been carrying on business together in partnership from the 1st July, 1893, under the name, style and firm of Turner, McKeand & Co.

I propose now to consider the construction and operation of the instrument as regards the old debt of $5,259, 1st, as if the old firm was still existing, and 2nd, if necessary, as to what effect if any the dissolution of the old firm and the formation of the new had upon it.

Now by the instrument it is witnessed and it is thereby covenanted and agreed by and between the parties thereto,

1. That in the event of the death of the said party of the first part, or in case the said party of the first part shall at any time, in the opinion

1895

FRANCIS v. TURNER.

Gwynne J.

of the said parties of the second part or of either of them, from any cause become incapable of attending to his business, then and in either of such cases the said sum of five thousand two hundred and fifty-nine dollars, or any part thereof which shall then remain unpaid, shall become due and payable by the party of the first part to the said parties of the second part notwithstanding that the first day of December 1892 shall not have arrived.

Here it is necessary to observe that by a previous clause it had been recited that it had been agreed between the parties that the said sum of $5,259 should be due and payable in one year from the first day of December, 1891, subject to the proviso thereinafter contained, namely, the provision above recited from the instrument, which then proceeded as follows:

2. And if at any time it shall be the opinion of the said parties of the second part or either of them that the said party of the first part is so incapable of attending to his business, as aforesaid, a notice in writing signed by the firm name of the said parties of the second part stating that in their opinion the party of the first part is so incapable shall be served by them upon the said party of the first part or left at his usual place of abode, and such notice so served and the date of such service shall be and determine the date of such incapacity.

3. And it is further covenanted and agreed by and between the said parties hereto, that forthwith upon the death of the party of the first part, or upon the party of the first part becoming incapacitated from attending to his business as hereinbefore mentioned and provided, it shall be lawful for the parties of the second part, &c., to enter into and upon, and to take full and complete possession of, all the personal property, stock in trade, book debts, real estate, credits and effects in Manitoba of the said party of the first part, and to keep, hold and retain full and complete possession thereof, and to proceed with all reasonable despatch to sell and dispose of the said real estate, stock in trade, personal property, book debts, credits and effects of the said party of the first part, and to receive and hold the proceeds thereof and to apply the moneys which the said parties of the second part may receive from such sale or sales in payment first of the said sum of $5,259, or so much thereof as shall then remain unpaid, with interest at the rate of eight per cent per annum,

and secondly, in payment of all costs, charges and expenses incurred in carrying into effect the said purpose; and thirdly, to hand over to the party of the

first part all surplus moneys realized from the sale, and all property not sold.

Now the first question which suggests itself is: Can it possibly be held to have been the intent of the parties to this instrument that the provisions above contained in the paragraph numbered three, recited from the instrument and thereby purported to be given, should be unlimited in duration so long as the parties of the second part should suffer the old debt of $5,259, or any part thereof, to remain unpaid; and that at any time, however remote, the parties of the second part, by serving upon the party of the first part a notice to the effect stated in the above paragraph numbered two, might enter upon and take possession of and dispose of to their own use all the property subsequently, it may be, acquired by the party of the first part by purchase from other wholesale traders with whom he was dealing on terms of credit, while the parties of the second part, as the plaintiff Turner has stated the fact to be, only sold to him goods for cash, after the execution of the said instrument, and so cut out all the creditors who furnished the party of the first part with the property so to be taken and applied by the parties of the second part with eight per cent interest thereon? If the instrument invested the parties thereto of the second part with any such power, then if the party of the first part should carry on his business for twenty years and then die, while the parties of the second part should suffer the debt to remain unsatisfied, or if the parties of the second part could, while the party of the first part was still carrying on his business, at the expiration of such twenty years by serving a notice upon him, that in their opinion he was incapacitated from attending to his business and that therefore they would exercise the power now claimed, it must, I think, be admitted that if they could succeed in their contention

1895
FRANCIS
v.
TURNER.
Gwynne J.

a most ingenious device is after many years contrived which would have the effect of overriding and rendering nugatory all provisions of the law and all decisions of the courts relating to chattel mortgages, bills of sale, frauds upon creditors, and the rights of purchasers for value of chattel property from persons in the actual possession thereof as owners.

But whatever may be the power conferred by the instrument over the property it cannot in my opinion be construed as conferring any such power unlimited in its duration.

The provisions contained in the clause of the instrument above cited in the paragraph numbered 1, are plainly limited as to their duration.

The sole object of that clause appears from its contents to have been to expedite the time of payment of a debt before it should become payable, in the event of the death of the debtor, or of his becoming at any time, in the opinion of his creditors, the parties of the second part, incapable of attending to his business. Such being the sole effect of the death, in the event of its occurring, or of the debtor at any time becoming incapable, &c., which is provided for in the clause, the death therein referred to, and the event of the debtor becoming at any time incapable, &c., as provided for in the same clause, must be limited to their respectively occurring before the debt (the time of payment of which was to be expedited by their occurring), should become payable according to the time originally fixed for its payment, that is to say, the first of December, 1892.

Then the clause recited from the instrument as set out above in the paragraph numbered 2 plainly, as it appears to me, relates wholly to the expediting of the time of payment of the debt as provided for in the first

clause and without which it is plain that the first clause would have been incomplete.

In the case of death, that event happening no doubt determined the incapacity of the deceased to attend to his business, and therefore the second paragraph says nothing as to the case of death; but the parties of the second part never could expedite the time of payment of the debt by forming an opinion as to the incapacity of the party of the first part to attend to his business if they should keep that opinion unexpressed, a creature of their own minds or of the mind of one of them; provision therefore is made in the second paragraph above, without which the first would be incomplete, for signifying the opinion so formed to the party of the first part by service of a notice upon him, and by providing that the incapacity, however long the opinion may have been entertained by the parties of the second part, should date only from the time of the serving of such notice. Until at least service of such notice the time of payment of the original debt could not be expedited for incapacity of the party of the first part to attend to his business, as contemplated by the first clause. The first clause was therefore incomplete without the second which must be taken and read with, and as forming part of, the first, and this appears to me to be the true literal construction of the second clause. The language is:

> If at any time it shall be the opinion of the parties of the second part, &c., that the party of the first part is so incapable of attending to his business as aforesaid.

Now the words "so" and "as aforesaid" as here used cannot be construed as equivalent or as substitution for "in the opinion of the parties of the second part," &c., for these latter words are themselves expressly used in the clause. The words "so" and "as aforesaid" as here used must, I think, be construed as

1895

FRANCIS v. TURNER.

Gwynne J.

referring to the party of the first part becoming incapable of attending to his business, "so as aforesaid" mentioned in the preceding clause and for which provision is therein made in the event of its occurring as therein contemplated, that is to say, at any time before the 1st December, 1892, when the debt would in due course become payable. The first clause of the agreement being thus incomplete without the second they must be read together, and being so read must clearly, in my opinion, be limited as to their operation to the time elapsing between the 10th September, 1891, and the 1st December, 1892. Then if these clauses be so limited, is there any reason why a more unlimited operation should be given to the third paragraph? Its language is:

> And it is further covenanted, &c., that forthwith upon the death of the said party of the first part, or upon the party of the first part becoming incapacitated from attending to his business as hereinbefore mentioned and provided, it shall be lawful for the parties of the second part," &c.

The language here used "it is further covenanted, &c." seems at the outset to show that what is provided for in the clause is something in connection with and in furtherance of what had gone before.

Now the first clause, for any beneficial purpose would have been as incomplete without the third clause as it would have been, as above shown, without the second; for if the first and second had stood alone without the third, the parties of the second part to the instrument would have had no means of recovering judgment of the debt, the time for payment of which was expedited by the first clause, except by action, which in the event of the death of the party of the first part or of his becoming incapable to attend to his business might have proved a very protracted mode of realizing what in those events might prove to be a very insufficient

1895

FRANCIS v. TURNER.

Gwynne J.

security. This third paragraph was therefore introduced for the purpose of providing a speedy mode of recovery of the debt the payment of which was so expedited by the occurrence of the death or such incapacity of the party of the first part. The powers professed to be conferred by the third paragraph—

> forthwith upon the death of the party of the first part or upon his becoming incapacitated from attending to his business as hereinbefore mentioned and provided.

These latter words apply equally to the death of the party of the first part as to his becoming incapacitated &c.,—the death and the incapacity mentioned in the first clause of the instrument whereby it was provided that the time of payment of the debt should be expedited by the occurrence of either before the debt should become due by lapse of the time originally established for its becoming due; supplemented to this and as necessary to complete the benefit contemplated as conferred by the first paragraph, the third provides that forthwith upon the death of the party of the first part, that is the death before mentioned in the first paragraph, and forthwith upon the party of the first part becoming incapacitated from attending to his business as before mentioned and provided in the first and second paragraphs taken together, it shall be lawful for the parties of the second part, &c., to obtain satisfaction of the debt the time of payment of which was so expedited by the means mentioned in the third paragraph. Thus construed the whole three clauses are consistent and all are necessary to give efficacy and completeness to the first. What the parties were providing for, as I think, sufficiently appears upon the instrument, namely, the possibility of the death, or the incapacity of the party of the first part to attend to his business occurring before the sums mentioned in the instrument should mature due by the lapse of time appointed for

1895

FRANCIS v. TURNER.

Gwynne J.

that maturity. So the first clause provides that the debt made due to the parties of the second part upon the 1st of December, 1892, shall become due and payable by the party of the first part to the parties of the second part, notwithstanding that the said 1st day of December, 1892, shall not have arrived, in the event of the death of the said party of the first part or of his becoming incapable, in the opinion of the parties of the second part, of attending to his business; such death or incapacity must of necessity occur before the 1st December, 1892, but the first clause being incomplete as to the event of incapacity occurring, the second clause was introduced to remove such incompleteness, and as both first and second were incomplete without the third, it was inserted as indeed necessary to the completeness of the whole, and all three must be construed together as having relation to the expediting the time of payment of the debt as mentioned in the first paragraph. We thus give to the whole a natural and rational construction and avoid the extravagant contention urged on behalf of the plaintiffs that the instrument of the 10th September, 1891, gave to the parties thereto of the second part power unlimited in duration over all property the defendant Francis should ever thereafter acquire, so long as any part of the said debt of $5,259 should remain unpaid, which debt the parties of the second part might suffer to remain unsatisfied while they might be receiving interest thereon for the express purpose of enabling them, at their pleasure, to assert this extraordinary control which is now contended for over a person in business, trading with the rest of the world in ignorance of the peculiar power claimed to be enjoyed by these favoured creditors over the property of the common debtor.

The appeal should be allowed with costs, in my opinion, upon the above considerations alone, and judg-

ment be ordered to be entered for the defendants in the court below with costs, and for the delivery to them of the goods in question or payment of the proceeds arising from the sale thereof.

But assuming the power proposed to be conferred by the instrument of September, 1891, upon the parties thereto of the second part to be unlimited in duration, as now contended by the plaintiffs, the question remains: Did or did not the condition precedent arise which was necessary to arise before the powers proposed to be given by the instrument could come into force and be exercised?

In solving this question it is necessary to attach a definite meaning to the expressions used in the instrument, viz.:

> In case the said party of the first part shall, in the opinion of the parties of the second part, or of either, from any cause become incapable of attending to his business, &c., &c.

in the first paragraph, and the expression:

> Forthwith upon the party of the first part, becoming incapacitated from attending to his business as hereinbefore mentioned and provided it shall be lawful for the parties of the second part

&c., &c., as in the third paragraph.

From the terms of the instrument it is quite plain that it never was intended that the parties of the second part should have it in their power at any time they pleased, while Francis' debt to them remained unpaid, without any cause whatever but influenced by mere caprice at their own arbitrary will and pleasure, to declare the party of the first part to have become in their opinion incapable of attending to his business, and upon serving upon him a notice to that effect, that it should be lawful for them to take possession of his property and to dispose of it under the powers in the instrument, as the property of a person no longer capable of attending to his business

1895

FRANCIS v. TURNER.

Gwynne J.

It is obvious that when the instrument was executed Francis was deemed to be perfectly capable of attending to his business, and what was intended to be provided for was, the possible event of his falling into a condition different from that in which he then was, of such a nature as in the opinion of the parties to the instrument of the second part to render him incapacitated, that is, made by some cause or other incapable of attending any longer to his business. The only cause which could render a person, perfectly capable of attending to his business, incapacitated from doing so any longer must be a cause physical or mental, so that the incapacity contemplated by the instrument must be one arising from some physical or mental cause having such an effect upon the party of the first part as to render him, in the *bonâ fide* opinion of the parties of the second part, or of one of them, incapacitated from attending any longer to his business. The condition precedent was thus of a twofold character; 1st, that there should be shown to be some change in the condition or conduct of the party to the instrument of the first part, which, 2ndly, in the *bonâ fide* entertained opinion of the parties of the second part, or of one of them, had the effect of rendering the party of the first part incapacitated from any longer attending to his business. I have said "in the *bonâ fide* entertained opinion of the parties of the second part," for it is manifestly not the intent of the instrument that the parties thereto of the second part should acquire a right to exercise the powers mentioned in the instrument upon their merely serving a notice upon the party of the first part that they were of opinion that he had become incapacitated from attending to his business if they in fact and in truth did not entertain the opinion. Whether they did or did not in truth entertain the opinion within the meaning contemplated by the instrument raises a

question not to be concluded by their simply serving a notice upon Francis stating that they entertained the opinion; the truth or falsehood of such a statement is a matter to be inquired into like any other question of fact and determined by the reasons which may be given in support of the opinion, and by the acts and dealings of the parties professing to entertain the opinion with the person incapacitated in their opinion from attending to his business.

If they can give no reason for their entertaining the opinion which should influence the judgment of rational men acting in good faith, or if their own dealings with the party are inconsistent with their entertaining the opinion, the natural inference to be drawn is that it is not true that they entertained the opinion the actual *bonâ fide* entertaining of which is an essential element in the condition precedent. An opinion to be entertained is, according to all dictionaries of the English language—

the judgment which the mind forms of the proposition, the truth or falsehood of which is supported by a degree of evidence which renders it probable but does not produce absolute knowledge or certainty.

If the parties professing to entertain the opinion that the defendant Francis had become incapacitated from carrying on his business cannot support the judgment they profess to have formed of such incapacity by some such probable evidence as should satisfy rational men of their sincerity in the judgment they profess to have formed, they must abide the natural consequence in such a case of a judgment being rendered to the effect that in truth and in fact they did not entertain the opinion, and that their conduct in the premises is attributable to a wholly different cause, and this is the judgment which, in my opinion, the evidence in this case warrants.

The facts disclosed in the evidence are that from the time of the execution of the instrument of Sep-

1895

FRANCIS v. TURNER.

Gwynne J.

tember, 1891, Francis proceeded with the carrying on of his business as before. He continued purchasing goods from the old firm of Turner, McKeand & Co., who, as the plaintiff Turner says, sold to him for cash only, and from other wholesale dealers upon terms of credit.. Three wholesale dealers who have dealt with him for ten, eleven and twelve years respectively, testify that during all that period there was no change whatever observable in his capacity for attending to his business, that he was a very careful, painstaking honourable, cautious and capable man.

Upon the 30th of June, 1893, however, the Commercial Bank of Manitoba failed. Upon that day the plaintiff Turner, as he himself testifies, went out to Headingly, where Francis carried on his business, to see him with regard to the failure of the bank, because, as he said, Francis had a big discount there and he was afraid that the failure of the bank might get Francis into trouble. He thought that the bank would go to work and crowd a great many people in the country, and that he, Turner, would be the first to move; accordingly, without communication with any of Francis' other creditors, he went out to Headingly, where, at Francis' store there, he heard that Francis was not feeling well; from there he went down to Francis' house and saw him, and "first told him that the bank had failed and asked for an assignment of book debts in the shape of notes or otherwise to cover the Turner, McKeand & Co. account." Turner says that Francis replied that he was not feeling well and that he asked Turner to come again another time, and that he would see him later. Francis, as to this interview, says that Turner came up to the house and asked him for an assignment of his book debts for the benefit of Turner, McKeand & Co. and also to sign a demand note which he had with him, and said:

I see you are a little rattled ; I will not bother you any more to-night,

and then left. Francis says that Turner found him not at all ill, but working at his books. Turner says that his next interview with Francis was on the 12th July, in Winnipeg, when he says he pressed Francis for the covering of the account, the old account, by notes or otherwise, and that after talking together for some little time they arranged that they should go out together the next day to Francis' place to get from him farmer's notes, book debts or whatever he had to cover the account; that they went out together the next morning, and upon arrival at Francis' place he refused to give an assignment of any debts at first. Being asked if he did not ask him for any reason why he had promised the night before, but refused the following morning, he answered :

No, I did not that I know of,

that he did not ask for any reason in direct words, that Francis argued about the thing a little and being asked—

what was the reason for his objecting as far as you could make out ?

he answered—

well I made out, I asked to let my clerk go out there and collect and he demurred to that and I think that was the reason he objected, and after a while we came to an understanding that we would appoint his Mr. Fowler.

Then he says that after a while Francis agreed to assign the book debts and produced his journal no. one—in which Turner wrote and Francis signed the following :—

Know all men by these presents that I, Frederick Henhurst Francis, of the Parish of Headingly, for valuable consideration given by James Louis Turner and Daniel Naismith trading as Turner, McKeand & Co. of the City of Winnipeg (the receipt whereof is hereby acknowledged) do hereby assign, transfer and set over all the accounts in journal number one used as a ledger since 1890, from page twenty-three to

1895

FRANCIS
v.
TURNER.

Gwynne J.

page four hundred, and do hereby grant and assign accounts and all causes of action now pending to the aforesaid James Louis Turner and Daniel Naismith trading as Turner, McKeand & Co.

and at the foot thereof Turner subscribed the following with the name of Turner, McKeand & Co.

We hereby authorise Mr. Alfred Fowler, of Headingly, our agent to collect above assigned accounts and also give him the right to appoint agents so to do.

At the same time as this was executed Turner says that it occurred to him that he would look after the other commercial creditors of Francis; accordingly that he suggested to Francis that he should give him such a note, and he got from Francis a list of the accounts due, and Francis signed a note prepared by Turner for the above purpose. Turner says that his idea in getting this demand note for the other creditors was that the commercial creditors should come in ahead in case judgment should go against Francis at the suit of the Commercial Bank or any one else. He said that though this is not quite usual, yet commercial men do this to help each other.

As to the above assignment of the book debts Turner says that "it was to be acted upon through Mr. Fowler in a quiet way." Mr. Fowler was to get out a detailed statement of account and appoint his own agent. Mr. Fowler he says "appointed Mr. Francis for the store."

Turner says that he gave Mr. Fowler the right to appoint any one, but that he would naturally infer that he Fowler would appoint Mr. Francis or his son.

He naturally inferred that Fowler would do so because he was an old friend of Francis and had formerly been in partnership with him. His, Turner's, intention was that Fowler should make out detailed statements. He thought he would appoint Mr. Francis, and he requested Mr. Fowler to get statements out as quickly as possible in detail, upon getting which it was Turner's intention, as he said, to send out a col-

lector to go over the country. This is the material substance of Turner's account of what took place on the 13th July when he left and, as he says, did not see Francis again until the 19th, or it may be the 18th August.

Now, with reference to the above assignment of debts, it is to be observed that it professes to proceed upon consideration proceeding from Turner and Naismith, the plaintiffs in this suit, and does not mention even the old debt to show that the assignment was made for the purpose of securing it. No trust purpose whatever is stated; it professes to be an absolute sale and assignment to Turner and Naismith for consideration paid by them. Yet it is perfectly clear that this was not the fact, and that it was executed for some trust purpose cannot be doubted. From Turner's evidence that he at the same time procured from Francis his promissory note for the amounts due to his creditors, other than the Commercial Bank, including the debt due to the old firm of Turner, McKeand & Co., the reasonable inference to be drawn is that these other creditors, equally with the old firm of Turner, McKeand & Co., were to share in the benefit of the assignment, and if they were, as no distinction is made in the assignment between the debts due to those creditors and the old debt due to Turner, McKeand & Co., they should all share alike in the benefit of the assignment. But it cannot be doubted that the assignment was executed upon some trust purpose, and as none is mentioned in the assignment we must collect by parol evidence dehors the instrument what that trust purpose was; we have seen Turner's evidence upon that subject. Now, the evidence of Francis as to what took place on the 12th and 13th July, is as follows: He says that the meeting between him and Turner on the 12th July took place in this wise; that feeling in

1895

FRANCIS v. TURNER.

Gwynne J.

difficulties he consulted with some of his creditors, who advised him to see Turner as one of the largest of his creditors, and talk over his affairs with him; that he accordingly went to see Turner and had a conversation with him at the Clarendon Hotel on the evening of the 12th, during which (to use Francis own language):

> Turner asked me how old my eldest son was? I said eighteen years of age, and he said I might appoint him to collect the accounts—it does not make any difference at all—only a matter of form—and he said, "who do you think would do?" And I said Mr. Fowler knows my affairs pretty well and has been associated with me in business—

The conversation resulted in Francis agreeing to give to Turner a demand note to cover the debts of all the commercial creditors and an assignment of the book debts for the benefit of all the creditors including the Commercial Bank. He said that the object of the demand note was that it might be used in the event of the Commercial Bank endeavouring to garnish any of Francis' debts. He said that they went out on the 13th to Headingly to complete the above arrangenent and that Francis then gave Turner a list of the commercial creditors whose accounts were to be covered by the demand note, the amount of which Turner filled in; and then in the presence of Fowler and his son who were in the store with him he signed the assignment in the journal which Turner himself wrote—and said that he would act as trustee for all the creditors. The journal with the assignment in it was left with Francis in the store. Being asked what understanding if any he had with Turner as to what Fowler was to do he replied—

> Mr. Turner said, to make out a list of the book debts from the journal and get them down to Winnipeg as soon as you can in order that the commercial men may have a list if they want it; and I said: What am I to do with the list? and he said: Who was appointed to look after your affairs? and I said Mr. Redmond and Mr. Whitla, and he said,

give it to Mr. Redmond and he can do with it according to the instructions he has received at the meeting of your creditors—

and Francis added that in accordance with the instructions so given by Mr. Turner the list was made out and given to Mr. Redmond. This is the substance of what took place up to and including the 13th July.

Now as to what took place under the assignment of debts, between the 13th July and the 19th August, Turner says that he knew nothing and made no inquiries, as to what Francis was doing about the book debts. Being asked why he went out again on the 19th August, his answer was that it was on the advice of his solicitor—that they had hunted round every place they could think of (whatever that meant) and his solicitor said it was the best thing to do, to drive out. Accordingly he went out to Headingly and took with him his solicitor and an employee named McLean. When they got to Francis' store they found Francis and Fowler there, and Turner demanded of Francis the book containing the assignment of the debts, and Francis at once peremptorily refused to give it up alleging as his reason that they had been assigned for the benefit of his creditors, whereas Turner was claiming it, and demanded it to be given up for his own benefit. Francis said that he had taken legal advice upon the subject and would not give up the book; in this Fowler supported Francis. The latter thereupon left his store saying that he was going to his house and would be back in three hours when, as Mr. Turner's solicitor understood, he would turn them out, if they should be there I suppose he meant. Then, and for the first time, appears to have been entertained the idea of trying to overcome Francis' persistent refusal to give up to Turner the book containing the assignment of debts, by invoking in aid the instrument of the 10th September, 1891, upon the

1895

FRANCIS v. TURNER.

Gwynne J.

ground or pretense that Francis had within the meaning of that instrument become incapacitated to attend to his business, for then and there the following notice was written out and signed by Mr. Turner and given to McLean to serve, who followed Francis to his house and served it on him there:

It is the opinion of this firm that you are incapacitated from properly attending to business within the meaning of the agreement between you and this firm, dated the 10th September, 1891, and we intend forthwith to take possession pursuant to the provisions of said agreement.

And take notice that our said firm now consists of James Louis Turner and Daniel Naismith jr.

And we hereby demand from you immediate payment of the sum of $4,600, more or less, due and payable to us under the said agreement.

Dated Headingly, Man., August 19, 1893.

TURNER, McKEAND & CO.

To F. H. FRANCIS, Esq., Headingly, Man.

Turner says, that this notice was then written out at Headingly, and being asked if he had had any idea of having it written out before he went out on that day, he replied that he had brought out the agreement of September 1st, 1891, with him intending to act under it "if there was any of this want of business going on," by which he said he meant: "If the business was not going on in a proper way," which he further explained by saying:

I mean to say that business was not run in a proper way if a party makes a big lot of book debts and do not return them and packs away the books and hides them.

Then the evidence of Mr. Turner's solicitor as to what took place on the 19th August after service of the notice on Francis, is very significant and is substantially as follows:

Francis came down to the store about half an hour after the notice was served. He did not say very much, except that he seemed to be indignant and said he was going away and would be back in three

hours; and as I understood him, he was going to throw us out then. He then went down to his house.

Mr. Turner and his solicitor then went to their dinner at the hotel, and while they were at dinner Francis came and sat down and had a conversation with Turner, during which Turner said—

that he felt himself forced to take this step from the position Mr. Francis had taken about the book debts, and that he had brought a man to collect them; that his principal object was to assist Mr. Francis and that he still hoped there was some way of Mr. Francis getting out of his difficulties.

They then left the table and walked for miles on the prairie, during which time Turner and Francis were, as he says "discussing the matter in the most friendly way." Francis said that he was afraid

that now, after all these years, the course Turner had taken was going to ruin him.

To which Turner replied,

that he had no wish to ruin him, but to assist him; that if a man were put in to collect these he thought there might be enough to pay off Turner, McKeand & Co. and leave a surplus for the other creditors, and that he thought if that were done Francis' credit would be improved and that he could get out of his difficulties ultimately.

The solicitor then says:

It was suggested (he does not say by whom) that it might be hard to control the Commercial Bank; now that it was in liquidation they might proceed to extremities, but Mr. Turner urged and I urged, that it would be much better to carry out the course we intended, which course was, in the first place, to collect the book debts.

After a lot of discussion they got to the store, without arriving at anything definite. Then the solicitor says:

I left Mr. Turner and Mr. Francis in conversation and walked out a little distance, when Mr. Turner came over to where I was, and in consequence of what he said I went back to Mr. Francis and said to him: Mr. Turner says that you would like for us to go out of possession until you can have an opportunity of seeing your creditors.

And the solicitor proposed to him that McLean should remain in possession "until such times

1895

FRANCIS v. TURNER.

Gwynne J.

as might be necessary"; to this Francis objected, it is unnecessary to state the reason alleged. The solicitor then suggested that Francis should take substitution from McLean and so that McLean and Francis should hold joint possession of the stock in trade both for himself (Francis) and for Turner McKeand & Co. The solicitor says:

> I told Mr. Turner in Mr. Francis' presence that I thought there might be some risk in giving up possession and leaving it in Mr. Francis' own possession, but Mr. Francis said no there would be none, that he would undertake that we would be in the same position as we were then on the following Thursday, that no change would be made in connection with the stock; and the book debts were particularly mentioned. Mr. Turner seemed satisfied with this.

Now the plain meaning of all this is that Francis agreed that upon Turner giving up what he called his rightful possession of Francis' premises and property, and which Francis insisted was wrongful, and giving Francis until Thursday the 24th to consult his creditors upon the matter, both parties should upon Thursday at 6 o'clock be in the same position in which they then were, which was nothing more than this that Turner should be in the position of claiming to be entitled to the book debts for his own use independently of the instrument of September 1891, and to be in possesssion of the whole of Francis' property under that instrument subject to the trusts thereof, all which Francis absolutely denied, repudiated and resisted, and that in the meantime Francis should consult his creditors, in whose hands he then was and by whose advice he would naturally act in the premises.

The mode adopted for carrying out this arrangement was that Mr. Turner's solicitor drew out on the back of Turner's appointment of McLean as his agent the appointment by McLean of Francis as his substitute which the solicitor procured Francis, who was without a solicitor present to advise him, to sign

1895

FRANCIS v. TURNER.

Gwynne J.

as accepted by him. But notwithstanding such acceptance the fact remains that it was merely assented to for the purpose of securing the result agreed upon, namely, that upon Thursday the 24th August both parties, unless Francis should submit to Turner's demands or to some part thereof, should be in the same position as they then upon the 19th of August were, viz., Turner insisting that he was, as above, entitled to the book debts irrespective of the agreement of September, 1891, and also that he was in legal possession of Francis' property under the agreement of 1891, subject to the trusts thereof, and Francis denying that Turner had any such right, title or possession and asserting that on the contrary Turner was a trespasser upon Francis' premises and property.

The evidence of Francis as to what took place between the 13th July and the 19th August, and upon the latter day, is that he delivered to Mr. Redmond, as it had been agreed with Turner that he should, a list of his liabilities and that shortly afterwards he received a parcel of postal cards of which the following is a sample:

WINNIPEG, MAN., 13th July, 1893.

DEAR SIR,—We beg to notify you that Mr. F. H. Francis of Headingly, has assigned his account against you amounting to $ to us and that you are requested to make payment either to Mr. Alfred Fowler of Headingly, our agent, or his agent, at Mr. Francis' store at once.

TURNER, McKEAND & CO.

Upon receipt of these cards he took them into Winnipeg to consult with Mr. Redmond and Mr. Whitla, two of his creditors, who at a meeting of his creditors held prior to the 13th July were appointed a committee to interview the liquidator of the Commercial Bank and under whose advice he was acting. He was advised by his creditors not to distribute the post card circulars, for that if he did Turner might thereby obtain an advantage.

1895

FRANCIS v. TURNER.

Gwynne J.

Accordingly acting upon the advice of his creditors he did not distribute the post cards and he told Turner that he had not sent them out and did not intend to do so. This took place about three weeks after the 13th July.

Then he says that about a week before the 19th of August there was a meeting of his creditors at Mr. Whitla's office at which Mr. Turner was present; at that meeting Mr. Turner addressing the other creditors said:

Perhaps gentlemen you don't know that I hold an assignment of Mr. Francis' book debts here in my pocket, and it is for Turner & McKeand.

Thereupon Mr. Bethune, a creditor, got up and said:

Well, that is not what you told me about that Mr. Turner; you told me that it was for the benefit of all the creditors.

Mr. Bethune, who has been examined as a witness in the case, swore that Mr. Turner did inform him that he had got an assignment from Mr. Francis, and that he held it for the benefit of his, Francis', creditors; and he added that Turner said that his main object in taking the assignment was to protect the debts from garnishing proceedings, if such should be taken by the Commercial Bank.

Mr. Redmond was also sworn as a witness in the cause, and he stated that Mr. Turner informed him that he had taken the assignment of the book debts, but that he had taken it in trust for all the creditors outside of the Commercial Bank.

That he did so take it is in truth quite consistent with the form of the assignment, as already shown, which did not state for what trust purpose it was made; although written by Turner himself it did not state that it was taken for his benefit or for that of Turner, McKeand & Co. The purpose for which it was taken was left open to be established by evidence, and Turner's own admission of the purpose for which

1895

FRANCIS v. TURNER.

Gwynne J.

it was made by Francis, and accepted by him, should be in itself conclusive against him, apart from the evidence of Francis.

Then Francis says that he saw Turner, in Winnipeg, on the afternoon of the 18th August, and that then, for the first time, Turner asked him for the book (by which I understand him to mean the book containing the assignment) "for the firm of Turner, McKeand & Co.," and he said he was going to send a man out to collect, whereupon Francis asked him what he was going to do with the proceeds, to which he replied:

I am going to collect them for Turner, McKeand & Co.

To which Francis answered:

If you send a man out in that way, you will force me to do a thing that all will regret.

By this, of course, he meant that he would make an assignment. To this Mr. Turner said:

Don't do anything to-night and I will come out on Saturday afternoon (the next day) and we will talk over affairs and come to a satisfactory arrangement all round.

And I, he says:

then agreed that I would not make an assignment until after he had a conversation with me on the 19th.

In the morning when he went to his store he found Mr. Turner and his solicitor there, they having come out the night before. Then Turner made a demand for the book and Francis refused to give it, and shortly afterwards the notice was served as already stated in the other evidence.

The evidence of the solicitor already given is abundantly sufficient in itself to show that in the arrangement made by him with Francis it was never intended or supposed, that by signing as "accepted" the paper signed by McKeand, Francis should be deemed to be departing in the slightest degree from the attitude of determined resistance to the action of Turner in his

1895

FRANCIS v. TURNER.

Gwynne J.

attempt to take possession of his premises and property; but it may be well in closing the evidence to give Francis' evidence upon this point as showing his understanding of the matter, and of the position in which he felt himself to be, unassisted as he was by any legal advice. Being asked why he did mark that paper as "accepted," he replied, that he did it to get them out of the store, that he was there perfectly helpless. That he told them he would eject them from the store, and that Mr. Darby, Turner's solicitor, said to him: "if you dare do that you will do so at your own risk, now I warn you." That it was Saturday afternoon, he added, and he had no chance of coming into Winnipeg to consult any one, because the lawyers would be away on Saturday afternoon, and he knew the other creditors' stores would be closed and he made up his mind that he would go and see the other creditors and his solicitor in connection with the seizure, and he said further, that he had a talk with Mr. Turner after the service of the notice upon him, and that he said to him that if he would give Francis his guarantee that he would act for the benefit of the creditors, he might take the book and the stock and his house and everything he owned, that he did not wish to keep anything for himself, that he was in the hands of his creditors and dared not give him, Turner, any preference if he wanted to. He wanted an opportunity to come down to Winnipeg to see his other creditors and a lawyer, and so he signed saying: "It does not prejudice me or prejudice you, we will all be in the same position if nothing is done in the meantime, because I will not dispose of the stock." So things remained in *statu quo*; he went into Winnipeg consulted the other creditors and his lawyer; and when Turner came on the 24th and demanded the books and said also that he had come under the agreement of September 1891, he told Turner that he had no books

1895

FRANCIS v. TURNER.

Gwynne J.

to give him, and when closing his store at 6 o'clock in the evening he turned him out of the store and retained undisputed possession of his property until the 28th August when he made the assignment to Bertrand for the benefit of his creditors.

Now from all this evidence it is apparent that up to the last moment Turner was dealing with Francis as a person perfectly capable of attending to his business; and indeed it is impossible to avoid drawing from the evidence as given by Turner himself, the inference that it was because of Francis' capacity to attend to his business, and his persistent refusal to place Turner in a position which would enable him to claim the right of applying to his own benefit the assignment of the debts which Francis had made to Turner, McKeand & Co. upon the express agreement, as he insists, and as Turner himself admitted to Mr. Bethune and Mr. Redmond, that they would hold the assignment of the debts in trust for the benefit of his Francis' creditors, that induced Mr. Turner to have the notice served upon the 19th August, and not any *bonâ fide* belief in the assertion made therein that in the opinion of his firm Francis was incapacitated from attending to his business within the meaning of the instrument of September 1891.

The assignment of book debts which was made upon the 13th July 1893, was not made or asked to be made in virtue of that instrument. There can be no doubt entertained upon the evidence that, in point of fact, that assignment was made with intent that the assignees Turner, McKeand & Co. should hold it if not for the benefit of all the creditors alike as sworn by Francis and admitted by Turner himself to one of Francis' creditors, at least for the benefit of all outside of the Commercial Bank as stated by Turner to another of such creditors. To the last moment Turner was insist-

1895

FRANCIS v. TURNER.

Gwynne J.

ing however upon getting the book containing the assignment into his possession with the declared intention of using it for the exclusive benefit of his firm, although if Francis was really, in the *bonâ fide* opinion of the firm, incapacitated within the meaning of the instrument of September 1891, they would have been as much entitled to the book debts as to any other property belonging to Francis under that instrument.

The only possible conclusion to be drawn from the evidence and from Turner's own conduct in the premises throughout is that in point of fact he did not and that his firm did not upon the 19th August 1891, when the notice was served, or at any time, entertain within the meaning of the instrument of September 1891, the opinion that Francis was, within the meaning of that instrument, incapacitated from attending to his business; and that the notice was served in the hope and expectation, by the false pretence that Turner's firm did entertain the opinion therein expressed, to obtain thereby an undue advantage over the other creditors of Francis whose persistent resistance of which attempt, in the interest of his other creditors, was perfectly justifiable and commendable.

Assuming therefore the old firm of Turner, McKeand & Co. to be still in existence, and the powers conferred by the instrument of September 1891, to be unlimited in duration, there is nothing shown in evidence to displace the right of Bertrand to any part of the property expressed in the indenture of the 28th August 1893, to be assigned to him by Francis.

The appeal therefore must be allowed with costs and judgment be ordered to be entered for the defendants in the court below and for return to the defendant Bertrand of any of such property as may, if any does, remain unsold, and for payment to him of the moneys realised from the sale of such as has been sold.

1895

FRANCIS v. TURNER.

Gwynne J.

I have not thought it necessary to inquire whether the new firm of Turner, McKeand & Co., consisting of the plaintiff Turner and Naismith, have any interest whatever in the premises under the instrument of September 1891, although if it had been necessary I may say that I can see nothing in the evidence which shows that Martindale, one of the parties to that instrument, ever parted with, or that the new firm ever acquired, his interest in the old debt of $5,259, and yet the instrument of September 1891, provides, from a superabundant excess of caution, that the powers conferred thereby upon the old firm should not be vested in any new firm formed by substitution or addition unless such new firm shall have assumed the debt due by Francis. However, as already said, this is in my opinion, for the reasons above given, immaterial now.

SEDGEWICK J.—In concur in the judgment of Mr. Justice King.

KING J.—This is an appeal from a judgment of the Court of Queen's Bench for Manitoba in favour of the plaintiffs in an action of replevin. The case turns upon the right of plaintiffs to take possession, as security for a debt, of a stock of dry goods, etc., belonging to defendant Francis.

It appears that, in the year 1890, Francis became insolvent. Amongst his creditors was the firm of Turner, McKeand & Co. of Winnipeg, then composed of Turner and one Martindale, to which firm he owed, for goods sold, the sum of $5,259, upon promissory notes then overdue. An arrangement was then made, with assent of all creditors, to the effect that the creditors, other than Turner, McKeand & Co., should accept a compromise of their claims at about 50 per cent. to be secured by promissory notes of Francis, indorsed by

1895
FRANCIS
v.
TURNER.
King J.

Turner, McKeand & Co., and that the latter firm should be paid in full, but that the payment of their claim should be postponed until the 1st day of December, 1892. Accordingly, Turner, McKeand & Co. gave their indorsements, amounting in the aggregate to $3,631. In consideration of all this they were to have certain security, the character of which was expressed in an agreement under seal made on the 10th day of September, 1891. By this it was, *inter alia*, covenanted and agreed that, in the event of Francis' death, or in case he should at any time, in the opinion of the parties of the second part (Turner and Martindale), or either of them, from any cause become incapable of attending to his business, then, and in either of such cases, the said sum of $5,259 should become due, although the 1st of December, 1892, might not have arrived, and the amount of the indorsements should at once become payable, although the notes might not be due or might be in other hands.

It was also provided that in the event above referred to a notice in writing, signed by the firm name, stating that, in their opinion, Francis was so incapable, should be served upon him, or left at his usual place of abode, and that such notice so served, and the date of such service, should be and determine the date of such incapacity.

It was further agreed that forthwith, upon the death of Francis, or upon his becoming incapacitated from attending to his business as thereinbefore mentioned and provided, it should be lawful for Turner, McKeand & Co., their agents, etc., or either of them, to enter into and upon, and to take full and complete possession of, all the personal property, stock in trade, book debts, real estate, credits and effects of Francis, and to keep and hold possession, and proceed with all reasonable dispatch to sell and dispose of the same, and out of the

proceeds to satisfy the amounts due under the agreement, repaying to Francis any surplus, etc.

It was also agreed that, in case of a change in the firm of Turner, McKeand & Co., the agreement and security should enure to the benefit of the members of the firm as changed, provided that the latter firm should have assumed the liabilities of the old one as indorsers as aforesaid, and should also have taken over the indebtedness of Francis to the old firm.

After the completion of this transaction, Francis continued on in his business at Headingly, a place about 12 miles from Winnipeg, and from time to time reduced the aggregate amount of Turner, McKeand & Co.'s contingent liability upon the indorsed notes.

On the 1st December 1892, the amount due Turner, McKeand & Co. for goods sold became payable, but it was not paid, and it does not appear that they pressed for payment. By September following, the sum was reduced from its original amount of $5,259 to about $4,600.

On 30th June, 1893, Martindale retired from, and Naismith entered, the firm which continued on under the same name. It does not appear that the new firm became indorsers of the Francis notes, although the evidence leads to the inference that it took over the indebtedness of Francis to the old firm for goods sold.

About the same time a local bank with which Francis dealt, and to which he was indebted, went into liquidation, with the result that Francis was obliged to lay the state of his affairs before his creditors, when it was seen that he was in an embarrassed condition, and a couple of his creditors were appointed to advise with him. This was about the 13th July.

Before that time, and soon after the failure of the bank, Turner, McKeand & Co. apprehending that the bank might take proceedings for the recovery of its

1895

FRANCIS v. TURNER.

King J.

claim, persuaded Francis to assign the book debts to them. This was done or attempted by a memorandum entered in one of Francis' books of account. Turner, McKeand & Co. upon this, sent out to Francis printed forms of notice of assignment to be filled up and sent to the several debtors. Francis, fearing the effect of this upon his other creditors, under whose directions he was then acting, did not send out the notices, but notified his other creditors, and, on inquiry of Turner McKeand & Co., told them that he had delivered some of the notices, implying that he had delivered them to the debtors, but secretly having reference to the delivery to his creditors.

On 19th August Turner, accompanied by his solicitor and a clerk named McLean, went out to Headingly and demanded the book containing the assignment of the book debts. Francis refused, and then Turner caused the following notice to be served:

It is the opinion of this firm that you are incapacitated from properly attending to business within the meaning of the agreement made between you and this firm, dated the 10th September, 1891, and we intend forthwith to take possession pursuant to the provisions of said agreement. And take notice, that our said firm now consists of James Louis Turner and Daniel Naismith, jr., and we hereby demand from you immediate payment of the sum of $4,600 more or less due and payable to us under the said agreement.

Dated Headingly, Man., Aug. 19, 1893.

(Sgd.) TURNER, McKEAND & CO.

To F. H. FRANCIS, Esq.,
Headingly, Man.

Turner forthwith took possession of the premises and of the stock of goods, etc., and placed McLean in charge. Francis protested, but apparently did not raise the question of his alleged incapacity, and afterwards, upon the same day, with the assent of Turner, accepted possession from McLean under an appointment in writing (accepted in writing by Francis), by which Francis was to act as a substitute of McLean under

Turner, McKeand & Co., and to hold jointly with McLean until the 24th August, up to the hour of 6 p.m.

Turner and his party, including McLean, then returned to Winnipeg, and on the 24th August went back again to Headingly to resume personal possession. Francis, however, disputed his right, and with aid of superior force ejected Turner. Two days afterwards he made an assignment to Bertrand, the official assignee, in trust for the benefit of all his creditors. Bertrand went into possession and so remained until 22nd September, when the proceedings in replevin were begun, and in a few days afterwards an agreement was come to, under which Bertrand sold the property for benefit of whom it might concern.

Upon trial of the action before Taylor C.J. judgment was given against Francis, but in favour of Bertrand. On appeal plaintiffs were held entitled to recover against both.

The contention on the part of Bertrand was that there was no evidence of a joint conversion. On this point the reasons of the learned judges in appeal satisfactorily show that, if there was a conversion at all, Bertrand is jointly liable with Francis.

Upon the main point, viz., as to plaintiffs' right to the goods, the chief contention of appellants is that the event had not arisen warranting the plaintiffs to take possession, because that, as contended, the alleged opinion as to Francis' incapacity to attend to his business was not a real, but merely a pretended opinion; and further, that the notice was not such as the agreement provided for, inasmuch as it purported to be the opinion of Turner and Naismith, while the latter had in the circumstances no power to act in the matter.

It was argued that the language used in the agreement in authorizing the taking possession, required that there should be incapacity in point of fact, but

1895

FRANCIS v. TURNER.

King J.

the words of reference "as hereinbefore mentioned and provided," bring down and incorporate the qualification that the incapacity is to be determined by the opinion of Turner, McKeand & Co. Of course this means an honest opinion, one that is real and not pretended. But if honest it governs, even although mistaken in point of law or fact, illogical or inconclusive. The essential thing is that there shall be an honest determination of the thing to be determined. And the right to judge extends to everything that enters into the formation of the honest judgment. In language quoted by Mr. Justice Killam from *Allcroft* v. *Bishop of London* (1), Lord Bramwell says:

> If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him.

In a fair sense a man may be said to be incapable of attending to his business when he is not able to give to it the attention that it reasonably requires. This may arise from a number of causes differing in kind, *e.g.*, from illness affecting mind or body, from state of health not amounting to illness, from physical restraint or absence, from intemperate habits, from undue attention to outside matters taking the mind unduly from the particular business, or from any cause operating upon the individual materially impairing his efficiency as a business man. The agreement extends to incapacity however caused, and therefore covers different degrees of incapacity, for the nature and degree of incapacity varies with the cause. The plaintiffs had assumed large obligations for Francis, and while they seemed content with his personal responsibility, so long as he appeared to them able to apply himself efficiently to his business, they sought to protect themselves from loss in case, at any time, he should, in their opinion, from whatever cause become

(1) [1891] A.C. 666.

inefficient or incapable. But, however caused, the incapacity must be such as to materially affect efficiency and injure the business, or be calculated to do so.

Then, did plaintiffs come to an honest and real opinion as expressed in their notice of August 19th? The learned Chief Justice has found that they did, and the Court of Queen's Bench has unanimously agreed that the finding ought not to be disturbed.

There would not appear to be much doubt that Turner was moved to give the notice because of his failure to get the books from Francis. This is the conclusion upon the whole evidence, and is also established by the evidence of his solicitor, Mr. Darby, who says that, in the conversation that took place with Francis after the seizure, Mr. Turner said that he had felt himself forced to take this step from the position that Mr. Francis had taken about the book debts; that he expected to get the book debts and that he had brought a man up to collect them. But strictly this merely means that he would not have resorted to extreme rights of seizure, etc., if he had received certain security.

The learned counsel for defendants properly pressed Turner closely for the grounds of his opinion that Francis was incapable. And indeed it was to have been expected that one who was authorized to form an opinion and did claim to have formed it, and who certainly acted as having done so, should have been able to give some reasonable ground for his alleged opinion, if it was a real opinion.

Disengaged from irrelevant matter, what he says is about as follows, and in his own language:

> I think he is incapacitated from properly attending to his business and was so for some time. * * * His business ways lately to me were not satisfactory in many ways. * * * Both in the way he was worrying himself in not getting enough of goods, and his neglect

1895

FRANCIS v. TURNER.

King J.

of business matters. * * * Not only in the way of not paying notes, but in not collecting properly from his customers, and from the talk of others I judged that I had better look after myself. * * * He wasted too much time coming into Winnipeg. * * * I thought it was to buy a small jag of goods.

The following questions and answers are then put and given:

Q. These are the only objections you had to him? A. I haven't got any more to say about it.

Q. So that it was as much his financial incapacity that you objected to as anything else? A. No, it was the way the man is worn down by worry. He is generally unfit for business.

If Turner is to be believed in this, and if he, rightly or wrongly, honestly thought that Francis was worn down by worry, and generally unfit for business, of which his (in Turner's opinion) loose business methods, waste of time over small matters, financial embarrassment, and the placing of himself in the hands of his creditors and accepting their direction, may be thought to be signs, it cannot be said that Turner had so little ground for his conclusion that Francis' efficiency as a business man had become materially impaired, that we cannot suppose him to have been honest in the conclusion he professes to have reached.

The following passage from the judgment of Mr. Justice Killam appears to put the case very concisely:

Bad judgment or improper management would not constitute incapacity, but to a business man having the opportunity of observing the party they might not unreasonably, according to circumstances, indicate that the party was incapable, to a serious extent, of attending to the business. Mental worry, due to business troubles or to other causes, might easily affect a business man so as to make his attention to business fitful and partial, so as to prevent his bringing to bear upon his business his full mental and physical powers.

Next, as to the notice; the agreement authorized either of the original members of the firm to form the opinion and give the notice. Turner clearly formed the opinion, (if one was formed at all), and the notice

manifestly purports to express and convey it to Francis. There could have been no question in Francis' mind at the time, that Turner was an active promoter of what was being done.

1895

FRANCIS v. TURNER.

King J.

For these reasons, which are substantially those given below, the conclusion of the Chief Justice at the trial ought not to be set aside, except as varied by the Court of Queen's Bench, and this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *W. F. McCreary.*

Solicitor for the respondents: *J. W. E. Darby.*

1895

*Oct. 31.

WILLIAM H. MERRITT (DEFENDANT).. APPELLANT;

AND

REGINALD F. D. HEPENSTAL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Master and servant---Negligence of servant—Deviation from employment—Resumption—Contributory negligence—Infant—Evidence.

A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so he ran over and injured a child.

Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start.

The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner* v. *Grace* (1 F. & F. 359) followed.

If in a case tried without a jury evidence has been improperly admitted a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it.

APPEAL from a decision of the Supreme Court of New Brunswick (1) sustaining a verdict for the plaintiff and refusing a new trial.

The defendant Merritt is a grocer in St. John N.B., and his teamster, Gorman, having been sent out one day with parcels of goods for delivery to customers, delivered all but one and then went home to his supper; after supper he started out to finish his work and on the way ran over the infant child of the plaintiff who brought an action against Merritt for compensation. On the trial of the action it was shown

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

(1) 33 N. B. Rep. 91.

that the child ran out from the sidewalk to the middle of the street when the waggon was approaching and evidence was admitted of the nurse who attended the child after he was hurt to the effect that since the accident he was affected with urinary trouble. The trial judge, who tried the case without a jury, found that the action of the child in running out upon the street contributed to the accident, but that it could have been avoided by the exercise of reasonable care on Gorman's part, and he gave a verdict for the plaintiff. A judgment for defendant or a new trial was moved for on the grounds that Gorman, having abandoned defendant's business when he went to his supper, could only resume it by returning to the place where he had delivered the last parcel and that he had not, in fact, resumed it when the accident happened; that the negligence of the child caused the accident; and that the evidence of the nurse should not have been admitted, as she was not called as an expert and was contradicted by the physician who attended the child. The verdict having been sustained defendant appealed to this court.

C. A. Stockton for the appellant. Gorman was not in defendant's employ when the accident occurred. *Rayner* v. *Mitchell* (1); *Mitchell* v. *Crassweller* (2); *Storey* v. *Ashton* (3).

There was contradictory evidence as to the speed at which Gorman was driving, and the whole being consistent with the absence as well as with the existence of negligence a non-suit should have been granted. *Cotton* v. *Wood* (4).

Armstrong Q.C. for the respondent was not called upon.

The judgment of the court was delivered by:

(1) 2 C. P. D. 357.
(2) 13 C. B. 237.
(3) L. R. 4 Q. B. 476.
(4) 8 C. B. N. S. 568.

1895

MERRITT v. HEPENSTAL.

The Chief Justice.

THE CHIEF JUSTICE (Oral) :—We are all of opinion that this appeal should be dismissed. Negligence by the servant of the appellant is clearly proved, in fact there could not be a stronger case, and the defence as to contributory negligence entirely fails, not only on the authority of *Davies* v. *Mann* (1), but also on the opinions expressed in *Gardner* v. *Grace* (2), where the cause of action was an injury to a child of three years of age. In that case Channell B. said :

> The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shown that the injury was occasioned entirely by his own negligence.

This seems to be the result of the cases, English as well as American, though there may be some contradictory decisions.

A new trial is asked for on the ground of the improper admission of the evidence of the nurse who attended the plaintiff's child, that in her opinion a urinary trouble with which the child was affected resulted from the accident. I cannot find in the record that any such opinion was expressed by the nurse, but if it was, we could reject her evidence altogether and still maintain the verdict.

The case was tried by a judge without a jury, and the position of a Court of Appeal in such a case, as distinguished from a case tried with a jury, is clearly pointed out by Bramwell B. in the case of *Jones* v. *Hough* (3), in these words :

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

(1) 10 M. & W. 546. (2) 1 F. & F. 359.
(3) 5 Ex. D. 122.

1895

MERRITT v. HEPENSTAL.

The Chief Justice.

Another point argued was that Gorman was not in the employ of the defendant when the accident happened. That he was in such employ at the time there can, in our opinion, be no doubt. *Whatman* v. *Pearson* (1) was a stronger case than the one before us, and I do not think the learned counsel has been successful in his attempt to distinguish it from the present. Though Gorman had for a time abandoned his master's business, he had resumed it when he started out to deliver the remaining parcel just as much as if he had returned to the store and made a fresh start.

As to damages Mr. Justice Hanington, in giving judgment in the court below on the motion for a new trial, says:

> This case comes clearly within the doctrine laid down in *Whatman* v. *Pearson* (1). If there is any cause for complaint it is that the damages are too small.

In this I entirely concur.

I think the learned judge who tried the case was right in his findings as to the facts, as well as in his ruling as to the law.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. A. Stockton.*

Solicitor for the respondent: *J. R. Armstrong.*

---

(1) L.R. 3 C.P. 422

1895

*May 20.
*Dec. 9.

THE DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION (DEFENDANT)..... APPELLANT;

AND

FRANCIS J. BRADT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Mutual Insurance Company—Contract—Termination—Notice—Statutory conditions—R. S. O. (1887) *c.* 167—*Waiver—Estoppel.*

B. applied to a mutual company for insurance on his property for four years giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50 being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B. and no policy was issued within the said time which expired on March 4th, 1891. On April 17 B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph and on April 29th the latter wrote returning the money remitted by B. who afterwards sent it again to the manager and it was again returned. B. then brought an action which was dismissed at the hearing and a new trial ordered by the Division Court and affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the

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

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

Ontario Insurance Act (R.S.O. [1887] c. 167) governed such contract though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions it was ineffectual for non-compliance with condition 115 requiring variations to be written in a different coloured ink from the rest of the document and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19 which provides that notice shall not operate until seven days after its receipt.

Held, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2), by which the verdict for the defendants was set aside and a new trial ordered.

The action in this case was brought by one Barnes on an alleged contract by the defendant company to insure his property for $1,500. Barnes applied to the company for insurance to this amount for four years, and gave an undertaking to make the payments that should be required from time to time and a note for the first premium. He received a receipt from the company for such undertaking, describing the amount mentioned therein as the premium for insurance on the property described in his application, and providing that the company could cancel the contract within fifty days by written notice mailed to Barnes, and that non-receipt of a policy within such time was to be taken, with or without notice, as absolute evidence of the application. Barnes received no notice of rejection and no policy within the fifty days, but after the time had expired payment of his note was demanded and the amount sent, his letter of remittance crossing one from the manager notifying him that his application

(1) 22 Ont. App. R. 68, sub nom. (2) 25 O.R. 100.
Barnes *v.* Dom. Grange Assoc.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

was not accepted and enclosing his undertaking and note. Two days after this letter was received the insured property was destroyed by fire, of which Barnes notified the company, and shortly after received back the money he had remitted, which he sent to the company again and was again returned to him. He then brought his action for the insurance.

The documents above referred to and the correspondence between the parties are all set out in the judgment of the Chief Justice on this appeal.

Barnes died while the action was pending and it was revived in favour of his executrix, Frances J. Garroway, who is the present respondent Francis J. Bradt. The trial judge held that the contract of insurance was at an end when no policy was received by Barnes at the expiration of the fifty days. His judgment was reversed and a new trial ordered by the Divisional Court, confirmed by the Court of Appeal.

Aylesworth Q.C. for the appellant. If there was any contract at all between the company and Barnes, it was one for only fifty days certain, to be enlarged in the discretion of the board of directors. See *Billington* v. *The Provincial Ins. Co.* (1).

The demand for payment of the note was no waiver of the condition for terminating the contract. *McGeachie* v. *The North American Life Ins. Co.* (2); *Frank* v. *The Sun Life Association* (3).

Cameron for the respondent, referred to *Hawke* v. *The Niagara Mutual Ins. Co.* (4); *Smith* v. *Mutual Ins. Co.* (5).

THE CHIEF JUSTICE :—This is an appeal from a judgment of the Court of Appeal for Ontario, affirming

(1) 3 Can. S.C.R. 182.
(2) 23 Can. S.C.R. 148.
(3) 20 Ont. App. R. 564; 23 Can. S.C.R. 152 note.
(4) 23 Gr. 139.
(5) 27 U.C.C.P. 441.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

an order for a new trial of the action granted by the Queen's Bench Divisional Court.

The original action was instituted by Benjamin Barnes against the appellant to recover on an alleged contract of insurance against fire, and upon the death of Barnes was revived by the respondent as the executrix of his will. The property had originally been insured by the appellants under a policy which expired on the 15th January, 1891. On the 13th of January, 1891, Barnes applied to the appellants, through their local agent at Parkhill, in the neighbourhood of which the insured property was situated, for a renewal of his policy for a further term of four years, and he thereupon signed and delivered to the agent three documents, viz: an application for the insurance, being a printed form filled in, a document described as an undertaking, and a promissory note for the premium. The application was headed as follows:

Application of B. Barnes of the Township of West Williams to the Dominion Grange Mutual Fire Insurance Association, for insurance against loss or damage by fire or lightning to the amount of $1,500 for four years from the 13th January, 1891, on the following property:

Then followed a description of the property and certain questions to be answered by the agent and his answers thereto. The paper called "The Undertaking" was as follows:

Undertaking.

$46.50. January 13, 1891.

Policy No. 19960.

I, B. Barnes, being desirous of becoming a member of the Dominion Grange Mutual Fire Insurance Association for four years from the date hereof, agree to hold myself liable to pay to the said Association, at such times and in such manner as the Directors thereof may determine, such amounts as may be required from time to time, not to exceed in any case forty-six dollars and fifty cents.

(Signed) B. BARNES

And in the margin was the following "Received on this undertaking by note $15.25."

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

The promissory note for the premium was as follows:

January 13, 1891, No. 19960.

On the first day of May next I promise to pay to the Dominion Grange Mutual Fire Insurance Association fifteen $\frac{25}{100}$ dollars at the head office of the company, Owen Sound, value received, being for premium on the application for insurance to the amount of $1,500 this day made. And in case this note is not paid at maturity the policy to be issued to me will become void, although the holder of the note may proceed to collect the same.

(Signed) B. BARNES.

And on the margin of the note was the following:

Premium	$ 13 95
Policy fees	1 30
	$ 15 25

In exchange for these documents the agent gave Barnes a receipt as follows:

Provisional receipt No. 16. January 13, 1891.

Received from B. Barnes, post office, Parkhill, an undertaking for the sum of $46.50, being the premium for an insurance to the extent of fifteen hundred dollars, on the property described in his application of this date numbered 16. Subject however to the approval of the Board of Directors who shall have power to cancel this contract at any time within fifty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office. And it is hereby mutually agreed, that unless this receipt be followed by a policy within the said fifty days from this date the contract of insurance shall wholly cease and determine, and all liability on the part of the Association shall be at an end.

The non-receipt by the applicant of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said board of directors. In either event the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time during which the said property was insured.

And in the margin of this receipt were written the following words: "Paid per note on above $14.25; agent's fee $1. January 13, 1891.

On the 4th of March, 1891, the term of fifty days from the date of the receipt expired. No policy was

sent to Barnes, nor was any communication whatever made to him up to the 17th of April, 1891, when the manager of the appellants' association sent him by mail a postal card, in these words:

The Dominion Grange Mutual Fire Insurance Association. { To B. BARNES, Parkhill, P.O.

OWEN SOUND, April 17th, 1891.

DEAR SIR,—Your note given for policy No. 19960, amounting to $15.25, falls due on the first day of May next. Please remit promptly, returning this card with cash or post office order.

Yours fraternally,

R. J. DOYLE, *Manager.*

On the 20th of April Barnes mailed at Parkhill a registered letter, addressed to the appellants' manager at Owen Sound, containing $15.25, the amount of the premium note, which fell due on the first of May, 1891, for the payment of which they had asked by their postal card of the 17th. This letter reached the appellants on the 23rd of April, 1891, and the money enclosed was entered in their cash book as having been received from Barnes.

A letter dated 18th of April, 1891, but bearing the Owen Sound postmark of the 20th April, 1891, was written by appellant's manager to Barnes:

We return herewith undertaking No. 19960 and your short date note. The board have decided not to receive application. Thanking you for the offer of the risk.

This letter must, of course, have crossed Barnes' letter containing the remittance of the money to pay the note.

On the 24th of April the insured property was destroyed by fire, and on the 27th of April, 1891, Barnes by telegraph notified the manager of the appellants of the loss.

On the 29th of April, 1891, the appellants' manager wrote and posted the following letter to Barnes:

We received your application for insurance dated the 13th of January last, on the 21st of January, and we wrote on the 3rd of

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

February to our agent, Mr. McLeish, on the subject. The deposit should have been $18, instead of $13.95, and the undertaking should have been $60 instead of $46.50. On the 18th of April this application came before the board and was declined. We mailed you your undertaking and short date note on the 18th inst. We received your money here on the 23rd inst., and we now return it herewith, viz., $15.25, as we cannot enter it in our book.

On the 9th of May, 1891, Barnes returned the money to the appellants in a letter in which he says:

I return you your insurance money, $15.25, which you dunned me for.

And on the 13th of May, Doyle, the respondent's manager, again sent back the money and wrote Barnes as follows:

We received to-day $15.25 from you for note which was returned to you on the 18th of April last. We have no note against you for this amount. We have no insurance in this company in your favour in force since the expiry of your provisional receipt on the 3rd of March last. Your application for insurance was declined by the Board, of which you were duly notified. There was no use in your sending this money here, as we have no claim against you.

On the application which was produced from appellants' custody there appeared this memorandum:

4-2-91. Unless agent give satisfactory explanation respecting question 28.

(Signed) A. E.
" G. F.

Declined 18-4-91. Cancelled and notes returned 18-4-91.

This action was commenced on the 29th of June, 1891. The original plaintiff died in October, 1891, leaving a will by which he appointed the respondent his executrix. Probate having been granted to the respondent the action was revived by her.

Several defences were set up. First, it was insisted that on the proper construction of the application, interim receipt, premium note and undertaking, there was no subsisting contract at the time of the loss, but that the same had lapsed by reason of non-delivery of

a policy within the fifty days. It was also pleaded that there was fraudulent misrepresentation in the application; that there was fraud in making the claim for loss; and a release which was obtained from the respondent *pendente lite* was set up at the trial. This release was impeached by the respondent as having been obtained by fraud, intimidation and undue influence.

The action came on for trial before Mr. Justice Falconbridge and a jury. The burthen of proving the loss and the facts impeaching the release was upon the respondent, and it also lay upon her to establish that there was an existing contract at the date of the loss. At the conclusion of the plaintiff's case the learned judge, considering that, according to the proper construction of the written contract, the agreement for insurance had lapsed at the end of the fifty days, and also considering that there was no evidence of waiver or estoppel, withdrew the case from the jury and entered judgment for the defendants (the present appellants.)

As regards the issue as to the release, there can be no doubt but that evidence impeaching it sufficient to establish a *primâ facie* case was given by the respondent.

A motion for a new trial having been made before the Divisional Court of Queen's Bench, two questions arose, viz. First, a pure question of law, involving the legal construction of the provisional contract of insurance and the applicability to it of the Ontario Insurance Act R. S. O. ch. 167, and the further question, whether, if there had been a lapse of the insurance according to the contract by the non-delivery of a policy within the fifty days, the condition providing for such lapse had not, by reason of the conduct of the appellants in relation to the demand for payment and the receipt of

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

the money, been waived by them, and whether they were not estopped from setting up the condition. The first question is purely one of law, the determination of the second depends upon the sufficiency of the evidence to establish a *primâ facie* case of waiver or estoppel.

The learned judges who constituted the Divisional Court (the Chief Justice and Mr. Justice Street) were of opinion that there was one provisional contract of insurance, not merely for the fifty days, but for four years, subject to determination by the Association by notice within the fifty days, or by non-delivery of a policy within that term; that to this contract the provisions of the Ontario Insurance Act were applicable; that the conditions of the interim receipt were at variance with the standing conditions as to determination of contracts of insurance by notice; that the conditions of the statute applicable to variations of the standing conditions not having been complied with these standing conditions governed the contract, and therefore, notice not having been given to the insured in compliance with the 19th standing condition (section 147 of the statute), the provisional contract of insurance created by the interim receipt had not been determined at the time of the loss. The court, therefore, ordered a new trial, and directed that the appellants should pay the costs.

On appeal to the Court of Appeal that court was equally divided. The learned Chief Justice of Ontario was of opinion that the appeal should be dismissed for the reasons relied upon by the Divisional Court, and also, apart from the statute, for the additional reason that there had been a waiver of the condition as to the effect of non-delivery of a policy within fifty days. Mr. Justice Maclennan concurred in this conclusion, for the reason that the statutory condition as

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

to notice had not been complied with. Mr. Justice Burton and Mr. Justice Osler agreed with the trial judge. These learned judges considered that there had been a completed contract of insurance only as to the fifty days, and that as to the residue of the four years term no contract was created by the interim receipt; that there was as to that at most a mere proposal for insurance, requiring for the constitution of a contract the assent of the appellants, which was never given.

I am unable to agree with the learned judges of the Court of Appeal who treated the contract embodied in the interim receipt as one limited to the fifty days. The application is for an insurance for four years; it is so specifically stated in the introductory paragraph of that document. The words are:

> Application of B. Barnes * * * for insurance against loss or damage by fire or lightning * * * for four years from the 13th of January, 1891, on the following property:

This is the only contract Barnes is shown to have ever proposed or assented to. The receipt must be considered as an acceptance of this proposal. In terms it is so. What other meaning can be attributed to the initial clause:

> Received from B. Barnes an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date, numbered 16.

What is this but an acceptance of the proposal embodied in the application? Then the premium secured by the note is the entire instalment of the premium then due for the whole four years, not a part of it proportioned to the term of fifty days. The receipt also speaks of the contract as an entire contract, that is, a contract according to the terms of the application. The appellants recognize that some contract was created by the receipt; then that contract could only have

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

been an agreement in the terms of the application, for Barnes never assented to any other. These and other considerations convince me that, in the construction of the contract, the Queen's Bench Division and the judges in appeal who concurred in their view were entirely right. This provisional contract was, however, subject to two conditions subsequent; first, it might be put an end to by the appellants at any time within the fifty days by notice; secondly, it was to lapse and determine *ipso facto* if no policy was delivered within the fifty days. Were these provisions subject to the Ontario Insurance Act? It has been determined, and cannot, on the strong, clear and express language of section 114, be open to dispute, that that enactment applies to all contracts of insurance against fire, and is not restricted to contracts in the form of policies. The words are:

> The conditions set forth in this section shall, as against the insurers, be deemed to be part of every contract, whether sealed, written or oral, of fire insurance hereafter entered into, or renewed, or otherwise in force in Ontario.

It must, therefore, necessarily apply to such a contract as that before us, at least according to the construction I place upon it. Then what is the effect of the statute as applied to this receipt? The statutory condition 19 provides how insurances are to be terminated by notice from the insurers. It requires that such termination can only be at the end of five days after a formal service of notice to that effect, or seven days after the receipt at the post office of the assured's address of a registered letter containing the notice. If the contract before us is to be considered as one terminated by notice it is manifest that it had not been terminated according to this statutory condition at the date of the fire. There was no formal service of notice, and the appellants' letter dated the 18th of April,

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

posted at Owen Sound on the 20th April, was only received at Parkhill on the 22nd of April, and the fire occurred on the 24th of April. There was therefore no interval of seven days as required by the statutory condition. It must, however, be remembered that the receipt provides that the non-receipt of a policy within fifty days shall operate as incontrovertible evidence of the rejection of the contract by the directors. Is this, or is it not, a variation of the statutory condition in question? If it is, as Mr. Justice Maclennan points out, it is ineffectual for non-compliance with section 115, which requires such variations to be printed in a different coloured ink from the rest of the document in which it is contained. If that requirement had been complied with the question would then have been raised, to be determined by the court, as to whether it was a reasonable condition. Still it might stand with the statutory condition if not inconsistent with it. This depends on whether the negative fact of the non-receipt of the policy is or is not intended as an equivalent for notice, in other words, whether it is not intended as a negative mode of giving notice. I think there can be no doubt that it must be so considered. What is a written notice of rejection but evidence of rejection. Then where the appellants say in their receipt that the non-receipt of a policy shall be taken as incontrovertible evidence of rejection, they say in effect that it shall operate as a notice. The law, however, says that notice shall be in writing, and most reasonably requires that a defined interval shall elapse between its receipt and its operation as a termination of the contract. It would, in my opinion, be to sanction an evasion of the wholesome provision of the statute, to hold that this condition of the receipt is not entirely inconsistent with standing condition 19. Had the device of printing it in a different coloured ink

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

been adopted I think no court could have held it to be a reasonable condition.

I therefore with great respect must entirely dissent from the ruling of the learned trial judge and the opinions of the learned judges in the Court of Appeal who concurred with him.

Upon another point I also concur with the learned Chief Justice of Ontario. I am of opinion that there was at least some evidence of waiver for the consideration of the jury in the facts, that the payment of the premium was demanded by the letter of the 17th of April; that it was paid accordingly and retained for six days by the appellants; that at the time the letter of the 17th of April was written the directors had not determined to reject the risk. Whether this is sufficient to establish waiver or to estop the appellants we are not called upon now to determine. All I do say is, that there was some evidence for the jury. I cannot treat the post-card of the 17th of April as the mere mistake of a clerk; of course a jury might so consider it, but it is entirely a question for a tribunal called upon to decide on the facts. No one can deny, that in the interval between the receipt of the post-card and the receipt of the letter posted at Owen Sound on the 20th of April, Barnes was justified in believing that his insurance was carried by the appellants, and that he was thus relieved from the necessity of protecting his property by other insurance.

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

TASCHEREAU J.—The appellant has, in my opinion, made out a strong case, but I will not dissent from the conclusion reached by the majority of the court that the appeal should be dismissed.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

Gwynne J.

GWYNNE J.—It appears to me to be free from doubt that there was no contract of insurance in force at the time of the fire. *Billington* v. *The Provincial Insurance Co* (1) seems to me to be a conclusive authority in favour of the appellants. There the company accepted the risk and, in accordance with their practice where the risk extended only over a short period, instead of a formal policy they issued a certificate which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by the policy. The late Chief Justice of this court, Sir Wm. Ritchie, delivering the judgment of the court there says (2):

> If there was no short policy plaintiff was clearly out of court. Unless followed by a policy within thirty days from the date of the provisional receipt the insurance by the terms of the receipt wholly ceased.

That appears to be the case here, and I am, therefore, of opinion that the appeal should be allowed and the action in the court below dismissed with costs.

SEDGEWICK and KING JJ, concurred in the judgment of the Chief Justice.

Solicitors for the appellant: *Creasor & Smith.*

Solicitors for the respondent: *Meredith, Cameron, Judd & Drumgole.*

---

(1) 3 Can. S. C. R. 182. (2) At p. 197.

1895

*Oct. 5.

*Dec. 9.

LA COMPAGNIE POUR L'ECLAIRAGE AU GAZ DE ST. HYACINTHE (PLAINTIFFS)..... } APPELLANTS;

AND

LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE (DEFENDANTS)..... } RESPONDENTS.

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

Construction of statute—By-law—Exclusive right granted by—Statute confirming—Extension of privilege—45 V. c. 79, s. 5 (P.Q.)—C.S.C. c. 65.

In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general act (C.S.C. c. 65)the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special act of incorporation (45 V. c. 79, Q.), sec. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general act, either by the terms of the act itself or by resolution, by-law or agreement of the said city of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present act, including their right to break up, &c., the streets * * * and in addition it shall be lawful for the company, in substitution for gas or in connection therewith. or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise, and to convey the same by gas or otherwise * * * with the same privilege, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this act."

Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new

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

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed.

Held also, that it was a private act notwithstanding it contained a clause declaring it to be a public act, and the city was not a party nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the legislature and apply the maxim *verba fortius accipiuntur contra proferentem* especially where exorbitant powers are conferred.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court in favour of the defendants.

The only question for decision on this appeal was whether or not the plaintiff company had, by their special act of incorporation (1) and a by-law of the city council of St. Hyacinthe, the exclusive right to manufacture and sell electric light in the said city. The courts below held that the company had not the right.

The facts of the case, and the section of its charter on which the company relied, are set out in the judgment of the Chief Justice.

Geoffrion Q.C. for the appellant. The statute extends all privileges held by the company in the manufacture and sale of gas to the manufacture and sale of electric light. The language is in no way ambiguous and effect must be given to it even though it be arbitrary and unjust. Endlich on Interpretation of Statutes (2).

It is imperative on the appellant company, if it claims the privilege, to furnish electric light. Potter's Dwarris on Statutes. The light has been furnished and the company should be protected in carrying out its obligation.

Lafleur and *Blanchet* for the respondent. Plaintiff's

(1) 45 V. c. 79. (2) Par. 4.

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

charter is a private act and should be construed strictly, and all presumptions made in favour of private rights and against exclusive privileges. Hardcastle on Statutes (1); *Dwyer* v. *Corporation of Port Arthur* (2); *City of London* v. *Watt* (3).

The privilege mentioned in the act will not be held to grant a monopoly if another construction is possible, which it is.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appellant company was originally incorporated in 1880, under the General Act, Consolidated Statutes (Canada), c. 65, for the purpose of manufacturing and selling illuminating gas in the city of St. Hyacinthe. The municipal authorities of St. Hyacinthe were assenting parties to this incorporation.

On the 11th of January, 1881, the city council of St. Hyacinthe passed a by-law granting to the appellant company an exclusive right and privilege to manufacture and sell gas in the city of St. Hyacinthe, both for lighting the streets and public places and for supplying the citizens therewith, for the term of twenty-five years from the date of the by-law, and the appellants were thereby authorized to build gas works and to make use of the streets and public roads of the city for placing the pipes necessary for distributing gas.

In 1882 the persons then composing the appellant company under the first incorporation obtained from the legislature of the province of Quebec a special Act of incorporation, being the Act 45 Vic. c. 79. The first section of this statute enacted the incorporation under the same name of the shareholders of the former com-

(1) Pp. 273-5. (2) 22 Can. S.C.R. 241.
(3) 22 Can. S.C.R. 301.

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

pany, and declared that the real estate, franchises, and assets of every kind belonging to the company so formed should belong to the company incorporated by the act, and should form part of its property to all intents and purposes. The fifth section of this act is in the following words:

All the powers and privileges conferred upon the said company, as organized under the said general act, either by the terms of the act itself, or by resolution, by-law, or agreement of the said city of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present act, including their right to break up, dig and trench so much and so many of the streets, squares, highways, lanes and public places, within the limits of the city of St. Hyacinthe, and the adjoining parishes in the county of St. Hyacinthe, as may be necessary for laying down the mains and pipes required to make the necessary connections between their works and the premises of their patrons, doing no unnecessary damage in the premises, and taking care, as far as may be, to preserve a free and uninterrupted passage through the said streets, squares, highways, lanes and public places while the said works are in progress, and in addition, it shall be lawful for the company, in substitution for gas, or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power, derived either from gas or otherwise, and to convey the same by pipes or wires, and with the same privilege and subject to the same liabilities as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this act.

The city of St. Hyacinthe did not in any way consent to this legislation, and was no party to it.

The last mentioned act did not recite or refer specifically to the by-law of the 11th January, 1881, or to the agreement entered into thereby between the city of St. Hyacinthe and the original company, conferring the monopoly, as regards gas, therein mentioned. Since 1882, up to the date of the action, the appellants had, to the exclusion of any other company, supplied gas for lighting purposes to the city and its inhabitants, and since 1887 they have also sold and supplied electric light.

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

On the 16th February, 1894, on a petition presented by Antoine Morin, a by-law was passed by the city council of St. Hyacinthe, authorizing him, or any company or firm which he might subsequently form, to make use of the streets and roads of the city for placing poles, wires and other apparatus necessary for the construction of a line for the sale of electric light to the inhabitants of St. Hyacinthe. The appellants protested against the adoption of this by-law.

Subsequently, Antoine Morin and his associates applied to the Lieutenant-Governor in Council, under a general act of the province, for letters patent of incorporation, which were accordingly issued on the 19th of April, 1894, and thereby the respondent company was incorporated.

By the letters patent of incorporation the object of the respondent company was declared to be as follows :

> Pour l'achat, la possession et l'exploitation de forces motrices hydrauliques pour toutes sortes de fins industrielles, et notamment pour la production et la distribution, la vente et la location de la lumière, de la chaleur, et de la force motrice produites par l'électricité.

Upon their organization the respondents proceeded to make contracts with individuals, citizens of St. Hyacinthe, for lighting their houses and places of business by electricity, and at once began to construct in houses and streets of St. Hyacinthe a line and installation which at the date of the institution of the present action they were in process of completing.

The appellants insist that, by the fifth section of their special Act of incorporation of 1882, a like monopoly and exclusive privilege to furnish electric light was conferred upon them as was in terms conferred upon them by the by-law of the 11th January, 1881, in respect of gas.

The respondents' contentions are that the fifth section, according to its proper legal interpretation, does

1895

LA COMPAGNIE POUR L'ECLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

not extend the exclusive privilege, which the by-law assumed to confer as to gas, to electric lighting; secondly, that the by-law itself was *ultra vires*; and thirdly, that if the construction of the fifth section of the Act of 1882 is such as the appellants insist the enactment itself was *ultra vires* of the Quebec Legislature.

I shall not have to consider the two last objections as I entirely agree with the courts below, which have both construed the fifth section of the Act of 1882 in the manner the respondents contend for. I therefore confine my judgment exclusively to this question as to the proper meaning of the fifth section.

In the first place it is a most important consideration to be borne in mind, in the construction of this Act of the legislature, that it is a private Act to which the city of St. Hyacinthe was not a party, and which was not in any way assented to by it. It is none the less a private Act for the reason that it contains a clause declaring it to be a public Act (1). In *Dawson* v. *Paver* (2), Wigram V. C. says that:

> Whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act) but upon the nature and substance of the case.

And in Maxwell on Statutes (3) it is said that

> enactments which invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, are construed more strictly perhaps than any other kind of enactment.

The courts take notice that these Acts are obtained on the petition of the promoters, and in construing them treat them as contracts between the applicants for them and the legislature on behalf of the public,

(1) *Richards* v. *Easto* 15 M. & W. 244; *Moore* v. *Shepherd* 10 Ex. 424; *Shepherd* v. *Sharp* 1 H. & N. 115.

(2) 5 Hare 434.

(3) Maxwell on Statutes 2 ed. p. 363.

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

and the language in which they are expressed is treated as the language of the promoters, and the maxim *verba fortius accipiuntur contra proferentem* is applied to them; and the benefit of any ambiguity or doubt is given to those whose interests would be prejudicially affected, especially when such persons are not parties to the Act nor before the legislature as assenting to it. And particularly is this so where exorbitant powers, such as a monopoly, are conferred.

Further, it has been laid down by as high an authority as could be quoted that:

> If words in a local or personal Act seem to express an intention to enact something unconnected with the purpose of the promoters and which the committee, if they had done their duty, would not have allowed to be introduced, almost any construction, it has been said, would seem justifiable to prevent them from having that effect (1).

Having referred to these general rules applicable to the construction of private acts, I now proceed to examine the particular enactment in question, viz., the fifth section of the appellants special Act of 1882. In the first place, as I have already said, there is no recital of the by-law of the 11th January, 1881, and nothing on the face of the act to show that the attention of the legislature was called to its terms, or that it was in any way brought to their notice. The general confirmation of privileges conferred by the former general act, or by resolution, by-law or agreement of the city of St. Hyacinthe, contained in the first part of the section, would not, it is manifest, by itself confer any other exclusive right than that relating to the exclusive privilege, for twenty-five years, to light with gas. If the proposition of the appellants is correct, the monopoly which they claim as to electric lighting must be conferred by the subsequent part of the section, expressed in these words:

(1) Per Lord Blackburn, *River Wear Commons* v. *Adamson* (2 App. Cas. 743); Maxwell on Statutes 2 ed. p. 365.

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

And in addition it shall be lawful for the company, in substitution for gas, or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise, and to convey the same by pipes or wires, and with the same privilege and subject to the same liabilities as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this act.

The question then is really narrowed to this: Must we say that it was intended by the legislature by the words "with the same privilege" without more, and without having before them the by-law which defined the extent of the privileges as to gas, to grant to the appellants, for their own exclusive private profit and advantage, a monopoly of selling electric light in the city of St Hyacinthe for the term of twenty-five years?

I am of opinion that but one answer is admissible to this question, that which has already been given by Mr. Justice Gill in the Superior Court, and by the Court of Queen's Bench. The purpose of the promoters in procuring their private act must be deemed to have been merely to extend their own powers, and to confirm existing by-laws and agreements The grant of a new exclusive privilege of electric lighting was something entirely unconnected with these purposes, something which concerned not merely the appellants themselves, but which would operate very prejudicially against the interests of the inhabitants of the city of St. Hyacinthe, and which it is not to be presumed the legislature would have granted without their consent, or at least without hearing them. To construe the statute in the way contended for by the appellants would therefore work a great injustice, and would be in direct violation of the general principles of construction applicable to such legislation, already referred to. It is said that the word "privilege" must necessarily mean an exclusive privilege to sell electric light,

1895

LA COMPAGNIE POUR L'ÉCLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

The Chief Justice.

but I think that is not so, inasmuch as this word "privilege" can be referred to the privileges already conferred by the general act and by the by-law, and specified in the former part of the fifth section, viz., the privilege of 'breaking up, digging and trenching the streets, squares, highways, lanes and public places," and this interpretation is strengthened by the consideration that the "privilege" is coupled with a declaration that it is to be subject to the "same liabilities" as apply to the manufacture of gas, such liabilities being manifestly those before specified, viz., liabilities to take due care in exercising the privilege, to preserve a free passage through the streets, and to do no unnecessary damage.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Geoffrion, Dorion & Allan.*

Solicitors for the respondent: *Lafleur & Macdougall.*

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY (DEFENDANT)..... } APPELLANT;

1895

*Oct. 3, 4, 5.

Dec. 9.

AND

LOUIS TOURVILLE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Insurance against fire — Condition of policy — Fraudulent statement — Proof of fraud — Presumption — Assignment of policy — Fraud by assignor — Appeal — Questions of fact — Reversal on.

Where an insurance policy is to be forfeited if the claim is in any respect fraudulent it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or by circumstantial evidence.

The assignee of the policy cannot recover on it if fraud is established against his assignor.

If a sufficiently clear case is made out the court will allow an appeal on mere questions of fact against the concurrent findings of two courts. *Arpin* v. *The Queen* (14 Can. S.C.R. 736); *Schwersenski* v. *Vineberg* (19 Can. S.C.R. 243); and *City of Montreal* v. *Lemoine* (23 Can. S.C.R. 390) distinguished.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court in favour of the plaintiffs.

The action was upon a policy of insurance against fire issued by the defendant company to one Duval on a quantity of lumber in his yard on the river Nicolet and assigned by Duval to the plaintiffs. One of the conditions of the policy was that it should be forfeited if the claim was in any respect fraudulent, and the defence of the company to the action was that

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

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Duval in his application for insurance had materially exaggerated the quantity and value of the lumber and obtained thereby insurance above its value and that he had fraudulently exaggerated the amount of his loss. The contention of the plaintiffs on this appeal was that the fraud charged had not been directly proved, but had to be presumed from the evidence which was not sufficient, and also that Duval's fraud could not deprive them of the benefit of the policy. The courts below held that the charge of fraud had not been made out and gave judgment against the company.

The material facts of the case, with the pleadings and substance of the evidence are set out in the judgment of the court.

Trenholme Q.C. and *Lafleur* for the appellants. A clear case of fraud has been made out and the evidence can be dealt with by this court as well as the court of first instance. *Bland* v. *Ross* (1).

Duval's fraud forfeited the policy and the assignees are in no better position than he would be.

Beïque Q.C. and *Geoffrion* Q.C. for the respondents. There is no direct evidence of fraud and it cannot be presumed. If it could Duval's fraud cannot affect the innocent assignees.

Two courts have found that no fraud was committed and this court will not interfere with those findings. *Arpin* v. *The Queen* (2); *Schwersenski* v. *Vineberg* (3); *City of Montreal* v. *Lemoine* (4).

The judgment of the court was delivered by:

TASCHEREAU J.—By this action instituted in March, 1884, the respondents, as assignees of one Evariste

(1) 14 Moo. P. C. 236.
(2) 14 Can. S. C. R. 736.
(3) 19 Can. S. C. R. 243.
(4) 23 Can. S. C. R. 390.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

Duval, claim from the company appellant the sum of $5,000, being the amount of an insurance policy issued on the 7th September 1883, by the appellant to the said Duval, concurrently with other policies in various other companies, amounting altogether to $17,000, on a quantity of lumber then piled in a yard on the river Nicolet, which lumber was but two weeks afterwards destroyed by fire.

The appellants pleaded in answer:

1. That the policy was obtained by the false and fraudulent representations of Duval that the lumber insured was worth $30,000, whereas at no time during the existence of the policy was it worth half that sum:

2. That Duval, in the application, materially exaggerated the quantity and value of the lumber mentioned therein, and thereby obtained from the appellants and other companies, represented by the same agent, simultaneous insurances to the amount of $17,000 over and above $12,000 prior insurance—thus making $29,000 of insurance in all, whereas the lumber thus insured was worth not more than $11,500; the whole contrary to one of the conditions of the policy, which was to be null in such an event:

3. That the insurance was forfeited in accordance with a clause in the policy, because Duval falsely and fraudulently exaggerated the amount of the loss in his claim, by putting it at $36,515.68, whereas it did not exceed $11,500.

After a protracted and voluminous *enquête* the Superior Court gave judgment for the amount claimed. This judgment was confirmed by the majority of the Court of Queen's Bench, Hall J., in a dissenting opinion, holding that though the charge of fraud had not been made out, yet the lumber destroyed was proved to have been worth not more than $15,482.

The company now appeals from that judgment.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

The controversy here, as in the courts below, bears exclusively on questions of fact.

We are of opinion that the appellants have fully made out their case.

It is in order, before reviewing succinctly the salient parts of the evidence adduced on both sides, to consider a proposition of law strenuously relied upon by the respondents. Conceding, on this argument at least, that if the appellants' contentions as to over-valuation and over-insurance by Duval prevail a clear case of fraud has been made out against him, they pressed upon us the uncontrovertible maxim that fraud is not to be presumed, *odiosa et inhonesta non sunt in lege præsumenda*, and argued therefrom that as the appellants' proof of over-valuation rests entirely upon presumptions and inferences of facts their defence must fail. The respondents would thus seem to contend, indirectly at least, that the courts cannot find fraud unless it be directly proved. But, for obvious reasons, this proposition is untenable.

There would be very little protection against fraud if such was the law. Those who intend to defraud do all in their power to conceal their intent.

Their acts could not defraud if they were not clothed with the garb of honesty. A maxim of the criminal law, based on the same principle, is that the guilt of the accused is never to be presumed. But that does not mean that a criminal shall not be convicted if he has not taken a witness for his crime.

It is likewise, as a general rule, only by presumptions and circumstantial or inferential evidence that dishonesty can be proved.

As Coquille said, a long time ago:

> Selon les règles de droit, la fraude ne peut être prouvée que par conjectures, parce que ceux qui veulent frauder travaillent de tout leur pouvoir pour la couvrir.

Or, as says Dumoulin:

Elle ne serait pas fraude, si elle n'était occulte. Ce sont donc les circonstances qu'il faut principalement considérer, *fraus consistit in circumstantiis.*

It is useless to insist further on this point.

Another legal proposition put forward by the respondents at the hearing is just as untenable. They argued that, even if Duval's fraud has been established, they nevertheless are entitled to recover against the company, because, as they contend, they cannot be held answerable for his fraud. This is a startling proposition. They, as assignees, would have a right of action though their assignor had none. They would have been subrogated to a claim vitiated by fraud, but would yet claim the right to pocket the benefit of that fraud. What a protection to frauds on the insurance companies would such a doctrine carry if it were to prevail.

I will now briefly review the facts of the case.

They, *in limine*, are of a nature to throw discredit on the respondents' claim. Duval, when he took this insurance in his own name, did so, he has to admit, in direct violation of a contract he had with the respondents, by which he had covenanted that all insurances on this lumber would be taken in their name as security for their advances. And he not only concealed this from the agent, but concealed it also from the respondents till after the fire. Nay, more, during two days after the fire that one of the respondents was down at Nicolet discussing with him the loss and the claim against the insurance companies, he, Duval, never said a word of these additional insurances he had so taken on the 7th of September. It is only later, and then not from him at all, but from the companies, that the respondents heard of these new insurances.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

Now this *suppressio veri*, though perhaps not alone directly affecting the result here, as it may be that Duval was not bound to disclose it, yet cannot but at the very outset of the case, under the circumstances, tell unfavourably against him. And it may be doubtful whether if he had revealed the fact that he was so acting in fraud of an express agreement with his creditors the agent would have taken the risks at all.

Another feature of the case which, at its inception, cannot but strike one's attention, is the enormous addition made by Duval to the insurance previously carried by the respondents on this lumber. The latter, though they had over $25,000 at stake, and usually kept this lumber pretty fully covered, had insured for $12,000 only, and Duval was aware of it. He, however, on the 1st of September, not only doubles that amount but takes additional insurances to the amount of $17,000, thus, behind the respondents' back, increasing the insurance from $12,000 to $29,000. The reason he gave to the agent for this large increase was the accumulation of sawn lumber in his yard, caused by the Whitehall Company not taking delivery as agreed. Now, it was then not over two working weeks since this Whitehall Company had ceased their shipments. And so it would have been in that short space of time, if we believe him, that the insurable value of the lumber in this yard would have increased from $12,000 to $29,000. The thing is incredible on its face. But we have, moreover, direct evidence by Kelly the agent of this Whitehall Company, from a statement he personally prepared for his principals three days only before the fire, that the whole quantity of sawn lumber in the yard sold to them, but not yet delivered, amounted to only 545,000 feet, of the value of $5,523.75. So that Duval's additional insurance for $17,000 was over three times more than the

value of the lumber upon which he then, himself, justified it.

The controversy, I ought to have remarked before, turns principally on the amount of lumber that the logs must have produced during the season of 1883, the respondents contending that the fire destroyed 3,820,348 feet, as sworn to by Duval in his proof of loss, whilst the appellants say that there cannot have been in the yard then more than 1,621,162 feet. As to the value of the lumber, and the quantity of logs that came down to the mill, there is no dispute.

The plan resorted to by Duval and the respondents to establish the quantity of lumber burned is this: to take, in the first place, the amount of sawn lumber carried over from the season of 1882 as per inventory of December of that year, viz., 844,828 feet; 2nd, the number of logs made in the winter of 1882-83, and a few scattered logs picked up or bought from others; then deduct from the total the lumber sold before the fire, the lumber saved from the fire, and that produced from the logs unsawn at the time of the fire, and the difference should, as they contend, represent the quantity burned, which by that method they would make out to have been 3,820,348 feet, of the value of $36,515.68.

The respondents' case rests, it is rightly remarked by the Court of Appeal, almost entirely on the oral evidence of one Marchand, Duval's culler, and on four specifications professing to be four original reports made by him to Duval of the logs cut in the shanties in the months of December, January, February and March of the winter in question. He says those are the original statements made each month by Albert Duval, brother and clerk of his employer, from his, Marchand's, dictation and reading from his culler's book, which he brought down from the shanties; that

1895
THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.
Taschereau J.

after A. Duval had completed the statement it was again checked over to insure correctness; that he, Marchand, then signed the statement, and went back to the shanties for another month's operations. It is a singular fact that a copy of these so-called specifications was never sent to the respondents, though Duval, by his contract with them, had bound himself to do so. The respondents never saw them till after the fire. And one cannot but be struck with the similarity in the appearance, as exhibited to us in manuscript, of the paper, the writing, the ruling, which is by hand and consists of double lines of red and blue pencilling, which would lead one who had to do with documentary evidence to say at once that they were all prepared at the same time. They profess to contain an inventory of the different kinds of logs, their length, and contents in board measure. But Marchand's original culler's book, from which all these figures were read out, has disappeared and that disappearance has taken place only after the insurance companies' contestation of this claim. Now, Marchand's statements, it is amply proved by the best possible evidence that an insurance company can almost ever bring in such a case, cannot be accurate, and no credence can be attached to his testimony. According to his calculations the cut of logs produced on an average during that season:—

Pine	159 ft. per log.
Spruce	87 " "
Hemlock	121 " "
Bass	132 " "
Ash	109 " "

His logs, however, were of the same quality and size as those cut by George Ball and McCaffrey, two respectable mill owners on the same river. Yet, for the same year, Ball's pine logs gave only 70 feet, and Mc-

Caffrey's 89, whilst Duval claims 159 feet for his. In spruce, McCaffrey's logs only produced 53 and a half feet, Ball's logs produced 57, whilst according to Duval's theories his produced 87 feet. In hemlock, McCaffrey and Ball got 90 feet per log, whilst Duval claims that he got 121. In bass, Ball got 80 feet per log, but Duval claims to have had 132. In ash, Ball got 80 feet per log, but Duval claims he got 109 feet. On an average, upon the whole of the operations, Ball & McCaffrey got 78 feet per log, but he, Duval, claims to have got 116. So that according to Marchand, if his statements were correct, Duval would have got, out of the same quantity, quality and kind of logs, over 2,000,000 feet more than his neighbours in the same business on the same river in the same year, and made over $20,000 more than they did. Or, to put it in another form, if Duval and Marchand are to be believed, they got out of 59,000 logs as many feet in quantity and as much in dollars as any other mill owner on the same river got the same year, or ever got any year before or after the fire, out of 90,000 logs of the same kind and size. Or, Duval would have made, according to the calculations of one Welch, an expert examined in the case, a profit, in 1883, of 57 and a half per cent. And yet his neighbours were doing a flourishing business and he was a bankrupt.

If a comparison is made with the result of 1882, the year preceding the fire, taking Duval's own figures, his 59,000 logs gave him, in 1883, 2,300,000 feet more than the same number would have given him in 1882. And the average, upon the whole of his operations would be 116 feet per log for the year of the fire, though only 78 feet for the preceding year. An explanation of how he could, in 1883, get 38 feet more per log than his neighbours, whilst in 1882 he got only the same num-

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

ber as they did, has not been attempted. The reason is plain. Logs have not such a power of expansion. If we apply the same test to the years succeeding the fire, as far as proved in the case, the result is the same, over 2,000,000 feet more for the same number of logs in 1883.

Every such test that can be applied reveals the extraordinary coincidence that the over-valuation by Duval is over two million feet. This harmony in the results tells heavily against the respondents.

Duval would have us believe that his 59,000 logs of 1883 were all of 11 inches and over. But that is incredible. It is in evidence that of the whole cut of 1885 for the same mill, from the same limits, one third, and of the whole cut of 1887 more than one half, were under eleven inches. McCaffrey's and Ball's logs for 1883 also comprised a large number under eleven inches. It is, moreover, in evidence that instead of the logs of 1883 being cut on the 11 inch limit and being unusually large, as Duval and Marchand swear, the foremen who cut the logs and the men who handled them were ordered to cut them of nine inches and over, and that they did cut them that size, and even down to eight inches. And the evidence is all one way by the men who made and handled and saw the logs, that they were logs of the same size and description as were made in all other years on the same river from 1882 to 1887, inclusive, for that mill and for all the other mills on the Nicolet; all the witnesses say they were the ordinary logs of the river Nicolet.

Not a single reason has been given, or attempted to be given, to explain why in 1883 alone a different kind and size of logs should have been made, or their production so enormously increased, and a result attained so much larger than that of every other year and every other mill on the same river.

Tourville himself, one of the respondents, has to admit that it is the same description of lumber that is sawn from year to year in the locality.

There is another piece of evidence, the result of which also carries great weight against the respondents. In fact, in every form in which an outside check can possibly be availed of by the appellants, as well remarked by Mr. Justice Hall in the Court of Appeal, the case presents the clearest evidence of uniform and systematic exaggeration of such an extent, and under such circumstances, as to be absolutely incompatible with good faith.

It is in evidence that all the lumber sawn at the mill up to the 14th of August was piled and loaded under contract at 40 cents per 1,000 feet, for which Duval paid $605.64. Now $605.64 at 40 cents per 1,000 feet gives 1,514,100 feet, or say in round numbers 1,600,000, as the total output up to the 14th of August, two weeks before the application for insurance, and five weeks before the fire. Now as he claims that the fire destroyed 3,820,348 feet, and that he sold 2,232,279 feet before the fire, all sawed during that season except 844,828 feet, it follows that he claims that he sawed 5,207,799 feet before the fire. And if 1,600,000 feet only were sawn up to the 14th of August, it follows he sawed the balance of 3,600,000 in the five weeks from the 14th of August to the 21st of September, whilst it took him eight weeks after the fire from the 21st of September to the 17th of November, running under pressure, to saw 1,427,351 feet, in that same mill, after it had been put in a better condition.

Or, to put it in another way, his mill during 30 days would have cut 120,000 feet a day. And yet the respondents have to admit in their factum that from 35,000 to 40,000 a day was the utmost that it could ever give. And here again this evidence establishes over 2,000,000 feet as Duval's over-valuation.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

The same result is obtained by a comparison of the cost of sawing. Taking Duval's own figures again, he would have to be able to saw 2,000,000 more feet before the fire for the same wages that it would have cost him after the fire when the mill had been repaired. How it happened could not, of course, be explained.

Then, by asserting as he does that he sawed 5,207,000 feet before the fire, he claims that he sawed before the fire for $1.50 per 1,000 feet, the same lumber that cost him $2.50 per 1,000 feet after the fire in a better mill.

Again, it cost him in wages to run that mill 48 days after the fire $3,555.51 or $74 a day, against $7,862.84 for a pretended 144 days before the fire, or $54 per day. At the same rate of $74 per day he must have run only 106 days before the fire, and at 30,000 feet per day cut only 3,180,000 feet before the fire and not 5,207,000 as claimed.

The respondents attempted to support their estimates by proving the capacity of the mill and the number of days it was in operation during that season. But far from succeeding in doing so their evidence on this point turns out to be more favourable to the appellants' contentions than to theirs.

According to one Chabot's evidence, upon which they mainly rely on this part of their case, the mill would have cut 75,000 logs. Now Duval himself cannot claim more than 59,000; the boomage account is there to check him. So that Chabot evidently proves too much; his exaggerations result from his own figures. Moreover, according to his own estimates, the cut gave in 1883 only 80 feet per log, whilst Duval claims 116. So that, on the controversy as to the average output, the respondents' principal witness entirely supports the appellants' contentions. That which makes against

his point who swears may be believed, although that which makes for it is disbelieved.

The respondents' evidence as to the number of piles in the yard is also unreliable. Assuming the number claimed by Duval to be proved, we still are without satisfactory evidence of the quantity contained in each pile. We have on this point nothing but opinions of a vague and unreliable nature, proved withal to be untenable by the various tests I have alluded to. The same may be said of the evidence as to the number of logs sawn after the fire.

As to the evidence of the two Duvals the remarks that I made as to Marchand's evidence fully apply. Their figures are based on Marchand's statements, and they, like him, swear to what is conclusively proved to have been physical impossibilities. The number of witnesses who swear to such things cannot have any weight. *Non numerantur, sed ponderantur.*

Such are the principal features of the evidence in the case.

If, as it has been well remarked (1), the force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove, the appellants' case is as clearly made out as a case of this nature can ever possibly be.

The evidentiary facts, the facts they rely upon, are unmistakably proved. Their absolute incompatibility with the respondents' theories is also patent. There is no room for any other solution, if these facts are true, but that Duval grossly and wilfully exaggerated the quantity of his lumber, both on the 1st of September on his application for insurance and in his statement of loss after the fire It is an utter impossibility that

(1) Wills on Circumstantial Evidence, p. 32; Bentham, Rationale of Judicial Evidence, vol. 7, p. 76.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

the calculations resulting from respondents' own evidence could be correct, and that Duval had the quantity of lumber he claims to have had, and upon the incorrectness of these calculations there is no room for controversy. The logic of figures is irrefutable.

Such a number of cogent circumstances so closely connected with each other, each separately tending to the same mathematical result and rationally consistent with but one solution, circumstances which it is impossible to conceive to have been fraudulently or designedly brought together, and as to which there is no room whatever for the hypotheses of confederacy or error, irresistibly lead to the conviction that the fact of over valuation by Duval to which they all unequivocally depose is true. The united force of so many coincidences carries of itself the conclusion to which its various elements converge. Such an array of facts and figures cannot possibly mislead. It amounts to demonstration, carrying with it absolute certitude, which no oral evidence can weaken.

The disappearance, unsatisfactorily explained, of the culler's pass books, and of all the papers which might have thrown any light upon the controverted facts, is a feature of the case that I should have alluded to previously. The rule *omnia præsumuntur contra spoliatorem* is one based on common sense and reason. If these papers had supported the claim they would have been scrupulously taken care of, and their non-production justifies us, in law, to come to the conclusion that they would, if forthcoming, be adverse to the respondents' contentions. Mill owners, it is proved by Rutherford, Welch and Ward, always preserve these books. And when is it that they have disappeared? Only when a contestation by the insurance companies was dreaded. They were in existence when an arbitration about this same fire mentioned in the record took place, but were

not produced before the arbitrators though called for. The ignorance or loose business habits of Duval are invoked as an excuse for their non-production, but *il ne faut pas prendre l'ignorance pour l'innocence, ni la rusticité ou la rudesse pour la vertu.*

The appellants have made out the clear case that is required to justify us, nay to oblige us, on an appeal even upon questions of fact, not to adopt the conclusions of the court below. If the case had been tried by a jury a verdict for the respondents would undoubtedly have been set aside, as being against the weight of evidence, and a new trial ordered. But, as we are here judges of the facts of the case, as the courts below were, our judgment must be to dismiss the action.

Further, there are abundant reasons why this case should not be held to fall under the general rule that, upon such an appeal against the concurrent findings of two courts, we should not interfere.

First, it was not tried by a jury. 2nd. The judge who determined it in the first instance did not hear the witnesses, but gave his judgment upon written depositions. 3rd. The Court of Appeal expressed great doubts in adopting the findings of the judge of first instance. 4th. The judgment of the Court of Appeal was not unanimous, Mr. Justice Hall finding it proved that Duval had over-insured for more than one-half the quantity and value of the lumber. 5th. By the *considérants* of the judgment of the Superior Court it does not appear that the non-production by the respondents of the written documents bearing on the controversy was taken into consideration. 6th. The Court of Appeal appears to have given weight to a piece of evidence of undoubted illegality, the award upon a certain arbitration about this fire to which the appellants were not parties.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

On all these grounds the case is distinguishable from *Gray* v. *Turnbull* (1); *North German Co.* v. *Elder* (2); *Allen* v. *The Quebec Warehouse Co.* (3); *Council of Brisbane* v. *Martin* (4); and that class of decisions which we have ourselves given effect to in this court in various instances *inter alia*, *Arpin* v. *The Queen* (5); *City of Montreal* v. *LeMoine* (6); *Schwersenski* v. *Vineberg* (7); and from which we do not intend here to deviate.

The case falls under the exceptions foreseen in all the decisions wherein the general rule was followed, and the following have their full application; indeed, they enlarge the duties of a Court of Appeal further than is required to justify the allowance of this appeal:

The judicial committee is not bound by the decision of the court below upon a question of evidence, although in general it will follow it (8).

The parties are entitled to have the decision of the Court of Appeal on questions of fact as on questions of law, and the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made. As a rule, a court of appeal will be disinclined to interfere, when the judge hearing the witnesses has come to his decision upon the credibility of witnesses as evidenced by their demeanour, but otherwise, in cases where it depends upon the drawing of inferences from the facts in evidence (9).

And in *Bigsby* v. *Dickinson* (10) it was held that:

Although the Court of Appeal, when called on to review the conclusion of a judge of first instance, after hearing witnesses *vivâ voce*, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will in a proper case act upon its own view of the conflicting evidence." "Of course," said James L.J. in that same case, "if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence our labours would be very much lightened, but then, that would be doing

(1) L.R. 2 H.L. Sc. 53.
(2) 14 Moo. P.C. 241.
(3) 12 App. Cas. 101.
(4) [1894] A.C. 243.
(5) 14 Can. S.C.R. 736.
(6) 23 Can. S.C.R. 390.
(7) 19 Can. S.C.R. 243.
(8) *Canopa* v. *Larios* (2 Kn. 276).
(9) *The Glannibanta* (1 P.D. 283).
(10) 4 Ch. D. 24.

away with the right of appeal in all cases of nuisance, for there never is one brought into court in which there is not contradictory evidence."

And Bramwell L.J. said:

The legislature has contemplated and made provision for our reversing a judgment of a Vice Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as these which have been presented to us from reversing a decision from which we dissent, it would have been better to say, at once, that in such cases, there shall be no appeal.

And in *Jones* v. *Hough* (1), Bramwell L.J. said:

First, I desire to say a word as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to, and not accept his finding. I have not the slightest doubt that such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that it is our jurisdiction, our power and our duty; and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley J. has given it, we ought to give that judgment.

The cases of *Thurburn* v. *Steward* (2), and *Symington* v. *Symington* (3), though they have but a limited application, yet may be referred to on the point. Also what our present Chief Justice said on the subject in *Phœnix Ins. Co.* v. *Magee* (4); and the case of *Russell* v. *Lefrançois* (5), where this court reversed the concurrent findings of the two courts below upon a question of fact, and the Privy Council refused leave to appeal. True it is, that there the credibility of any of the witnesses was not directly questioned; but here, even upon that

(1) 5 Ex. D. 122.
(2) L.R. 3 P.C. 478.
(3) L.R. 2 H.L. Sc. 415.
(4) 18 Can. S.C.R. 61.
(5) 8 Can. S.C.R. 335.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

point, we are in the same position as the two courts below were, their conclusions having been exclusively reached, as ours have to be, upon the mere reading of written depositions.

In *Aitken* v. *McMeckan* (1) the Privy Council, and in *The Queen* v. *Chesley* (2) this court, also reversed on a question of fact.

We have here, according to the express terms of the statute, to give the judgment which, in our opinion, the Court of Appeal should have given, and that court should have exercised their power to reverse the decision of the Superior Court. The law would be absurd indeed, if on the one hand it gave an appeal on questions of fact, whilst on the other hand such an appeal could never be allowed. It is on the assumption that there may be error in the judgment, although two courts have concurred therein, that the right of appeal is given in such a case, even on questions of fact.

The judges of the Appellate Court are as capable in such a case,

says Lord Kingsdown in *Bland* v. *Ross* (3),

(and indeed are presumed to be more capable), of forming an opinion for themselves as to the proof of facts and as to the inferences to be drawn from them.

In *Chard* v. *Meyers* (4) Strong V.C., now Chief Justice of this court, said upon the same point:

I concede that when there is a balance of evidence causing the determination of a question of fact to be dependent altogether on the credit to be given to particular witnesses, it is almost impossible for the court, on such an appeal as this, to overrule the decision of the master in whose presence the witnesses have been examined. But if there is, as I find here, a balance of direct testimony, and the circumstances point strongly to one conclusion, and against the other, I know of no reason why the court may not review the evidence, and reverse the master's finding.

And the learned judge reversed the master's finding,

(1) [1895] A.C. 310.
(2) 16 Can. S.C.R. 306.
(3) 14 Moo. P.C. 236.
(4) 19 Gr. 358.

discrediting a witness upon whose evidence the master had determined the case. 1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

Add in *Morrison* v. *Robinson* (1) the same learned judge held that the rule that where the decision of a question of fact depends altogether upon the credit to be given to the direct testimony of conflicting witnesses, the court, as a rule, will adopt the finding of the master, who has had the advantage of hearing the witnesses, applies only where the evidence being directly contradictory there are no circumstances pointing to the probability of one statement rather than of the other.

We do not fail to take into consideration, I need hardly say, that the fact of the two provincial courts having come to the same conclusion enhances the gravity of our duties, and imposes upon us, more than might perhaps be required under other circumstances, the strict obligation not to allow the appeal without being thoroughly convinced that there is error in the judgment. But, at the same time, we would unquestionably be forgetful of our duties if we did not form an independent opinion of the evidence, and give the benefit of it to the appellants if they are entitled to it.

Over-insurance must be put a stop to, as much as it is in the powers of the courts to do it. Therein lies one of the greatest sources of fraud in connection with the insurance business. If the assured is not in part a co-assurer with the company, that is to say, if the parties to the contract have not a common interest in the preservation of the property insured, one of the most efficient safeguards against fraud and crime is removed. Any such contract where the assured might expect to make a profit by the destruction of the property insured is, in law, tainted with immorality. And to require from a company, when called upon to pay a loss

(1) 19 Gr. 480.

1895

THE NORTH BRITISH & MERCANTILE INSURANCE COMPANY v. TOURVILLE.

Taschereau J.

over which hangs any suspicion, a stronger proof than the appellants have made in this case to defeat a fraudulent claim, would be virtually to leave the assurer at the mercy of the assured, a result which obviously, in the public interest, even more than in the companies' interest, should by all possible means be averted. *Interest reipublicae ne maleficia remaneant impunita.*

Appeal allowed. Action dismissed. Costs in the three courts against respondents, distraits to their attorneys.

Appeal allowed with costs.

Solicitors for the appellants: *Dunlop, Lyman & Macpherson.*

Solicitors for the respondents: *Beique, Lafontaine, Turgeon & Robertson.*

WILLIAM M. KERR AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY (DEFENDANTS ..... } RESPONDENT.

1895

*Oct. 7.

*Dec. 9.

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

Prescription—Commencement—Continuing damage—Tortious Act—Public work—Contractor—Liability of principals for act of.

The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time.

A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) reversing the portion of the judgment of the Superior Court against the defendants which was not acquiesced in.

The action was brought by the plaintiffs for compensation for injury to his property by the construction of a part of the road of the defendant company through the city of Montreal. Damages were claimed and allowed by the Superior Court on several heads of injury, all of which were acquiesced in and settled by the defendant company except one by which the plaintiffs were awarded $5,500 for the closing up of a right of way which he claimed to have enjoyed for over

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

1895

KERR v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

thirty years. The company appealed from this portion of the judgment on two grounds both of which had been pleaded, namely, that the plaintiff's action, not having been taken within two years from the time the wrongful act complained of was committed, was prescribed by art. 2261 C. C. and also by the Railway Act, and that the alleged closing up of the right of way was the unauthorized act of the contractor for the construction of the road for which the company was not responsible. The Court of Queen's Bench gave effect to this latter contention and reversed the judgment of the Superior Court as to this head of damage, and also held that the amount awarded to plaintiff was not justified by the evidence and that the judgment was *ultra petita* in that said amount covered past and future damages and relieved the company from the obligation to restore the right of way which was asked by the declaration.

The plaintiff appealed from such judgment to this court.

Taylor for the appellant. The judgment of the Superior Court was not *ultra petita*. The company had the choice to restore the property or pay damages and cannot complain if the latter is ordered. *Pion* v. *The North Shore Railway Co.* (1).

The company is not relieved from liability on the ground that the wrongful act was committed by the contractor. The Railway Act entitles the plaintiff to compensation from the company for any damage sustained by the building of the road. See *Pion* v. *The North Shore Railway Co.* (1); *Morrison* v. *The City of Montreal* (2); *Wood* v. *The Atlantic & North-West Railway Co.* (3); Railway Act, 1888, secs. 92 and 145.

The damages were continuous and the prescription does not apply. *Grenier* v. *The City of Montreal* (4).

(1) 14 App. Cas. 612.
(2) 25 L. C. Jur. 1.
(3) Q. R. 2 Q. B. 335.
(4) 25 L.C. Jur. 138.

1895

KERR
v.
THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

Abbott Q.C. for the respondent. The contractor was entirely independent of the company who could not have prevented him from doing the injury complained of. *Hughes* v. *Percival* (1); *Steele* v. *The South Eastern Railway Co.* (2); *Ellis* v. *The Sheffield Gas Co.* (3).

The plaintiff's action was prescribed. See *McGillivray* v. *The Great Western Railway Co.* (4); *May* v. *The Ontario & Quebec Railway Co.* (5).

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

TASCHEREAU J.—Under article 2261 of the Civil Code the appellant's right of action was prescribed when he instituted these proceedings. The doctrine of the continuance of damages relied upon by him to answer the plea of prescription, does not help him in this case (6). It has been carried too far in the cases he quoted. The prescription runs from the act which causes the damage, when the damage complained of results exclusively from that act, without any new tortious act from the tort-feasor, and when the damage complained of could have been foreseen and claimed for at the time that the *quasi* offence which caused it was committed, or within two years therefrom. Had the plaintiff then a right of action, in which he would have recovered compensation for prospective damages, including those he now claims? That is the question. If he then had that action, as the appellant here clearly had after the company's acts he complains of, the prescription runs from the time his right of action accrued. *Breakey* v. *Carter* (7). There is no new right of action

(1) 8 App. Cas. 443.
(2) 16 C. B. 550.
(3) 2 E. & B. 767.
(4) 25 U. C. Q. B. 69.
(5) 5 C. L. T. 551.
(6) 1 Sourdat, no. 638.
(7) Cass. Dig. 2 ed. 463.

1895

KERR
v.
THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

Taschereau J.

arising every day of the year. The damages are consecutive but not successive. And I can see no difference on this point between injuries to property and bodily injuries. Compare *Canadian Pacific Railway Co.* v. *Robinson* (1).

I would dismiss the appeal.

GWYNNE J.—The sole question upon this appeal is whether or not the defendants are responsible for the acts of an independent contractor employed by them in the construction of their railway in digging and carrying away and depositing upon the line of railway earth taken from a piece of land of one Howell altogether outside of the railway land but situate between the land of the plaintiff and a highway called Hallowell street, and over which land of Howell at the place where the soil was dry and the earth taken away therefrom the plaintiff claims to be entitled to a right of way from his own land to Hallowell street. The sole ground upon which the claim of the plaintiff to make the defendants responsible for these the acts of their independent contractor is rested, is a clause in the contract between the defendants and the contractor whereby, as is claimed, the defendants, by agreeing to provide the contractor with necessary borrowing pits, have made themselves responsible for his acts even though such acts should constitute trespass upon the property of others, or otherwise tortious to others. The only clauses in the contract having any relation to the question are those numbered respectively 22 and 32 and are as follows:—

22. In cases where the adjoining roadbed excavations are insufficient to form embankments the deficiency will generally be made by widening the cuts and by putting wider ditches through them; but there are special cases where earth will have to be hauled several miles

(1) M. L. R. 6 Q. B. 118; 19 Can. S. C. R. 292; [1892] A. C. 481.

to make up embankments, and it is understood that the cost of this haul is to be included in the contract or schedule price and also the cost of any trestle work that may be required to deposit it, and in no case will the contractor be allowed to borrow without the consent in writing of the engineer.

32. Roads constructed to and from any point on the line of railway for the convenience of the contractor for the conveyance of the material or otherwise must be at his own risk, cost and charges, but the company will provide the necessary land for the right of way and borrow pits.

The necessary land for borrow pits in this clause mentioned are plainly, as it appears to me, places where by the consent in writing of the engineer given under clause 22 the contractor has been allowed to borrow earth. It is not suggested that the place in question was such a place or that in point of fact the contractor had any actual authority whatever from the defendants to take earth from the place under consideration. Upon no principle of law can the defendants be made responsible for independent tortious acts of the contractor; for his acts if tortious to the plaintiff the contractor himself alone must be responsible. Appeal dismissed with costs.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed both on the ground of prescription and on the ground that the company is not liable for the wrongful act of the contractor.

KING J.—I concur in the judgment of Mr. Justice Gwynne.

GIROUARD J.—I agree with Mr. Justice Taschereau that the plaintiff's action was prescribed. The appeal must fail also on the ground taken by Mr. Justice Gwynne.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor & Buchan.*

Solicitors for the respondent: *Abbotts, Campbell & Meredith.*

1895
*Oct. 8.

GEORGE BARRINGTON AND OTHERS ..... } APPELLANTS ;

AND

THE CITY OF MONTREAL ....DEFENDANT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Appeal—Mandamus—Judgment of Court of Review—54 & 55 V. c. 25 (D).

54 & 55 V. c. 25 (D) does not authorize an appeal to the Supreme Court of Canada from a decision of the Court of Review in a case where the judgment of the Superior Court is reversed and there is an appeal to the Court of Queen's Bench. *Danjou* v. *Marquis* (3 Can. S. C. R. 251) and *McDonald* v. *Abbott* (3 Can. S. C. R. 278) followed.

MOTION to quash for want of jurisdiction, an appeal from the Superior Court for Lower Canada sitting in review at Montreal.

By R. S. C. ch. 135 an appeal would lie to the Supreme Court from the decision of the court of final resort in the province only such court, in the province of Quebec, being the Court of Queen's Bench. By 54 & 55 Vic. ch. 25, an appeal was granted from the Superior Court in Review in cases where, and so long as, no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from which by the law of the province of Quebec are appealable to the Judicial Committee of the Privy Council.

In this case the appellants, Barrington and others, petitioned the Superior Court for a writ of mandamus to compel the City of Montreal to proceed with certain

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

1895

BARRINGTON v. THE CITY OF MONTREAL.

works on the streets of the city under the provisions of a statute of the province. The Superior Court ordered a peremptory writ of mandamus to issue and the Court of Review, on appeal by the city, reversed the judgment of the Superior Court and set aside the order for the writ. The petitioners then took an appeal to the Supreme Court from the decision of the Court of Review.

The respondent's factum did not raise the question of jurisdiction but on the appeal being called for hearing:

Ethier Q.C. moved to quash the appeal.

This case is not within 54 & 55 Vic. ch. 25. The judgment of the Superior Court was not affirmed and an appeal could have been taken to the Court of Queen's Bench. It is therefore governed by *Danjou* v. *Marquis* (1), and *MacDonald* v. *Abbott* (2).

Weir for the appellant *contra*. The cases cited were determined under the provisions of R. S. C. ch. 135, but the law has been since altered and appeals from the Court of Review are now allowed This case is within the terms of the present Act.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral).—It is quite clear that we have no jurisdiction to entertain this appeal. The case of *Danjou* v. *Marquis* (1), expressly decided that an appeal did not formerly lie to this court from a decision of the Court of Review that court not being the court of last resort in the province. By 54 & 55 Vic. ch. 25, passed since the decision in *Danjou* v. *Marquis* (1), an appeal is allowed from decisions of the Court of Review in certain cases, but that statute does not apply to the case before us; it only provides for

(1) 3 Can. S. C. R. 251. (2) 3 Can. S. C. R. 278.

1895

BARRINGTON v. THE CITY OF MONTREAL.

The Chief Justice.

such appeals when the judgment of the court of first instance has been affirmed, and no appeal lies to the Queen's Bench. Here, the judgment of the Superior Court has been reversed by the Court of Review, and there was nothing to prevent the appellant from appealing to the Court of Queen's Bench.

The case cited, and that of *MacDonald* v. *Abbott* (1), which follows it, govern the case before us and the appeal must, therefore, be quashed.

Appeal quashed without costs.

Solicitors for the appellants: *Weir & Hibbard.*

Solicitors for the respondent: *Roy & Ethier*

(1) 3 Can. S. C. R. 278.

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANT).. } APPELLANT ;

AND

GEORGE HURDMAN, ADMINISTRATOR, &C. (PLAINTIFF)..... } RESPONDENT.

1895
*Oct. 16, 17.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Loan of cars—Reasonable care—Breach of duty—Negligence—Risk voluntarily incurred—"Volenti non fit injuria."

A lumber company had railway sidings laid in their yard for convenience in shipping lumber, over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading.

Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk of injury to them.

On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted the jury had found that "the deceased voluntarily accepted the risks of shunting" and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push.

Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "*volenti non fit injuria*" had no application. *Smith* v. *Baker* ([1891], A.C., 325), applied.

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

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Queen's Bench Divisional Court (2), in favour of the plaintiff.

The plaintiff sued as administrator of the estate of Thomas F. Hurdman, who was killed on the 30th December, 1892, under the following circumstances:

The deceased was employed by the Shepard & Morse Lumber Co., proprietors of a yard for piling and sorting lumber, about two miles from the Canada Atlantic Station at Ottawa.

The railway company had lent rails to the lumber company, which had constructed switches and sidings upon their own property, separated from the defendants right-of-way by a fence, and closed by a gate under the control of the lumber company.

The mode of doing business between the companies was that the lumber company made out and presented the bills of lading from their Ottawa office to the railway company at the station in Ottawa, and freight was paid by the lumber company from Ottawa to the point of destination, but, as a matter of convenience to the lumber company, the railway company gratuitously hauled empty cars from Ottawa to the yard to be loaded, and brought them away when loaded. At the outset, the lumber company sorted the cars and collected them for the railway company by means of horses, as they objected to allow locomotives inside their yard, but afterwards, without any special arrangement, the practice changed, and the railway company, at the request of the lumber company, sent their engine and force of yardmen into the lumber company's yard, to do the sorting and moving of cars.

On the 30th December, 1892, the railway company, at the request of the lumber company, sent an engine

(1) 22 Ont. App. R. 292. (2) 25 O.R. 209.

and a working force of four men, to leave empty cars and bring away the cars shipped, and also to bring away any other cars pointed out by the lumber company, even though not billed or shipped, and to do the shunting in the yard required for the purpose of sorting and arranging the cars. The car in which the deceased was killed was not yet shipped or billed, but the yard-master of the railway company was requested to shunt and bring it away to Ottawa, to be subsequently billed. This was a closed or box car filled to the roof with lumber, and when coupled for the purpose of placing it on another siding was still in the possession and under the control of the lumber company. The counting of the lumber was not completed, and the deceased and another employee of the lumber company were in the car counting the lumber, in a narrow space across the middle of the car from one door to the other. The yard-master waited for them to finish and get out of the car, but they told him not to wait, saying that it was all right; that they would soon finish counting and look out for themselves.

This car was then coupled to the train, shunted several times, and finally dropped or allowed to run down into another siding, when it collided with cars standing on that siding with sufficient force to cause the lumber in the car to be moved, and deceased was fatally injured.

It appeared that this mode of shunting was in common use on railways.

The jury answered the first three questions submitted to the effect that there had been negligence in the management of the car, in giving the car too strong a push, and that they believed the accident was the result of such negligence. The fourth question and the answer of the jury thereto were as follows:

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

4. Q. Did the deceased, knowing the danger, voluntarily accept the risks of shunting? A. The deceased voluntarily accepted the risks of shunting.

On the finding of the jury a verdict was entered for plaintiff which was affirmed by the Divisional Court and the Court of Appeal.

Chrysler Q.C. and *Nesbitt* for appellant: There is no evidence of negligence. The immediate cause of the death was the shifting of the lumber in the car, not the impulse given to the car. *Callender* v. *Carleton Iron Co.* (1).

Deceased was not killed by the negligence of any persons who were at the time, and under the circumstances, the servants of the company.

Murray v. *Currie* (2); *Murphy* v. *Caralli* (3); *Rourke* v. *White Moss Colliery Co.* (4); *Donovan* v. *Laing Syndicate* (5).

The conveying of deceased in the car was not assented to by the defendants and must be presumed to have been at the request and for the purposes of the lumber company, and at their risk. Deceased placed himself upon the train voluntarily, and was not lawfully there at the time of the accident. *Sheerman* v. *The Toronto &c. Railway Co.* (6); *Graham* v. *The Toronto &c. Railway Co.* (7); *Blackmore* v. *Toronto Street Railway Co.* (8).

The jury having found that deceased voluntarily incurred the risk of shunting, the plaintiff cannot recover. *Volenti non fit injuria. Thomas* v. *Quartermaine* (9); *Thrussell* v. *Handyside* (10).

See also *Moffat* v. *Bateman* (11); *Smith* v. *Baker* (12).

If a man rides on a freight train as a matter of convenience to himself, the railway company receiving no

(1) 9 Times L.R. 646.
(2) L.R. 6 C.P. 24.
(3) 3 H. & C. 462.
(4) 2 C.P.D. 205.
(5) [1893] 1 Q B. 629.
(6) 34 U.C.Q.B. 451.
(7) 23 U.C.C.P. 541.
(8) 38 U.C.Q.B. 172.
(9) 18 Q.B.D. 685.
(10) 20 Q.B.D. 359.
(11) L.R. 3 P.C. 115.
(12) [1891] A.C. 325.

reward, and is told there is danger, but ageees to take his chances, and the car being put in too rapid motion, he is hurt, could he recover? That is the neat question here. *Gallin* v. *London and North Western Ry. Co.* (1). The jury has found, for the purposes of this case, the very facts above stated.

McCarthy Q.C. and *Blanchet* for the respondent.

The jury found that the death of the deceased was the result of the appellants' negligence. The deceased did not voluntarily accept the risks arising from the negligence. If the deceased assumed the ordinary risk of shunting, when performed with reasonable care, his undertaking was with the lumber company in whose service he was, but appellants seek to use it to shelter themselves from the consequences of negligence established against them. There was no undertaking between the deceased and appellants. From the time the negligent act was committed deceased was physically restrained from saving himself; he was compelled to remain on the car.

The doctrine of *volenti non fit injuria* does not apply in cases where negligence has been proven and found by the jury, and the deceased was not *volens* within the legal meaning of the maxim. It was necessary for defendants to prove not only that deceased had agreed to accept the risk, but also that he agreed to waive all recourse for consequent injury. *Smith* v. *Baker* (2); *Osborne* v. *London and North-Western Railway Co.* (3); *Brown* v. *Leclerc* (4); *Thrussell* v. *Handyside* (5); *Town of Prescott* v. *Connell* (6); *Heaven* v. *Pender* (7); Pollock on Torts (8).

There was no loan of the engine by the appellants to the lumber company, and the appellants did not

(1) L.R. 10 Q.B. 212.
(2) [1891] A. C. 325.
(3) 21 Q. B. D. 220.
(4) 22 Can. S. C. R. 53.
(5) 20 Q. B. D. 359.
(6) 22 Can. S. C. R. 147.
(7) 11 Q. B. D. 503.
(8) 4 ed. p. 155.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

cease to have control over the conductor, engine driver, fireman and brakeman employed by them while shunting. They continued to remain their servants handling their own engine and cars. The appellants could have dismissed or withdrawn from the work the men controlling the engine at any time, which the lumber company could not have done, and this is the test for the purpose of determining whose servants they were at the time the accident occurred. See *Cameron* v. *Nystrom* (1); *Johnson* v. *Lindsay* (2); *Jones* v. *Liverpool* (3); *Oldfield* v. *Furness* (4).

TASCHEREAU, SEDGEWICK and GIROUARD JJ. were of opinion that the appeal should be dismissed with costs.

GWYNNE J.—This action was brought by the administrator of a deceased person against the defendants to recover damages from them for the death of the deceased, caused, as is alleged, by the negligence of the defendants and their servants.

In the statement of claim it is alleged that the deceased was a clerk in the employment of a company called the Shepherd & Morse Lumber Company, at their lumber yard adjoining the line of the defendants' railway near the city of Ottawa, his duty being to count the lumber placed by the Shepherd & Morse Co. in the care of the defendants for carriage on their railway; that in the lumber yard there were a number of switches connected with the defendants' line of railway, and that upon the day in question certain cars, the property of the defendants, were upon the said switches for the purpose of being loaded with lumber; that while the deceased was lawfully in one of

(1) [1893] A. C. 308.
(2) [1891] A. C. 371.
(3) 14 Q. B. D. 890.
(4) 9 Times L. R. 515.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

the said cars, counting the lumber therein for his employers, certain servants of the defendants who were in charge of and operating a locomotive of the defendants for the purpose of moving the cars in the said lumber yard when loaded with lumber, proceeded to move the car in which the deceased was so lawfully employed as aforesaid from the switch or siding upon which it was and to place it upon another switch or siding where other cars were, and that the defendants' servants in charge of the said locomotive so carelessly and negligently shunted and removed the car in which the deceased so was, that by reason of such negligence of the defendants' servants the said car was made to collide with such force and violence with other cars upon the switch into which the car in which the deceased was so as aforesaid was shunted, that the deceased was thereby killed; and that the collision so causing his death was caused by the careless and negligent handling by the defendants and their servants of the said cars, and the careless and negligent coupling of the same and by the negligent and wrongful acts of the defendants and their servants in having shunted or kicked the said car in which the deceased was with greater force and violence than was necessary and in not having applied the breaks of the said car in time to prevent the said collision. To this statement of claim the defendants pleaded in substance that they were not liable. The learned judge before whom the case was tried with a jury submitted certain questions to the jury which they answered as follows:

1. That there was negligence in the management of the car in question.

2. In giving the car too strong a push.

3. We believe the accident was the result of the negligence aforesaid.

The fourth question put to them was —

Did the deceased knowing the danger voluntarily accept the risk of shunting?

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

To which they replied—

The deceased voluntarily accepted the risk of shunting.

The parties came to an agreement that if the plaintiff was entitled to judgment upon these findings the damages for which such judgment should be entered should be $750. The learned judge who tried the case thereupon entered judgment for the plaintiff which judgment has been maintained by the Court of Appeal for Ontario.

In this appeal from that judgment the learned counsel for the appellants contended that judgment of non-suit should have been entered as had been moved upon the part of the defendants in the courts below, or that judgment should be entered for the defendants upon the above answer of the jury to the fourth question submitted to them. His contention in support of the non-suit was:

1. That the deceased was not killed by the negligence of any persons who were at the time and under the circumstances the servants of the defendants.

2. That there was no evidence to go to the jury establishing negligence conducive to the accident.

3. That under the circumstances in evidence it did not appear that the defendants or the persons in charge of the locomotive owed any duty to the deceased and so that the defendants could not be guilty of negligence in the performance of any duty owed to him.

And as to the judgment for the defendants upon the answer of the jury to the fourth question it was contended that this finding of the jury entitled the defendants to the benefit of the principle *volenti non fit injuria*.

Now as to the contention that the persons whose negligence is alleged to have caused the death of the deceased were not, at the time

of the occurrence of the accident which caused the death, the servants of the defendants and in their employment, but were then in the employment of, and the servants of, and under the control of, the Shepherd & Morse Lumber Company, the facts are these: This lumber company have a lumber yard alongside of the main track of the defendants' railway, from which latter into the lumber yard there are several switches or sidings for the convenience of the shipping of lumber by the defendants' railway. Formerly the practice had been for the lumber company to draw the lumber from their yard by horses on to the railway of the defendants, to be by them conveyed to the destination indicated by the lumber company. A different practice was introduced as being doubtless more convenient for both the lumber company and the defendants; no agreement as to the matter was proved to have been entered into, but the practice was as follows: The defendants supplied cars as required to the lumber company to be loaded; when loaded the lumber company sent a list to the defendants of cars which they had loaded and ready for removal, whereupon the defendants sent their servants to the lumber yard with a locomotive for the removal of the loaded cars from the respective sidings in the lumber yard upon which they were and to bring them into the defendants' station at Ottawa, whence they were despatched as directed by bills of lading signed by and on behalf of the lumber company. Upon the evening preceding the day on which the fatal accident occurred the lumber company sent to the defendants a list of cars which they had in the yard loaded and ready for removal. The car in which the deceased was when killed was not one of the cars upon that list, but on the following day the defendants' servants in charge of a locomotive sent for the purpose of removing the cars on the list took

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

this car also, as it was loaded while they were in the yard upon such employment. There was not a particle of evidence that there was any agreement between the defendants and the lumber company that the defendants' servants while employed with the locomotive in removing the cars from the lumber yard should be the servants of the lumber company, and under their control, nor was there anything in the evidence from which it could reasonably be inferred that the defendants' servants so employed were in truth the servants of the lumber company and under their control; or that the lumber company ever assumed to exercise any control whatever over the defendants' servants in the use of the locomotive and the removal of the cars; all that was suggested was that the servants of the lumber company pointed out to the defendants where the cars stood which were to be removed. In short, there was nothing whatever in the evidence to indicate that the defendants' servants in removing the loaded cars on to the track of the defendants were acting otherwise than in the employment of, and as the servants of, and for the benefit of, the defendants; and so the contention before us that the servants of the defendants when in charge of the locomotive moving the loaded cars from the yard of the lumber company to the railway of the defendants, were while so engaged the servants of the lumber company and in their employment and under their sole control, and were not the servants of the defendants, or in their employment, cannot be maintained; none of the cases cited support that contention. Then as to the contentions that there was no evidence to go to the jury of negligence, assuming the deceased to have been a person to whom under the circumstances in evidence any duty was due, and that the defendants did not owe to him any duty even though the persons in charge of the

locomotive should be regarded as the servants of the defendants and in their employment and under their control. The circumstances upon which this question as to owing a duty to the deceased depends are these: One Clarke, who was in charge of the locomotive, and of the engineer, fireman and brakesman employed in working it, says that after he had coupled the car in which the deceased was to the locomotive he stood for the space of about half a minute by the car in which the deceased and another young man, servants of the lumber company, were employed in counting the lumber, and that the young man, whose name is Ashler

looked out and wanted to know if I was waiting for them and I says, yes, and then he said go on with your work we are all right.

Young Ashler gave similar evidence. He says "Clarke wanted to know if we wanted him to wait," and being asked if he told him not to wait he answered "yes," and being asked if the deceased told him to say not to wait he answered "yes." Thereupon Clarke, without giving any notice to the engineer that the young men were on the car, gave to him a signal to proceed which he accordingly did, and after shunting about, moving loaded cars from one switch in the yard to another, collecting the cars to be removed, finally shunted the car in which the young men were upon a down grade with such force that the car in which the young men were came into violent collision with another car, and by such collision and the displacement of the lumber in the car in which the young were the deceased was killed. Now assuming the defendants to be answerable for the conduct of the persons in charge of the locomotive used in moving the car, and that the deceased was in the position of a person to whom the defendants owed the duty of moving the car with all due care and skill, there cannot be a doubt that upon the evidence given the case could not

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

have been withdrawn from the jury, and they have found that the death of the deceased was caused by negligence in the car having been given too great a push. There was evidence to the effect that the push given to it was too strong and altogether unnecessary for the purpose of attaining the object in view; and indeed there was besides evidence of negligence in other respects, namely, in not notifying the engineer that the young men were in the car and in not having brakesmen upon it

Now, Clarke having taken the car and removed it with the young men in it lawfully pursuing their business in the service of their employers counting the lumber, there cannot, I think, be entertained a doubt that under such circumstances Clarke owed to the young men the duty of taking care that the car should be moved with the utmost skill and care so as to avoid all risk of any injury occurring to them. This proposition appears to me so free from doubt that I cannot think it necessary to seek for an authority to maintain it. In *Heaven* v. *Pender* (1), a question arose as to whether a dock owner who had received into his dock a vessel to be repaired and painted by its owner owed any duty to a painter employed by the owner of the vessel to paint so as to be subject to an action at suit of the painter for negligence in a staging, upon which the painter had to stand when painting the vessel, not being sufficiently secure, whereby the painter fell and sustained injuries, and it was held by the Court of Appeal, reversing the judgment of the Queen's Division, that the dock owner did owe a duty to the painter, and the action was sustained.

Lord Esher, Master of the Rolls, giving his judgment n that case, says:

(1) 11 Q.B.D. 503.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

The questions we have to solve in this case are: What is the proper definition of the relation between two persons, other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe with regard to the person or property of each other such ordinary care or skill as may be necessary to prevent injury to his person or property, and whether the present case falls within such definition?

He then proceeds to discuss several cases in illustration of the proposition he enunciates, and then adds:

The proposition which these recognized cases suggest, and which is therefore to be deduced from them is, that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Then he adds:

Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all.

He then proceeds to criticise *Langridge* v. *Levy* (1); *George* v. *Skivington* (2); *Corby* v. *Hill* (3); *Smith* v. *London and St. Katharine Docks Co.* (4); *Indermaur* v. *Dames* (5); *Winterbottom* v. *Wright* (6); the judgment of Cleasby B. in *Francis* v. *Cockrell* (7); and he concludes that the true principle upon which every one of these cases can be rested is that embodied in the above proposition as enunciated by him.

Now although Lords Justices Cotton and Bowen declined to concur in the applicability of the rule as enunciated by him to the several cases which he had criticised and to which he had applied it they do not

(1) 2 M. & W. 519; 4 M. & W. 337.
(2) L. R. 5 Ex. 1, 5.
(3) 4 C.B.N.S 556.
(4) L.R. 3 C.P. 326.
(5) L.R. 1 C.P. 274; 2 C.P. 311.
(6) 10 M. & W. 109.
(7) L.R. 5 Q. B. 501.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v.

Gwynne J.

dissent from its applicability to the circumstances of that case of *Heaven* v. *Pender* (1); and this appears from the judgment of the court in *LeLievre* v. *Gould* (2). There the judgment in *Heaven* v. *Pender* (1) was attempted to be applied by counsel to a case to which it never was intended to apply and to which it had no application. There mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages had been reached; certain untrue statements had been made but without any fraud; in some of the certificates the mortgagees advanced monies to their prejudice; and it was sought to make the surveyor responsible to the mortgagees for negligence in the giving of the certificates which was contended to be in breach of a duty the surveyor owed to them; but Lord Esher, Master of the Rolls, there says:

> The case of *Heaven* v. *Pender* (1) has no bearing upon the present question. That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property.

And Bowen L. J. says:

> Is there any duty known to the law in such a case as the present? It is said that *Heaven* v. *Pender* (1) and cases of that class show that the defendant had a duty to the plaintiff. It is idle to refer to cases which were decided under totally different aspects and upon totally different considerations of the law.

And A. L. Smith L.J. says (3):

> The decision in *Heaven* v. *Pender* (1) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another, that if due care was not taken damage might be done by the one to the other.

(1) 11 Q. B. D. 503. (2) [1893] 1 Q. B. 491.
(3) P. 504.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

The judgment of the Court of Appeal in *Heaven* v. *Pender* (1) and the principle upon which it proceeded as enunciated by the Master of the Rolls, affirmed as that principle has been in *Lelièvre* v. *Gould* (2), is a conclusive authority that in the present case, that principle is conclusive in favour of the plaintiff, if authority were necessary, that the servants of the defendants in taking the car in which the deceased, as appears in evidence, was, owed a duty to him to take care that the car should be moved with all necessary care and skill, the breach of which duty would constitute actionable negligence, from responsibility for which in the present case the defendants cannot escape unless their last contention can be adjudged in their favour, namely, that upon the answer of the jury to the fourth question submitted to them they are entitled to have judgment entered for them. The law, as now settled by the judgment of the House of Lords in *Smith* v. *Baker* (3), is that the maxim *volenti non fit injuria* has no application in the case of injuries occasioned by the negligent conduct of the defendants. It is unnecessary to inquire whether the very trifling evidence of consent, as extracted above, justified the finding of the jury that "the deceased voluntarily accepted the risks of shunting," but in view of the nature of that evidence, coupled with the finding of the jury that the death of the deceased was caused by negligence in the shunting, namely, in giving too strong a push to the car in which the deceased was, it is impossible to construe the finding of the jury in answer to the fourth question in any other way than that the deceased voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner. To construe the finding as that the deceased voluntarily incurred the risks of shunting however improperly, carelessly and negligently conducted would

(1) 11 Q. B. D. 503.
(2) [1893] 1 Q. B. 491.
(3) [1891] A.C. 325.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

Gwynne J.

be utterly at variance with the evidence, with the plainest principles of common sense and with the principle as now firmly established by the judgment of the House of Lords as to the application of the maxim *volenti non fit injuria*; and as the jury have found that the death of the deceased was due to the negligence of the defendants in shunting the car in which the deceased was in a careless and negligent manner by giving to the car in which the deceased was a stronger push than was necessary, the verdict and judgment for the plaintiff must stand and the appeal must be dismissed with costs.

KING J.—It seems very clear that the operation of shunting the cars which occasioned the injury was directly under the control of the railway company's servants. For their own, as well as for the lumber company's purposes, in order to facilitate the carrying on of mutually advantageous business, the railway company sent their engines under the control of their own servants upon the lumber company's premises to take out such cars as the latter company might indicate, in order to their being put in course of transportation by the railway company. There is no reason at all for concluding that there was a loan by the railway company of its servants to the lumber company.

It seems also clear that the deceased was rightfully in the car. He was doing the work of his employers, the lumber company, counting and tallying the lumber which they had put in the car. It is said that the work of counting was finished before the accident took place. Asher, the fellow servant with deceased in the car, says that he himself had finished his count. Of the deceased, he does not seem sure: "I guess he had finished it; but he had not finished his work on the

tallies." This latter was incidental to the work of counting, and even although it might have been done afterwards the remaining in the car to finish it can not render his being there wrongful.

Then it is said that (apart from any question as to deceased being *volens*) the defendants owed to the deceased no duty or care, or at most only that of abstaining from reckless or wanton conduct. But when, for their own purposes, they chose to move the loaded car with the lumber company's servants in it, they owed to them a duty to exercise reasonable care to prevent injury to them. Such a duty is independent of contract. *Foulkes* v. *Metropolitan District Railway Co.* (1); *Sewell* v. *British Columbia Towing Co.* (2); *Meux* v. *Great Eastern Railway Co.* (3).

A duty to exercise reasonable care arises in the use of things dangerous to life, and the evidence clearly shows that the operation in question was dangerous to persons in the car.

The jury have found that there was a want of reasonable care in giving the car too strong a push. It is argued that there was no evidence of this. But a rate of speed was testified to which (although denied) was shewn to be excessive, and which, if it existed, was caused directly by the act of defendants' servants.

There was also evidence that as a result of the concussion the end of the car was bulged out by the shifting lumber. This also was some proof of excessive force

Then we come to what is really the most material point, viz: the effect of the finding of the jury that the deceased, knowing the danger, voluntarily accepted the risks of shunting. But what is meant by the "risks of shunting"? *Primâ facie*, the risks ordinarily

(1) 4 C. P. D. 267. (2) 9 Can. S. C. R. 527.
(3) [1895] 2 Q. B. 387.

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

King J.

incident to the operation when performed with reasonable care and skill. The defendants, however, say that the question (as left and as passed upon) covered as well risks arising through want of reasonable care and skill in the operation. Undoubtedly they are entitled to rely upon any observations of the learned judge in his charge to the jury in explanation of the question submitted. And the learned judge said:

> Did the deceased, knowing the danger, voluntarily accept the risks of shunting? As I understand that, what are you asked to consider in regard to that is this, that the young man placed himself between these boards when he knew the car was to be put in motion, and did he apprehend, did he know, that there was danger, that he was in a position of peril from the liability of the car being put in too rapid motion, and that the result of the rapid motion would be in the concussion to cause the lumber to go together and so injure him and destroy his life? Did he, knowing nothing of the danger, having it before his mind, knowing the conditions which existed, voluntarily place himself in a position of danger and run the chances of the car being run too rapidly, of there being a concussion, of the lumber coming together and of the result which happened? Did he, knowing the danger, voluntarily accept the risk of shunting? If you think that he, knowing the danger that would arise from too rapid shunting of the car from a collision, from the moving of the lumber, knowing of that danger, voluntarily, of his own will. accept the risks in staying in the car while the car was being shifted, then you will say yes. If you think he did not, then you will say no.

The learned judge himself thinks that the question did not cover the risks of negligence, and the several courts through which the case has passed are of the like opinion.

Now the operation of shunting a car, loaded as was this, was intrinsically dangerous to any one inside the car, that is to say, it was intrinsically dangerous notwithstanding the exercise of reasonable care and skill in the doing of it. Such inherent dangers were voluntarily assumed by the deceased. Is it found that he assumed further risks? The learned counsel for de-

fendants argue that it is because the learned judge pointed out, as an example of the risks, that of the car being run too rapidly, and it is argued that this implies negligence. But this is not necessarily so. A too rapid motion of the car might well happen notwithstanding the exercise of reasonable care. Where it is sought to put the deceased in the position of a consenting party to the omission of reasonable care in the doing of an act which, with reasonable care, was sufficiently dangerous, it ought to be presented clearly to the jury so that they might distinguish in their minds between the taking of risks ordinarily incident to a dangerous operation, and the taking of the added risks arising from want of reasonable care and skill.

Such a presentation was not made, and so the defendants cannot treat the finding as conclusively covering risks arising from their own want of reasonable care.

The defendants' counsel distinctly disclaimed any desire to seek a new trial (probably in view of the moderate damages assessed upon the present trial), and hence the expediency of seeking a more explicit finding upon the point was not presented.

Nor do I think that much would be gained by a new trial, for, from the simple facts of deceased's knowledge of the danger inherent in shunting, and that, in reply to an inquiry of defendants' servant having charge of the operation, as to whether the deceased wanted him to wait until the counting was finished, the deceased said to him not to wait, I think that a jury would hesitate very much before inferring that he foresaw and fully appreciated the risk of accident from the want of reasonable care, and voluntarily assumed to take such risks upon himself.

For these reasons, which do not differ from those presented by the learned judges who have heretofore

1895

THE CANADA ATLANTIC RAILWAY COMPANY v. HURDMAN.

King J.

had to deal with the matter, I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Chrysler & Lewis.*

Solicitors for the respondent: *Kidd, Blanchet & Jones.*

JOHN MACLEAN (DEFENDANT).....APPELLANT; 1895

AND *Feb. 25, 26.
*June 26.

ALEXANDER STEWART (PLAINTIFF).. RESPONDENT.

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

Partnership—Judicial abandonment—Dissolution—Composition—Subrogation—Confusion of rights—Compensation—Arts. 772 and 778 C. C. P.

A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership.

Held, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner as well as the partners' individual rights as between themselves.

Held, reversing the decision of the court below, the Chief Justice and Taschereau J. dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion.

APPEAL from a decision of the Court of Queen's Bench, for Lower Canada (1), affirming a judgment of the Superior Court (2), which condemned the defend-

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

(1) Q. R. 3 Q. B. 434. (2) Q. R. 4 S. C. 36.

1895

MACLEAN v. STEWART.

ant to pay to the plaintiff $10,261.08, part of the sum contributed by the plaintiff towards the capital of a commercial partnership formerly existing between them and one J. H. Smith which had terminated upon their making a judicial abandonment for the benefit of the firm's creditors.

The following statement of the case is taken from judgment of Mr. Justice Sedgewick.

On the 31st December, 1886, John MacLean, the defendant and appellant, Alexander Stewart, the plaintiff, and James Hardisty Smith, *mis en cause*, entered into partnership, MacLean's contribution to the capital being $4,480.91, Stewart's $25,292.47, Smith's $30,350.96. Before the expiration of the term of five years, viz., on the 22nd July, 1891, the partnership was dissolved by a judicial abandonment which the partners made at the demand of their creditors. At the time of the abandonment, according to the partnership books, there stood to the credit of Stewart's capital $17,185.82, to the credit of Smith's capital $27,379.54, and to the debit of MacLean's $29,079.31.

Although the statement prepared at the time of the abandonment showed a surplus of assets over liabilities of about $15,000, it is nevertheless admitted that the partnership was wholly insolvent, the plaintiff himself testifying that the assets of the estate were not more than enough to pay fifty cents on the dollar. Afterwards an arrangement was come to by which MacLean, with the knowledge and assent of his partners, undertook to pay, and did eventually pay, a composition of fifty cents on the dollar to ordinary creditors, and the full claims of all privileged creditors, in consideration of which the assets of the firm were transferred to him personally, the creditors at the same time discharging both him, and his partners as well, from all liability in respect of the partnership. This

1895

MACLEAN
v.
STEWART.

action is brought by Stewart against MacLean to recover from him his proportion of the amount appearing in the firm books at the time of the abandonment as having been drawn from the firm assets.

The action was tried in the Superior Court, and judgment was entered in favour of the plaintiff for $10,261.08½, with interest.

Upon appeal to the Court of Queen's Bench this judgment was sustained.

Beïque Q.C. and *Greenshields* Q.C. for the appellant. Respondent's right of action was extinguished as a necessary consequence of the discharge granted to appellant.

An abandonment by a commercial firm includes, by operation of law, not only the partnership property but also the private property of the partners, and the curator is vested with all the property abandoned, whether disclosed or not disclosed in the inventory. *Reid* v. *Bisset* (1); *Re Macfarlane* (2); *Lewis* v. *Jeffrey* (3); *Ontario Bank* v. *Foster* (4); Bedarride, Faillites (5); C.P.C. arts. 772 & 778; Pardessus, Droit Commercial (6).

Binney v. *Mutrie* (7), is not a case in point. First because there was neither abandonment, or composition, or discharge, and second, because under the English law, unless otherwise provided, only the use of capital is contributed (Lindley on partnership 5 ed. pp. 402, 403); whereas under the French law the capital contributed becomes the property of the firm, and on liquidation is treated like any other asset (8).

Macmaster Q.C. for the respondent. The abandonment and the composition effected by the appellant

(1) 15 Q.L.R. 108.
(2) 12 L.C. Jur. 239.
(3) 18 L.C. Jur. 132.
(4) 6 Legal News, 398.
(5) Vol. 2, nos. 743-4.
(6). No. 1086.
(7) 12 App. Cas. 160
(8) 26 Laurent no. 267 *et seq.*; Pont Société no. 365.

1895

MACLEAN v. STEWART.

did not extinguish the rights and obligations of the partners between themselves

The members of a partnership who obtain a discharge by abandoning partnership assets to creditors may reciprocally exercise their personal recourse in the settlement of partnership accounts between themselves (1).

There is no subrogation.

A partner can claim an account and partition from his co-partners. Arts. 1898, 712-727 C.C. In this account and partition each returns to the mass what he has received, the debts are deducted and the balance divided between the partners. Returns are due only from co-heir to co-heir not to legatees nor creditors of succession. Art. 723 C.C. The abandonment absorbed the assets and left nothing available to form the mass, but the drawings of the partners. The partners having been discharged from the partnership debts, the mass must return to them in its entirety; it is then applied towards the payment of the capital which is due to each partner (2).

The abandonment is not a mode of either extinguishing obligations or releasing from debts except to the extent that they are paid or remitted. The claims of the creditors subsist for the unsatisfied portion of the debts until they release the partners. The claims of the creditors against the partners and the claims of the partners *inter se* are totally distinct and separate. Now the creditors could not release the partners from the claims they might have *inter se*. While their assets were in the hands of their creditors these claims of the partners *inter se* could not be exercised to their prejudice, but once discharged the claims of the partners *inter se* were untramelled.

The conveyance to MacLean was simply a conveyance

(1) Cour de Cassation, Dalloz, 69, 1, 67.

(2) S.V. 65, 1, 12.

of the assets of the co-partnership, and did not include the assets and liabilities of his co-partners. It did not pass the individual estate and rights of each partner and rights cannot be taken away by implication. As regards the creditors the overdraft could not be looked upon as an asset. It added nothing to the rights of the creditors. The overdraft is nothing more or less than a result of the "keeping of the reckoning" between the partners.

As to the plea of compensation there is no foundation whatever for it. Appellant simply bought the bankrupt estate from the creditors, at the rate of fifty cents on the dollar on the amount due to firm creditors. He received money's worth in goods and credits and cash on hand for the amount he paid in the form of composition, and he cannot make the payment avail in the double capacity of satisfying his obligations to his late partners and purchasing the bankrupt stock. Lindley on Part. (1); arts. 1839, 1103, 1854, 1863, 1865, C.C. See also *Binney* v. *Mutrie* (2); *Neudecker* v. *Kohlberg* (3); *West* v. *Skip* (4); *Gunnell* v. *Bird* (5).

THE CHIEF JUSTICE.—I can see no error in the judgment appealed against; therefore, adopting the reasons assigned by Chief Justice Lacoste in delivering the judgment of the Court of Queen's Bench, I am of opinion that this appeal must be dismissed.

FOURNIER J.—I concur in the judgment prepared by Mr. Justice Sedgewick in this case.

TASCHEREAU J.—I dissent for the reasons stated by Chief Justice Lacoste. This appeal should be dismissed.

SEDGEWICK J.—His Lordship stated the facts of the case as above set out and proceeded as follows:—

(1) Pp. 584, 591.
(2) 12 App. Cas. 165.
(3) 3 Daly, 407.
(4) 1 Ves. Sr. 239.
(5) 10 Wall 304.

1895

MACLEAN v. STEWART.

Sedgewick J.

In my view the appeal must be allowed and that upon three grounds which I shall, as briefly as I can, point out.

I am willing to admit, and it may be taken for granted for my purpose, that had the firm been dissolved in the ordinary way, there having been no judicial abandonment, and had the action been brought for the winding up of the partnership and the distribution of its assets upon the basis of the partnership articles, amongst the different partners, the defendant Stewart would rightly have been called to pay the amount of the judgment recovered in the present action. But in my view the case here presented is a different one calling for the application of different principles. There is no question here as to the legal consequences which follow upon the judicial abandonment by the members of a partnership of the firm assets for the benefit of its creditors. Such an abandonment transfers to the curator not only the estate and rights of action of the partnership but also the estate and rights of action of each member of that partnership. It may be that theoretically the property still remains in the firm or in its several members, but all right of action in respect of it passes over exclusively to the curator, their right of action for the time being ceasing. The claim now in suit, if a valid one, was a right of action which the plaintiff had against MacLean at the time of the dissolution, and passed by virtue of the abandonment and subsequent proceedings to the curator. In my view that right of action so transferred and vested in the curator has never yet been re-transferred to the plaintiff. It went from him by operation of law. It has never been restored either by operation of law or by any act of any person qualified or authorized to make such restoration. In the present case the abandoned property was in effect purchased

by the defendant MacLean, but assume that no such transaction had taken place and that the insolvent estate had been wound up under the Code by the curator, and distributed by him as therein directed, in that case it could not, I think, be contended that Stewart could proceed by action and recover for his own benefit the amount now in controversy. If MacLean out of his private or separate estate was able to pay that money, the curator and not Stewart would have been entitled to it for distribution among the joint creditors of the firm after the separate creditors of Stewart had first been paid in full. By what act or under what law did this money, which otherwise would have belonged to the creditors, become the property of Stewart? Although, it is true, the creditors have discharged Stewart, the consideration for that discharge was not the transfer to him individually or to the firm of his or of the firm's property and right of action. So as far as he was concerned he was discharged but the property and rights which by the abandonment went to the curator still remained outstanding in the curator who alone might sue in respect of them. I am unable to see how the purchase by MacLean on his own account, and (we must assume) with his own money, from the curator of the abandoned property could vest in Stewart any right of action. One effect of the abandonment was to dissolve the firm. From that moment the partners became strangers. Their existing liabilities and obligations toward each other doubtless remained unimpaired, but each individual had thereafter a right to do business on his own account and for his own benefit without reference to any of his late associates. MacLean, therefore, had as much right to purchase the firm assets as any stranger, and was in no sense acting in the getting back of the estate as an agent or for the benefit of Stewart, and its transfer to

1895

MACLEAN v. STEWART.

Sedgewick J.

him, viewed as a transfer simply, could not in any way that I can perceive enure to Stewart's benefit. Indeed, if Stewart's right of action had passed over to the curator it makes no difference whether the curator himself realized the assets and made distribution of their proceeds or whether he sold them; so long as there was no transfer from the curator to the three partners or to himself he had no right of action.

The learned Chief Justice of the Queen's Bench, while admitting to the fullest extent that the abandonment transferred to the curator, not only the firm's rights but the rights of Stewart as well, argues that because there was a composition and discharge, that is to say, because the creditors discharged the members of the partnership in consideration of which MacLean, one of the partners, pledged himself to pay the composition, "the partners regained the exercise of their personal rights which the abandonment had taken from them."

With all respect I must differ from this view. There was no composition and discharge in the ordinary sense in the present case so far as Stewart was concerned. There would have been had each member been discharged; had they each undertaken to pay the composition, and had there been a transfer to the three of the abandoned estate. But here, Stewart got his discharge, nothing more. If it gave him the right to recover any private debts of his own, to recover the very claim in question, it would, it seems to me, have given him the right in common with his two late associates to recover the debt due the firm, a position which is manifestly without foundation. I repeat, the discharge of a debtor under the Code of Civil Procedure operates as a discharge only and does not bring with it, as incidental thereto or otherwise, any right of action which he may have had before abandonment. I

am therefore of opinion for this reason that the action should have been dismissed.

There is, however, another ground upon which I think the plaintiff must fail. As already stated, the effect of abandonment by operation of law was to transfer to the curator all the property and rights of the firm as a firm, and of each individual member of it. The transfer from the curator to MacLean was intended to give to MacLean every asset which under the abandonment had become vested in the curator, and in my view the transfer of the 6th November, 1891, from the curator to MacLean, gives full effect to that intention. The order of the Superior Court of the 13th October, 1891, authorized the curator "to transfer the assets and estate generally of the said firm to the said John MacLean," and the instrument of transfer purports to transfer and make over unto the said John MacLean "all the assets and estate generally of the said late firm of John MacLean & Co. as they existed at the time the said curator was appointed."

It would be unreasonable to suppose that there was an intention, either on the part of the court authorizing the transfer or on the part of the parties themselves, that while what might be termed the partnership assets were to be affected the individual assets of the partners were still to remain outstanding in the curator, and it is doing no violence to the language of the instrument to hold that the expression, "all the assets and estate generally of the said late firm of John MacLean & Co. as they existed at the time the said curator was appointed," included the separate estate of the individual partners, as well as the joint estate of the partnership itself. That, I think, is the proper construction to give the instrument. It would follow, therefore, that inasmuch as the claim now sued on was a right of action which Stewart had at the time of the

1895

MACLEAN v. STEWART.

Sedgewick J.

abandonment, it was a right of action which became vested in MacLean by virtue of the transfer. It may be, and the learned Chief Justice throws out a suggestion to that effect, that the rights of the partners *inter se* were not clearly and distinctly in contemplation when the final arrangements were being made. It is clear, however, to my mind that MacLean, in offering to pay a composition to his creditors, never contemplated that he would be obliged to pay in full any indebtedness from himself to his co-partners. If such had been the intention there should have been a clear indication of it in the instrument itself.

There is a further ground which, in my view, necessitates the allowance of this appeal. As I have already stated MacLean, as the purchaser of the firm assets as between himself and Stewart, must be deemed to be a stranger. Supposing a real stranger, one who had never had any relations whatever with the firm, had purchased the estate and paid off, whether by a composition or in full, the claims of every creditor, he would thereupon as a result become possessed of all the rights of such creditors, as well as of the curator himself. In other words he would become subrogated to their rights. In my view MacLean occupies exactly the same position. Having liquidated all the partnership debts with his own moneys the debts which before were due from the firm to the creditors became due to him personally. So far as Stewart is concerned it makes no difference whether MacLean paid fifty or one hundred cents on the dollar. MacLean becomes in effect a creditor of the firm, not for the amount of the composition paid by him, but for the full amount of the indebtedness which that composition represented. The evidence does not, I think, show the exact amount of money which as a matter of fact MacLean did pay. It does show, however, that the firm's direct and indi-

1895

MACLEAN v. STEWART.

Sedgewick J.

direct liabilities on June 30, 1891, were $281,246.41, of which the direct liabilities amounted to $164,935.91. Assuming this statement to be correct, and that he paid off this latter sum (which he in some way must have done), he would be deemed a creditor of the firm for that sum, and not, as I have already stated, for the amount he paid in liquidation of it. Now when this action was brought MacLean had either paid, or was under an obligation to pay, that indebtedness. And when Stewart, in this action, said in effect to him:

> You, MacLean, at the time of the dissolution of the firm had not only withdrawn from it your original capital, but $29,079.31 as well, pay me my proportion of that overdraft

MacLean had a right to reply, as he has in effect replied:

> It is true that I had overdrawn to the extent you mention at the time of the dissolution, but since that date I have refunded it five times over. I have paid out of my own pocket (it does not concern you how) $164,935.91 to the creditors of the firm, and if there is to be litigation between us it is from you and not from me that payment is to come.

Stewart may reply, and does reply:

> Yes, but for that payment you got in consideration the assets of the firm. "Assets," you admit in reply, "representing in value only fifty per cent of the liabilities. I have more right to hold you responsible for your proportion of the difference between the value of these assets and the amount of the debts I have paid than you have to call upon me for a dollar.

This supposed conversation, I think, correctly represents the legal position of the parties, and it shows at least that the state of the accounts, as they appeared from the partnership books, affords no indication as to the rights of the parties as they existed when MacLean got his transfer and paid off the partnership debts. It further gives strong force to the argument of appellant's counsel that the action was wrongly brought and that the procedure prescribed by article 1898 of the Code should have been followed.

1895

MACLEAN v. STEWART.

Sedgewick J.

On the whole, I am of opinion that the appeal must be allowed and the action dismissed, the appellant to have costs in all the courts.

KING J.—I am of opinion that this appeal should be allowed with costs, and the action dismissed with costs in the Superior Court.

Appeal allowed with costs and action in Superior Court dismissed with costs to appellant in all courts.

Solicitors for the appellant: *Atwater & Mackie.*

Solicitors for the respondent: *Macmaster & Maclennan.*

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

AND

FREDERIC C. JARVIS (PLAINTIFF).....RESPONDENT.

1894
Oct. 2, 3.
1895
*Jan. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trespass—Damages—Easement—Equitable interest—Municipal by-law, registration of—Notice—Registry Act, R.S.O. ch. 114.

R.S.O. [1877] c. 114 s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration but applies to all interests.

If the owner of land gives permission to the municipality to construct a drain through it the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevokable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchase for value without notice. *Ross* v. *Hunter* (7 Can. S.C.R. 289) distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario (1), affirming the judgment in the High Court of Justice (Queen's Bench Division) by which the appellants were restained from maintaining or using a sewer through the lands of the respondent.

The action was brought for wrongful entry by the workmen of the city of Toronto upon the plaintiff's land for the purpose of repairing a sewer constructed by the village of Yorkville, now part of the city of Toronto.

The sewer was constructed under the following circumstances: One Severn was owner of the land in

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

(1) 21 Ont. App. R. 395.

1894

THE CITY OF TORONTO v. JARVIS.

1877, and requested the council of Yorkville to construct a sewer in the course of an open drain which ran across his land, and into which the sewage was discharged. The mutual advantage to the parties was that the corporation got a right to lay the sewer in Severn's land, and the latter was relieved from the offence occasioned by the open drain. The sewer was enlarged subsequently, and has remained there ever since. In the meantime, by a series of conveyances, the lands through which the sewer runs became vested in the respondent.

Armour Q.C. and *H. M. Mowat* for the appellant. The council of Yorkville entered with the leave of the owner, who waived the formality of a by-law; they were not compelled to take proceedings *in invitum*, nor to pass a by-law to justify this entry, but by taking and using the land for a sewer they became established in their rights as long as they chose to remain.

The interest of the municipality was a legal right not necessary to be evidenced by an "instrument," and not in fact evidenced by an "instrument" capable of registration, and was therefore not within the registry laws. *Israel* v. *Leith* (1). The case of *Ross* v. *Hunter* (2), is thus not in point.

Both the Municipal Act and the Registry Act 56 Vic. ch. 21, sec. 83, require the registration of by-laws affecting highways, but leave others untouched.

It is clear that there may be interests valid without registration. *McMaster* v. *Phipps* (3); *Harrison* v. *Armour* (4); *White* v. *Neaylon* (5).

Having with the license of the owner entered for the very purpose of expending money in lasting works, and expended it, the license originally given could not

(1) 20 O.R. 361.
(2) 7 Can. S.C.R. 289.
(3) 5 Gr. 253.
(4) 11 Gr. 303.
(5) 11 App. Cas. 171.

and cannot be revoked without notice to the licensee, and compensation for the expenditure. A parol license executed, is in a different position from a parol license for a recurring act or a series of acts. *Liggins* v. *Inge* (1); *Winter* v. *Brockwell* (2); *Plimmer* v. *Mayor of Wellington* (3). An executed license cannot be revoked at will: *Wallis* v. *Harrison* (4); *Ramsden* v. *Dyson* (5).

Moss Q.C. and *W. D. Macpherson*, for respondent. Whatever may have been the circumstances attending the construction of the sewer many years ago there is not now, and has not been for many years, anything to show that the sewer had been made use of nor in any way to indicate the presence of the sewer in or on the premises. No by-law was passed in reference to the sewer nor was any grant of the land for the purpose made. The respondent was and is a *bonâ fide* purchaser for value without notice or knowledge of the sewer referred to. He first became aware of its presence when the city's employees entered upon his land and were digging it up in order to get at and repair the sewer. He protested and upon their refusal to discontinue the present action was brought.

As there appears to have been no conveyance what the former owner gave the corporation amounted in law to a mere license to construct and maintain this sewer through his land during his life at the most, or possibly at his pleasure, or during his ownership of the property.

Incorporeal rights cannot pass by parol license without a deed. *Fentiman* v. *Smith* (6); *Hewlins* v. *Shippam* (7).

The maintenance of the present sewer cannot be justified by the license. *McMillan* v. *Hedge* (8); *Ross*

(1) 7 Bing. 682.
(2) 8 East 308.
(3) 9 App. Cas. 699.
(4) 4 M. & W. 538.
(5) L. R. 1 H. L. 129.
(6) 4 East 107.
(7) 5 B. & C. 221.
(8) 14 Can. S. C. R. 736.

1894

THE CITY OF TORONTO v. JARVIS.

v. *Hunter* (1); Wood on Nuisance (2). Any license granted was revocable and was revoked by the annexation of Yorkville to Toronto increasing the servitude, by notices given by respondent, and by the conveyance of the lands. *Roberts* v *Rose* (3); *Wallis* v. *Harrison* (4); Goddard on Easements (5).

The right of the city of Toronto was an equitable interest within the meaning of section 85 of the Registry Act (R. S. O. c. 114) and as against a registered title is invalid. This case is governed by the case of *Ross* v. *Hunter* (1) There is no substantial difference between the provisions of the Nova Scotia Registry Act and the Ontario Registry Act, except that in section 83 there is a clause reaching the case of equitable interests.

The judgment of the court was delivered by—

THE CHIEF JUSTICE.—In 1877 John Severn was seized in fee of the *locus in quo* and in that year gave permission to the corporation of Yorkville, now represented by the appellant, to construct a drain through the land in question for the purpose of carrying off surface and other water. The municipality made the drain accordingly.

In 1879 John Severn sold the land to his son George Severn. John Severn died in February, 1880. The sale to George Severn was completed before the death of John Severn. The deed by which the property was conveyed to George Severn was not put in evidence, and it does not very clearly appear whether it was executed by John Severn himself, or by those who took under his will. The parol evidence of George Severn, given on cross-examination by the appellant, is that

(1) 7 Can. S. C. R. 289.
(2) 2 ed. pp. 380-383.
(3) L. R. 1 Ex. 82.
(4) 4 M. & W. 538.
(5) 4 ed. p. 525.

the sale to him was carried out about the 28th of January, and that his father died on the 8th of February, 1880. By this I understand that there was a conveyance to him on the first mentioned date. It does not appear to have been disputed that this conveyance was registered; the title is spoken of in the judgment of the Court of Appeal as a registered title, and the only question as regards the registry laws seems to have been whether the interest of the municipality was an interest to which the registry laws applied, and I find it nowhere suggested that if it was there had not been such registration of the deeds as to bring the case within the operation of those laws.

George Severn, having acquired title as before mentioned, made certain mortgages. Under a power of sale contained in some of these mortgages the late Sheriff Jarvis, the father of the respondent, became a purchaser of the property for valuable consideration. Subsequently the land became vested in the respondent under a conveyance from the trustees of his father's will. These mortgages and the deed to the respondent were all duly registered.

The city authorities having entered and performed certain works in connection with the drain the respondent brought the present action to recover damages for trespasses committed in so entering; also damages for maintaining the drain.

The appellant pleaded the agreement with John Severn. The respondent replied that he and those under whom he claimed were purchasers for value and set up the registry laws.

The agreement by John Severn with the municipality of Yorkville, under which the drain was constructed, was proved beyond doubt. It was, however, also established that there was no by-law of the Yorkville council authorizing the taking of the land for the

1895

THE CITY OF TORONTO v. JARVIS.

The Chief Justice.

drain. Further, it was established by the evidence of George Severn himself, that he had direct notice of the agreement between his father and the municipality before he purchased.

Upon this state of facts Chief Justice Armour and the Court of Appeal have successively held that the respondent is entitled to recover. Their judgments both proceed upon the ground that the respondent is entitled to the benefit of the registry laws.

It is not necessary that we should define with exactitude the nature of the interest in the land taken by the municipality under the agreement with John Severn. Whether that agreement is to be taken as conferring the property in the land required and taken for the purposes of the drain, or whether it is to be considered as conferring a *quasi* easement for that purpose, or was a mere license, can make no difference. In either case it was an interest in land to which the registry laws apply.

If it was the intention to give a title to the property in the land or an easement, it matters not which, then the agreement must be deemed to have been a contract for an interest in land partly performed, one which, being for the valuable consideration involved in the expenditure on the drain, a court of equity would have decreed specific performance of. If it was a mere license it would have been revocable at first, but if not countermanded before money had been expended in the execution of the purpose for which it was conferred it would have by that expenditure become irrevocable, and therefore an interest in land. *Plimmer* v. *Mayor of Wellington* (1).

Under the original registry law equitable interests not created in writing, and therefore not susceptible of registration by memorial according to the machinery

(1) 9 App. Cas. 699.

provided by the act, were held not to be within the registry laws, and so not liable to be defeated by the registration of a subsequent grantee for value from the same grantor. A familiar example of this principle was afforded by the case of a mortgage by deposit of the title deeds. If, however, there was a writing which might have been registered it was subject to be avoided by subsequent registration, although a mere equitable title might have been conferred by it. It is not, therefore, accurate, at least under the old law, to confound equitable interests with interests not conferred by a written title, and for that reason not capable of registration.

By the Revised Statutes of 1877, c. 114, s. 83, it was, however, enacted that:

> No lien, charge or interest affecting land shall be deemed valid in any court in this province, as against a registered instrument executed by the same party, his heirs or assigns.

This provision is clearly not restricted to interests derived under written instruments susceptible of registration, but it applies to all interests, including equitable mortgages, vendor's liens, parol contracts partly performed, and interests having their origin in verbal agreements such as the present, if it is to be viewed as a right to maintain the drain under an irrevocable license.

I can see no ground for confining the operation of this clause to interests in land derived under some written title.

The consequence is that the respondent's registered title must prevail against the interest of the appellant derived under the parol agreement with John Severn, unless something has occurred to disentitle him to the benefit of this eighty-third section.

It is true that George Severn had notice which would have disentitled him to set up priority obtained by re-

1895

THE CITY OF TORONTO v. JARVIS.

The Chief Justice.

gistration. This, however, was a mere personal disqualification and cannot affect those claiming under him through a registered chain of title as purchasers for value having no notice. Within this last description the respondent is clearly included.

Then it is not immaterial to notice a peculiarity in the wording of the 83rd section which does not make it essential that the registered instrument should have been executed by the grantor who conferred the unregistered interest, or even by his heirs, but gives priority even where the registered deed has been executed by the "assigns" of the party who conferred the prior unregistered interest.

The case of *Ross* v. *Hunter* (1) has, in my opinion, no application. That was a very plain case since the grantee, who had in that case omitted to register, claimed under a deed which could have been put on the registry in the ordinary manner.

The appellant also insisted on the Municipal Act applicable at the date of the agreement with John Severn in 1877. That act was the Municipal Act of 1873, cap. 48. By sec. 372 subsec. 10, it was enacted that—

> The council may pass by-laws for entering upon, breaking up, taking and using any land for the purposes of a sewer.

It was argued that such a by-law did not require registration and that the case was therefore altogether outside the registry laws.

If there had been a by-law authorizing the taking of this land I should have agreed in this proposition. There was, however, no by-law and for that reason there was no expropriation under the statute. Had there been a by-law a certain publicity would have been given to the title of the municipality to the land taken up by the sewer, which is entirely lacking in the absence of such an ordinance. I cannot, therefore,

(1) 7 Can. S.C.R. 289.

agree with the appellant's contention that we are to ascribe the appellant's title to the Municipal Act, treating the by-law as having been waived, and therefore to hold the interest as one conferred by a title paramount to the registry laws. I entirely agree with what is said on this point by Mr. Justice Osler in delivering the judgment of the Court of Appeal.

It is objected to the judgment which was entered by the learned Chief Justice of the Queen's Bench that it was too large, since, as it was contended, it would entitle the respondent to recover damages not only in respect of his own time but also for damages accrued in the time of his predecessors in title. This objection is wholly unfounded. Any damages which accrued prior to the respondent's acquisition of title cannot be said to belong to him. Then the terms of the judgment in directing a reference are that it be referred to the referee—

> to ascertain the loss and damages (if any) sustained by the plaintiff by reason of the illegal entry and wrongful acts of the defendants complained of in the statement of claim herein.

This clearly confines the reference to an inquiry in respect of damages accrued in the plaintiff's own time.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. M. Mowat.*

Solicitor for the respondent: *W. D. Macpherson.*

1894
*Oct. 27.
1895
*Mar. 11.

GEORGE GOODERHAM AND CHARLES STARK (PLAINTIFFS).... } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Public highway—Registered plan—Dedication—User—Statute, construction of—Retrospective statute—46 V. c. 18 (O).—Estoppel.

The right vested in a municipal corporation by 46 V. c. 18 (*O*) to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court by which a perpetual injunction to prevent the city from entering on plaintiffs' land was refused.

A full statement of the facts and questions at issue in this case appears in the judgment of the court delivered by Mr. Justice Gwynne.

Nesbitt and *McKay* for the appellants. At common law exhibiting a plan of streets and even selling lots according to said plan would not amount to dedication. *Carey* v. *City of Toronto* (1); *Heriot's Hospital* v. *Gibson* (2).

There must be an acceptance by the public. *Cubbit* v. *Maxse* (3).

---

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

(1) 11 Ont. App. R. 416. (2) 2 Dow 301.
(3) L. R. 8 C. P. 704.

1894

GOODERHAM v. THE CITY OF TORONTO.

The city cannot invoke the aid of the statute 50 Vic. ch. 25, sec. 62 (O.) as its requirements have not been complied with.

Robinson Q.C. for the respondent referred to *Rowe* v. *Sinclair* (1).

The judgment of the court was delivered by:

GWYNNE J.—The plaintiff Gooderham may be regarded as sole appellant and sole plaintiff, for his co-plaintiff Stark claims only as his tenant.

This was an action instituted by the plaintiff to restrain the city of Toronto from entering upon and trespassing upon land described in the statement of claim as being composed of one large field containing about 22½ acres which, for a period exceeding 30 years, had been fenced in on all sides except the south where the land abuts upon the waters of Ashbridge's Bay, being a part of lot no. 14 in the broken front of the township of York, lying south of South Park Street or Eastern Avenue in the city of Toronto and bounded on the east by the line dividing lot no. 13 from lot no. 14 in the broken front of the said township, and on the south by the boundary line established between the several owners of the broken front lots and the grant by the Provincial Government to the city of Toronto, and on the west by lands owned by John Smith and leased to Gooderham and Worts, limited, of which piece of land so inclosed and fenced in as one field for a period of over 30 years the plaintiff Gooderham claimed to be seized in fee simple, save as to a small piece of about ⅕ of an acre near the south-west corner of the said field of which he claimed to be possessed as tenant thereof for a period of 42 years from the 22nd day of January, 1885, from John Smith the owner thereof in fee. The defendants claim the right to enter upon the said land

(1) 26 U. C. C. P. 233.

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

and to take possession of parts thereof which, they claim, do constitute certain public streets and highways in the city of Toronto placed under the jurisdiction and control of the defendants by the act known as the Municipal Act and the acts passed in amendment thereof.

The case may be said to rest wholly upon certain admissions made by the respective parties to the suit, although much evidence was adduced. The plaintiffs case was opened upon an admission signed by the counsel and solicitor of the defendants as follows:

> That the plaintiff George Gooderham is, and those from whom he has derived title by conveyance have been for the past twenty-five years, in occupation of part of the east half of lot number fourteen in the broken front concession in the township of York, bounded on the east by the line between lots numbers thirteen and fourteen in the said township; on the south by the northern boundary line of the lands granted by the Crown to the defendants by patent dated May 18th, 1880; on the west by lands owned by one John Smith and the Grand Trunk Railway Company; and on the north by the south limit of Eastern Avenue, formerly South Park Street. That the said lot comprises one large field containing about twenty-two and one-half acres, and fenced in on the north, west and east sides, and that such field has been so fenced for the past twenty-five years.

The place where, and the only place where, the Grand Trunk Railway bounds the said field on the west, as is said it does in the said admission, is where, as appears by the plan hereinafter mentioned produced in evidence, the fence along the northern side of the said field, that is, along the southern limit of South Park Street, comes in contact with the eastern limit of the said railway.

The learned judge, Mr. Justice Ferguson, who tried the case has found in his judgment that in point of fact it was established in the evidence before him that until the making of the lease by Gooderham to Stark the land in question was occupied by the plaintiff

Gooderham, and those under whom he claims, as a pasture field for cattle and continually fenced in as such field for a period of thirty years or more.

Assuming it to have been so occupied and enclosed for thirty years the possession of the plaintiff Gooderham, and of those under whom he claims, and so the date at which his commencement of title would begin, would reach back to the year 1859, and assuming the field to have been so occupied and fenced for the period only of twenty-five years, that would date the commencement of his title to the year 1864. Now such being admitted to be the title of the plaintiff Gooderham, the whole onus is cast upon the defendants of showing the pieces of land over and upon which they claim control and right of entry to be public streets and highways.

The matters of fact upon which the defendants rest their claim, as gathered from the admissions of the parties and the facts in evidence, are as follows:—

On the 1st of July, 1853, the Honourable Henry John Boulton, then of the city of Toronto, being seised in fee simple of about 35 acres of the east half of the broken front no. 14 in the first concession from the bay of the township of York, conveyed the same by deed of bargain and sale, by a particular description therein, to James Boulton and Thomas Saulter in fee simple, who, upon the same day, by an indenture of bargain and sale by way of mortgage, reconveyed the same land to the said Henry John Boulton in fee simple, subject to redemption upon payment of the full sum of £3,000 of lawful money of Canada, being the consideration money mentioned in the indenture of bargain and sale executed to them by the said Henry John Boulton, together with interest thereon at the days and times in the said indenture of mortgage mentioned. While the said James Boulton and Thomas Saulter

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

were so seized of the said lands, subject to the said indenture of mortgage, the Grand Trunk Railway Company, in virtue of the powers vested in them by law, located their railway across the said land. This location of the railway caused considerable speculation and gave birth to expectations that the land might be made available for sale in small lots. The evidence upon this subject is that of John Smith himself, who says:

> The railway caused this excitement and this property to be laid out. Mr. Saulter and James Boulton bought this from Henry John as a speculation, and they were going to lay it out to the railway.

Smith owned the west half and Saulter and Boulton the east half of the lot, and the latter asked Smith if he would let his part be shewn so as to make it look like a good advertisement, to which he replied that he would have no objection to that, but that he would not consent to have his part registered because he wanted to utilize his land in farming, and did not want to lay it out in lots. Then he says that when Saulter and Boulton went to lay out their part, they found that at the point where their half abutted on Smith's half on Queen Street they could not have a corner lot unless they could get land from Smith for a road, and so, as Smith says, they said to him:

> Mr. Smith, will you let us have the whole of the road and we will give you ten lots on our part.

To this proposition Smith agreed. James Boulton and Thomas Saulter then caused a plan to be made of the whole broken front lot, including Smith's half, showing the whole subdivided into town lots and numbered, with spaces for streets for a proposed sale by auction contemplated and advertised to take place upon the 9th day of August 1854.

No success appears to have attended such exposure to sale by auction if it ever took place. The plan so

prepared was filed in the registry office of the county of York on or about the 26th day of December, 1854, and numbered 105. By an indenture bearing date the 5th day of May, 1855, James Boulton and Thomas Saulter granted and Henry John Boulton confirmed unto the said John Smith his heirs and assigns ten of the said lots as laid down on the said plan and numbered as follows: 141, 142, 143, 153, 234, 242, 253, 342, 346 and 351. The above lot numbered 253 was inserted plainly by mistake for it is on the plan as situate upon Smith's own or west half of the broken front lot. The lot intended as will appear hereafter was no. 243. The consideration of the deed is stated therein to have been as follows:

> In consideration of the said John Smith having dedicated to the public and for the benefit of the said parties of the first part a street sixty-six feet wide as the same is laid down on the plan of the survey of that piece or parcel of land formerly known as lot number fourteen in the broken front of the township of York now forming part of the city of Toronto and owned by the said John Smith, James Boulton and Thomas Saulter, such street extending from the Kingston road to the south side of Front street produced east and also in consideration of five shillings of lawful money of Canada to them paid by the said John Smith.

By a decree of the Court of Chancery bearing date the 8th day of May, 1860, and by two final orders bearing date respectively the 17th day of January, and the 27th day of June, 1861, all the estate and interest of the said mortgagors, James Boulton and Thomas Saulter, their heirs and assigns, in the whole of the east half of the said broken front lot number 14, save and except in the lots 141, 142, 143, 153, 234, 242, 243, 342, 346 and 351, these being the lots in which Smith was interested, and excepting also the lots numbered on the said plan as numbers 161, 162, 163, 167, 168 and 189, was absolutely foreclosed. To whom or when these latter six lots were sold does

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

not appear, nor do I think it at all important as affecting the point in issue in this case, for they are all of them on that portion of the broken front lot which lies north of South Park Street, as shown on the said plan. Nos. 161 and 162 front on Queen Street and abut on the east upon the Grand Trunk Railway; 163 lies immediately to the rear of them, abutting on the east on the Grand Trunk Railway, and on the west on a street designated on the plan as Strange Street; lot 167 is shown on the plan to front upon a street designated D'Arcy Street, its north-easterly corner being distant 152 feet from Queen Street; 168 lies immediately to the south of 167, its north-easterly corner being distant 202 feet from Queen Street; lot number 189 fronts on Queen Street, having a frontage of 51 feet, 5¼ inches, and a depth of 132 feet; of the other lots excepted from the decree of foreclosure, four of them, that is to say, 141, 142, 143 and 153, are situate north of South Park Street and the Grand Trunk Railway, and the other six south of South Park Street, as shown on the said plan.

Now, upon the foreclosure of the mortgage by Henry John Boulton, it was quite competent for him to have inclosed the whole of the land comprised in the decree of foreclosure and lying to the south of South Park Street and to have abandoned the plan wholly as to such part without the let, suit, trouble, claim, demand, interruption or denial of any person whomsoever, subject only to such claim as John Smith had in virtue of his being grantee as aforesaid of the said six lots lying south of South Park Street. No person whatever other than the said John Smith could, under the circumstances appearing in evidence, have had any right or interest in law to dispute such action upon the part of the said Henry John Boulton, his heirs or assigns; and such the estate and claim of the said John Smith

his heirs and assigns was liable to be defeated by dispossession for the period limited for making an entry upon or bringing an action or suit for the recovery of real estate. That it was Mr. Henry John Boulton who first inclosed the field which the plaintiff Gooderham and those under whom he claims are admitted to have had in their occupation as a pasture field for twenty-five years prior to December 1889, there is no reason whatever for entertaining a doubt.

Then it appears that by an indenture of bargain and sale bearing date the sixteenth day of March eighteen hundred and sixty-five, the said Henry John Boulton granted, bargained and sold to Clarke Gamble his heirs and assigns the whole of that part of the east half of the said broken lot as described in the decree of foreclosure, and by an indenture bearing date the 23rd day of November, 1870, the said Clarke Gamble conveyed the same land by the same description to George Leslie his heirs and assigns. Now although the description in these deeds was precisely the same as that in the decree of foreclosure still the field in question which was occupied throughout as a pasture field contained within its fences the whole of the east half of the lot no. 14 south of South Park Street, including the lots numbered 234, 242, 243, 342, 346 and 351, so as aforesaid conveyed to Smith, and also so much of the west half of the said broken front lot as consisted of sixty-six feet in width lying south of South Park Street and abutting upon the westerly limit of the east half of the said lot; this is apparent from Smith's own evidence and from an indenture of lease produced in evidence bearing date the 17th July, 1866, whereby Smith demised to William Gooderham, James G. Worts and George Gooderham for 21 years —

all that certain tract of land situate lying and being in the ward of St. Lawrence in the said city of Toronto, containing 50 acres

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

more or less, being the farm now in the actual occupation of the said lessor divided into two several parcels by the Grand Trunk Railway, parcel number one lying north of the said inclosed railroad containing about thirty acres and parcel number two lying south of the said railroad, containing about twenty acres, and being composed of the west half of lot number fourteen, and lot number fifteen in the broken front formerly in the township of York, now the city of Toronto, and bounded as follows: on the north by the Kingston road, on the south by the Marsh and waters of the Bay of Toronto, on the east by land owned by the trustees of Harriet E. Gamble, wife of Clarke Gamble, and on the west by the River Don.

In his evidence Smith explains that the piece demised was bounded on the east by a fence which ran as now along what appears on the above map to be the west limit of Saulter Street, and that the land spoken of in the lease as owned by the trustees of the wife of Clarke Gamble is the property now in litigation, and he says that when he executed that lease he knew that the portion designated on the plan as Saulter Street, lying to the south of the railway, was enclosed within the field occupied by Gamble as pasture and by Leslie after him; of the fact that it was so occupied there does not appear to be any doubt. Now while Leslie was so in occupation of the said field, and on the 21st December, 1874, the Ontario Act 38 Vic. ch 16, was passed, whereby it was enacted that as to all persons resident in the Province of Ontario no person after the first day of July, 1876, should make any entry or bring any action or suit to recover any land, &c., but within ten years next after the time at which the right to make such entry or to bring such action or suit should have first accrued.

The evidence, therefore, justifies the conclusion that on the 13th day of March, 1884, when Leslie executed the indenture of that date whereby he conveyed all the land south of South Park Street therein described to Edward Blong who was acting in the transaction as the agent of the plaintiff Gooderham, he was

seized by statutory title of an absolute estate of inheritance in the whole of the land south of South Park Street, constituting the field which is admitted and proved to have been in 1889 in the occupation of the plaintiff Gooderham and those under whom he claims as one pasture field fenced in on every side, for a period exceeding 25 years absolutely freed and discharged from every estate, title, claim and demand whatsoever of the said John Smith and of all other persons whomsoever. The land, however, which is purported to be conveyed by the deed from Leslie to Blong is described therein as being composed of a part of the said broken front lot no. 14 particularly described as follows:

> Commencing at the intersection of the south side of South Park Street or Eastern Avenue with the division line between the broken front lots thirteen and fourteen, thence southerly along the said division line one thousand three hundred and sixty feet more or less to the boundary line established between the several owners of the broken front lots and the grant lately made by the Provincial Government to the city of Toronto, thence south sixty-one degrees fifty-two minutes twenty-two seconds west, on an astronomical course along such boundary line seven hundred feet more or less to the intersection with the prolongation southerly of the east side of Saulter Street, then northerly along the east side of Saulter Street one thousand four hundred and ninety feet more or less to the south side of South Park Street or Eastern Avenue, then easterly along the south side of the last mentioned street six hundred and eighty feet four inches more or less to the place of beginning, containing twenty-two acres and thirty-five hundreths of an acre and comprising among other lands—

the several lots which are enumerated therein according to plan no. 105 registered in the registry office of the county of York. Now upon the evidence of Smith and the admission that Gooderham and those under whom he claims had had in 1889 occupation of the whole of the land in respect of which the present litigation has arisen lying south of South Park Street fenced in as one pasture field for 25 years it is plain that Leslie and those under whom he claimed had such occupation

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

in 1884 for 20 years of which period Leslie himself had exclusive occupation for 14 years, so that he had good right and title when he executed the deed of the 13th March, 1884, to convey the whole of the said pasture field, there can I think be little doubt that the intention of the parties to that deed was to convey the pasture field of which Leslie and those under whom he claimed had such continuous possession, and that the western boundary of the piece as described in the deed being stated to be the eastern side of Saulter Street produced, arose from the draftsman assuming that the fence along the west side of the field was on such east side of Saulter Street produced This by Smith's evidence, however, appears not to have been the case; but adopting his evidence as correct, namely, that the fence is and always has been along the west side of Saulter Street as shown on the plan then, although it must be admitted that in such case there is a piece of land east of the fence, and which was always occupied by Leslie and those under whom he claimed as part of the one inclosed pasture field which is not covered by the description in the deed executed by Leslie, still Gooderham's title to such intervening space or piece of land upon his taking possession thereof in succession to Leslie, would have been as appears by the evidence a perfectly good indefeasible statutory title had he chosen to insist upon such title. However, by an indenture bearing date the 22nd day of January, 1885, the said John Smith in consideration of sum of one thousand dollars paid to him by the plaintiff Gooderham did grant unto the said plaintiff to have and to hold to the sole use of himself, his heirs and assigns, for ever

all and singular these certain parcels of land and premises, situate, lying and being in the city of Toronto, being part of broken lot no. 14, in front of the first concession from the Bay, composed of lots numbers 234, 242, 243, 342 and 351, according to registered plan 105,

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

and by said indenture be released to the said plaintiff all his claims upon the said land.

The operation of that release is by statute declared to be,

to exonerate and discharge the releasee from all claims and demands whatsoever which the releasor might or could have upon the releasee in respect of the said lands or upon the said lands.

And by an indenture of lease of the same date he demised and let to the said plaintiff the "lot 346" according to registered plan number 105 to have and to hold for the term of 21 years, to be computed from the said 22nd day of January, 1885, which term was further extended by an indenture bearing date the 21st day of December, 1888, for a further period of 21 years, or in all 42 years from the 22nd January, 1885.

It cannot, I apprehend, be doubted that at the time of the passing of the Ontario Act 50 Vic. ch. 25, that is to say, in April, 1887, the plaintiff Gooderham was solely and absolutely seized of an indefeasible estate of inheritance in fee simple in the whole of that part of the east half of the said broken front lot no. 14, which lies south of South Park Street, and also in so much of the west half of that lot south of South Park Street as is designated upon the said plan as Saulter Street, the same having at that time been held inclosed with the east half of the said lot south of South Park Street by the said plaintiff and those under whom he claims for 23 years, freed and absolutely discharged from all claims whatsoever of all persons whomsoever, save only such private claim as the said John Smith could assert by reason of the said plaintiff having accepted from him the said lease of the said lot number 346; what may be the nature and extent of such claims we are not called upon to determine in the present case; that is a matter in which John Smith is himself alone concerned, and which can be entertained

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

and adjudicated upon only in a suit properly instituted by himself; what we are concerned with at present is only a claim asserted by the defendants, the city of Toronto, on behalf of the public, for which there is not any foundation whatever, unless it can be established, as is contended that it can be and is, upon a true construction of the Ontario statute 50 Vic. ch. 25.

In order to arrive at a true construction of that statute the most material element to be considered is the condition in which the land in respect of which the litigation arises, and the plaintiff Gooderham's title thereto, was at the time of the passing of the said Act.

The statute law bearing on the question under consideration before the passing of the said act, was as follows:

By the Revised Statutes of Ontario of 1877, ch. 146, sec. 67, which was simply a re-enactment of a law in force ever since municipal institutions were established in Canada in 1849, it was enacted as follows:—

> Whereas towns and villages in Ontario have been, or may be, surveyed and laid out by companies and individuals, and by different owners of the land comprising the same, and lands may have been or may be sold therein according to the surveys and plans thereof; therefore all allowances for roads, streets or commons which have been surveyed in such towns and villages and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, shall be public highways, streets and commons, and all lines which have been or may be run and the courses thereof given in the survey of such towns and villages and laid down on the plans thereof, and all posts or monuments which have been or may be placed or planted in the first survey of such towns and villages to designate or define any such allowances for roads, streets, lots or commons, shall be the true and unalterable lines and boundaries thereof respectively.

Sections 524 and 531 of the Ontario statute 46 Vic. ch. 18, which are but re-enactments of similar sections

which had been in force ever since the passing of the act of the late province of United Canada in 1858, viz, 22 Vic. ch. 22, secs. 300, 322 and 323, were enacted for the purpose of determining and defining what roads were public roads and the rights and liabilities of municipal corporations in respect thereof. 46 Vic. ch. 18 enacts as follows:

Sec. 524. All allowances made for roads by the crown surveyors in any town, township or place already laid out or hereafter laid out, and also all roads laid out by virtue of any statute or any road whereon the public money has been expended for opening the same or whereon the statute labour has been usually performed, or any roads passing through the Indian lands, shall be deemed common and public highways unless where such roads have been already altered or may hereafter be altered according to law.

Sec. 531. Every public road, street, bridge and highway shall be kept in repair by the corporation and in default of the corporation so to keep in repair the corporation shall besides being subject to any punishment provided by law be civilly responsible for all damages sustained by any person by reason of such default but the action must be brought within three months after the damages have been sustained.

2. This section shall not apply to any road, street, bridge or highway laid out by any private person, and the corporation shall not be liable to keep in repair any such last mentioned road, street, bridge or highway until established by by-law of the corporation, or otherwise assumed for public user by such corporation.

The act then repeats sec. 1 of 13 & 14 Vic. ch. 15, as still in force as follows:

The right to use as public all roads, streets, and public highways within the limits of any city or incorporated town in the province shall be vested in the municipal corporation of such city or incorporated town (except in so far as the right of property or other right in the land occupied by such highways have been expressly reserved by some private party when first used as such roads, streets or highway and except as to any concession road or side road within the city or town where the persons now in possession or those under whom they claim have laid out streets in such city or town without any compensation therefor in lieu of such concession or side road.)

From these sections it appears to be clear, 1st, that the right of the public or a municipal corporation to

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

use as a public highway a road or street laid out by a private person on his own property applied only to such roads or streets as were in actual use as private roads or ways to property purchased by parties, and fronting on such roads or streets.

2nd. This right was qualified by such reservations as might have been made by the person laying out such road or street when first used as such road or street, showing very clearly, I think, that the user of such road or street as a private road or street was an essential condition precedent to the public or the municipality being in a position to acquire a right to use it as a public highway.

3rd. A private road so in use was liable to be made a public road or highway by the application of public money for keeping it in repair and in a condition fit to be used, but until so converted from a private road or street into a public road or street the municipality were by 46 Vic. ch. 18, sec. 531, declared to be under no responsibility to keep it in repair, or liability to persons injured by its not being kept in a sufficient state of repair. In fine there must have been a private road or street in actual existence and used as a private road in order to its being converted into a public road or highway. Now from the title of the plaintiff Gooderham, as above shown to the inclosed pasture field, of which he and those under whom he claimed had actual occupation for over 23 years at the time of the passing of the Act 50 Vic. ch. 25, sec. 62, no part of that inclosure could then have been acquired for public use as a public road, street or highway, otherwise than by statutory expropriation and payment of compensation to Gooderham for the land taken for such purpose.

The question before us therefore simply is: Does that Act divest Gooderham of the title and right which,

under such title, he had in the lands under consideration immediately before the passing of the Act, and appropriate any part of such, his property, to public use as public streets and highways? It is admitted on all hands that if the Act must be construed as so doing it would work a great injustice to the plaintiff, for which there is no precedent in legislation, and which would be in direct conflict with the provisions of the statute as to the acquisition of private property for public purposes upon payment of compensation.

Mr. Justice Osler, while admitting the injustice which such a construction works, and while recognizing the duty of the courts to avoid, if possible, attributing to the legislature the intention of committing such an injustice, thinks that intention too plainly expressed to leave to the courts any discretion.

Mr. Justice Burton relieves the legislature from the imputation of injustice in a judgment from which, before I should dissent, I should have to give it further consideration if I thought it necessary to the determination of this case that it should rest upon the view there taken. But in my opinion there is really no just ground for imputing to the legislature the unjust intention imputed. The act, properly construed, warrants no such imputation, and in fact is not, in my opinion, open to the construction insisted upon by the defendants and put upon it by the judgment appealed from. The Act, in its sixty-second section, simply re-enacts the provisions of the old section 67 of ch. 146 of R.S.O. of 1877, omitting the preamble, and for the words "towns and villages" substituting the words "cities, towns and villages, or any part thereof," and adding, as a proviso, the enactment in subsection 2 of sec. 531 of 46 Vic. ch. 18 above extracted. The language used in the section cannot reasonably be construed as affecting, or as intending to affect, any

1895

GOODERHAM v. THE CITY OF TORONTO.

Gwynne J.

property so situated as to title as the property of the plaintiff under consideration is, nor, as regards the time past, anything else than roads or streets which at the time of the passing of the act were then already in existence as private roads, to the use of which purchasers of property abutting thereon were then entitled, which roads and streets so in existence the section under consideration subject to the proviso as to the non-liability of the corporation to keep the same in repair converted into public highways. That being, as I think it is, the true construction of the section the appeal must be allowed with costs and a decree be ordered to issue in the court below with a declaration that the lands the right to open which as public highways the defendants claim are not public highways by force of the said statute or otherwise, with costs in the courts below to be paid by the defendants to the plaintiff. A declaration to this effect will be sufficient to protect the rights of the plaintiff, and cannot prejudice any private right if any which the plaintiff's lessor John Smith may have in respect of the said lot no. 346 and by reason of the plaintiff Gooderham having accepted such lease thereof.

Appeal allowed with costs.

Solicitors for the appellants: *Beatty, Blackstock, Nesbitt & Chadwick.*

Solicitor for the respondent: *Thomas Caswell.*

JAMES ARMSTRONG AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPH NASON (PLAINTIFF) ..... RESPONDENT.

1894
*Oct. 17, 18.
1895
*Mar. 11.

JAMES ARMSTRONG AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

ALFRED WRIGHT (PLAINTIFF) ..... RESPONDENT.

JAMES ARMSTRONG AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

WM. J. McCLELLAND (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Sale of lands—Waiver of objections—Lapse of time—Will, construction of—Executory devise over—Defeasible title—Rescission of contract.

An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time."

Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P. a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter the said B.S. and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue.

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

1894

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

At the time of the agreement B.S. was alive and had children. An objection was taken to the title but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance, or rescission of the contract.

Held, reversing the judgment of the court below, that although B.S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement.

APPEAL from decisions of the Court of Appeal for Ontario (1), affirming judgments rendered in the High Court of Justice (2) in favour of the respective plaintiffs.

Certain lands were devised in two separate lots in fee to the testator's two daughters Anne and Bridget, with the following proviso:

"And be it understood that if either of my daughters die without lawful issue the part and portion of the deceased shall revert to the surviving daughter, and in the case of both dying without issue then I authorize my executors, together with the pastor of St. Paul's Church and my brother Michael Murnan, to subdivide the estate, or the proceeds of the estate, amongst my relatives, as those gentlemen whom I have appointed for that purpose may deem right and equitable in their prudence, justice and charity.

The appellants having acquired title through the devisees made agreements for the sale of certain portions of the lands to the respondents respectively. The agreements each contained the provision that the vendee should be obliged to examine the title at his own expense, and should have ten days from the date thereof for that purpose, and should be deemed to have waived all objections to title not raised within that

(1) 21 Ont. App. R. 183. (2) 22 O.R. 542.

1894

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

time, the vendors not to furnish abstract of title, title deeds or copies thereof, or any evidences of title other than those in their own possession. And it was expressly provided that time should be considered the essence of the agreement.

Specific objections to the title were not made within the time specified, and the vendees went into possession of their respective lots, but after the payment of several instalments under the agreements the defects in the title were discovered, and suits were brought by the respondents for specific performance, or in the alternative for rescission of the agreements and the return of the moneys so paid.

Cook and *Macdonald* for the several appellants. The agreement is explicit that all objections to title not made within ten days shall be deemed to be waived. In *Rosenberg* v. *Cook* (1), a similar time limit bound the vendee. See also *Imperial Bank* v. *Metcalfe* (2).

A vendee may agree to take the vendor's title without question and in such case he must accept whatever the vendor is able to give. *Duke* v. *Barnett* (3).

The vendees did not elect promptly to disaffirm and must abide by the contract. *Robinson* v. *Harris* (4). And see also *re Gloag and Miller's Contract* (5); *Bown* v. *Stenson* (6).

Armour Q.C. for the respondents Nason and Wright. It is admitted that the title is defective and the only question is whether or not the plaintiffs are estopped from disputing it by the agreement.

Courts are unwilling to force defective titles on purchasers. *Want* v. *Stallibrass* (7); *Saxby* v. *Thomas* (8); *Brown* v. *Pears* (9).

(1) 8 Q.B.D. 162.
(2) 11 O.R. 467.
(3) 2 Coll. 337.
(4) 21 O.R. 43; 19 Ont. App. R. 134.
(5) 23 Ch. D. 320.
(6) 24 Beav. 631.
(7) L.R. 8 Ex. 175.
(8) 63 L.T.N.S. 695.
(9) 12 Ont. P.R. 396.

1894

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG ve MCCLELLAND.

The failure to object within the time does not oblige the vendees to accept a defective title. *In re Marsh* (1); *McIntosh* v. *Rogers* (2); *Martin* v. *Magee* (3). Waiver by vendee cannot be based on something he did not know. *Blacklow* v. *Laws* (4); *Want* v. *Stallibrass* (5). *Marsh* Q.C. for the respondent McClelland and *Lindsey* for the respondent Wright referred to *Harnett* v. *Baker* (6); *Waddell* v. *Wolfe* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an action by a purchaser of land asking for specific performance of the contract, and that the vendor may be compelled to make out a good title, and in default of his so doing that the contract may be rescinded and part of the purchase money already paid may be ordered to be repaid.

The agreement for the sale and purchase contained the following provision:

> The vendee to examine the title at his own expense and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time, and should any valid objection to the title be raised that the said vendors cannot or are unwilling to remove they shall cancel this agreement and return the money paid. The vendors not to furnish abstract of title, title deeds or copies thereof or any evidences of title other than those in their own possession.

Upon the investigation of the title by the purchaser it appeared that the vendors derived title through Henry Callender who was a purchaser from Bridget Sherwood a devisee under the will of Ann Paterson, and it is upon the construction of this will that the objection to the title now made by the respondent is

(1) 24 Ch. D. 11.
(2) 14 O.R. 97.
(3) 18 Ont. App. R. 384.
(4) 2 Hare 40.
(5) L.R. 8 Ex. 175.
(6) L.R. 20 Eq. 50.
(7) L.R. 9 Q.B. 515.

founded. This question of construction was argued in both the courts below. The testatrix, Ann Paterson, devised the land in question to her daughter Bridget Sherwood and also devised other land to another daughter Ann Wallbridge. The will contained the following direction:

> And be it understood that if either of my daughters die without lawful issue the part and portion of the deceased shall revert to the surviving daughter.

Then followed a gift over in case both daughters should die without issue.

It was held by Mr. Justice Street first, and then by the Court of Appeal, that the proper construction of this devise was that Bridget Sherwood took an estate in fee simple, subject to an executory devise over in case she should die without issue living at her death.

This construction, in which I entirely agree, has not been called in question by the appellant in this appeal.

The fact appeared to be that Bridget Sherwood was alive and had children. The vendors at the time of the sale had therefore an estate in fee simple, defeasible in the event of Bridget Sherwood dying without leaving issue living at her death; they had also the possession of the land.

It was sufficiently established in evidence that no objection to the title was taken within ten days, the time limited by the clause of the contract already stated.

The learned Chief Justice of Ontario and Mr. Justice Osler were of opinion, in accordance with the judgment of Mr. Justice Street, the trial judge, that the objection based on the defeasible nature of the vendor's title was still open to the purchasers, and that they were entitled to a rescission of the contract, whilst Mr. Justice Burton and Mr. Justice Maclennan were of the contrary opinion.

1895

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

The Chief Justice.

It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent on him to make out a good title in fee simple. It is, however, of course, open to the parties to such a contract to agree that the vendor shall be relieved from this obligation. The question before us is whether they have done so by the agreement under consideration.

In carrying out a sale of land the vendor is in all cases bound to deliver an abstract showing a good title unless this duty is dispensed with by the contract. Here this obligation is expressly waived by the vendees. It is therefore not open to us in the present case, as has been done in some English cases, to confine the provision of the contract requiring objections to be taken in the limited time, to objections appearing on the abstract leaving other objections not disclosed by the abstract, but discovered by the vendee, at large, to be taken at any time. In the face of the positive stipulation of the parties this could not be done here without altering the contract.

We are therefore brought face to face with the question whether we can altogether disregard the condition before referred to, for if it does not apply to an objection like that which has been taken it can have no operation whatever. Where the terms of the contract require the vendor to make out a title in fee simple and there is a condition like the present, and it is made to appear that the vendor has nothing at all to sell, not even the possession, it has been held that such an objection going to the "root of the title," as it has been termed, is not precluded by a condition expressed in like terms with that under consideration.

In the case of *Re Tanqueray-Willaume & Landau* (1),

(1) 20 Ch. D. 465.

1895

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

The Chief Justice.

the question arose on a contract of sale entered into by executors, who claimed to have an implied power of sale. Mr. Justice Kay held that the purchaser who did not take the objection within the time required by the condition of sale was nevertheless not concluded by it, saying—

I think the condition in these conditions of sale does not prevent the purchaser from raising an objection of that kind because it goes to the root of the whole matter.

This case was carried to appeal, but the Court of Appeal holding that the vendors had the power of sale which they had claimed to exercise the point in question did not there arise.

Want v. *Stallibrass* (1), was an action by a purchaser to recover his deposit. The vendors were trustees under a will which conferred upon them a power of sale to arise on the death of a tenant for life. It appeared on the face of the abstract that this tenant for life was still alive. The power of sale had therefore not become exercisable, and the court held that the vendors, having nothing to convey, notwithstanding the objection had not been taken within the time required by the conditions of sale, the purchaser was entitled to recover his deposit.

Pollock B. there says :

The basis of the contract is that the vendor has a title, and although parties might by these conditions of sale waive even this I do not think the plaintiff has done so ; on the contrary it appears to me that by failing to give any objection or requisition within the stipulated time he cannot be taken to have waived that which was the foundation of the whole contract, and which on the face of the defendant's own abstract is shewn not to exist.

In both the cases just referred to it is apparent that there was a total failure of consideration and that the vendee, if he had been compelled to pay his purchase money, would have got nothing whatever for it.

(1) L. R. 8 Ex. 175.

1895

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

The Chief Justice.

In the present case the purchaser will get a present holding title accompanied with possession, a title in fee, defeasible it is true upon the happening of a contingency, and therefore not a marketable title, but still a title, though a precarious one. The objection here taken is therefore one which does not go to the root of the title.

In *Rosenberg* v. *Cook* (3), where the purchaser got nothing but possession, it was held by the Court of Appeal that he was bound by a condition requiring him to take objections in a limited time. It is true that in that case the particulars of sale did disclose that the vendor was not selling an absolutely good title. The judgment of Jessel M. R., however, shews that he was not inclined to treat such conditions as the present as merely illusory stipulations.

In the present case if we do not give effect to the terms of the contract we defeat the intention of the parties and, as Mr. Justice Burton observes, make a new contract for them, for if it was open to the purchaser to take the objection relied on all objections shewing that the vendors could not make a good title would also have been open indefinitely in point of time, and the clause in question would have been altogether reduced to silence. This, I think, cannot be done. I am therefore of opinion that we must allow the appeal with costs and judgment must be entered in the court below for a specific performance of the contract as claimed by the plaintiff, but without any inquiry as to title which he must, for the reasons before stated, be deemed to have waived. Had this been a vendor's action for specific performance different considerations might have been open, since the remedy of specific performance is one subject to the judicial discretion of the court.

(3) 8 Q. B. D. 162.

1895

ARMSTRONG v. NASON.

ARMSTRONG v. WRIGHT.

ARMSTRONG v. MCCLELLAND.

The Chief Justice.

The appellants are entitled to costs in the Court of Appeal, but not in the Divisional Court.

Armstrong v. *McClelland* was argued at the same time as *Armstrong* v. *Cook* and the pleadings and evidence are the same; the same judgment must therefore be entered in that case.

Armstrong v. *Wright.*

I agree with the Court of Appeal, that the objection to the title was sufficiently taken within the ten days. That appeal must therefore be dismissed with costs.

Appeals against Nason and McClelland allowed with costs. Appeal against Wright dismissed with costs.

Solicitors for the appellants: *Cook, Macdonald & Briggs.*

Solicitor for the respondent Nason: *Joseph Nason.*

Solicitors for the respondent Wright: *Lindsay, Lindsay & Evans.*

Solicitors for the respondent McClelland: *Smith & Smith.*

1895

*Feb. 21.

*June 26.

G. B. S. YOUNG AND OTHERS (PLAINTIFFS) APPELLANTS;

AND

JAMES MACNIDER (DEFENDANT).....RESPONDENT.

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

Trustees and administrators—Fraudulent conversion—Past due bonds, transfer of—Negotiable security—Commercial paper—Debentures transferable by delivery—Equities of previous holders—Art. 2287 *C. C.—Estoppel — Brokers and factors — Pledge—Implied notice—Duty of pledgee to make inquiry—Innocent holder for value—Arts.* 1487, 1490, 2202 *C. C.*

The Quebec Turnpike Trusts bonds issued under special acts and ordinances (Rev. Stats. Que., 1888, Sup. p. 505) are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in a case of *Young* v. *Rattray*, and having been afterwards lost were advertised for in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds then being long past due but payment being provided for under the above cited statutes.

Held, affirming the judgment of the Court of Queen's Bench, Fournier and Taschereau JJ. dissenting, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title ; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bonâ fide* holder.

Held, also, (affirming the opinion of the trial judge), that a *bonâ fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein. *In re European Bank. Ex parte Oriental Commercial Bank* (5 Ch. App. 358) followed.

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

1895

YOUNG v. MACNIDER.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court, District of Quebec (2), in an action brought to revendicate six bonds of the Quebec Turnpike Trust from the possession of the defendant, by which the defendant had been condemned to restore the bonds to plaintiffs.

The facts of the case appear from the head note and are fully set out in the judgment of the court pronounced by His Lordship the Chief Justice.

Stuart Q.C. for the appellants.

Langlois Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appellants who are the plaintiffs in the action are legatees under the will of the late David Douglas Young. The action is brought to revendicate from the possession of the defendant, the present respondent, six bonds or debentures issued by the Quebec Turnpike Trust, numbered, 3, 4, 5, 16, 17 and 51, the aggregate face value of which amounted to $5,000 and upon which debentures some ten years arrears of interest was due.

The defence set up by the respondent in his pleadings was that having been for twenty years and upwards a stock and share broker and private banker, one Welch had been in the habit of borrowing large sums from him and pledging bonds as security for such loans; that Welch was indebted to him in the sum of $6,125 the amount of certain promissory notes discounted by him for Welch, and including a sum of $800 lent to the appellants through the ministry of Welch, and to secure the payment of which the bonds in question had been pledged by Welch as being

(1) Q.R. 3 Q.B. 539. (2) Q.R. 4 S.C. 208.

1895

YOUNG v. MACNIDER.

The Chief Justice.

his own property; that Welch was insolvent and the defendant did not know to whom the bonds belonged; that they were in the possession of Welch apparently as owner; and he prayed for the dismissal of the action unless the plaintiffs preferred to pay $6,125 and the costs.

The plaintiffs replied that Welch was the administrator of their father's estate and as such was intrusted with the custody and safe keeping of the bonds in question, but was not authorized to deal with them in any way; that it was a matter of public notoriety that Welch was the administrator of the estate of the appellants' late father, and that such fact was known to the defendant at the time he took the bonds from the defendant Welch; that the defendant was also aware that Welch had been unfortunate in business and was not possessed of property in his own right; that the bonds in question were publicly advertised for in a Quebec newspaper, the "Morning Chronicle," on the 18th July, 1883, as having been lost, and that they had been the subject matter of correspondence in the same newspaper; that in the year 1883 the bonds had been filed as exhibits in a cause pending in the Superior Court wherein Rattray was plaintiff and the heirs Young were defendants, and they were indorsed as exhibits in that cause and still bore such indorsement when received by the defendant from Welch, by which it was rendered apparent that the bonds were the property of the appellants; that in consequence of the knowledge which the defendant had of the position which Welch occupied towards the appellants, and others, he was bound to have made reasonable inquiry as to the ownership of the bonds, and to have exercised due care before receiving them, and that by reason of his neglect so to do the respondent was not a holder in good faith. And further, that Welch was not au-

1895

YOUNG v. MACNIDER.

The Chief Justice.

thorized to deal with the bonds in any way, and in pledging them Welch was guilty of a fraud and conveyed no title to the respondent who was a tortious holder inasmuch as the respondent was aware when he took the bonds that he was taking them from a person who had no power to deal with them and who was therefore fraudulently converting them.

The case was heard before Mr. Justice Andrews. Both Welch and the respondent were examined as witnesses on behalf of the plaintiffs, and Welch was also examined as a witness for the defendant. It was proved beyond question that Welch held the bonds which were the property of the appellants as the administrator of their father's estate; that he had improperly and dishonestly pledged them with the respondent to secure moneys which he had borrowed for his own use. There was, however, no evidence to establish that the defendant was not a *bonâ fide* holder of the debentures for valuable consideration except the fact that some four or five years before the respondent received the debentures there had been a controversy about them between one D. Rattray and the representatives of the estate of the late D. D. Young, and that this controversy had been the subject of correspondence in a Quebec newspaper, the "Morning Chronicle," and in addition the further fact that three of the bonds bore an indorsement which indicated that they had been filed as exhibits in the Superior Court in an action there pending of *Rattray* v. *Young*.

Mr. Justice Andrews rendered a carefully considered judgment by which he condemned the respondent to restore the debentures to the appellants. The learned judge based this decision upon the ground that the defendant did not come within any of the exceptions to the rule of law that no one can confer a better title than he has himself; that the debentures were over-

1895

YOUNG v. MACNIDER.

The Chief Justice.

due and consequently the respondent took no title. The case of *In re European Bank. Ex parte Oriental Commercial Bank* (1), and other authorities were relied upon by the learned judge for the proposition that negotiable securities transferred after they were due were taken by any holder for value subject to all equities affecting them, including not merely equities belonging to prior parties to the paper but also to equities of third persons, and that this rule applied to the transfer of a security negotiable by delivery which had been transferred by an agent in fraud of his principal.

The Court of Queen's Bench on appeal reversed this decision holding that the debentures in question were negotiable securities; that even though they were overdue that affected only their exigibility as against the parties (makers or indorsers) who were liable on the paper itself and did not apply to the case of an agent who had negotiated a security in fraud of his principal; further, that the debentures in question had been used and dealt with in the market in such a way that they could not be considered as overdue securities; and lastly, that the appellants by reason of their having placed securities transferable by delivery in the hands of an agent, and thus having conferred power upon that agent to negotiate them, were estopped as against a *bonâ fide* holder for value, as the respondent was held to be, from asserting their title to his prejudice, and for these reasons the court allowed the appeal and dismissed the action.

I am of opinion that the court of Queen's Bench was in all respects right in holding that the respondents had no notice of the appellants' title to the bonds in question. Neither the fact of the publication of the advertisement nor the marking of the bonds as exhibits

(1) 5 Ch. App. 358.

in a former action were sufficient to establish that fact. The evidence of the brokers and bankers who were called as witnesses for the appellants was strictly inadmissible, the subject of inquiry not being one in which the evidence of experts is admissible. To give effect to the opinions of these gentlemen would be to substitute them for the court on the trial of an ordinary question of fact.

I do not agree with the Court of Queen's Bench that in general a *bonâ fide* holder who acquires ordinary commercial paper such as bills or notes after dishonour takes subject only to the equities of prior parties to the paper. Upon this point I agree with Mr. Justice Andrews that not merely the equities of prior parties, but also those of third parties, may be enforced against such holders. This is the effect of the decision in *In re European Bank. Ex parte Oriental Commercial Bank* (1), and I think we ought to follow that authority. In the view I take, however, this point is immaterial. It is also unnecessary to determine another question on which I have much doubt, namely, whether these bonds, especially having regard to the statutory authority under which they were issued, and to the way in which they have been dealt with in the market, are for this purpose to be considered as ordinary mercantile securities such as bills and notes. Many American cases would seem to show that they are.

The *ratio decidendi* which I proceed upon in holding that the respondent is entitled to be protected as a *bonâ fide* holder is that of estoppel, a ground strongly relied upon in the judgment of Mr. Justice Hall in the Court of Queen's Bench. I am of opinion that the appellants, having placed their bonds, transferable by delivery, in Welch's hands, and having thus enabled

(1) 5 Ch. App. 358.

1895

YOUNG
v.
MACNIDER.

The Chief Justice.

him to deal with them as his own, are now, when he has committed a fraud which must result in a loss either to themselves or to the respondent, precluded from asserting their title in such a way as to throw the loss upon the respondent. In applying this principle of estoppel it appears to me that the circumstance of the bonds being overdue is of no importance. This doctrine has for its support very high and late authority. The cases of *Goodwin* v. *Robarts* (1); *Rumball* v. *Metropolitan Bank* (2); *London Joint Stock Bank* v. *Simmons* (3); *Bentinck* v. *London Joint Stock Bank* (4); are all authorities strongly supporting the judgment of Mr. Justice Hall in this respect.

In France, where the rule *possession vaut titre* applies generally to the transfer of title to movables (which are thus then on the same footing as these bonds transferable by delivery are with us), a similar doctrine is applied to such property, as is shown by Laurent (5) and Troplong (6).

The action having been brought for the revendication of the bonds, and not for their redemption, I do not think we ought to interfere with the judgment of the Court of Queen's Bench to provide relief for the appellants which they have not sought. Moreover, it is not clearly to be ascertained from the depositions for what amount the respondent is entitled to hold them in security. This may, probably, to some extent depend on the applicability and legal effect of article 1975 of the Quebec Civil Code. The judgment in this case will not, of course, in any way prejudice the rights of the appellants to maintain an action to redeem, should the appellants be compelled to have recourse to such a remedy.

The appeal is dismissed with costs.

(1) 1 App. Cas. 476.
(2) 2 Q.B.D. 194.
(3) [1892] A. C. 201.
(4) [1893] 2 Ch. 120.
(5) Vol. 28 Mandat, nos. 54 to 59.
(6) Mandat, nos. 604 to 607.

1895

YOUNG v. MACNIDER.

Taschereau J.

FOURNIER J.—I concur with Mr. Justice Taschereau's conclusion to allow this appeal and restore the judgment of the Superior Court.

TASCHEREAU J.—I would have no doubt on the question of the legality of MacNider's title as a pledgee to these debentures if he had acquired them in good faith. There is no room, in my opinion, for the appellants' contention that the law of the province of Quebec, which governs this case, differs now on this point from the law of France as to such *titres au porteur*, notwithstanding the difference in the wording of art. 2268 of the Quebec code and the corresponding art. 2279 of the French code.

The owner of negotiable securities payable to bearer and transferable by mere delivery, who intrusts an agent with the possession thereof, gives him, *ipso facto*, in law, towards third parties in good faith, the right to effectually sell or pledge them. In constituting his agent the apparent absolute owner of these securities, and conferring upon him all the indicia of ownership, he precludes himself from disputing the title of any subsequent *bonâ fide* transferee. Or, to put it in another way, the agent stands in the same position as if he had a power of attorney from the owner, authorizing him to deal with the securities, in his own name, as he might think fit. Or, in other words again, as laid down in Smith's Mercantile Law (1) on the same principle in reference to agents generally:

> He who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize him or not, since, when one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud, should be the sufferer.

(1) 10 ed. p. 136.

1895

YOUNG v. MACNIDER.

Taschereau J.

2 Leroux, Prescr. nos. 1324, 1328: Buchère, Des valeurs mobilières, nos. 802-816; Troplong, Nantissement, nos. 74-76, Prescript. nos. 1055, 1286 *et seq.* 2 Pardessus dr. comm. nos. 181, 313, 483; de Folleville, de la possession des meubles et titres au porteur, nos. 23, 25, 36, 61 bis, 116, 331, 590; 32 Laurent, nos. 568, 575, 598; Boileux, vol. 7, p. 882; 3 Delv. 438; 4 Aubry & Rau, par. 432, notes 1 and 12; Dall. 29, 1, 384, 52, 5, 427; 58, 1. 238; Bédarride, Achats et ventes, No. 21; Per Fournier J. in *Sweeny* v. *Bank of Montreal* (1).

Art. 1573 C.C. supports the respondent's contention on this point, though negatively, that the simple transfer from hand to hand of such securities confers a perfect title *adversus omnes.*

The second part of art. 1027 is also based on the doctrine that possession of movable property is equivalent to a title. And in the case of *Sweeny* v. *The Bank of Montreal* (1), it is evident that in all the courts, but for the fact that the bank had been put upon inquiry, the transfer by Rose of the securities in question in that case would have been held perfectly valid as against the true owner.

The question is open to still less doubt here, as the securities pledged to MacNider are payable to bearer, *titres au porteur*, whilst in Sweeny's case, to give a title to the transferee a regular transfer of the securities there under litigation had to be made in the books of the company by which they had been issued.

I would also adopt without hesitation the Court of Appeal's opinion as expressed by Mr. Justice Hall, that the law as to the transfer of overdue securities, that the transferee acquires no better title than the transferer had, does not affect MacNider's title, assuming that art. 2287 C.C. (which would govern here, as these debentures

(1) 12 Can. S.C.R. 661.

1895

YOUNG v. MACNIDER.

Taschereau J.

were pledged to MacNider before the passing of the Bills of Exchange Act of 1890), extends to debentures of this nature. The judgment of the Superior Court on this point was, in my opinion, erroneous.

The only question that could be raised under that article, were it applicable, is: What title did Welch have as against the Turnpike Trust? And that would bring us back to the question whether the possession of a security payable to bearer is equivalent to a title. And unquestionably, as against the Turnpike Trust, Welch's title was perfect, and a payment in good faith by the company to him would have been unassailable. Welch could have maintained an action against the company, and there were no equities between him and the company that the company could have opposed to him. For "the equities of the bill, not the equities of the parties" (1), can alone be a defence by the maker of such an instrument.

MacNider's title cannot be less valid, as against the Turnpike Trust, than Welch's was. That is, however, what the appellants' contentions would lead to. There is nothing to help the appellants' case on this point in Daniel on negotiable instruments, relied upon by them, and by the Superior Court, though the passage they quote, read alone, would seem at first to bear them out. But *cavendum est a fragmentis*, and a reference to pars. 725, 725*a*, 782, 786, 803 and 1192 of the book, makes it clear that what is intended by the writer is that it is only as against the maker that the transferee's title to overdue securities is not better than the transferer's. I refer to *Fairclough* v. *Pavia* (2); Byles on Bills (3); *Chalmers* v. *Lanion* (4); Randolph on Commercial paper (5); *Brooks* v. *Clegg* (6); Pothier, Change (7)

(1) *Sturtevant* v. *Ford* 4 M. & G. 101.
(2) 9 Ex. 690.
(3) 15th ed. 190, 191.
(4) 1 Camp. 383.
(5) Secs. 1006, 1879 *et seq.*
(6) 12 L.C.R. 461.
(7) Nos. 184 *et seq.*

1895

YOUNG v. MACNIDER.

Taschereau J.

2 Bédarride, Dr. com (1); 1er Pardessus. Lettre de change (2); Ruben de Couder, Dict. de dr. com. (3).

The case of *Tinson* v. *Francis* (4), is quite distinguishable. There the plaintiff's transferer could not have maintained an action against the maker.

Malins V.C. in *Ex parte Swan* (5) said:

> The broad proposition that the transferee of a bill after dishonour can under no circumstances have a better right against the acceptor than the drawer would have, cannot at this day be maintained.

There are cases from the United States courts that would seem to support the appellants' case on this point, but they are not governing authorities.

Then, were it necessary to determine the point, I would doubt very much if that rule and article 2287 of the Code apply at all to promissory notes or securities payable to bearer. 2 Pardessus (6); *Courty* v. *de Béville* (7); Sirey (8). For when a security payable to bearer is transfered by delivery, the transferer is no longer a party to it. Story on Promissory Notes, par. 117; Dall. (9) cites a case directly in point. The maker is the bearer's direct debtor, and there is no privity between the maker and the previous holders. Lyon-Gaen (10). In *Cols* v. *Dufour-Clarat* (11) it is expressly held in that sense, that the holder of a security payable to bearer is the immediate creditor of the maker, who cannot oppose to him the exceptions that he would have had against previous holders. See also *Barrois* v. *Grimonprez* (12). These debentures, moreover, are not promissory

(1) Nos. 319, 320, 322 *et seq.*; 642 *et seq.*
(2) Nos. 132, 134 *et seq.*
(3) Vo. billet au porteur, nos. 12, 13, 17, 18.
(4) 1 Camp. 19.
(5) L.R. 6 Eq. 344.
(6) Dr. com. no. 352.
(7) Dall. 72, 1, 115.
(8) Table Générale vo. Endossement, nos. 27 *et seq.*
(9) Rep. vo. Effets de commerce, nos. 409, 410.
(10) Dr. Comm. vol. 5, nos. 135, 771 *et seq.*
(11) Dall. 86, 2, 230.
(13) Dall. 68, 5, 161.

1895

YOUNG v. MACNIDER.

Taschereau J.

notes, and art. 2287 C. C. is not applicable at all in the province of Quebec to debentures or like securities, even payable to order. I am not disposed to think that, as the appellants' contention on this point would import, the words "Bills of Exchange and Promissory notes" in sec. 91 of the British North America Act, can be construed as including such debentures, and that the Federal Parliament has now exclusive legislative power over them as it has over bills of exchange and promissory notes. They are securities of the kind known under the French law as *effets publics* (1), reimbursable out of a certain fund, which said fund has always been held in the province not to be seizable under execution. 4 Vic. ch. 17, secs. 21, 27; 16 Vic. ch. 235, sec. 7; *The Queen* v. *Belleau* (2). I have not seen a single case, or a single text book where such securities have been called promissory notes, or considered as such. And if these debentures are not promissory notes the case is governed exclusively by the French law and the Quebec Code. As said by Sir Montague Smith, in the Privy Council, in the case of *Bell* v. *Corporation of Quebec* (3), English and American decisions are not governing authorities in the province. Except as to the rules of evidence, art. 1206 C. C., and to a certain extent as to promissory notes, by a special article of the code (art. 2340), in force as to this case, the commercial law of the province of Quebec, as a general rule, is the French law.

Upon the contention that a commercial contract is governed by the English law in the province of Quebec, Aylwin J. said, in *The Montreal Assurance Co.* v. *McGillivray* (4):

A more dangerous error than this could not be committed; commercial contracts like all others are governed by the law of Lower

(1) Sirey's Tables. eo. verb.
(2) 7 App. Cas. 473.
(3) 5 App. Cas. 84.
(4) 8 L. C. R. 423.

1895

YOUNG
v.
MACNIDER.

Taschereau J.

Canada. It is in proof only of commercial matters that the rules of evidence of the law of England are to be resorted to.

Now, under the French law, the appellants have not been able to cite a single authority that bears out their contentions and the conclusions reached by the Superior Court in their favour on this point. I would on this point, as on the first, think their contention unfounded.

However, I dissent from the judgment about to be rendered, and I would have allowed this appeal on the ground that the respondent was not justified in taking these debentures from Welch without making the inquiry which the circumstances, to my mind, ought to have suggested to him, and that the consequence of his forbearance to do so must be held fatal to the pledge he accepted from Welch. He shut his eyes not to see; he put no questions, not to know. For we must assume that Welch would not have told an untruth if he had been asked to whom those debentures belonged. *May* v *Chapman* (1).

The facts are not disputed, and this part of the case depends on inferences from the undisputed facts proved in the case, and so is, consequently, fully open to the appellants upon this appeal. And that being so, no assistance can be had from a reference to the cases of *London Joint Stock Bank* v. *Simmons* (2); or *Bentinck* v. *London Joint Stock Bank* (3), and cases of that class. As said by Lord Halsbury in the Simmons case. "no one case can be an authority for another," when the solution rests on the evidence.

The following facts are disclosed by the oral and documentary evidence in the present case: The respondent knew that Welch was a mere agent, and had no business but the business of others. He knew that

(1) 16 M. & W. 361.
(2) [1892] A. C. 201.
(3) [1893] 2 Ch. 120.

the Young estate were owners of debentures of this same Turnpike Trust, and that they, having lost trace of them, had some years previously advertised for them in the Quebec newspapers, through this very same Welch as their agent. He saw the Young's estates name indorsed on three of these debentures, or a tag as it were attached to each of them, bearing their name; as he well knew the Rattray thereon mentioned had had possession of them only as agent for the estate; he knew that Welch had some years previously made a disastrous failure, from the effects of which he had never recovered; he also knew that Welch had succeeded Rattray as agent and administrator of the Young estate; he, in fact, as appears by his own plea, lent money to the Young estate through Welch as their agent. Now, when he received these debentures from Welch, three of which were indorsed, as I remarked, so as to show that they had certainly, at one time, been part of that estate, whose agent Welch then was to his knowledge, and so bearing on their face an unmistakeable mark of infirmity, it was incumbent upon him, in my opinion, to make inquiries as to Welch's right to dispose of them. Laurent (1).

When there exist circumstances of a nature to arouse suspicion, says the Cour de Cassation inferentially (2), or, as says the Court of Appeal at Rouen in *Piat* v. *Weismann* (3):

> Lorsqu'une circonstance accessoire et concomitante est venue éveiller les soupçons sur la loyauté du vendeur,

the purchaser or pledgee of securities, payable to bearer, should require the seller or pledger to justify his right to sell them.

By wilfully shutting his eyes in such a dealing with a man whose business was essentially one of a fiduciary

(1) Vol. 23, no. 604; see Dall. 68, 3, 88.

(2) Dall. 72, 1, 161.

(3) S. V. 73, 2, 80.

1895

YOUNG
v.
MACNIDER

Taschereau J.

character McNider was not acting in good faith in the eyes of the law, whatever views the mercantile community, according to its present standard of morality, may entertain upon the matter. Jones on Pledges, 104, 105.

One of his own witnesses, McGie, a stock broker of twenty-five years standing, swears that, with the indorsement, *Rattray* v. *Young*, on these debentures, he would rather have had nothing to do with them. And Dean swears that, under the circumstances, he would not have advanced money to Welch upon these debentures without making some inquiry as to his powers.

Dumoulin, manager of the People's Bank, also brought in by the respondent, testified in the same sense that he would have inquired from Welch about his right to these debentures if he, Welch, had offered them to the bank. These two witnesses,it is true,would have limited their suspicions of Welch's dealing with those debentures to the three so indorsed. But, to my mind, the very name of Young in connection with any of them should have suggested to the respondent that they might possibly all of them belong to the Young estate, as he well knew that Welch was the administrator of that estate, and that he was not in a financial position so flourishing as to be the owner of this amount of valuables. In fact, even without these indorsements, MacNider would have shown more prudence under the circumstances, with his perfect knowledge of Welch's financial status and of his occupation, not to take these debentures from him before asking him if he had the right to dispose of them.

One taking under such circumstances a pledge of negotiable securities from another who is notoriously but an agent, and professes to be only an agent, cannot infer the agent's authority to pledge them. He is

1895

YOUNG v. MACNIDER.

Taschereau J.

bound to inquire and know what his authority is. *Cooke* v. *Eshelby* (1); Jones on Pledges, 493. But here, MacNider was afraid of the answer, and that is why, in my opinion, he did not put the question. He might have known but he preferred not to know, so as not to lose, perhaps, a good bargain. He avoided making inquiries, because they might be injurious to him. *Jones* v. *Gordon* (2).

And when, as here, the securities pledged are overdue, the pledgee is still less justifiable in having accepted them without inquiry. For "where a note of hand," (and I cannot see why this should not apply to debentures) "is assigned after maturity, and there is fraud in the transaction, the law on slight grounds will presume that the indorsee had knowledge of the fraud, if it appears that he omitted to satisfy himself as to the validity of the note." Such is the law laid down long ago in the Court of King's Bench at Quebec in a case of *Hunt* v. *Lee* (3). In *Taylor* v. *Mather* (note to *Brown* v. *Davis*) (4),, Buller J. had previously held that where there is fraud in the transfer of a negotiable instrument, if it be made after maturity, the slightest circumstance will be sufficient to imply notice. And it must be remembered that whilst mere possession of a negotiable instrument payable to bearer is a *primâ facie* evidence of the holders's good faith, yet that applies only to any holder taking the bill before maturity. But where such an instrument has been fraudulently disposed of by the owner's agent, as in the present case, and an action is brought by the owner against the holder, proof of the fraud will throw on the holder the burden of proving his good faith, especially if he had received the security after maturity. Randolph on Commercial Paper, pars. 159, 160, 1026, 1683. Art. 2202 C.C.

(1) 12 App. Cas. 271.
(2) 2 App. Cas. 616.
(3) 2 Rev. de Leg. 28.
(4) 3 T.R. 83.

1895

YOUNG v. MACNIDER.

Taschereau J.

has then no application. The plaintiff having proved his title the onus of proving a possession sufficient to defeat that title lies on the defendant.

I have alluded to the fact that by his plea it appears that MacNider, besides the moneys lent to Welch, personally, lent money to the Young estate. Now he claims by the conclusion of his plea a right to pledge on these debentures as well for the loan he so made to the Young estate as for the loan he made to Welch personally. There was undoubtedly nothing to prevent Welch from pledging his own debentures for a loan made to his principals. But I fail to see in MacNider's plea any contention of that nature. The plea simply claims a tacit pledge created by the operation of the law for the Young estate's debt. A special pledge of other securities had been given by Welch for this loan. Now, if, on the face of his own allegations, these debentures are by law security for his claim against the Young estate, it must be that they are the property of the Young estate. Without special allegations to that effect in the plea it cannot be assumed that a pledge held by MacNider for a debt due by the Young estate belongs to any one else than to the Young estate.

For these reasons the appeal should, in my opinion, be allowed with costs, and the *dispositif* of the judgment of the Superior Court should be restored.

GWYNNE J. and SEDGEWICK J. concurred in the judgment of the Chief Justice.

KING J.—I am of opinion that this appeal should be dismissed with costs, for the reasons given in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Caron, Pentland & Stuart.*

Solicitor for the respondent: *C. B. Langlois.*

LA BANQUE VILLE MARIE (PLAINTIFF) ..... } APPELLANT;

AND

MARY JANE ELIZABETH MORRISON (DEFENDANT) ..... } RESPONDENT.

1895

*May 10.

*June 26.

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

Special tax—Ex post facto legislation—Warranty.

Assesment rolls were made by the city of Montreal under 27 & 28 V. c. 60 and 29 & 30 V. c. 56 apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the legislature by two special acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes both special and general had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid.

Held, affirming the judgments in the courts below, Gwynne J. dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale.

APPEAL from the decision of the Court of Queen's Bench, affirming the judgment of the Superior Court, district of Montreal, dismissing the plaintiff's action by which she claimed to be reimbursed moneys paid the corporation of the city of Montreal for assessments imposed on the lands in question for their proportion of the cost of widening Saint James street and St. Lambert street.

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

1895

LA BANQUE VILLE MARIE v. MORRISON.

In 1866 the owners of land fronting on St. James and St. Lambert streets in Montreal, petitioned the city council for the widening of the streets mentioned, the costs of the improvements to be assessed against the lands benefited thereby as provided by 27 & 28 Vic. ch. 60 and 29 & 30 Vic. ch. 56. The council granted the petitions, by resolution, and the improvements were made during the year 1868. A special assessment was made apportioning upon the lands benefited the cost of the works in the same year and the property of the defendant was taxed thereby for $1,755 as the proportion of the cost of widening St. James street and for $650.63 as the proportion of widening St. Lambert street.

In 1873 defendant sold the lands to plaintiff and conveyed them by deed with the usual warranty containing a clause declaring that all taxes, both general and special, had been paid, and three days after the execution of the deed defendant paid the $1,755 assessed for the St. James street improvements to the corporation.

The roll imposing the rate for the St. James street improvements was contested and by decision of the Privy Council on 1st January, 1878, in the case of *The City of Montreal* v. *Stevens* (1), it was set aside as null on account of irregularities in the award of the commissioners, and the $1,755 paid by the defendant was returned to her by the corporation. On the application of the city council the act 42 & 43 Vic. ch. 53 was then passed, secs. 4 and 7 of which authorized the corporation to make a new roll which was afterwards done and the property in question therein assessed for $3,331 for the cost of the same works. The assessment affecting properties benefited by the widening of St. Lambert street was also contested, but no decision arrived at as during the pendency of the suit the roll

(1) 3 App. Cas. 605.

1895

LA BANQUE VILLE MARIE v. MORRISON.

was lost. The corporation again had recourse to the legislature and obtained the act 44 & 45 Vic. ch. 73 authorizing another new roll which was made in 1881 and the lands in question assessed therein for the St. Lambert street improvements at $650.63.

The plaintiff paid the taxes thus imposed and claimed reimbursement under the warranty and declaration contained in the deed, but defendant refused payment on the ground that the lands had never been legally taxed until after her ownership had ceased, and that the warranty and declaration had reference only to the taxes legally due at the date of the sale.

Geoffrion Q.C. and *Charbonneau* for appellant. As to the St. James street item the trouble is not the new assessment, but goes back to the resolution when the city of Montreal, on the petition of the defendants *auteurs*, ordered the street to be widened. The charge exists from that time, *en germe* and absolutely for the whole cost. The assessment roll does not create the charge but only distributes it.

We are not dealing now with a tax. In this case the proprietors join together and agree that the whole cost will be assessed between themselves under a competent authority. The corporation is acting the part of an arbitrator between the proprietors.

The amount assessed between the properties by both rolls was never the debt of the corporation but the joint debt of the different proprietors interested. It is only because the commissioners had separated two proceedings that the assessment roll was annulled in *City of Montreal* v. *Stevens* (1).

As to the St. Lambert street item the roll was not null but simply lost, and the new roll was only a continuation or copy of it. Moreover the proportion

(1) 3 App. Cas. 605.

1895

LA BANQUE VILLE MARIE v. MORRISON.

of the two rolls being the same the respondent has no interest in the matter of warranty to contest said proportion. *Levy* v. *Renauld* (1).

Lajoie for respondent. At the time the defendant sold the plaintiff the property neither tax was due or exigible. The Saint James Street roll was declared null, and the Saint Lambert Street roll was involved in a contestation during which it was lost and deprived of legal effect. It was only after the sale, and in virtue of new and special legislation, that any apportionment creating a charge upon the property was made.

There is no material difference between assessments of this kind and ordinary taxes. The former are expressly assimilated to the latter by 27 & 28 Vic. ch. 60, sec. 24. *Vide* Dalloz (2); *Monestier* v. *Vincent* (3); *Thibault* v. *Robinson* (4).

It is not enough that the charge may exist in a potential state, in germ, it must be full-born (5).

The " new rolls of assessment " provided for by 42 & 43 Vic. ch. 53, sec. 4, and 44 & 45 Vic. ch. 73, sec. 1, prove the non-existence of the old rolls. Before the new could be put into force the old were blotted out, one by annulment the other by loss or destruction.

How can a right be said to survive " in germ " after it has been blotted out? *Cross* v. *The Windsor Hotel Co. of Montreal* (6).

THE CHIEF JUSTICE.—I am of opinion that the appeal must be dismissed.

As to the St. James street property the taxes paid by the appellant, and which he now seeks to recover

(1) 20 R.L. 449.
(2) Rep. vo. Vente, no. 1046, 1047.
(3) Dal. vo. Commune, no. 2626.
(4) Q. R. 3 Q. B. 280.
(5) C.C. art. 1508; C.N. art. 1626.
(6) M.L.R. 2 Q.B. 8: 12 Can. S.C.R. 624.

1895

LA BANQUE VILLE MARIE v. MORRISON.

The Chief Justice.

from the respondent, were never legally imposed until after the sale. This was recognized by the city, who repaid the taxes she had paid them and then imposed new and legal taxes, but taxes not coming within the clause of guarantee in the deed of sale.

As to the St. Lambert street property, I am equally of opinion that the respondent is not liable to make good what the appellant has had to pay. The roll upon which this assessment was originally imposed was lost, and without it the taxes could never have been enforced but for the intervention of the legislature. If the legislature had not intervened the respondent never would have been in any way liable for these taxes to the appellant. Then this *ex post facto* legislation was what obliged the appellant to pay. The respondent never agreed by the clause of warranty in the deed of sale to indemnify the appellant against such act of the legislature but only against taxes lawfully imposed at the date of the sale, and these appellant has never paid, though he has paid others of the same amount attributable, however, to another legal source, an altogether different obligation created by paramount authority since the sale. Therefore, for the same reasons as those contained in the *considérants* of Mr. Justice Gill's judgment and in the notes of Mr. Justice Bossé, the appeal must be dismissed.

TASCHEREAU J.—Tant qu'à l'item pour l'élargissement de la rue St. Jacques, je renverrais l'appel sans hésitation. J'écarte le paiement de $1755 fait par l'intimée à la corporation peu de jours après la vente à l'appelante, et le remboursement de cette somme fait par la corporation à l'intimée en 1878. Je ne vois pas que ni l'un ni l'autre puisse affecter la question en litige ici entre les parties. C'était un paiement indû, c'est-à-dire sans cause ou considération, et fait par

1895

LA BANQUE VILLE MARIE v. MORRISON.

Taschereau J.

erreur. L'acte qui autorise la corporation à retenir ces paiements, et les imputer sur le nouveau rôle, ne fut passé que quelques mois après le remboursement fait à l'intimée. La corporation était donc légalement tenue de rembourser l'intimée tel qu'elle l'a fait, le 15 août, 1878. Le nouveau rôle d'ailleurs est lui-même subséquent. Il est daté du 30 novembre, 1878.

Je pose la cause comme si, en fait, c'était l'intimée qui, sur contestation du rôle de répartition, l'eût fait déclarer nul, d'une nullité de *non esse*, et ce avant la vente par elle à l'appelante. C'est la même question, posée d'une manière différente, sans doute, mais qui, ainsi débarrassée des faits qui ne peuvent l'affecter, rend plus lucide la question légale que, d'accord avec la cour Supérieure et la cour du Banc de la Reine, nous croyons devoir résoudre en faveur de l'intimée. Elle a vendu l'immeuble en question avec garantie de tous troubles et stipulation expresse que les taxes et cotisations générales et spéciales, y compris celles de l'année courante, avaient été payées. Or, elle n'a pu par là vouloir stipuler que pour ce qui était dû et payable. Or, il n'y avait alors rien d'échu, rien de payable à la corporation. C'est là l'effet rétroactif du jugement rendu plus tard annulant la répartition. La doctrine que le vendeur répond de toute éviction dont le germe existait lors de la vente n'est pas applicable aux contributions publiques, ou droits imposés par la loi elle-même (1). Que l'acheteur connaît ou est censé connaître tout aussi bien que le vendeur.

Si, par exemple, une répartition pour la construction d'une église est faite payable pendant dix ans, et que soit, cinq ans après cette répartition, un immeuble qui y est affecté est vendu avec garantie, le vendeur est tenu de tous les arrérages jusqu'à la vente, mais la garantie ne couvrira pas les cinq années à écheoir.

(1) Pothier, Vente, n° 86-87, 194 *et seq.*

1895

LA BANQUE VILLE MARIE v. MORRISON.

Taschereau J.

L'appelante voudrait faire remonter la taxe en question jusqu'à la résolution du conseil de ville de 1867. C'est par cette résolution, dit-elle, que cette propriété a été taxée, pour le coût de l'élargissement de la rue St. Jacques.

Mais cette prétention n'a pas été accueillie par le jugement *a quo*, et ne pouvait l'être.

C'est là, de la part de l'appelante, soutenir que si son achat eût eu lieu, au lendemain même de cette résolution, et dès avant toute autre procédure, la garantie de l'intimée se serait étendue à cette taxe. Or cette proposition est erronée. Un immeuble n'est taxé en pareil cas, et la corporation n'y a aucun droit que pour la répartition qui établit le privilège, et non seulement son montant. Ou, en d'autres termes, il n'y a pas de privilège, il n'y a pas de taxes, tant que le rôle n'en a pas fixé le montant. La corporation n'a pas de créance contre qui que ce soit, avant la répartition.

C'est dans ce rôle et son homologation, qu'est le décret, qui, pour la première fois, affecte spécialement chacun des immeubles imposables. Et comment l'intimée aurait-elle pu payer une taxe dont le montant n'étaient pas établie, ou payer avant que la taxe fût due, payer sans cause, sans dette ? Il est bien vrai que la résolution du conseil de ville a, dès 1867, decrété que les travaux requis pour l'élargissement de la rue St. Jacques seraient faits aux frais des propriétaires intéressés, *ut universi*. Mais cette résolution par elle seule n'a pas créé de taxe spéciale sur chacun d'eux, *ut singuli*, ni sur chacune de leurs propriétés.

La jurisprudence de la cour de Cassation nous fournit une cause décidée dans ce sens. Elle est rapportée dans Sirey (1). Le sommaire s'en lit comme suit:

Le propriétaire ou l'habitant d'une commune qui postérieurement à un jugement prononçant au profit d'un tiers des condamnations

(1) *Monestier* v. *Vincens*, S. V., 44, 1, 209.

1895

LA BANQUE VILLE MARIE v. MORRISON.

Taschereau J.

pécuniaires contre cette commune, vend les propriétés qui y sont situées, n'est pas tenu de garantir l'acquéreur des charges que fait peser sur lui une ordonnance postérieure, qu'établit une contribution supplémentaire sur toutes les propriétés situées dans la Commune pour parvenir à l'acquittement de ces condamnations.

Cette décision a, dans l'espèce, une application entière.

Ici, le jugement, c'est la résolution de 1867, et le rôle de 1878, est l'ordonnance postérieure à l'acquisition de l'appelante. Je ne parle plus de celui de 1868. Celui-là, je l'ai dit, est frappé, *ab initio* de nullité de *non esse*, *defectus potestatis*, *nullitas nullitatum*.

L'obligation créée en 1867 n'a été jusqu'à la répartition de 1878, que l'obligation de la masse des contribuables. Ce n'est que pour la répartition que chacun d'eux ou chacune de leurs propriétés, est devenu débiteur. *Si quid universitati debitur singulis non debitur, nec quod debet universitas, singuli debent.* Domat (1). Et c'est bien la propriété de l'appelante et non celle de l'intimée qui a été taxée par le rôle de 1878. La corporation ne pouvait évidemment pas alors la taxer comme appartenant à l'intimée ; et c'est l'appelante seule qui pouvait contester ce nouveau rôle ; l'intimée n'y avait plus de droits.

Sur l'item de $650.63 *plus* $45.42, pour intérêt, montant payé pour l'élargissement de la rue St. Lambert, je suis d'avis que l'appelante doit avoir jugement. Il y a une grande différence entre cet item et celui de la rue St. Jacques. Ici, le rôle était fait et parfait lorsque l'intimée a vendu à l'appelante ; et aucun jugement n'est intervenu depuis pour l'annuler comme il en a été pour celui de la rue St. Jacques. La somme due sur la propriété en question était établie et exigible, et l'intimée était en faute de ne pas l'avoir payée auparavant. Le fait que ce rôle était perdu ne la relevait pas

(1) Lois Civiles, liv., 2, titre 3, sec. 3, n°· 5, page 164.

de son obligation à cet égard. Une copie en existait sur les livres de la cité. Le témoin Arnoldi l'a produite à l'enquête.

Si le conseil a eu recours à un autre acte de la Législature, pour obtenir la permission d'y substituer un nouveau rôle, ceci ne peut changer les droits et les obligations des parties et enlever les droits acquis. Ces droits et ces obligations restent ce qu'ils étaient au jour de la vente.

Il n'y a pas ici d'effet rétroactif qui puisse les affecter. La forme que le statut 44 & 45 V. c. 73 a autorisée pour la collection des taxes imposées et dues dès 1867 ne change pas la taxe, ni sa date, vis-à-vis des parties à l'instance. C'est dès 1867 que cette propriété a été taxée spécialement par la répartition alors faite, et rien depuis n'a affecté la validité de cette répartition.

Si l'intimée eût payé cette somme à la corporation elle n'aurait pas pu la répéter comme elle a pu le faire de celle payée pour la rue St. Jacques ; ce n'aurait pas été un paiement indû.

Par la perte du rôle la collection forcée par la corporation pouvait être devenue difficile, soit même impossible ; mais la somme restait tout de même légitimement due sur cette propriété ; et étant due et payable dès avant la vente par l'intimée à l'appelante, elle tombe tant sous la clause de garantie de tout trouble, contenue dans l'acte, que sous la stipulation expresse du paiement de toutes les cotisations, générales et spéciales, due sur la propriété.

Il n'y a pas au dossier un mot de preuve sur la nature de la contestation de ce rôle qui paraît avoir été pendante lorsqu'il a été adiré, et nous ne pouvons assumer que cette contestation était basée sur les mêmes moyens que ceux qui ont prévalu contre le rôle de la rue St. Jacques.

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

GWYNNE J.—In the month of June, 1866, the Honourable J. A. Berthelot, then testamentary executor of the will of the late Sir Louis Hypolite Lafontaine, auteur of the defendant in this suit, the owner of a piece of land situate at the corner of little St. James street and St. Lambert street in the city of Montreal, together with other proprietors of land fronting on St. James street, and so interested in procuring that street to be widened, presented a petition to the council of the corporation of the city of Montreal praying that little St. James street aforesaid, should be widened from Place d'Armes to St. Gabriel street, the said petitioners, by their said petition, offering to pay the whole or such part of the cost of such improvement under the provisions of 27 & 28 Vic. ch. 60 as the said council of the corporation should think fit.

Some time afterwards a like petition was presented to the council by the proprietors of land fronting on St. Lambert street, praying in like manner for the widening of that street from Notre-Dame street to little St. James street, at the cost of the petitioners and others, proprietors of land fronting on St. Lambert street and benefited by the improvement thereby petitioned for.

Resolutions of the council of the corporation were duly passed, in the year 1867, granting the prayers of the respective petitioners, upon the express condition, however, that the whole of the cost of making the said enlargements of the said streets respectively should be borne by the said petitioners and others, the owners of land fronting on the said streets respectively and benefited by such improvements, such amounts to be levied by a special tax, rate or assessment to be apportioned and imposed by law upon the lands so fronting on the said street and benefited by the improvements as aforesaid petitioned for.

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

Upon the faith of these resolutions or acts of the council of the corporation the said respective improvements were made and completed by the corporation in 1868.

Now, by force of the above resolutions or acts of council it cannot, I think, be doubted that the piece of land at the corner of St. James and St. Lambert streets sold by the defendant to the plaintiff in 1873, as hereinafter mentioned, was legally and effectually charged with its fair proportion, as yet unascertained it is true, but still with its fair proportion, of the cost of the said respective improvements. The respective works having been performed upon the faith of the said resolutions of council, the lands fronting on the said respective streets became legally charged by the resolutions and the statute in virtue of which they were passed with their fair proportion of the costs of the works, although such proportion remained to be determined in the manner provided in the statute in that behalf. Upon the 9th day of January, 1868, commissioners were appointed by the council under the provisions of the statute 27 & 28 Vic. ch. 60 to fix and determine the price and compensation to be allowed for each piece of ground required for the widening of said little St. James street, and were ordered to begin their operation on the 15th January, 1868, and to make their report upon the 15th April following. The amount so to be paid and allowed was duly fixed by the said commissioners at the sum of $127,788.43, which sum thereby and by force of the said resolution of council upon the petition of the said owners of property fronting on said little St. James street and benefited by the said property became a charge upon the whole of the said lands so fronting upon said St. James street, although the proportion in which the same should be borne by the several pieces of land so fronting and benefited and the owners thereof remained to be determined.

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

By a roll of apportionment of the said sum among the several lots of lands fronting on St. James street and the proprietors thereof, made and signed by the same commissioners who had fixed the price to be paid for land required for the widening of said little St. James street upon and bearing date the 22nd day of July, 1868, the said commissioners apportioned the sum of $1,755 as the amount by which according to their valuation the said piece of land at the corner of little St. James and St. Lambert streets was benefited by the widening of little St. James street as aforesaid.

Commissioners appointed to fix and determine the price and compensation to be paid for each piece of land required for the purpose of widening St. Lambert street aforesaid, under the resolution or act of council in that behalf, duly fixed and determined the sum to be paid for such land at the sum of $26,318.48, and they by a roll of apportionment, the date of which is not given to us, apportioned the sum of $650.63, as the amount by which according to their valuation the said piece of land at the corner of little St. James and St. Lambert streets was benefited by the widening of St. Lambert street aforesaid. The particular date of this apportionment does not appear, but it also was made sometime in 1868.

Now what by notarial deed bearing date the 26th day of November, 1873, the above defendant agreed to sell, and sold to the plaintiff for the sum of $12,200, was the said piece of land at its full value as so benefited. There cannot I think be a doubt that the purchase money agreed upon between the parties was so agreed upon as the price of the piece of land with the increased value attached to it by the widening of the streets, the benefit of which the *venderesse* had enjoyed for five years, and upon the faith that a proportionate part of the cost of the said improvements

had been borne and paid by her. She does not appear to have had the slightest objection to the said respective apportionments of $1,755, and $650.63 as her share of the cost of the said improvements; whatever objection there might have been to either of them she, in so far as appears, was at the time of the sale of the said piece of land to the plaintiffs quite content therewith and there does not appear to be any reason for entertaining a doubt that the price agreed upon for the land was its full increased value as benefited by the said improvements so made at a cost, the defendant's proportion of which was treated by both the seller and the purchasers as between themselves to be conclusively fixed at the said sums of $1,755 and $650.63, so *de facto* apportioned against the defendant and as having been paid by her.

Now by the notarial deed the defendant sold the said piece of land to the plaintiffs—

avec garantie contre tous troubles, &c., &c., et causes d'éviction et de troubles généralement quelconques,

for the sum of $12,200, and by the said deed—

la dite venderesse déclare que les taux et cotisations générales et spéciales des lieux présentement vendus ont été payées y compris celles de l'année courante.

It appears now that at the time of the execution of the above deed the said sums of $1,755 and $650.63 had not, in fact, been paid to the city by the defendant, but that those sums were, or at least that the said sum of $1,755 was, regarded by the defendant as having been so charged upon the said piece of land and the defendant in respect thereof, that the non-payment thereof by the defendant would constitute *un trouble ou une cause de trouble* guaranteed against by the defendant, or a breach of the above covenant of the defendant in the deed, or at least that, having regard to the fact that the price paid by the plaintiffs for the

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

piece of land, was its price as increased in value by the work, the defendant thereby receiving the full benefit of the work. That plaintiffs were entitled to have the amount as aforesaid apportioned against the land as the defendant's share of the cost paid by her for the plaintiffs is apparent from this, that three days after the execution of the deed of sale to the plaintiffs, and when, therefore, the piece of land was the property of the plaintiffs, the defendant paid to the city corporation the said sum of $1,755 so as aforesaid apportioned against the said piece of land and the defendant in respect thereof. That sum so paid was a payment voluntarily made by the defendant, and as so made was, as I think we must hold, a payment made for the use and benefit of the plaintiffs, the then owners of the piece of land purchased by them at a price which we must also, I think, hold to have been agreed upon by the parties as the full price of the land as increased in value by the widening of the streets so as aforesaid made, and that sum having been so paid by the defendant the plaintiffs were entitled to enjoy the benefit thereof, and the defendant had no right whatever at any time afterwards to demand and receive from the city repayment of a sum so paid; but having received repayment thereof as she appears to have done on the 15th August, 1878, she must, clearly as it appears to me, reimburse the plaintiffs to that amount, with interest, and place the plaintiffs, in respect of that amount, in as good a position as they would have been if the defendant had not demanded and received repayment thereof.

The grounds upon which the defendant now insists upon her right to retain this sum are that in 1878 the Privy Council in England affirmed a judgment of the Court of Queen's Bench in the province of Quebec in appeal which affirmed a judgment of the

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

Superior Court in a suit instituted by one Stephens against the corporation of the city of Montreal (1) for exacting by execution payment by the said plaintiff of the sum of $2,838.50, for which a lot of land of the plaintiff in that action had been charged for defraying the expense of widening little St. James street, by which judgment the court, upon the purely technical ground that the roll of apportionment of cost had not been made in the precise manner required by the law in that behalf, held that roll to be null and that Stephens therefore was entitled to judgment in his action, and the now defendant claims that by force of that judgment she had a right to demand and receive from the city on the 15th August, 1878, and now to retain, the $1,755 so voluntarily as aforesaid paid by her, and to subject the land now the property of the plaintiffs to the full cost of the widening of the said streets in addition to the purchase money paid by them as the full price thereof as increased in value by the work done and assumed to have been done at the cost of the defendant when that purchase money was agreed upon. But whether the defendant when she sold the property to the plaintiff did or did not know of the action instituted by Stephens, or of the grounds upon which it was based, she might have been well content, as by the sequel it appears she had good reason to be, assuming her not to have sold the property with the apportionment as made against her, and when selling the property it was important to her as well as to the plaintiffs that the amount which her lot of land as abutting on the street should contribute to the cost of work performed five years previously upon the authority of an act of council passed at the request of the owners of such lots and upon the express condition that the whole cost of the work so petitioned for should be

(1) 3 App. Cas. 605.

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

charged upon the lots fronting on the streets in proportion to the benefit conferred upon each by the work, should be finally fixed and determined when the plaintiffs and defendant were negotiating as to the price to be paid by the purchaser for the then value of the land so increased in value. Nothing was more natural than that the price should be arrived at upon the basis that the vendor had been chargeable and charged with and had paid or should pay the precise amount as apportioned against her, whether that amount had or had not been arrived at, in the precise form prescribed by the statute. There was no necessity for their being affected by whatever might be the final result of the suit instituted by Stevens against the city. They had peculiar interests which the judgment in that case whatever it might finally be, could not and should not affect, and this I think is what we must conclude to have been done when the price to be paid by the plaintiffs to the defendant was agreed upon, and as the defendant cannot retain the $1,755 so as aforesaid paid and so as aforesaid repaid to her, and so subject the plaintiffs to payment, in addition to their purchase money of that amount, so neither I think can the plaintiffs now claim to be reimbursed by the defendant the sum which in excess of the said sum of $1,755 they have been compelled to pay under the provisions of the statute 42 & 43 Vic. ch. 53. The purchase money was agreed upon upon the faith that as between the parties vendor and vendee the apportionment against the lot was legal and final and conclusive, and as between them it must still, I think, be held to have been so although by the roll substituted by 42 & 43 Vic. ch. 53 the cost for widening Little St. James street imposed upon the lot purchased by the plaintiffs has been increased from $1,755 to $3,331.20 or nearly doubled. By that act it was enacted that payments made upon the

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

basis of the annulled rolls should not be invalidated but should go in discharge *pro tanto* of the amount to be apportioned by the new roll authorized by the statute to be made. The plaintiffs therefore should and would upon the new roll have received the benefit of the said sum of $1,755 so made as aforesaid by the defendant for the benefit of the plaintiffs if the defendant who, in the purchase money received by her from the plaintiffs had received the full benefit of the improvement, had not, wrongfully in my opinion, received back from the corporation the amount so paid, and having received it back she must reimburse that amount to the plaintiffs.

Then as to the $650.63, the roll by which that sum was in 1868 apportioned against the said piece of land for the cost of widening St. Lambert street never was cancelled but it was lost, and by reason thereof another act 44 & 45 Vic. ch. 73 was passed, which authorized the corporation to make a new roll in its place, whereby to recover from the parties benefited by that improvement the cost thereof. Now the work having been completed in 1868, and the lost roll having apportioned against the said piece of land the said sum of $650.63 as its share of the cost of widening St. Lambert Street, it is obvious that the defendant, when five years afterwards she sold the land to the plaintiffs for its full value as so improved, is the person who, in the language of the Statute 44 & 45 Vic. c. 73, was benefited by the improvement, and who should therefore pay the share of the cost apportioned against the piece of land so sold by her, which sum has been by the new roll fixed at precisely the same amount as had been determined by the lost roll. Upon the whole, I am of opinion that when the defendant sold the land to the plaintiffs it was so effectually charged by the act of the council of the corporation and the statute by force of which the widening of the streets was authorized to be made at

1895

LA BANQUE VILLE MARIE v. MORRISON.

Gwynne J.

the cost of the lands fronting thereon, with their fair proportion of such cost when determined as required by law, as to make a claim upon the land against the plaintiffs for such proportion when ascertained *une trouble ou cause de trouble* guaranteed against by the defendant in her deed to the plaintiffs; and further that the defendant by reason of her having in the purchase money received by her from the plaintiffs, received the full benefit of the improvement, she, as the person so benefited, is in justice bound to reimburse the plaintiffs to the extent of the said sum of $1,755 and $650.63 as apportioned by the rolls of 1868, which I think we must take to have been accepted by both parties as conclusive between them when the purchase money was agreed upon.

The appeal should therefore, in my opinion, be allowed with costs, and judgment be ordered to be entered for the plaintiffs in the action for the said sum of $1,755, with interest thereon from the 15th August, 1878, and for the sum of $650.63 with interest thereon from the time of the payment thereof to the corporation by the plaintiffs, together with their costs of the action.

SEDGEWICK J.—I concur in the judgment pronounced by the Chief Justice.

KING J.—I am of opinion that this appeal should be dismissed with costs, for the reasons given for the judgment of the Court of Queen's Bench.

Appeal dismissed with costs.

Solicitor for the appellant: *N. Charbonneau.*

Solicitors for the respondent: *Bisaillon, Brosseau & Lajoie.*

FRANK ROSS.....APPELLANT; 1893

AND *Oct. 4, 5, 6.

ANNIE ROSS AND OTHERS.....RESPONDENTS. 1894

*Mar. 3.

ANNIE ROSS AND ANOTHER.....APPELLANTS;

AND

FRANK ROSS AND OTHERS.....RESPONDENTS.

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

Will, form of—Hólograph will executed abroad—Quebec Civil Code, art. 7—Locus regit actum—Lex domicilii—Lex rei sitae—Trustees and executors—Legacy in trust—Discretion of trustee—Vagueness or uncertainty as to beneficiaries—Poor relatives—Public Protestant charities—Charitable uses—Right of intervention—Persona designata.

In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the city of Quebec, while temporarily in the city of New York made the following will in accordance with the law relating to holograph wills in Lower Canada:

"I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for Public Protestant Charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm"

A. R. and others, heirs at law of the testator, brought action to have the will declared invalid.

Held, Taschereau J. dissenting, that the will was valid.

Held further, Fournier and Taschereau JJ. dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the code, nor since under the code itself (art. 7), imperative, but permissive only.

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

1893

Ross
v.
Ross.

Held also, Taschereau J. dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to movables wherever situated, having been executed according to the law of the testator's domicile, and good as to immovables in the Province of Quebec, having been executed according to the law of the situation of those immovables.

In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institution for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator claiming as a poor relative.

Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick J. dissenting; but that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will.

Held further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed.

Held, per Fournier and Taschereau JJ., that the bequests to "poor relatives" was absolutely null for uncertainty.

APPEAL and CROSS-APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1) affirming the judgment of the Superior Court by which the action to set aside the will of the Hon. James Gibb Ross was dismissed as to part of the claim and affirmed as to the remainder.

(1) Q.R. 2 Q.B. 413.

The will, which appears at length in the head note, was wholly written and signed by the testator while temporarily in New York in 1865, and was by him mailed from New York to Quebec, addressed to his brother Frank; it was subsequently restored to the testator, who on various occasions subsequently at Quebec delivered it to Mr. F. Ross, the last occasion being in 1883, five years before his death.

The estate in the province of Quebec alone is sworn at about four millions. The testator further had large property, both real and personal, in other provinces of Canada and in the United States.

During the pendency of the suit William Russell Ross, a first cousin and former partner of the testator, then in bad health and advanced in life, in poor circumstances and with a large family, applied for assistance, pleading the terms of the will, and upon being refused he presented a petition in intervention which was allowed, cause to the contrary being shown by plaintiffs and defendants.

Subsequently further interventions were filed by Morrin College and Finlay Asylum, claiming to be public protestant charities and as such to be interested in supporting the validity of the will.

Plaintiffs and defendants also opposed these interventions, but the points taken were decided against them by the Superior Court.

The plaintiffs contended that the will was invalid because, being in holograph form, it was made in New York where wills made in that form are not in general recognized; and, further, that the trust devise is void for uncertainty, and that thus the trust half should be apportioned amongst the heirs-at-law. Mr. Frank Ross answered that the will was in all respects valid, that under it he took the estate "subject to the trusts therein stated," and that, by the law of New York, wills made

1893
Ross
v.
Ross.

by persons domiciled elsewhere are valid in that State, so far as personalty therein is concerned, if made in the form required by the law of the testator's domicile. To the interventions, the plaintiffs and the defendant, Frank Ross, pleaded similar defences—the defendant in addition demurring.

For pleas to the interventions plaintiffs set up:

1. The will was bad in form as having been made in New York.

2. Under no circumstances is Morrin College—an institution under Presbyterian control—entitled to anything.

3. Under no circumstances is the Finlay Asylum—an institution under the control of the Church of England—entitled to anything.

4. Under no circumstances is William Russell Ross entitled to anything, because Mr. Frank Ross "has declared that in his judgment the said intervenant is not entitled to any part of the money so bequeathed as aforesaid."

5. The firm, composed of W. R. Ross and testator, lost money, which fact disqualifies W. R. Ross from receiving anything under the will.

6. The whole of the estate of the testator has been vested in Frank Ross by the will, and no separate trust has been created by the will, and neither the intervenants nor any other person have a right to interfere with Frank Ross in the matter of any bequest whatever, the whole will (except the bequest to Mary Frame) being entirely and absolutely at his discretion, supposing that the will is valid as the intervenants pretend.

The defendant Frank Ross contested the interventions on the grounds following:

1. That the whole estate and succession was absolutely his own, and the bequests in favour of public pro-

testant charities and of poor relations were void for vagueness and uncertainty, and conferred no right whatever in favour of any charity or relation.

2. As Episcopalian and Presbyterian institutions, the Finlay Asylum and Morrin College have no claim under the will.

3. At the time of the death of the testator W. R. Ross was indebted to his estate in the sum of $116;279.30, for his share of a losing speculation in 1872, and for a subsequent advance of $40,000 made in 1885, and is consequently disqualified from taking under the will.

4. For the reasons stated, and denying that he is called upon to exercise any discretion, Frank Ross declared that under no circumstances will he ever give anything to his cousin, W. R. Ross.

McCarthy Q.C. and *Stuart* Q.C. for the appellant Frank Ross.

The present appeal is from part of the judgment of the Court of Queen's Bench for Quebec, confirming the judgment of the Superior Court, whereby the legality of the bequest in the will directing the appellant to use one-half of his estate for public protestant charities in Quebec and Carluke and amongst poor relatives as he should judge best, was sustained.

The evidence establishes that a holograph will is invalid according to the laws of New York unless executed by the testator in presence of two witnesses and attested by them; that nevertheless, a holograph will, executed in New York by a person domiciled in Quebec, would be valid in New York to pass personal property, but not real estate, provided the will were valid in Quebec. Sec. 2611 N.Y. Code of Procedure.

A testamentary bequest, to be valid, must be the expression of the will of the testator; he cannot make a legacy depend upon the will of a third person, nor

1893
Ross
v.
Ross.

can he leave the choice of the legatee to a third person. Pothier (1); C.C. art. 756; 7 Aubry & Rau (2); Toullier (3); 3 Zachariae (Massé & Vergé) (4); 18 Demolombe (5); *Re Jean Merendol* (6); Merlin (7); *de Sauvan* v. *de Sarrieu* (8); *Moeglin* v. *Willig* (9); *Détève & Détève* (10); *Laboujouderie* v. *Raffier* (11); *Legrand-Masse* v. *Héritiers Lépine* (12); *Beurier* v. *Emorine* (13); *Britelle* v. *Déyvrande* (14); *Simon* v. *Simon* (15).

Saying that if no discretionary power had been given the law would imply equal distribution and the court would distribute equally, would be to assume the validity of a bequest to charities unnamed and undefined, and to relatives undescribed. In *Liddard* v. *Liddard* (16) the question arose as to the distribution of property among the children of the deceased. In such a case our law provides for equal distribution but as between relatives, some distant and some close, the law gives to the nearer collateral relations to the entire exclusion of the further.

The Superior Court has not the powers of the courts in France, nor of the Parlement de Paris, and cannot overrule the express provisions of the statute 34 George 3, ch. 6, which while conferring upon the Courts of King's Bench, to which the Superior Court succeeded, the jurisdiction of the Prevôté de Paris, provided that nothing in the act should grant the court legislative powers possessed by any court prior to the conquest.

(1) (Bugnet's ed.) vol. 8 Traité des Donations entre-vifs no. 73.
(2) P. 69, ss. 655, 656.
(3) vol. 5 nos. 350, 351, 606.
(4) P. 34, note 8.
(5) Nos. 608, 618.
(6) Merlin Repertoire vo. Légataire sec. II, p. 425 Belgian edition.
(7) Repertoire vo. Institution d'Héritier, sec. v. ss. 1, no. xviii, vol. 15, p. 367.
(8) S.V. 57, 1, 182.
(9) S.V. 52, 2, 435.
(10) S.V. 49, 2, 538.
(11) S.V. 41, 2, 240.
(12) S.V. 27, 1, 409.
(13) S.V. 60, 1, 346.
(14) Dalloz. Recueil 70, 1, 202.
(15) Journal du Palais 1827, p. 132
(16) 28 Beav. 266.

Stuart v. *Bowman* (1); *McGibbon* v. *Abbott* (2); *Tilden* v. *Green* (3); *Levy* v. *Levy* (4).

What shall be considered charities in England is settled by the statute 43 Elizabeth c. 4.

The doctrine of the English law, which it is suggested the court should follow in this case, for the purpose of preventing the legacy from lapsing in the event of the appellant not executing it, has been harshly criticised and does not recommend itself either by its wisdom or its justice. *Cary* v. *Abbot* (5). See remarks by Sir William Grant in *Morice* v. *The Bishop of Durham* (6).

The decisions in *Contant* v. *Mercier* (7) have no material bearing upon this discussion, as the question of jurisdiction and power was never raised.

The intervening parties should be not only possible but certain beneficiaries, to justify their intervention. The old rule "*l'intérêt est la mesure des actions*," as contained in the Code of Procedure art. 13, applies. The decision in the Privy Council in *McGibbon* v. *Abbott* (8), appears to support the view that where a person's rights are dependent upon the exercise of a legal discretion vested in another, no right to defend the instrument creating the discretion accrues until after the exercise of the discretion has created a right. *Isaac* v. *Defriez* (9); *Attorney-General* v. *Price* (10); *Anon.* (11).

As to the Morrin College, it is an educational institution and in no sense a charity.

The Finlay Asylum, though a charitable institution in the proper acceptation of the word, is not a public

(1) 3 L.C.R. 309.
(2) 8 Legal News 267.
(3) 130 N.Y. 29.
(4) 33 N.Y. 107.
(5) 7 Ves. 490.
(6) 9 Ves. 399; 10 Ves. 537.
(7) 20 R.L. 379, 382.
(8) 10 App. Cas. 653.
(9) 17 Ves. 373*n*.
(10) 17 Ves. 371.
(11) 1 P. Wm. 327.

1893
ROSS
v.
ROSS.

charity. By its Act of Incorporation, 20 Vic. ch. 219, the Finlay Asylum is founded for the relief of persons of the communion of the Church of England, and the government of the institution is vested in the rector and churchwardens of the parish church of Quebec.

Geoffrion Q.C. and *Lafleur* for appellants, Annie Ross and John Theodore Ross. The will in question was made before the coming in force of the Civil Code, and its formal validity must be decided by the law at the time of its execution. Dalloz (1).

None of the articles of the Code which refer to this subject purport to introduce new law. They express the law as it stood immediately before the passing of the Code, and for a long time anterior thereto.

Article 7 of our Civil Code adopts in its entirety the rule *locus regit actum*. This rule was always considered as imperative, and not merely facultative. *Re Gilbert Andras* (2); *de Pommereu* (3); Merlin (4); *in re de Boisel* (5); *in re d'Argelos* (6).

All decided in the *Picqassary case* (7), was that holograph wills were authorized by the custom of Angoulème. See also, Bourjon (8); Ricard (9).

Article 999 C. N. really emphasizes the rule by creating a special exception in favour of holograph wills made abroad by Frenchmen. Demolombe (10); Marcadé sur art. 999. Laurent (11); *Browning* v. *de Nayve* (12); *Mendès* v. *Brandon* (13); Aubry & Rau (14).

(1) Rép. "*Dispositions entre-vifs et testamentaires*," nos. 3499, 2504 and 2507 and the authorities there cited.
(2) 17 Guyot Rép. vo. Testament, 167-8.
(3) 7 Journal Audiences, 515.
(4) Rép. vol. 17, p. 532-3.
(5) 7 Journal des Audiences, 689.
(6) 7 Journal des Audiences, 520.
(7) Journal des Audiences, vol. VII, p. 528.
(8) Vol. II, p. 305.
(9) Don. vol. I, p. 322, no. 1286.
(10) Vol. XXI, pp. 450-4, nos. 482-3.
(11) Principes, vol. XIII, p. 166, no. 159.
(12) Dal. 53, 1, 217.
(13) Journal de Palais 1850, 2, 187.
(14) Vol. I, p. 112, par. 31.

In England and Scotland, up to 24 & 25 Vic. ch. 114, the rule was that validity of the will depended on the law of the testator's last domicile. By this act British subjects, only in so far as regards personal estate, may adopt the forms recognized by the *lex actus*, or by the law of the domicile of origin. Dicey On Domicile (1).

In the United States the rule recognized is that of the testator's domicile. Story Confl. of Laws (2).

The rule of the law of New York requires conformity to the law of Quebec; and as the law of Quebec requires that the formalities of foreign law should be adopted and followed the provisions of our law have not been complied with, and the will is invalid.

The Marquis de Bonneval died in 1836, in London, where he had resided for a considerable period, and left a will executed in England in the English form dated 19th September, 1814. The will was contested and the question debated whether the Marquis de Bonneval was domiciled in England or in France. The court held that the testator had never lost his French domicile of origin, notwithstanding his prolonged residence in England, that the validity of the will should be decided by the French law, and ordered a suspension of proceedings until a decision should be obtained from the French courts. *De Bonneval* v. *De Bonneval* (3).

Both the Court of Appeal and the Cour de Cassation held that as the testator had followed the usual form required by the place of execution (England), the will must be held valid.

If the will in question is considered as a will in the English form it could not operate in regard to realty even in Quebec, inasmuch as it does not comply with

(1) Pp. 298, 303.
(2) Par. 468.
(3) Jour. du Palais 43, 1,288; 1 Curt. 856.

1893
Ross
v.
Ross.

the requirements of the Statute of Frauds. *Meiklejohn* v. *Atty.-Gen.* (1).

Sec. 10 of the Quebec Act merely introduced a new form of will, and must be interpreted as referring to wills made within the province. Endlich on Statutes, ss. 174, 387; *Migneault* v. *Malo* (2).

The French rule *locus regit actum* is part of our law, is an imperative rule, and was constantly and inflexibly applied by the highest courts in old France, and is still applied by the Cour de Cassation in France, and cannot be characterized as unreasonable or inconvenient as compared with the English rule in force when the Quebec Act was passed, and down to the Imperial Act 24 & 25 Vic. c. 114.

The power of election given Frank Ross by the will is so absolute that he might, following *McGibbon* v. *Abbott* (3), entirely exclude any one of the intervenants.

The rule known as the *cy près* doctrine, when the beneficiary can not be ascertained, has no place in our law, nor do the modern French decisions apply (4). To follow the case of *Liddard* v. *Liddard* (5), would be to violate the testator's express intention. The legacy to charities and poor relations should be declared to be void for vagueness and uncertainty, and because, in the absence of the exercise by Frank Ross of the discretionary powers vested in him by the will, the courts of this province could not enforce the execution of this bequest.

The present appellants do not agree with Frank Ross as to the disposition which should be made of the fund representing this trust in the event of the bequest being set aside. If the charitable bequest is void heirs-at-law are entitled to half the estate.

(1) Stuart's L.C.Rep.581; 2 Kn. 328.
(2) 16 L. C. Jur. 288; L.R. 4 P.C. 123.
(3) 8 Legal News 267.
(4) Dalloz 46, 2, 155.
(5) 28 Beav. 266.

1893

Ross v. Ross.

Presumptive heirs of a man still living would not be permitted to take any proceedings, even conservatory, with respect to an estate in which they may never have any real interest, and it is difficult to see why the present intervenants should be in any better position than presumptive heirs.

With regard to William Russell Ross, such discretion as the trustee may have has been exercised so as exclude him from all participation in the estate.

As to Morrin College, under its charter, 24 Vic. ch. 109, which provides in section 7 that all the property belonging to the corporation shall be exclusively applied to the advancement of education in the college, and to no object, institution or establishment whatever not in connection with nor independent of the same, it cannot be regarded as constituting a charitable institution.

As regards the Finlay Asylum, incorporated by 20 Vic. c. 219, such a sectarian institution cannot pretend to be a public charitable institution of Quebec, and has no *locus standi* in this case, and no right or interest to support the will in question.

McCarthy Q.C. and *Stuart* Q.C. for respondent Frank Ross on the appeal of Annie Ross *et al*, prayed the confirmation of that part of the judgment appealed from, whereby the sufficiency of the will is established, citing:—C. C. art. 7; Pothier Don. ch. 1, art. 1, s. 1; Arrêt of 14th July, 1722 (Jour. des Audiences, lib. 5, ch. 31. Ricard (1); Bornier (2); Boullenois (3); Savigny, Private International Law, p. 265. Fœlix, Droit International Privé (4); 5 Pardessus (5); 1 Laurent (6); Dalloz (7); 1 Aubry & Rau (8).

(1) Traité du Don Mutuel no. 306.
(2) Ch. 28, no. 20.
(3) Vol. 2 pp. 75, 78.
(4) No. 83, p. 107.
(5) Droit Commercial, p. 255, no. 1486.
(6) Nos. 100, 101, 102.
(7) Répertoire vo. Lois, no. 430.
(8) P. 112 § 31, no. 6, note 79.

1893

ROSS v. ROSS.

Geoffrion Q.C. and *Lafleur* for respondents Annie Ross and John T. Ross on the appeal of Frank Ross. The reasons and authorities on behalf of these respondents have been set forth at length on their own appeal.

Irvine Q.C. and *Cook* Q.C. for respondents "The Morrin College" and "The Finlay Asylum." (*Fitzpatrick* Q.C. with them).

The question for solution is: Is a holograph will made in New York by a person temporarily there, but domiciled at the time in the province of Quebec, and owning both moveable and immoveable property in said province, which is disposed of by the will, valid, such form of will not being locally recognized by the laws of New York, although the rule prevails there as elsewhere generally in the United States, that a will disposing of moveable property is valid if made in the form prescribed by the laws of the testator's domicile—one disposing of immoveables being only valid if made in accordance with the law of the place where the real property is situated—*lex rei sitae?*

Against the validity of the will it is urged that the matter must be governed by our own law, and that by it the maxim, *locus regit actum*, requires a will made in New York to be made in a form valid by the laws of that state on pain of nullity. It is contended that article 7 of our Code, based on the ancient law, follows this rule, and declares, at least by implication, that acts and deeds are invalid if not made in the form required by the *lex loci actus*; that our Code must be interpreted on this point in conformity with the old French law which prevailed in this province, and that by that law such a will was invalid.

Such a conclusion seems to be contrary to the whole avowed policy of our Code and of the Imperial statute 14 George 3, ch. 83, on the subject of wills, by which freedom of willing and facilities for doing so were

1893

ROSS v. ROSS.

extremely favoured and carried far beyond anything known to the old law, the policy of which in this respect was the very reverse of our own, seeking as it did uniformly to restrict the powers of and facilities for disposal by testament.

See Merlin's opinion *re de Mercy* (1). He is far from placing the maxim *locus regit actum* on a firm foundation as a rule of settled law. He cites the law and a large number of writers, including Vinnius, Burgundius, Rodenburg, against the rule. Again in the same article (2), Merlin reports an appeal judgment in the case of the will of Despuget, of the 20th August, 1806, which clearly shows how far the doctrine was from settled law. Troplong (3), speaking of article 999 of the Code Napoleon, does not say that it is an innovation or new law, but asserts that it gives the preference to the opinion of Ricard and his school, the opposite opinion, that is, from that of Furgole, Guyot and Merlin, which opinion was supported not only by Ricard, but by Boullenois, Cujas and many of the greatest names in French jurisprudence as well as by *arrêts* of parliament. Troplong refers to an *arrêt* to that effect as not an isolated one; and how divided views were on the question is seen in the statement of the various opinions by Pothier, and by all the authors who discuss it (Laurent, Droit Int., vol. 6, nos. 406, 422, 424), or by referring to even the last *arrêt* reported by Merlin, or to any *arrêt* that deals with the subject, an example of which is seen in the *arrêt* of Cambolas, liv. 4, ch. 41, where the question is discussed both as regards wills and contracts in an *arrêt* of the 7th of August, 1622, there reported. The old writers and Ricard, cited under C. C. art. 854, are in favour of the validity of such wills made abroad, in conformity with the law of the testa-

(1) Répertoire vo. Testament, sec. 2, par. 3, art. 8.

(2) Sec. 2, par. 4, art 1.

(3) Don. Test. No. 1734.

1893
Ross
v.
Ross.

tor's domicile. In this they are supported by Boullenois and by Cujas. At no. 191 of part I of Ricard, he cites an *arrêt* in support of the validity of a holograph will by letter missive, and gives as a precedent the case of the codicil made by Lentulus in a letter written from Africa, which was approved by Augustus, and became law as stated in the Institutes B. 2, tit. 25.

Wharton, Conflict of Laws, 2nd ed. p. 573, and sec. 588; Story, Conflict of Laws, ss. 465, 468, *et seq.*; 4 Burge, Colonial and Foreign Laws, p. 582 *et seq.*, and p. 590; Savigny, sec. 381, p. 324. The observance of the form in use at the place of the act is merely *facultative*, and allows an election. Fœlix, p. 107. Bar 36. Westlake, Private International Law, 123. Fœlix, vol. 1, p. 181. C.C. art. 6 and authorities *in pede*, art. 7, C. N. 999; *Abbott* v. *Fraser* (1); C. C. arts. 850, 854; Troplong, Don. Test. vol. 3, p. 392, no. 1465; 1 Laurent, Droit Civil, 158, 162; 6 Laurent, Droit. Int, 653; Aubry & Rau, vol. 7, subsec. 699; 21 Demolombe 142.

The Imperial statute 14 Geo. 3, introducing the absolute freedom of devise by will, and the right of willing in the English form "with all its incidents," laid down by the Privy Council in *Migneaut* v. *Malo* (2), necessarily introduced the right of making a will in the form of the *lex domicilii*. Until the Code the power to make wills in this form existed, and British subjects could make them anywhere. *Meiklejohn* v. *The Attorney General* (3). Personalty follows the law of the domicile, wills are valid if made in accordance with the law of the domicile, and only valid (till 24 & 25 Vic.), if made according to such law. This principle is a rule of private international law, and part of the *jus gentium*. *Croker* v. *The Marquis of Hertford* (4); *Bremer* v. *Free-*

(1) Ramsay's Dig. p. 857.
(2) 16 L.C. Jur. 288
(3) Stuart's L.C. Rep. 581; 2 Kn. 328.
(4) 4 Moore P.C. 339.

man (1); *Whicker* v. *Hume* (2); Story, Conflict of Laws (3); Wheaton (4).

Under the old law of France previous to the cession the weight of authority was in favour of the rule *locus regit actum* being facultative and not imperative, in relation to wills; and during the last 150 years the rule that a testator may make his will, in relation to personalty, according to the *lex domicilii*, has by common assent become a rule of private international law.

The will is valid under 14 Geo. 3, ch. 83, in force when it was made, and preserved *quoad* it, by C. C. art. 2613.

The *lex loci actus* was not violated but observed, the law of New York empowering strangers to make wills according to the *lex domicilii*. The devise in trust and the discretion of the trustee come expressly under art. 869 of the Civil Code which the codifiers (fourth report art. 124 *bis*, p. 181) state to be purely old law. The nature and extent of this discretion is well stated by Troplong, Pothier and all the authors (5). *Quoniam quasi viro bono ei potius commissum est, non in meram voluntatem hæredis collatum*. The discretion in this case is much less than in those cited.

The expression, *as he may judge best*, would not admit of discussion in view of the opinion expressed by all the authors—that *si putaveris* is binding. Frank Ross is bound to distribute the trust estate whether he will or not, to the best of the judgment of a *bonus vir*, due regard being had, as Troplong says, to the fortune to be distributed, the position and needs of the recipients and all other circumstances.

To judge of the distribution evidence can be given, even parol, before the court of all matters that will

(1) 10 Moore P.C. 306.
(2) 7 H.L. Cas. 124.
(3) Secs. 380, 381.
(4) 3 ed. p. 134.
(5) 1 Troplong, Don. Test., nos. 277, 278; 6 Pothier, Don. Test., ch. 2, art. 8.

1893
Ross
v.
Ross.

enable it to judge of the *bona fides* of the distribution, and how far it conforms to the judgment or *arbitrium boni viri* (1); *Dellevaux* v. *Jambon* (2).

The trustee cannot defeat the trust by refusing to distribute the fund. The court will do it for him even under English law where the courts allow much more absolute discretion to trustees than does our own, which in this respect is based on the equitable doctrine of the Roman law approved and adopted by Pothier and our best jurists. But even by English law the trustee must distribute the funds. Thus Lewin on Trusts ch. 28, p. 836, is in point. *Gower* v. *Mainwaring* (3).

The fact of a trustee having refused or failed to make a distribution is a ground on which the court will interfere and control him. Lewin, 777. The discretion is not as to who are to be the objects of the charity or bequest, but as to the proportion to each, and that must be *bonâ fide* and not capriciously determined. Lewin, 839.

Abbott v. *McGibbon* (4) does not apply, as the object arrived at in substitutions is to conserve the property in the family, and that object is secured by giving to one of the family. In the Ross will the object is to support charities generally of a particular class and poor relations, and to give all to one or to a few is to defeat the intention of the testator. For *arrêts* see Ricard, no. 589, and *Beaucourt* v. *Soc. &c. de Lille* (5).

There is no vagueness and uncertainty in the sum, for the amount is fixed, nor in the objects, for they are readily ascertainable. No microscopic search is required to discover the public Protestant corporate charities of this city and of a small Scotch village.

(1) 4 Demolombe, Don. Test., no. 37; 7 Aubry & Rau, par. 712.
(2) S.V. 80, 2, 197, and 72, 1, 406; and see Wigram on Interpretation of Wills, p. 51; Jarman on Wills, 392, 397.
(3) 2 Ves. 87.
(4) 8 Legal News, 267.
(5) S.V. 75, 1, 307.

1893

Ross v. Ross.

See also *Noad* v. *Noad* (1); *Molson's Bank* v. *Lionais* (2); *Comte* v. *Lagacé* (3); *Russell* v. *Lefrançois* (4); *Harding* v. *Glyn* (5); Taylor, Ev. (6); *Moggridge* v. *Thackwell* (7); *Power* v. *Cassidy* (8).

It is sufficient for the intervenants to establish a *primâ facie* interest; the question of their absolute rights is to be decided when other claimants have been notified to appear. The immediate object is to defend the document on which their rights depend, which is impugned by both the plaintiffs and the defendant.

The charter of the Finlay Asylum (20 Vic., ch. 219) establishes that it is a public Protestant charity at Quebec.

The case of Morrin College is still stronger. The testator was for years a governor; he repeatedly expressed his intention of providing for it substantially; a short while before his death he stated that the college had been opened prematurely and on insufficient means, that it was doing a good work and would succeed, and he was in the habit of contributing to its bursary fund for the assistance of students with limited means.

What Morrin College is, and was intended to be, its charter (24 Vic. ch. 109), the trust deed and deed of gift produced in the case, the statement of the first principal, and the evidence abundantly show. The deeds explain Dr. Morrin's intentions:—

"Whereas, the said Joseph Morrin is desirous of leaving some permanent memorial of his regard for the city of Quebec, * * * and at the same time of marking his attachment to the Church in which he was reared, and to which he has always belonged;

"And, whereas, he considers none can be more suitable for both purposes than a provision for increasing

(1) 21 L.C. Jur. 312.
(2) 3 Legal News, 83.
(3) 3 Dor. Q.B. 319.
(4) 8 Can. S.C.R. 335.
(5) 1 Atk. 469.
(6) 9th ed. s. 1131.
(7) 3 Bro. C.C. 517.
(8) 79 N.Y. 602.

1893

Ross
v.
Ross.

and rendering more perfect the means of obtaining for the youth generally, and especially those who may devote themselves to the ministry of the said Church, the means of obtaining a liberal and enlightened education; he does, &c., &c."

The inaugural address declares the principles which were intended to guide the policy of the college, and which have ever since been pursued. For over thirty years, with very limited resources, it has, apart from theological instruction which was necessarily presbyterian, afforded a liberal and enlightened education to all desirous of obtaining it, without test or subscription of any kind, and by means of professors belonging, not only to the various Protestant churches, but to the Roman Catholic church. Nominal fees exacted from others have never been required from poor students, who have also, apart from their religious belief, been aided by money bursaries and free accommodation in the college rooms. The generous intention of the founder was to supply a want which, the University being exclusively Catholic, and its instructions given almost entirely in the French language, could not so well render to the Protestant and English speaking youth.

Both French and English law regard colleges as charities. If the statute of Elizabeth on charitable trusts is in force in this province the question does not admit of a doubt; and in a sense it is submitted that that statute is in force. From the earliest period the King, as *pater patriæ*, was by his prerogative the guardian and protector of charities. The act of Elizabeth declared and defined the charitable objects over which the prerogative extended, and in this sense it forms part of our law, as necessarily being introduced at the cession of the country to the British Crown.

C.C., 869. Theobald, pp. 181, 182. *Pomeroy* v. *Willway* (1).

The King's Edict of 1743, cited in *Fraser* v. *Abbott* (2), prohibited under certain circumstances the foundation of charitable establishments by will.

Our own statute book, in which for the last hundred years educational and benevolent institutions are classed together, fully bears out this view. *Desrivières* v. *Richardson* (3).

No order was made in the Superior Court as to costs. As to whether the estate generally, as held by Chief Justice Meredith, in *Russell* v. *Lefrançois* (4), and supported by this court (5), the losing parties individually, should bear the costs, it is for the court to say. It is clearly a hardship for the successful parties to be compelled to bear their own. It may be said that no appeal has been taken by the intervenants in this case. That is true; but all costs are in the legal discretion of the court seized of the cause; and in *Peters* v. *The Quebec Harbour Commissioners* (6), where no appeal was taken on this subject, the court dealt in its own way with costs. The respondents submit that costs should be awarded in all courts.

The respondents ask that the judgment appealed against be affirmed, and costs awarded them in all courts;

1. Because the will is in all respects valid, both as a holograph will under the French system, and as a will of personalty under the English system in force in this province in 1865;

2. Because, under the will, a valid trust was established, to the extent of one-half of the estate passing under it, in favour of charities and poor relations, and

(1) 59 L.J. Ch. 172.
(2) Ramsay's Digest, 861.
(3) Stuart's L.C. Rep., 226.
(4) 5 Legal News 81.
(5) 8 Can. S.C.R. 375, 384.
(6) 19 Can. S.C.R. 685.

1893

ROSS v. ROSS.

by proving the will and accepting and administering the estate, Mr. Frank Ross accepted the office and assumed the duties and responsibilities of a trustee;

3. Because Morrin College and the Finlay Asylum are public Protestant charities within the meaning of the will; and William Russell Ross is a poor relative within such meaning, and as such they had an interest to intervene for the purpose of defending and establishing the validity of the document upon which their rights and those of their co-beneficiaries depend;

4. Because Frank Ross having asserted that the whole estate devised was his own absolutely, and having disregarded the obligations of a trustee, the respondents were bound to intervene to protect their interests; particularly as the plaintiff and defendant plead that the trust devise of half the estate is void, and only differ as to its distribution;

5. Because Frank Ross, pleading that the will was valid, is estopped from denying the validity of such trusts on the issues with the intervening parties.

Irving Q.C. and *Cook* Q.C. for respondent W. R. Ross on both appeals.

William Russell Ross is admitted to be a poor relation. His interest, however, is barred, in the opinion of both plaintiff and defendant, from the double fact of his having lost money when in partnership with the testator, and having owed money to the estate when he died. And so Frank Ross, while denying that he is called upon to exercise any discretion, uses what he terms his discretion, and excludes his cousin. Rights, conferred by the testator, cannot be thus summarily dealt with without a mockery of justice. That James Gibb Ross intended that his poor relations, others than his heirs-at-law, should be benefited is proved by this. In 1865 he had but two heirs-at-law apart from Frank, for whom the will provided, and they

both were then as wealthy as, if not more wealthy than, J. G. Ross himself.

The respondent, William Russell Ross, submits that the judgment of the court appealed from is in all respects right, in so far as it affects him, save as to costs. He relies on the opinions of Mr. Justice Andrews, and of the Chief Justice of the Court of Queen's Bench, and on the reasons urged by the intervening parties, Morrin College and Finlay Asylum, and prays that the appeals be dismissed with costs in all courts.

THE CHIEF JUSTICE.—First, as regards the principal action which had for its object a declaration that the will was null and void, I am of opinion that the plaintiffs fail and that the action must be dismissed as against the defendants Frank Ross and Dame Mary Frame, with costs. In other words, I am for affirming the judgment of the Superior Court so far as it relates to the principal action in all respects, except that portion of it which declares the will void as to immovables situate in Ontario, New Brunswick, British Columbia and in the United States. I think the judgment in this last respect was wrong. There was no jurisdiction in the Quebec courts to deal with such immovables, the question of the validity or invalidity of wills as to immovable property being one exclusively for the forum *rei sitae*. I will not say that the judgment does any harm by this declaration, but it being irregular and without jurisdiction I think the judgment of the Superior Court, and of the Court of Queen's Bench which affirms it, should be rectified by striking out all about immovables in Ontario, New Brunswick, British Columbia and the United States. This would leave the judgment, so far as concerns the principal action, a judgment dismissing the action. This dis-

1894

Ross
v.
Ross.

The Chief Justice.

missal of the action should, for manifest reasons, be with costs to Frank Ross and Dame Mary Frame.

My reasons for this conclusion as to the disposition of the appeal from the judgment in the principal action, are as follows: First, I am of opinion that the rule *locus regit actum* was not before the enactment of the code (nor since under the code itself, art. 7) imperative, but permissive only. The jurisprudence is, it is true, contradictory, but Pothier treats it as an unsettled point, and such great authorities as Boullenois, Ricard, Massé, Mailher de Chassat, Wharton, Story, Westlake, and I may say all modern writers whose opinions are entitled to weight, are in favour of *locus regit actum* being regarded as permissive only. To hold it to be imperative would be harsh and unreasonable, entirely at variance with the policy of the law of Lower Canada since the Quebec Act, 1774, which favours the exercise of the testamentary power instead of discouraging it, as was the policy of the old law of France, and most arbitrary in making the sufficient execution of a will depend upon the locality of a testator who, whilst *in transitû*, makes his will according to the law and forms of his own domicile. Viewed as permissive only the rule *locus regit actum* is, on the other hand, most beneficent and reasonable since it enables a testator who wishes to make an authentic will to avail himself of the notaries and public officers of a foreign country through which he may be passing at a time when he would not be able to avail himself of the instrumentality of the notaries and public officers of his domicile. I therefore conclude that the will was good because made in strict accordance with the law relating to holograph wills prevailing in the province of Quebec, in which province the testator was domiciled, both at the time of the will and at the time of his death.

1894

ROSS v. ROSS.

The Chief Justice.

Secondly, I agree with the reasons of the learned Chief Justice in his judgment in the Court of Queen's Bench, that even if the rule *locus regit actum* does apply, yet it sufficiently appears from the evidence, that by the law of the State of New York this will would be considered good as to movables everywhere, and as to immovables in Quebec. Good as to movables wherever situated because it was executed according to the law of the testator's domicile, and good as to immovables in the province of Quebec because executed according to the law of the situation of those immovables. Therefore, applying the rule *locus regit actum* the will was a good will according to the law of the State of New York, at least to the extent to which it can properly come under the jurisdiction of the courts of the province of Quebec; that is to say, excluding the immovables situate in the provinces of Ontario, New Brunswick and British Columbia, and in the United States.

Then as to the Interventions. As the principal action was to annul the will, and as that action is dismissed, we are not called upon to interpret the legacies to any greater extent than is rendered necessary for the purpose of disposing of the interventions, but to this extent we must interpret it in order to ascertain if the parties had any right to intervene.

Then the intervention of William Russell Ross must be dismissed because he has no *locus standi* to maintain it.

The gift to "poor relations" is, according to the terms of the will, not an absolute gift to the objects the testator intended to benefit, but rightly interpreted is to be read as conferring upon Frank Ross a faculty of selection amongst persons coming within that description. Could William Russell Ross have possibly derived any benefit under this disposition? If it had

1894

Ross v. Ross.

The Chief Justice.

been in the power of Frank Ross to select him as one of the beneficiaries I should unhesitatingly have agreed with the learned Chief Justice of the Queen's Bench in holding that William Russell Ross had a *locus standi* to maintain an intervention in favour of the assailed will, though his interest would be contingent and uncertain until Frank Ross should exercise his faculty of selection. But according to the interpretation which I put on the description "poor relations," Frank Ross had no power to select this William Russell Ross, who was a cousin of the testator only and not one of his heirs-at-law, as a beneficiary under the will. "Poor relations" must be interpreted as meaning "heirs-at-law." The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected. The word "relations," then standing alone, must be restricted to some particular class, for if it were to be construed generally as meaning all relatives it would be impossible ever to carry out the directions of the will. The line must therefore be drawn somewhere, and can only be drawn so as to exclude all except those whom the law, in the case of an intestacy, recognizes as the proper class among whom to divide the property of a deceased person who dies intestate, namely, his heirs. Then William Russell Ross is not an heir; therefore his intervention must be dismissed with costs to Frank Ross, but without costs as regards the plaintiffs and other heirs who contested the intervention on a ground which failed, namely, that the testament was null.

As regards the intervention of "Morrin College," it does not come within the description of a charitable institution according to the ordinary meaning of the words, for in administering the law of the province of Quebec we have, of course, nothing to do with technical charities under the English law and the statute of

Elizabeth. If, therefore, Frank Ross were to select Morrin College as a charitable institution entitled to benefits under the will his selection would be unauthorized and void, for it does not appear from the record that that seminary of learning is an eleemosynary institution. Consequently, for the same reason as in the case of William Russell Ross, the intervention of Morrin College must be dismissed with costs to Frank Ross.

As regards the intervention of Finlay Asylum, it stands on a different ground from the other interventions and must be maintained upon the principle the learned Chief Justice states. It would be competent to Frank Ross to select Finlay Asylum as a beneficiary, and this gives that institution a right to intervene for the purpose of supporting the will. Frank Ross fails, therefore, in his contestation in this respect and must pay the costs of the intervention of Finlay Asylum.

As I say above, I only interpret the will so far as is necessary for disposing of the interventions. I disclaim any intention of construing its provisions as to these legacies to poor relatives and charities beyond this. I therefore leave open for future consideration, and for a determination in some further action or proceeding if the parties cannot agree, the questions of how far Frank Ross's powers of selection go; whether he can give to some of the heirs and exclude others, or whether he must give something to all; and I would say the same with reference to the charities. Further, the question of whether Frank Ross himself is entitled to benefit as one of the heirs is not in any way prejudiced by the present judgment. The judgment in the principal action must, therefore, be varied by omitting all reference to the immovables outside the province of Quebec, and by simply dismissing the action with costs to

1894

Ross
v.
Ross.

The Chief Justice.

Frank Ross and Dame Mary Frame. The intervention of William Russell Ross and that of Morrin College must both be dismissed with costs payable to Frank Ross. The intervention of Finlay Asylum must be maintained with costs against Frank Ross.

As regards the costs in the Court of Queen's Bench, Frank Ross and Dame Mary Frame are to have their costs of the appeal from the judgment in the principal action, and Frank Ross is to have his costs of the appeal in respect of the intervention by William Russell Ross and Morrin College and must pay the costs of the appeal of Finlay Asylum, and in this court the costs must be disposed of in the same way as in the court of Queen's Bench.

FOURNIER J.—L'action en cette cause, intentée par Dame Annie Ross contre Frank Ross et autres, a pour but principal de faire déclarer nul le testament olographe de feu James Gibb Ross. Après avoir allégué le décès, à Québec, le 1er octobre 1888, du dit feu James Gibb Ross, elle déclare que plus d'un an après, le 28 octobre 1889, un testament olographe, daté du 8 février, 1865, à New-York, a été trouvé à sa résidence, lequel se lit comme suit :

I hereby will and bequeath all my property, assets or means of any kind to my brother Frank, who will use one half of them for public protestant charities in Quebec and Carluke, say the Protestant Hospital Home, the French-Canadian Mission, and amongst poor relatives, as he may judge best, the other half for himself and for his own use, excepting two thousand pounds which he will send to Miss Mary Frame, Overton Farm.

(Sd.) JAMES G. ROSS.

Elle allègue ensuite que ce testement est nul, parce qu'il a été fait à New-York dans une forme qui n'est pas reconnue par la loi de cet État ; elle allègue de plus que le défendeur Frank Ross a seul pris possession de la succession en vertu de ce testament, et qu'elle, la deman-

deresse, ainsi que les autres défendeurs sont les seuls héritiers légitimes du dit feu James G. Ross, ayant droit à sa succession.

En vertu d'un amendement permis plus tard, la demanderesse a ajouté à sa déclaration les allégations suivantes, que même si ce testament pouvait être considéré valable dans aucune partie, il était certainement illégal quant à tous les immeubles situés en dehors de la province de Québec, parce que la loi des pays de leur situation, ne reconnaissait pas la validité d'un semblable testament quant aux immeubles, et que quant à l'autre moitié léguée à Frank Ross pour être distribuée à sa discrétion parmi les institutions charitables, et à des parents pauvres, le dit James G. Ross devait être considéré comme décédé *ab intestat*, attendu que ce legs était nul pour cause d'incertitude. Elle concluait à la nullité du testament, que le dit Frank Ross fut condamné à lui livrer un neuvième de la succession, et de plus, à lui rendre compte des fruits et revenus.

Frank Ross et Mary Frame, ont seuls plaidé à l'action, la validité du testament du dit James Gibb Ross ; que ce testament, quoique fait à New York, a été apporté par le testateur à son domicile à Québec, qu'il l'a toujours conservé jusqu'à sa mort ; ce testament est fait suivant les formalités de la province de Québec, où il avait son domicile, et par la loi de New-York, tout testament fait dans cet état, suivant la loi du domicile du testateur, est légal ; les défendeurs nient aussi que le testament a été exécuté dans l'État de New-York. Les conclusions demandent le renvoi de l'action.

Tous les faits qu'il était nécessaire de prouver à l'appui de cette contestation ont été admis.

A cette action se sont portées parties intervenantes.

1o. W. Russell Ross, se disant un parent pauvre du testateur ; 2o. le Morrin College ; et 3o. le Finlay

1894
Ross
v.
Ross.
Fournier J.

Asylum, alléguant qu'ils étaient des institutions charitables, (*public charities*) suivant l'intention du testateur, pour soutenir la validité du testament.

Le droit des intervenants a été contesté par la demanderesse et le défendeur, qui ont allégué quant au Morrin Collège qu'il n'était pas une institution charitable suivant l'intention du testament, et quant au Finlay Asylum que ce n'était pas une institution publique charitable, et quant à W. Russell Ross, le dit Frank Ross disait avoir déjà exercé à son sujet la discrétion qui lui était laissée par le testament, en l'excluant de la participation du legs pour les motifs qu'il a indiqués.

La cause présente pour la décision de cette cour, les questions suivantes :

1o. Validité du testament de James G. Ross, fait à New-York.

2o. Les legs qu'il contient en faveur des institutions charitables et des parents pauvres du testateur, est-il valable ?

3o. S'il est nul, à qui doivent revenir les biens légués, aux héritiers du testateur, ou à son légataire, Frank Ross ?

4o. Les intervenants avaient-ils un intérêt suffisant pour justifier leur intervention dans la cause ?

Le testament ayant été fait en 1865, c'est à la loi antérieure au code civil de la province de Quebec qu'il faut recourir pour en décider la validité. Le testament étant dans la forme olographe, sa validité doit être décidée d'après les principes de l'ancien droit français qui était alors en force dans la province de Quebec.

L'Honorable Sir Alexandre Lacoste, juge en chef, a discuté dans ses savantes notes sur cette cause, les opinions les plus en vogue parmi les auteurs qui ont écrit sur le droit des gens et traité de la validité des testaments faits à l'étranger. D'après les uns, le testa-

ment n'est valide que s'il est fait selon les formalités requises par la loi du lieu de sa confection, d'après la maxime *locus regit actum*. Une autre opinion veut qu'il soit fait suivant la loi du domicile du testateur. La troisième, qui est la plus généralement adoptée, dit-il reconnaît tous les testaments faits en la forme requise, soit là où se trouve le testateur, soit en celle de son domicile.

Après avoir passé en revue ces diverses opinions et cité beaucoup d'arrêts l'Hon. Juge en arrive à la conclusion que la maxime *locus regit actum* régissait le territoire assujetti à la coutume de Paris et que d'après notre droit en 1865 le testament fait à l'étranger par une personne domiciliée dans le Bas-Canada devait être fait suivant les formes du lieu où il était passé à peine de nullité.

Le droit ancien a été reproduit dans l'article 7 de notre code civil qui se lit comme suit :

> Les actes faits ou passés hors du Bas-Canada sont valables, si on y a suivi les formalités requises par les lois du lieu où ils sont passés.

On a soutenu à l'argument que les testaments olographes n'avaient pas de forme. Certains auteurs ont émis cette opinion. Cependant, le grand nombre est d'un sentiment contraire et la jurisprudence se déclare dans leur sens.

> En nous référant à notre code civil, dit l'Hon. Sir A. Lacoste, nous trouvons que l'article 842 qui a trait aux conditions exigées pour la validité des testaments en général et du testament olographe en particulier se trouvent sous la rubrique " De la forme des testaments." Comme le dit Pothier, la forme du testament olographe consiste dans le fait qu'il doit être écrit en entier par le testateur, et signé par lui.

Quelle est, d'après la loi de l'État de New-York, la validité du testament de James G Ross fait à New-York en 1865 ? Si ce testament eût été fait par un résident de l'État, il serait nul, comme n'ayant pas été attesté par deux témoins. Mais l'art. 2611 du code de procédure de

1894

Ross
v.
Ross.

Fournier J.

cet État, permettant aux étrangers de faire un testament suivant les formes du pays de leur domicile, ce testament est légal en vertu de cette disposition introduite en faveur des étrangers. Ce testament, entièrement écrit de la main du testateur et signé de lui, se trouvant en la forme olographe conformément à la loi en force, lors de sa date, dans la province de Quebec, est par l'exception de l'art. 2611 de la loi de New-York, en faveur des étrangers, reconnu valable comme le testament d'un étranger, autorisé par cette loi à se servir de la forme de testament de son pays. C'est comme si la loi de New-York avait admis spécialement la forme olographe en faveur des étrangers, et, en ce sens, c'est par application de la règle *locus regit actum*, que ce testament doit être considéré comme valable. Ce testament quoique valable ne peut cependant pas avoir le même effet partout. S'il devait être invoqué dans l'État de New-York, il ne pouvait avoir d'effet que par rapport aux meubles comme étant fait suivant la forme du domicile du testateur. Mais n'étant pas exécuté en présence de deux témoins, il n'aurait aucun effet quant aux immeubles situés dans l'État de New-York. Cependant sa validité comme testament fait d'après la loi du pays où il a été exécuté (à New-York) n'en est pas affectée ; l'effet seul en est limité suivant la loi du pays où il est invoqué.

Mais dans la province de Québec il doit être considéré quant à ses effets comme testament fait d'après la loi en force ici, et produit tous les effets que la loi en force lui donne.

On doit de plus, l'interpréter conformément à l'art. 8, code civil reproduisant l'ancien droit, qui veut que

les actes s'interprètent et s'apprécient suivant la loi du lieu où ils sont passés, à moins qu'il n'y est quelque loi à ce contraire, que les parties ne s'en soient exprimées autrement ou des autres circomstances, il n'apparaisse que l'intention n'ait été de s'en rapporter à la loi d'un

autre lieu ; auxquels cas, il est donné effet à cette loi ou à cette intention exprimée ou présumée.

1894

ROSS v. ROSS.

Fournier J.

Le testament ayant été fait en vertu d'une disposition spéciale de la loi de New-York, permettant à l'étranger de tester d'après la loi de son domicile, ce testament doit avoir tout l'effet qu'il aurait eu s'il eût été fait dans la province de Québec. Au lieu de n'avoir effet que pour les meubles comme s'il était invoqué à New-York, il doit, au contraire, dans Québec, s'appliquer à toute espèce de biens, soit meubles, soit immeubles. En outre, l'intention évidente du testateur était de s'en rapporter à la loi de son pays, comme le prouve l'étendue des termes du testament par lequel il lègue tous ses biens sans distinguer entre ses meubles et ses immeubles. Cette intention résulte également des circonstances établies dans la cause. Le testateur n'était que de passage à New-York. Sa fortune se trouvait presque toute entière dans la province de Quebec. Il a de suite envoyé son testament à son frère à Québec. Se l'étant ensuite fait remettre, il l'a gardé en sa possession dans la province de Québec jusqu'à son décès.

Je crois pour toutes ses raisons que le testament doit avoir l'effet d'un testament olographe, comme s'il avait été fait dans la province de Québec quoique fait à New-York.

Quant à la validité des legs faits par le testament j'ai le regret de différer d'avec l'Hon. Sir A. Lacoste au sujet des interventions du Morrin College, et de W. R. Ross comme parent pauvre.

Le Morrin College n'est pas une institution de charité. C'est uniquement une maison d'éducation. S'il est vrai d'après quelques auteurs, que quelques-unes de ces maisons puissent être considérées comme des institutions de charité, il n'en peut être ainsi du Morrin College. C'est uniquement une maison d'éducation

1894

Ross
v.
Ross.

Fournier J.

dont l'emploi des revenus est appropriée d'une manière si exclusive à l'éducation qu'elle ne pourrait, sans violer les conditions de sa charte, employer partie de ses fonds en charité. Cet emploi est réglé par la sec. 7eme de son acte d'incorporation de manière à lui enlever toute possibilité de se prétendre une institution charitable. Voir Acte d'incorporation du College Morrin, sanctionné 18 Mai, 1861. (24 Vic. c. 109.)

7. All the property at any time belonging to the said corporation, and the revenues thereof, shall at all times be exclusively applied and appropriated to the advancement of education in the said college, and to no other object, intentions or establishment whatsoever unconnected with or independent of the same.

Le Morrin College ne pouvait devenir une institution de charité n'a pourtant point qualité pour accepter un legs en cette qualité ni pour intervenir dans cette cause pour soutenir la validité du testament.

Le legs aux parents pauvres est aussi nul pour cause d'incertitude. Que doit-on entendre par l'expression " poor relations " (parents pauvres) ? Sont-ce les parents aux degrés successibles, ou seulement tous ceux qui pourraient tracer leur descendance d'un ancêtre commun, qui doivent être compris dans ce legs ? Ces parents pauvres ne sont aucunement désignés et ne pourraient être reconnus par aucun événement indiqué par le testateur; l'expression vague et incertaine dont le testateur s'est servi rend leur identification impossible et doit être rejetée.

Cependant, dans tout legs il y a deux conditions indispensables, une chose léguée, et une personne à laquelle la chose est léguée. Sur ces deux points la loi requiert que le testateur s'explique avec certitude. Le legs pour être valide doit être l'expression de la volonté du testateur ; le legs ne peut pas dépendre de la volonté d'un tiers, ni le choix du légataire être laissé à une tierce personne ; agir ainsi, ce ne serait pas exercer

le pouvoir accordé par la loi de disposer par testament, mais plutôt transférer ce pouvoir à une tierce personne. Pothier, Donations testamentaires, pose ainsi la règle :

No. 73. Une disposition testamentaire est nulle par vice d'obscurité lorsqu'on ne peut absolument discerner quel est celui au profit de qui le testateur a voulu la faire. No. 78. De même que pour la validité du legs il faut qu'on puisse connaître à qui le testateur a voulu léguer, il faut aussi qu'on puisse connaître ce qu'il a voulu léguer, autrement le legs est nul, selon cette règle, *quae in testamento ita scripta sunt ut intelligi non possint, permissi sunt ac si scripta non essint.* L. 73 et 1er, ff de Reg. jur.

Troplong (1).

La certitude de la personne gratifiée est une des premières conditions de toute libéralité. La raison donnée par Caius se résume dans ces paroles : "*Incerta autem videtur persona, quam per incertam opinionem, animo suo testator subjicit.*" Le testateur n'a eu aucune idée précise de la personne gratifiée ; il n'aurait rien dit de positif.

Cette autre règle du droit romain "*in alienam voluntatem conferri legatem non potest*, a été adoptée dans notre code, art. 756.

7 Aubry & Rau (2).

Les dispositions testamentaires doivent être faites en faveur de personnes certaines. Si elles étaient faites au profit de personnes incertaines, elles seraient à envisager comme non avenues.

On entend par personnes incertaines celles dont l'individualité n'est ni actuellement déterminée, ni même susceptible de l'être par l'arrivée de quelque événement indiqué dans le testament.

Les dispositions testamentaires doivent être l'expression directe de la volonté du testateur. De ce principe résultent deux conséquences suivantes :

(*a*) Le testateur ne peut faire dépendre l'existence même d'un legs, du pur arbitre *meram arbitrium* de l'héritier ou d'un tiers.

(1) Don. et Test. vol. 2, 517-18. (2) P. 69, ss. 655 and 656.

1894

Ross
v.
Ross.

Fournier J.

(*b*). Le testateur ne peut faire dépendre l'effet d'un legs en ce qui concerne la désignation du légataire du choix de l'héritier ou d'un tiers. En d'autres termes, il ne peut conférer à qui que ce soit la faculté d'élire, c'est-à-dire de choisir soit indéfiniment, soit parmi plusieurs individus indiqués au testament, la personne qui devra profiter du legs (1).

Demolombe dit comme suit : (2)

> Nous croyons qu'il faut entendre par personnes incertaines celles dont l'acte même de disposition ne détermine pas actuellement l'individualité et n'indique non plus aucun moyen aucun événement par l'accomplissement desquels elle pourrait être plus tard déterminée.
>
> Puisqu'il faut que le légataire soit désigné par le testament lui-même, le testateur ne saurait confier à l'héritier ou à un tiers le soin de le désigner : et voilà comment la faculté d'élire se rattache à la théorie des personnes incertaines.

Voir aussi Merlin *in re Jean Merendol* (3) ; Merlin (4) ; Rej : 12 août 1811, Cass. Affre. Lauglier et Héritiers Merendol (5) ; Rej : 3 mars 1857, Cass. *Héritiers de Sauvan* v. *de Saurieu* (6) ; Arrêt, C. d'Appel de Colmar. Affre. *Mœglin* v. *Willig*. 22 mai 1850 (7).

> Considérant que le testament doit être l'expression de la volonté du testateur, fixé sur une personne certaine, et ne saurait être par suite subordonné à la volonté d'un tiers, que le légataire doit être clairement désigné etc.

Arrêt Cour d'Appel de Douai, 15 Déc. 1848, *Detève* v. *Detève* (8) ; Arrêt C. Royale de Bordeaux 6 mars 1841, *Labonjouderie* v. *Raffier* (9) ; Rej. Cass. 8 août 1826. *Legrand Masse* v. *Lepine* (10) ; Cass. 28 mars

(1) 5 Toullier, nos 350, 351, 606 ; 3 Zachariæ (Massé & Vergé) p. 34, note 2.
(2) Vol. 18 no. 608 et 618.
(3) Rép. vo. Lég. par. II, vol. 16, p. 425 [éd. Belge].
(4) Rép. vo. Institution d'Héritier, s. V., par. 1, no. XVIII, vol. 15, p. 367 [éd. Belge].
(5) S.V. 11, 1, 391.
(6) S.V. 57, 1, 182.
(7) S.V. 52, 2, 435.
(8) S.V. 49, 2, 538.
(9) S.V. 41, 2, 240.
(10) S.V. 27, 1, 409.

1894

Ross
v.
Ross.

Fournier J.

1859. *Beurier* v. *Emorine* (1). Rep. Cass. 30 nov. 1869. *Britelle et al.* v. *Deyvrande* (2); *Simon* v. *Simon* (3).

D'après l'énoncé de ce jugement, on voit que la certitude sur la personne de légataire est une des premières conditions de la validité de tout legs. Tout legs fait à une personne incertaine doit être considéré comme nul. Les personnes incertaines sont celles dont l'individualité n'est pas déterminée par le testament ni susceptible de l'être par l'événement de quelque condition indiquée dans le testament. Il suit de là que la validité du legs ne peut dépendre de l'arbitraire de l'héritier ou d'un tiers, et que le testateur ne peut non plus en ce qui concerne le choix du légataire, le faire dépendre du choix de l'héritier ou d'un tiers.

L'Hon. Juge qui a décidé en première instance a énoncé dans sa savante dissertation sur cette cause, les principes souvent formulé, ainsi qu'il suit:

1st. It is the certain policy of our law and my clear duty to give effect to the whole will of the testator unless prevented by insuperable difficulties. 2nd. If the will had not contained the words giving Mr. Frank Ross a discretionary power as to the selection of the particular individual bodies and persons to be benefited, but had simply said that he should give one half of the estate to the public protestant charities of Quebec and Carluke and to poor relatives, I think the law would imply that the distribution between them be an equal distribution. 3rd. I think that if Mr. Frank Ross shall refuse or neglect to exercise the discretion vested in him by the will, the courts here should not allow such refusal or neglect to defeat the testator's bequest; but as the court lacks the special knowledge which Mr. Frank Ross presumably has of what would have been the distribution which the testator would have wished, it would make no endeavour to exercise any discretion or discrimination beyond that pointed out by the lines of the will itself and would therefore distribute the testator's bounty equally among all the individuals composed in the category or class of beneficiaries therein designated.

Le premier de ces principes est admis. Il n'en est pas de même de deux autres. Il n'est certainement pas

(1) S.V. 60, 1. 346. (2) Dalloz, Recueil 1870, 1, 202.
(3) Journal du Palais 1827, 132.

1894

Ross
v.
Ross.

Fournier J.

correct de dire que si le testament n'avait pas donné à Frank Ross le pouvoir de faire lui-même la distribution, elle aurait lieu par parts égales d'après la loi ; et que dans le cas où il refuserait d'exercer les pouvoirs qui lui sont conférés la cour en ferait la distribution. Cette distribution égale ne peut avoir lieu qu'entre successibles au même degré, mais entre parents à différents degrés les plus proches excluent les plus éloignés. Si Frank Ross décédait sans avoir fait la distribution la cour ne pourrait en ordonner une distribution égale entre les parents, car les tribunaux dans la province de Québec ne possèdent aucun pouvoir à cet égard. La 34 Geo. 3, tout en conférant à la cour du Banc du Roi remplacée par la cour Supérieure, la juridiction de la Prévôté de Paris, a cependant déclaré qu'aucun pouvoir législatif possédé par aucune cour avant la Conquête n'était transféré à la Cour du Banc du Roi.

La cause du testament de *Dame Anne &c., Beauvoisin* (1), citée dans le factum de l'appelant, qui avait laissé le résidu de ses biens aux pauvres honteux qui seront choisis par les exécuteurs testamentaires se rapportant au choix des pauvres à leur discrétion, est une de ces causes où les cours par l'exercice de leur pouvoir législatif substituait leur volonté à celle du testateur. C'est en vertu de ce pouvoir que la cour ordonna que la moitié du résidu des biens serait divisée entre les héritiers suivant l'ordre dans lequel ils auraient succédé si la succession avait été *ab intestat* et l'autre moitié à l'Hôtel-Dieu de Paris et aux pauvres de l'aumône de Lyon. Quoique cette distribution soit contraire au testament on voit cependant que dans la moitié attribuée aux parents, la cour a suivi l'ordre de succession. Il en doit être de même dans le cas d'un legs faits aux pauvres parents. C'est l'ordre de succession qu'il faudrait suivre. D'autres causes de ce genre sont citées,

(1) Ricard n° 589.

1894

Ross
v.
Ross.

Fournier J.

mais elles sont comme celle-ci, fondées sur l'exercice du pouvoir législatif de ces cours.

Maintenant en France les legs faits aux pauvres ou pour des fins de charité sont considérés comme faits au bureau de Bienfaisance de la Commune. Nous n'avons aucune institution de ce genre dans notre province. Parmi les nombreuses institutions de charité existant dans le pays, aucune n'est autorisée par la loi à réclamer et administrer les legs présumés faits par ces objets.

Considérant le legs fait aux parents pauvres comme absolument nul pour cause d'incertitude, je suis d'avis que W. R. Ross n'avait aucun droit d'intervenir dans la présente cause et que son intervention doit être renvoyée.

Le jugement doit aussi être modifié dans cette partie qui condamne le défendeur Frank Ross à remettre et livrer à la demanderesse un neuvième indivis des biens de la succession située en dehors de la province de Québec, savoir dans la province d'Ontario, New Brunswick, la Colombie Anglaise, et les Etats-Unis, parce qu'il n'est pas prouvé que le dit défendeur en ait jamais eu possession ; cette partie du jugement doit être retranchée ; en outre, la cour n'avait aucune juridiction pour décider sur l'effet de ce testament dans les provinces ci-dessus nommés. Le testament attaqué doit être déclaré bon et valide, et l'action renvoyée avec dépens ainsi que les interventions du Morrin College et de W. R. Ross, aussi avec dépens.

TASCHEREAU J.—I dissent, I would allow the appeal. There is, however, one of the questions of law arising in the case upon which I agree that the conclusion reached by the judgment appealed from is entirely correct. That is, as to the absolute nullity of Ross's will by the law of the province taken alone and ex-

1894

Ross v. Ross.

Taschereau J.

clusively of the New York statute. The learned Chief Justice, Sir Alexander Lacoste, has so amply demonstrated the soundness of the doctrine unanimously adopted by the Court of Queen's Bench on this part of the case, that I would have thought it unassailable. The respondent, however, not quite sure perhaps of his position on the other question in the case, to which I shall presently refer, upon which he succeeded before the Court of Queen's Bench in having the will in question maintained, has strenuously argued before us, as he had a perfect right to do, that this will is valid by the law of the province independently of the New York law, and that the Court of Queen's Bench's judgment to the contrary is erroneous. Under the circumstances, though I feel that I cannot add anything to the strength of the reasoning of the learned Chief Justice of the Court of Queen's Bench, I have thought that the respondent was entitled to expect at our hands a full review of the question.

It is a general rule, in relation to forms of acts or deeds, that forms prescribed merely for the purpose of facilitating the solemnization of an act or deed are facultative or optional, but that forms necessary to their validity, as those for wills all are, must imperatively be complied with. In accordance with this principle, besides other reasons, the jurisprudence was uniform in France, before the Code Napoleon, that the rule *locus regit actum*, re-enacted by art. 7 of the Quebec code, imperatively governed wills made in foreign countries, including holograph wills.

Laurent (1), answers the opinions expressed to the contrary by the German writer Savigny, and a few others whom Wharton, Conflict of Laws, 585-588, 681, calls modern Roman jurists, upon whose writings the respondent has almost exclusively to rely in support of

(1) Dr. Intern. par. 259, vol. 2.

his impeachment of the conclusion reached by the court of Queen's Bench on this point. Not a single case has been cited by him in support of his contention. On the contrary, I find that as far back as in 16.0, in a case of *Pinard* v. *Andras* (1), the Parliament of Paris held that a holograph will made in Bruxelles by a Frenchman domiciled in Paris was absolutely null because the Belgian law did not allow that form of will. The same doctrine was followed by the same high court in 1720, in the case of *d'Argelos* (2), in 1721 in the case of *Pommereu* (3), and in 1722 in the case of *Boisel* (4). These cases are all noted, with an *acte de notoriété*, in the same sense, *re Paulo*, in Guyot (5), where the author adds, page 166, that—

It cannot be seriously contended that the formalities required by law for a will are personal and are carried with the person everywhere.

The Pommereu case, reported at length in 7 Journal des Aud. 515, commented upon by Merlin (6), is precisely in point. The will there in question had been made in the holograph form by a testator whose domicile was in Paris, while he was temporarily in Douay where holograph wills were not legal. The argument in support of the will was, as it is here on the part of the respondent, that as it was in the form allowed by the testator's domicile it was valid; that the testator carried everywhere with his person the right to make a holograph will; that the contrary doctrine is irrational and inconvenient; that a holograph will has no forms, &c., &c.

Against the will it was argued that a will null by the law of the place where it was made is null everywhere even if made according to the law of the testator's

(1) 17 Guyot Rep. 167-8.
(2) 7 Jour. Aud. 520.
(3) 7 Jour. Aud. 515.
(4) 7 Jour Aud. 689.
(5) Rep. vo. Testament.
(6) Rep. vo. Testament.

1894

Ross v. Ross.

Taschereau J.

domicile; that it is an error to say that the option to make a will either in one form or in another is attached to the person and carried with the person everywhere.

The question, it will be seen by this short extract of the report of the case, was fully argued on both sides, and the result was, as stated, that the highest court of the Kingdom declared the will null.

In another case, *re Millot*, on the 15th July 1777, a holograph will, made in Paris by a testator domiciled in a place where such wills were not legal, was held valid. And on the 15th Pluv. and 20th August 1806, by two *arrêts*, a will made in Bordeaux where holograph wills were not legal, by a testator domiciled in Paris where such wills were legal, was declared void. The leading commentators under the old system adopted the same doctrine.

Auzanet, on art. 289 of the Coutume de Paris, says :—

What of a will by a Frenchman in Italy, in England, in Spain or any other foreign country in the form required by the *lex loci*? Held that it is valid, even for the properties situated in France. And if the will is not made according to the form required by the law of the country where it is made, it must be declared null, even if it is made in conformity with the laws of the country where the property devised is situated, and that as to immovables as well as to movables.

"The formalities for a will," says Bourjon (1), "are those required by the law of the place where it is made." And Ricard (2), says that the question whether it is *lex domicilii* or the *lex loci* or the *lex rei sitæ* which is to govern the formalities of a will had formerly been a subject much discussed, but that it is now settled by a uniform jurisprudence that the formalities must exclusively be those required by the law of the place where the will is made.

Troplong (3), answers what Ricard says to the contrary in another part of his writings which is also

(1) 2, 305.

(2) Donat. 1er no. 1286.

(3) Donat. no. 1737.

1894

Ross
v.
Ross.

Taschereau J.

commented upon in the Pommereu case I have referred to. Ferrière, Grand Coutumier (1), Rosseau de la Combe (2), Furgole (3), all adopt the same doctrine, and recognize that the law is authoritatively settled in that sense.

In France, now, under art. 999 of the Code Napoleon, and in Louisiana under art. 1588 of their Code, a holograph will, according to the French form, made in a foreign country is valid whether the law of that foreign country authorizes it or not, but that provision is no where to be found in the Quebec Code. That it has been deliberately left out there can be no doubt. The drafters had constantly before them in the course of their labours the enactments of those two Codes, and they did not adopt a single article without maturely weighing the changes thereby made in the law and closely scrutinizing their corresponding enactments, yet they entirely omitted this provision that a holograph will may be legally made anywhere.

This, to my mind, is as conclusive on the question as if the code had decreed expressly that a holograph will cannot be made in any foreign country where such a form of will is not allowed, and that such had always been the law in the province.

A reference to the leading commentators under the Code Napoléon also supports that view.

Marcadé (4), says:

C'est uniquement la loi du pays où l'acte se fait qui doit en régir la forme, *locus regit actum*. D'après ce principe un français ne pourrait tester valablement en la forme olographe que sur le territoire français ou dans un pays dont la loi admettrait également cette forme de tester. C'est ce qui a eu lieu jusqu'à la publication du Code.

And he adds that it was generally admitted by the best commentators and by a uniform jurisprudence.

(1) On art. 289 Coutume de Paris vol. 4, p. 131 *et seq.*

(2) Vo. Testament, p. 706.

(3) Vol. 1, p. 69.

(4) Vol. 4, p. 61 on art. 999.

1894

Ross
v.
Ross.

Taschereau J.

under the old system, that a holograph will made in a country where that form is not known to the law, was invalid. Coin-Delisle (1), and Demante (2), are of the same opinion. I refer also to Journal du Droit International Privé, 1880, p. 381; Dalloz (3), says in the same sense:

> Il en est du lieu comme du temps; c'est la loi du lieu où le testament a été passé qui règle les formalités de cet acte. De là l'adage si connu, *locus regit actum*. No. 2507. L'application de la règle *locus regit actum* aux testaments olographes était quelque peu contestée sous l'ancienne jurisprudence. * * * Mais l'opinion de Bouhier et de Ricard ne prévalent pas. Furgole * * et Pothier * * * soutinrent l'opinion contraire. * * * Ces auteurs concluaient que le testateur quelle que fût d'ailleurs sa loi personnelle, était capable ou incapable de tester par testament olographe, suivant que cette forme était ou non admise dans le lieu où le testament se trouvait écrit. Cette théorie a été consacrée par quatre arrêts de parlement du 10 mars 1620, 15 janvier 1721, 14 juillet 1722, 15 juillet 1777, par un acte de Notoriété du Châtelet, du 13 septembre 1702, et appuyée de l'autorité de Merlin. Ces arrêts avaient fixé la jurisprudence d'une manière invariable, et il ne restait de dissidence dans la doctrine que l'opinion contraire de Boullenois, opinion influencée par une extension systématique et évidement exagérée des principes de l'auteur sur les statuts. No. 2508. Le Code Napoléon ne s'est occupé de la maxime *locus regit actum* que pour la confirmer comme il l'a fait par l'article 999 à l'égard du testament authentique tout en la modifiant à l'égard du testament olographe accomplis l'un et l'autre par un français en pays étrangers.

Demolombe (4), says:

> Il est vrai que l'article 999 autorise le Français à faire un testament olographe suivant la forme française dans les pays mêmes où cette forme ne serait pas admise; mais c'est là une exception que la loi française a faite en faveur des Français, afin de leur donner le plus de moyens possibles de faire leur testament en pays étranger; exception de faveur, disons-nous, qui ne prouve nullement que les auteurs du Code aient méconnu le vrai caractère de la loi qui autorise cette forme de testament.

(1) Donat. et Test., on art. 999.
(2) Vol. 4, p. 301.
(3) Rép. vo. Dispositions, entre-vifs et testamentaires, no. 2506.
(4) Vol. xxi, nos. 482-3 p. 453.

1894

Ross v. Ross.

Taschereau J.

The same author then discusses the assertion of Fœlix and Aubry and Rau that the rule *locus regit actum* is facultative so as to permit the execution of the will either according to the law of the domicile or according to the law of the place of execution, and adds (1) :

Cette doctrine, sans doute, pourrait paraître raisonnable, et nous sommes en effet porté à croire qu'elle serait, si elle était admise, un progès du droit nouveau sur l'ancien droit. Mais il faut reconnaître que l'ancien droit ne l'avait pas admise ; et nous avons aussi constaté ailleurs qu'elle n'a pas encore non plus réussi à se faire reconnaître dans notre droit nouveau.

At par. 482, in fine, the author says that the doctrine in France before the Code had almost universally prevailed that a holograph will made in a country where that form of will is not recognized, is a nullity, even if the *lex domicilii* of the testator recognized it. And at par. 106 *bis* vol. 1, p. 129 the same author says :—" Is the rule *locus regit actum* imperative or merely facultative ? " The question was under the old law much discussed, but, however, the opinion that it was imperative had prevailed. And such is the tendency of our modern jurisprudence.

Laurent (2), says :—

La dérogation est claire, mais quelle en est la portée ? En faut-il conclure que la forme des testaments olographes est un statut personnel ? On l'a prétendu et nous verrons à l'instant que cette question de théorie a un intérêt pratique. Il nous semble que la difficulté n'en est pas une, car les principes les plus élémentaires sur l'interprétation des lois suffisent pour la décider. Que la loi qui règle les solennités d'un acte ne soit pas une loi personnelle tout le monde en convient ; l'opinion de Boullenois et de Bouhier est toujours restée isolée. L'article 999 en dérogeant à l'adage, *locus regit actum*, a-t-il changé la nature des lois concernant les formes ? Il a permis au Français de faire un testament olographe d'après la loi française dans les pays où cette forme de tester ne serait pas admise. Toute exception doit être renfermée dans les limites de la loi qui l'a établie. L'exception de l'article 999 se borne à accorder à un Français une faculté qu'il n'avait pas en

(1) Dem. vol. xxi, no. 484, p. 454.

(2) Dr. Civ. vol. xiii, p. 166, no. 159.

1894
Ross
v.
Ross.
Taschereau J.

vertu du droit commun, voilà tout. Le statut reste donc ce qu'il était, un statut réel.

The same writer at par. 245 *et seq.* vol. 2, droit international, repeats the same doctrine. Also in vol. 1 droit civil 90 *et seq.*, and in vol. 6 droit intern., nos. 415-922, he says of art. 999, Code Napoleon, that the Code has deviated from the old law on the subject and inaugurated a new principle. In vol. 7 dr. intern. nos. 5 *et seq.*, are other remarks of the same writer in the same sense.

Aubry and Rau (1), though of opinion that the rule *locus regit actum* is merely facultative and not imperative, concede that under the old law the rule was held to be imperative. That it is facultative under art. 999 of the Code Napoleon is unquestionable, but I repeat it, that it is not and never has been law in the province of Quebec; and Boileux (2) says:—

> Under the jurisprudence anterior to the code it was generally admitted that a Frenchman could not validly make a holograph will in a country where that form of will was not legal.

I refer also to the decisions in *De Veine* v. *Routledge* (3); to the same case in Cassation (4), and to 3 Troplong (5), where it is said that the opinion of Ricard and others to the contrary did not prevail in France before the Code

As to the contention faintly urged on the part of the respondent, that the fact that holograph wills have no form and that they need not be dated from any place shows that they can be made anywhere, I need only say that it is one that was propounded long ago by Ricard *inter alios*, whose opinion is so often wrong, says Troplong, no. 1463, but has never been sustained by any court, and is repudiated expressly by the judg-

(1) Vol. 1, p. 112.
(2) Vol. 4, p. 122.
(3) S. V. 52, 2, 289.
(4) S. V. 53, I, 274, sub. nom. *Browning* v. *de Nayve.*
(5) Donat. nos. 1736 *et seq.*

ment in the Pommereu case (1), to which I have already referred, where that same point had been explicitly taken, and Merlin calls it a "subtilité." The respondent contends that the rule *locus regit actum* is absurd and irrational. That may or may not be. Laurent (2), and Despagnet (3), think that it is the English rule that is absurd. With this, however, clearly we are not concerned.

For these reasons I agree with the Court of Queen's Bench (and we are unanimous on this point I understand, though I have not seen my learned colleagues' opinions), that under the law of the province, considered alone and without reference to the New York law, Ross's holograph will made in New York is void.

The Court of Queen's Bench, however, have maintained the validity of that will upon the ground that it was made according to the form required by the law of New York and consequently valid under art. 7 of the Quebec Code and the rule *locus regit actum*. Now as a matter of fact alone, upon the evidence in the record, I would say that this will is not made according to the forms required for wills in New York. The experts examined all agree that holograph wills are unknown to the New York law. That should put an end to the controversy. But the conclusion reached by the Court of Queen's Bench on this branch of the case is based upon art. 2611 of the New York Code of Procedure by which it is decreed that:

A will of personal estate, executed by a person not a resident of the state according to the laws of the testator's residence, may be admitted to probate.

Therefore, they say, Ross's will is made in the New York form as to personal estate.

I am unable to adopt this reasoning. It rests entirely, it seems to me, on a misconstruction or mis-

(1) 7 Journal Aud. 515.
(2) 7 Dr. Intern. 10 *et seq.*
(3) Journal De Dr. Intern. prive 1890.

1894

Ross v. Ross.

Taschereau J.

application of the New York statute. (I cite here the cases of *Bremer* v. *Freeman* (1), *Concha* v. *Murrietta* (2), and *City Bank* v. *Barrow*, (3), as to the construction of a foreign code.) The granting of the probate of a will made under a foreign law is not conclusive and does not regulate and affect the ultimate destination of the property; Jarman, (4); *In re Kirwan's Trusts* (5); *Barnes* v. *Vincent* (6); *Abston* v. *Abston* (7); *Atkinson* v. *Rogers*, (8); and ancillary probate may be granted of a will made according to the laws of the foreign domicile of the testator though that will is invalid according to the *lex fori* (9).

In *Thornton* v. *Curling* for instance, reported in England in 8 Sim. 310, and in France in Journal du Pal. 1826, 898, commented upon by the Vice Chancellor in *Price* v. *Dewhurst* (10), the will there in question had been made in England, in the English form, by a testator domiciled in France. That will was null according to English law, because not in the form required by the law of the testator's domicile. Yet it was admitted to probate in England, 2 Addams, 6, because it was valid as to form in France according to the rule *locus regit actum*, though eventually the Cour de Cassation in France held its dispositions illegal under the French law. And such a course of dealing would be followed under the same circumstances in New York, I apprehend, as by art. 2624 of that same code, it is only of wills made in the State by residents of the State that the Surrogate determines the validity. By art. 2694 it is expressly enacted that the validity of a will of any personal

(1) 10 Moo. P.C. 306.
(2) 40 Ch. D. 543.
(3) 5 App. Cas. 664.
(4) Vol. 1, 5th Eng. ed. 5.
(5) 25 Ch. D. 373.
(6) 5 Moo. P.C. 201.
(7) 15 La. An. 137.
(8) 14 La. An. 633.
(9) Jarman p. 5 *et seq.*
(10) 8 Sim. 300. Robertson on Succ. 287.

property situated within the State is regulated by the laws of the State or country of which the decedent was a resident at the time of his death. It is only to personal estate in New York that this article can have any application, and it is likewise only to personal estate in New York that art. 2611 is intended to apply. It cannot, it is evident, have any application in the courts of any foreign country.

The form that, under art. 7 of the Quebec Code declaratory of the old law, has to be followed by a Quebecer who makes a will in New York, is the form required by the law of New York for wills by its own subjects, the form generally used in New York, as the last part of art. 999 of the Code Napoleon reproducing the rule *locus regit actum* expresses in clear terms. And the New York Legislature had not the power to alter that law for the province of Quebec, and to decree that a Quebecer could in New York make his will either according to his *lex domicilii* or to the *lex loci actus*, or to neither one nor the other, but according to a mixture of both, at least so as to affect movables in Quebec.

It cannot be that the legislature of New York had the right to pass a statute in the following terms: "Whereas by the law of the province of Quebec a holograph will made in New York by a citizen of the province is invalid in Quebec; whereas it is expedient to provide otherwise; it is hereby decreed that hereafter such a will shall be valid." Could such an enactment affect property in Quebec? I would say not, and the New York legislature never intended to do so. To give to their statute the meaning that the respondent contends for would be to extend it in a manner not justified by any principle of law that I know of.

1894

Ross v. Ross.

Taschereau J.

The respondent, in other words, would argue, at least his argument leads to it, that though the legislature in Quebec has refused to adopt the change in the law made in this respect as to holograph wills by art. 999 of the Code Napoleon or by art. 1588 of the Louisiana Code, yet the New York legislature has done it for them.

To so contend is evidently to forget the sovereignty of the province and of the law of the domicile of the testator in the matter and leads to a reasoning in a circle. And a safe rule that I would apply here is the one laid down by Lord Penzance in a somewhat analogous case, *Pechell* v. *Hilderly* (1) that in determining the question whether such a will is valid or not, regard can be had to the law of one country alone at a time and the court will not mix up the legal precepts of different countries. The law of Quebec is exclusively the rule here. But were it necessary to make the inquiry, it seems to me established in the case that the will would be held invalid in New York.

Mr. Adams, one of the experts examined in the case, makes this point clear and I do not see that he is contradicted by the other experts. As in England, in matters of testate succession, when the will has been made by a person dying with a foreign domicile, inquiry is made in New York, I assume, with regard to the validity of that will by the law of the domicile and according to the result of such inquiry, probate of the will is granted or rejected. Art. 2694 New York Code of Procedure (2).

Upon evidence that by the Quebec law a holograph will made in New York by a citizen of Quebec is not valid in Quebec to transmit property real or personal situated or to be found in Quebec if, by the New York

(1) L.R. 1 P. & D. 673.

(2) Robertson on Success. 26 ; *Abd-ul-Messih* v. *Farra* 13 App. Cas. 431.

1894

Ross
v.
Ross.

Taschereau J.

law, holograph wills by citizens of New York are not valid in New York, this will in question here would not be admitted to probate in New York.

This art. 2611 of the New York Code of Procedure does not cover this will as it applies only to a will of personal property executed by a person not a resident of the State according to the laws of the testator's residence. And Ross's will is not executed according to the laws of the testators's residence.

It was said at the argument on the part of the respondent, this will is good by the Quebec law, it is also good by the New York law, why should it not be upheld? This is, however, but an assumption of the very question at issue. That is precisely what has to be determined, whether this will is valid or not; and to such an argument the appellants have only to answer, with not more but with as much force, by saying that as the will is bad in Quebec, and also bad in New York, it cannot be upheld. If Ross had left personal estate in New York, and the New York Court upon contestation of his will had referred the question of its validity to the Quebec courts, following the course adopted by the Prerogative Court in England in de Bonneval's case (1), to have the question settled by Ross's *lex domicilii*, the Quebec courts would have had to answer, and the Court of Queen's Bench concedes it, that by Ross's *lex domicilii*, alone and independently of the New York law, the rule *locus regit actum* imperatively governs, and that this will by that law is therefore null; that by the Quebec law a Quebecer, who in New York desires to make a will disposing of either movables or immovables, or both, in Quebec, must do so according to the New York forms. And as a holograph will is not in the New York form, that would have been the end of the controversy, as art. 2694 of the

(1) 1 Curteis 856.

1894

Ross v. Ross.

Taschereau J.

New York Code of Procedure, above referred to, expressly says that as to personal estate it is by Ross's *lex domicilii* that, in New York, the validity of his will is to be concluded. I utterly fail to understand the import of the rule *locus regit actum*, if it does not mean, adapting it to this case, that a Quebecer who desires when in New York to make a will has to make it according to the form required by the law of New York for its own subjects; or to put it in other words, if a will in the holograph form made by a New Yorker in New York is void under the New York law in New York, a Quebecer's will in that form made in New York is also void in Quebec, which is Ross's *lex domicilii*.

This art. 2611 of the New York Code, relied upon by the Court of Queen's Bench to maintain this will, requires no form at all for any will in the sense that the word "requires" bears in art. 7 of the Quebec Code. It is a mere enabling enactment as to probate when a foreign testator has left personalty in the State of New York. The form that is required by the New York law for New York citizens for a will made in the State of New York is the form derived from the English law of a will before witnesses. All that this article of the Code of Procedure enacts is that a will made by a non-resident of the State of movables to be found in the State may be admitted to probate if made according to the law of the testator's residence. It does not purport to legalize any will otherwise illegal. It merely decrees that probate may be granted in New York, as to personalty, of any will that is legal by the law of the foreign testator's residence. It does not at all help any will, or in any way come to the assistance of any will, that is not perfectly legal by the law of the testator's residence and by that law alone. The fact that Ross's will happens to have been made in New York

does not make the least difference. The article does not merely apply to wills made in New York; it has the same application to a will made for instance in England by a Frenchman domiciled in Paris, or in Paris by an Italian, or to bring the illustration closer to the present case, to Ross's will if it had been made in England. If, under such a will, the testator had disposed of movables in New York, and probate was in consequence demanded in New York, the New York court would grant probate if the will is good by the law of the testator's residence exclusively, and refuse it if the will is bad by that same law. Such is the New York law. In the Marquis de Bonneval's case above cited a Frenchman had made his will in England in the English form. The court in England (1), held that by the English law the validity of that will as to personalty in England had to be determined by the law of France, the *lex domicilii* of the testator, and accordingly referred the case to the French courts to ascertain what that law was. Thereupon the Court of Cassation in France, where the case was eventually carried, determined (2), that, by the French law, that will made in England, irrespectively of the question of the testator's domicile, by a French subject in the English form was good under the common law and art. 999 of the Code Napoleon, which decrees, in express words, that a Frenchman in a foreign country may make his will in the forms recognized (*usitées*) in that country, re-enacting thereby the rule *locus regit actum*, which had always governed in France and which is reproduced in art. 7 of the Quebec Code, as I have already remarked. But if instead of being a will in the English form de Bonneval's will had been a holograph will, the courts in France would unquestionably before the Code have held it utterly void

(1) 1 Curteis 856. (2) S.V. 43, 1, 209.

1894

ROSS v. ROSS.

Taschereau J.

as they did for the Pinard Andras, the d'Argelos, the Pommereu and the de Boisel wills, and the other wills in the cases that I have cited.

This enactment of the New York code, art. 2611, upon which the respondent bases this branch of his argument is, it seems to me, nothing more than a re-enactment of the English common law; *Bremer* v. *Freeman* (1); *Croker* v. *The Marquis of Hertford* (2). Now, would Ross's holograph will have been good according to Quebec law if made in England? That is the same question undoubtedly. The law of England, as I have said, is the same as the law of art. 2611 of the New York Code. Would not the courts in France, before the Code Napoleon, have held such a will null, as they did in the above cited cases? Upon an application for probate of Ross's will, if it had been made in England the court in New York would not have proceeded before inquiring what was Ross's *lex domicilii*, and upon ascertaining that by that *lex domicilii* a holograph will made in England by one of its subjects is void, as the English law does not know of holograph wills, probate would have been refused.

The New York article can apply only to wills made by a subject of a foreign country, or of any other State of the Union where the English law on this subject prevails, that is to say where, by the testator's *lex domicilii*, he carries everywhere with his person the right to make a will in the forms prescribed by the law of his own country, a doctrine which, to use Guyot's words in the passage I have cited, cannot be seriously contended for under the French common law. With the law on the subject under the English system there is in the New York law no conflict; with the law under the French system there is conflict.

(1) 10 Moo. P.C. 306. (2) 4 Moo. P.C. 339.

It has been said that it would be an anomaly if this will was held to be valid in New York and invalid in the province of Quebec. But anomalies of this kind, assuming that the New York courts might uphold the validity of this will, are constantly met with. It is the inevitable result of the differences between the municipal laws of the different countries of the civilized world. In a case of *Guigonand* v. *Sarrazin* (1), for instance, a will made in Austria was declared null by the French courts, though it had been held valid by the Austrian courts. In a case of *Meras* v. *Meras* (2), a holograph will made in France by a Spaniard was held good by the French courts, though it had been held bad by the Spanish courts. And an English subject, temporarily in France, may, by the French law, make a holograph will in France, and such a will will affect both movables as well as immovables situated in France. *Re Quartin* (3); *Meras* v. *Meras* (2). But in England such a will at common law would have been invalid; *Croker* v. *the Marquis of Hertford* (4); *Bremer* v. *Freeman* (5); as to both movables and immovables. And a will in the English form, made in France by an Englishman domiciled in England, is null in France both as to movables and immovables (6). See *Mendes* v. *Brandon* (7). It is good in England as to both. *In re* Rippon (8); *In re* Raffenel, (9); *Doglioni* v. *Crispin* (10). "Attendu," says the Cour de Cassation, in *Re Browning* (6), declaring the nullity of a will in the English form made in France by an Englishman:

(1) Jour. de Dr. Intern. privé, 1877, p. 149.
(2) Journ. de Dr. Intern. privé, 1882, p. 426.
(3) S.V. 47, 1, 712.
(4) 4 Moo. P.C. 339.
(5) 10 Moo. P.C. 306.
(6) 4 Demol. Donat. 484; 6 Laurent Dr. Intern. no. 420: *De-Veine* v. *Routledge*, S.V. 52,2, 289; and in Cassation, *sub nom. Browning* v. *de Nayve*, S.V. 53, 1, 274.
(7) Journ. du Pal., 1850, 2, 187.
(8) 3 S. & T. 177.
(9) 3 S. & T. 49.
(10) L.R. 1 H.L. C. 301.

1894

ROSS v. ROSS.

Taschereau J.

Qu'il est de principe de droit international que la forme extérieure des actes est essentiellement soumise aux lois, usages et coutumes des pays où ils sont passés ; que ce principe s'applique aux testaments olographes comme tous autres actes publics et privés. Attendu que si tout ce qui tient à l'état du testateur, à l'étendue et à la limite de ses droits et de sa capacité est régi par le statut personnel qui suit la personne partout où elle se trouve, il en est autrement de la solennité de l'acte et de sa forme extérieure qui sont reglées par la loi du pays où le testateur dispose. Qu'ainsi le testament olographe fait par un étranger en France, et dont l'exécution est demandée devant les tribunaux français ne peut être déclaré valable qu'autant qu'il réunit toutes les conditions de forme exigées par la législation française, quelle que soit à cet égard la législation du pays auquel appartient le testateur.

The *considérants* of the same court, *re Quartin* and of the Paris Court of Appeal, in *Mendes* v. *Brandon*, cited above, are as strong and clear in the same sense.

On the same principle it is held in France that a joint will, although null if made in France, is valid in France if it is made by foreign consorts in their domicile of origin, according to the law of the place, even for immovables (1).

A case of *Whall* v. *Van Often* (2), goes very far in support of the same doctrine. There, a holograph will made in France by a Dutchman was declared valid as to the personal estate left by the testator in France, though by the Holland Code holograph wills are not merely not allowed, but prohibited; so that the estate in France went to the legatees under the will and the estate in Holland went to the heirs at law, the court unequivocally repudiating, as they did in the Meras case cited before, the preponderance of the foreign law over the municipal law of the country that, in the present case, the doctrine of the Court of Queen's Bench would concede to the New York law over the law of the province of Quebec.

1) Journ. de Dr. Intern. privé, 1882, pages 322, 360. (2) Dal. 59, 2, 158; S. V. 60, 2, 37.

1894

Ross v. Ross.

Taschereau J.

These examples demonstrate that no rules or principles of private international law, upon which the respondent partly bases his contentions on this point, can have any bearing on this case. There are on the question no rules *ex comitate* between States or *ad reciprocam utilitatem* that can be given effect to in the courts of justice. Each country, as the cases I have quoted demonstrate, follows its own law in each case without reference to the foreign law.

In *Dupuy* v. *Wurtz* (1), for another instance, a citizen of New York made his will in France bequeathing both real and personal property in the form recognized by the State of New York. That will was clearly null *in toto* in France. But the New York Code held it good *in toto* (2).

A New Yorker, who whilst temporarily in Quebec, desires to make a will, has, by the New York law, to make it according to the New York form to devise his real estate in New York, and if he desires to bequeath any estate, real or personal, situate in Quebec, he must, by the Quebec law, make another will according to the Quebec forms. But a will by a Quebecer in the New York forms, whilst temporarily in New York, will, by the Quebec law, pass his real and personal estate in Quebec, and, by the New York law, both his real and personal estate in New York. And in this Dominion itself the same divergence exists in the laws between the different provinces, at least between the province of Quebec and the English law provinces. A will made in Quebec, for instance, under the French law form does not affect real estate in Ontario, but a will made in Ontario under the Ontario form affects real estate in Quebec. This shows that international law has nothing to do with the question.

(1) 53 N.Y. 556.

(2) See 7 Laurent, Dr. Intern. 21-2, on that case.

1894

Ross v. Ross

Taschereau J.

In Louisiana, in 1848, in *Re M'Candless* (1) it was held that under the civil law in force in that State the form of the will is to be decided according to the law of the place where made, whether it relates to movables or immovables situated in another country, whatever principles to the contrary may prevail in countries governed by the English common law, and consequently, a will of movables and immovables situated in the state, made in another country by a citizen of the state, temporarily there according to the forms of that other country, was declared valid. This Louisiana decision, rendered under the same system of law that rules the province of Quebec, is a striking instance of the difference between the English and the French law on the subject, a difference which we must constantly bear in mind in determining this case.

Under the English law the rights that attach to the person and are carried with him everywhere, under the rule *mobilia personam sequuntur*, include, as to personalty, the right to make a will in the form of the testator's *lex domicilii*. Under the French law that rule does not extend to forms of wills; this right of a testator is not included in the rights that attach to the person, and the laws as to forms of deeds or wills are *statuts réels*, not *statuts personnels*.

Another great difference between the two is that under the French system the rules for the forms of wills are the same for movables as for immovables. Laurent (2); Pothier (3); 1er Boileux, page 22; Quartin's case, cited above, and Annotator's remarks; whilst under the English system the *lex rei sitae* strictly prevails as to realty. It does not necessarily follow, however, (under both systems pro-

(1) 3 La. An. 579.
(2) Dr. Intern. vol. 7, no. 10 *et seq.*
(3) Introd. aux Cout. ch. 1er, part 1ere.

bably) that a will to be valid in form must conform to that law which would have regulated the succession to the testator's property if he had died intestate, as said per Sir John Nicholl in England, in *Curling* v. *Thornton* (1), and as results from the judgment of the Cour de Cassation in France in *re Quartin* above cited on the first ground of the *pourvoi*.

In *Bremer* v. *Freeman* (2), the Privy Council held that by the French law an Englishman domiciled in France, though not naturalized, cannot validly by a will made in France in the English form bequeath movable property in England. The French courts would unquestionably have also held the will in question in that case void, as, under any circumstances, by the French law, is a will in the English form made in France, even by an Englishman domiciled in England, valid either as to movables or as to immovables, whilst by the English law, such a will made in France by an Englishman domiciled in England is valid, and, in fact, as to real estate in England, the only one that an English court would recognize. The French law had in that case been misconstrued in the Prerogative Court (3).

The respondent's argument by which he relies on the private international law in force in New York to uphold Ross's will is based on the same fallacy as his argument by which he tries to uphold it on the New York Code of Procedure (4). It is a *petitio principii*. It assumes that the will is good by the Quebec law. It is merely an argument that could be invoked if Ross's will had been made in Quebec. Then it would unquestionably be good in Quebec both as to movables and immovables, and good by the New York law to

(1) 2 Addams 19.
(2) 10 Moo. P.C. 306.
(3) 1 Deane, 192.
(4) Westlake Private International Law, pars. 83, 84.

1894

Ross v. Ross.

Taschereau J.

transmit personal property in New York. It is a settled principle of private international law that the formalities required for a deed or an instrument of any kind, are those required by the law of the place where the deed or instrument is made. *Locus regit actum;* Journ. de dr. intern. privé, 1883, p. 85. The respondent's argument begs the whole question and assumes that this holograph will made in New York is just as valid by the Quebec law as if it had been made in Quebec. In other words, it assumes that art. 999 of the Code Napoleon is not new law, and that the rule *locus regit actum* is not law in Quebec, both of which propositions are untenable.

I would come to the conclusion that Ross's will is void, but in any case I do not see how it can affect immovables in Quebec. It is only as to movables that the New York statute, in express terms, legalizes a devise by a foreigner made according to his *lex domicilii*, and Ross's will, it is conceded, would not affect immovables situated in New York, if he had left any. If he had devised his immovables only clearly his will would not be admitted to probate in New York. On what principle it can be made to extend to immovables in Quebec I cannot see. The intentions of the testator are to be given effect to, it is said. Certainly, but that is so only of the intentions that he has expressed in a valid will, and so far only as such will is valid. If intention alone was to be given effect to there would be no need for any form. If a will is valid as to movables the testator's movables will pass under it, but if invalid as to immovables these immovables are left intestate.

Such was the result of the two cases before the Privy Council of *Meiklejohn* v. *The Attorney General* (1), and *Migneault* v. *Malo* (2), in both of which, though the tes-

(1) 2 Knapp 328. (2) L.R. 4 P.C. 123.

tators had clearly disposed of both their movables and immovables, yet the wills were held valid as to movables only. To use the words of Lushington J. in *Croker* v. *The Marquis of Hertford* (1):

> We sit here not to try what the testator may have intended, but to ascertain on legal principles what testamentary instrument he has made.

And in France it is said on the same principle:

> La solennité des testaments qui est de droit public est de beaucoup plus grande et plus puissante considération que l'entretènement de la dernière volonté d'un particulier. Brodeau sur Louët, vol. 2, p. 754.

In this very case it is evident that Ross's intention was to bequeath all his immovable property wherever situated. Yet it is conceded that his will does not cover the immovables he left in Ontario.

The only point that now remains for my consideration in this case is the view taken by the Superior Court that this will is valid as made in the English form as it was introduced in the province in 1774. Now, under the Statute of Frauds, the English law in force in Quebec in 1865 when this will was made, nothing but personal estate could be devised by a holograph will. And here again the judgment should in any case be reformed so as to maintain this will only as to the personal estate of the testator. But I go further, and I think, with what may be assumed to have been the unanimous opinion of the Court of Queen's Bench, that this will, as an English will, is null *in toto*. By the English law, different in this again from the French law (2), the will speaks at the death of the testator and it is the law at the time of Ross's death that governs the execution of his will. Now, by that law, art. 851 of the Code, in force when Ross died, wills derived from the English form both as to mov-

(1) 4 Moo. P.C. 339.

(2) Dev. table gén. *v.* Testament, no. 37; Sirey 1er vol. Codes Annotés sous art. 2, No. 163; *Migneault* v. *Malo*, L.R. 4 P.C. 123.

1894
Ross
v.
Ross.
Taschereau J.

ables and immovables must, as now in England, be executed before witnesses. Art. 2613 C.C. invoked by the respondent against this has no application. That it is the law at the time of the death that governs the wills derived from the English law and its execution is no new rule in the Code. And that article relates only to new rules or changes made in the law by the Code so as not to affect past transactions or acquired rights. And when article 581 decrees that thereafter all such wills must be executed before witnesses, that applies to the wills of all those who died after the coming into force of the Code.

I would allow Annie Ross's appeal and maintain her action. Consequently, and also for the reasons given by my brother Fournier, I would dismiss all the interventions with costs on all the issues, and allow Frank Ross's appeal with costs on the appeal between him and those intervening parties. I remark that in the formal judgment of the Court of Queen's Bench there is no reference to these interventions or any of them. However, this has no consequence.

As to Frank Ross's appeal or cross-appeal as between him and the plaintiff, there should be a reformation at least of that part of the judgment by which he is condemned to deliver up the real estate left by the testator outside of the province of Quebec, and to render an account of his administration thereof. It is established that he never had possession of that real estate. The admission in the record relates only to the estate devised by the will, and the realty outside of the province, it is conceded, did not pass by the will. How can he deliver up what he never had, or render an account of an administration which he never had?

SEDGEWICK J.—I concur with the learned Chief Justice in this case except as to that part of the judg-

ment relating to Morrin College, whose intervention in my opinion should be maintained as that of a charity within the terms of the will, and except as to costs in the lower courts. I think that the order of the Superior Court and the order of the Court of Queen's Bench as to costs should stand except as to the interventions dismissed.

1894
Ross
v.
Ross.
Sedgewick J.

KING J.—I concur in the judgment of the Chief Justice except as to costs in the lower courts. The orders in the Court of Queen's Bench and the Superior Court should stand except as to the interventions which have been dismissed.

Appeal and cross-appeal dismissed with costs.

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

Solicitor for appellants Annie Ross, *et al*: *Eugene Lafleur.*

Solicitors for respondents, Morrin College, Finlay Asylum and W. R. Ross: *W. & A. H. Cook.*

Solicitor for respondent, Mary Frame: *G. Irvine.*

1893

*Nov. 30.
Dec. 1.

1894

*Nov. 5.

1895

*Mar. 11.

PETER IMRIE, (DEFENDANT).. .....APPELLANT;

AND

BLOWERS ARCHIBALD, ANNIE BREFFIT, WILLIAM H. ARCHIBALD AND OTHERS, (PLAINTIFFS AND DEFENDANTS).....} RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mortgage of trust estate—Equity running with estate—Equitable recourse by —Construction of deed—Description of lands—False demonstration—Water lots—Accretion to lands—After acquired title—Contribution to redeem—Discharge of mortgage—Parol evidence to explain deed—Estoppel by deed.

On the dissolution of the firm of A. & Co. by the retirement of C. D. A. the business was carried on by the remaining partners T. A. and B. A. on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description adding a further or alternative description and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property

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

1894

IMRIE v. ARCHIBALD.

and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage. and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due and the foreclosure proceedings were continued for their benefit.

Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.

Per Gwynne J.—The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.

Held, further, that as the construction of the mortgage depended upon the state of the property at the time it was made parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected :

That as there were no specific descriptions or recitals tending to shew that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage :

That even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment of Mr. Justice Ritchie for foreclosure of a mortgage.

The facts and questions at issue sufficiently appear by the head-note and in the judgments reported.

Borden Q.C. for the appellant.

Besides the water lots described in the mortgage, certain other water lots purchased by the mortgagors since the making of the mortgage, became bound

1894

IMRIE v. ARCHIBALD.

by the mortgage and must bear a proportion of the mortgage debt. *Trust & Loan Co.* v. *Ruttan* (1); *Bensley* v. *Burdon* (2); *Irvine* v. *Irvine* (3); Rawley on Covenants (4); Jones on Mortgages (5); *Goodtitle* v. *Bailey* (6).

If the plaintiffs had owned the subsequently acquired water lots at the time of the execution of the mortgage, they could not have foreclosed only that portion of the property of which the defendant has become the purchaser. The same result follows if the subsequently acquired lands became bound by the mortgage. *Jones* v. *Beck* (7); Fisher on Mortgages (8); Story's Equity Jurisprudence (9); Jones on Mortgages (10); *Allen* v. *Clark* (11).

The words "subject to a mortgage, dated 24th May," contained in the deed from plaintiff to C. D. Archibald, do not imply or amount to a covenant or undertaking on the part of C. D. Archibald to pay off the mortgage debt. They cannot do more than make the land conveyed to him liable to contribute a proportionate part of the mortgage debt. The land so conveyed was only a portion of the lands which had been granted by the mortage in question. *Fiske* v. *Tolman* (12); *Pike* v. *Goodnow* (13); *Strong* v. *Converse* (14); *Drury* v. *Tremont Co.* (15).

The mortgage debt has been discharged by payment. If the plaintiffs had paid on the day after the execution of the bond of indemnity it cannot be doubted that the mortgage would be thereby discharged.

(1) 1 Can. S.C.R. 564.
(2) 2 Sim. & Stu. 519.
(3) 9 Wall. 617.
(4) 5 ed.s. 252 p. 380,s. 264 p.423
(5) Secs. 561, 679, 825, 1483.
(6) Cowp. 597.
(7) 18 Gr. 671.
(8) 4 ed. s. 1100 and 1103.
(9) S. 1233*d*, and cases cited, and note 4.
(10) Secs. 743,1089 to 1092, 1620 to 1624, 1625 note 4.
(11) 17 Pick, 47, (Mass).
(12) 124 Mass. 254.
(13) 12 Allen [Mass.] 472.
(14) 8 Allen [Mass.] 557.
(15) 13 Allen [Mass.] 168.

1894

IMRIE v. ARCHIBALD.

The present liability to pay and present right to receive concurring in the same person operated as payment and performance of the contract. Per Wilde C. J., in *Harmer* v. *Steele* (1).

The bond of indemnity was barred by the statute of limitations when the compromise took place more than twenty-one years after it was made. The bond, being so barred, had ceased to effect or operate upon the rights of the persons in whom the mortgaged premises were vested.

Irrespective of the bond of indemnity plaintiffs were bound to discharge the mortgage and to indemnify therefrom the lands of C. D. Archibald. A mere release of that obligation would not affect any subsequent payment of the mortgage debt by the mortgagors, or prevent such payment from operating as a discharge of the mortgage.

The bond of indemnity was not a registered document and did not affect the title to the land as against the defendant who had no notice thereof. It was therefore a matter of no moment to him to know the terms of the alleged bond. The burthen is upon plaintiffs to prove notice to the defendant of this bond and compromise thereof, and they have failed to do so. Defendant's position is the same as if he had purchased with notice of the bond of indemnity, and as if that bond had remained unreleased. Under these circumstances a subsequent payment of their debt by the mortgagors would discharge the mortgage. Can the mortgagors by taking an assignment of their own mortgage acquire any right other than that of having the $8,000 paid by them on the indemnity bond applied or appropriated in payment of the mortgage debt?

On the question of notice counsel referred to *Kettlewell* v. *Watson* (2); *Ware* v. *Egmont* (3), *Hamilton* v. *Royse* (4).

(1) 4 Ex. 1.
(2) 21 Ch. D. 704.
(3) 4 DeG. M. & G. 460.
(4) 2 Sch. & Lef. 315.

1894

IMRIE v. ARCHIBALD.

Ross Q.C., for the respondents.

Charles D. Archibald in the mortgage to Forman included the "ballast heap" lot as well as no. 6, and therefore under the sheriff's deed Thomas D. and Blowers Archibald obtained title to it, and when they came to mortgage the Cameron and Ferris lots they took the description of the lots in their own deed and gave an alternative or further description only. This alternative description does not in terms cover more than 5, 6 and the "ballast heap" lots, and if the words do include anything beyond these the last words should be rejected, as *falso demonstratio*.

The equity of redemption passed to defendant, Peter Imrie, subject to the mortgage. The deed will be construed by the state of the property at the time it was made, and the court should hear extrinsic evidence to explain the description. *Brady* v. *Sadler* (1); *Templeman* v. *Martin* (2); *Hubbard* v. *Hubbard* (3); *Cox* v. *Friedly* (4); *Hall* v. *Lund* (5); Washburn on Real Property (6); Broom's Legal Maxims (7).

The mortgage describes the property as fronting on Spanish River or Sydney Harbour, and gives the natural boundaries, in favour of which a presumption exists. "Fronting on" is equivalent to bounded by, and is quite unlike "fronting." Angell on Water Courses (8). Where land intervenes between a building or lot and the street, then the building or lot cannot be said to "front on" or "abut on" the street. *Lightbound* v. *Bebington Local Board* (9); *Newport Sanitary Authority* v. *Graham* (10); *Wakefield Local Board* v. *Lee* (11).

In *Litchfield* v. *Scituate* (12) it was held that the words

(1) 17 Ont. App. R. 365.
(2) 4 B. & Ad. 771.
(3) 15 Q.B. 227.
(4) 33 Penn. 125.
(5) 1 H. & C. 676.
(6) 4 ed. vol. 3, p. 384.
(7) P. 497.
(8) 7 ed. s. 26a.
(9) 14 Q.B.D. 849; 16 Q.B.D. 577.
(10) 9 Q.B.D. 183.
(11) 1 Ex. D. 336.
(12) 136 Mass. 39.

"bounded by the sea" or "by the harbour" takes, in that State, to low water. In this country it would be to ordinary high water mark. In Washburn on Real Property (1), a case is mentioned in which a property was "bounded by the highlands," and the line was required to follow the indentures of the hills. The description in the mortgage would, therefore, be incorrect if the "ballast heap" is excluded, for it, and not Sydney harbour, would then form part of the southern boundary. And see *Iler* v. *Nolan* (2); *Cartwright* v. *Dettor* (3); *Mahoney* v. *Campbell* (4); *Gillen* v. *Haynes* (5); *White* v. *Gay* (6); *Roe* v. *Vernon* (7); *Rooke* v. *Kensington* (8); *Moore* v. *McGrath* (9); *Walsh* v. *Trevannion* (10).

There is a presumption that the description covers only the property owned. *Hurly* v. *Brown* (11). At the time of making the mortgage T. D. and B. Archibald owned no water lots in front of 5 and 6 except the "ballast heap."

In any case they are entitled to foreclose and sell such two lots for the whole amount of the mortgage, irrespective of the water lots in front of them.

T. D. and B. Archibald had the right either to pay the mortgagees or C. D. Archibald, who would then be bound to protect them from the mortgagees.

The release to plaintiffs on the compromise had the same effect as payment in full. *Cowper* v. *Green* (12).

After this payment and release the land remained as the primary fund for payment of the mortgage debt. The rights of the mortgagees would be unimpaired, but T. D. and B. Archibald could call on the owner of the equity of redemption to protect them.

(1) 4 ed. vol. 3, p. 405.
(2) 21 U.C.Q.B. 309.
(3) 19 U.C.Q.B. 210.
(4) 15 U.C.Q.B. 396.
(5) 33 U.C.Q.B. 516.
(6) 9 N.H. 126.
(7) 5 East 51.
(8) 2 K. & J. 753.
(9) Cowp. 9.
(10) 16 Sim. 178.
(11) 98 Mass. 545.
(12) 7 M. & W. 638.

1894

IMRIE v. ARCHIBALD.

A grantee can not sue his grantor on covenants for title and further assurance when at the time of deed the grantee has the title to the lands of which the grantor has not title but for which he has covenanted.

THE CHIEF JUSTICE.—This is an action for the foreclosure of a mortgage dated the 24th of May, 1859, by which certain lands at Sydney, Cape Breton, were mortgaged by Thomas Dickson Archibald and Blowers Archibald to William Gammell and John Christie, to secure the payment of six thousand pounds and interest.

The plaintiffs, James C. Mackintosh and Edward P. T. Goldsmith, are the executors of John S. McLean, deceased, in whom the mortgage became vested under a transfer from the mortgagees and several subsequent mesne assignments, and the principal defendant is Peter Imrie in whom the equity of redemption is now vested and who claims title under the mortgagors and through several intermediate conveyances of the equity of redemption. In the events which have happened and which will be hereafter stated, John S. McLean became *pendente lite* a trustee of the mortgage for the original mortgagors, and the action was subsequently prosecuted for the benefit of Blowers Archibald and the executors of Thomas D. Archibald, who are now the parties having the beneficial interest in the mortgage.

In order that the case may be clearly understood it is necessary to state the circumstances which led to the creation of this mortgage and also to refer to some of the dealings with the equity of redemption, which will explain the apparently anomalous circumstance that we find the parties who were the original mortgagors now seeking the foreclosure of the mortgage which they themselves created.

For some time before the 31st December, 1853, Thomas Dickson Archibald, Blowers Archibald and Charles

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

Dickson Archibald had carried on business in co-partnership, at Sydney, as ship agents, ship builders and merchants, under the firm name of Archibald & Co. On the last mentioned date this copartnership was dissolved, and a deed of dissolution was executed by which it was agreed that Charles Dickson Archibald should retire from the business, leaving it to be carried on by the two other partners, the latter agreeing to pay the debts of the firm, including a debt due to James Forman, to secure which Charles Dickson Archibald had, in 1849, mortgaged certain lands and buildings at Sydney on which the partnership business had been carried on and which were his own separate property, and which are the same lands and properties which are comprised in the mortgage in question in this action. Charles Dickson Archibald thenceforth resided in England and the other two partners continued to carry on the business in Cape Breton. Some time before the 16th of May, 1859, proceedings were taken by Forman, the mortgagee under the mortgage of 1849, for the foreclosure of that security and the sale of the lands comprised in it, and in that foreclosure suit a decree had been made under which, according to the established practice of the Supreme Court of Nova Scotia, the mortgaged property was sold by the sheriff and purchased for the amount of the mortgage debt, interest and costs, by Thomas Dickson Archibald and Blowers Archibald, to whom the sheriff on the 16th of May, 1859, executed a deed of sale. In order to raise the money to effect this purchase Thomas Dickson Archibald and Blowers Archibald had recourse to a loan from William Gammell and John Christie, and in order to secure this loan Thomas Dickson Archibald and Blowers Archibald on the 24th of May, 1859, executed two several bonds, each for the payment of three thousand pounds, to Gammel and

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

Christie respectively, and for further security executed on the same day the mortgage which is the subject of the present action. Charles Dickson Archibald, having discovered the fact of the making of this mortgage soon after it was effected, insisted that his former copartners had improperly dealt with his property by re-mortaging it in the way mentioned, as they undoubtedly had, inasmuch as by the agreement of dissolution they were bound to exonerate it from Forman's mortgage the burden of which they had assumed. Thereupon on the 20th July, 1859, Thomas Dickson Archibald and Blowers Archibald conveyed their equity of redemption to Charles Dickson Archibald, and they also executed a bond, bearing the same date, by which they bound themselves to Charles Dickson Archibald to indemnify him against the mortgage to Gammell and Christie. This bond recited the mortgage, the conveyance of the equity of redemption before stated, and that the obligors had agreed to indemnify Charles Dickson Archibald against the incumbrance on his lands, and the condition was as follows:

> Now the condition of this obligation is such, that if the said Thomas Dickson Archibald and Blowers Archibald, their heirs, executors administrators and assigns, do and shall well and truly indemnify and save harmless the said Charles Dickson Archibald, his heirs and assigns, from all claims of the said William Gammell and John Christie for or on account of said mortgage, and shall discharge the debt due on said premises that the same may be finally free from all liability on account of said mortgage, then the foregoing obligation to be void, otherwise to remain in full force and virtue.

On the 26th July, 1859, by an indenture of that date made between Charles Dickson Archibald and his son Charles William Archibald, the former, for the valuable consideration therein stated, conveyed to the latter in fee simple the lands and hereditaments comprised in the mortgage to Gammell and Christie. Subsequently, and on the 3rd of June, 1862, by indenture of that

date made between Charles William Archibald and Annie Parker, the former conveyed to the latter for the valuable consideration therein expressed the same lands and hereditaments, in fee simple.

Subsequently, Charles Dickson Archibald was declared a bankrupt in England, and Thomas Ritchie Grassie was appointed the creditors' assignee of his estate. A dispute thereupon arose between Mrs. Parker (who had previously intermarried with John Hearne Breffit), and the assignee as to which of them was entitled to the indemnity bond of the 20th of July, 1859, and the money secured thereby. Mrs. Breffit claimed that this bond formed part of her separate estate, and the assignee insisted that it formed part of the bankrupt's assets. Thereupon this dispute was compromised (subject to the approval of the Court of Bankruptcy), and a memorandum of agreement to that effect bearing date the 23rd of May, 1882, was executed. By this instrument, which recited the dispute, it was agreed that Mrs. Breffit should call in and compel payment of the full amount secured by the indemnity bond, and that of the amount she should so recover she should pay over to Mr. Grassie, as the assignee in bankruptcy of Thomas Dickson Archibald, one clear half, which Grassie should accept in full satisfaction and discharge of his claim in respect of the said bond. And it was provided that the agreement should be void and of no effect unless sanctioned by Her Majesty's London Court of Bankruptcy. This agreement which, as I have said, recited that Mrs. Breffit claimed title to the bond as part of her own separate estate, was duly sanctioned and confirmed by the Court of Bankruptcy, by an order bearing date the 15th of October, 1884.

In an indenture bearing date the 5th of November, 1884, and made between Annie Breffit and John Hearne

1895

IMRIE
v.
ARCHIBALD.

The Chief Justice.

Breffit, her husband, of the first part, Thomas Ritchie Grassie, the assignee in bankruptcy of Charles Dickson Archibald, of the second part, and Thomas Dickson Archibald and Blowers Archibald of the third part, and duly executed by the parties of the first and second parts, after reciting the bond of the 20th of July, 1859; the dispute between Mrs. Breffit and Grassie as to which was entitled to the benefit thereof, the agreement of the 23rd of May, 1882, before stated, and the order in bankruptcy of the 15th October, 1884, approving the compromise, there were recitals in the words following:

> And whereas the said Thomas Dickson Archibald and Blowers Archibald are unable to pay the said principal moneys and interest secured by the said bond, and also dispute their liability to pay the same, and whereas the said parties hereto of the first and second parts, being satisfied of their inability to pay the said moneys in full, and in settlement of the said dispute as to liabilities, agreed with the said Thomas Dickson Archibald and Blowers Archibald, subject to the sanction of the said court, to accept in settlement and discharge of the moneys payable by virtue of the said bond the sum of $8,000 in four promissory notes of $2,000 each, with interest, to be signed by the four members of the firm of Messrs. Archibald & Company, of Cape Breton, and also signed or indorsed by Mr. McLean, president of the Bank of Nova Scotia.

There was then a further recital that the notes had been drawn and indorsed as agreed, and had, at the request of Mrs. Breffit and Mr. Grassie, been made payable to the joint order of Mr. Charles Harris Hodgson and Mr. Arthur Torriano Rickards, the former being the solicitor of Mrs. Breffit and the latter the solicitor of Mr. Grassie, and that the notes so made and indorsed had been handed to the said Mr. Hodgson and Mr. Rickards, and that upon the notes being so handed over as aforesaid Mrs. Breffit and her husband, and Mr. Grassie, had agreed to execute the release thereinafter contained, and it was witnessed that in pursuance of the agreement and in consideration of the premises, the

said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie thereby released the said Thomas Dickson Archibald and Blowers Archibald, their and each of their estates and effects, from the bond of the 20th July, 1859, and from the sum of six thousand pounds and interest intended to be thereby secured and every part thereof, provided that the release should not extend to the $8,000 secured by the four promissory notes given in pursuance of the agreement.

By a memorandum indorsed on the bond, also dated the 5th November, 1884, and signed by Annie Breffit and Thomas Ritchie Grassie, it was declared that the moneys secured thereby having become vested in the last named persons, all claims in respect of the bond had been duly satisfied by the four promissory notes given in pursuance of the contemporaneous agreement, that Mrs. Breffit and her husband, and Grassie, had released the obligors, and that the bond was given up to the obligors to be cancelled. Subsequently Mrs. Breffit sold and conveyed the lands to the defendant, Peter Imrie, in whom, subject to the mortgage, the same are now vested. I have not thought it necessary to trace the chain of title by which, through several assignments and wills, the mortgage of 1859 became vested in certain persons claiming under the mortgagees Gammell and Christie. Nothing is in dispute respecting these transfers. It is sufficient to say that the property was about to be sold to satisfy the mortgage, when, at the request of Thomas Dickson Archibald and Blowers Archibald, the late Mr. John S. McLean advanced the money due upon the mortgage, which was thereupon, by deed dated 30th July, 1888, assigned to him by George Imrie, John Love Imrie and Mary Gammell, the parties entitled thereto.

Thereupon Mr. McLean continued this action, which had been previously begun, for his own benefit, and

1895

IMRIE
v.
ARCHIBALD.

The Chief Justice.

he having since died is now represented in it by his executors.

Subsequently Messrs. Archibald (Thomas Dickson Archibald and Blowers Archibald) paid off to Mr. McLean, or to his executors, his advance, and the action is now being carried on for the benefit of Blowers Archibald and the executors of Thomas Dickson Archibald, who are the real and beneficial parties in interest entitled to the money secured by the mortgage of 1859.

In addition to the documentary evidence very little oral proof was given. Of this the only portion now material relates to certain questions as to the parcels comprised in the several mortgages of 1849 and 1859. It is not according to the English practice to raise questions of parcel or no parcel in a foreclosure suit, but under the practice prevailing in Nova Scotia according to which mortgaged lands are sold in a foreclosure suit by the sheriff, without particulars or conditions of sale, it may be convenient, in order that there may be some ascertainment of the subject of the sale, and it is with a view to this that the evidence in question was given. The cause was originally heard before Mr. Justice Ritchie who made the decree asked for by the plaintiffs—the present respondents—and this decree was affirmed on appeal by the full court, composed of Mr. Justice Weatherbe, Mr. Justice Ritchie and Mr. Justice Townshend, Mr. Justice Weatherbe not agreeing in all respects with the other members of the court.

No question was made in either of the courts below as to the right of the original mortgagors, Thomas Dickson Archibald (now represented by his executors) and Blowers Archibald, to a foreclosure judgment, nor has any such question been raised before this court either in the factums or on argument. It seems to be quite plain that in the events which have happened,

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

and having regard to the transactions which have taken place, the Messrs. Archibald, although originally they were the parties who created the mortgage and therefore primarily the debtors bound to pay it, have become as well entitled to stand in the place of the mortgagees and to take the benefit of the assignment made to their trustee Mr. McLean as if they had previously to that assignment been entire strangers to the transaction. Originally no doubt Messrs. Archibald were the parties primarily liable to pay off this mortgage, not merely as between them and the mortgagees, but also as between them and Charles Dickson Archibald. They had purchased the lands of the latter under a sheriff's sale to realize the debt secured by the mortgage to Forman in 1849 which, by the articles of dissolution, they were bound to pay in exoneration of those lands. Therefore, having mortgaged those lands which were vested in them as mere trustees for Charles Dickson Archibald, they were, on general principles of equity, under an obligation to indemnify him against the debt with which they had improperly burdened his property. Being so bound they recognized their liability and put it into a formal shape by executing the indemnity bond. Then it cannot be doubted that if they had subsequently paid the amount secured by their mortgage to Gammell and Christie into the hands of Charles Dickson Archibald whilst he was the owner of the equity of redemption, they would have satisfied this obligation and the previous order of liability would have become inverted, and they, although still liable to the mortgagees, would as between themselves and Charles Dickson Archibald and those claiming under him have been no longer liable to indemnify them against the debt.

Then, upon the bankruptcy of Charles Dickson Archibald, the right to the indemnity must have vested

1895

IMRIE
v.
ARCHIBALD.

The Chief Justice.

either in his assignee as a personal debt or in the person in whom the equity of redemption in the mortgaged lands had become vested. I have no doubt but that Mrs. Breffit, who was the owner of the estate which she had acquired as a purchaser for valuable consideration, was entitled to the indemnity which in equity ran with the lands. This seems to have been a matter of some doubt since it was made the subject of a compromise which was confirmed by the Bankruptcy Court. But it makes no difference, for supposing that the Messrs. Archibald (T. D. and Blowers) had paid off the full amount of the debt of six thousand pounds to Mr. Grassie and Mrs. Breffit under an arrangement between them to divide the amount, they releasing the Messrs. Archibald, they would then be no longer liable to pay or contribute to the payment of the mortgage debt as between themselves and those claiming under Charles Dickson Archibald, and if compelled to pay by the enforcement of their personal liability by the mortgagees, they could have insisted upon being subrogated to the rights of the mortgagees and have enforced the charge upon the lands. If this were not so they would have been compelled to pay twice over without any recourse to recoup them, for that would have been the result if, first having paid the indemnity to the persons entitled to it, they had then been compelled by the mortgagees to satisfy their personal obligation under the covenants in the mortgage deed, and were not entitled to take an assignment of the mortgage as a security for the second payment. The Messrs. Archibald were therefore exactly in the position of a vendor of an estate in mortgage, who is bound, if there is no provision to the contrary, to indemnify the purchaser against the outstanding incumbrance; if he does this by paying the money to the purchaser himself he satisfies his obligation, and if he is subsequently com-

pelled by the mortgagee to pay in fulfilment of his personal liability, there is nothing to preclude him from taking a transfer of the mortgage and from enforcing it against the purchaser from himself. All this is too plain to need demonstration.

Then, as Mr. Justice Townshend points out, the effect of the transaction between the assignee in bankruptcy and Mrs. Breffit and the Archibalds, has just the same effect as if they had paid the full amount of the six thousand pounds into the hands of Charles Dickson Archibald while he still retained the property.

The points really in controversy before Mr. Justice Ritchie at the trial, and before the court in *banc*, related first to the sufficiency of the description of parcels in the Forman mortgage to comprise a piece of land known as the "Ballast Heap," and secondly, as to the effect of the mortgage of 1859 to charge certain water-lots, the title to which was not acquired by the mortgagors or by one of them until some time after the date of the mortgage.

As to the first point, that respecting the "Ballast Heap," we must go back to the mortgage to Forman in 1849, for if this parcel of land was not included in that mortgage the mortgagors, in the mortgage of 1859, would have had no title to it, their title to any of the lands depending on the sheriff's deed, the description in which followed that in Forman's mortgage.

So much of that description as has reference to the question now under consideration is as follows:

> Also all the estate, right, title, interest and reversion of the said Charles Dickson Archibald, of and in and to those two certain lots of land situate and being at the Bar of North Sydney, aforesaid, and which heretofore belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney Harbour or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each one hundred acres, more or less, the said lots being now in the occupation of Messrs. Archibald & Company.

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

At the date of the mortgage to Forman there was vested in the mortgagor, Charles Dickson Archibald, the title to certain lots or parcels of land which were then in the occupation of the firm of Archibald and Company, and which had been acquired as follows :— First, lot number five, containing 120 acres, more or less, had been on the 20th January, 1792, granted by the Crown to John Henry, and had through certain conveyances made by one John Cameron become (except as regards five small parcels) vested in fee simple in Charles Dickson Archibald. Lot number six, also containing 120 acres, more or less, was originally granted by the Crown on the 1st of June, 1794, to one Francis Jones whose devisee had conveyed it to John Ferris, by whose representatives it was conveyed to Charles Dickson Archibald in 1838.

The Ballast Heap lot contained three-fourths of an acre. It was a water lot filled in by discharged ballast and was originally granted by the Crown on the 8th of April, 1826, to the same John Ferris who had acquired the title to lot no. 6. It was immediately in front of lot no. 6, and was described in the Crown grant as "part of the stone ballast heap in front of lot no. 6." It formed in fact a projection or continuation of lot no. 6, into the waters of the harbour. This ballast heap was included, by the same description as that contained in the Crown grant, in the same conveyance of the 1st of May, 1838, by which the representatives of John Ferris conveyed to Charles Dickson Archibald lot no. 6. The respondents in their factum state the following proposition :

> The deed will be construed by the state of the property at the time the deed was made and the court will endeavour to put itself in the position of the parties to find out their intention, and will if necessary hear extrinsic evidence to explain the description.

To this proposition I assent and the parol evidence as to the state of the property at the date of the mort-

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

gage deed was, it appears to me, admissible. It appears from this evidence that long before 1849 the ballast heap and lot no. 6 were one solid piece of land; that the former lot had become an accretion to the latter; that on the ballast heap lot there was a wharf or dock; that the buildings in which the business of the firm of which Charles Dickson Archibald was a member was carried on, were situated partly on lot no. 6 but principally on the ballast heap; that in short the ballast heap and lot no. 6 were used indiscriminately for that purpose. Then, lot no. 6 did not "front on" the waters of the harbour inasmuch as the ballast heap intervened between the water and lot no. 6 to a certain extent of water frontage, and that the description in the deed "fronting on the waters of Sydney Harbour or Spanish River" would therefore not be applicable if it was intended to convey only lot no. 6 excluding the ballast heap lot, but would be entirely applicable if the description in the mortgage deed is construed as including the ballast heap lot as an accretion to or an extension of lot no. 6. Blowers Archibald, examined as a witness, says that what was called the Ferris property in 1838 was "no 6 and the lot below the road (*i.e.* the ballast heap lot) with buildings 1, 2 and 3 on it," and again the same witness says:

> I don't recollect any particular instance where any person called that lot the Ferris property, but it was generally called the Ferris property; it was called in 1838 the Ferris property.

Edward Phalen, another witness, says:

> I always knew this property occupied by the Archibalds to go by the name of the Ferris property.

Taking this evidence as to the denomination which the property had by usage acquired in connection with the description, "fronting on the waters of Sydney harbour or Spanish river," I have no difficulty in agreeing with both the courts below in holding that

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

the ballast heap lot was included in the mortgage to Forman as part of the land referred to as formerly belonging to John Ferris. That the mortgage to Gammell and Christie also included the ballast heap is demonstrated by the same description, and is strengthened by the additional description of the land mortgaged "as being all the property formerly and now in the occupation of Messrs. Archibald & Company," which would be falsified by the non-inclusion of this ballast heap lot, and also by the general words, "also all and singular the water lots and docks in front of said lots." The conveyance by Thomas Dickson Archibald and Blowers Archibald to Charles Dickson Archibald was, for the reasons before given, also sufficient. The same observation applies *a fortiori* to the conveyance from Charles Dickson Archibald to Charles William Archibald, for that deed not only describes the land as formerly belonging to John Ferris and fronting on the waters of the harbour, but it also refers expressly to water lots in front of lot no. 6, and to the description in a lease made by Charles Dickson Archibald to the firm of Archibald & Company, which beyond all question included the ballast heap, since it describes the subject of the lease as "docks, wharves, stores and other erections on the southern side" of the main road, a description which could only apply to property which included the ballast heap. And, for the reasons just given, the descriptions of the parcels in the conveyance by Charles William Archibald to Mrs. Breffit, and by Mrs. Breffit to Peter Imrie, were also inclusive of the piece of land in question. Upon this head, which, as the question of parcel or no parcel always does, involves a question of fact only, I therefore agree with the judgment appealed against.

Another point which is urged by the appellant is this. It is said that inasmuch as the mortgage of 1859 to

Gammell and Christie, which is now sought to be foreclosed, having contained the general description "also all and singular the water lots and docks in front of said lots," and inasmuch as Thomas Dickson Archibald afterwards, in 1860, acquired title to other water lots in front of the lots described, that this after acquired property belonging to the mortgagor became subject to the mortgage, and is consequently liable to contribute to the mortgage debt in proportion to its value relatively to the other lands in exoneration *pro tanto* of the owner of the equity of redemption. There is more than one conclusive answer to this contention. First, the description is not a specific description but a general description which would be satisfied by applying it to the ballast heap lot. Then, the doctrine of estoppel cannot apply for the mortgage was a deed operating under the statute of uses, an innocent conveyance, unlike a fine or feoffment, which by itself will not work an estoppel (1). Then, it contains no recital by which, apart from the operation of the deed itself, an estoppel might have been created. That the covenants will not work an estoppel is now established by the decision of Jessel M.R. in the case of *The General Discount Co.* v. *The Liberator Building Society* (2). Apart from the common law doctrine of estoppel however, if there had been an unambiguous specific description of property as a subject of the mortgage to which the mortgagor had no title at the date of the mortgage but had afterwards acquired a title, a court of equity would no doubt under ordinary circumstances have interfered (except as against a *bonâ fide* purchaser for value without notice of the equity of redemption) in favour of the mortgagees to charge such after acquired lands with the mortgage debt, but the answer to any argument

(1) *Bensley* v. *Burdon* 2 Sim. & Stu. 519. (2) 10 Ch. D. 15.

1895

IMRIE
v.
ARCHIBALD.

The Chief Justice.

founded on that doctrine is conclusive from what I have already mentioned that no intention is indicated to include such after acquired property by the general words used, and also from other reasons which I shall proceed to state.

If there had been a specific description of the after acquired water lots so that the intention to include them had been free from all doubt, the mortgagees being therefore entitled to the benefit of the equity which I have referred to, the proposition of the appellant that they ought to bear a ratable proportion of the mortgage debt would even then have been unsustainable, for the equity in question could not have been available to the purchaser of the equity of redemption in the face of the transaction between the mortgagors, the Archibalds, on the one hand, and Mrs. Breffit and the assignee in bankruptcy of Charles Dickson Archibald, on the other hand. By that transaction the liability of Blowers Archibald and Thomas Dickson Archibald, the mortgagors, to indemnify Charles Dickson Archibald, was satisfied and discharged as fully and completely as if the former had actually paid the whole amount of six thousand pounds secured by the bond (1).

This being so, even if the other conditions of the right to the equitable liability to contribution had been present, it is manifest that it could not have been applied without the inequitable and unjust result of compelling payment twice over (*i. e. pro tanto*) according to the relative value of the subsequently acquired lots. In this respect also I therefore entirely agree with the judgment of Mr. Justice Townshend.

Lastly, a further question has been raised which is not set up in the pleadings and which does not seem to have been brought under the notice of the learned

(1) Cowper & Green 7 M. & W. 638.

1895

IMRIE
v.
ARCHIBALD.

The Chief Justice.

judges who dealt with the case in the courts below, and which is not in any way adverted to in the appellant's factum. It is said that Mrs. Breffit, being a married woman, was not bound by the compromise transaction which resulted in the discharge of the indemnity bond. I am of opinion that there is nothing in this objection. It sufficiently appears that the indemnity bond, so far as Mrs. Breffit was entitled to the benefit of it, was her separate property. This appears from a recital in the memorandum of agreement of the 23rd of May, 1882, entered into by Mrs. Breffit and her husband, and Mr Grassie, the assignee. That recital is as follows:

> And whereas the said Annie Breffit claims to be beneficially entitled as part of her separate estate to the said sum of six thousand pounds and interest, secured by the said bond, and which claim to the extent of the same being separate estate of his wife the said John Hearne Breffit expressly admits and acknowledges, testified by his being a party hereto.

There is only printed in the appeal book before us the part of this memorandum of agreement executed by Mr. Grassie, but if there were nothing more than this, from it and the subsequent confirmation in the Bankruptcy Court and the settlement I should, in the absence of any defence based on this alleged incompetency being raised by the pleadings, have thought it one not to be now given effect to. There is, however, much more, for the deed of release of the 5th of November, 1884, by which the indemnity bond was discharged and the compromise was carried out, Mrs. Breffit and her husband both being parties to the deed, fully recites the agreement of the 23rd of May, 1882, and its confirmation by the Court of Bankruptcy. This, therefore, read together with the recited agreement is an express recognition of Mrs. Breffit's title by herself and her husband to the money secured by the bond as money settled to her separate use. Under these circum-

1895

IMRIE v. ARCHIBALD.

The Chief Justice.

stances it appears to be beyond question that this court ought not now to give effect on behalf of Mrs. Breffit to an objection which she has not suggested herself, and which in any case would be unsustainable, more especially as it appears from the deed of release and from other documents in evidence that in the matter of the agreement with Mr. Grassie, as well as in the compromise of the bond debt, Mrs. Grassie was advised by Mr. Hodgson, a solicitor, who acted for her alone and who must be presumed to have watched over her interests.

The appeal is dismissed with costs.

FOURNIER, TASCHEREAU and KING JJ. concurred.

GWYNNE J.– This action is brought by and in the interest of and for the benefit of the defendant Blowers Archibald one of the mortgagors in the mortgage in the pleadings mentioned, in his own right and as co-executor with William H. Archibald (another defendant) of the last will and testament of Thomas D. Archibald the other mortgagor in the mortgage which is now sought to be forclosed in the names of the mortgagees and their representatives and an assignee of the mortgage who holds the same in trust for the mortgagors as plaintiffs, but in the interest of the mortgagors against the appellant who claims title in the manner hereinafter mentioned. This claim of the mortgagors is based upon an equity upon which they rely as entitling them to be reimbursed out of the mortgaged lands whereof the appellant is now seized by title derived by mesne conveyances from Charles Dickson Archibald to whom, as the mortgagors allege, the land was sold by them subject to the mortgage, and the mortgagors having in discharge of their covenant contained in the mortgage paid to the mortgagees the

1895

IMRIE v. ARCHIBALD.

Gwynne J.

mortgage debt, they contend that they have now an equity which entitles them to use the names of the mortgagees and of their assignees as aforesaid, in the interest of them the mortgagors to reimburse themselves out of the mortgaged lands the amount so paid by them to the mortgagees with interest thereon.

This equity so invoked by the mortgagors is founded upon the principle that when lands in mortgage are sold by the mortgagor subject to the mortgage the mortgage debt is treated as the amount of, or part of, the purchase money agreed to be paid by the vendee, and that therefore if the vendee does not pay the mortgage debt but leaves the mortgagor to do so under his personal obligation, an equity arises in favour of the mortgagor, upon his paying the mortgage debt, to keep the mortgage alive for his own benefit, and in the name of the mortgagee or an assignee of the mortgagee to enforce the mortgage against the mortgaged lands in order to reimburse himself to the amount of the mortgage debt so paid by him. One of the questions involved in this, in some respects very singular and complicated case is, whether the circumstances of the present case are such as to entitle the mortgagors to have the benefit of that equitable principle to any, and if any to what, amount.

The mortgage now sought to be foreclosed in the interest of the mortgagors, was executed upon the lands therein mentioned to the mortgagees therein mentioned, upon the 24th May, 1859. The only title which the mortgagors Blowers Archibald and Thomas D. Archibald at the time of the execution of the said mortgage had to the lands therein mentioned, was acquired by them in virtue of a sheriff's deed executed upon the 16th of the said month of May, 1859, under a decree of foreclosure and sale, made in a suit for the foreclosure of a certain mortgage bearing date the 27th day

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

of September, 1849, and made by one Charles Dickson Archibald, since deceased, as mortgagor, to and in favour of one James Forman, as mortgagee, and for the sale of the premises thereby mortgaged.

Charles Dickson Archibald, the mortgagor in that mortgage, was at the time of the execution of the mortgage a partner in a trading firm consisting of himself and the said Blowers Archibald and Thomas D. Archibald, and the mortgage was executed upon property belonging to the said Charles Dickson Archibald alone in security for a sum of money which was the debt of the firm. In the month of December, 1853, the firm was dissolved by the retirement of the said Charles Dickson Archibald therefrom. By a deed of dissolution then executed the continuing partners Blowers Archibald and Thomas D. Archibald covenanted with the said Charles Dickson Archibald that they would as quickly as possible wind up the affairs of the old firm by collecting the assets and discharging the liabilities thereof, and that so soon as they should have discharged the debts due to the several creditors of the firm who should sign a deed of arrangement agreed upon as containing the terms of the dissolution, and so soon as they should be able to pay all the debts of the firm, including the said mortgage debt to Forman, which the said Charles Dickson Archibald was by the said mortgage primarily liable to pay, they would repay him such amount and also any other amount which he should be legally liable to pay, and should pay as a partner in the said firm. The decree of foreclosure in the suit upon the Forman mortgage appears to have been obtained and the sale thereunder to have taken place during the absence of Charles Dickson Archibald in England. There is a letter among the exhibits dated the 26th of May, 1859, from Thomas D. Archibald at Sydney, Cape Breton, addressed to Charles

1895

IMRIE v. ARCHIBALD.

Gwynne J.

Dickson Archibald, by which it appears that the latter had, upon the 14th of the same month of May, written from New York to the former remonstrating against the foreclosure proceedings and complaining that until his arrival at New York from England he had never heard of such proceedings having been taken, for in that letter of the 26th May, Thomas D. Archibald makes use of the following language:

> It appears to me very strange indeed that up to the time of your writing from New York you did not know that Forman had foreclosed his mortgage and sold your property on the 4th May. It was advertised on the 29th of March and Adams Archibald was in communication with Edward at New York respecting the sale. Some time previous to my leaving Halifax in the spring I took it for granted that you were advised of the time the sale was to take place, and had made up your mind to let it go. Finding the property was to be sold over our heads I made arrangements to purchase it, and bought it in at the sheriff's sale for £4,500. I got the money from Gammell and Christie and gave them a mortgage from the sheriff's deed. Had I not been prepared to purchase it would have fallen into the hands of a young Englishman by the name of Butler, who came out to reside here and brought with him some £6,000 to invest. I was glad to get possession of it for I expected opposition from various quarters. It is better it should fall into our hands than into the hands of strangers, and I presume you will be pleased to find it is so.

In addition to the fact already shown, that by the deed of dissolution Thomas D. Archibald and Blowers Archibald, who had undertaken the winding up of the affairs of the dissolved firm, were out of the assets of the firm eventually to pay off the amount secured by the mortgage as a debt of the firm, Blowers Archibald, in his evidence given in the present case, states some facts which throw light upon the passage above extracted from the letter of the 26th May, 1859, which tend to show that in purchasing at the foreclosure sale Thomas D. and Blowers Archibald were in fact "buying in" the property to protect Charles Dickson Archibald's rights and interests there-

1895

IMRIE
v.
ARCHIBALD

Gwynne J.

in, and in recognition of their own liability to pay the debts secured by the mortgage out of assets of the firm, and for protection also of their own interests as occupying a part, if not the whole, of the property called the Ferris property, under Charles Dickson Archibald, in carrying on the business which they carried on since the retirement of Charles Dickson Archibald and the dissolution thereby of the old firm, and that they had no idea of acquiring the property as their own absolute property. By the evidence of Blowers Archibald it appears that the firm, which consisted of himself and Thomas D. and Charles Dickson Archibald, was formed in 1838 upon the dissolution of a firm theretofore existing under the name of S. G. Archibald & Co.; that S. G. Archibald & Co. up to and at the time of the dissolution of that firm occupied property called the Ferris property under a lease from S. G. Archibald, the then owner thereof in fee, which lease expired in 1838. That the new firm of Archibald & Co., formed in 1838, continued to occupy the same property under Charles Dickson Archibald, the then owner thereof in fee, until the dissolution of the firm in 1853, and that thereafter Thomas D. Archibald and Blowers Archibald, who still carried on the same business, continued to occupy the same property under Charles Dickson Archibald until and at the time of the sheriff's sale under the decree in the suit upon the Forman mortgage, which covered a part at least if not the whole of the property called the Ferris property. It is obvious, therefore, that in 1859, when the property in that mortgage was offered for sale under the decree of foreclosure, Thomas D. Archibald and Blowers Archibald had a sufficient motive to have induced them to have "bought in" the property, as Thomas D. Archibald expresses himself in the letter of the 26th May, 1859, in the interest of Charles Dickson

Archibald, as well as in their own interest and not for themselves adverse to Charles Dickson Archibald, and this seems to explain the expression in the letter to the effect that he Thomas D. Archibald presumed that Charles Dickson Archibald would have been pleased to find that they had "bought in" the property. Accordingly we find that upon the arrival of Charles Dickson Archibald at Sydney from England, where he appears to have taken up his permanent abode, he and Thomas D. Archibald and Blowers Archibald seem to have come to an understanding with each other whereby the said Thomas D. and Blowers Archibald in recognition of Charles Dickson Archibald's right and claim to have the property so purchased reconveyed to him, agreed to convey to him to have and to hold to the use of himself, his heirs and assigns, in fee simple the estate which they then had in the lands mortgaged, that is to say, subject to the mortgage, but that they would keep him, his heirs and assigns and the lands absolutely indemnified, and saved harmless from all claim by the mortgagees upon the land for the mortgage debt. This arrangement so agreed upon was carried into effect by the execution by the said Thomas D. Archibald and Blowers Archibald of an indenture bearing date the 20th July, 1859, and a bond of the same date also executed by them. By the indenture they conveyed, among other lands, unto the said Charles D. Archibald, his heirs and assigns, the lands which were described as follows, that is to say:

Those two certain lots of land situate and being at the Bar of North Sydney aforesaid, which formerly belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney Harbour or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association and containing each 100 acres, more or less, the said lots being now or formerly in the occupation of Archibald and Company.

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

Also all that lot or parcel of land at North Sydney aforesaid, on which the brick store or warehouse is situated, and which formerly belonged to Clark and Archibald, the above mentioned lots described as formerly belonging to John Ferris and John Cameron, and containing 100 acres each, more or less, being subject to a mortgage dated the 24th day of the month of May now last past, and made between the said parties of the first part, and William Gammell and John Christie, Esquires, of little Bras d'Or, in the county of Cape Breton, for a consideration therein contained, together with all and singular the houses, outhouses, buildings and improvements therein and thereto belonging. To have and to hold (subject nevertheless to the mortgage incumbrance to the said William Gammell and John Christie) of the two certain lots hereinbefore mentioned unto the said Charles Dickson Archibald, his heirs and assigns forever.

The bond of even date with the above indenture was executed in a penalty of £12,000, Nova Scotia currency, and the recitals and conditions thereof are as follows:

Whereas the real estate belonging to the said Charles Dickson Archibald situate at the Bar (so called) North Sydney, in the county of Cape Breton, recently in the name of the said Thomas Dickson Archibald and Blowers Archibald consisting of two lots of land formerly belonging to John Ferris and John Cameron containing each one hundred acres more or less hath been conveyed by way of mortgage to William Gammell and John Christie for the consideration of the sum of six thousand pounds by the said Thomas Dickson Archibald and Blowers Archibald by indenture bearing date the 24th day of May in the present year as by reference to said indenture will appear.

And whereas the said Thomas Dickson Archibald and Blowers Archibald have this day conveyed the said premises to the said Charles Dickson Archibald and have agreed to pay off and discharge the said sum of six thousand pounds and all interest due thereon, and to save harmless the said Charles Dickson Archibald, his heirs and assigns, from all claims or demands of the said William Gammell and John Christie, and to relieve the said real estate from all liability under the said mortgage, they having received the benefit of the amount for which said mortgage was given.

Now the condition of this obligation is such that if the said Thomas Dickson Archibald and Blowers Archibald their heirs, executors, administrators and assigns do and shall well and truly indemnify and save harmless the said Charles Dickson Archibald his heirs and assigns from all claims of the said William Gammell and John Christie for and on

account of the said mortgage and shall discharge the debt due on said premises that the same may be finally free from all liability on account of said mortgage then the foregoing obligation to be void, otherwise to remain in full force and virtue.

1895

IMRIE v. ARCHIBALD.

Gwynne J.

The recitals in their instrument contain a statement of pre-existing facts which are here acknowledged as such for the purpose of explaining why the obligors should enter into the obligation contained in the bond to protect and save harmless the grantee of the real estate, which had been conveyed by the indenture of even date, and his heirs and assigns, subject to a mortgage, and the real estate itself so conveyed from all liability under that mortgage. The facts so admitted to exist substantially are to the effect that the real estate mortgaged by the obligors, although appearing on registry in their names as the legal owners thereof so as to make the mortgage legal and binding in the hands of the mortgagees, was in truth and justice and in equity the property of the obligee, to whom the mortgagors had in recognition of such his right conveyed by the indenture of even date the estate remaining; and that as the mortgagors had taken advantage of their apparent legal title to mortgage, as their own, lands which in truth and equity were the property of the obligee in security for moneys lent to and received and enjoyed by the mortgagors to their own use, justice and equity required that they should indemnify the transferee of the land, who was the true owner thereof, and his heirs and assigns, and the land itself so transferred from all liability under the mortgage. These facts being admitted or proved would have entitled Charles Dickson Archibald, wholly apart from the bond and if none had ever been executed, to have obtained relief in equity and indemnity from the mortgagors against the mortgage so executed, and this even after the execution of the indenture, which

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

had conveyed the lands to him and his heirs and assigns, in terms "subject to the mortgage." Those words in the indenture in the presence of the above facts would be construed as having been inserted for the purpose merely of designating the estate which the grantors had; but to the transfer of such estate there would be attached, by reason of the facts admitted, a right in equity vested in the grantee, his heirs and assigns, to have the lands relieved by the mortgagors thereof from all liability under the mortgage; and in such a case, in the event of the mortgagors paying off the mortgage and procuring a transfer of it to a trustee for their benefit, they never could have made the claim now made by them of enforcing the mortgage in the names of the mortgagees, or of the transferee thereof, for their own benefit against the lands mortgaged upon the ground that they had expressly conveyed the lands to Charles Dickson Archibald subject to the mortgage. Now the only benefit which Charles Dickson Archibald obtained by reason of the execution of the bond of the 20th July, 1859, was that he and his heirs and assigns should have the additional security of the right of maintaining an action at law upon the bond, and of recovering thereon to the amount of the penalty as security for such damage as they should sustain by reason of a breach of the condition of the bond to be assigned upon the record in the action and proved. Upon the same 20th day of July, 1859, Charles Dickson Archibald by an indenture of lease of that date demised and let to the said Thomas D. Archibald and Blowers Archibald for a term of 21 years, to be computed from the 1st day of the then present month of July, at a rental of £100 per annum of the money of Nova Scotia for the first ten years, and of £200 of like money per annum for the residue of the term, a certain water lot therein particularly described, the descrip-

tion of which has a bearing upon the second question raised in this case, and will have to be considered by and bye, but need not be set out at present.

Upon the 26th of July, 1859, Charles Dickson Archibald, by an indenture of bargain and sale, granted, bargained, sold and conveyed unto one Charles William Archibald, his heirs and assigns, to have and to have and hold to his and their own use for ever

those two certain lots of land situate at the bar of North Sydney, in the Island of Cape Breton, known as lots numbers 5 and 6, theretofore belonging to John Cameron and John Ferris, deceased, said lots fronting on the waters of Sydney or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each 100 acres, more or less, subject to a lease of part of the said premises to Thomas Dickson Archibald and Blowers Archibald. Also all the front of lot no. 2, situate near the above described lots, as the same was reserved on the sale and conveyance of the residue of the said lot no. 2 to one William Peppet, and also all and singular those wharf and water lots, and lands covered with water, situate and being in front of the said lots nos. 2, 5 and 6, as the same are delineated and described in the grant thereof to the said Charles Dickson Archibald, together with all and singular the houses, stores, warehouses, buildings, piers, wharves, quays and docks, &c., to the said several lots and parcels of land, and land covered with water belonging.

It is admitted that this indenture was drawn by Charles Dickson Archibald himself and not by a professional man, and the fact that it was so drawn is urged on the part of the appellant as explaining a passage therein which, as the appellant insists, is manifestly an erroneous statement of matter of fact, but which, on the contrary, is relied upon by the respondents as supporting their contention upon the second question arising in this case, and to which I shall have occasion to refer by and bye. I am at present dealing only with the question as to the equity, if any, which the mortgagors have to enforce in their own interest the mortgage in the names of the mort-

1895
IMRIE
v.
ARCHIBALD.
Gwynne J.

gagees upon the land mortgaged, whatever they may have been, deferring for the present the consideration of the question of what lands were mortgaged, which is the second question in the case. Upon the 3rd day of June, 1862, the said Charles William Archibald, by an indenture of bargain and sale of that date, granted. bargained, sold and confirmed unto Anne Parker, then a widow residing in England, and to her heirs and assigns, all the several lots of land and land covered with water which had been conveyed to him by the said indenture of the 26th July, 1859. The said Anne Parker afterwards intermarried with one John Hearne Breffit, whose wife she was in the month of May, 1882, when the transaction next hereinafter mentioned took place between her and one Thomas Ritchie Grassie, who is said to have been the creditors' assignee in England of the estate and effects of the said Charles Dickson Archibald, who in his life time, but then deceased, had become bankrupt in England. At this time Mrs. Breffit was seized of the whole of the estate which Charles Dickson Archibald had at the time of the execution by him of the indenture of 26th July, 1859, in the lands mortgaged by Thomas D. Archibald and Blowers Archibald by the indenture of the 24th May, 1859, and of all the rights and equities existing against the mortgagors in that indenture by reason of the existence of the facts which occasioned the execution of the bond of the 20th July, 1859. No one but herself and her husband in her right had any estate or interest in the estate in the said lands so conveyed to her, nor in the equities attached thereto against the mortgagors arising out of the existence of the facts aforesaid, nor in the said bond of the 20th July, 1859. That bond was not a money bond, conditional for the payment of money to the obligee, his executors, administrators or assigns. It was simply a

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

bond the condition of which was to indemnify Charles Dickson Archibald as the true owner of the land mortgaged wrongfully by the mortgagors who had only apparently a legal title, which apparent title made the mortgage good in the interests of the mortgagees against the land, and released the heirs and assigns of the said Charles Dickson Archibald and the lands mortgaged from all liability under the mortgage ; in such a bond the creditors' assignee in bankruptcy had no interest, as it is not pretended nor alleged that he had any estate or interest in the lands to be indemnified from the mortgage.

An instrument to which the signature of Thomas R. Grassie alone is appended has been produced in evidence which purports to contain the terms of an agreement entered into in the month of May, 1882, between Mrs. Breffit and her husband of the one part and the said Thomas R. Grassie of the other part. It is as follows :

Memorandum of agreement made on the twenty-third day of May, one thousand eight hundred and eighty-two between Annie Breffit formerly Annie Parker widow, now the wife of John Hearne Breffit of Snarebrook in the county of Essex, gentleman, and the said John Hearne Breffit of the one part, and Thomas Ritchie Grassie of Gresham House Old Broad street in the city of London of the other part creditors' assignee of the estate and effects of one Charles Dickson Archibald deceased a bankrupt.

Whereas by a bond dated the twentieth day of July, one thousand eight hundred and fifty-nine, under the hands and seals of Thomas Dickson Archibald and Blowers Archibald, the said Thomas Dickson Archibald and Blowers Archibald became bound unto Charles Dickson Archibald the above named bankrupt in a penal sum for securing payment by the said Thomas Dickson Archibald and Blowers Archibald their executors administrators and assigns, unto the said Charles Dickson Archibald his executors administrators and assigns of a certain sum of six thousand pounds and interest therein mentioned which said sum in the events which have happened is now due and owing; and whereas the said Annie Breffit claims to be beneficially entitled as part of her separate estate to the said

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

sum of six thousand pounds and interest secured by the said bond, and which claim, to the extent of the same being separate estate of his wife, the said John Hearne Breffit hereby expressly admits and acknowledges, testified by his being a party hereto, but her claim is disputed by the said Thomas Ritchie Grassie as such creditors' assignee as aforesaid; and whereas the said Annie Breffit has applied to the said Thomas Ritchie Grassie to allow her to use his name for the purpose of taking proceedings for the recovery of the money due upon the said bond and has offered to pay to the said Thomas Ritchie Grassie, as creditors' assignee as aforesaid, one clear half of all moneys which she may recover in such proceedings in discharge of all his claim as such assignee to the moneys secured by the said bond, and the said Thomas Ritchie Grassie is willing to accept such offer upon the conditions hereinafter contained, provided he obtains the sanction of the Court of Bankruptcy to this agreement. Now it is hereby agreed between the said parties as follows:

1. That the said Thomas Ritchie Grassie shall empower the said Annie Breffit, her executors, administrators and assigns, in the name of him the said Thomas Ritchie Grassie as creditors' assignee as aforesaid, and his successors in interest, to call in and compel payment of the said debt of six thousand pounds and of all interest for the same and by all legal proceedings to enforce the said bond, and to give effectual discharges of the said debt, and for that purpose shall execute all such further documents to be prepared at the expense of the said Annie Breffit as shall be necessary.

2. That the said Annie Breffit shall with all due diligence and reasonable speed after this agreement shall have been sanctioned as hereinafter provided, take all such steps and proceedings legal and otherwise at her own sole cost and expense, as shall be necessary for recovering the said sum of six thousand pounds and interest and enforcing the said bond, and shall pay to the said Thomas Ritchie Grassie, as such creditors' assignee or his successors in interest, one clear half of any and all sums received or recovered by virtue of the said bond, free from any deduction, which same sum or sums the said Thomas Ritchie Grassie shall accept in full satisfaction and discharge of all right, title, claim and interest of him the said Thomas Ritchie Grassie as such creditors' assignee, his successors in interest, of, in and to the said bond and the moneys thereby secured.

3. That the said John Hearne Breffit and Annie Breffit shall indemify and hold harmless the said Thomas Ritchie Grassie, his executors, administrators, assigns and his successors in interest, and the estate of the said bankrupt, against all costs, expenses, payments, judgments, orders, claims, actions, suits and liabilities whatsoever occasioned by or

in any way incidental to, or arising out of any acts or proceedings legal or otherwise that may be necessary to enforce the said bond and recover the moneys thereby secured or otherwise arising directly or indirectly from the use of his name.

4. That notwithstanding anything to the contrary herein contained, this agreement shall be void and of no effect, unless sanctioned by Her Majesty's London Court of Bankruptcy upon application duly made, as witness the hands of the said parties.

This instrument appears to be signed by Thomas R. Grassie alone, but it appears to have been recognized by an indenture bearing date the 5th day of November. 1884, which is executed under the hands and seals of Mrs. Breffit and her husband and the said Thomas R. Grassie which is in the terms following:

This indenture made the fifth day of November, 1884, between Annie Breffit the wife of John Hearne Breffit of Tyne Villa, &c., &c., &c., gentleman, and the said John Hearne Breffit of the first part, and Thomas Ritchie Grassie of, &c., in the city of London, creditors' assignee of the estate and effects of Charles Dickson Archibald deceased, a bankrupt of the second part, and Thomas Dickson Archibald and Blowers Archibald both of Nova Scotia of the third part. Whereas by a bond dated the 20th day of July, 1859, under the hands and seals of the said Thomas Dickson Archibald and Blowers Archibald, the said Thomas Dickson Archibald and Blowers Archibald became bound to Charles Dickson Archibald the above named bankrupt in a penal sum for securing payment by the said Thomas Dickson Archibald and Blowers Archibald unto the said Charles Dickson Archibald his executors, administrators and assigns of a certain sum of six thousand pounds and interest therein mentioned. And whereas the said Annie Breffit and Thomas Ritchie Grassie have both claimed to be entitled to the principal moneys and interest secured by the said bond. And whereas by an agreement bearing date the 23rd day of May, 1882, and made subject to the sanction of the London Court of Bankruptcy between the said Annie Breffit and John Hearne Breffit of the one part and the said Thomas Ritchie Grassie of the other part, the said parties agreed to take proceedings upon the said bond for the recovery of the moneys thereby secured in the manner therein provided and to divide all moneys recovered by virtue of the said bond in equal moieties between them, that is to say, that the said Thomas Ritchie Grassie should receive and take one moiety thereof and the said Annie Breffit the other moiety thereof, and such arrangement was afterwards sanctioned and the agreement duly confirmed by order of the London Court of

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

Bankruptcy made on the 15th day of June, 1882. And whereas the said Thomas Dickson Archibald and Blowers Archibald are unable to pay the said principal moneys and interest secured by the said bond and also dispute their liability to pay the same. And whereas the said parties hereto of the first and second parts being satisfied of their inability to pay the said moneys in full and in settlement of the said dispute as to liabilities, agreed with the said Thomas Dickson Archibald and Blowers Archibald subject to the sanction of the said court, to accept in settlement and discharge of the moneys payable by virtue of the said bond, the sum of eight thousand dollars in four promissory notes of two thousand dollars each Canadian currency with interest to be signed by five members of the firm of Messrs. Archibald and Company of Cape Breton, and also signed or indorsed by Mr. McLean the president of the Bank of Nova Scotia, such notes to bear date the 16th day of June, 1884, and to be payable respectively on the 31st days of December, 1884, 1885, 1886 and 1887. And whereas such agreement was duly sanctioned and confirmed by the London Court of Bankruptcy by an order bearing date the 15th day of October, 1894. And whereas the said four promissory notes have been drawn for the said respective amounts and interest, and have been signed by five members of the firm of Messrs. Archibald and Company, and have been indorsed by Mr. McLean, the president of the said bank, and at the request of the said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie, have been made payable to the joint order of Charles Harris Hodgson, the solicitor for the said Annie Breffit and John Hearne Breffit, and to the order of Arthur Torriano Rickards, the solicitor of the said Thomas Ritchie Grassie. And whereas the said promissory notes have at the like request of the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, been handed to the said Charles Harris Hodgson and Arthur Torriano Rickards on their behalf, as they the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, do hereby respectively admit and acknowledge. And whereas upon such promissory notes being handed over as aforesaid, the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, agreed to execute such release as hereinafter mentioned. Now this indenture witnesseth, that in pursuance of such agreement and in consideration of the premises the said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie do and each of them doth hereby release the said Thomas Dickson Archibald and Blowers Archibald, their and each of their heirs, executors, administrators, estates and effects from the said bond dated the 20th day of July, 1859, and from the sum of £6,000 and interest intended to be thereby secured, and every part thereof. Provided always, and it is hereby agreed and declared that

this present release shall not extend to the said sum of eight thousand dollars secured by the four promissory notes before mentioned, or any part thereof.

And on the back of the said bond is indorsed a memorandum which is signed by the said Annie Breffit and Thomas Ritchie Grassie, and bearing date the same 5th day of November, 1884, which is as follows:—

Memorandum—the principal moneys and interest secured by the within bond have become vested jointly in Annie Breffit, wife of John Hearne Breffit of Tyne Villa, Grove Hill, Woodford, in the County of Essex, gentleman, and Thomas Ritchie Grassie of Gresham House, London, creditors' assignee of the within named Charles Dickson Archibald, and all claims in respect of the within bond have been duly satisfied by the transfer by the within named obligators to the said Annie Breffit and Thomas Ritchie Grassie, of four promissory notes for two thousand dollars each, payable respectively on the 31st days of December, 1884, 1885, 1886 and 1887, respectively, and the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie have by indenture bearing even date with this memorandum released the said obligors from the said bond and the moneys intended to be thereby secured and the said bond has accordingly been given up to the obligors and cancelled.

(Signed) ANNIE BREFFIT.
" THOS. R. GRASSIE,
Assignee in Bankruptcy of C. D. Archibald.

I am unable, I must confess, to understand by what means Mrs. Breffit and her husband could have been induced to sign these instruments which so misrepresent the true nature, purport and effect of the bond and its conditions, and which are so at variance with her real rights and interest in the lands mortgaged and in the bond. Their having signed the instruments is, to my mind, only explicable by their having been ignorant of Mrs. Breffit's title and estate in the lands, and of her equitable rights against the mortgagors, by reason of her deriving title from Charles Dickson Archibald the true owner of the land as against the mortgagors. However, they have signed the instruments and we must now determine the effect of their

1895
IMRIE
v.
ARCHIBALD.
Gwynne J.

having done so upon the present action, for to whatever extent the estate of Mrs. Breffit in the lands was affected by them, the estate of the appellant must be affected also, as he derives title from her by a deed dated the 10th April, 1885. The statement of claim is framed as an ordinary action for foreclosure of a mortgage instituted by the mortgagees, and a person deriving title by assignment from them against the mortgagors and parties alleged to be seized of the equity of redemption, of whom the appellant is one, subject to the mortgage. The appellant in his defence among other defences alleged that the mortgage was paid off by the mortgagors and so satisfied and that the present action was instituted by them in their own interest, but in the name of the mortgagees and a person to whom they had procured the mortgage to be assigned, but in trust for their benefit. In their reply to this defence the mortgagors, for there is no doubt that the action is instituted by them and in their interest, set up what is the true foundation upon which the first question in this case, as it appears to me, must depend. They allege, as they do also in their defence to a counter claim of the appellant:

> That before the said Peter Imrie became purchaser of the equity of redemption in the lands and premises described in the said mortgage, the said Thomas Dickson Archibald and Blowers Archibald agreed with the said Annie Breffit and John Hearne Breffit, who were the immediate predecessors in title of the said Peter Imrie in the said lands and premises and the then owners thereof, that they the said Thomas Dickson Archibald and Blowers Archibald would pay to the said Annie Breffit and John Hearne Breffit the amount of the said mortgage debt and the interest due thereon, and that said mortgage should remain a charge on the said lots of land, and that the said lots should be a security therefor, and that the said Annie Breffit and John Hearne Breffit would assume said mortgage debt and the interest due thereon, and release the said Thomas Dickson Archibald and Blowers Archibald from all liability therefor; that the said Thomas Dickson Archibald and Blowers Archibald accordingly did pay to the said Annie Breffit and

John Hearne Breffit the whole of said mortgage debt and all interest due thereon, and the said Peter Imrie had notice and knowledge of said facts at and before the time he became purchaser of the lands described in said mortgage.

1895

IMRIE v. ARCHIBALD.

Gwynne J.

Upon the above allegations is rested the right of the mortgagors who, as now clearly appears, having paid and discharged the mortgage debt, have instituted this action in their own interest but in the names of the mortgagees and their assignee, who holds the mortgage in trust for the mortgagors, to charge the lands and the estate of the appellant therein with the principal of the mortgage debt so paid off amounting to $23,360 and the interest thereon from the 1st of June, 1880, which interest it is claimed amounted upon the 5th February, 1889, to $12,172.80. It is in support of the above allegations that the several documents executed respectively by Mrs. Breffit, her husband, and Thomas Ritchie Grassie were produced; there was no evidence whatever of such an agreement having been entered into or any agreement of a like effect unless the instruments produced contain within themselves such an agreement; there is no pretense that the whole mortgage debt and interest was as is alleged paid to Mrs. Breffit and John Hearne Breffit; but what is now contended is that the instruments in themselves contain an agreement quite different from that alleged, namely, that in consideration of the eight thousand dollars paid by Thomas Dickson Archibald and Blowers Archibald as mentioned in the instruments, Mrs. Breffit and her husband would assume the said mortgage debt and the interest due thereon and that the said mortgage should remain a charge upon the said Annie Breffit's estate in the said lands and that she and her husband would release the mortgagors from all liability therefor. This contention, as already observed, is quite different from that alleged in the pleadings by the mortgagors and in

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

my opinion it cannot prevail. I cannot but think that if it had been represented to Mrs. Breffit and her husband that by the instruments which they signed they were charging her estate in the lands or incurring any obligation to pay the mortgage debt and interest and to indemnify the mortgagors from the payment thereof they never would have signed the instruments, nor if that had really been their intention could the instruments have been framed in the shape in which they were. Having regard to the circumstances under which the indenture of the 20th of July, 1859, was executed, although that deed purported to convey the lands to Charles Dickson Archibald, his heirs and assigns, subject however to the mortgage, if the mortgagors had paid off the mortgage in the life time of Charles Dickson Archibald they never could have asserted any equity against him to be indemnified to the amount of the mortgage debt out of the lands so conveyed to him even though no bond of indemnity had ever been executed by the mortgagors; the facts the existence of which occasioned the execution of the bond would have afforded a complete answer to any such claim if asserted on behalf of the mortgagors. So neither could the mortgagors make any such claim against the heirs or assigns of the said Charles Dickson Archibald; the estate of his heirs or assigns in the lands conveyed to him by that indenture would be entitled to the same protection from the assertion of such an equity by the mortgagors as Charles Dickson Archibald would himself have been entitled to, if living, and still seized of the lands so conveyed to him. The mortgagors, therefore, cannot succeed in the present suit in virtue of the words "subject to the mortgage," &c., &c., contained in the indenture of the 20th July, 1859. The question is not one between the mortgagees *bonâ fide* seeking to enforce their mortgage security against

1895

IMRIE v. ARCHIBALD.

Gwynne J.

persons who as between themselves and the mortgagees are undoubtedly seized only of an estate in the lands subject to the mortgage, but the question is: What right, legal or equitable, have the mortgagors after having in discharge of their personal obligation to the mortgagees paid and satisfied them their mortgage debt to claim to be indemnified for such payment out of the mortgaged lands whereof the appellant is seized by title derived from Charles D. Archibald, to whom the mortgagors had reconveyed the lands, nominally it is true, "subject to the mortgage," but in reality for the purpose of revesting in him, his heirs and assigns, his own property, the apparent title to which the mortgagors had acquired under circumstances which vested in him the right in equity to have the lands reconveyed to him indemnified from the mortgage? The mortgagors can only sustain such a claim in virtue of an express contract of the appellant or of some one under whom he claims title. In view of the circumstances under which the indenture of the 20th July, 1859, was executed, there was not as already shown any such contract involved in that indenture notwithstanding the words "subject to the mortgage," &c., &c., therein used. There was no contract existing whereby Mrs. Breffit was under any obligation either personally or through her estate in the lands to indemnify the mortgagors against the payment of their mortgage debt prior to the execution by her upon the 5th November, 1884, of the release of the bond of the 20th July, 1859, nor at any time unless such a contract is contained expressly in the terms of that release. If the bond so released had never been executed the circumstances which constituted the occasion of its having been executed, when executed, were in themselves sufficient to exclude all idea of Charles D. Archibald, his heirs or assigns, being under any obliga-

1895

IMRIE v. ARCHIBALD.

Gwynne J.

tion whatever to indemnify the mortgagors against the payment of their mortgage debt in whole or in part. It is impossible therefore, in my opinion, to hold that the release of such a bond can place the assigns of Charles D. Archibald in a worse position than they would have been in if the bond had never been executed. There had been no original contract of indemnity in existence which could be said to have been suspended only during the existence of the bond and reinstated by its release. The release contains no language amounting to a personal covenant to indemnify the mortgagors against the payment of their debt to the mortgagees, and there is no language used competent to create a charge by Mrs. Breffit in favour of the mortgagors upon her estate in the lands; and moreover such a charge even if expressly stated could only be made valid by a deed executed by Mrs. Breffit, she having been a married woman, in a precise manner prescribed by statute and not pursued in the execution of the release.

In fine there can, I think, be no doubt that that instrument did not operate nor was it ever intended to operate as an instrument creating a charge upon Mrs. Breffit's estate in the lands in favour of the mortgagors, and if it did not create such a charge there is no instrument which did.

Upon what then can this equity which is insisted upon by the mortgagors be rested? There is nothing whatever in my opinion upon which it can be at all rested unless it be upon the fact of the payment of the eight thousand dollars which the mortgagors paid apart from all consideration of the accompanying release of the bond; upon that payment it may I think be rested but limited to the amount so paid and interest thereon.

In the absence of all evidence of any such agreement as that alleged by the mortgagors

in the pleadings for their indemnity against the mortgage debt having been actually entered into between them and Mrs. Breffit and her husband, and having in view what were her real rights and interests at the time of the payment of the $8,000, and the incorrect manner in which her rights and interests were represented in the instruments signed by her, I think it impossible to construe these instruments or any of them as amounting to an agreement in consideration of the $8,000 paid by the mortgagors to Mrs. Breffit and the assignee in bankruptcy of Charles Dickson Archibald in equal shares to charge Mrs. Breffit's estate in the lands, or the lands, with a sum then amounting, according to the mortgagors' own showing, to the principal sum of $23,360, and interest thereon from the 1st of June, 1880, an amount exceeding $6,000, in the whole upwards of $29,360. As to the recital in the instruments that the mortgagors were unable to pay more than the $8,000, which seems to have been thought necessary to be inserted to give appearance of fairness to the arrangement, no stress can be laid on this, for the mortgagors seem to have had no difficulty in paying off the mortgage debt and all arrears of interest when sued by the mortgagees in 1887. To the extent of the amount of the $8,000 which was paid by the mortgagors in November, 1884, I think we may recognize their equitable right to be reimbursed out of the lands mortgaged. Mrs. Breffit must, I think, be regarded as having received the whole of that sum; for the amount which the assignee in bankruptcy of Charles Dickson Archibald who had no claim whatever upon the mortgagors received, must I think be considered as given to him by Mrs. Breffit who herself had no claim whatever to any part of the sum so paid unless by way of indemnity to herself and her estate from the mortgagees' claim under the mortgage to whom

1895

IMRIE v. ARCHIBALD.

Gwynne J.

six thousand of the eight thousand dollars was then overdue for arrears of interest, not having applied the money in payment of the claims of the mortgagees; the mortgagors having paid off the mortgage in full may be permitted I think to claim indemnity out of the lands mortgaged and the appellant's estate therein to the amount of the said sum of $8,000 and interest thereon from the 5th day of November, 1884.

This leads to the consideration of the second question which is as to what were the lands mortgaged, which question is really narrowed to this: Was any, and if any what part of a certain water lot which was granted by the Crown to one John Ferris by letters patent dated the 8th April, 1826, covered by the mortgage? The water lot so granted is described in the said letters patent as

a water lot on the northern shore of the north-west branch of Sydney or Spanish River being part of the stone ballast heap in front of lot no. 6 granted to Francis Jones, beginning at a stake south forty-three degrees west one hundred and eight links from the south-eastern corner boundary of said lot no. 6, and thence bounded by the outline of the ballast heap to within a few paces of the extreme end, so as measure four hundred links from the shore at the extreme length to intersect the western outline of the said ballast heap at three hundred and fifty-five links from the shore, thence following the said outline to the shore, and thence along the shore to the place of commencement; also a projection on the eastern side line of the ballast heap, and near the south-eastern extremity thereof measuring sixteen feet in breadth and fifty feet in length, making the whole of the extreme breadth two hundred and four links, containing about three-quarters of an acre.

By an indenture bearing date the 1st May, 1838, the administrators of the estate of John Ferris, jr., conveyed to Charles Dickson Archibald, in fee simple, lot no. 6, on the north-west arm of Spanish River, by the description contained in the grant thereof from the Crown to one Francis Jones, dated 1st June, 1794, namely, as follows:—

1895

IMRIE v. ARCHIBALD.

Gwynne J.

Beginning at the south-east corner of lot no. 5 below the said mill creek, from thence running by the magnet north 33° W. 156 chains (of four rods each) more or less, to the north-east corner boundary of lot no. 5, thence north 57° east 8 chains, thence south 33° east 155 chains, more or less, to the shore of the river as above mentioned, thence westerly following the windings of the said shore to the place of beginning,

and also the above water lot in front of the said lot no. 6, as described in the said letters patent therefor to the said John Ferris, dated 8th April, 1826. By letters patent bearing date the 28th day of December, 1847, three several water lots lying in front of shore lots nos. 2, 5 and 6, on the north shore of the north-west arm of Sydney harbour were granted by the Crown to Charles Dickson Archibald by special descriptions respectively in the said letters patent mentioned, the description of the water lot in front of the shore lot no. 6 is so drawn as to include within its limits the stone ballast heap lot as granted to John Ferris by letters patent of the 8th of April, 1826; and the description was so framed doubtless because Charles Dickson Archibald was then seized in fee of the water lot or stone ballast heap lot so granted to John Ferris. The description is as follows:

Also a lot lying in front of the shore lot no. 6 heretofore granted to Francis Jones bounded by a line beginning on the shore at the western boundary of the said lot number six and thence running south thirty-three degrees east eleven chains and twenty links more or less into the harbour to the general boundary line aforesaid

(namely, a line extending north fifty-seven degrees east from the south end of the water lot lying in front of the shore lot number two)—

thence north fifty-seven degrees east, eight chains, thence north thirty-three degrees west, ten chains and eighty links more or less to the shore at the eastern boundary of the said lot number six, and thence westerly along the shore boundary of the said lot number six and along the boundary of a wharf lot containing about three roods heretofore granted to John Ferris the younger to the place of commencement, containing eight acres and eight perches more or less.

1895

IMRIE v. ARCHIBALD.

Gwynne J.

The shore lot no. 5 was granted by the Crown to one John Henry by letters patent bearing date the 20th January, 1792, by the following description:

All that tract or lot of land situate, lying and being on the north-east side of the north-west arm of Prince William Henry's Sound, and known and distinguished as lot number five which is butted and abounded as follows, viz., beginning at a fir tree on the bank side being the south-west corner boundary of lot no. 6, thence running by the magnet north thirty-three degrees west one hundred and fifty-six chains of four rods each; thence south fifty-seven degeees west eight chains; thence south thirty-three degrees east one hundred and fifty-seven chains more or less to the shore side of the arm aforesaid, and from thence to be bounded down stream by the several courses of the said shore to the boundary first mentioned, containing in the whole by estimation one hundred and ten acres more or less.

This lot was conveyed by John Henry the grantee to John Cameron in fee simple by indenture bearing date the 2nd of August, 1822, by the same description as that contained in the original grant thereof from the Crown and by John Cameron to Samuel George Archibald by indenture bearing date the 4th May, 1839, by the same description, excepting, however, therefrom certain parcels thereof theretofore conveyed by John Cameron to divers persons therein mentioned, by the deeds therein mentioned, and by indenture bearing date the 27th June, 1839, Samuel George Archibald conveyed to Charles Dickson Archibald the lands so conveyed to him, and by an indenture bearing date the 1st of February, 1838, the said Charles Dickson Archibald became seized in fee simple of one of the pieces so excepted. Now, the indenture of mortgage bearing date the 27th day of September, 1849, executed by Charles Dickson Archibald to John Forman, covered several parcels of land besides those with which we are at present concerned; these latter are therein described as follows:—

Also all the estate, right, title, interest, equity and reversion of the said Charles Dickson Archibald, of, in and to those two certain lots of land

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

situate and being at the bar at North Sydney aforesaid, and which heretofore belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney harbour or Spanish river, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each one hundred acres, more or less, the said lots being now in the tenure and occupation of Messrs. Archibald and Company, and also all the right, title, interest, equity and reversion which he hath, or hereafter may or can have, in or to all that lot, piece or parcel of land at North Sydney aforesaid, on which the brick store or warehouse is situate, and which formerly belonged to Clarke and Archibald.

The question we have now to deal with is twofold, namely: 1st. Does the above description cover (as is averred by the respondents, the mortgagors, in whose interest the mortgage of the 24th May, 1859, is sought to be foreclosed, but denied by the appellant,) the stone ballast heap lot granted to John Ferris, jr., by the letters patent dated the 8th April, 1826? And 2nd, if it does, is that lot covered by the description in the mortgage of the 24th May, 1859? As to the first branch of this question it is difficult to conceive that by the description given Charles Dickson Archibald intended to include that lot which the letters patent of the 28th December, 1847, included within the limits of the larger water lot by those letters patent granted, whereby the smaller lot so became part of the larger water lot as to be utterly inaccessible by water save over the waters outside of the smaller and within the limits of the larger water lot, and so became valueless except as part of the larger water lot. Then by the evidence of Mr. John McLean, who has known the premises as far back as 1831 and thenceforward, it appears that Plant owned the land lot east of the Ferris land lot no. 6, and that he did not own any property east of the stone ballast heap lot, all east of that lot being land covered with water and used as a public dock; so much of which land covered with water as lay east of the ballast heap lot and in front

1895

IMRIE
v.
ARCHIBALD.

Gwynne J.

of the land lot no. 6 is covered by the letters patent of the 28th December, 1847. Then he says further that he never knew of the ballast heap lot being spoken of as part of the land lot, that it was generally spoken of as the Ferris water lot; when Ferris owned it, it was always known to be and called a water lot. Then Blowers Archibald in his evidence says, that Archibald & Co. did not occupy the whole of the Ferris land lot in 1838, 1849 and 1859, that they occupied about one quarter of the land lot no. 6 at those dates, and about 12 acres of the land lot no. 5, that they were acting as Charles Dickson Archibald's agents in respect of the back of lot no. 5, and were in possession for him but paid no rent for the rear part of those lots, that this possession continued up to the time when the mortgage of the 24th May, 1859, was executed, and as I understand him also until 1882. Between 1838 and 1859, he says that Archibald & Co. built a number of buildings on the land lots nos. 5 and 6 above the road, that is above the road which separated or was supposed to be on the line which separated the land lots from the water lots in front, that the price of those buildings was debited to Charles Dickson Archibald and the rent was paid by paying him 6 per cent on the cost of the buildings.

Then he further says, that in 1836 he went to the North Bar to take charge of the store which Clarke and Archibald then had there upon the Ferris property, which he indicates as store marked no. 1 on a plan produced. This store seems to be placed partly upon what was or was supposed to be part of the ballast heap lot and partly on the road which is situate upon the lot no. 6 and separates the water lot in front of lot no. 6 from the part of that lot which was occupied by Archibald & Co. from 1838 under Charles Dickson Archibald.

1895

IMRIE v. ARCHIBALD.

Gwynne J.

We have thus as it appears to me the clearest possible evidence that the land or shore lots nos. 5 and 6 alone in themselves answer the description of the land mortgaged as the "two lots which heretofore belonged to John Ferris and John Cameron."

They are two lots containing each one hundred acres; taking them together they were bounded on the east by property of Samuel Plant and on the west by property of the General Mining Association; they did front on the waters of Sydney harbour and they were then in the occupation of Messrs. Archibald and Company, while the ballast heap lot never was bounded on the east by property of Samuel Plant and instead of fronting upon the waters of Sydney harbour it was a water lot situate in the waters of that harbour. In 1849 it had become and was in point of fact used as parcel of the greater water lot granted by the letters patent of the 28th December, 1847, to Charles Dickson Archibald, and that it should have then been dealt with as the old ballast heap lot, or intended to be covered by the description given in the mortgage is to my mind inconceivable, but such a construction becomes impossible when we find that besides the two lots containing each 100 acres, as above described, the mortgage expressly covers "also the brick store which formerly belonged to Clarke and Archibald," and which appears to have been or to have been suffered to be partly upon the lot no. 6 and partly upon the ballast heap lot. It is impossible to say that any part of the ballast heap lot was included in the mortgage unless it be so much as was covered by the brick store which formerly belonged to Clarke and Archibald. The mortgage therefore in fact covered only so much of the two land lots nos. 5 and 6 as the mortgagor Charles Dickson Archibald was seized of, and the brick store formerly occupied by Clarke and Archibald.

1895

IMRIE v. ARCHIBALD.

Gwynne J.

Then by the mortgage of the 24th May, 1859, now sought to be foreclosed in the interest of the mortgagors they, after stating the two lots intended to be mortgaged according to the precise description contained in the Forman mortgage, add these words—"further described as follows," and then set out the description given of the lots nos. 5 and 6 respectively in the original grants thereof from the Crown, from which they make certain exceptions, thus alleging in effect that the two lots granted by the Forman mortgage were the land lots 5 and 6 or the mortgagor's interest therein. The mortgage then proceeds thus—

> Also all and singular the water lots and docks in front of said lots and all the right and title of the said Thomas Dickson Archibald and Blowers Archibald therein and thereto with the wharves stores and erections together with all houses outhouses buildings and improvements thereon and thereto belonging, etc.

And this is only the clause which can be appealed to as being sufficient to cover the brick store which formerly belonged to Clarke and Archibald, and which in those terms was covered by the Forman mortgage. It is, however, now argued by and on behalf of the mortgagors in the indenture of the mortgage of the 24th May, 1859, that this clause commencing "also all and singular the water lots," &c., is part of the previous sentence, and therefore that what the mortgage says is that the prior part of the description of the two lots, as taken from the Forman mortgage covered the land lots 5 and 6, and also all and singular the water lots in front of those lots, but such a construction is plainly impossible, for it would include the whole of the eight-acre water lot in front of lot no. 6, and the water lot in front of lot no. 5, the former of which was leased to Thomas Dickson Archibald and Blowers Archibald for 21 years by the indenture of lease of the 20th July, 1859, and the latter subsequently sold by Charles

1895

IMRIE v. ARCHIBALD.

Gwynne J.

Dickson Archibald; and, moreover, there is no pretense that any part of those water lots, nor until this argument was used, which is so at variance with the residue of the argument of the mortgagors, was it ever contended, that by the Forman mortgage any water lot was covered unless it was the small ballast heap lot; the argument, therefore, that the clause in the mortgage commencing "also all and singular the water lots and docks in front of the said lots," &c., is to be read as part of the previous sentence cannot be entertained, and the result is that the effect to be given to this sentence can only be to cover the brick store which formerly belonged to Clarke and Archibald mentioned in the Forman mortgage, which together with the mortgagors' estate in the lots nos. 5 and 6, is all that the mortgage can cover of the property of Charles Dickson Archibald in which the appellant is interested.

It seems to me to be scarcely necessary to refer to the argument addressed to us founded upon the position in which the words

subject to a lease of part of the said premises to Thomas Dickson Archibald and Blowers Archibald

appear in the conveyance of the 26th July, 1859, from Charles Dickson Archibald to Charles William Archibald, for the language affords really no foundation for the argument; the language is that the lots known as lots nos. 5 and 6 were as to part thereof subject to a lease to Thomas Dickson Archibald and Blowers Archibald. How that lease was executed, whether by deed or by parol, and for what term is not stated; the lease by the indenture of the 20th July, 1859, plainly is not such a lease as is spoken of in this sentence, for that lease does not affect, or purport to affect, any part of the lots nos. 5 and 6, but is expressly confined to a water lot in front of lot no. 6, situate on the south side of the road, which

1895

IMRIE v. ARCHIBALD.

Gwynne J.

by the evidence is shown to separate the shore lot no. 6 from the water lot in front thereof; in short, it is the water lot as granted by the letters patent of the 27th December, 1847, and includes the so-called ballast heap lot. The evidence also shows that the lots nos. 5 and 6, or so much thereof as was the property of Charles Dickson Archibald, was then in the occupation of Thomas Dickson Archibald and Blowers Archibald, and such occupation may have been by lease, by deed or by parol; or which perhaps is more probable, as the deed was prepared by the grantor himself, and as the deed conveys also

> all those wharf and water lots in front of the said lots 2, 5 and 6, as the same are delineated and described in the grant thereof to the said Charles Dickson Archibald, together with all and singular the stores, warehouses, buildings, &c., to the said water lots belonging.

The words "subject to a lease of part of the said premises," should have been (and would have been if the lease had been prepared by a professional man), inserted at the close of this description of the water lots in which case they would accurately apply to the lease of the 20th July, 1859, but placed as they are they plainly cannot, and as the mortgagors' argument can only rest upon the words as they are used, and as so used they do not support their contention, which is that the appellant as deriving title from Charles Dickson Archibald is estopped by this language in the deed from Charles Dickson Archibald to Charles William Archibald from contesting as against these mortgagors that the so-called ballast heap lot is not covered by their mortgage, there is, as I have said, no foundation in my opinion for this contention.

The decree, in my opinion, should be foreclosure and sale only of the estate which Charles Dickson Archibald, at the time of the execution of the mortgage of September, 1849, had in the shore lots nos. 5 and 6, and

in the brick store which had theretofore belonged to Clarke and Archibald, with all such directions as may be necessary to determine the identity of this building, for the realization only of the sum of $8,000, with interest thereon at 6 per cent per annum from the 5th November, 1885, each party to pay their own costs of this appeal.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Ross, Sedgewick & Mackay.*

1894
*Oct. 3, 4.
1895
*Mar. 11.

JOSEPH FORTIER (DEFENDANT).....APPELLANT ;

AND

WILLIAM B. LAMBE, ÈS QUALITÉ, (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Constitutional law—Powers of provincial legislatures—Direct taxation—Manufacturing and trading licenses—Distribution of taxes—Uniformity of taxation—Quebec statutes 55 & 56 V. c. 10 *and* 56 *V. c.* 15—*British North America Act*, 1867.

The provisions of the Quebec statute, 55 & 56 V. c. 10 as amended by 56 V. c. 15 do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature.

The license required to be taken out by the statute is merely an incident to the collection of the tax and does not alter its character.

Where a tax has been imposed by competent legislative authority the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional.

Bank of Toronto & Lambe (12 App. Cas. 575), followed.

Attorney General v. *The Queen Insurance Co.* (3 App. Cas. 1090), distinguished.

APPEAL from the decision of the Superior Court sitting in review at Montreal (1), affirming the judgment in the Superior Court (2), which condemned the defendant to pay the amount of the license fee imposed on manufacturers and traders under the statutes 55 & 56 Vic. c. 10 amended by 56 Vic. c. 15.

The action was brought by the plaintiff, as collector of provincial revenue for the district of Montreal, to

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

(1) Q.R. 5 S.C. 355. (2) Q.R. 5 S.C. 47.

recover the license fee or tax imposed by the statutes upon the defendant as a merchant carrying on business by wholesale and retail within the limits of the city of Montreal. Defendant resisted the recovery on the grounds, 1. That the acts were *ultra vires*, being a regulation of trade and commerce; 2. That the license fee or tax imposed was an indirect tax; and 3. That admitting the tax to be within the competence of the provincial legislature, it had not been levied or apportioned in a legal or constitutional manner.

The preamble of the Act recites the extent of the funded and floating debt of the province and of the estimated expenditure and the insufficiency of the present revenue to meet the increased expenditure and additional burdens put on the province, and the expediency and necessity of levying new taxes to meet such debts and obligations, and the statute then proceeds to impose the taxes. The tax now specially questioned is the double license fee provided by section 826*c* which enacts that every trader doing business in Montreal by wholesale, or by wholesale and retail, shall, if his stock in trade exceeds in value $500, be obliged to take out in each year a license from the collector of provincial revenue, for which he shall pay $100; and section 826*d* which provides that in certain cases double license fees shall become due and be exacted, and the person in default shall, in addition to any other recourse against him, be liable to a penalty of $100, and in default of payment to imprisonment for one month. Among the cases specified is that of any person or firm bound to take out a license failing to do so, or carrying on trade or business, or selling by wholesale or retail, any goods, wares or merchandise of any kind without having a license.

The defendant admitted that he was a person of the class specified, and based his defence entirely upon the constitutional objections taken.

1894

FORTIER v. LAMBE.

Geoffrion Q.C. and *Leet* for appellant. The tax is unconstitutional because:

1. It is an indirect tax. 2. It is a regulation of trade and commerce. 3. It affects to license and control subjects outside the category of licenses a province may issue. 4 If, in its incidence, it is direct it has not been legally apportioned.

The legislature intended to make the carrying on of business impossible without a license, to pass a license Act governed by principles and rules of law relating to license Acts and license fees, and coming within subsec. 9, of sec. 92 of the British North America Act, and the courts must interpret the Act according to such intention.

The levy is not "taxation" within the legal meaning of the term and within the meaning of the term as used in the British North America Act, and the legislature, in endeavouring to levy a license fee, violated an imperative principle necessary to direct taxation under subsec. 2. *Severn* v. *The Queen* (1); Cooley on Taxation (2); Blackwell on Tax Titles (3).

A levy, in order to meet the requirements of taxation, must be apportioned over the whole taxing district at a uniform rate. Cooley on Taxation (4). See *Jonas* v. *Gilbert* (5), remarks by Ritchie C.J. at p. 365.

The essential elements necessary to distinguish this impost from arbitrary levies are wanting. The remarks of the judges below would indicate that the power for such a levy lies not so much in the fact that it conforms to the legal definition of a tax, as because of the sovereign power of the legislature. The powers of the Imperial Parliament are not restricted by a written constitution imposed by a superior power, and

(1) 2 Can. S.C.R. 70.
(2) 2 ed. p. 237.
(3) 5 ed. secs. 2, 3.
(4) 2 ed. pp. 141, 243.
(5) 5 Can. S.C.R. 356.

consequently Mr. Justice Jetté's quotations as to absolute sovereignty cannot apply. The only English authority really applicable are the remarks of Sir Barnes Peacock in *Hodge* v. *The Queen* (1).

The legislature can simply levy a tax. It cannot confiscate. It cannot arbitrarily select one city or one municipality and collect from it the whole revenue of the province, nor can it levy from the inhabitants of one municipality at a different rate from another. It cannot select a few individuals to bear the tax.

The principle that the legislature cannot discriminate is laid down in *Attorney General* v. *Toronto* (2).

While the rate of apportionment is entirely within the discretion of the legislature, yet if the rate is not uniform and equal but the reverse, the courts should interfere to prevent the violation of the necessary principle of equality, making it not a tax but an arbitrary levy. Blackwell on Tax Titles (3); Cooley on Taxation (4).

Casgrain Q.C. Attorney General of Quebec and *Martin* for the respondent.

The tax is of the same nature as that imposed by 45 Vic. ch. 22 (Q.), on commercial corporations, which was held to be within the authority of the local legislature. *Lambe* v. *Bank of Toronto* (5).

The tax in question is a direct tax. Burroughs on Taxation, 146; Jevons Pol. Economy (1878) p. 127; Say, Economie Politique; Merlin (6). Lord Selborne laid down the same doctrine in *Attorney General* v. *Reed* (7).

As to the opinion expressed in *Severn* v. *The Queen* (8), that a brewer's license fee under 37 Vic. c. 22 (O.), was an indirect tax, see the remarks in their Lord-

(1) 9 App. Cas. 132.
(2) 23 Can. S.C.R. 514.
(3) 5 ed. ss. 11, 27.
(4) 2 ed. p. 169.
(5) 12 App. Cas. 575; 10 Legal News 258; 32 L.C.Jur. 1.
(6) Rep. vo. Contributions Publique, p. 1.
(7) 10 App. Cas. 141.
(8) 2 Can. S.C.R. 70.

1894

FORTIER v. LAMBE.

ships' judgment in the Privy Council in the case of the commercial corporations (1). The present acts are not prohibitive in their effect.

The true character of the tax is not to be determined by the use of the word "license." The Quebec Legislature made use of the same word in the Act 39 Vic., c. 7, "An Act to compel assurers to take out a license," but in *Attorney General* v. *The Queen Insurance Company* (2), the Privy Council refused to regard it as a license act or the price payable as the price of a license but took it to be a mere stamp act, and the price payable as the price of a stamp, and that this was indirect taxation and *ultra vires*. Looking at the act in question and the true character of the so-called licenses, we submit that the Quebec Legislature imposed here a direct tax just as 45 Vic. c. 22 imposed a direct tax upon commercial corporations.

As to interference with the regulation of trade and commerce the remarks of their Lordships in *Bank of Toronto* v. *Lambe* (1), show that contention to have been too wide when urged by the banks and commercial corporations. It must necessarily follow that the contention has no more force in this case than it had in the cases just referred to.

As to the application of principles laid down by decisions under the constitution of the United States of America, the Privy Council expressed the opinion in *The Bank of Toronto* v. *Lambe* (1), that it is quite impossible to argue from the one case to the other.

It was said that the legislature might crush a bank out of existence and so nullify the power to erect banks, and it is now suggested that the power to regulate trade and commerce may be nullified by crushing

(1) *Bank of Toronto* v. *Lambe*, 12 App. Cas. 584.

(2) 3 App. Cas. 1090; 22 L.C. Jur. 307.

traders out of existence under heavy taxation. The Judicial Committee said as to that (1):

"When the Imperial Parliament conferred wide powers of local self-government on great colonies, such as Quebec, it did not intend to limit them on the speculation that they would be used in an injurious manner. They were trusted with the great power of making laws for property and civil rights, and may well be trusted to levy taxes."

It is said that even supposing the tax is not illegal on other grounds it has not been equally or fairly apportioned over the territory taxed.

Under our system Parliament has absolute sovereignty, and its acts are not subject to be questioned by the courts when within the competence of the legislature. See Cooley on Taxation (2); Potter's Dwarris on Statutes (3); Sedgewick on Statutory & Commercial Law 182; *Hodge* v. *The Queen* (4).

In the commercial corporations cases it was urged that the tax imposed upon them was unjust and inequitable but the courts refused to take this ground into consideration at all. *Bank of Toronto & Lambe* (1).

THE CHIEF JUSTICE.—This judgment is in my opinion free from error. If I was at liberty to do so, I might hold according to the opinion I expressed in *Severn* v. *The Queen* (5), that a license of this kind came within the words "other licenses" in subsec. 9, sec. 92 British North America Act, but I am precluded from doing this by the judgment of this court in that case.

(1) *Bank of Toronto* v. *Lambe*, 12 App. Cas. 586; 32 L.C. Jur. 6.
(2) 2 ed. p. 247.
(3) p. 479.
(4) 9 App. Cas. 117; 7 Legal News 23.
(5) 2 Can. S. C. R. 70.

1895

FORTIER v. LAMBE.

The Chief Justice.

I am, however, of opinion that this is the case of a direct tax and is governed by the decision of the Privy Council in the *Bank of Toronto* v. *Lambe* (1), and that it is not an indirect tax within *Attorney General* v. *Queen Insurance Co.* (2). I quite agree with the courts below in the definition which they give of a direct tax. In order that a tax may be indirect it must appear clearly that it was one not to be ultimately borne by the person by whom it is to be paid in the first instance. I cannot say that a tax upon a man's business is one which must necessarily be borne by the persons who make purchases from him.

This distinction between a direct and an indirect tax depending on the incidence of the tax is well pointed out by Professor Sidgwick in his work on Political Economy (3), where he says:

> We have now to note a new element of imperfection and uncertainty in the equalization of taxation due to the fact that we can only partially succeed in making the burden of either direct or indirect taxes fall where we desire; the burden is liable to be transferred to other persons when it is intended to remain where it is first imposed, and on the other hand when it is intended to be transferred the process of transference is liable to be tardy and incomplete. Indeed this process is often so complicated and obscure that it is a problem of considerable intricacy and difficulty to ascertain where the burden of a tax actually rests; and it is not even a simple matter to state accurately the general principle for determining the incidence of a tax supposing all the facts to be known.

And in a note he adds:

> The common classification of taxes as direct and indirect appears to me liable to mislead the student by ignoring the complexity and difficulty of the problem of determining the incidence of taxation.

If this tax was imposed without the device of a license it would be precisely identical with that in question in *The Bank of Toronto* v. *Lambe* (1), and I cannot see that the circumstance that the persons affected

(1) 12 App. Cas. 576. (2) 3 App. Cas. 1090.
(3) Ed. 2, p. 571.

1895

FORTIER v. LAMBE.

The Chief Justice.

by the tax are, for convenience of the government in collecting it, required to take out a license can make any difference. It is a direct tax to all intents and purposes, and within the powers expressly conferred upon the legislature.

The objection of want of uniformity which was so strongly pressed is no legal objection. Granting that the legislatures have the power of imposing such taxes it is for them to say how it is to be distributed.

We have not in the British North America Act any such provision as that contained in the constitution of the United States, which requires that all taxes, excises and imposts shall be uniform throughout the United States (1).

The cases cited in support of this contention were principally American authorities which had reference to this express constitutional provision requiring uniformity.

The appeal must be dismissed with costs.

TASCHEREAU J.—The contention of the appellant based on the ground that this tax has not been legally apportioned, and is null for want of uniformity and equality, is, in my opinion, untenable. Whatever political economists and other writers may say on this subject I know of no law in the Dominion that in any way puts any restriction, limitation or regulation of that kind on the powers of the federal or provincial authorities in relation to taxation within their respective spheres.

In the United States a provision on the subject is to be found in the federal constitution, but there is no similar enactment in the British North America Act.

The appellant's other contention, that this tax involves a regulation of trade and commerce, and is

(1) Const U.S. art. 1, sec. 8, no. 1.

1895

FORTIER v. LAMBE.

Taschereau J.

therefore *ultra vires*, is also untenable. A similar point was urged in *Citizens Ins. Co.* v. *Parsons* (1), and in *Bank of Toronto* v. *Lambe* (2), and declared unfounded. The reasoning of their Lordships of the Privy Council upon that point in those cases applies here. In fact, if this is a direct tax, *cadit questio*, this statute is *intra vires*; the fact that it might involve in a certain degree a regulation of trade and commerce cannot deprive the provincial legislature of the right to raise a revenue by means of direct taxation, or impair such right in any way.

The cases of *Almy* v. *The State of California* (3); *Lin Sing* v. *Washburn* (4); *Brown* v. *Maryland* (5); and *Leloup* v. *The Port of Mobile* (6) cited by the appellant, do not support his contention. He here again seems not to have given sufficient attention to the differences between the British North America Act and the United States constitution on the subject. Is this a direct tax? is therefore the first question that presents itself in this case, and if the question is answered affirmatively there is an end of the appellant's case.

The cases of *Reg.* v. *Taylor* (7); *Severn* v. *The Queen* (8); *Attorney General* v. *The Queen Ins. Co.* (9); *Attorney General* v. *Reed* (10); *Bank of Toronto* v. *Lambe* (2), though not directly in point, contain all that can be said, and almost all the authorities and writers that can be cited, on this question. It would be, however, useless for me, in the view I take of the present case, and fettered by authority as I deem myself to be, to enter into a renewed consideration of the different aspects of the question in relation to the British North America Act. I mean, of course, as a question of law,

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) 24 How. 169.
(4) 20 Cal. 534.
(5) 12 Wheat. 419.
(6) 127 U. S. R. 641.
(7) 36 U.C.Q.B. 183.
(8) 2 Can. S.C.R. 70.
(9) 3 App. Cas. 1090.
(10) 10 App. Cas. 141.

1895

FORTIER v. LAMBE.

Taschereau J.

not as one of statesmanship or political economy. Assuming that licenses, generally speaking, constitute indirect taxation, a proposition that in law I would now very much doubt as applicable to the British North America Act, I hold that though the Quebec legislature has resorted to a system of licenses as a means to raise the tax in question yet this statute is not to be taken as a license Act.

It is evident, by its terms, that it contains no prohibition whatever as to manufacture or trade. Therefore no license, no permit (*lices licere*) is necessary in the province as a condition precedent to legally manufacture or legally trade, and all contracts entered into by the manufacturer or trader in the course of his business are perfectlylawful and enforceable at law (1). The Liquor License Acts, on the contrary, as did also the Act under consideration in *Severn* v. *The Queen* (2) absolutely prohibit the selling of any liquor without having first obtained a license to do so. Under that class of statutes, every time a sale without license is made the penalty is incurred; each sale is a distinct offence, and is altogether unlawful. Under the statute now under consideration the double license fee is exigible only once a year, and the sale or manufacture without a license is not unlawful in the sense that a sale of liquor without a license is under a prohibitory law. This is, it seems to me, as direct a tax as the tax under consideratien in the Bank of Toronto case, which by the Privy Council has been declared to constitute direct taxation. In fact it is nothing else but an extension to private individuals of that statute which applied only to corporations. Now, if this tax was a direct one when imposed upon commercial corporations, is it the less direct when imposed upon private

(1) Cooley on Taxation pp. 385, 406, and cases there cited.

(2) 2 Can. S.C.R. 70.

1895

FORTIER v. LAMBE.

Taschereau J.

individuals? And can the form of collecting the tax alter its nature? We have the high authority of the Privy Council in *Attorney General* v. *The Queen Insurance Co.* (1) for the proposition that it does not. And in the same sense Mr. Justice Clifford, delivering the judgment of the United States Supreme Court in *Scholey* v. *Rew* (2), in answering negatively the argument, that the tax in question in that case was a tax on land because the act creating it made it a lien on the land, said: "Nor is the tax in question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

In my opinion the license in question here is likewise merely an appropriate regulation to secure the collection of a direct tax.

I would dismiss the appeal. If the question was *res integra* I would be inclined to think that the words "direct taxation" in subsec. 2 of sec. 92 of the British North America Act were not intended to give to the provinces the very large powers of taxation that are claimed by the respondent here, and which the judgments of the courts below concede them, either directly or inferentially. However, in view of the decision of the Privy Council, I have to refrain from giving my own opinion on the question submitted.

GWYNNE J.—It is sufficient, in my opinion, in this case to say that the Act of the Province of Quebec, 55 & 56 Vic. ch. 10, as an Act for the purpose of imposing "direct taxation within the province for provincial purposes" is upon the authority of the judgments of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe* (3), *intra vires* of the provincial legislature. Upon this ground I think the Act is maintainable, and that the appeal should therefore

(1) 3 App. Cas. 1090. (2) 23 Wall. 331.
(3) 12 App. Cas. 575.

1895

FORTIER v. LAMBE.

Gwynne J.

be dismissed with costs. As to the contention of the appellant on the one side that the Act was *ultra vires* of any jurisdiction conferred by item 9 of sec. 92, and that of the respondent on the other hand that the Act was *intra vires* of that item, and that the authority of *Severn* v. *The Queen* (1), was so shaken by the judgment of this court in *Molson* v. *Lambe* (2) that it should no longer be followed, I decline to express any opinion, for the reason already given, as to whether this case is or is not governed by *Severn* v. *The Queen*, (1), or whether that case was well or ill decided. It certainly has not been judicially overruled, and until it shall be it is, I presume, binding upon this court, and it is not necessary for the decision of the present case to bring it within *Severn* v. *The Queen* (1), and as to its being shaken by *Molson* v. *Lambe* (2), a perusal of the report of that case will show that the only question raised and submitted to the court in that case was as to the right of a party to proceedings in an inferior jurisdiction, by the law of the province of Quebec, to prohibit the judge of the inferior jurisdiction from proceeding to judgment upon issues joined in the matter before him; and the judgment of the court was that as the matter in which the issues were joined was within the jurisdiction of the Superior Court proceedings in prohibition could not be instituted according to the law of the province of Quebec to prevent the judge proceeding to judgment in the case, and that if he should render an erroneous judgment in the matter it could be reviewed upon a *certiorari*.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Maclaren, Leet & Smith.*
Solicitors for the respondent: *Beaudin & Foster.*

(1) 2 Can. S.C.R. 70.
(2) 15 Can. S.C.R. 253.

1895

*May 15,16.

*Dec. 9.

THE PROVINCE OF ONTARIO.....APPELLANT;

AND

THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.....RESPONDENTS.

In re INDIAN CLAIMS.

ON APPEAL FROM AN AWARD IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Constitutional law—Province of Canada—Treaties by, with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands—B.N.A. Act s. 109.

In 1850 the late province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the Government of the province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory thereby ceded by the Indians at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time."

By the B.N.A. Act the Dominion of Canada assumed the debts and liabilities of the province of Canada, and sec. 109 of that Act provided that all lands, &c., belonged to the several provinces in which the same were situate "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

The lands so surrendered are situate in the province of Ontario and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874 at the increased amount) and claims to be reimbursed therefor.

Held, reversing the said award, Gwynne and King JJ. dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or

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

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

"an interest other than that of the province in the same," within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the province of Canada.

APPEAL from an award of the arbitrators appointed to adjust the accounts between the Dominion of Canada and the provinces of Ontario and Quebec respectively.

The circumstances under which this appeal came before the court were the following:

Prior to and in the year 1850 the Ojibeway Indians inhabited large tracts of land on the eastern and northern shores of Lake Huron, and on the northern shore of Lake Superior, which tracts of land were at that time within the boundaries of the then province of Canada, but since the year 1867 are within the province of Ontario. At the date first above mentioned, 1850, the administration of Indian affairs within the province of Canada was in the hands of Her Majesty the Queen, and the management of the business with the said Indians was conducted by officers and agents appointed by the Government of Great Britain.

In the said year 1850 the Honourable William Benjamin Robinson was duly authorized by Her Majesty, represented by the Government of the province of Canada, to negotiate and enter into agreements with the above named Indians for the extinguishment of their title to, and to obtain cessions of, portions of the tracts of land occupied and inhabited by them, for the purpose of opening up the said lands for settlement, and developing the mineral resources of the same, and on the 9th day of September, 1850, an agreement was entered into between the said Hon. W. B. Robinson on behalf of the Queen and the Ojibeway Indians of the Lake Huron district, which agreement is in the words and figures following:

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

"This agreement made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the province of Canada, between the Honourable William Benjamin Robinson of the one part, on behalf of Her Majesty the Queen, and (naming them) principal men of the Ojibeway Indians, inhabiting and claiming the eastern and northern shores of lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay, on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada west to which they have any just claim on the other part, witnesseth:"

"That for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice will be given at such places as may be appointed for that purpose, they, the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors forever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said chiefs and their tribes in common, for their own use and benefit; and should the said chiefs and their respective tribes at any time desire to dispose of any part of such reserva-

tions, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole interest and to the best advantage; and the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this province, hereby promises and agrees to make, or cause to be made, the payments as above mentioned; and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the provincial Government."

"The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent-General of Indian Affairs, or other officer of like authority, being first had and obtained. Nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree, that in case the government of this province should before the date of this agreement have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use, then and in that case such sale, or promise of sale, shall be perfected by the government if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs."

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

"The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further, that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (which is twelve hundred and forty) to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty the annuity shall be diminished in proportion to their actual numbers."

A similar treaty was entered into with the Lake Superior Indians in which the annuity to be paid was £600 and the number in the tribe was stated to be fourteen hundred and twenty-two.

On the union of the provinces in 1867 the Dominion became liable for the debts of the several provinces as provided in sections 111, 112 and 142 of the British North America Act, which are as follows:

"111. Canada shall be liable for the debts and liabilities of each province existing at the union.

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

"142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and the selection of the arbitrators shall not be made until the parliament of Canada and the legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec."

In accordance with the last named section arbitrators were chosen, and on the third day of September, 1870, two of them, namely, Hon. John Hamilton Gray and Hon. D. L. MacPherson, gave their award, paragraphs 1 and 13 of which are as follows:

"I. That the amount by which the debt of the late province of Canada exceeded on the thirtieth day of June, one thousand eight hundred and sixty-seven, sixty-two millions five hundred thousand dollars, shall be and is hereby divided between and apportioned to, and shall be borne by, the said provinces of Ontario and Quebec respectively, in the following proportions, that is to say—the said province of Ontario shall assume and pay such a proportion of the said amount as the sum of nine millions eight hundred and eight thousand seven hundred and twenty-eight dollars and two cents bears to the sum of eighteen millions five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents; and the said province of Quebec shall assume and pay such a proportion of the said amount as the sum of eight millions seven hundred and seventy-eight thousand and seven hundred and ninety-two dollars and fifty-five cents bears to the sum of eighteen millions

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents."

"XIII. That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate by the other of the said provinces."

In 1891 the Parliament of Canada passed the Act 5 & 55 Vic. ch. 6, which contained the following provisions:

"An Act respecting the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, and between the said provinces."

[Assented to July 10th, 1891.]

"Whereas certain accounts have arisen or may hereafter arise in the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec both jointly and severally, and between the two provinces, concerning which no agreement has hitherto been arrived at; and whereas it is advisable that all such questions of account should be referred to arbitration: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

"1. For the final and conclusive determination of such accounts, the Governor General in Council may unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, to whom shall be referred such questions as the Governor General and the Lieutenant-Governors of the said provinces shall agree to submit."

"2. The arbitrators shall consist of three judges, one to be appointed by the Governor General in Council and one by each of the said Provincial Governments, and all three shall be approved of by each Government."

"3. The arbitrators shall not assume to decide any disputed constitutional question, but if any are raised they will note and report them with their award but without delaying the proceedings."

"4. Any two of the arbitrators shall have power to make an award."

"5. The arbitrators, or any two of them, shall have power to make one or more awards, and to do so from time to time."

"6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal."

"7. In case of an appeal on a question of law being successful the matter shall go back to the arbitrators for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes."

"8. The appointment of the said arbitrators by Order in Council and their award in writing shall be binding on Canada, save in case of appeal on questions of law, in which case the final decision thereon shall be binding on Canada."

"9. In case of a vacancy by death or otherwise among the arbitrators, the same shall be filled in the same

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

manner as the appointment was first made, any such appointment to be approved of by the other two Governments."

In the same year the legislature of Ontario passed an Act 54 Vic. ch. 2, and the legislature of Quebec passed 54 Vic. ch. 4, each of which was identical in terms with the above Dominion statute.

In accordance with the provisions of the said statutes the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec; and the Hon. George W. Burbidge, Judge of the Exchequer Court of Canada, were appointed arbitrators and the counsel for the three governments entered into an agreement of submission which provided that certain matters should be referred to said arbitrators including:

"1. All questions relating to or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec."

"2. The accounts are understood to include the following particulars":

"(*d*) The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference."

"(*e*) The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said Government."

The arbitrators made and published an award in respect of the claim of the Dominion for re-payment of the sums paid to the Indians under the above mentioned treaties, which award with the reasons given by the several arbitrators for the conclusion reached therein is as follows:

"AWARD ON INDIAN ROBINSON TREATIES, HURON AND SUPERIOR.

13th February, 1895.

"*To all to whom these presents shall come:*

"The Honourable John Alexander Boyd, of the city of Toronto, and province of Ontario, Chancellor of the said province; the Honourable Sir Louis Napoleon Casault, of the city of Quebec, in the province of Quebec, Chief Justice of the Superior Court of the said province of Quebec; and the Honourable George Wheelock Burbidge, of the city of Ottawa, in the said province (of Ontario), Judge of the Exchequer Court of Canada,—Send greeting."

"Whereas it was in and by the Act of the Parliament of Canada, 54 & 55 Victoria, chapter 6, and in and by an Act of the Legislative Assembly of Ontario, 54 Victoria, chapter 2, and in and by an Act of the Legislature of Quebec, 54 Victoria, chapter 4, among other things provided that for the final and conclusive determination of certain questions and accounts which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the Governments of the provinces of Ontario and Quebec in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor General and Lieutenant-Governors of the provinces should agree to submit;"

"And whereas we, the undersigned John Alexander Boyd, Sir Louis Napoleon Casault, and George Wheelock Burbidge, have been duly appointed under the said Acts and have taken upon ourselves the burdens thereof;"

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

"And whereas it was provided in and by the said Acts that such arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time;"

"And whereas certain questions respecting a claim made by the Dominion of Canada against the provinces of Ontario and Quebec in respect of Indian claims arising out of the Robinson treaties, and respecting a certain other claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure, and a certain other claim made by the province of Ontario against the Dominion of Canada in the first instance, and by notice to the province of Quebec against that province, for the recovery of a balance of the Upper Canada Municipalities' Fund, have been submitted to such arbitrators, and they have heard the parties thereto;"

"Now, therefore, the said arbitrators exercising their authority to make a separate award at this time respecting the said matters, do award, order and adjudge in and upon the premises as follows, that is to say:"

"I. In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson treaties:"

"1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual."

"2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the

treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled."

"3 That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year."

"4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873, 36 Vic. c. 30."

"5. That interest is not recoverable upon any arrears of such annuities."

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of The British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario; and that

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

this burden has not been in any way affected or discharged."

"7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled."

"8. That in respect to the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law."

"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

"That Mr. Chancellor Boyd dissents from so much of the proposition contained in this paragraph as relates to the date at which such payment should be charged."

"II. With respect to the claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure:"

"1. That the Government of Canada recover against the province of Ontario the amount claimed for the year 1878, but that in reference to the claim made in respect of the years 1879 and 1880 the province of Ontario be discharged, and that this award is without prejudice to any question as to whether or not the province has paid more than was actually due in any year."

"III. With respect to the claim made by the province of Ontario against the Dominion of Canada, and by notice against the province of Quebec, for the recovery of a balance on the Upper Canada Municipalities' Fund:"

"1. That the province do recover against the Dominion $15,732.76, parcel of the sum of $21,488.74 claimed, which said sum of $15,732.76 is to be credited to the province of Ontario in the province of Ontario account as of the date of the 1st of July, 1872; and, that as to the balance of the said claim, amounting to $5,755.98, the Dominion be discharged, and that the province of Quebec be discharged in respect of the whole claim."

"In witness whereof we, the said John Alexander Boyd, Sir Louis Napoleon Casault and George Wheelock Burbidge, have hereunto set our hands and seals this thirteenth day of February, A.D. 1895."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Witness: L. A. AUDETTE."

(The award was published and decision given on 14th February, 1895.)

"In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to Statute of Canada, 54 & 55 V. c. 6, Statute of Ontario, 54 V. c. 2, and Statute of Quebec, 54 V. c. 4."

"On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the Union, as in such award is mentioned, the arbi-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

trators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Dated at Quebec,
this 26th day of March, 1895."

THE HONOURABLE MR. CHANCELLOR BOYD'S REASONS FOR AWARD OF FEBRUARY 13TH, 1895, DELIVERED 14th FEBRUARY, 1895.

"I. This broad question as to the obligation of Ontario with respect to the Indians of the "Robinson treaties" may fairly and properly be dealt with as if the provisions of the Treaty and the sections of The British North America Act relating to lands were placed in juxtaposition.

"Then arises the inquiry: Does any interest in respect of these Indians attach to the lands belonging to Ontario under the 109th section of British North America Act?"

"The course of construction applicable both to constitutional Act and Indian treaty is not that a literal and strict meaning be given to the words, but that they shall be construed liberally and comprehensively so as to further the reasonable scope of the provisions. This benignant construction obtains with added force in the construction of a treaty wherein the rules of international rather than of municipal law are to be regarded."

"Now in these transactions with the aborigines from the earliest colonial times in North America the Government has assumed the status of the Indian tribes to be that of distinct political communities. When the dealing has been by the Crown for the cession of territory over which some legal possessory right by the tribes in actual occupation has always been recognized, then the form of the transactions has been that of a treaty. Superadded to this, it is, to be taken into account that the Indians relatively to the whites are in a state of dependency or pupilage, and that the nearest legal analogy as to the relationship between their tribes and the Government is that of guardian and ward."

"Hence arises the doctrines well established in American jurisprudence, and dating from the era of British colonization, that treaty stipulations are to be carried out with the utmost plentitude of good faith and with even generous interpretation in favour of these public wards of the nation."

"I cite the language of Mr. Justice McLean, in *Worcester* v. *State of Georgia* (1): 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"This language is quoted and approved of by Mr. Justice Mathews, giving the opinion of the court in *Choctaw Nation* v. *United States* (2), and he continues thus: 'The recognized relation between the parties to this controversy is that between a superior and an

(1) 6 Peters 582.

(2) 119 U. S. R. at p. 27.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interest may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisdiction formulating the rights and obligations of private persons equally subject to the same laws.' "

" 'The rules to be applied are those which govern public treaties, which even in the case of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger sense which constitutes the spirit of the Law of Nations.' "

" On the face of the treaty of 1850 are found indicia of generous intentions contemplated and liberal dealings promised. Fixed annuities are given, as to which no question now arises. Then comes the provision for the augmentation of the annuities, 'should the territory ceded at any future period produce such an amount as will enable the government, without incurring loss, to increase the annuity.' That is to say, if the rents, issues and profits (whether from sales, leases, mining royalties, timber licenses or other sources of revenue derived from the surrendered land) shall yield a surplus after payment of all outlay in connection with the development and improvement of the territory, then that surplus shall go to augment the annuities from time to time. True, the mere words

used do not say that the increased annuity is to be paid out of the proceeds of the land, but that is the plain and reasonable implication. In a dealing between guardian and ward, if the guardian took all the ward's property and undertook to maintain him, besides the general remedy equity would affix a trust to that effect upon the property so taken. Here the Indians would seem to have a right to an accounting even on the words of the treaty, so as to ascertain whether the event had arisen upon which the annuities were to be augmented. If upon such accounting a proper surplus appeared natural equity would impose a charge upon that surplus for the benefit of the Indians. That surplus would be in truth in the eye of equity the primary fund for the payment of the augmentations. The legislature (that includes the government) appears to treat even the fixed annuities as charges on the properties surrendered, and this though the payments are to be punctually made before any of the lands may have been realized. This no doubt is a proper fiscal arrangement (12 Vic. c. 200, s. 3). Even as to the fixed annuities, it would seem more obviously right where the annuities, as in the case of the augmentation, were only to be paid when a surplus arises out of the administration of the lands."

"In this latter case it would be not only a matter of finance and ordinary book-keeping, but also a conclusion of proper administration, that the revenue for the payment of the augmented annuities should be derived from the surplus outcome of the lands, and should be regarded as a charge upon that revenue, and so earmarked as applicable under the 'Robinson Treaties.'"

"This charge upon the proceeds of the lands which between individuals would have been looked for (especially where the weaker party was granting his property to the stronger) is here not expressed, because

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

the undertaking of the Crown to make the payments afforded ample security, but nevertheless the real nature of the transaction involves the existence of an interest in the Indians in and upon the proceeds of the territory surrendered."

"The term 'interest' used in the statute is of large enough import to include this latent charge, as put by Mr Justice Kay *In re Thomas* (1), an interest in the proceeds of land sold is 'an interest in land in contradistinction to an estate in land.'"

"The making of a treaty usually implies that the nation will by its municipal laws do all that is necessary to carry the provisions of the treaty into effect. (Per Anderson, B., in *Reg.* v. *Serva* (2). If the parts of this treaty were thus extended, one proper term would be to charge the augmentations of the annuities upon the surplus revenues of the territory after the deduction of all proper outlays."

"By analogy to the equitable doctrine laid down in *Waring* v. *Ward* (3), it appears to me that there is an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario."

"II. I think the treaty provides for an increase in the number of Indians who shall share in the augmented annuities as individuals, and that the increase is not to go to the Indians as a tribe but to the several members *per capita* at the time of payment. This is applying the liberal construction to the language used, so as to give the greatest possible benefit to the party least able to protect their own interests. The provision as to diminution of the annuity has reference only to the fixed sums, and does not impair the meaning given to the language used as to the augmentations. It is

(1) 34 Ch. D. 172.
(2) 2 C. & K. 86.
(3) 7 Ves. 336-7.

likely that the treaty was shaped with reference to the then prevalent idea that the tribes were dying out, but the intent of the treaty was to assist the Indians to change their state in bringing them a step nearer to civilization. If, however, the tribes increase in number the only limit of future payment is when they become entirely civilized so as to cease to be Indians."

"III. It is not desirable to define with minuteness who are Indians entitled to share, in advance of any particular case which arises for decision. It would appear from the despatch (a letter of Mr. Robinson, the Commissioner), which accompanies the treaty that half-breeds were then embraced in and numbered with the tribe in the approximate totals given. The recognition of these half-breeds as members of Indian tribes by the government appears to be manifested in contemporaneous and subsequent statutes."

"When the statute of Canada (13 & 14 Vic. ch. 74, passed 10th August, 1850), permitted none but Indians and those who may be intermarried with Indians to reside upon Indian lands (unless under special license from the government officer), and the act altogether seems to contemplate as Indians those of pure or mixed blood and those intermarried with and living among Indians (no distinction being made to sex). Then coming down to 1857, the statute of that year (20 Vic. ch. 26), gives a definition of Indians as meaning persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian bands, residing upon unsurrendered lands, or upon lands specially reserved for tribal use in common, and who shall themselves reside upon such lands; that is, one of other blood married to one of Indian blood, acknowledged as a member of the tribe and living on the tribal land with the tribe (whether man or woman) is accounted a member of that tribe. And the descendants of such marriage would

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

be Indians as long as the tribal relation and residence lasted."

"This appears to be a more comprehensive category than would be the case if the matter rested on common law or on international law, for in such case, the maxim *partus sequitur patrem*, governs cases as to Indians. (See judgment of Parker J., in *Ex parte Reynolds* (3).

"There is the observation also to be made that the government of Canada, before 1867, had always power to regulate the inhabitancy of Indian lands by excluding all whites therefrom, and their marriage and residency on the part of white people must have been with the sanction of the government."

"I would therefore favour generally the application of the rule so as to include among Indians those of other blood, who are not only married to Indians, but were adopted and acknowledged by the tribe as members, and as such lived in tribal relation with the other members at their common place of residence. If all these conditions did not exist (as to the males anyway) I should say the person of other blood and his descendants was and were not included in those entitled under the treaties."

"IV. A similar difficulty arises as to the definition of what outlay should be taken into account before the right to increased annuities arises. All expenses connected with the survey and administration of the lands and the keeping of the accounts and all outlays going to develop and advantage the territory so as to induce settlement and sale would appear to be properly charged against the income from their lands, but it is better to deal with disputed items as they arise specifically than now to attempt to exhaust all details by way of anticipation."

(3) 5 Dillon 394.

"V. In case it appears that surplus revenues existed sufficient to pay increased annuities and that there has been paid by the Dominion Government pursuant to the suggestion of Attorney-General Mowat made in 1873, these payments should be recouped to the Dominion as of this date and without interest."

"The nature of annuities is such as not to carry interest and the offer of the Attorney-General then to submit the matter in dispute as to liability to judicial tribunal should preclude the Dominion from getting interest during the period of delay from then till now."

The Honourable SIR LOUIS NAPOLEON CASAULT:

"I would like to say one word about the interest, and about the responsibility of the provinces for the annuities subsequent to confederation. I have had occasion to consider the question before now, a good many years ago, and was firmly of the opinion that for all annuities, and even the capitalization subsequent to confederation, that it should be borne by the province of Ontario. I have had no occasion to change my mind—far from it—and I am glad to say that my two brother arbitrators are to-day of the same opinion. But there is a distinction to be drawn between the annuities payable after confederation, and those which became due before confederation. Of course, those which became due before confederation were due by the province of Canada to the Indians, and formed the debt of the province of Canada, and for those, if any there be, they should be paid both by Quebec and Ontario, in the proportion held by the first arbitration."

"As to interest, we have come to the conclusion, which was not adopted by the learned Chancellor, that the interest should be paid upon a balance of about $900,000 and $500,000, say $1,500,000 by Ontario, and by Quebec upon $625,000, if the balance against each province amounted to these amounts, and if by the final

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

settlement of the accounts the balance was made less the interest should be for the less amount. I think this is nothing but a sequence of what we have decided. Of course, it should go with interest if the final settlement of the accounts diminishes the amount for which we have said that the Dominion was entitled to interest as against the province of Ontario, and if not, of course there would be no interest."

In re INDIAN CLAIMS.

THE HONOURABLE MR. JUSTICE BURBIDGE:

"The case was presented to us by counsel with such completeness and lucidity of argument, and the learned Chancellor has, in the opinion that he has just delivered, and to which we have all listened with so great interest, dealt so fully with the principal issues involved, that I shall content myself with stating, as briefly and with as little discussion as possible, the conclusions to which I have come."

"I am of opinion, and as to that I do not know that there is any controversy between the parties, that if in any year since the two treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government of the province of Canada, or its successor, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase, not exceeding four dollars for each individual. So much they were entitled to as a matter of law and right. Any increase beyond that would have been a matter of grace."

"I am further of opinion that the total amount of annuity to be paid under each treaty is in such a case to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaty; that is, that in case of an increase in the number of Indians beyond the number of 1,240 named in one treaty, and 1,422 in the other,

the annuity, if the funds permitted, was to be equal to a sum that would provide four dollars for each Indian of the tribes entitled. The only difficulty I have had on this point arises from the provision for the diminution of the annuity in case the number of those entitled fell below two-thirds of the numbers mentioned. In that case they were not to have 'the full benefit' of the treaty, and the annuity should be diminished in proportion to the actual members. If this provision, however, be taken to have reference only to the fixed annuities, which at the moment were for all parties the more important matter, the difficulty disappears. That clause probably was intended to operate in reduction in the case provided for of the perpetual and fixed annuities that were payable quite apart from any consideration of the amount of the revenues to be derived from the ceded territory, leaving the other provision as to increase to depend upon the excess of such revenues over the charges referable to the opening up and administration of such territory. That, on the whole, it seems to me, must have been the intention of the parties."

"Then as to 'the individuals' who in case the increase can be made without loss are to be reckoned in ascertaining the amount of the annuity, it is clear of course that they are to be Indians belonging to the tribes or bands entitled, and no one should be counted who was not by law or well-established custom a *bonâ fide* Indian of the tribe or band."

"I agree with what was said by Mr. Robinson of the danger of attempting at present an abstract definition of the word "Indian." With reference to the period before the union I do not see that there can be any difficulty. Whatever government is now liable to pay or make good any amounts that were payable but not paid before the union, is so liable as the successor or successors of

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

the old province of Canada, the government of which appears to have kept a record or list of the names of the Indians entitled to share in the fixed annuities. Generally speaking the 'individuals' whose names appear on such lists would be those to be taken into account in computing any increased annuity that should have been paid. The onus of showing that the names of any individuals entitled to be reckoned were improperly omitted from such lists should now be on the Indians, or those who act for them, and in like manner no names should, I think, be struck off, except for good reason shown by those whose interest it is to keep the numbers down."

"With reference to the period after confederation, neither Ontario nor Quebec would be in any way affected or precluded by the action of the Parliament or Government of Canada, or of any of its officers, either in prescribing a definition of who are Indians or in adding to the lists the name of any 'individual' as an Indian of a tribe or band entitled to the benefit of either treaty. The burden of showing that the names of any Indians so added since the union to such lists were rightly added, would be, it seems to me, on the Government of Canada."

"I should be equally unwilling to attempt a definition of the expenses and charges for the opening up, settlement and administration of the ceded territory that should be taken into account in determining whether or not the annuities could be increased 'without incurring loss.' In a general way they must, I think, be fairly referable to the administration of the particular territory and not of the class of expenditures that are incurred by governments for the general advantage of the whole country. During the argument certain expenditures by the Government of Canada since the union were mentioned; but on the whole they did

not appear to me to be such as should be taken account of. If, however, there should happen to be any expenditure directly made or incurred by the Government of the Dominion for the purpose of the opening up of, and enhancing the value of, the particular territory in question, I am not at present prepared to say that it should not be taken into account."

"Then as to the question raised by Mr. Robinson as to whether or not any excess of revenue in any year might not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, I see no reason to change the view I expressed at the hearing, that that could not be done. If in any year the condition prescribed by the treaties did not happen the Indians have in respect of that year no claim. Of course any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be taken into the accounts of that year. But if in any year the increased annuity could not be paid without loss after taking any such existing excess or balance into account, then there was as to that year no liability to pay any increased annuity."

"I think there can be no doubt that any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada since the 111th section of the British North America Act, 1867."

"I am also of opinion that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act."

"I do not think that Ontario and Quebec have, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30). The

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

matter was never considered or taken any account of in such capitalization or in any of the proceedings leading up to the award of Sept. 3rd, 1870, or in the award itself."

"With respect to the Act of 1873, its effect, so far as it is necessary now to consider it, was to substitute the sum of $73,006,088.84 for the sum of $62,500,000.00 in the 112th section of the British North America Act, 1867, the result being that Ontario and Quebec became and remained conjointly liable to Canada for any excess of debt over the former instead of the latter sum. That is the clear construction of the Act itself, and it is one that has been acted upon without question by all parties since the Act of 1873 was passed. The contention for a different construction is now raised for the first time. It is now said that the Act of 1873 was conclusive of the amount of the debt with which the old province of Canada entered the union. If so, the province of Canada account was closed in 1873, and the negotiations between the parties that have occurred since the agreement of 1888 (Exhibit Z, Report of Conference, 1888, p. 4), the settlement of particular items of that account coming in or ascertaining between the years 1873 and 1888 (*id.* pp. 19 to 22), and our awards in respect to that account and interest thereon all go for nothing. The question is not, it seems to me, open to fair debate."

"With reference to the question of interest on any increased annuities that may be now ascertained to have been payable prior to the union to the Indians under the treaties in question, it is obviously necessary to distinguish between the rights of the Indians to interest, and the question of interest as between the Dominion and the provinces of Ontario and Quebec as the successors in liability to the old province of Canada. The latter question has been concluded by the agree-

ment of 1888, and our award following that agreement. The question as to whether or not interest should be computed on any arrears of such annuities is another matter depending upon the right in law or equity of the Indians to interest as against the Crown, and it seems to me that they have no case either at law or in equity. I regret that I cannot see my way to a different conclusion. But I have no doubt that the debts and liabilities for which Canada became liable under the 111th section of the British North America Act are legal debts and liabilities, and that the excess of debt for which, under the 112th section, Ontario and Quebec became conjointly liable to the Dominion, cannot, without the conjoint consent of Ontario and Quebec, be increased by any debt or liability not enforceable in law or equity."

"If there is to be any consideration of any claim of the Indians to interest on any arrears of annuities payable before the union in recognition of any moral obligation or as a matter of good conscience, it is for Ontario and Quebec to consider the matter and admit or deny the claim as they see fit. The Dominion can collect from them only what they legally owe, and cannot by discharging moral obligations make Ontario and Quebec liable; and there is, if I may express an opinion on that point, obviously no obligation, legal or moral, on the Dominion to do more than collect for the Indians from Ontario and Quebec whatever amount of arrears the province of Canada owed to them, and to pay it over to the tribes entitled."

"Unless Ontario and Quebec will consent that in computing the amount of arrears due to the Indians at the union, such arrears shall be computed with interest, they must, it seems to me, be made up without interest."

"With reference to the period subsequent to the union, the case presented by the Dominion for the

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

tribes of Indians interested in the treaties in question is, that the ceded territory became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein. The other question as to whether or not Ontario and Quebec are conjointly liable under the 112th section of the Act to the Dominion for such increased annuities with or without a right on the part of Quebec to be indemnified by Ontario against the same, is not now raised. That question is reserved to come up in some future proceeding or not, as the Dominion may think proper."

"Now, looking to the particular matter, my mind lends a ready assent to Mr. Robinson's argument that it is equitable that this burden should fall upon Ontario. Ontario has the advantages resulting from the ownership of the lands, and it should bear the burden. I agree to that; considered as a matter by itself it is highly inequitable that any part of the burden should fall upon Quebec, and even in a greater degree inequitable that Nova Scotia or New Brunswick or any of the provinces that came into the union since 1867 should be called upon as a part of the Dominion to contribute anything towards making good to the tribes entitled the increased annuities payable to them under the treaties mentioned; and were it not for the consideration to which I am about to refer I should for myself have little or no hesitation in joining in making an award upon the 'equitable principles' mentioned in the sixth section of the Acts under which we are sitting. But the union of the provinces was a large matter involving many issues and considerations of great moment, and the compact to which expression was given in the Act by which the union was con-

summated is one which should, I think, be guarded and maintained with great watchfulness and care. What one might think to be fair and equitable with respect to a particular matter dealt with in the Act, abstracted from other provisions therein, might in conjunction with such provisions be in fact and reality unfair and inequitable. So it seems to me that the only safe way is to adhere strictly to the compact or treaty that was made by the province that entered into the union; and that the highest fairness and equity will be found in giving to each the advantages, and imposing upon each the burdens, it has bargained for. The case is one in which we ought, I think, to proceed upon our view of 'a disputed question of law,' and I am better satisfied to follow that course as it will save to the party against whom any award is made a right of appeal to the Supreme Court of Canada, and thence to the Judicial Committee of the Privy Council [54 & 55 Vict. (D.), c. 6, s. 6]."

"Now with reference to the question of law in dispute, it seems to me clear that in a narrow and strict sense the Indians for whom this claim is made by the Dominion had at the union no interest in the lands constituting the ceded territory, other than the right or privilege of hunting thereon or fishing in the waters thereof so long as such lands were ungranted. These Indians were no doubt interested in such lands in the sense that it would be to them an advantage to have them managed with a prudence and forethought that would at the earliest possible time and for the longest time possible give them the increased annuities for which the treaties made provision. But the very object of the surrender was to give the Crown a free hand in the settlement and administration of the land and to divest the Indians of any title thereto or interest therein. And so too, looking to the parties to

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

the treaties in question, the Crown on the one side and the several tribes of Indians on the other, it is possible that the Crown did not, after the surrender, hold the ceded territory on any trust that would be enforceable in law. But in a broader sense, and I agree fully with the learned Chancellor in thinking that the treaties in question and the British North America Act should be construed in a large and liberal way, it seems to me that the Indians, in entering into such treaties, reposed a confidence in the Crown that it would manage the ceded lands fairly for the advantage of all concerned, and so as to raise thereout, if that were fairly possible, the moneys to pay the increased annuities, and that there was a corresponding duty resting on the Crown to do so. In that sense the lands were at the union, it seems to me, subject to a trust or interest existing in respect of the same. It is objected that it was not the lands constituting the ceded territory, but the proceeds of the lands, that were impressed, if at all, with any such trust, or in which the Indians had any such interest, and it is 'lands' and not 'proceeds of lands,' that are mentioned in the 109th section of the British North America Act, 1867. But that objection does not, it seems to me, present any great difficulty in view of the facts of the case. These lands were, before the surrender, and have since been vested in the Crown. There was no change of title at the union. The Crown continued to hold them. Before the union the beneficial interest in such lands and the right to take and appropriate the revenues arising therefrom was vested in the province of Canada, and by the 109th section of the British North America Act, 1867, that right passed to the province of Ontario. The lands themselves did not pass in the sense that the title thereto was transferred. What passed was the right to administer and take the proceeds, the revenues arising from such

lands. This is clear, I think, from two passages of the judgment of the Judicial Committee, delivered by Lord Watson in the *St. Catharines Milling and Lumber Company* v. *The Queen* (1), cited by Mr. Justice King in *Farwell* v. *The Queen* (2), and from what the same learned Lord said in delivering their Lordships' judgment in the 'Precious Metals' Case,' the *Attorney-General of British Columbia* v. *The Attorney-General of Canada* (3)."

"In the former case, referring to the effect of the Imperial statute, 3 & 4 Vic. c. 35, Lord Watson said:—

"'There was no transfer to the province of any legal estate in the Crown lands which continued to be vested in the Sovereign, but all moneys realized by sales, or in any other matter, became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.'"

"And then with reference to the distribution of property under the British North America Act, 1867:

"'It must always be kept in view that, whenever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, (as the case may be), and is subject to the control of its legislature, the land itself being vested in the Crown.'"

"The following are extracts from the judgment in 'The Precious Metals' Case.':—

"'The title to the public lands of British Columbia has all along been, and still is, vested in the Crown;

(1) 14 App. Cas. 46. (2) 22 Can. S.C.R. 559.
(3) 14 App. Cas. 295.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUÉBEC.

In re INDIAN CLAIMS.

but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, has been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion Government should occupy the position of a freeholder within the province.'"

"'In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the province for 'public lands,' which is, in substance, an assignment of its rights to appropriate the territoral revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.'"

"That view of what lands mean when vested in the Crown in the right of or for the use or benefit of the Dominion or of a province relieves us, I think, of any difficulty that might otherwise arise in respect to any

distinction between a trust or interest in such lands and in the proceeds of or revenues arising out of such lands."

"I think the ultimate burden of making provision for the payment of the increased annuities in question falls upon the province of Ontario, and that that burden has not, as against the Dominion or these Indians, been in any way affected or discharged. I express no opinion as to the effect of the award of 1870 on the respective rights of Ontario and Quebec. That question would arise in a case presented by the Dominion against the two provinces under the 112th section of the British North America Act, but does not arise here."

"With reference to interest on arrears of annuities accruing due after the union and not paid to those entitled, it seems to me that they stood in the same position as those that accrued before the union and that interest should not be computed without consent of Ontario. But as to the increased annuities paid by the Dominion to the Indians in 1874 and since, the Dominion should, I think, have interest on any amounts so properly disbursed, if our award as to interest on the province accounts permits thereof. The payments were made after notice and after certain negotiations between the Dominion and Ontario, in which, without determining on whom the burden should ultimately fall, it was admitted the Indians were entitled. The question, then, is not one of interest on unpaid annuities, but of interest on moneys paid by the Dominion in respect of a legal liability, for which it is entitled to indemnity against Ontario"

"I think any such moneys so properly paid should be charged against the province in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

affected by any previous ruling as to interest on that account."

The province of Ontario appealed from said award to the Supreme Court of Canada.

Æmilius Irving Q.C, *S. H. Blake* Q.C. and *J. M. Clark* appeared for the appellant, the Province of Ontario.

Christopher Robinson Q.C. and *W. D. Hogg* Q.C., for the respondent, the Dominion of Canada.

D. Girouard Q.C. and Hon. *J. S. Hall* Q.C., for the respondent, the Province of Quebec.

Irving Q.C. With your Lordships' permission, my learned friends Mr. Blake and Mr. Clark appear on behalf of Ontario; I am also in the case but I shall not address the court. My learned friend Mr. Blake will lead.

Blake Q.C. Ontario claims that there was no trust in respect to these lands; that no trust could have been declared in regard to them; that any trust would have absolutely defeated what the parties were endeavouring to arrange, which was that the lands were to be placed in the possession of Canada, so that they might deal absolutely with them. If there was to be any trust in favour of the lands it would have absolutely defeated what the province of Canada was desirous of carrying out. For what the province of Canada wanted to do was at once either absolutely to give away or absolutely to sell, or absolutely to deal with, these lands. If there had been any trust, or if there had been any interest retained in favour of the Indians, then the province would have been utterly unable to do what it desired to carry out. The arrangement was one to do away with any right, to do away with any interest, to do away with anything that in any possible way might check the freest dealing with this property. The

Indians, of course, are perfectly satisfied, because, instead of the illusory charge which they had of fishing and shooting, they get absolutely as much of the land as they felt they could possibly deal with. They retain—and it is specified in the treaty as all that they do retain—the right to fish and shoot on all the other lands until the Government chooses to sell them; but the moment it gives them away, or sells them, or leases them, that ends it. They take a certain sum of money down, and they take the promise of the Government, which embraces the honour of the Crown, which embraces all, it may be, that might come from the lands, which embraces all the revenues of the Government. They take that promise and set absolutely free all these lands; and if these lands are not set absolutely free from any trust and from any interest, then the whole object of the treaty is utterly and entirely defeated.

Trusts or charges, or anything of that kind, would be out of the question because it binds or touches the land; the very object of what was being entered into is utterly defeated, because the person that takes the land must take it with the trust or with the charge, and the land is not land absolutely free to be dealt with, as was the intention of those parties. I think that that should be emphasized, because while both the learned Chancellor and Mr. Justice Burbidge say that, taking this as an ordinary instrument, and construing it as an ordinary instrument, construing it so as to further the reasonable scope of the provisions, they are able to stretch it in such a way as to create upon the land that which did not exist. Now, my Lords, you will find that the learned Chancellor says:

"The course of construction applicable both to the constitutional Act and Indian treaty is not that a literal and strict meaning is to be given the words, but that they shall be construed liberally and comprehensively,

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

so as to further the reasonable scope of the provisions." I have no objections whatever to the reasonable scope of the provisions being followed out; but is not the true scope here that the lands are not to be charged? Is not the true scope of the provision that the Government is to take the lands freed from any interest or charge?

It is only by the one solitary means that Ontario can be made responsible and that is by holding that they have taken the lands subject to a trust and holding the lands under the trust must discharge it; and in discharging it, must pay these annuities. Ontario alone did not enter into this bargain; Ontario was not known then. There was no contract with Ontario; it was a contract with the provinces composed of Upper and Lower Canada, and the only way that Ontario can be made responsible is, not by carrying out the reasonable scope of the instrument, but by freely and entirely negativing what is its scope, altering it entirely, altering it entirely to the detriment of Ontario, altering it entirely not to the betterment of the Indians. And this has not been stretched in order to help the Indian, because the Indian knows perfectly well that he has got the whole of the Dominion behind his back in this payment. But what I do submit is that here the true scope is that the lands are not chargeable. The true scope is that there is to be a personal payment by the Crown to the Indians; and if there is to be any such enlargement must not the enlargement be according to the scope of the instrument, and not to defeat the instrument? If you turn round now and say there is to be a trust—and it is admitted that that is an enlargement—why, my Lords, it is an enlargement that defeats the instrument and does not carry it out.

Then again, it is said that there is an implied obligation to pay them out of the revenue from the lands. I

submit not; no implied obligation to pay them out of this at all; a distinct bargain made for certain benefits on the one side and certain benefits on the other; that there will be, in case I make well out of my bargain, a certain additional sum or an augmentation in your favour.

So, I say there was no charge, no right, no interest, and one of my strong arguments is the language that has been used by these two learned judges, showing that the language, taken as it usually is taken, does not warrant it, and showing that the very object that was had in view would be utterly defeated if the language was so broad. But then they say "because these are Indians, you are to deal liberally with them," forgetting, my Lords, that it does not give the Indians one cent more or one cent less. The Indians are not dissatisfied with their paymaster; and, forgetting that, they are making this change in this bargain—for virtually it is a change—not in favour of those that they say are entitled to consideration, but in order to charge the one province as against the other.

I went through the cases that have been referred to, but I did not find that there was anything whatever in them which negatived the position taken by the province of Ontario here.

The case well known to his Lordship, the Chief Justice of the court, of the *Canada Central Railway* v. *The Queen*, in which his Lordship gave judgment in the first instance (1), was referred to. Well, my Lords, I gladly take the conclusion of his Lordship, Chancellor Sprague, there, at page 314, where it was urged there should be, even in an Act of Parliament, an extension or the like. He says: "I am in doubt whether the consequences were appreciated by the legislature, but our duty is to interpret it, and that is our only function."

(1) 20 Gr. 273.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

And then your Lordships will find at pages 326 and 328 of that judgment, a citation of cases in regard to the construction of Acts of Parliament. In that case of the Central Railway Company there was the express statement—and your Lordships will find that at page 275—that the company was to be entitled to a grant of land. I am simply referring to the cases cited, and referring to the fact that there is nothing in those cases which would warrant what the learned arbitrators have done. By section 18 of the Act there certain lands were set apart, and at page 289 it is said that it is taken for granted that, as between individuals, the right to that specific land existed. The only question was the making a selection out of four million acres of lands that were granted; and the court came to the conclusion that if there was a sale of 5 acres out of 100 that the party might make a selection of it. But there was the most absolute trust as declared by the Act of Parliament in favour of the Railway Company that was presenting the petition. And in *Booth* v. *McIntyre* (1), another case cited, it was held that the company had the power untrammelled by any restrictions to enter upon the lands of the Crown, and that that was not taken away but reserved by section 109 of the British North America Act. But there the right existed; it was plain and specific; no question about it.

Then there was a case in Maclean's Reports, as to the treaties with Indians and the tribes and others, and I do not find anything there. On the contrary it was held that the distinction was not authorized by the constitution; that is, to deal in treaties with Indians in different ways from other treaties. They are treaties within the meaning of the constitution, and as such should be laws of the land. Mr. Hallock, whose book was also referred to, says that they are to receive a fair and liberal interpretation, according to the inten-

(1) 31 U. C. C. P. 183.

tion of the contracting parties. That is all that is to be kept in view, according to the intention of the contracting parties—which I say would be utterly defeated by the interpretation put here—and be construed in good faith. Their intention is to be governed by the same rules which we apply to the determination of contracts. That is the third edition of Hallock's International Law, 296. Whitton says they are to be construed in the same way; and Story also, vol. 2, page 44.

I submit, therefore, my Lords, that the true conclusion in respect to this matter was that Ontario is not individually liable for the payment of this amount; that nothing has transpired to place upon Ontario any additional responsibility; and that this is a debt either of the old province of Canada in the augmentation of it, as well as in the original amount; and that it must either be discharged by that province, or else discharged by the Dominion of Canada.

Clark follows for the appellant. In the present appeal before your Lordships, and in the argument before the learned arbitrators, the whole question was as to whether there was a sole liability of the province of Ontario for payment of these annuities subsequent to confederation; the other question was not raised. Ontario asked before the arbitrators that the whole matter should be settled at once, but the Dominion reserved their right to make a claim afterwards against the province of Canada under section 112, if the present claim failed; but your Lordships will see that that matter is not adjudicated upon at all in the award, and was purposely left out by the arbitrators, and that matter, namely, the liability of the old province of Canada, as to whether the Dominion was liable under section 111, and had any right over against the province of Canada under section 112—that is against Ontario

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

and Quebec jointly—is entirely left in abeyance, and is not the subject of the present appeal.

Then the whole question now before your Lordships is as to the construction of these treaties and of section 109, of course taken in connection with section 111, and so on, so far as they throw light on section 109.

First, I would like to call your Lordships' attention to the suggestion made in the factum of the Dominion and in the judgment of the learned Chancellor, namely, that all the meaning of these sections could be obtained by construing the British North America Act, or at least the sections in question, as if the treaties, which are the subject of the present bill, had been incorporated in them by way of preamble.

If we consider it in that way, we have first the treaties in question mentioned in the case, and of which my learned friend read sufficient to illustrate the present argument. Then we have the treaties declaring that the Indians surrender, and so on, using the largest possible words of grant, all their right, title and interest—using the very words of the British North America Act—in the lands in question, and give up all their right, title and interest in the land.

And what I submit is that the only interest that the Indians expressed on the face of the treaty—I shall deal afterwards, if necessary, with the question of the implication—refers to the reservations mentioned in the treaty, which are not in question, and to the rights to shoot, and so on, given to the Indians under the words of the treaty.

I submit that the previous arbitrators, in 1870, having dealt with the matter, there should not now be an award which is in direct conflict with the previous award, especially when your Lordships bear in mind that there was an appeal from the previous award to the Privy Council, and that the Privy Council con-

firmed the award so far as the objections then taken. In the special case which is referred to in paragraph 6 of the judgment of the Privy Council, (your Lordships will find that special case printed in the Ontario Sessional Papers of 1878, number 42) your Lordships will see that this identical section, 109, is made part of the case. So that if there was anything in the award of 1870 which was in conflict with section 109, then that was the objection appearing on the special case before the Privy Council, and is, I submit, concluded in favour of Ontario by the judgment of the Privy Council, that so far as any objection was made to the award in the special case the award is valid.

Before the learned arbitrators, and in the factum of the Dominion, they argue in favour of the principle that Ontario getting the benefit of the lands should bear the burden of these annuities, and in support of that contention they rely, apparently, on the direction of the Privy Council in *St. Catharines Milling Company* v. *The Queen* (1); but all the decisions of all the courts are collected in the 4th volume of Cartwright, the cases under the British North America Act at page 107 and subsequent pages, commencing with the decision in the Privy Council. Now, your Lordships will see from the whole of the reports, and from the way in which the matter was discussed in the Supreme Court (2), that originally it was a matter entirely between the Attorney-General for Ontario and the St. Catharines Milling and Lumber Company. That was decided in that way by the Chancellor of Ontario, the Court of Appeal for Ontario, and this court. And it was only on the application for leave to appeal to the Privy Council that the question of the right of the Dominion came in at all; and the Dominion was allowed, on a special order made in that case, to intervene, and it is pointed out in

(1) 14 App. Cas. 46. (2) 13 Can. S. C. R. 577.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

the citation in the factum that the whole of the question in regard to the effect of that treaty then in question in 1873, was to be decided on the appeal to the Privy Council; and at page 60 of that case, in the judgment, Lord Watson says that, seeing that Ontario gets the benefit of the land there in question, that Ontario must recoup the Dominion the money payments which are there referred to; but what I point out to your Lordships is that the circumstances in that case were entirely distinct from the present case, and that that case can have no application to the decision here. Your Lordships will observe that the treaty there in question, being the North-west Angle Treaty, no. 3, was made in 1873, subsequent to confederation, so that the position was that at the time that treaty was made in 1873, Ontario took those lands, as was held in all the courts, subject to the burden of the Indian interest, whatever that interest may be.

There is a case in 31 Common Pleas which construes the word interest, and I submit the considerations there are entirely in favour of Ontario, and that only the class of matters which are referred to are intended to be covered by the words "trust and interest" in section 109.

Robinson Q.C. for the Dominion of Canada. There are two or three considerations, which may be put very shortly, which it seems to us is almost conclusive in favour of the constructions which the arbitrators have adopted. In the first place, as I understand, those principles which apply, and which my learned friends seek to apply, with reference to the legal authorities, as to the existence or non-existence of a vendor's lien, and different cases of that kind, and as to the existence or non-existence of a trust, are not relevant to the issue; there is no vendor's lien here; the Dominion is not seeking to retain a vendor's lien; it is

a transaction *sui generis*; you cannot find any transaction like it. The reason of it is this: this land undoubtedly, in the hands of the old province of Canada and before confederation, was certainly land in which the Indians had an interest. It was land subject to a trust for their benefit.

What would have been the position of things before confederation? Canada would have had to pay this debt out of the proceeds of this land. Well, now, does not Ontario, getting this land, hold it from Canada just as Canada held it? What is the difference? The Crown held it before for the benefit of the old province of Canada. There has been no sale and no transfer of title, as we all know. The Crown hold it now for the benefit of the province of Ontario. Why should the Crown hold it for the benefit of the province of Ontario in any different way or different position or free from any claims which attached to it while they held it for the province of Canada? I hold land for A. and hold it for A., with this interest which B. has in it, namely, to get the proceeds from it over and above a certain sum; I make an arrangement instead of holding it for A. I shall hold it for C.; why should I not hold it for C. under the same conditions as I hold it for A? Why should the interest in the land be changed by reason of a difference to the *cestui qui trust*? Because that is what it means. We submit the whole arrangement shows that plainly.

Now, then, let us consider for a moment clause 13 of the award of 1870. Let us see how things stood before that arbitration. Confederation had taken place; the division of assets between Ontario and Quebec had to be made by this arbitration; by confederation the lands in each province went to that province subject to the interest or trust of either people under section 109; but it was thought desirable that this question of

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Indian annuities should be dealt with by the arbitrators of 1870, and it was brought before them, and what did they say? I suppose they looked at section 109, and they said:

This land has become the property of the province. Now, if this land is subject to any annuity or to any claim to be paid out of the proceeds of the land, it must be quite understood that the province that gets the land is not to have any claim on the other provinces for it.

Now, let us see if this is not borne out by the very words of that award. I have not quite apprehended the force or foundation of my learned friend's argument that that award is against us:

"That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to, the said province in which they are so situate, by the other of the said provinces.

How does that affect the claim which is made here by the Dominion against one of the provinces? How has it any bearing upon it? I think that what they said is: "You Ontario, get these lands; you will have to pay the annuities. Now, you must recollect you will have no claim against Quebec or any of the other provinces for it."

The arbitrators have put this case on those grounds, which I submit are unanswerable. In the first place there is a trust or interest. Ontario has got the fund out of which is to come the proceeds or funds which have to pay the annuities. The payment of the annuities is conditional on the person holding the lands en-

abling the payment of those increased annuities. It could not be dealt with by the arbitrators of 1869, because you cannot tell from time to time what the proceeds will be. The case stands in a very peculiar position. Ontario has the lands and is administering the lands, and Ontario is the only person who can tell what the proceeds are. The proceeds depend upon the management of those lands and the receipts of Ontario from these lands. The arbitrators have based their finding on the equitable principle laid down in *Waring* v. *Ward* (1), that principle which is to be found in Broom's Maxims, page 634, 6th edition.

We say, these lands passing to Ontario were taken by Ontario subject to the interest of the Indians in them; that that is the fair meaning of the statute, as it would be if you would put the treaty and the statute in juxtaposition; and that that is the reasonable and fair construction of the statute, looking at the constitution as a constitution, and looking at the treaty as a treaty; because, looking at it on all principles of equity and justice, it should be interpreted that way; and we say, therefore, the judgment should be affirmed.

Hogg Q.C. follows. There is one question I wish to draw your Lordships' attention to, and that is with reference to clause 13 of the award of 1870; that clause deals with the rights only of the provinces; the arbitration was for the purpose of the distribution and division of assets and liabilities as between the provinces, as between Ontario and Quebec, or Upper and Lower Canada, and for the purpose of freeing one from the other It has the effect of freeing absolutely the one province from any claim the other province may have with reference to a charge such as the one at present, but it has no other effect. It does not affect the right of the Indians to say that

(1) 7 Ves. 336.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

they have a claim, nor of the Dominion on behalf of the Indians that this claim should be presented. In other words, if the clause 13 has the effect which my learned friends for Ontario have said, then if there is an interest of the Indians in those lands under the 109th section of the British North America Act, then that clause of the award is *ultra vires* the powers of the arbitrators of 1869.

There is just one other point, my Lords, that I had intended to draw your Lordships' attention to; that was with reference to the statement made by my learned friends from Ontario, as to the difference which exists between the treaty referred to in the St. Catharines Milling case, and the present treaty. My learned friend made the statement that the St. Catharines Milling case established the character of the interest which the Indians had in lands in this country; that is, that the interest there defined was the only interest which the Indians had in the lands. That is quite true with reference to the treaty in that case; for a fixed annuity under that treaty the Indians surrendered all their interest, whatever it might be. In the present treaties there was a fixed annuity, but there was a contingent annuity, or an annuity based upon the lands being of sufficient value or sufficient produced from those lands to pay a further annuity; and while the whole interest of the Indians in the lands in the North-west Angle Treaty was disposed of for a fixed annuity, the whole interest in the Robinson Treaty was not disposed of, because they retained an interest in the results or produce of the lands for the augmented annuity; and therefore at the time these lands came into the province of Ontario at confederation there was still this outstanding interest which the Indians had, and that is the interest which the learned arbitrators have defined in their judgments as an interest

under the 109th section of the British North America Act.

Girouard Q.C. for the respondent, the province of Quebec.

(The learned counsel after pointing out that no suggestion was ever made until 1884 that Quebec should be liable for these payments, proceeded as follows):

Now, it seems to me, that in order to fully understand this case it will be proper to give a little history of the Indians on this continent, and to consider the purpose of these Robinson Treaties. On the one side Her Majesty, Queen Victoria, represented by the Hon. William Robinson, Commissioner of Crown Lands, and on the other side certain tribes of Indians called in the treaty Nation Indians of Lake Huron, and Ojibeways of Lake Superior. I would like to go back to the very beginning, and show the history of the Indians at the present time, to show they are not to be considered as individuals, to show their rights are not mere rights of subjects of Her Majesty. I shall show that these Indians have some greater rights than British subjects. When the Spanish, English and Dutch took possession of this northern America what did they do? They immediately put themselves into relations with what they called the Indian nation, not only one Indian nation but several of them. The English sought the friendship of what was called then the Confederacy of the Five Nations located at the south of lake Ontario, between Niagara and somewhere, the line of the province of Quebec and the province of Ontario to-day; and the French sought the friendship of the other Indian nations which were inhabiting the northern portion of the St. Lawrence as far as Sault Ste. Marie. It was admitted that these Indian nations formed distinct political communities in the country. Treaties were made with them, not only as far as the line was con-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

cerned, but also as far as peace and war were concerned. In 1698 came the end of that long war which commenced in 1667. In the month of September, 1698, there was a large gathering of all the Indian nations inhabiting the whole of this northern continent for the purpose of concluding the peace with the French King, represented by the colonial authorities in Canada. Then later on we find that the French King made some provisions for the maintenance of these Indians.

The cession of Canada took place in 1763, and then you find a different policy pursued by the English Government. The French Government took possession of all the lands of the province of Quebec as their own. They did not purchase anything from the Indians, but in some cases reservations followed; but it was a sale, it was a gift or donation from the King of France for the benefit of these Indians. The mission of Oka of Two Mountains is one; Caughnawaga is another; the mission of St. François du Lac is another; and another one will be at Quebec, at Lorette. There is a great difference between the wording of these Indian treaties made at the time with the French and those made with the English. Let us take one which has been the subject of contention before the court of justice in order to understand the scope of these treaties which the French King made for the Indians. I take the concession of Sault St. Louis, for the benefit of the Iroquois which was made in the year 1680 to the Jesuit Fathers:

"Our dearest and well-beloved, the Religious Order of the Society of Jesus, residing in our Dominion of New France, have caused it to be most humbly represented to us that the lands of the Prairie de la Magdelaine which were heretofore granted to them, being too damp for the purpose of sowing and providing for the sustenance of the Indians who have thereon settled,

and that it is feared they might leave if we were not pleased to give them the land called the Le Sault, containing two leagues in width from a point opposite the St. Louis Rapids, going up along the lake by an equal depth, with two islands, islets and shoals, which are in front and adjoining the lands of the said Prairie of La Magdelaine, which would allow them not only to receive the said Iroquois, but even to increase their number, and to spread by that means the knowledge of Faith and of Gospel."

And then the grant proceeds to say that the title to the land is given to the Jesuit Fathers "on condition that the said land called the Sault, shall belong to us free and clear, as it then may be, without any claim on us." And then there is a provision in the grant that the French people shall not reside on this reservation.

About the time of the cession to Great Britain the Jesuit Fathers undertook to sell to some white men pieces of that reservation. The Indians complained. There was a regular law-suit; and the decision was that although the title in the land was in the name of the Jesuit Fathers, still it was subject to a trust, and that trust was that it should be for the sole use of these Iroquois Indians. The word "trust" is not used in that grant or cession. It is not said that the Jesuit Fathers shall hold the land in trust for the Indians. It is a gift, a donation, to the Jesuit Fathers, without using the word "trust," but the trust can be construed just the same. It is a constructive trust from the very wording of the grant, which says that it shall be:

"To allow the Jesuit Fathers not only to receive the said Iroquois, but even to increase their numbers, and to spread by that means the knowledge of Faith and of the Gospel," and so on.

That decision will be found in the last volume of what is called Indian treaties and surrenders, published by the Dominion Parliament in 1891.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The decision was rendered by General Gage, and I think it should have careful scrutiny and examination. He says that:

"At the surrender of this country, all things had been well arranged to maintain the said Indians in possession of their lands at Sault St. Louis, but that now the Jesuit Fathers, their missionaries, were granting continually to the French the lands forming part of the territory of Sault St. Louis, which, however, they believed belonged to them, by a title of grant given them by his most Christian Majesty."

Then he says:

"We are of opinion that the grant of the lands of Sault St. Louis was made to the Jesuit Fathers with the sole intention of settling there Iroquois and other Indians, and that all the soil could produce was intended for their profit and advantage."

I mention this case in order to show how liberally a treaty of this kind must be construed. It must be construed especially in favour of the Indian. Now let us take the policy of the British Government since the cession. After the revolutionary war, the Iroquois, who had been always friendly to the English, desired to cross the St. Lawrence and be located somewhere about the Peninsula of Niagara; and you find that about the end of the last century, treaties and surrenders were made by the British Government with the different Indian nations. All those treaties will be found in the volume which I had in my hand a moment ago. I have taken the trouble to compare all those treaties from say about the first cession—1785 I think is the date of the first one—to about the year 1856, and I find only about two kinds of treaties. First there is an absolute surrender for a fixed sum without any trust; for a sum say of a thousand pounds; such a treaty surrenders all titles, rights, and interests

in certain tracts of lands, and there is no reservation of any kind whatever. That is what I call a surrender absolute. I may say that most surrenders are absolute. And then you find also surrenders which are not absolute. I forgot to mention that all the land of Upper Canada, after the cession to Great Britain by France, was held by the Indians, with the exception of a few pieces at Cataraqui, at Niagara, and all along Windsor and Sault Ste. Marie. All that piece of land was still inhabited by the Indians, and it was therefore necessary for Great Britain, pursuing the policy they had followed in the United States, to extinguish what was known as the Indian title.

In twenty of these surrenders the word "trust" is to be found; in ten of them it is not to be found; the wording is the same, the only difference being that the word "trust" is not to be found in the treaty. Instead of reading "upon the trust and with the intent," it is "that His Majesty, his heirs and successors may out of the proceeds of the profits of the said lands and premises, arising from the sale or leasing or such other disposition of the lands or any part thereof as to His Majesty, his heirs or successors, may seem meet, make provision for the maintenance and religious instruction of the Indians."

The trust is provided for; the trust is created; the trust is stipulated, undoubtedly, just as in a case where the word "trust" is used. The treaty is worded in the same way, except the word "trust" is not there. Well, I do not think a court of justice ought to make any distinction because in a deed the word "sell," for instance, is used if it is a deed of sale, or the word "trust" is used if it is a deed in trust. But is the character different? Is the nature of it different, or the whole text of it, so that we may see whether, from the wording, you can make up or construe a trust? I

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

say the wording is just the same, with the exception of the word trust.

Then, in the next place, supposing you come to the conclusion that because the word "trust" is used in some of these surrenders—including the surrenders by those Lake Huron and Lake Superior Indians—that there is no trust in those ten cases, but there is a trust in the other twenty cases, in what a state of confusion would the lands held for the benefit of the Indians be. You will have some subject to a trust, and some not subject to a trust. I say that with reference to all the lands which have been bought subject to a trust, whether the word "trust" is used in the deed or not used in the deed, but from the context of it we can infer a trust, that is, a promise on the part of Her Majesty that something should be done for the benefit of these Indians in the future—that then there is a trust. And I say more than that. I say that is the interpretation that has been given by all the authorities in this country from the end of the last century to the present time.

Now, my Lords, I intend to quote the statute to show that it was the intention of the late legislature that lands subject to the payment of annuities, lands subject to increased annuities, were construed as lands held in trust, and that these annuities formed a charge upon the land. I quote in the first place from the statute which has been already quoted, but I think it is very important that the special attention of the court should be called to it, that is 12 Victoria, chapter 200, commonly known as the Public Schools Lands Act, or Consolidated Statutes of Canada ch. 26. The statute proceeds to set apart acres of land for the purpose of education, but at the very end of the clause it says:

"But before any appropriation of the moneys arising from the sales of such lands shall be made, all charges thereon for the management or sale thereof, and all Indian annuities charged upon such lands or moneys, shall be first paid."

My learned friends say these school lands were located in a place where no Indian annuities were due; but it puts it still more strongly, it seems to me. But supposing it is the case—which I do not believe—it shows the intention of Parliament that it should not be possible that school lands should be set apart to destroy Indian annuities. The Indian annuities shall continue to be the first charge upon the lands. In the face of that interpretation given to it by our own Parliament, the late province of Canada, represented by Quebec and Ontario to-day, the very parties to this arbitration, are we going to be told that the Parliament of the late province of Canada did not intend to make a charge upon their land when their statute says so. If one treaty could be quoted where it says that for the said annuity the said lands shall be charged, I would understand it; but no such treaty can be found. There are two kinds of surrenders; one is absolute, on consideration of such money paid down, and the other one is subject to future annuities, or increased annuities. There is never a case where it states the lands shall remain charged, or a lien shall exist. But I say that when you find that declaration of the late Parliament of the province of Canada contained in the statute of 1849, it shows the intention of the parties then; that is to say, the late province of Canada, represented by Ontario and Quebec—the very parties to-day contending for a different interpretation—we find their declaration that Indian annuities which all stand upon the same footing, are a charge upon the lands which were surrendered.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Now, I have only one more word to say. My learned friends representing Ontario hold that the arbitrators of 1870 did, in fact, deal with this question; but I submit they did not; I submit that they had no power to do it; and they did not do it. The only thing they said was that "all the lands in either of the said provinces of Ontario or Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

I say in the first place that this exception made in favour of Ontario is only as to a claim the province of Quebec may have in this matter. Quebec claims nothing. Who claims it? The Indian. They may claim in their own name, or they may claim in the name of the Dominion; and even if these first arbitrators had in view to remove any claim of the Indian, they had no power to do so. If the Indians had a trust upon these lands under section 109, it was not in the power of the first arbitrators to set aside that section 109 of the Constitution, and the Privy Council has been very careful in deciding the special case which was submitted to them, to declare that the award was valid only as far certain points of form were concerned.

"The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said Special Case into consideration, and having heard counsel for the province of Ontario, and likewise for the province of Quebec, their Lordships do this day humbly advise Your Majesty that under the circum-

stances stated in the Special Case (to which circumstances all their answers must be taken to refer):

"1. John Hamilton Gray had not become disqualified to act as an arbitrator.

"2. That after hearing before the three arbitrators two of them could legally render a decision or award, and could do so in the absence of the third, absenting himself under the circumstances stated.

"3. That after the subsequent *ex parte* hearing before two arbitrators, in the absence of the third then two of them could legally render a decision.

"4. That the arbitrators appointed by Quebec had not the right to resign, and the Government of Quebec had not the right to accept his resignation and to revoke his appointment, and such resignation and revocation were not effectual and valid.

"5. That after one of the arbitrators had so affected to resign, and his resignation had been so accepted, and his authority had been so affected to be revoked, the remaining two could legally proceed to hear the case and make a final award.

"6. That so far as regards any objection made to the award in the Special Case, the award of the 3rd of September, 1870, is valid (save as affected by the Dominion Act therein set forth)."

The Dominion Act is the British North America Act.

Nothing is plainer than this decision of the Privy Council:

"Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said recommendations and advice of the Lords of the Judicial Committee of the Privy Council be adopted, and that the same be punctually observed, obeyed and carried into execution as the decision of Her Majesty upon this Special Case.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Whereof the Governer General of the Dominion of Canada, the Lieutenant-Governor or Commander in Chief of the same for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

I forgot, when dealing with the legal status of the Indians, taken as nations and not as individuals, to say that the laws passed by these Indian nations had been recognized by the courts of our own country as binding upon themselves. Take the case of marriage; take *Connolly* v. *Woolwich* (1), which says that the marriage of a white man to an Indian, according to their own laws, was a valid marriage; and they have certain rules and laws of succession, certain rules and laws concerning the property, which was especially reserved for their own use. I forgot to mention that, as another illustration of the proposition I laid down at the beginning, that those Indians, as nations, must not be looked upon as a big corporation or company; but must be looked upon as a nation, having a political economy in the country.

Hall Q.C. followed. I would like to say one or two words with reference to section 109; and I would like your Lordships to bear in mind that in dealing with this question under the British North America Act, and in dealing with the question you have to deal with now, you are dealing, so to speak, with the three crowns. It is not a dealing between three individuals, or between the Crown and any one particular individual; and we are dealing with the British North America Act, which Mr. Girouard still says ought to be considered, not as a strict statute, but more as a compact and agreement between the various parties; and this section 109 is not only to be considered with reference to the interests of this particular claim, but with whatever interest there may have been with other

(1) 11 L.C. Jur. 197.

parties with reference to existing lands they may have held prior to the union.

I do not think adding the words "subject to any trust," &c., destroys the intent which the parties had; and while that clause does refer to the various other provinces, it has more of a particular bearing between Ontario and Quebec. And what was the condition of affairs there? The Crown, if I may use the expression, of the old province of Canada, held all these lands in Ontario and Quebec, and of course they held these lands without any mortgage or hypothec being put upon them in the sense that they could not give a good title; and they had to be apportioned as between Ontario and Quebec in some manner or form; therefore, under section 109, the general rule is laid down—the lands in Ontario will go to Ontario, and the lands in Quebec will go to Quebec; and you in Ontario will take care of all the liability and all the obligations the Crown is under in respect to those lands, and we will not be troubled by any person who may have any claim or petition of right; and we in Quebec take these lands, not by a deed, not as a third party getting a deed in writing purporting to give us a title to lands under a deed; but we just take them by way of apportionment; they are still Crown lands; and instead of belonging to the Crown of Canada, if I may use that expression, they go to the Crown in Quebec; and the Crown in Quebec takes those lands and has to abide by all the conditions, liabilities, and anything of that kind there may be attached to those lands.

In construing this clause, section 109, in reference to that, the words "trust" and "interest" are not to be taken in their ordinary strict sense, or even in a municipal sense; but they must be taken in the broad sense made in the treaty with the Indians at that time. The Crown dealing with the Indians, as they had done

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC. *In re* INDIAN CLAIMS.

for a number of years, clearly recognizing, as far as the Indians are concerned, whether it was right or wrong, or legal or illegal, clearly leading the Indians to believe they had some rights or title in the land. Now, having dealt with them in that way, have not the Indians got this interest in the lands? Have not they a right in the proceeds of the lands? Have not they a right to come in and protect themselves? And now we say, the lands having gone over to Ontario in that way, and being in the Crown, as it were, all the time, they must take them subject to the trust existing in the Crown. We think under the terms of the Robinson Treaty there is clearly a trust there that out of the proceeds of the lands the increased annuity must be paid; and it is out of those proceeds alone that the trust must be paid, and it could not be charged against the Consolidated Revenue Fund without some legislation. It is only a trust in respect to those, and no more; and it is only the party who has the administration of the lands, and who has the proceeds who can be reached in order that these increased annuities may be paid; and we say that is the province of Ontario.

Blake Q.C. in reply.

THE CHIEF JUSTICE.—This is an appeal from a portion of an award made on the 13th February, 1895, by the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of the province of Quebec; and the Hon. George Wheelock Burbidge, Judge of the Exchequer Court of Canada, arbitrators appointed pursuant to three identical statutes passed respectively by the Parliament of the Dominion and the Legislatures of Ontario and Quebec, providing that for the final and conclusive determination of certain questions and

accounts, which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the governments of the provinces of Ontario and Quebec, in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor and the Lieutenant-Governors of the provinces should agree to submit.

The sixth and seventh sections of these identical statutes were as follows:

6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

7. In case of an appeal on a question of law being successful, the matter shall go back to the arbitrators for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes.

By a document signed by counsel for the Dominion and the two provinces respectively, dated the 10th of April, 1893, and entitled "first agreement of submission," after reciting the statutes before referred to, and the appointment thereunder of the arbitrators before named, certain questions were agreed to be referred, including all questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and certain particulars were then specified, which it was agreed should be understood as included in this general submission, one of which specifications was as follows:—

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference.

This agreement of submission was adopted by the three governments of the Dominion, Ontario and Quebec, by Orders in Council of the Governor General and the Lieutenant-Governors in Council, made respectively on the 13th of April and the 15th of April, 1893.

The appeal now before us is from a portion of the award made by the arbitrators under this submission, disposing of the claim of the Dominion Government in respect of certain payments made to the Indians mentioned in the treaties hereafter referred to, and also of claims to further payments set up by the Dominion Government on their behalf.

On the 7th September, 1850, the Hon. William B. Robinson, acting as a commissioner on behalf of the Crown, obtained from the Ojibeway Indians of the Lake Superior district a surrender in favour of the Crown of certain Indian territory, situate within the limits of the late province of Canada, as described in a treaty entered into on that day between Mr. Robinson, on behalf of the Crown, and the chiefs and principal men of the Ojibeway Indians, inhabiting part of the northern shore of Lake Superior. And on the 9th day of September, 1850, the same Commissioner obtained a like surrender of certain other lands, by the Ojibeway Indians inhabiting and claiming certain portions of the eastern and northern shores of Lake Huron, represented by their chiefs and principal men, and which lands were described in a treaty entered into on the last mentioned day.

The surrender under the Lake Superior Treaty was in consideration of the sum of two thousand pounds paid down, and a perpetual annuity of five hundred pounds. The consideration for the Lake Huron sur-

render was the sum of two thousand pounds paid down, and a perpetual annuity of six hundred pounds.

The Lake Huron Treaty contained the following clause, viz.:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should all the territory hereby ceded by the parties of the second part, at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

The Lake Superior Treaty contained a clause in the same words, with the exception of the statement of the number of Indians which in the latter treaty was stated as being 1240.

It is under the provision for the payment in a certain event of increased annuities that the question now presented for the decision of this court has arisen.

By the British North America Act provision was made for the disposition of the public lands which, on the 1st of July, 1867, the date of confederation, were the property of the province of Canada which became extinct by that Act. Provision was also made for the assumption by the Dominion of the debts and liabilities of the province of Canada, and for the payment by the new provinces of Ontario and Quebec of interest on any excess of that debt of $62,500,000, and for the deduction of that interest from the half-yearly subsidies payable to those provinces. Further, provision was

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

made for a division and adjustment by arbitration of the debts, credits, liabilities, properties and assets of Upper and Lower Canada. The sections of the British North America Act material to be considered are sections 109 to 113 inclusive, and section 142. These sections are as follows:

109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

111. Canada shall be liable for the debts and liabilities of each province existing at the union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union, $62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth schedule to this Act, belonging at the union to the province of Canada, shall be the property of Ontario and Quebec conjointly.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

By an Act of the Dominion Parliament (36 Vict. ch. 30) passed on the 23rd May, 1873, the amount of debt to be absolutely assumed by the Dominion was increased from the sum of $62,500,000 as fixed by the 112th section of the Confederation Act, to $73,006,088.84 and thereafter interest was only to be deducted against the

provinces of Ontario and Quebec on any excess of debt over the last mentioned sum. I refer to this statute, not because I think it has any bearing on the questions now before us for decision, but because it is an alteration of the terms imposed by the British North America Act. The effect of this Act (36 Vict. ch. 30) has already been considered by this court on a former appeal from the same arbitrators (1).

At the date of the Robinson Treaties in 1850 the management of Indian affairs was not in the hands of the provincial government, those affairs having been administered by the Governor General as representing the Imperial Government until some time in or after the year 1854, when it was handed over to the province.

The province of Canada, however, paid the fixed annuities, amounting in the aggregate to $4,400, every year up to the date of confederation, and since confederation up to the present time the Dominion Government have paid the same amount. The question raised by this appeal is confined to the increased annuities. What is claimed by the Dominion is that the difference between the fixed annuities, which, distributed amongst the Indians, amounted to $1.60 per head, and the increased annuities of $4 per head stipulated for by the clause in the treaties before set forth from 1851 to 1867, and which have never been paid to the Indians, should be paid by the province of Canada with interest to 31st December, 1892, amounting in all to $325,440; and that the province of Ontario should pay to the Indians the sum of $95,200, being the amount of the increased annuities from the date of confederation in 1867, up to the year 1873, with interest added to the 31st December, 1892.

(1) See *Canada* v. *Ontario and Quebec* 24 *Can.* S. C. R. 498.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

Further, it is claimed by the Dominion that as the Dominion Government has from 1874 to 1892, inclusive, paid the increased annuities to the Indians, it should be reimbursed the amount so paid by the province of Ontario, the sum thus claimed for increased annuities paid by the Dominion since 1874 amounting, with interest to 31st December, 1892, to $389,106.80.

In 1874 the province of Ontario admitted that from the year 1851, up to 1892, the surrendered territory produced an income sufficient to enable the government to pay the increased annuities without incurring loss, and that the Indians are of right, under the treaties, entitled to the payment of the arrears. This has not been disputed by the province of Quebec and I regard it as a fact conceded on all hands.

As regards this debt or liability up to 1867, it was clearly one of the late province of Canada which must be considered as having been assumed by the Dominion under section 111 of the British North America Act, forming part of the general debt with any excess of which over the sum of $73,006,088.84, Ontario and Quebec were to be charged and were to pay interest on as provided for by section 116 of the British North America Act. This is, however, subject to a claim, not of the Dominion but of the province of Quebec, to throw the whole of this debt or liability existing at confederation on the province of Ontario. The contention of the Dominion, however, is that there was in respect of these annuities, payable subsequent to 1867, a charge in favour of the Indians upon the surrendered lands, or a trust of the rents, profits and proceeds thereof in their favour, and that when these lands became vested, under the 109th section of the Union Act of 1867, in the province of Ontario, that province took them *cum onerê* subject to the trust or charge in favour of the Indians.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

Ontario insists that there is no trust or charge created by the treaties, and that the liability to pay the increased amount of the annuities since confederation was, at the date of the British North America Act, a debt, or at least a liability, of the province of Canada which is to be dealt with under sections 111, 112 and 116 just as the annuities up to the date of confederation are to be dealt with. Further, it is contended by Ontario that the whole question is *res judicata*, having, as it is said, been disposed of by the 13th clause of an award made on the 3rd September, 1870, by arbitrators appointed under the 142nd section of the British North America Act. Under that provision three arbitrators were appointed in 1870, two of whom made the award already referred to, the third—the arbitrator for Quebec—the Hon. Charles Day, having resigned his office and retired from the arbitration. Two questions having arisen as to the validity of this award of 1870, one as to whether the award made by a majority of the arbitrators was valid, and the other as to the qualification of Mr. John Hamilton Gray, one of the arbitrators who made the award, these questions were referred to the Judicial Committee of the Privy Council who pronounced in favor of the legality of the award, and their report was accordingly confirmed by an order of Her Majesty in Council on the 26th March, 1878. The merits of the award of 1870 were not, so far as I can find, in any way before the Privy Council, the reference to them being confined to the two points mentioned. By the first clause of the award the arbitrators of 1870 fixed the proportions in which Ontario and Quebec respectively were to contribute to the excess of debt of the province of Canada assumed by the Dominion, over the amount fixed by the statute.

The 13th clause of the award of the 3rd of September, 1870, is as follows:

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate, by the other of the said provinces.

This award has now stood for twenty-five years, its legality never having been disputed except as before mentioned.

This adjudication Ontario now sets up as a final disposition of the same question as that raised before the present arbitrators and now under appeal.

By their separate award of the 13th February, 1895, a portion of which is now under appeal, the present arbitrators found and awarded as follows:

In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson Treaties.

1. That if in any year since the treaties in question were entered into, the territory thereby ceded produced an amount which would have enabled the Government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity to a former year, in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the ex-

cess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario; and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect to the matters hereinbefore dealt with, the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account.

The province of Ontario on the 4th of March, 1895, gave the following notice of appeal from the award:

Notice of appeal and limitation of contention of appeal.

Take notice that under the provisions of the statutes above mentioned the province of Ontario intends to appeal to the Supreme Court of Canada from the award of the arbitrators herein bearing date the 13th day of February, 1895, but delivered and published on the 14th day of February, 1895.

And further, take notice that Ontario will, on the hearing of such appeal, limit its contentions and except only to so much of the said award as determines and decides, as stated and formulated in paragraph 6 of the award, as follows:

That the ceded territory mentioned become the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

such event falls upon the province of Ontario ; and that this burden has not been in any way affected or discharged.

And also as formulated in paragraph 9 of the award, as follows :

That as respects the increased annuities that have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account, as of the dates of payment by the Dominion to the Indians.

Ontario will urge among other grounds for appeal against the matters assumed to be decided by paragraphs 6 and 9 of the award above set forth that the said matters are decisions of the learned arbitrators upon disputed constitutional questions, the same being raised and relied upon in the respective cases of Ontario and Quebec filed of record before the learned arbitrators, and which questions were renewed and pressed at the argument before the learned arbitrators, whereby Ontario disputed that any liability in respect of the said matters accrued or could accrue to Ontario except jointly with Quebec ; and that the decision of the learned arbitrators in the premises are not final.

Subsequently to this notice of appeal the arbitrators made the following order :

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to statute of Canada, 54 & 55 V. c. 6, statute of Ontario, 54 V. c. 2, and statute of Quebec, 54 V. c. 4.

On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada, and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union, as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

J. A. BOYD.
L. N. CASAULT.
GEO. W. BURBIDGE.

Dated at Quebec, this 26th day of March, 1895.

No appeal was lodged by the province of Quebec.

I now proceed to consider the questions thus presented by the appeal.

In the first place nothing in the clause of the treaties providing for the augmentation of the annuities in the event specified indicates that the undertaking to make these increased payments was to constitute them a charge or lien upon the surrendered lands. There is nothing shewing that either the original annuities of six hundred pounds and five hundred pounds per annum, or one dollar and sixty cents per head of the respective bands of Indians, were to be paid out of the proceeds of the lands or out of any particular fund, nor that in the event of a right to the increased amount arising it should be paid out of any particular fund; all that is specified is that in the event of the augmentations being payable without loss they were to be paid. This does not mean that the increase was to be paid out of the proceeds of the lands, but has reference only to the event in which the increase was to become payable. There is, therefore, no ground for saying that there was any express charge, lien or trust. Then, if there is any charge it can only be on the principle of the equitable lien of an ordinary vendor of real property, and from analogy to the rules of courts of equity applicable to such liens. I think this argument entirely inadmissible. At the date of these surrenders, in 1850, the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown. Not until 1854 was the management of Indian affairs transferred to the provincial governments. The Indians had therefore the highest security which could be given for the payment of the augmentations, the assurance and covenant of the Imperial Government

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

There was, therefore, no reason for giving or implying any other. Then, as these lands were acquired by the Crown with a view to settlement, for developing mineral deposits, and for the purpose of applying the timber to purposes of utility, it would have been in the highest degree inconvenient that the power of dealing freely with them for these purposes should be fettered with any latent lien or trust. Again, even if we are to apply strictly the rules applicable between ordinary vendors and purchasers, numerous authorities show that this would not be a proper case for the implication of a lien. I refer to the cases cited in the Ontario factum as showing this conclusively (1).

Further, as against the Crown or Government, implications of this kind are not to be made. The Indian bands had as security the pledge of the Imperial Government whose commissioner and delegate, through the appointment of the Governor General, Mr. Robinson was, and they had the security of a charge on the consolidated fund of the province of Canada for the government of that province, which government, though the surrender was not made to it directly, obtained the benefit of it, the lands so soon as surrendered coming under the act of parliament by which the territorial and casual revenues had before the date of the surrender been transferred to the province, and the original annuities were therefore always paid out of the consolidated fund and not out of a specific fund provided from the revenue derived from the lands themselves. There was therefore, no necessity that this security should be supplemented by any charge or lien not expressed in the treaties themselves.

(1) See *Dixon* v. *Gayfere*, 1 DeG. & J. 659; *Boulton* v. *Gillespie*, 8 Gr. 223; *Gilman* v. *Brown*, 1 Mason (U.S.) 212; *Parrott* v. *Sweetland*, 3 Mylne & K. 655; *Wilson* v. *Daniels*, 9 Gr. 491; *DeGear* v. *Smith*, 11 Gr. 570.

An argument against the province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of *The St. Catharines Milling Co.* v. *The Queen* (1). In that case there was an Indian surrender to the Crown represented by the Dominion Government, made in 1873, subsequent to confederation. The Privy Council held that this surrender enured to the benefit of the province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown, and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the province of Canada which was to pay for them, and the present question only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities.

The statute which gives jurisdiction to this court to entertain this appeal in the section I have already quoted from provides that an appeal shall be only in respect of points decided by the arbitrators in which they shall indicate that their award has proceeded on disputed questions of law. In the 8th paragraph of the award it is stated that in the decision under appeal the arbitrators did so proceed. This of course limits this court to purely legal considerations in adjudicating on the matter in controversy, and it excludes all such equitable considerations as to what might be fair and reasonable

(1) 14 App. Cas. 46.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

outside the construction of the British North America Act, and the legal interpretation of the treaties, and I have so endeavoured to deal with the case. The question before us is, therefore, purely a question of law arising upon the construction of the treaties and the British North America Act.

The result is that the liability incurred by the Crown and the province of Canada to pay the increased annuities was, at the date of confederation, a general debt or liability of that province within the meaning of the 111th section of the British North America Act, and as such one required by that section to be assumed primarily by the Dominion, subject to such recoupment as is provided for by the 112th and 116th sections. That it was a "liability" though consisting of deferred periodical payments cannot be doubted, and that it was a "debt" though not payable *in presenti* is also clear; it therefore comes within the literal meaning of the 111th section, and we are not at liberty to unravel the arrangements between the two divisions of the old province, upon which it may be assumed the provisions of the Union Act as to the apportionment of assets and liabilities was based in order to arrive at some secondary meaning contrary to the ordinary and natural import of the language of the Act.

Then, turning to the award of 1870, I am of opinion that this point was substantially decided by the arbitrators appointed under the 142nd section of the British North America Act. I have already stated the 13th section of that award determining that lands in either Ontario or Quebec surrendered by Indians in consideration of annuities should be the absolute property of the province in which the lands might be situated, free from any charge, and that the annuities should be included in the general debt of Canada,

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

which was to be borne in the first place by the Dominion subject to such indemnity as the statute provides, as regards any excess over the fixed amount. The burden of the indemnity was of course to be borne by the provinces in the proportions declared by the arbitrators in the first section of their award. It is true that at the time this award of 1870 was made no question had arisen regarding the payment of the augmented annuities, but this in my opinion can make no difference. There is nothing before us to show that the arbitrators of 1870 did not intend to refer to the liability to pay the increased annuities when they made their award. That liability was clearly within the terms of the 142nd section of the British North America Act, and of the reference to them, and they had power to decide questions of law as well as questions of account and matters of fact, and were the sovereign judges of all such questions. It must therefore be intended that, having before them the treaties and the act of parliament under which they acted, they decided as a question of law that the increased annuities were not charged upon the surrendered lands, and that there was no trust of these lands for the purpose of paying the annuities. I think, as I have already said in disposing of the first point, that they were right in this view of the law. But whether they were or were not right can make no difference, for the award of 1870 must be conclusive on all the parties to it. It has stood for twenty-five years unimpeached except upon the points referred to the judicial committee, and now to re-open it and disturb one of its provisions, upon which other dispositions may have depended, would not only be most unfair but would be a proceeding without any legal warrant, statutory or otherwise. The arbitrators must therefore be taken to have had in mind all the annuities, the original fixed annuities as well as those

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

The Chief Justice.

contingently provided for. They held that the lands vested absolutely, free from any charge, and this must have included both. It is out of the question to say, as is argued in the factum of the province of Quebec, that in so deciding the arbitrators were assuming to alter the provisions of the 109th section of the British North America Act, by holding that the lands should be vested free from incumbrances, which the statute declared should be a charge. So to argue is to beg the question. Of course we are not to presume that the arbitrators intended so far to exceed their powers as to assume to repeal the statute. What they intended is clear. They meant to say, and did in terms decide, that the annuities in question, all of them, the increased as well as the original annuities, which formed the consideration for these cessions were not charged upon the surrendered lands at all but formed part of the general debts and liabilities of the former province of Canada.

This appeal must be allowed, and the award must be varied by substituting for the 6th paragraph thereof, the following:

> The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely, and free from any trust, charge or lien in respect of any of the annuities as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned. And further, by striking out the 7th and 9th paragraphs of the award.

The province of Ontario is entitled to the costs of this appeal to be paid by the Dominion.

TASCHEREAU J.—Concurred.

GWYNNE J.—The sole question involved in this appeal simply is which of the governments, namely, that of the Dominion of Canada, or of the provinces of

Ontario and Quebec conjointly, or that of the province of Ontario alone, is chargeable with the fulfilment of obligations and liabilities to the Ojibeway Indians of Lakes Superior and Huron, if any have accrued since confederation in virtue of the terms of the treaties entered into between Her Majesty and the respective Indian nations in the year 1850 before confederation.

By treaty bearing date the 7th day of September, 1850, entered into between Her Majesty the Queen through the intervention of the honourable William B. Robinson acting for her, duly authorized in that behalf, of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting the north shore of Lake Superior from Batchewanaung Bay to Pigeon River at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from the said tract and also the islands in the said lake within the boundaries of the British possessions therein, of the other part; it was witnessed that in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of five hundred pounds to be paid and delivered to the said chiefs and their tribes at a convenient season of each summer not later than the first day of August at the honourable the Hudson Bay Company's post ot Michipicoton and Fort William, they the said chiefs and principal men did freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed; and by a certain other treaty, bearing date the 9th day of the same month of September, between Her Majesty the Queen

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

through the intervention of the said honourable William B. Robinson acting for her and duly authorized on that behalf of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie and thence to Batchewanaung Bay on the northern shore of Lake Superior together with the islands in the said lake opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from Canada as well as all unconceded lands within the limits of Canada west to which they have any just claim, of the other part, it was witnessed that for and in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice should be given at such places as might be appointed for that purpose, they, the said chiefs and principal men on behalf of their respective tribes did fully, freely and voluntarily surrender all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed.

Each of the said treaties respectively contained a promise and undertaking of Her Majesty expressed in the terms following:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time provided that the amount paid to each individual shall not exceed the sum of

one pound provincial currency in any one year or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (such numbers in the treaty with the Lake Superior Indians being stated to be then twelve hundred and forty, and of the Lake Huron Indians in the treaty with them to be then fourteen hundred and twenty-two), to enable them to claim the full benefit thereof, and should their numbers at any future period not amount to such two-thirds (of their then numbers respectively) the amount should be diminished respectively in proportion to their actual numbers.

The first point presented for our consideration is the construction of the above clause which is common to both of the treaties, and in the consideration of it it is altogether beside the question to insist that the title of Her Majesty to the lands mentioned in the treaties as being surrendered by the Indians were vested in Her Majesty in right of Her Crown to the fullest extent independently of the treaties and that the execution of those instruments neither added to, nor detracted from Her Majesty's title to the ceded territories It is not contended that Her Majesty's title to the lands was not perfect, independently of the treaties, or that Her Majesty derived title to the lands in virtue of the surrender by the Indians mentioned in the treaties; what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instru-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

ments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.

Now, by the claims under consideration Her Majesty was graciously pleased to promise and agree with the Indians, the parties of the second part to the said respective treaties, that in case the territories mentioned in the said respective treaties as being thereby ceded by the respective parties thereto of the second part should at any future period produce such an amount as would enable the government of the province of Canada, without incurring loss, to increase the fixed annuities thereby secured, that then, in such case, the same should be increased from time to time to an amount not exceeding one pound provincial currency to each individual of the respective tribes or nations. Now as the payment of the increased annuity is expressly made contingent upon the fund to be realized or produced out of the territories expressed to be ceded proving to be sufficient to enable the Government of Canada to pay such increased sum without incurring loss, the plain construction of Her Majesty's promise and undertaking is that such increased sum (in the event of the fund permitting it) should be paid out of the funds so to be produced and so enabling the government to pay it without incurring loss. The fulfilment of that promise and undertaking involved a trust graciously assumed by Her Majesty affecting the fund to be produced and realized out of the territories expressed to be respectively ceded to Her Majesty. It cannot, I presume, admit of a doubt that if the province of Canada had continued, and was still in existence as

it was in 1850 when the treaties were entered into, the increased sum, though first charged upon the consolidated fund of that province, must have been charged upon and paid out of the fund realized and produced out of the ceded territories, which were paid into the consolidated fund, if such proceeds enabled Her Majesty's provincial Government of Canada to pay the increased amount without incurring loss; but that government no longer being in existence, although the fund is, that same fund, in whose hands soever it is, appears to be the sole fund which, if it be sufficient to enable the payment to be made without incurring loss, is naturally and reasonably still chargeable with the payment, unless there be some different provision of statutory obligation made in that behalf upon or since the confederation of the provinces into the Dominion of Canada.

At the time of the union of the provinces in 1867 there does not appear to have been any claim or inquiry made for the purpose of ascertaining whether or not sufficient funds had been produced out of the ceded territories or either of them to have enabled the Government of the late province of Canada, without incurring loss, to have paid the increased annuity or any part thereof by the said treaties agreed to be paid; but in 1873, upon the petition of the Indians, suggesting that the proceeds from the respective territories must then be sufficient to entitle them to fulfilment of the stipulations of the treaties in that behalf, the matter was, by an order in council of the Dominion Government, made the subject of a communication with the Government of the province of Ontario, and by an order in council of that government, bearing date the 31st October, 1874, it was admitted by that government that the proceeds from the ceded territories were then sufficient to entitle the Indians to the in-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

creased sum, and while repudiating all liability of the province to be charged with the Indian annuities, it was suggested that this point as to the liability of the province should be either forthwith submitted to the Court of Chancery upon a statement of facts to be concurred in by the governments concerned, or that the Dominion Government should settle with the Indians without prejudice as to what government ought ultimately to pay the proposed increase. Upon this order in council having been communicated to the Government of the Dominion, the suggestion that that government should settle with the Indians in respect of the increased sum claimed, without prejudice to the question of liability to be determined at a future period, was adopted and accepted by the Dominion Government by an order in council of 22nd July, 1875, and accordingly thenceforth the increased annuity, as promised by treaties, has been advanced by the Dominion Government.

Now, by three several Acts, viz., 54 Vic., ch. 4 of the legislature of the province of Quebec; 54 Vic., ch. 2 of the province of Ontario, and 54 & 55 Vic., ch. 6 of the Parliament of the Dominion of Canada, all three being in identical terms, after reciting therein respectively that certain questions had arisen, or might thereafter arise, in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had hitherto been arrived at, and that it was advisable that all such questions of account should be referred to arbitration, it was by the said several Acts enacted, among other things, that for the final and conclusive determination of such accounts, the governments of the respective provinces and of the Dominion might unite in the appointment of three arbitrators, to whom

should be submitted such questions as the Governor General and the Lieutenant-Governors of the said provinces should agree to submit; that the arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time; that the arbitrators should not be bound to decide according to the strict rules of law or evidence, but might decide upon equitable principles, and when they did proceed on their view of a disputed question of law, the award should set forth the same at the instance of either or any party, and that any award made under the said Acts should be, in so far as it related to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council in case their Lordships were pleased to allow such appeal.

Arbitrators were duly appointed to act in the premises by and on behalf of the Governments of the Dominion of Canada and of the provinces of Ontario and Quebec respectively, under the provisions of the said respective Acts in that behalf. Thereupon an agreement was made and entered into between the said respective governments through their respective counsel acting in their behalf, and bearing date the 10th day of April, 1893, which agreement, as an agreement of submission to arbitration, they recommended for adoption by the said respective governments. By this agreement after reciting the above mentioned statutes and that arbitrators had been appointed in pursuance of the provisions thereof, and that

it is intended by these presents to define and agree upon certain questions in difference which shall be submitted to the said arbitrators for their determination and award.

Now, therefore, it is agreed by and between the several governments, parties hereto, that the following questions as mentioned in the order of the Governor General in Council of the twelfth day of December, eighteen hundred and ninety, be and they are hereby re-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

ferred to the said arbitrators for their determination and award in accordance with the said statutes, namely:

1. All questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and to accounts between the two provinces of Ontario and Quebec.

2. The accounts are understood to include the following particulars:

Here follow several particulars, including the following paragraphs, lettered "*d*" and "*e*."

d. The claims made by the Dominion Government on behalf of the Indians and payments made by the government to Indians to form part of the reference.

e. The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said government.

This agreement of submission was approved and adopted by order in council of the Government of the province of Quebec, bearing date the 13th day of April, 1893, and by orders in council of the Government of the province of Ontario and of the Dominion of Canada bearing date respectively the 15th day of April, 1893.

This submission referred to the award of the arbitrators, as a matter concerning which no agreement had been arrived at at the time of the passing of the said several statutes passed in the 54th and 55th years of Her Majesty's reign, and therefore as being within the province and operation of those statutes, the determination of the claim made by the Indians of Lake Huron and Lake Superior in 1873 for an increase of $2.40 per head in their number under the provisions of the above treaties of 1850. In such submission were involved two questions, namely: 1. Whether and when first the increase claimed had become due and payable; and 2, assuming it to have become due and payable within the terms of the treaties by what government and out of what fund it was to be paid.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

Upon the arbitration the Government of Ontario insisted, among other things, that in point of fact the lands ceded by the treaties have not produced revenues sufficient to permit of the payment of the augmentation claimed by the Indians or any part thereof; and even though the revenues so received should prove to be sufficient for that purpose, denied all liability upon the Ontario Government to pay the increase claimed or any part thereof either conjointly with Quebec, or separately.

As to these two questions, it was agreed by all the parties to the arbitration, with the approbation of the arbitrators, that this latter question affecting liability to pay, assuming the fund to be sufficient, should be in the first place determined, leaving the question of fact as to whether the liability had accrued and when first, and the amounts so accrued due and payable, to be subsequently entered into; accordingly, the arbitrators in the exercise of the authority vested in them by the said statutes in virtue of which they were acting to make one or more awards from time to time, in respect of these matters have in an award made by them awarded adjudged and determined:

1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby accrued to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties the annuities, if the revenues derived from the ceded territory permitted without incurring loss, were to be equal to a sum that would provide $4 to each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased an-

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

nuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not been in respect of any such liability discharged by reason of the capitalization of the fixed annuities or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territories mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable upon any arrears of such annuities accruing after the union and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect of the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario account as of the date of payment by the Dominion to the Indians and so fall within and be affected by our previous ruling as to interest on that account.

This award was made on the 14th February, 1895. On the 26th day of March, 1895, an order was made and signed by all the arbitrators in the words following:

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec pursuant to statute of Canada 54 & 55 Vic. ch. 6, statute of Ontario 54 Vic. ch. 2, and statute of Quebec 54 Vic. ch. 4.

On motion of counsel for the province of Ontario, and upon hearing what was alleged as well by counsel for the province of Ontario as by

counsel for the Dominion of Canada and the province of Quebec, we the undersigned arbitrators do with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that in respect of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law; but that in respect of the question of interest upon such increased annuities so paid which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario, in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

The matter in this order contained was thus attached to the said award and the eighth paragraph of the award above cited was inserted for the purpose of complying with the provisions of the statutes above cited in virtue of which the arbitrators were acting, namely:

6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed in their view of a disputed question of law the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

The award does not state in terms any disputed question of law upon which the arbitrators proceeded, their dealing with which might be subjected to appeal. The question which was in dispute was simply the liability imposed by the sixth paragraph of the award upon the province of Ontario to pay all sums by way of increased annuities, if any such had accrued due and payable, by force of the stipulations in the said treaties of 1850 in the several or any of the years subsequent to the union in 1867. We were repeatedly

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

informed by the learned counsel for the appellants, the province of Ontario, during the argument that this is the sole matter at present in appeal. No question therefore arises before us as to the liability imposed by the 4th paragraph of the award upon Ontario and Quebec conjointly in respect of any such sums by way of increased annuities if any accrued due and payable under the stipulations of the treaties between the making of them and the treaty of union in 1867. Any such sums which so had accrued due and payable prior to the union may well be held to have constituted part of the debt of the province of Canada existing at the union.

Now, by the treaty of union, the Dominion of Canada assumed the debts and liabilities of Canada existing at the union subject to the provision and condition that Ontario and Quebec conjointly should be liable to the Dominion of Canada for the amount, if any, by which the debt of the province of Canada exceeded at the union sixty-two millions five hundred thousand dollars, and should be charged with interest at the rate of five per centum per annum thereon. The sole obligation which in substance was incurred absolutely by the Dominion in the union, was the assumption of the debt of the province of Canada existing at the union and the liability to pay such interest, if any, as the province of Canada was subject to at the union in respect of so much of the debt of that province existing at the union as exceeded the said sum of sixty-two millions five hundred thousand dollars. Now by a Dominion Act passed in 1873, 36 Vic. ch. 30, after reciting therein that the debt of the late province of Canada as then ascertained exceeded the said sum by the sum of ten millions five hundred and six thousand and eighty-eight dollars and eighty-four cents, enacted that, in the accounts between the several

provinces of Canada and the Dominion the amounts payable to and chargeable against the said provinces respectively, in so far as they depend upon the amount of debt with which each province entered the union, should be calculated and allowed as if the sum fixed by the 112th section of the British North America Act, 1867, was increased from sixty-two millions five hundred thousand dollars to seventy-three millions six thousand and eighty-eight dollars and eighty-four cents.

This Act is not to be construed as a statutory declaration by Parliament binding upon the Dominion Government that the total debt of the province of Canada existing at the union was the sum of $73,006,088.84, and no more, but reciting that so far as then ascertained, the debt of the province of Canada exceeded $62,500,680 by $10,506,088.84, and the true construction of the Act is that the accounts between the Dominion and the provinces of Ontario and Quebec shall be taken as if the sum of $73,006,088.84 had been inserted in the 112th section of the British North America Act, 1867, instead of the amount which was therein inserted, thus making that section for the purpose of taking said accounts read as follows: "Ontario and Quebec conjointly shall be liable to Canada for the amount, if any, by which the debt of the province of Canada exceeds at the union $73,006,088.84, and shall be charged with interest at the rate of five per centum per annum thereon."

As the object of the Act was simply to subject the Dominion Government to a greater burden than it had assumed by the treaty of union, there can be no doubt that it was quite competent for the Dominion Parliament to pass the Act so altering the effect of the 112th section of the British North America Act.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

Now it is sufficiently obvious, I think, that if any debt or liability to pay to the Indians, parties to the treaties of 1850, by any augmentation in their annuities under the stipulations of those treaties, has accrued in any of the years subsequent to confederation, such cannot be held to have constituted a debt or liability of the late province of Canada, which ceased to exist upon confederation being accomplished, much less can it be said to have constituted a debt or liability of the late province of Canada existing at the union. True it is, no doubt, that the treaties in virtue of the stipulations of which such debt or liability, if any there be accrued, were entered into prior to confederation, but these treaties did not in themselves, nor did anything contained in them or either of them, constitute a debt or liability upon the late province of Canada to pay any sum of money by way of augmentation of the fixed annuities stipulated for therein respectively. By the terms of the treaties no augmentation of the fixed annuities stipulated for was to take place in any year unless, nor until, the following conditions should concur:

1st. That the territories respectively ceded by the treaties should produce such an amount as would enable the Government of the then province of Canada, without incurring loss, to increase the annuity from time to time to an amount not exceeding one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order; and

2nd. That the number of the Indians entitled to the benefit of the respective treaties should amount to two-thirds of their number at the time of the treaties being entered into, and mentioned in the respective treaties. If the number of Indians benefited by the respective treaties should in any year fall short of two-thirds of the number mentioned in the respective treaties,

no augmentation of annuity in such year accrued. The concurrence of these conditions being necessary to entitle the Indians, parties to the respective treaties, to any augmentation in their annuities in any year, no debt or liability, nor any claim under the stipulations of the treaties could accrue save in each particular year as it should come into existence, and in which those conditions should concur. No augmentation, therefore, claimed as having accrued due in any year subsequent to confederation can by possibility be held to have constituted a debt or liability of the late province of Canada, which province ceased to exist before the accruing of such debt or liability, much less a debt or liability of that province existing at the union. And the case, therefore, is not one which in any respect falls within the 111th or 112th sections of the British North America Act, 1867. Consequently the claims of the Indians to any augmentation in their annuities in respect of the years subsequent to confederation and all liability in respect thereof must be determined and adjudicated upon, either under the provisions of some other clause in that Act or upon some principle of law and justice applicable to a point or question which, it may be, is not in express terms covered by the Act.

Now, as has been already observed, what Her Majesty, according to the true construction of the treaties, was graciously pleased to undertake and promise was, that the augmentation of annuities which, if any, should accrue due and payable within the stipulations of the respective treaties should be paid to the Indians, parties thereto, respectively out of the proceeds of the respective territories ceded. No other fund was contemplated out of which such augmentations should be paid, and the promise did certainly not operate as imposing a personal obligation upon Her Majesty. The condition then in which the matter

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

stood prior to confederation, was that while Her Majesty was seized in fee in right of Her Crown of the lands mentioned in the territories as ceded to Her Majesty, she held the same for the benefit of the province of Canada, to be sold and disposed of by Her Government of that province as the property of that province, and notwithstanding that letters patent of the said lands granted by the Government of Canada would pass an absolute title in fee simple to the grantees thereof, still Her Majesty's gracious undertaking and promise in the treaties as to the augmentation of the annuities constituted a trust assumed by Her Majesty in the interest of the Indians to the fulfilment of which Her Government of the province of Canada, so long as that province existed, was in conscience bound. Now by union of the British North America provinces into the Dominion of Canada, upon the completion of which the province of Canada ceased to exist, it was enacted by the 109th section of the British North America Act, 1867, that "all lands, &c., belonging to the province of Canada at the union, and all sums then due and payable for such lands, &c., shall belong to the several provinces of Ontario, &c., in which the same are situate, or arise subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

Her Majesty's undertaking and promise constituted a trust obligation existing in respect of the proceeds arising out of the ceded territories which, until the union, belonged to the late province of Canada, and in the fulfilment of such obligation the Indians, parties to the treaties, had an undoubted interest. The above clause in the British North America Act was never framed with intent to provide for the case of a trust capable of recognition in a court of law or equity, as being attached to the lands themselves so as to affect a

purchaser with notice, as contended by the learned counsel for Ontario. The estate of Her Majesty in the ungranted lands of the Crown in the province never were, nor were supposed to be nor indeed could be, subject to any such trust, but the undertaking of Her Majesty in the treaties, constituting as it did a trust obligation assumed by Her Majesty in respect of the proceeds of the ceded territories, the language of the section appears to be quite appropriate to the expression in the Act of a provision, in accordance with the principles of law, equity and common sense, that the fund out of which the augmentation in the annuities were contemplated to be paid by the treaties should, after the union equally as before, provide for the payment of any augmentations which should accrue due and payable after the union. And as by the 109th section of the British North America Act the province has become entitled to that fund, Her Majesty's government of that province must take the same subject to the trust obligation in the interest of the Indians assumed by Her Majesty by the stipulations of the treaties. Her Majesty's government of the province of Ontario must in all reason and justice take the property mentioned in the section subject to the same obligation as to the payment of augmentations of the annuities, if any such accrue due after the union, as the late province of Canada would have held them if no union had taken place. This was the unanimous judgment of the arbitrators upon this point. That judgment is not at variance with any principle of law, or any statutory provision; on the contrary it is in perfect accordance with the plainest principles of justice and is not open to any sound legal objection.

It was argued that the question under appeal had already been concluded by a paragraph in an award between the province and the Dominion made in 1870.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Gwynne J.

The clause of that award relied upon for the above purpose by the province of Ontario is as follows:

13. That all lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate free from any further claim upon or charge to the said provinces in which they are situate by the other of the said provinces.

Now as to this clause in that award it is to be observed:

1. The submission by the Government of the province of Ontario by the order in council referring the very question under consideration to the present arbitrators as a question as to which no agreement had hitherto been arrived at, seems to afford answer to the contention that the matter had been disposed of by the award of 1870.

2. The present case is not for the determination of or adjudication upon any claim made by any of the provinces against the province of Ontario, but for the determination of and adjudication upon the single question as to where exists the liability to discharge the obligation assumed by Her Majesty in the interest of the Indians to pay any increased annuities stipulated for by the treaties of 1850 which have accrued due and payable since the ceded territories became by the union the property of the province of Ontario.

3. As already shown, augmentations so accruing since the union did not in point of fact form and indeed could not have formed, any part of the debt of the late province of Canada mentioned in 36 Vic. ch. 30 as then ascertained as being $73,006,088.84; the fixed annuities only as the only sums then known to exist as a debt of liability of Canada were included in that sum.

4. There seems therefore, to be no foundation whatever for the contention that the question now under consideration involves a matter concluded by the award of 1870.

The determination of the question by the present arbitrators is in conformity with every principle of justice and with the provisions of the 109th section of the British North America Act which seem to be indeed simply declaratory of what law and justice would have required if the clause had not been inserted in the Act, namely, that the proceeds of the ceded territories should bear the burden of discharging Her Majesty's obligation to the Indians under the stipulations of the treaties as to any augmentation of annuities, if any have accrued due under the treaties since the union, whereby the ceded territories became the property of Ontario.

The award, therefore, must be maintained, and the appeal dismissed with costs.

SEDGEWICK J.—It is admitted, but only for the purpose of this appeal, that the Indians in question are entitled to be paid the augmented annuities which they have been receiving since 1874. It is not, however, admitted by the appellant province that there is any liability on the part of that province to pay these annuities, and it contends that should it in any way be found liable it is only liable conjointly with the province of Quebec. The questions are, first: Do the annuities in question constitute a debt or liability under section 112 of the British North America Act? And secondly: If such liability exists, shall it be borne by Ontario and Quebec jointly or by Ontario alone? The first contention was but feebly put forward by counsel for Ontario, and I must confess that I see no ground for giving it any weight.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Sedgewick.

By the scheme of the Union Act, Canada was to become liable for the debts and liabilities of the confederating provinces, in other words, she entered into an obligation to liquidate and satisfy all provincial creditors. The scheme, however, did not contemplate that the Dominion was to commence its existence with an indebtedness measured by the full extent of provincial liability. As between the Dominion and the provinces the public debt of Canada was fixed at $77,500,000; $62,500,000 being the amount absolutely assumed on behalf of Ontario and Quebec, and $8,000,000 and $7,000,000 on behalf of Nova Scotia and New Brunswick respectively, and it was provided that, should the debt of the old province of Canada exceed the $62,500,000, assumed by the Dominion, those provinces should be liable to Canada for that excess, with interest at five per cent per annum. No similar provision was made in regard to Nova Scotia or New Brunswick, inasmuch as the debts of those provinces did not amount to the sums assumed on their behalf by the Dominion. It is very clear that the Dominion entered upon its national existence with a fixed and indisputable debt. While it was under an obligation to pay all existing provincial debts or liabilities, no matter how large or how much in excess of the $77,500,000 they might eventually be found to be, it had a right to recoup itself by calling upon Ontario and Quebec to make good the difference between the actual indebtedness and the net amount which as between the provinces and itself it undertook to pay. The actual amount of that excess has never yet been definitely ascertained. By the Dominion Act of 1873, the $62,500,000 assumed by the Dominion on behalf of Ontario and Quebec was increased to $73,006,088.84, but even that increased amount does not fully represent the liabilities of the old province, and it is one of the objects

of the tribunal from whose award this appeal is taken, to determine definitely the exact amount of that excess in order that there may be a complete and final adjustment of accounts between the Dominion and these provinces.

Now, the annuities payable to Indians by virtue of pre-confederation treaties made with them, having in view the surrender of the Indian title to the Crown in any public lands, clearly constituted a liability on the part of the old province of Canada, which liability was assumed by the Dominion under the British North America Act. The argument is, that section 112, in making Ontario and Quebec liable for the excess of debt beyond the $62,500,000, does not make it liable for pre-existing liabilities which are not debts, and that the annuities in question, though they are liabilities, do not come within the meaning of that expression. As already stated, I dissent from this view. These annuities, though perhaps not debts in the strict sense of that term until they become due, are debts immediately thereafter, but whether or not, they are, in my judgment, debts within the contemplation of section 112, for which the provinces are liable. It may not have much bearing on the case, but it is proper to notice that in the award made in pursuance of section 142 of the Union Act, clause 13 expressly states that these annuities, or that portion of them which was fixed by the original treaties "are included in the debt of the old province of Canada." I entertain no doubt but that this is the correct view, and that in the adjusting of the accounts between the Dominion and the old province of Canada, the annuities payable to the Indians since the 1st of July, 1867, whether these annuities are to be augmented as therein provided for, or remain as originally fixed, constitute a liability or debt which the old provinces, whether Ontario alone, or Ontario and Quebec jointly, must assume.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Sedgewick J.

The other question involved in this appeal is a more difficult one. Is Ontario alone liable for these annuities, or is it conjointly liable with Quebec? The matter, as I view it, is of no significance to the Dominion. It is solely a question as between Ontario and Quebec. The case, however, is put forward by the Dominion insisting that Ontario is solely liable. I extract from its statement of claim the following:

9. The Dominion of Canada claims that under the "Robinson Huron Treaty" and the "Robinson Superior Treaty" for the 16 years from the dates of the said treaties until the date of confederation of the provinces in 1867, and based upon the increased annuity of $4 per head, and after giving credit for the sum of $1.60 which was yearly paid to each individual Indian during the said period, there is due and payable by the late province of Canada to the Indians aforesaid the sum of $325,440 for principal money and interest, and the Dominion asks the board to award payment of the said sum by the said province of Canada.

10. By the British North America Act, 1867, the tracts of land which had been ceded to Her Majesty, under the said Robinson treaties, became and formed portions of the public lands of the province of Ontario.

11. By the 111th section of that statute it is enacted that "Canada shall be liable for the debts and liabilities of each province existing at the time of the union," and by the 109th section it is provided that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of the union, and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate, or arise, subject to any trusts existing in respect thereof, or to any interest other than that of the province in the same."

12. The Dominion submits that at the time of confederation the lands which had been ceded by the said Indians, under the said treaties as aforesaid, came into the hands and possession of Ontario subject to the trusts contained in the said treaties and subject to "an interest other than that of the province in the same" within the meaning of said section 109, namely, the right of the Indians to receive and be paid the annuities under the terms and stipulations of the said treaties, and that from and after the 30th June, 1867, the province of Ontario, as the beneficial owner of the said lands, and recipient of the revenues derived therefrom, was legally liable to provide the Dominion with moneys necessary to pay the said annuities to the Indians under the said treaties.

13. By section 91 of the British North America Act, the Parliament of Canada is given legislative authority over "Indians and lands reserved for Indians," and the Dominion acting under said authority has enacted laws for the government of the Indians of Canada, and has undertaken the administration of, and has since the passing of the said act administered, the affairs of the Indians throughout Canada.

14. The Dominion submits that it was and is the duty of the province of Ontario to pay into the Dominion treasury, out of moneys received as revenues from the lands which were ceded as aforesaid, such sums as would enable the Dominion to carry out the provisions and requirements of the said treaties; but the province of Ontario has hitherto declined to admit any liability, and has paid no sum to the Dominion for the purposes aforesaid, although often requested to do so, and although it has been admitted by the said province of Ontario that the revenues received by the said province out of the said ceded territory have been more than sufficient for many years past to have satisfied the claims of the said Indians to be paid the full increased annuities mentioned in the said treaties of $4 for each individual Indian.

15. From the year 1867 until the year 1875, the Dominion annually paid to and distributed amongst the said Indians the annuities of $2,400 and $2,000 mentioned in the said treaties respectively, and the Dominion now claims on behalf of the Indians, for the reasons above set out, that the province of Ontario ought to pay all arrears of annuities since the 30th June, 1867, made up of the difference between the sum of $1.60 and the sum of $4 for each individual Indian, which arrears of annuity with interest thereon from the 30th June, 1867, to the 31st December, 1892, amount to the sum of $95,200, and the Dominion asks the board to award payment of the said sum by the province of Ontario.

16. Since the year 1875 the Dominion, for the reasons before mentioned, has paid in each year up to and including the year 1892, the full increased annuity of $4 to each individual Indian within the said treaties, and the Dominion now claims to recover from, and be paid by, the province of Ontario the sum so paid, which sum with interest thereon amounts to the sum of $389,106.80.

Quebec supports the Dominion view, while Ontario contends upon this point that the case is one in which Quebec is jointly liable with her.

The clause of the treaty giving rise to the conflict is as follows: (the clauses are the same in both treaties).

Should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Sedgewick J.

be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of the treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

And section 109 of the British North America Act referred to in the Dominion case is as follows:

All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of the union and all sums then due and payable for such lands, mines, minerals and royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, or arise, subject to any trusts existing in respect thereof, or to any interest other than that of the province in the same.

Now in my view this section is material for the purposes of this case, only in so far as it transfers to Ontario the Crown lands, &c., within its territorial limits. It does not purport to deal with property or rights or interests other than those of the Crown. As far as I can at present see the section would have been equally effectual for its purpose had the words "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same" been left out. The Dominion took those large areas known as "Ordnance lands" under section 108. The *quantum* of the interest which passed by the operation of that section was not greater, and not less, because these words were omitted. In the case of the Crown lands, Ontario took the whole of old Canada's interest—in the case of the Ordnance lands the Dominion took the whole of the old provinces' interest—private rights in both cases remaining undisturbed. The section is, however, material in so far as it operates as a transfer.

There is a principle referred to by the learned Chancellor that where in ordinary cases a vendor sells lands charged with a mortgage or other burden in respect to which he the vendor is under a personal obligation the purchaser takes them not only subject to that burden, but subject, too, to the duty of indemnifying the vendor in respect to his obligation, and that too irrespective of contract. In other words the law imposes upon the buyer the duty of discharging the burden, and, as between him and the seller, relieves the latter from it. And this principle has been more than once recognized by this court. *Williston* v. *Lawson* (1), *Fraser* v. *Fairbanks* (2).

Then too, there is the principle expressed in the maxim *qui sentit commodum sentire debit et onus.* If a person accept anything which he knows to be subject to a duty or charge it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself (3).

On the whole I am of opinion that if the lands in question or the proceeds of those lands are burdened by the operation of the Indian treaties, if they have been put in pledge or hypothecated in order to render more secure the stipulated annuities, if the Indians have in them a property right whether legal or equitble capable of being enforced or adjudicated upon by petition of right or otherwise in a court of justice, then Ontario having under the Union Act taken these lands, she has taken them subject to this burden, and is therefore bound to relieve Quebec therefrom.

But the question still remains: Do these treaties as they are called in law create a burden upon or give to the Indians an interest in the lands they purport to cede ?

(1) 19 Can. S. C. R. 673. (2) 23 Can. S. C. R. 79.
(3) Broom 7th ed. p. 708.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC. *In re* INDIAN CLAIMS.

Sedgewick J.

Before minutely examining the phraseology of the contract, a few words may be necessary as to some preliminary considerations that should not be lost sight of in endeavouring to arrive at its meaning.

A self respecting state in dealing with its citizens in matters of contract does not usually give the public property as a security for the fulfilment of its obligations. It gives its promise, it pledges the national faith, but nothing more. A person contracting with it, should he ask more, would so far manifest a distrust in either its good faith or its credit, and a state by yielding to the request would so far admit that such distrust was not wholly groundless. Not during the present century has any powerful civilized state pledged to its subjects state property (crown jewels for example), as security for a national obligation. On the other hand a state may consistently with its dignity pledge its revenues or other property when it takes upon itself the obligations of another state, or when it goes into the foreign money markets to raise money for the purposes of the nation. When in the old provinces the casual and territorial revenues of the Crown were surrendered, and in return they assumed the burdens of the civil list, as well as the other obligations of the Imperial Government previously incurred in connection with the administration of affairs of British North America, the provinces, by special act, pledged the whole of the provincial revenues as security for the performance of such obligations in the case of old Canada including in such secured imperial obligations the annuities payable to Indians under the then existing treaties. That pledge, however, was made, not to or for the benefit of the functionaries or classes mentioned, but to the Crown itself and for its security alone.

Another consideration has a bearing on the matter. The contest in this case is not between the Indians on

the one hand and the Government on the other; it is in its last analysis a contest between Ontario and Quebec. The principle of generous construction so ably and correctly pointed out by the learned Chancellor would very properly be applicable were it a case of the former kind. Had the rights of the Indians been in question here—were their claims to the increased annuity disputed—did that depend upon some difficult question of construction or upon some ambiguity of language—courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law—the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.

But I do not see that where the question is solely between the two provinces these high ethical doctrines should have weight. It is one thing from motives of grace or from a sense of moral obligation to do more than justice to the Indian races. It is quite another thing in the construction of a legal instrument to give weight to these motives in favour of one province at the expense of another, especially when these races are in no way benefited thereby.

In my view this contract is in the present controversy to be read like any other contract as between parties who are *sui juris*, and dealing with each other at arms' length.

Another question is involved. It is in my view immaterial whether the treaties give to the Indians an interest in the ceded lands themselves or in the proceeds of those lands. The authorities, I think, clearly

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Sedgewick J.

establish the proposition that under the Statute of Frauds and the Statutes of Mortmain, and similar statutes, an interest in the proceeds of the sales of lands is an interest in the lands themselves. Leach, Vice-Chancellor, in *Attorney-General* v. *Hanley* (1), thus expresses it :

> That money to arise from the sale of land is an interest in land admits of no doubt.

In the well-known case of *Jeffries* v. *Alexander* (2), the House of Lords, although divided in opinion, so held. In that case Mr. Justice Blackburn (one of the six learned judges who gave their opinion) (3) says :

> But the devise of land to be sold on the bequest of the mortgage money does actually give the objects of the bounty of the testator an equitable interest on the land which is to be sold, or in the mortgaged estate, and therefore is within the very words of the statute a gift of an interest in land.

And so the late Master of the Rolls held in *Lacey* v. *Hill* (4) ; and Mr. Justice Kay in *Re Thomas. Thomas* v. *Howell* (5). Nor was any different rule laid down in this court in the case of *Stuart* v. *Mott* (6), as I understand that case.

I now come to the treaty itself, and the question is as to the effect of these words :

> Should the territory hereby ceded at any future period produce such an amount as will enable the Government, without incurring loss, to increase the annuity hereby secured to them (the Indians), then, and in that case, the same shall be augmented.

Now there is here no express creation of a charge, whether upon the lands or upon their proceeds. Are we to read into or add to this stipulation what, it is argued, it impliedly contains "and the lands hereby ceded, or the proceeds thereof, after deducting cost of

(1) 5 Madd. 327.
(2) 8 H.L. Cas. 594.
(3) At p. 626.
(4) L.R. 19 Eq. 346.
(5) 34 Ch. D. 166.
(6) 23 Can. S.C.R. 384.

administration, is hereby charged with the payment of such augmented annuities"?

If we are, then I think the Indians have an interest and Ontario is bound to discharge it. But is that the true meaning of the contract? Was that the intention of the parties? Did the Indians, in consideration of the cession, get the personal obligation of the Crown *plus* an interest in the proceeds of the ceded lands to bolster it up as it were and make it more binding, or did they get that obligation only?

Let me consider the case had this provision as to the augmented annuities been left out. In that case the Indians would have been entitled to a perpetual annuity of £1,100. As to this sum there are no words from which it could possibly be implied that any property was to be pledged as security for its payment. The only security was the personal covenant of the Sovereign. The Indians do not appear to have asked —the idea of implementing that covenant by further pledges never seems to have been contemplated or suggested. Then, when in the course of the negotiations the question of augmentation came up and was settled in the manner specified, was it the intention either of the Indians or the Crown that their rights to the increased annual sum should be secured not only by the Crown's covenant, but by the pledging of the property as well? Let us suppose that in the case of the fixed annuity some Sachem—wise above his fellows —had suggested: "We are giving up our lands and you are giving us £4,000 and our reserves, but what security have we that you will pay us to the end of time the eleven hundred pounds a year? Give us a mortgage as security." Would not the answer have been refusal—a kindly one it may be, but an explanation that the Queen Mother did not so deal with her children—that they must take her at her word or not at

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC

In re INDIAN CLAIMS.

Sedgewick J.

all? And were the same suggestion made when the other question came up, would not the same answer be given? For my part I cannot bring myself to think that it was ever within the contemplation of the parties that as security for payment the Indians were to have a charge upon the proceeds of the ceded lands.

What does the word "interest" mean whether used in a statute or according to the common law? As I understand it, it means such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings. One may be interested in a property but have no legal interest in it. If he has a legal interest he can enforce it against the property. If in the present case the lands in question are burdened with the charge the Indians have such an interest in their proceeds as will enable them to follow the moneys no matter where they are or to whom paid, they have a property right in the moneys themselves indefeasible, indestructible, which the State must acknowledge and to which the courts must give effect.

In the present case the Indians, I admit, are interested in these lands in the sense that the augmentation of the annuities wholly depends upon what they will sell for but not in the sense that they have any right in or to the proceeds of such sales no matter what they amount to.

They have no "interest" in these proceeds. The treaty might have made the augmentation dependent or conditional upon the happenings of any other uncertain future event, the increased or diminished population of the tribe at a given time for instance, or the going of one of their number to Rome on a certain day. But it is the event alone they are interested in. If circumstances so combine as to produce the event then the money becomes payable.

I admit too that were it a matter of contention as to whether the determining event had happened it would be necessary on the part of the Indians to have an inquiry as to the amounts realized from the sale of the ceded lands; but that inquiry would be necessary not for the purpose of obtaining a declaration that the Indians were entitled to be paid therefrom but for the purpose of establishing whether the determining event had happened and the consequent liability of the Crown upon its personal covenant.

The question has been presented to us as a pure matter of law. I have been unable to find that as a matter of law the Indians have any charge upon or interest in the lands ceded by the treaties in question or that these lands or their proceeds are subject to any interest or trust by reason of such treaties. They have therefore become the absolute property of Ontario.

It was further contended that the question was settled in favour of Ontario by the operation of clause 13 of the award under the British North America Act of the 3rd of September, 1870. If clause one of that award be read with clause 13 then it seems to me that that contention is correct. I have already stated that in my view the moneys payable under the Robinson treaties whether upon the original or the augmented basis was a debt or liability of the old province of Canada at the time of the union, that the whole of that liability was assumed by Canada, she thereby becoming responsible to the Indians therefor, and that (subject to the principal question in this appeal) Ontario and Quebec conjointly are liable therefor to the Dominion as a portion of that excess of debt referred to in section 112. Now under section 142 of the British North America Act the division of the debts and liabilities of Upper Canada and Lower Canada was to be referred to the arbitration therein specified, and that

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Sedgewick J.

arbitration was held and an award made. That award did not purport to determine the amount of such debts or liabilities. It did, however, purport to divide that amount and to fix the proportion to be borne by Ontario and Quebec respectively. Clause 1 of the award specifies that proportion, Ontario being declared liable to pay such a proportion of the excess as the sum of $9,888,728.02 bears to the sum of $18,587,520.57 and Quebec being declared liable to pay such a proportion as the sum of $8,778,792.55 bears to the same sum; or, approximately, Ontario is to pay five-ninths and Quebec four-ninths of the old province's liabilities. It appears to me that both provinces are still bound by this award and that this finding determines the question involved in this appeal. It is a finding that Quebec as well as Ontario is liable to recoup the Dominion on account of these Indian annuities and it determines the proportions to be borne by each.

KING J.—The question is whether Ontario alone, or jointly with Quebec, is liable to be charged in account with the Dominion with the amounts paid by the Dominion since the union in satisfaction of increased annuities payable to certain Indian tribes under the Robinson treaties of 1850.

It is held by the arbitrators that the amounts are chargeable against Ontario alone.

In the year 1850 it was deemed advisable by Her Majesty's Government to extinguish Indian rights in and over extensive districts on the shores of Lakes Huron and Superior occupied by tribes of the Ojibeways and it was in accordance with practice that the conclusions should take the form of a treaty between Her Majesty and the chiefs and principal men representing the tribes. Treaties were concluded by Mr.

Robinson acting on behalf of the Queen, which in the provisions material to the present inquiry are alike.

It was declared (citing from the Huron treaty):

That for and in consideration of the sum of £2,000 currency * * to them in hand paid, and for the further perpetual annuity of £600 (£500 in the case of the Superior treaty) * * * they the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest to and in the whole of the territory (saving and excepting certain reservations), and the said William Benjamin Robinson on behalf of Her Majesty and the Government of the province hereby promises and agrees to make or cause to be made the payments as above mentioned, and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded to them, and to fish in the waters thereof as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the provincial government.

There was then this further stipulation:

The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that, should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province without incurring loss to increase the annuity hereby secured to them, then and in that case the sum shall be augmented from to time provided that the amount paid to each individual shall not exceed the sum of one pound currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number which is 1422 (in the Lake Superior case 1240), to entitle them to claim the full benefit thereof. And should they at any future period not amount to two-thirds then, the said annuity shall be diminished in proportion to their actual numbers.

At and before the passing of the British North America Act, 1867 (and at and before the making of the cession), the casual and territorial revenues from the Crown lands of Canada had been granted by the

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

King J.

Imperial Government to the province of Canada. The effect of this was that the lands were thereafter held by the Crown in right of the province of Canada.

Then came the union in 1867. By sec. 109 of the British North America Act, it was enacted that

> all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Secs. 111 and 112 are as follows:

> 111. Canada shall be liable for the debts and liabilities of each province existing at the union.
>
> 112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of 5 per cent per annum thereon.

In the accounts heretofore adjusted and settled the fixed annuities under the above treaties have been regarded as a portion of the debt of the province of Canada, and the provinces of Ontario and Quebec have been charged with a capital sum sufficient to yield such annuities according to the terms of the award of 1870, made under the provisions of section 114 of the British North America Act. These fixed annuities were regularly paid by the Dominion Government, as having the administration of Indian affairs. As for the augmented annuities, nothing was paid in respect of them, either by the old province of Canada or by the Dominion Government, until about the year 1874, when a claim for them was made on behalf of the tribes. The Dominion Government becoming satisfied that the increased amounts were properly payable (as seems to be the fact) paid over the same, upon an understanding

with the provinces that the question of ultimate responsibility as between the different governments should be afterwards settled.

The present arbitration is for the purpose of settling (amongst other questions of account and claims) "the claims made by the Dominion Government on behalf of the Indians."

Upon that portion of this claim involved in the present appeal, viz., the claim for payment of increased annuities for the period subsequent to the union, the arbitrators have found (par. 6):

> That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

The arbitrators declare in their award that these conclusions proceed upon their view of disputed questions of law, the effect of which is, by the statute, to render them appealable.

In the reasons given by the learned Chancellor, concurred in by the other learned judges, it is held, in conformity with decisions of the Supreme Court of the United States, that treaties with the aborigines are to receive a generous interpretation in favour of them as public wards of the nation. Approaching it in this spirit, the learned Chancellor concludes that although the mere words used do not say that the increased annuity is to be paid out of the proceeds of the land, still that, in his opinion, is the plain and reasonable implication.

Upon the appeal the province of Ontario contests the position that the lands passed to it subject to any trust in respect of it, or to any interest in the Indians so far

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

King J.

as relates to the claim in question. It is further contended that, as by section 111 the Dominion assumed the "debts and liabilities" of the old province of Canada, and by section 112 the provinces of Ontario and Quebec are liable over to the Dominion only for the excess of "debt" over $62,500,000, the effect of this is that the augmentations becoming payable after the union are to be assumed by the Dominion, under section 111, as a "liability" existing at the union, while they are not a "debt" under section 112 to be taken into account in calculating the excess of debt for which Ontario and Quebec are conjointly responsible over to the Dominion.

It was further claimed that if the amounts are to be charged against the provinces at all, it must be against both Ontario and Quebec jointly in the proportion fixed by the award of 1870, and not against Ontario alone.

In the second of the above contentions the province of Quebec joins.

Now, first, respecting such contention, it is to be noted that, while section 111 uses both words "debts" and "liabilities," section 112 does not use either of them, but instead, the comprehensive word "debt":

> Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union the sum of $62,500,000.

This general word "debt" may very well include all forms of indebtedness, whether ascertained or unascertained, determinate or indeterminate, except so far as particular provisions of the Act impose a limitation.

The financial provisions of the scheme of union were manifestly a matter of arrangement between the provinces of old Canada, Nova Scotia and New Brunswick; and while, for the public creditor, the Dominion was to be the paymaster, as between the provinces

and it, the amount of provincial indebtedness which the Dominion, as representing the people of the united provinces as a whole, was to assume was definitely determined and limited by the amount of debt of the several provinces stated to be assumed by it without recourse.

It follows, therefore, that the ultimate liability in this case must fall either upon Ontario alone, or upon Ontario conjointly with Quebec according to the ratio fixed by the award of 1870 for the division of the debts and liabilities of the old province of Canada in excess of the sum stated by the Act of 1873.

Then, as the main question, viz: whether the ceded lands were subject to a trust or interest as claimed. In *St. Catharines Milling & Lumber Co.* v. *The Queen* (1), it is laid down that:

> Wherever public land with its incidents is described as "the property" of or as "belonging to" the Dominion or province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the province (as the case may be) and is subject to the control of the legislature, the land itself being vested in the Crown.

When therefore it is declared that upon the union the lands shall belong to the province in which they are situate, subject to any trust in respect thereof or to any interest other than that of the province in the same, the saving clause extends to trusts or interests affecting the beneficial use of the land, or its proceeds.

The question then is: Did the Crown, or the province of old Canada to whose rights Ontario has succeeded, hold the proceeds to be derived from the ceded lands upon any trust to pay to the Indians the augmented annuities?

There is no doubt that the Indians were dealt with as though they were possessed of substantial rights which at least imposed a burden upon the lands. In

(1) 14 App. Cas. 46.

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

King J.

St. Catharines Milling Co. case already alluded to, Lord Watson said that it was not then necessary to express any opinion upon the precise quality of the Indian right, but it was sufficient to say that there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title which became a *plenum dominium* when that title was surrendered or otherwise extinguished.

The consideration to the Indians for the ceding of their rights was threefold, the cash payment, the fixed annuity, and the further annuity up to a certain amount depending upon the proceeds of the lands. Although the promise on the part of the Crown to pay the augmentations is separated from that relating to the fixed annuity and the cash payment, and although it is introduced by reference to the liberal intentions of the Crown, still all that was promised by the Crown constituted the consideration for the act of cession.

Practically it does not now, and it never did, make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or not. Their assurance of payment would be equal in either case.

Nor, on the other hand, would it practically make any difference to the Crown whether or not the Indians were declared to have such interest in the proceeds. *Ex hypothesi*, the lands were to be sold, and there could be no fetter upon the right to dispose of them.

The matter only came to have practical significance when it became necessary to consider the nature of the transaction in relation to the provisions of the British North America Act.

The question is to be solved by the light of what is expressed and by the application to it of general principles of law.

The law is very considerate of the rights of a vendor of an interest in lands. It proceeds upon the principle that one who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it and not to pay the full consideration money. This is a general principle of most systems of law. Hence the lien of the vendor, which is deemed to be based upon a natural equity.

This may even exist where the price, or a part of it, is payable in the way of an annuity, but in such case the circumstances may be such as to exclude the notion that the parties could have reasonably contemplated such a lien.

Here it was manifestly contemplated that the land might be sold, and as there was to be no limit to the continuance of the annuity it would not be reasonable to suppose that there was to exist a perpetual lien.

But it was agreed that if the ceded territory should at any future period produce, *i.e.*, from sales, rents, royalties, &c., such an amount as would enable the Government of the province of Canada, without incurring loss, to increase the stated annuity, then the same should be augmented from time to time to an amount not exceeding, in the whole, a payment to each individual of the sum of £1 currency.

Now this may mean merely that the revenues shall furnish a measure of increased price or be a circumstance to determine whether or not it shall be paid; or, on the other hand, it may mean that a part of the revenue shall go to the Indians by way of increased annuities in a certain event.

Where two interpretations of such an agreement are open, one consistent with and the other inconsistent with a provision for the security of the unpaid vendor, it would seem more appropriate to treat it as giving the more effectual security to the unpaid vendor, and

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

King J.

more in accordance with the general principles of the law to do so.

It would give to the undertaking a more simple and less circuitous operation, and one more in accordance with the natural meaning of the language, to construe it as providing that the augmented annuities should be paid out of the fund, the existence of which is the condition and the reason for its payment. Take the words in which the condition is expressed:

> Should the territory produce such an amount as would enable the Government, without incurring loss, to increase the stated annuity.

Is it not the natural meaning of this, that if the territory should produce such an amount as would enable the Government out of it, and without incurring loss, to increase the stated annuity, then etc.? I am inclined to think so. Upon the whole, therefore, but not without doubt, it seems to me that there is a reasonably clear manifestation of an intention to devote a portion of the proceeds of the ceded lands in certain events to the increased annuities.

If this is so, it would follow that Ontario, getting the lands subject to the trust, would have to discharge the burden which before that was upon the province of Canada, now represented by the provinces of Ontario and Quebec, unless there is something in the British North America Act, or in some other binding instrument or act, to make it otherwise.

It is contended that the award of the arbitrators made in 1870 under the provisions of section 114 of the British North America Act has such effect. By that section it was provided that:

> The division of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada.

In accordance therewith arbitrators were appointed, and on 3rd September, 1870, their award was made, by paragraph 1 of which it was determined that:

The amount by which the debt of the late province of Canada exceeded on the 30th day of June, 1867, $62,500,000, shall be and is hereby divided between, and apportioned to, and shall be borne by the said provinces of Ontario and Quebec respectively, in the following proportions,

i.e., in a certain named ratio.

By paragraph 13 it was determined:

That all the lands in either of the said provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate by the other of the said provinces.

Before that tribunal the province of Quebec had contended that the amount at which the fixed annuities had been capitalized should be charged against the province of Ontario upon grounds similar to some of those urged in the present appeal respecting the augmentation of the annuities, but the arbitrators rejected the contention and held as already stated in par. 13 of their award.

Accordingly, the capitalized amount of the fixed annuities was finally adjusted and settled, and in respect of it Quebec had no right further to contend that it should be dealt with as a charge upon the ceded territory in Ontario, nor would the Dominion have the right so to contend inasmuch as the result of a contrary decision would be to give to Quebec in the ultimate accounting a charge or claim against Ontario in respect of it.

But the matter of the augmentation of annuities was not raised before the arbitrators, and if the views herein stated upon the main point are correct, it is apparent

1895

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

King J.

that the two things do not rest entirely upon the same foundations. The finding of the arbitrators that the claim as to the fixed annuities that was brought before them did not constitute a charge upon the lands, is therefore not conclusive as to the matters in question here. Par. 13 is to be read in the light of the contention before the arbitrators, and not as an abstract and general denial of all charges, etc., respecting the annuities, but simply as a denial of the lands being subject to the alleged charge to which it was then claimed to be subject.

The result therefore, in my view is, that while the word "debt" in the 112th section is comprehensive enough by itself to include a liability for increased annuities becoming payable after the union, this particular liability, or part of the debt, of the late province of Canada is to be regarded as cast upon the province to which by sec. 109 the land is given subject to the burden. I think, therefore, that the appeal should be dismissed.*

*The Dominion of Canada and the province of Quebec have respectively obtained leave to appeal from the judgment in this case to the Judicial Committee of the Privy Council.

THE CORPORATION OF THE TOWN OF TORONTO JUNCTION..... } APPELLANT ;

AND

DAVID D. CHRISTIE.....RESPONDENT.

1895

*May 17,18.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Increasing damages without cross appeal—Rule 61, *Supreme Court Rules—Special statute.*

Under the Ontario Judicature Act, R.S.O. [1887], c. 44, ss. 47 and 48 the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its rule no. 61. Taschereau J. dissenting.

Per Strong C.J.—Though the court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute requiring the court, on appeal from the award, to pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the court may do, and a cross-appeal is not necessary.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming, by an equal division of opinion, the judgment of Mr. Justice Rose (2), on an appeal from the award of arbitrators in an arbitration under the Ontario Municipal Act.

The respondent, Christie, claimed damages from the town corporation for injury to his property by reason of the grade of the street having been raised some six feet, and his claim was submitted to arbitration under the provisions of The Municipal Act. The arbitrators found that the property had been benefited by the change in the grade rather than injured, but considering that he was technically entitled to damages they awarded him $100 and a portion of the costs. On ap-

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

(1) 22 Ont. App. R. 21. (2) 24 O.R. 443.

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

peal to a judge from the award the damages were increased to $1,000 with full costs, the learned judge being of opinion that he could deal with the matter at large. On further appeal the judges in the Court of Appeal were equally divided in opinion as to the jurisdiction of the judge to increase the damages, and his judgment stood affirmed. The corporation then appealed to this court.

Aylesworth Q.C. and Going for appellants argued that all that could be done on appeal was to affirm or set aside the award, citing *Lemoine* v. *The City of Montreal* (1); *Paradis* v. *The Queen* (2); *Morrison* v. *The Mayor of Montreal* (3).

Riddell and Gibson for the respondent referred to *Charland* v. *The Queen* (4); *Guay* v. *The Queen* (5).

THE CHIEF JUSTICE.—I have read the judgment prepared by Mr. Justice Gwynne in this case and I agree with it in all respects. I only desire to add that it is not to be considered in any respect as a departure from the rule already laid down by this court in the cases in which it was held that when there was no cross-appeal the court would not increase the damages awarded to the respondent (6).

The court has so held not because it has no jurisdiction in such cases to increase the damages, for the rule relating to cross-appeals leaves the right to interfere in behalf of a respondent entirely in the discretion of the court, but for the reason that it is fair to an appellant that the respondent, if he desires to object to the judgment appealed against, should formulate his

(1) 23 Can. S.C.R. 390.
(2) 1 Ex. C.R. 191.
(3) 3 App. Cas. 148.
(4) 1 Ex. C.R. 298.
(5) 17 Can. S.C.R. 30.
(6) See *City of Montreal* v. *Labelle* 14 Can. S. C. R. 741; *Stephens* v. *Chaussé* 15 Can. S. C. R. 379; *Bulmer* v. *The Queen* 23 Can. S. C. R. 488.

objection by giving notice in order that the appellant may be apprised of what he is required to answer.

In the present case the appeal to the Court of Appeal of Ontario was under a statute which required the court to pronounce just such judgment as in its opinion the arbitrators ought to have awarded. The statute itself, therefore, was sufficient notice of what the court might be called upon to do, and the same reason applies in this court.

The appeal must be dismissed with costs, subject to the variation directed in Mr. Justice Gwynne's judgment.

TASCHEREAU J.—I would dismiss the appeal which should never have been taken.

GWYNNE J.—I cannot entertain a doubt that the learned judge Mr. Justice Rose before whom this case came by way of appeal from the award made by the arbitrators herein had authority and jurisdiction under the provisions of the Ontario Municipal Act of 1892, to deal with the case in the manner in which he did. This case, in my opinion, is an apt illustration of the wisdom of the legislature in making awards in matters of this nature, wherein the injured party is deprived of his remedy by action at law, appealable to the courts, for I must say I find it difficult to maintain the award of the majority of the arbitrators upon any principle of law and justice which is reconcilable with the evidence; the judgment of the learned judge upon the appeal is not, in my opinion, open to any objection unless it be that which has been suggested by himself in his judgment, namely, that he does not feel at all satisfied that the amount allowed by him and to which he has increased the amount of the award is sufficient to compensate the plaintiff for the injury

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

complained of or to put the houses into the condition in which they were before the execution by the defendants of the work which has caused to them the injury complained of. The property which has been injuriously affected by work performed by the Municipality of the town of Toronto Junction in the exercise of their powers consists of two brick houses having together a frontage of about thirty-six feet erected upon a small town plot of about forty feet in width and one hundred feet in depth. The predecessor of the plaintiff in title purchased in the year 1889 the town plot before it had any building erected upon it. The lot was for the most part situate in low land. It does not appear to have had and indeed could not have had any value except as a building site. Accordingly, immediately upon acquiring it the plaintiff's predecessor in title, in order to make it valuable, resolved to erect upon it two small but substantial brick houses having good cellars, and fitted so as to be heated by a hot air furnace, but before doing so, as the lot abutted upon two streets which would be likely at some time to be raised above the level of the land as it then was, he, as shown by the evidence and found as a fact by the learned judge, communicated with the corporation officials and endeavoured to ascertain the grade to which the streets upon which his lot abutted would be raised, but was unable to obtain any information further than that the streets would probably be raised two feet. He could obtain no levels from the corporation; all that he could obtain was that the corporation engineer surveyed the lot for him, for the purpose no doubt of defining its limits along the street so as to prevent the buildings proposed to be erected encroaching upon the streets. In order to be, as he conceived, upon the safe side he erected the houses along the limits of the streets as so defined so as to allow four feet instead of two for the eleva-

tion to which the grade of the streets could be raised without causing any damage to the houses and so that the first floor of the houses was upwards of six feet above the natural level of the ground as it then was. The houses were finished in the summer or autumn of 1890, and as so finished were supplied with good and sufficient drainage, and the corporation has ever since enjoyed the benefit of the increased taxation to which the property became subjected, as property having dwelling houses erected thereon. Now, some time after the completion of the houses, and while they were occupied by tenants at the rent of about $10 each per month, and in the year 1891, the corporation proceeded to raise the grades of the streets, and while such work was in progress, being advised that a by-law should be passed, the municipal council of the corporation upon 5th of August, 1891, passed a by-law numbered 219, whereby it was enacted

that the plans and profiles of Dundas Street, Weston Road south, Annette Street, Ontario Street and Union Street, as prepared by the town engineer, and deposited in his office, be approved and adopted, and that the said streets be graded in accordance with said plans and profiles under the direction of the town engineer, who is authorized to carry out said work.

The streets upon which the town plot under consideration abutted were the above named Annette and Union Streets. After the passing of this by-law and thereunder those two streets were elevated to the height of upwards of six feet above the natural level as it had been, and so that the crown of those streets was about on a level with the first floor, that is to say, with the ceilings of the cellars of the houses as they had been erected.

Had the streets been elevated to the height of four feet only above their former natural level no damage whatever would have been caused to the houses. It is only for damage consequent upon their having been

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

raised two feet still higher that the plaintiff complains. Now the evidence of the gentleman who was mayor of the town in 1891 seems to cast some doubt upon the *bona fides* of the elevation to which the streets were raised, and as to the necessity for such elevation. He says that he used to ask the council why so much earth was being put down on the streets, but never got a satisfactory explanation. He formed the opinion that private parties were getting it done for the benefit of their own lands. A gentleman, he says, who owned property in the neighbourhood seemed to have a pull on the subway earth (that is earth which the corporation in making a subway for a railway had to remove) and he says that he considered that the grade of the streets was raised so high as a good way of getting rid of the subway earth and to benefit the property of that gentleman and of others in the neighbourhood, the plaintiff's property being in point of fact the only property which was damaged thereby. But whether the streets were or were not raised to the height to which they were raised, either unnecessarily or *malâ fide*, for the purpose of benefiting the property of others by damaging that of the plaintiff is immaterial for our present purpose for the Municipal Act ch. 184 R.S.O. sec. 483 expressly enacts that:

> Every council shall make to the owners or occupiers of, or other persons interested in, real property taken or owned by the corporation in the exercise of any of its powers or injuriously affected by the exercise of its powers, due compensation for any damage necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work, and any claim for such compensation, if any, not mutually agreed upon, shall be determined by arbitration under this act.

The effect of raising the streets upon which the houses abutted to the height to which they were raised was 1st, to deprive the houses of the drainage which

they had had without providing any substitutionary mode of drainage, and 2nd, to cause all the water falling upon the streets to pour down into the cellars of the houses and to make them as the evidence abundantly shows not only unsaleable but utterly uninhabitable unless and until some effectual mode of repairing the damage done and preventing a recurrence of the nuisance should be adopted. The evidence also shows that while the drainage which the houses formerly had is cut off, and while the corporation have constructed two drains in the adjoining streets, one is not placed low enough to carry off the water from the plaintiffs houses and into the other; although situate low enough the corporation have refused permission to the plaintiff to have access. For the injury thus caused the plaintiff had to pay his tenants for injury to their property $33 and to expend the further sum of $75 in executing some temporary work to prevent in some degree the recurrence of a flood of like character into the cellars of the houses; besides the moneys so expended amounting together to $108, and the loss of tenants ever since by reason of the houses having been rendered untenantable, the plaintiff has been damnified to the extent of the amount necessary to put the houses into as good and tenantable state of repair as that in which they were before the streets were raised to the height which has caused the injury complained of.

Now the nature and extent of the damage done consequential upon the work of the corporation and the cost of making all necessary repairs and of putting the houses into as tenantable a state of repair as they were in before that work was done are matters capable of pretty precise estimate by witnesses who are experts. Several witnesses of this description having large experience in the value of property of this description, have testified that the houses in their present condition

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

are wholly untenantable and also unsaleable, unless at the sacrifice of fully 50 per cent of the cost of the houses, that is to the amount of about $2,000, the actual cost of the two houses having been $4,000, and two architects and builders of houses have made precise estimates in items of the amount necessary to be expended in making the houses tenantable and in preventing a recurrence of the damage. Adopting that which is the lowest and therefore most favourable to the corporation, we find that amount to be $1,673.20. Of this sum $155 covers all the items in the estimate which can fairly be attributed to damage arising, assuming any to have arisen, from any other cause than the work for which the corporation are responsible, namely the cutting off the drainage which the houses had and substituting no other in its place, and the flooding of the houses necessarily arising from the grade of the streets having been raised to the level of the ceilings of the cellars, that is to say to a height of two feet above a point at which if the grade had been fixed no damage whatever could have been caused to the plaintiff's property.

These items are:

1. Repairing settlement brick and stone.....	$75 00
2. Carpenters' work, rebuilding foundation, sheeting base of porches and steps, fitting doors, trimmings, &c., after raising.....	50 00
3. Repairing plastering, painting and cementing down pipes..	30 00
	$155 00

Deducting this sum from the above $1,673.20, leaves the sum of $1,518.20 as the lowest estimate of the cost of putting the premises into that tenantable state of repair in which they were before the corporation executed the works complained of.

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

The contention of the corporation was that there had been a settling of part of the walls of the houses, which as was contended caused at least some part of the damage done. Now, although it is true that the evidence showed that when the foundation was being built there did occur a slight settlement at one point, still the evidence showed also that it was observed at the time and that provision was made to rectify it, and that there had been no settlement whatever after the houses were completed. However, *ex majori cautelâ*, and to avoid allowing to the plaintiff anything in respect of damage which the work of the corporation did not cause, I deduct the above sum of $155 as covering all items in the estimate for any damage which can be attributed to any other cause than the work of the corporation.

Now, to the above sum of $1,518.20, it is but just and reasonable that $108 expended in manner above mentioned should be added, thus making $1,626.20, and as the houses which formerly were rented at $10 per month each have been rendered utterly untenantable by the damage consequential on the work of the corporation, it is but reasonable that some allowance for loss of rent should be made. Upon this point it was urged on behalf of the corporation that there has been a general fall in rents, and indeed in the value of al real property in the neighbourhood, and that the houses might have become unoccupied, or if not occupied at very reduced rents even if the streets had never been raised. It was, however, the work of the corporation which made them untenantable, in which condition, by reason of their resisting the claim of the plaintiff, they continued to be for two years up to the date of the award. Under these circumstances the corporation cannot reasonably ask that a greater reduction should be made from the amount the plaintiff

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

would have received for rent, but for the work of the corporation, than 50 per cent of the amount formerly received. At this rate there should be added to the above sum of $1,626.20 the further sum of $240 for two years rent at $5 per month per house, making $1,866.20. Now, the arbitrators by their award have found that the premises of the plaintiff have been injuriously affected by the works of the corporation, but to the amount only of "$200" over and above

any benefit and advantage to the said land and premises arising from the grading and levelling of said streets.

How the arbitrators arrived at this sum we have no means of determining, nor had Mr. Justice Rose save by perusal of the evidence taken on the arbitration. The award, however, in its terms seems to show that some amount, though how much we cannot even guess, for no amount whatever was suggested in the evidence, has been deducted by the arbitrators from the cost of reinstating the premises in a tenantable condition as for some benefit or advantage which it has been assumed has been conferred upon the property which has been injured by the works of the corporation. Assuming any such deduction to have been made I not only concur with Mr. Justice Rose in holding that the award is wholly irreconcilable with the evidence but am of opinion that such a deduction in the present case would be contrary to every principle of justice and is unwarranted by the statute under which the arbitration has taken place. What the statute, namely sec. 483 of the ch. 184 R.S.O., enacts is that the corporation shall pay to all owners of property injuriously affected by work done by the corporation in the exercise of its powers—

due, that is to say full, compensation for any damage necessarily resulting from the exercise of these powers beyond any advantage which the claimant may derive from the contemplated work.

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

Now I must say that to me it does not seem to be possible within the limits of common sense to conceive how a small property like that of the plaintiff (the whole value of which consisted in the enjoyment of the two houses as dwelling houses together with the appurtenances thereto belonging), or how the claimant himself could derive any advantage whatever in respect of such property from work the necessary results of which has been proved to be that the houses have been rendered uninhabitable and even unsaleable at any price short of a sacrifice of at least 50 per cent of their cost; and that an outlay of a sum exceeding $1,500 is necessary to reinstate them in as good and tenantable a condition as they had been in. What the statute contemplates and the utmost it authorizes is that the value of any benefit if any there be which the injured property, that is to say which the property in its injured condition, may derive from the work which causes the injury if it can be ascertained and is not wholly speculative may be deducted from the amount which, apart from the value of such benefit, would be required to afford due compensation for the injury.

If, for example, property be injured in such a manner that it is necessary that the injury caused should be repaired before any benefit could accrue, the statute is not open to a construction so at variance with common justice and common sense, as that the prospective speculative estimate of the value of such benefit should be deducted from the amount necessary to repair the injury and to put the property into a condition to receive such benefit. Such benefit could not be said to be derived from the work causing the injury, but from the outlay expended to repair the injury. In the present case there is no suggestion whatever in the evidence that the plaintiff's property, in the condition in which it was when injured, has derived, or could

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

derive, any benefit from the work which has caused the injury; all that is suggested is that if the plaintiff's property had been quite different from what it was, that is, if it had been a vacant lot, it would in that case have derived some benefit from the work, the value of which benefit was so wholly speculative and unsubstantial and unreal that no attempt even was made to estimate it; but as to the plaintiff's property in the condition in which it was, being house property, the evidence is that nothing but injury resulted to it from the corporation work, which injury must continue until repaired or until due compensation, as required by the statute, shall be given therefor.

Although there has been no cross-appeal instituted by the plaintiff against the judgment of Mr. Justice Rose, still the Ontario Judicature Act ch. 44 ss. 47 and 48 R.S.O. and the rule of court, no. 16, made under that Act, gave full power to the Court of Appeal for Ontario to increase the amount to which the award had been increased by Mr. Justice Rose, and so likewise has this court like power under its rule no. 61.

In *The Queen* v. *Robertson* (1), although there was no cross-appeal, this court gave judgment in favour of the respondent upon a point in the case which the court below had adjudged against him. This is the precedent which I think should be followed in the present case, in order to prevent what otherwise, as it appears to me, would be a complete failure of justice, and that the plaintiff may have that adequate compensation for the injury done to his property by the work of the corporation which the statute contemplated assuring to him, and to prevent this remedy by arbitration to which he is limited by the statute proving to be illusory. I am of opinion, therefore, that the award should be increased to the above sum of

(1) 6 Can. S.C.R. 52.

1895

THE TOWN OF TORONTO JUNCTION v. CHRISTIE.

Gwynne J.

$1,866.20, for which sum, with interest thereon from the 19th of October, 1893, the date of the award, the plaintiff should have judgment, together with his costs, and that this variation being made the appeal should be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs, and judgment varied.

Solicitor for the appellants: *Charles C. Going.*

Solicitor for the respondent: *A. Cecil Gibson.*

1895

*Oct. 1.

*Dec. 9.

JOHN T. ROSS AND OTHERS (SUPPLIANTS)..... APPELLANTS;

AND

HER MAJESTY THE QUEEN (RESPONDENT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Final certificate of engineer—Previous decision—Necessity to follow.

The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliants' work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors.

Held, per Taschereau, Sedgewick and King JJ., that as the court in *McGreevy* v. *The Queen* (18 Can. S.C.R. 371) had, under precisely the same state of facts, held that the contractor could not recover that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed.

Held, per Gwynne J., that independently of *McGreevy* v. *The Queen* the contractor could not recover for want of the final certificate.

Held, per Strong C.J., that as in *McGreevy* v. *The Queen* a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment.

APPEAL from a decision of the Exchequer Court of Canada (1) dismissing the suppliant's petition of right.

The circumstances of this case were precisely the same as those in *McGreevy* v. *The Queen* (2). The suppliants were contractors for construction of a portion of the Intercolonial Railway, and before the work

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

(1) 4 Ex. C.R. 390. (2) 18 Can. S.C.R. 371.

1895

ROSS v. THE QUEEN

was completed the engineer, Mr. Sandford Fleming, resigned the position. Some time after Mr. Shanly, C.E., was appointed by the Crown to investigate unsettled claims in connection with the railway and report to the Government. He reported on the claim of the suppliants, recommending payment to them of a certain sum, but payment was refused, and in answer to a petition of right filed the Crown contended that there was no final certificate of the engineer, approved by the railway commissioners, as required by the Intercolonial Railway Act. The Exchequer Court judge dismissed the petition, holding that he was bound by the decision in McGreevy's case. The suppliants appealed.

Stuart Q.C. and *Ferguson* Q.C. for the appellants. In *McGreevy* v. *The Queen* (1) the judges were not in accord on matters of law, and the decision does not bind the court. See *Stanstead Election Case* (2); *Ridsdale* v. *Clifton* (3).

The merits were fully discussed in the former case, and we rely on the judgment of Strong J. therein.

Hogg Q.C. for the respondent, contended that the court could not but follow *McGreevy* v. *The Queen* (1), and on the merits cited *Cutler* v. *Powell* (4); *Munro* v. *Butt* (5).

THE CHIEF JUSTICE.—For the reasons stated in my judgment in the case of *The Queen* v. *McGreevy* (1), a case which involved precisely the same questions as those which are presented by the appeal now before the court, I am of opinion that this appeal should be allowed and judgment should be entered in the Exchequer Court for the suppliants.

(1) 18 Can. S.C.R. 371.
(2) 20 Can. S.C.R. 12.
(3) 2 P.D. 276.
(4) 2 Sm. L.C. 9 ed. 1.
(5) 8 E.& B. 738.

1895

ROSS v. THE QUEEN.

The Chief Justice.

The case of *The Queen* v. *McGreevy* (1) I do not consider a binding authority for the reason that a majority of the judges composing the court were not of accord on any proposition of law on which the decision of the appeal depended. The late Chief Justice and Mr. Justice Gwynne were of opinion that the certificate of Mr. Shanly was not the final certificate of the chief engineer. My brother Taschereau, my late brother Patterson and myself, in accord with the Exchequer judge, Mr. Justice Fournier, were of opinion that the certificate of Mr. Shanly was the final and closing certificate required by the contract. Mr. Justice Patterson, however, differing from the members of the court who in other respects agreed with him, thought that was not sufficient to entitle the suppliants to recover. Upon this latter point there was no concordance of a majority of the court. Under these conditions it is apparent that there was no agreement of a majority of the court on any distinct proposition of law. Upon authority, therefore, I consider the judgment in *The Queen* v. *McGreevy* (1) not to be a decision binding upon me, inasmuch as the judgment of the majority of the court proceeded upon no settled principle but upon different grounds.

I am, therefore, of opinion that the appeal should be allowed and judgment entered in the Exchequer Court in favour of the suppliants.

TASCHEREAU J.—Whatever may have been the reasons given by each of the judges who concurred in dismissing the suppliants' claim in *The Queen* v. *McGreevy* (1), the decision in that case is that upon a certificate such as the one upon which the suppliants here rely, the Crown is not liable. By that decision we are bound, and the appeal must be dismissed. It would

(1) 18 Can. S.C.R. 371.

1895

ROSS v. THE QUEEN.

Taschereau J.

be a blot on the administration of justice in this country if the present appellants succeeded upon a case precisely similar to that in which McGreevy failed.

GWYNNE J.—Upon the 26th day of October, 1869, two persons doing business together as contractors in partnership under the name, style and firm of J. B. Bertrand and Company, entered into a contract by deed with Her Majesty represented by the Intercolonial Railway Commissioners appointed under the Dominion statute 31 Vic. ch. 13, for the construction of a portion of the Intercolonial Railway, known as section nine of that railway, according to certain plans and specifications annexed to and made part of the said contract.

Upon the 15th day of June, 1870, the same contractors in like manner entered into a similar contract with Her Majesty for the construction of another portion of the said railway known as section fifteen thereof. By the said respective contracts the said contractors covenanted with Her Majesty that the said section number nine should be finally and entirely completed in every particular to the satisfaction of the said commissioners and their engineer on or before the first day of July, 1871, at and for the price or sum of $354,897 to be paid as in the contract for that section was provided, being at the rate of $16,899.86 per mile of that section, and that the said section number fifteen should in like manner be finally and entirely completed to the satisfaction of the said commissioners and their engineer on or before the first day of July, 1872, for the price or sum of $363,520.59, to be paid as in the contract for that section was provided, being at the rate of $30,000 per mile on that section. The said contractors by the said respective contracts further covenanted with Her Majesty—

1895

ROSS v. THE QUEEN.

Gwynne J.

That all the works should be executed and materials supplied in strict accordance with the plans and specifications, and to the entire satisfaction of the commissioners and their engineer, and that the commissioners should be the sole judges of the work and material, and that their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specifications or plans, or upon points not provided for, or not sufficiently explained in the plans or specifications, should be final and binding upon all parties. By paragraph no. 3 of said respective contracts, it was covenanted that the times before mentioned for the final completion of the works embraced in the respective contracts should be of the essence of the said respective contracts, and that in default of such completion on the respective days for that purpose limited by the contracts the said contractors should forfeit all right and claim to the sum or percentage by the said respective contracts agreed to be retained by the commissioners. and also to any moneys whatever which at the time of such failure of completion as aforesaid might be due or owing to the contractors; and that the contractors should also pay to Her Majesty as liquidated damages and not by way of fine or penalty the sum of two thousand dollars for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced in the said respective contracts, or any portion thereof, should remain incomplete, or for which the certificate of the engineer approved by the commissioners should be withheld, and the commissioners might deduct and retain in their hands such sums as might become due for liquidated damages from any sum of money then due or payable, or to become due and payable there-

1895

ROSS
v.
THE QUEEN.

Gwynne J.

after to the contractors. By paragraph numbered 4 in the said respective contracts it was provided that:

The engineer should be at liberty at any time before the commencement or during the construction of any portion of the work to make any changes or alterations which he might deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works whether or not such changes increased or diminished the work to be done, or the expense of doing the same, and that the contractors should not be entitled to any allowance by reason of such changes, unless such changes consisted in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work, or entitled to such allowance for increased work, as the case may be, as the commissioners might deem reasonable, their decision being final in the matter.

By paragraph 9 of the said respective contracts it was declared that—

9. It was distinctly understood, intended and agreed that the said prices or consideration of $354,897 in the one case and of $363,520.50 in the other shall be and shall be held to be full compensation for all the works embraced in or contemplated by the said respective contracts or which might be required in virtue of any of the provisions of the same, or by law, and that the contractors should not upon any pretext whatever be entitled by reason of any change or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer by the said respective contracts, or by law, to claim or demand any further

1895

ROSS
v.
THE QUEEN.

Gwynne J.

or additional sum for extra work or as damages or otherwise the contractors by the said respective contracts expressly waiving and abandoning all such claims or pretensions to all intents and purposes whatsoever except as provided in the fourth paragraph or section of the said respective contracts.

By the eleventh paragraph or section of the said respective contracts it was further mutually agreed upon by the parties thereto—

11. That cash payments equal to 85 per cent of the value of the work done approximately made up from the returns of progress estimates should be made monthly, on the certificate of the engineer that the work for or on account of which the sum should be certified had been duly executed, and upon approval of such certificate by the commissioners; that on the completion of the whole work to the satisfaction of the engineer a certificate to that effect should be given but that the final and closing certificate including the 15 per cent retained should not be granted for a period of two months thereafter; and that the progress certificates should not in any respect be taken as an acceptance of the works or release of the contractors from their responsibility in respect thereof, but that they, upon the conclusion of the works, would deliver over the same in good order, according to the true intent and meaning of the contract and of the specifications annexed to and made part of the said contract.

The contractors proceeded with the construction of the works under these contracts, and from time to time received progress certificates from Mr. Fleming, the engineer of the commissioners, and payment thereof, but they wholly failed to complete the respective works on the days limited by the contracts for the completion thereof, namely, the section 9 on the 1st

day of July, 1871, and the section 15 on the 1st day of July, 1872, and in the spring of 1873, by reason of such default continuing, the commissioners were obliged to take the completion of the said works into their own hands, and did complete the same under the terms of the contract at the cost of the Government.

The statement in the suppliants' petition of right in relation to this matter is thus stated by the suppliants in 23rd, 24th, 25th and 26th paragraphs of the petition of right.

23. The said J. B. Bertrand & Co., under the aforesaid contract for section 9, had undertaken to finish and complete the same on or about the first day of July, one thousand eight hundred and seventy-one, and they did virtually complete the same on or about the month of May, 1873, and if any delay occurred in the completion of the same it is altogether attributable to the acts of the commissioners and engineers under their directions, to the alterations made in the grades and line of location, to changes in the works and to large quantities of extra and surplus work imposed upon the said J. B. Bertrand & Co. and for which they cannot be held responsible.

24. The said J. B. Bertrand & Co. under the aforesaid contract for section 15, had undertaken to finish and complete the same on or about the 1st day of July, 1872, and they did virtually complete the same on or about the month of May, 1873, and if any delay occurred in the completion of the same it is attributable to the acts of the commissioners and the engineers under their direction—to the alterations made in the grades and line of location—to changes in the works and to the large quantity of extra and surplus work imposed upon the said J. B. Bertrand & Co., and for which they cannot he held responsible.

25. That the said commissioners in the spring of the year 1873, under misapprehensions and without any reasonable cause, and at a time when a large amount of money was due to the said J. B. Bertrand & Co. for work done, assumed control of the said works upon the said sections, and without giving J. B. Bertrand & Co. any notice of their intention of so doing in writing or otherwise as required by contract, paid out money so belonging to the said J. B. Bertrand & Co. to some of the workmen on the said works, which position the said J. B. Bertrand & Co. were forcibly constrained to accept.

26. That in consequence of this action of the commissioners the said J. B. Bertrand & Co. suffered great loss from the fact that the said

1895

ROSS
v.
THE QUEEN.

Gwynne J.

commissioners, after assuming control of the works, expended unnecessarily large sums of money which would not have been expended, and which the said J. B. Bertrand were not bound to expend, and which were for works not contemplated nor included in the contracts, and it is submitted that no portion of the same can be charged in deduction of the lump sum mentioned in the contracts for sections 9 and 15.

The allegations in these paragraphs of the petition are thus answered in paragraph no. 24 of the statement of defence filed by Her Majesty's Attorney General.

24. Her Majesty's Attorney General in answer to paragraphs 23, 24, 25 and 26 of the said petition says that the contractors having made default in the prosecution of the work required to be done under the said contracts, the said commissioners in strict accordance with the provisions of the said contracts and with the contractors' assent, finding the men employed by the contractors on the said sections of the said railway unpaid, notwithstanding that up to that time the contractors had been paid more than they were entitled to under the contracts, and finding the work upon the said sections stopped, took the work into their own hands and proceeded to complete the same in accordance with the terms of the said contracts; and the said Attorney General denies that the default of the contractors in not proceeding with their work upon the said sections was in any wise attributable to the said commissioners or the engineer of the Government.

Now after the completion of the work by the commissioners, and upon the first day of June, 1874, the said commissioners by force of an Act of the Dominion Parliament, 37 Vic. ch. 15, became *functi officio*, and thereupon all the powers and duties which had been vested in them became by the said Act transferred to and vested in the Minister of Public Works, and by the Act it was enacted and declared that all contracts entered into with the commissioners as such should enure to the use of Her Majesty and should be enforced and carried out under the authority of the Minister of Public Works as if they had been entered into under the authority of an Act passed in the 33rd year of Her

Majesty's reign entituled an Act respecting the Public Works of Canada.

Although the commissioners by this Act ceased to have control over the contracts entered into with them for the construction of the works contracted for by the above named contractors, their engineer, Mr. Fleming, continued for several years to be the engineer in charge of the Intercolonial Railway under the Minister of Public Works; and he could have given to the contractors the certificate in the above 11th paragraph of their contracts mentioned if they had by fulfilment of their contracts to his satisfaction became entitled to such certificates; but he never did give to them and indeed never could have given to them any such certificates within the terms of the contracts in that behalf for, by the default of the contractors to complete the works within the times in that behalf provided by the contracts, and the commissioners having been obliged because of such default to take the works from the contractors and to complete them themselves, the contractors by the express terms of the above third paragraph of the contracts had absolutely forfeited all claim to all sums which then remained due to them under their contracts, and all claim to have a certificate given to them by the engineer to the effect that they had completed the works in the contracts specified to his satisfaction.

In the month of September, 1875, all the rights, title, interest and demand of the said J. B. Bertrand & Co. against the Government of the Dominion of Canada, arising out of and connected with the construction of the said sections 9 and 15, were duly transferred to a Mr. John Ross, since deceased, whose representatives the present suppliants are. In the month of June, 1880, a Mr. Frank Shanly, C.E., was by an order in council dated the 21st June, 1880, ap-

1895
Ross
v.
The
Queen.
Gwynne J.

pointed chief engineer of the Intercolonial Railway "for the purpose (as stated in the order in council) of investigating and reporting upon all unsettled claims in connection with the construction of the line." In the month of July, 1881, Mr. Shanly made a report to the government in relation to a claim of J. B. Bertrand & Co. in respect of their contracts for the said sections 9 and 15, and it is upon this report that the claim of the suppliants is wholly rested, their contention being that it constitutes the final and closing certificate of the engineer given under the provisions of, and within the meaning of, the above quoted 11th section of the contracts with the said J. B. Bertrand & Co., and that under it the suppliants as representing J. B. Bertrand & Co. are entitled to recover the amount mentioned therein as an amount due to J. B. Bertrand & Co. under their contracts. Now without saying that in 1880, when Mr. Shanly was so appointed chief engineer of the Intercolonial Railway, there may not have been contracts in existence for work upon that railway in such a position that Mr. Shanly could have given certificates as contemplated by, and provided for in, the contracts for such work, it is in my judgment quite impossible to say that his appointment "for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line" gave him, or that any order in council could give him, authority to accept as completed, and to certify as completed, by the contractors to his satisfaction works which, like those on sections 9 and 15, had seven years previously been taken from the contractors for default in fulfilment of their contracts, and had been completed by the government through the said commissioners under the direction of their engineer, Mr. Shanly's predecessor, who alone was the person who could have certified that the

1895

ROSS v. THE QUEEN.

Gwynne J.

contractors had completed the works contracted for, if they had completed them, to his satisfaction as provided by the contracts. The language of the order in council appointing Mr. Shanly plainly, in my opinion, indicates that in a case like the present Mr. Shanly could do no more than investigate and report to the Government any circumstances attending the default of Messrs. J. B. Bertrand & Co. in fulfilment of their contracts, which might appear to warrant the Government, notwithstanding the forfeiture by the contractors of all right to any payment under their contracts, in entertaining favourably and *ex gratiâ* any claim preferred on behalf of the contractors, altogether apart from the contracts, and this, in my opinion, is precisely what Mr. Shanly's report in relation to J. B. Bertrand & Co.'s contracts does, and nothing more

He reports, first, that in May, 1873, neither of the sections was completed, and that the commissioners then took the works into their own hands and finished them. He then proceeds to say that he could find nothing to warrant, in a strict legal point of view, a departure from the terms of the contracts, which provide for all contingencies arising out of the increase or decrease of quantities shown in the bill of works and schedule of prices upon which the contracts were based; that it did not appear that the quantities were increased in the aggregate, but on the contrary they were decreased.

He thus reports to the government that the commissioners were justified in taking the works off the contractors' hands and in completing them themselves. Now, in this state of facts, the contracts provided in the above third paragraph thereof, that the contractors should forfeit all moneys whatsoever which at the time of their failure of completion of the works as provided in the contracts should be due or owing to them.

1895

ROSS v. THE QUEEN.

Gwynne J.

The facts as above reported also showed that nothing was claimed by or on behalf of the contractors under the 4th paragraph of the contracts, and that being so, the 9th paragraph of the contracts expressly provided that upon no pretext whatsoever should the contractors be entitled to claim or demand any sum in excess of the respective above mentioned contract lump sums, for extra work or as damages or otherwise howsoever, the contractors hereby expressly waiving and abandoning all such claims or pretensions to all intents and purposes whatsoever except as provided in the fourth section of the contracts.

Having thus reported and shown that the contractors had no claim under the terms of their contracts, Mr. Shanly in his report proceeded to recommend an allowance in excess of the lump sums agreed upon in the contracts to be made, namely, of $104,587 on section 9, and of $127,600 on section 15. Of the lump sum or contract price agreed upon for section 9, namely, $354,897, he reported that the contractors, when the work was taken off their hands in May, 1873, had been paid $346,658, leaving only a balance of $8,239 of the contract price for completion of that work, and as to section 15 he reported that the contractors had been paid the sum of $372,130, or the sum of $8,610 in excess of the contract price agreed upon for that section, and adding the $8,239 to the $104,587, making $112,816, he recommended that this sum should be allowed by the government on section 9, and deducting the above $8,610 from the $127,600 recommended in excess of the contract price of section 15, making the sum of $118,990, he recommended should be allowed on section 15. These sums he recommended should be allowed, not as being due under the contracts for his report clearly shows they were not, but because the evidence furnished to him disclosed great difficulties and cost incurred by the contractors in carrying out the heaviest portions of the

work, and he closes his report by saying that he thought the increased amounts he recommended would be equitable to the contractors and to the Government; that he thought that if the Government should adopt his recommendations the contractors would have a reasonable profit and that the Government would have full value for its money.

I confess that I am utterly unable to understand how these sums so recommended can be claimed to be sums recoverable under the terms of the contracts or how Mr. Shanly's report can be claimed to be a certificate within the meaning of the 11th paragraph of the contracts.

The appeal must in my opinion be dismissed with costs.

As it was argued that in a case of *McGreevy* v. *The Queen* (1) where a similar question arose there was not a concurrence of a majority of the court in the reasons upon which the judgment in that case was founded and that it therefore should be considered an open question I have thought it best, without entering into any question as to the correctness of that argument, to state anew my views in this case irrespective of the judgment in that case, the court being now differently constitute

SEDGEWICK J.—I am of opinion that in this case it is our duty to follow the decision of this court in *McGreevy* v. *The Queen* (1). I am also of opinion that although Mr. Shanly was an engineer capable of giving the certificate required by the statute yet the documents relied on as such certificate did not come up to the requirements of the Act. It was not, nor was it intended to be such a certificate.

(1) 18 Can. S. C. R. 371.

1896

ROSS v. THE QUEEN.

King J.

KING J.—I am of opinion that in this case we should follow the decision of the court in *McGreevy* v. *The Queen* (1).

*Appeal dismissed with costs.**

Solicitors for the appellants: *Pentland & Stuart.*

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

(1) 18 Can. S. C. R. 371.

*The Judicial Committee of the Privy Council has granted leave to appeal from this decision.

SYLVESTER NEELON (PLAINTIFF).....APPELLANT; 1895

AND *Oct. 14, 15, 16.

THE CITY OF TORONTO AND E. J. LENNOX (DEFENDANTS).... RESPONDENTS. 1896

*Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract, construction of—Inconsistent conditions—Dismissal of contractor —Architect's powers — Arbitrator—Disqualification—Probable bias— Evidence, rejection of—Judge's discretion as to order of evidence.

A contract for the construction of a public work contained the following clause "in case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary dispatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion, (with the consent in writing of the Court House Committee, or Commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor."

Held, Sedgewick and Girouard JJ. dissenting, that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the Committee.

At the trial, the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the

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

1895

NEELON
v.
THE
CITY OF
TORONTO.

materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved and if necessary what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.

Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling, of evidence within the discretion of the trial judge.

APPEAL from a decision of the Court of Appeal for Ontario dismissing the plaintiff's appeal from the judgment of the Chancery Division, which affirmed the judgment dismissing the plaintiff's action in the court below.

The material facts sufficiently appear from the above head-note and are more fully set out in the judgments reported.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellant. The first clause of the conditions is not inconsistent with the contract within the meaning of that term as used. The court must, if possible, harmonize the whole and only reject what is absolutely at variance with the whole. *In re Phœnix Bessemer Steel Co.* (1); *Anderson's Case* (2); *Fitzgerald* v. *Moran* (3).

The trial judge should have permitted evidence of malice on the part of the architect to be given. His ruling was not as to the mere marshalling of evidence, but a determination on matters of law. *Kemp* v. *Rose* (4); *Pawley* v. *Turnbull* (5); *Jackson* v. *Barry Railway Co.* (6).

As to notice by the architect, see *Roberts* v. *Bury Commissioners* (7).

McCarthy Q.C. and *Fullerton* Q.C. for the respondent, the city of Toronto. The general conditions are in

(1) 44 L.J. [Ch.] 683.
(2) 7 Ch. D. 75.
(3) 47 N.Y. 379.
(4) 1 Giff. 258.
(5) 3 Giff. 70.
(6) [1893] 1 ch. 238.
(7) L. R. 5 C. P. 326.

force only "if not inconsistent with the contract." The court is not, therefore, to read the documents as one, but only to say whether they are or are not consistent. See *Pauling* v. *Mayor of Dover* (1).

Nesbitt and *Grier* for the respondent Lennox, referred to *Vanderlip* v. *Smyth* (2).

TASCHEREAU J.—I agree with the opinion of Mr. Justice Gwynne. I think the appeal should be dismissed.

GWYNNE J.—Whatever cause of action, if any, the plaintiff has upon the matters alleged in his statement of claim, it is the same as he had when the action was commenced upon the 5th of September, 1892, and when he thereupon made the application for an injunction, which application resulted in the order of 10th of September, 1892.

Now, first, with reference to that order it may here be observed that the undertaking of the defendants therein recited—that they would keep proper accounts in respect of the work as it should progress—is no more than seems to have been provided for by the 8th clause of the contract, and the 10th and 11th clauses seem to provide sufficiently for all damages upon a settlement after the completion of the works, of all disputes which may have arisen during the progress of the works from whatever cause arising; what the order substantially does, as it appears to me, is that it refuses the injunction as asked for the removal of the architect and authorizes the work being proceeded with under the terms of the contract, as in the case when the contractor is dismissed for non-compliance with the requirements of the architect after the lapse of ten days from the service of notice as provided in the con-

(1) 24 L.J. [Ex.] 128. (2) 32 U.C.C.P. 60.

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

tract. Nothing whatever appears upon the papers produced in evidence by the appellant in relation to the matters in dispute between the contractors and the architect, before the Court House committee and the council, which afford any warrant for the extraordinary relief asked for in the motion for the injunction, namely of interfering with the contract by removal of the architect from the discharge of the duties imposed upon him by the contract.

The plaintiff's right to recover damages in the present action depends upon the result of the action as to the plaintiff's contention, namely, that nothing had occurred which afforded any justification to the defendants for dismissing the contractors from the work and proceeding with it themselves under the provisions of the contract in that behalf, or in other words, that the plaintiff was right and the architect wrong as to the sufficiency of the stone within the terms of the contract, and that the delay which had arisen in proceeding with the work was not the fault of the contractors, but of the architect, who had erroneously condemned, as not in compliance with the terms of the contract, material which the contractor insisted was in perfect compliance with the contract. This constituted the sum and substance of the controversy between the contractor and the architect up to the time of the commencement of this action and the motion for the injunction therein.

The undertaking of the defendants recited in the order is to pay such damages, if any, as should be awarded in the action "if the defendants were not justified in," (that is to say, had no jurisdiction, as was contended by the plaintiff, no justifying cause within the terms of the contract for) "taking the work out of the contractors' hands and proceeding with it themselves under the provisions in the con-

tract." No idea is suggested of the recovery of damages which would be purely nominal, occasioned merely by the non-fulfilment, if any there was, of some purely technical mode or form in the procedure to dismiss the contractors and to proceed with the work in the manner provided by the contract in a case where the justifying cause specified in the contract as authorizing the dismissal of the contractor and procedure with the work by the defendants under the provisions in the contract in that behalf existed. It never was supposed nor contended that if the justifying cause for taking the work out of the contractor's hands existed the plaintiff could in the present action recover substantial damages, for which alone the action could be maintained, if maintainable at all, because of the defendants not having taken some formal step, if any such was necessary, in the mode of procedure adopted for taking the work out of the contractor's hands when abundant cause for taking the work out of their hands existed under the terms of the contract. When this action was commenced on the 5th September, 1892, and when the motion for an injunction was made to the court on the 8th September, 1892, nothing had been done beyond giving the notice contained in the letter of the 29th August, which notice beyond all question the architect, without any concurrence of the Court House committee or of any other authority, was by the contract empowered to give and as the agent of the corporation not as a judge or arbitrator. The ten days given by that notice for the fulfilment of the architect's requirements had not elapsed. Whatever was the plaintiff's cause of action, any he had upon the 5th November, 1892, constitutes his cause of action now, and that involves this simple inquiry:—Was the plaintiff right in his controversy with the architect, and the architect wrong, as to the sufficiency of the stone which was

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

provided by the contractor and condemned and rejected by the architect, as had been the contention of the plaintiff before the Court House committee, the mayor of the city and the city council, and was the delay which had taken place in the progress of the works, occasioned by such erroneous condemnation and rejection of the stone?

The frame of this statement of claim with its prayer of relief therein, which points to nothing short of altering wholly the contract between the parties and procuring the court to assume the architect's duty of approving of the materials to be used in the work and in other respects assuming the duties which the contract imposes upon the architect, and demanding his removal, is based, as it appears to me, upon a misconception of the position occupied by the architect under the contract in the exercise of the functions vested in him thereby of rejecting and condemning or accepting material supplied by the contractors for the work and of giving notice to the contractors to supply proper material, etc., etc.

The contract is that the contractors will execute the work and provide all proper materials of the kind specified to the satisfaction of the corporation's architect or the clerk of the works, and that if they fail to provide such material as the corporation's said architect or the clerk of the works shall deem proper or shall fail to carry on the work with the expedition the architect or the clerk of the works shall deem necessary, then the architect may give them notice to the effect specified in the contract. In the exercise and discharge of his duty in respect of these matters it is not in the character of a judge or an arbitrator between the corporation and the contractors that the architect is by the contract authorized to act, but as an expert agent of the corporation in respect of those matters.

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

When he rejects as not in compliance with the contract material, which, as contended by the plaintiff in the present case, was in perfect compliance with the contract, it is the corporation who rejects, and if any actionable wrong be done by the rejection it is the corporation who are responsible in an action for damages for wrongful interference with the plaintiff in the fulfilment of his contract; to such an action the architect is not a necessary party. This, in my opinion, is the true conclusion to be arrived at from *Roberts* v. *Bury Improvement Commissioners* (1) as applicable to the present case.

Now, if there be anything in the above statement of claim which is cognizable in this action, it is simply this allegation that the architect wrongfully rejected and condemned, as not being in compliance with the contract, certain of the material supplied by the contractors for the work, and would not suffer such material to be used, although, as the plaintiff alleges and insists, the material so rejected and condemned was in perfect compliance with the terms of the contract. In such an action the architect would neither be a necessary or a proper party; the plaintiff's right of action would be established if he should be able to establish that the material so rejected was, as the plaintiff insists, in perfect compliance with the contract and so wrongfully rejected. The additional averment in the statement of claim in the present case that the architect in rejecting the material was actuated by malice towards the plaintiff, can be attributed solely to the draftsman being, and as I think erroneously, of opinion that the architect in the discharge of the powers vested in him by the contract as to rejecting material and superintending the work, was acting in the character of a judge or arbitrator and not as the

(1) L.R. 5 C.P. 310.

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

corporation's agent, and that so his decision was by the contract made conclusive, assuming his judgment to be honestly exercised, and that therefore in order to nullify his decision it would be necessary to aver and prove not only that his decision was erroneous, but that it was maliciously so; that he had in fact not exercised an honest judgment, but had through malice given a false and dishonest decision.

In either case the very gist and foundation of the plaintiff's claim for redress would be that the material rejected was in perfect compliance with the contract and so was wrongfully rejected.

Clauses 28 and 29 in the statement of claim seem to me to call for remark. In these clauses the plaintiff refers to the agreement of the 21st July, 1892, and gives an explanation of his reasons for that agreement being entered into. Now, accepting this explanation it is obvious therefrom, and from the terms of the agreement, that the plaintiff acknowledged that the architect had exercised a sound judgment in condemning the stone which he had condemned and refused to permit to be put into or to remain in the work, and that the plaintiff agreed to submit completely in future to the architect's judgment in relation to the stone and the manner of dealing therewith, and the plaintiff withdrew all the accusations which he had made against the architect before the Court House committee and the city council, such accusations having been that he had acted wrongfully in condemning stone as insufficient which was in perfect compliance with the requirements of the contract, so that he had acted not only wrongfully but maliciously and fraudulently so. In fact that agreement and the plaintiff's explanation of the object of its having been entered into as well as the papers produced in evidence by the plaintiff as to what took place on the plaintiff's application to the Court House committee, the city council

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

and the mayor afford the most complete evidence of the great indulgence and forbearance shown to the plaintiff and of the utterly frivolous nature of the accusations that in the discharge of his duties the architect was actuated by malice.

The appeal arises upon what took place at the trial upon issue joined by the plaintiff upon statements of defence filed by the defendants which cast upon the plaintiff the whole burthen of proof necessary for the maintenance of the action as stated in the statement of claim. Upon this issue being joined the plaintiff recognizing, and as I think correctly, that his allegation that the material condemned by the architect was in perfect compliance with the requirements of the contract constituted the very foundation of his action obtained, and at very great expense to both parties had executed, a commission or commissions for the taking of evidence upon this point at divers places in the United States. At the trial the plaintiff produced the evidence so taken and also put in as evidence the several papers already referred to, in relation to the several appeals made by the plaintiff to the Court House committee, the mayor, and the city council, in relation to the matters therein appearing. Counsel for the defendants contended that none of this matter constituted any evidence upon which this action could be maintained. The plaintiff was then put into the box for the purpose of giving evidence on his own behalf and he was asked when he first entered into a contract for getting stone for the work, and he answered in October, 1889, and he produced a contract dated the 26th October, 1889, entered into by Elliott and Neelon with one Craig and a Mrs. Elliott, whereby the former agreed to accept from the latter all the gray Credit Valley dimension stone required by the former according to dimensions to be given by them for the erection of the city

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

hall and court house, and in another contract of the date of the 19th May, 1891, between Elliott and Neelon, per S. Neelon and the Credit Valley Quarries Company, whereby the latter company assumed and agreed to fill the contract of the 26th October, 1889, in the place of the firm of Craig & Elliott, parties to that contract. The learned counsel for the defendants objected that the defendants could not be affected by these contracts. The object of the plaintiff in putting in this evidence was stated to be to shew that the contractors were guilty of no delay in progressing with the work as was evidenced by these early contracts being entered into.

These contracts, it will be observed, as appears by the papers produced in evidence by the plaintiff, especially in the letter of the plaintiff to the Court House committee of the 31st October, 1891, and that from the architect to the corporation solicitor of the date of the 30th March, 1892, were not acted upon, and for the reason as stated in the plaintiff's letter of the 31st October, 1891, when applying for permission to substitute Orangeville stone for Credit Valley stone, that the latter could not be procured in quantities sufficient, of the quality required by the contract. The fact therefore, of these contracts having been entered into, must, I think, be admitted to have been wholly irrelevant to the issue between the parties. Then the counsel for the plaintiff contended that as evidence of the malice of the architect, he was entitled to prove by the plaintiff with reference to the statement which was a privileged confidential statement made by the architect to his principals as appearing on the papers put in as evidence by the plaintiff, notably in his letter of the 20th May, 1892, to the mayor in answer to the latter's letters of the 27th April and 19th May to the effect: "If the contractors would attend to the execution of

their contract and spend less time in lobbying, etc., to effect changes in their contract with an eye to their own interests" that in point of fact the plaintiff did not desire to have the change made in his contract for his own benefit, nor did he lobby with such view as suggested by the architect. Then he contended the architect's objection to Pigott being taken in as plaintiff's partner and his reasons given to his principals for such objection, which are to be found in the letter from the architect to the solicitor of the corporation of the 30th March, and in a letter also from him to the chairman of the Court House committee of the date of 12th May, 1892 (exhibit no. 10 produced at the trial) afforded evidence of malice. A very long argument upon these matters and others of like character and also upon the construction of a particular part of the contract took place. This latter arose upon a contention raised by counsel for the plaintiff that a condition numbered "1" in a paper entitled "general conditions" was by a recital or preamble in the instrument containing the contract so incorporated into the contract that this condition numbered "1" is to be read with clause no. 8 in the contract as together to form one contract as regards the matters specified in the clause no. 8. The object of this contention (not really of any importance as it appears to me in the present case) was to insist that the provision in clause no. 8 vesting power in the architect to dismiss the contractors if they should fail to comply with the terms of a notice served on the contractors to the effect in clause 8 mentioned, is to be construed as qualified by the following words found in the condition numbered "1," viz.:— "with the consent in writing of the Court House committee" and that therefore clause 8 of the contract gave to the architect no power to dismiss the contractors, as the language of the clause 8 read alone

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

purports to convey; but that in dismissing under clause 8 the architect can only act with and by virtue of the consent in writing of the Court House committee.

The defendants on the contrary contended that as to the particulars mentioned in clause 8, that clause and that alone operated, and that in so far at least as the same matters were mentioned in the condition numbered "1" and in the clause 8 of the contract the latter prevailed; and so that the architect had by clause 8 power vested in himself without any consent in writing of the Court House committee to dismiss the contractors under clause 8 for non-fulfilment by them of the requirements contained in a notice given to them by the architect under the provisions of the clause 8. The frame of this condition numbered "1" is certainly very confused and imperfect. It provides that in the event of the contractor becoming bankrupt or insolvent or of his compounding with his creditors, or of his attempting to transfer the contract without the assent of the proprietors, or in the event of his refusing or neglecting, within 48 hours after notice given by the architect to him, to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or to comply with any order given by the architect to that effect,

> or in case the works, from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, or if the contractor shall persist in any course violating any of the provisions of his contract, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so

Here is a break in the sentence for the purpose plainly of introducing an alternative provision in the case of bankruptcy, insolvency, etc., etc. The sentence proceeds:

> Or in case of bankruptcy, insolvency, compounding with his creditors or any proposition therefor, or of his assigning or transferring his contract or any attempt to do so, then without previous notice the

architect shall have power at his discretion with the consent in writing of the Court House committee without process or suit at law, to take the work or any part thereof mentioned in such notice, out of the hands of the contractor, and either to relet the same to any other person or persons without its being previously advertised, or to employ workmen and provide materials, tools and other necessary things at the expense of the contractor, or to take such other steps as may be necessary in order to secure the completion of the said work.

It has been argued with considerable force that all difficulty in giving a plain, consistent and sensible meaning to the whole condition, can be removed by a very slight transposition of the words "the architect shall have the power at his discretion." To the words "at his discretion" in the sentence effect must be given. Something is by these words left to the architect's discretion, and whatever it is that is so left it cannot be subject to the control of the Court House committee. These words "at his discretion," cannot be read in connection with the words immediately following, viz.:—"With the consent in writing of the Court House committee." What then is it that is thus left to the discretion of the architect? Some transposition of these words seems to be necessary in order to give any sensible grammatical construction to this complicated confused sentence of so many parts. The alternative provision is limited to the event of the contractor becoming bankrupt, insolvent, or compounding with his creditors, etc., already provided for in a clause preceding the words "then the architect may give ten days' notice to do what is necessary, and upon his failure to do so." All that the architect could order a bankrupt or insolvent contractor to do would be to proceed with the work in some specified manner deemed necessary. The object of the draftsman seems to me to have been to provide that in the case of bankruptcy or insolvency, etc, of the contractor, that might be done without notice, but with the consent of the

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

Court House committee, which was authorized to be done upon failure of the contractor to comply with the requirements of a notice. That is to say in all cases including bankruptcy and insolvency, the architect is empowered to give a notice calling upon the contractor to do what the architect deemed to be necessary, and upon his failure to do so, or in the case of bankruptcy, insolvency, etc., then without notice with the consent in writing of the Court House committee, the architect should have power at his discretion, without process of law, etc., etc., either to relet without advertisement or to employ workmen, etc., or to take such steps as he may consider necessary in order to secure the completion of the work.

Then, again, there is another view depending upon the construction of the words in the recital or preamble of the instrument containing the contract. The condition numbered "1" in the paper intituled "general conditions" forms no part of the contract except in so far as it is, if it be, specially introduced in terms into the contract. Now in this recital or preamble where alone reference to the "general conditions" is at all made, such reference is made only in a recital of the fact that the contractors had put in a tender for performance of the work according to the specifications and general conditions referred to in the schedule hereto, which specifications and general conditions are made part of this contract except so far as inconsistent herewith, in which case the terms of this contract shall govern.

Now the general conditions contain provisions which equally with the specifications relate to the execution of the work by the contractors, and the reference to the general conditions being thus made in connection with the specifications and merely in a recital of the fact that the contractors had tendered for the performance

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

of the work according to the specifications and general conditions, it appears a reasonable construction that the general conditions thus recited as being part of the contract are those only which, like the specifications in connection with which they are mentioned, relate to the performance of the work for which the contractors had tendered, which only, except in so far as they might be altered by the contract, were made part of the contract. This construction would exclude wholly the condition numbered "1," which relates not to the performance of the work by the contractors, but to the action of the corporation in the event of the contractors not doing so or in the event of their becoming insolvent, etc., etc., or otherwise incapable of doing or unwilling to do so. And this would be abundantly sufficient for every reasonable purpose, for by clause 15 of the contract all material deposited on the ground for the work is made the property of the corporation, and clauses 8 and 9 of the contract make ample provision for every case, even for those of bankruptcy, insolvency, composition with creditors, etc., to the full as well as the condition numbered "1," if it operated alone, purports to do. But there remains the view in which all the courts below have concurred, namely, that in respect of the matters specially enumerated in clause 8 of the contract, the provision thereby made is complete in itself, without incorporation with the condition numbered "1," and it is consistent with the provision in that condition made with reference to the same matters, assuming the true construction of that condition, if standing alone, to be that the architect could not dismiss the contractor from the work for non-compliance with the architect's requirements, contained in a notice served upon the contractors without the consent in writing of the Court House committee

1896

NEELON
v.
THE
CITY OF
TORONTO.

Gwynne J.

and therefore that the provision in clause 8 by itself must prevail.

For my part I cannot entertain a doubt that the decision of the courts below is correct. That provision in clause 8 of the contract which purports to enable the architect to act alone in a particular matter, is quite inconsistent with a provision which forbids his acting in that matter except upon the authority in writing of another body or power. There would be no sense whatever in clause no. 8 being in the contract at all if it was not intended to contain the whole provision made by the contract in respect of the matters therein enumerated. The words "except so far as inconsistent herewith" are simply equivalent to "except as herein otherwise provided," and clause 8 does provide for everything mentioned in condition no. 1, and in respect of the particular matter under consideration differently from the provision in condition no. 1, assuming the true construction of the sentence of that condition under consideration to be as contended for on behalf of the appellant Moreover a reference to the provisions of the condition numbered "1" consequential upon the dismissal of a contractor are so different from those made as consequential upon dismissal under clause 8 of the contract that both cannot operate together and it appears to me to be clear that by the contract clause 8 was intended to operate alone in respect of the matters therein contained and that in all those matters it is as agent of the corporation and on their behalf that he is empowered to act and not as a judge or arbitrator.

By the condition numbered "1" upon dismissal, the contractor forfeits expressly all moneys then due under the contract, except that such moneys may be applied in payment of unpaid workmen, and that upon completion of the work by the corporation the contractor

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

shall be paid what sum, if any, as shall be certified by the architect whose certificate shall be absolutely conclusive and not appealable, whereas by clause 8, all moneys paid by the corporation in completing the work are to be deemed payments on account of the contract and the certificate of the architect after completion of the work is not made final and conclusive but is subject to arbitration if necessary. That clause 8 then wholly unaffected by anything in the condition numbered "1" must prevail in the present case cannot, I think, admit of a doubt. But the point is, as I have already suggested, really immaterial in the present action the gist and foundation of which is that the architect prior to the commencement of this action and consequently prior to the motion for the injunction therein which is also prayed for by the statement of claim, and prior also to his giving the notice of the 29th August, 1892, had wrongfully condemned, and prevented the plaintiff from using in the work, material as not sufficient within the terms of the contract which the plaintiff contends was in perfect compliance with those terms, and was therefore wrongfully condemned by the architect, whereas what is now contended to have been done without the consent in writing, assuming such consent to be necessary, was not done and could not have been done for the time had not elapsed as mentioned in the notice until after the commencement of the action and after the application therein for the injunction which is also prayed for in the statement of claim.

Moreover there is not even an allegation in the statement of claim that it was the architect who claiming to have authority in himself dismissed the contractor; on the contrary the allegation is that it was the defendants, that is to say, the corporation and the defendant Lennox, their servant or agent, and whatever wrong,

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

if any there be in the corporation having done so they not being named in the condition numbered "1" cannot be attributed to the absence of the consent in writing of a committee of their body. There is, as I have said, no doubt that under the contract the architect alone without the consent of the Court House committee had by clause 8 power to give the notice mentioned in that section.

After a long argument upon all the points the learned trial judge held:—

1st. That the architect was not bound to have the consent in writing of the Court House committee prior to serving the notice (of the 29th August, 1892).

2nd. That the rejection of the stone which the architect condemned as not being in his opinion in accordance with the terms of the contract, but which the plaintiff contended was in perfect compliance with those terms, was the very gist and substance of the action, and that before the architect could be adjudged to have acted maliciously in the discharge of duties devolved upon him by the contract, it must be shown that he acted wrongfully, and as the evidence was not sufficient, and indeed was not contended to be sufficient upon that point, he called upon the plaintiff's counsel to proceed with his evidence tending to show the stone to have been wrongfully rejected, and reserving until that should be established to be the fact, the consideration of the question whether malice in such wrongful rejection was necessary to be proved, and if necessary, what evidence would be sufficient to establish it. Upon this ruling counsel for the plaintiff declined to offer any further evidence, and thereupon the learned judge rendered judgment for the defendants. This judgment has been sustained by the Divisional Court in which the action was brought, and by the Court of Appeal for Ontario. The ruling of the learned judge

1896

NEELON v. THE CITY OF TORONTO.

Gwynne J.

and his judgment thereon must, in my opinion, be maintained, and the appeal must be dismissed with costs, and the plaintiff must be remitted to his remedies under the contract, which has provided for the case of the work being proceeded with by the corporation to completion, after it should be taken out of the contractor's hands for non-compliance with a notice given to him by the architect under clause 8 of the contract.

SEDGEWICK J.—In my view the only point in this appeal calling for special notice is as to the construction of the contract between the appellant and the city of Toronto. Attached to the main contract, and in a modified sense forming part of it, was a document called "general conditions." This instrument was prepared with the idea of using it, not only in connection with the main building contract, but with reference to all other contracts—heating, plumbing, &c., as well.

The main contract provided as follows:

The general conditions are made part of this contract (except so far as inconsistent herewith) in which case the terms of this contract shall govern.

And its eighth clause was in part as follows:

8. In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work.

The first clause in the general conditions was in part as follows:

In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so, the architect shall have the power, at his discretion,

1896

NEELON v. THE CITY OF TORONTO.

(with the consent in writing of the Court House committee, or commission as the case may be) without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor, and either to relet the same to any other person or persons, without its being previously advertised, etc.

Sedgewick J.

So that the only substantial difference between the two clauses is that while the first gives the architect the absolute right to dismiss the contractor upon the happening of a certain contingency, the second gives him that right, subject however, to the consent in writing of the Court House committee.

The question then is: Is this latter provision "inconsistent" within the meaning of the contract, with the former? If not the appeal must be allowed, for that consent was not obtained. If otherwise, a breach of contract has not been proved and the appeal fails.

I have arrived at the conclusion that there is no inconsistency between the two clauses. The contract must be interpreted by giving the words employed their ordinary meaning unless that will defeat the intention of the contracting parties to be gathered from the instrument as a whole. Now, in my view, in order that the charge of inconsistency between two stipulations may be sustained, they must be mutually exclusive of each other; they cannot stand together. Being repugnant or irreconcilable, the one to the other, one or other or both must give way. The natural meaning, either gathered from usage or from the etymological origin, of the word "inconsistent," is, not capable of standing together, and I think it was in that sense, and in that sense only, that the word was here used.

If the two stipulations had been in the main contract itself there is no possible question but that effect would be given to both. No one would presume to argue that they were, in that case, even apparently, not to say inherently, inconsistent. The second, it is

true, would modify, limit, qualify, cut down, the sweeping generality of the first, but it would not destroy or take away the right of dismissal thereby provided; both being capable of standing together, effect would be given to both.

Now if the reproach of inconsistency could not be made against these clauses if both were in the same document, if courts without hesitation would give efficacy to each, how do they become inconsistent when they appear in different documents all combined together for the purpose of making one complete contract? Why should they be held repugnant or irreconcilable (for both these adjectives in this connection are synonyms of "inconsistent") in the one case, and not in the other? I cannot follow any reasoning which leads to such a result.

I regard the clause in the condition so far as this right of dismissal is concerned as only a limitation of the power created by the contract or a direction specifying how that power was to be exercised. These general conditions, as I have said, were intended to be applicable to all contracts entered into by the city having reference to the building, furnishing and full completion and equipment of the new city building. Suppose one of these conditions had been "the city engineer alone shall have the right to dismiss a contractor." That would have been plainly inconsistent with the first clause in question here, and would therefore have been void. Suppose, however, another was: "The architect alone shall have the right to dismiss a contractor, but such dismissal shall be in writing and shall be signed by the architect in the presence of, and attested by, the city clerk." Would a stipulation of that character be inconsistent with the main one? The architect might say: "The contract gives me the right to dismiss. It does not prescribe the mode by which I am to exercise

1896

NEELON v. THE CITY OF TORONTO.

Sedgewick J.

it. It does not fetter by rules or regulations my methods of procedure. The contractor is in default. I have orally dismissed him, and propose to finish the building myself. That condition about the written dismissal and the attestation of the clerk is a limitation of the despotic power which the contract gives me, and I do not propose to be bound by it." Can there be any doubt as to what answer there would be to this ?

I may venture to suggest that there is a fallacy in the conclusions arrived at by the courts below in holding that there is an inconsistency between the stipulation in the contract and the stipulation in the conditions. May not the inconsistency exist, not in the stipulations themselves, but in the powers which they respectively give to the architect ? One may provide that the architect may dismiss the contractor, the other that such dismissal must be approved by the committee. The first gives to him the exclusive right, the second prescribes a condition to the exercise of that right.

Due effect may be given to both, both being read together. The stipulations themselves are therefore not inconsistent. But the right to dismiss given by the first is apparently an absolute, unfettered right, whereas by the second it is limited by, or made subject to, the supervision of the committee. If the architect has in his own person the absolute right of dismissal the committee cannot derogate from it. The two rights are inconsistent. But the contract does not refer to inconsistent rights, but to inconsistent stipulations, and if it had contained a provision to the following effect: "When any rights or powers are by the general conditions conferred upon the architect, inconsistent with the rights or powers upon him herein conferred, this contract shall govern;" in that case the respondent's contention would prevail; the right

purporting to be created by the one would override and make nugatory the right or power created by the other; the inconsistency would be established.

I admit that were there in the whole contract taken together something to indicate that this word "inconsistent" had an extraordinary or special meaning, that it did not refer to inconsistency but to something else, effect should be given to that intention; but, as I regard the matter, a reasonable view of the circumstances adds force to the conclusion to which I have come.

The general conditions gave a voice to the Court House committee. Several contracts and contractors were contemplated, this contract doubtless being the principal one. It seems to me to have been a most proper and reasonable stipulation in the interest of both the contracting parties, that no contract should be put an end to upon the mere dictum of the architect and without the assent of a committee of the city council, specially charged as the immediate representatives of the citizens with the oversight of the work. The architect might change from time to time. He might be reasonable or unreasonable. He alone had the right of dismissal, which right he might exercise with discretion or otherwise. To guard the city as well as the contractor against the unfair or despotic exercise of that right a certain amount of supervision and control, practically a right of veto, was given the committee. Now, I do not gather from the contract as a whole that so far as this contract was concerned it was intended that that veto right should be taken away. Why should it be taken away? This was by far the largest of the contemplated contracts. Why leave to the committee this right in the smaller contracts of heating, or lighting or painting or furnishing, circumscribing, limiting the architect's power there, but giving him absolute and uncontrolled authority here? I do not see

1896

NEELON
v.
THE CITY OF TORONTO.

Sedgewick J.

a reason, and I cannot conclude that such was the intention of the parties.

On the whole I am of opinion that the contract was taken from the appellant in a manner not authorized by it, and that he is therefore entitled to a reference as to damages upon the terms stated in the case.

In consequence of the view I have taken as to the construction of the contract it is unnecessary for me to discuss at length the other points raised by the appellant. My view, however, is that the appeal cannot succeed upon those grounds, for the reasons set out in the opinion of Mr. Justice Osler in the court below.

KING J.—The principal question in this appeal is as to the meaning of a couple of clauses in a building contract.

A recital in the contract states that the city of Toronto had advertised for tenders in connection with the building of a court house and city hall, and that the appellant had tendered to do certain of the work according to certain specifications and general conditions "which specifications and general conditions (it was declared) are made part of this contract except so far as is inconsistent herewith, in which case the terms of this contract shall govern," and that it was then recited that the tender was accepted by the city on the terms thereinafter mentioned.

By the 8th clause of the contract it is provided that:

In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work; and all payments made on account thereof to such other persons shall be deemed payments on account of the contract, but without prejudice to the right of the proprietors

to recover from the said contractors any money in excess of the contract price which may be paid for so finishing the works, or any other damage caused by any breach of this contract. But if any balance on the amount of this contract remains after completion the same shall belong to the contractors or the person legally representing them.

The first clause of the general conditions deals *inter alia* with the same or like matters, and gives power to the architect, in certain cases after notice, and in certain other cases without notice, but in both classes of cases only with the consent in writing of the Court House committee or commission as the case may be, to take the work or any part thereof mentioned in the notice out of the hands of the contractor, and to take such steps (either by reletting the work or by days' work, or in any other manner) as he may consider necessary in order to secure the completion of the said work.

Such clause in its material parts is as follows:

In case the works, from the want of sufficient or proper workmen, or materials, are not proceeding with the necessary despatch, or if the contractor shall persist in any course violating any of the provisions of his contract, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so, or in case of bankruptcy, insolvency, compounding with his creditors or any proposition therefor, or of transferring or assigning this contract, or any attempt to do so, then without previous notice the architect shall have the power at his discretion (with the consent in writing of the Court House committee or commission as the case may be), without process or suit at law, to take the work, or any part thereof mentioned in such notice, out of the hands of the contractor, and either to relet the same to any other person or persons, without its being previously advertised, or to employ workmen and provide materials, tools and other necessary things at the expense of the contractor, or take such other steps as he may consider necessary, in order to secure the completion of the said work.

The question then is, whether the words providing for the consent of the committee are to be read into the above recited 8th clause of the contract, or in other words, whether the power given to the architect by

1896

NEELON v. THE CITY OF TORONTO.

King J.

such clause is intended to be subject to the condition or limitation expressed in the general conditions as to the written consent of the committee being necessary.

Six learned judges have held that such limitation forms no part of the contract so far as relates to the subject of the 8th clause, and notwithstanding the able judgment to the contrary of Mr. Justice Burton I feel constrained to come to the same conclusion.

Things may be said to be inconsistent which are repugnant in their ordinary sense or as relating to the subject-matter. Where this happens in the same instrument, or in a series of instruments or documents duly authenticated as expressing the mind of the writer or writers, then inasmuch as one part is of equal authority with another it may be necessary, in order to give a meaning to every part, by reasonable implications and by the giving of an accommodated meaning to language, to harmonize with more or less of completeness what in the natural meaning is inconsistent.

But this necessity is not imposed until that which presents the inconsistency is authenticated as the language of the contract or other instrument, as the case may be. Here, whatever in the general conditions is inconsistent with the formal contract is excluded from it at the threshold.

When the parties speak of inconsistency, I take it that they refer to a repugnancy between the two things in their plain and natural and ordinary sense, or in the sense they bear as applied to the subject-matter; and so the clause of the recital means that if anything in the conditions is opposed to anything in the formal contract, when read in its plain, natural and ordinary sense, or as applied to the subject-matter, then, to the extent that such repugnancy exists, the conditions are

not to be taken as expressing the mind of the contracting parties.

Now, in plain, natural and ordinary language, and not less so as applied to the subject of a building contract, when it is said that B. may dismiss A. upon the happening of certain contingencies, there is a necessary implication that B. has of himself upon such contingencies the power and right to dismiss. And it is quite contradictory to this to say that he may not dismiss at all unless C. gives consent to his doing so. It is not a mere question as to the mode in which B. shall signify his action, but is fundamental as substantially changing the constitution of the dismissing authority. It is only when there is some force applied *ab extra* to mould the language, that it is possible to construe it otherwise than according to the plain import.

Passing from this, it is not easy to see why clause 8 was inserted at all, if it was not intended to effect an alteration of the conditions. If it effects a substantial alteration in the circumstances justifying dismissal, or in the substantial incidents of it (as some of the learned judges have thought) then certainly clause 1 of the conditions ought not to affect the interpretation of clause 8 of the contract. The only other apparent reason for the insertion of clause 8, was in order that the power of dismissal might be given to the architect alone in the cases provided for by it, *i e.* in cases where prior notice from the architect was necessary to constitute a default, leaving the other cases mentioned in clause 1 of the general conditions, where there might be a default independent of prior notice, to be still dealt with according to the original provisions.

It is immaterial that such original provisions might in some respects have been beneficial to both parties.

On these grounds, which are not different from those relied on by the learned judges in the other courts, I

1896

NEELON v. THE CITY OF TORONTO.

King J.

think that the dismissal was sufficient in point of authority. As to the form of the notice by the architect no question now arises, as any question upon it was formally abandoned.

Then as to the course taken at the trial in regard to the reception of evidence I do not feel altogether satisfied, but my doubts are not sufficient to lead me to differ from the concurrent opinion of so many learned judges.

In the result, therefore, I think that the appeal should be dismissed.

GIROUARD J.—If the contract had provided that the architect might dismiss the contractor without the consent of the Court House committee, this stipulation would certainly be inconsistent with the general conditions. But the two clauses, as they stand, do not cover exactly the same ground; I think that one helps the other, and I quite agree with my brother Sedgewick and Mr. Justice Burton that they are not inconsistent. Both can well be worked to the best advantage of the undertaking the contracting parties had in contemplation. Extensions or restrictions of a power already created, or directions for its exercise, contained in a contemporary deed, are not necessarily contradictions of the original stipulations. Before courts of justice can be called upon to sanction the exercise of a power so sweeping and so pregnant with most serious consequences as the one claimed by the respondents, it must be shown beyond doubt that it was conferred by the terms of the agreement; and if any reasonable doubt can be entertained the appellant should get the benefit of it. I cannot believe that the city of Toronto, which framed both the contract and the conditions, did stipulate for the intervention of a committee of its council between the architect and the contractor without some good and sound practical reasons; and I am

also inclined to think that the appellant had reason to see in it some protection against any unjust treatment from the architect. I am therefore disposed to give effect to this stipulation, rather than set it aside.

In my humble opinion the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Lash & Cassels.*

Solicitor for the respondent the City of Toronto: *Thomas Caswell.*

Solicitors for the respondent Lennox: *Beatty, Blackstock, Nesbitt, Chadwick & Riddell.*

1895
*Oct. 23, 24.
1896
*Feb. 18.

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE TOWNSHIP OF CHATHAM (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal by-law—Special assessments—Drainage—Powers of council as to additional necessary works—Ultra vires resolutions—Executed contract.

Where a municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a railway where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R.S.O. [1887] c. 184), and a new by-law authorizing it was not necessary. Taschereau J. dissenting.

APPEAL from the Court of Appeal for Ontario (1), affirming the judgment in the Common Pleas Division (2), which upheld the dismissal of the plaintiff's action in the court below.

Certain drainage works had been constructed under a by-law passed under the provisions of The Municipal Act, which benefited lands in an adjoining township, and after the completion of the works it was found absolutely necessary to construct a new culvert under the line of the Canadian Pacific Railway in order to carry off the increased flow of water brought down by the drain and prevent the flooding of the adjacent lands. The plaintiffs and defendants entered into a contract under seal by which the plaintiffs agreed to construct, and actually did construct, the

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

(1) 22 Ont. App. R. 330. (2) 25 O.R. 465.

necessary culvert at a cost exceeding two hundred dollars. When the works were completed they were inspected, accepted and used by the municipal corporation, and correspondence passed between the plaintiffs and certain officers of the corporation upon the subject of the works done, by which assurances were given to the plaintiffs that in case the funds provided by the original by-law for the drainage works proved insufficient to cover the additional cost of the culvert, the necessary funds would be provided to pay whatever difference there might be under the powers given in the Municipal Act. The municipal council passed resolutions approving of the work done by the plaintiffs and paid sums on account of the cost, but did not pass a new by-law or make any report or fresh assessment respecting the contract with the plaintiffs, or as to the works executed thereunder.

The special circumstances of the case and questions raised upon the issues appear more fully in the judgments reported.

Moss Q.C. and *MacMurchy* for the appellant. The culvert being essential for the efficient working of the drain, the case comes within sec. 573 of the Municipal Act. *In re Suskey and The Township of Romney* (1); *Attorney-General* v. *The Mayor of Newcastle* (2).

The work was constructed and accepted by the municipality, who cannot get rid of paying for it because there was no by-law. *Bernardin* v. *North Dufferin* (3).

Wilson Q.C. and *Pegley* Q.C. for the respondent. The municipality is only liable to the extent declared by statute. *Municipality of Pictou* v. *Geldert* (4); *Cowley* v. *Newmarket* (5).

(1) 22 O.R. 664.
(2) [1892] A.C. 571.
(3) 19 Can. S.C.R. 581.
(4) [1893] A.C. 524.
(5) [1892] A.C. 345.

1895

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

That a by-law was necessary see *Cross* v. *City of Ottawa* (1); *Waterous Engine Works Co.* v. *Town of Palmerston* (2).

Under the by-law passed debentures could not have been issued for the cost of the culvert. *Confederation Life Assoc.* v. *Howard* (3).

TASCHEREAU J. (dissenting).—I would dismiss this appeal. I cannot say that I see anything reprehensible in the respondents' refusal to pay this claim They are in duty bound to do so, and the appellants have no one else than themselves to blame if they suffer any prejudice. It was their duty, before entering into this contract, to ascertain whether or not this corporation was acting *intrâ vires*. *Bernardin* v. *North Dufferin* (4) has no application. The township at large gets no benefit from this drainage. I need not enter into a review of the sections of the Municipal Act that rule the case. That has been elaborately done in the three Ontario courts which have dismissed the appellants' claim. The question is, it seems to me, one largely of fact. Was this stone culvert contemplated when by-law no. 169 for this drainage was passed? With the three courts below, I say no. Was the work contemplated by the by-law fully completed when the agreement sued upon was entered into? With the three courts below, I say yes. This stone culvert was not thought of, or at all taken into consideration, when the by-law was passed. The assessment was levied in the two townships on an estimate for a drain through the cattle pass.

We are now asked to add to it a sum nearly doubling it in amount. And, in defiance of the unquestionable policy of the statute that none but those benefited by drainage work should be assessed for the cost thereof,

(1) 23 U.C.Q.B. 288.
(2) 21 Can. S.C.R. 556.
(3) 25 O.R. 197.
(4) 19 Can. S. C. R. 581.

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

the appellants would charge every inch of property in this township for this piece of drainage. That, it seems to me, would be a fraud on the taxpayers. I adopt Chief Justice Hagarty's reasoning in the Court of Appeal, and Chief Justice Galt's as reported in 25 O. R. 465.

Gwynne J.

GWYNNE J.—The municipal council of the township of Chatham, prior to the year 1890, had constructed certain drains known as the Louisville Tap and Big Creek drains under by-laws passed for that purpose by the municipal council of the said township under the provisions of the Ontario Municipal Act. In the year 1890 these drains became in a measure insufficient for the purpose for which they were constructed, and it was deemed expedient to make a new and additional outlet therefor; accordingly the township engineer was instructed to take levels, make estimates and assessments and report on the most practicable outlet for the water of the said drains, and he thereupon made a report recommending the construction of a drain from the river Thames at a point in lot 23 in the 2nd concession of the said township of Chatham, to be continued northerly under the Canadian Pacific Railway as it crossed lot 23 in 3rd concession of said township, to the Big Creek drain as it ran through lot 23 in the 4th concession of the said township, upon a plan and profile accompanying the report which was also accompanied by an estimate, and an assessment of lands which in the engineer's judgment would be benefited by the proposed work, some of which lands were in the adjoining township of Camden. The plan and profile annexed to the report showed that the depth to which the proposed drain was to be dug was such that at the place where it was proposed to pass under the railway it was to be several feet below the bottom of the cattle

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

pass there. Upon this report a by-law was passed by the municipal council of the township under the provisions of sec. 585 of the Municipal Act of Ontario, which authorized the township council to undertake and complete the work specified in the report under the provisions contained in secs. 569 to 582, inclusive, without the petition required in sec. 569. The by-law contained recitals:

1. The previous construction of the Louisville Tap and Big Creek drains under by-laws passed by the township council under the provisions of the Municipal Act.

2. That the better to maintain the said drains and to prevent damage to the adjacent lands, it was deemed expedient to make a new and additional outlet to the said drains.

3. That a number of ratepayers along the course of the said drains had petitioned the council praying that the said outlet might be made.

4. The report, plan, profile, estimate and assessment of the township engineer, and his recommendation that the proposed work should be undertaken, as it will be the means of doing "a vast amount of good, and will likely prevent expensive litigation."

It then enacted:

1. That the said report, plans and estimates be adopted, and that the said drain and the works connected therewith be made and constructed in accordance therewith. 2. That the reeve might borrow the sum of $2,839.61 to pay the estimated cost of the work as charged upon lands in the township of Chatham.

3. Enacted that special rates should be levied as directed upon the lots in the township of Chatham assessed by the engineer for the work.

Clause 4 provided for payment of the township's share for the benefit to its roads, and clause 5 appointed E. W. Haslett, one of the deputy reeves of the township and W. G. George (the township engineer) commissioners for the construction of the drain.

Upon the 18th November, 1890, the municipal council of the township of Camden passed a by-law for raising the amount assessed by the report and assessment of the engineer of the township of Chatham upon

lands in the township of Camden as benefited by the proposed work and for levying the amounts charged in such assessment upon the lots and roads in Camden.

The third recital in the above by-law of the township of Chatham is wholly irrelevant as the work was proposed to be constructed under the provisions of sec. 585 of the Municipal Act, and it is to be observed that the petition recited is not one within the provisions of sec. 569. As no petition was necessary the recital of there having been the one recited is wholly immaterial, and this case must be considered just as if there never had been the petition recited to have been presented or any petition.

Now the plan and profile adopted by the by-law clearly showed that the drain was contemplated to be constructed and that it must be constructed under the railway, and such being the case it was apparent that a properly constructed culvert sufficient to bear the weight of the superincumbent earth upon which the railway was laid was an absolute necessity. The bottom of the drain according to the design and profile and plan thereof was to be, when the drain should be constructed, 19 feet below the level of the rails. The engineer who designed the drain also knew, or was at least of opinion, that the plan of such a culvert should have to be approved by the railway company. In his evidence he says that the drain as designed would be absolutely useless unless carried under the railway by just such a culvert as has been constructed, and that the reason why he did not in his estimate of the work provide for the cost of the culvert through which the waters in the drain should pass was that when he made his report he did not know what kind of culvert the railway company would require. From about the time of the passage of the by-law continuously through the year 1891 until the making of

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

the contract upon which this action is brought, the township council, through some or one of their councillors, their solicitor, and their engineer, appear to have been in communication with the railway company in relation to the construction of the necessary culvert; a letter has been put in evidence dated the 20th February, 1891, from the solicitor of the township to a Mr. Armstrong, an official of the railway company at Toronto, in which is the following passage:

> DEAR SIR.—The council of the township of Chatham have requested me to write you about putting in a culvert in the Big Creek Cut-off at Kent bridge. They say that last fall you agreed to do so in conversation with the Reeve, &c., &c.

Then we find that the commissioner on the Big Creek outlet was, by a resolution of the council of the 9th March, 1891, authorized to consult W. G. McGeorge in regard to the proposed culvert, which in the resolution is called a "brick" culvert, under the Canadian Pacific Railway and to take such steps as he might recommend in the matter. The commissioner here referred to was the Deputy Reeve, Mr. Haslett, who with Mr. McGeorge himself were the commissioners appointed by the by-law to construct the drain. Then we find the chief engineer of the company directing the divisional engineer, Mr. Henderson, by a letter dated the 16th March, 1891, to arrange a meeting with Mr. McGeorge upon the subject.

This meeting took place and Mr. Henderson testifies that Mr. McGeorge stated then that he wanted the bottom of the culvert to be a little lower than the proposed bottom of the drain, to which Mr. Henderson says that he replied that it should be placed as low as he wished. Mr. McGeorge as to this meeting, in answer to the question: "Did you tell him what depth you wanted?" said "we both agreed it should go two feet lower than the bottom of the drain."

That would be 21 feet below the rail on the track from which the 19 feet to the bottom of the drain was measured.

Then upon the 13th May, 1891, we find Mr. McGeorge addressed to Mr. Henderson a letter in the following terms:

DEAR SIR,—May we soon expect a copy of the drawings of the culvert at the Big Creek drain cut-off and your estimate of cost. Our council keep asking me about it and I tell them you are likely very busy but we will soon hear from you.

Then we find that upon the 5th June, 1891, the railway company furnished to the township corporation through their solicitor a plan and estimate for the proposed culvert. This plan was placed in the hands of Mr. McGeorge for his approval, and he transmitted it to the township clerk, with a letter dated the 20th June, 1891, wherein he said:

The structure will be admirably adapted to its place, and will be of a very permanent kind. The cost is estimated higher than we had expected, but no doubt the engineer of the company has gone into it very carefully, and knows as nearly as can be computed in advance the cost of such work.

Upon the 25th June this plan and Mr. McGeorge's report thereon, as contained in the above letter, were laid before the council of the township, who thereupon passed a resolution to the effect following:

That the plans for the arch culvert under the Canadian Pacific Railway at the Big Creek outlet as sent from the Canadian Pacific Railway office, and prepared by the railway engineer, be adopted, and that the matter of the cost of said culvert be referred to the reeve and first and second deputy reeves, with power to settle with said railway company to the best possible advantage.

Upon the 4th July, 1891, the solicitor of the township transmitted to the general superintendent of the railway company a copy of Mr. McGeorge's above letter to the township clerk, in a letter of that date in which he said:

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

DEAR SIR,—I have submitted the plan sent me for this work to Mr. McGeorge, the township engineer, and I enclose you a copy of his letter to the township clerk, which will give you his views as to it.

I also enclose you a draft of a short agreement on the matter which you can revise, and I will have it engrossed in duplicate for execution.

Then after some observations in relation to the estimated cost, he closed his letter as follows:

The township is anxious to see the culvert put in this summer, so as to be ready for use when the fall rains come.

A lengthy correspondence then took place between the solicitor of the township and the solicitor of the railway company as to the frame of the agreement between the parties for the construction of the culvert by the railway company at the expense of the township, and as to the payment by the latter for the work. In the course of this correspondence the solicitor of the township, in a letter of the 17th August, says:

The drain in question is constructed under the Municipal Act, and if the funds assessed for construction are not sufficient in consequence of the culvert costing more than was anticipated, the council will have to amend the by-law under sec. 573, subsec. 1, Municipal Act ch. 184 R.S.O., 1887.

Now although it was apparent, as indeed has been admitted by the township engineer, that the drain as designed would be absolutely useless without the construction of a proper culvert at the place in question, nevertheless the commissioners appointed by the by-law to construct the drain proceeded with the digging of the drain from the Big Creek to the railway, a distance of more than a mile and a quarter, before ever the contract for the construction of a necessary culvert was entered into. The natural consequence of this proceeding was that the lands lying between the railway and Big Creek became flooded, to the great damage of the land owners, and the railway itself was endangered to such a degree that it was deemed necessary to protect it with piles driven in to resist the violence

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

of the descending waters and to avert the injury anticipated therefrom. Such a proceeding could scarcely be said to have been authorized by the by-law for construction of the work, and all damages arising therefrom would seem to be attributable to the negligence of the township authorities in proceeding with the opening of the drain from Big Creek before the necessary culvert was completed rather than to be necessarily incidental to, and consequential upon, the construction of the drain authorized by the by-law, so that if the culvert had not been a necessary part of the work contemplated and authorized by the by-law, the township corporation were placed in this dilemma, that they must, at whatever cost, carry off this water so brought down or pay all damages arising therefrom not only to the owner of the drowned lands, but also to the railway company. In such a state of facts there cannot, I think, be a doubt that upon the completion of the work under this contract the corporation would be bound to pay therefor as for a necessary work completely executed, the benefit of which they enjoy, and that they could not be permitted to set up the fraudulent defence that they had no power to enter into a contract for the construction of a work from the execution of which they derived such substantial benefit.

The defence to this action set up by the defendants is:

1st. That the charge made by the plaintiffs for the work is so much in excess of what was contemplated and estimated by the plaintiffs themselves, that the defendants have a right to insist upon the strictest proof of every item; and

2nd. That the contract was *ultra vires* of the corporation, and so not binding on them.

As to the first of these grounds of defence, the plaintiffs say that they constructed the work in every respect according to the dimensions and di-

1896

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

rections given by the township engineer and commissioner for the construction of the drain and according to the plan of the culvert approved by him and the township council, and they say that the cost was increased beyond what was anticipated and estimated by causes over which the plaintiffs had no control, namely, 1st the appearance of quick sand in the excavation to the depth required of which immediately upon its appearance the council of the corporation were informed and directed the plaintiffs to proceed with the work; and 2ndly by reason of the drain from the railway to the river Thames not having been dug to the depth required by the plan and profile of the work adopted by the by-law until after the completion of the culvert. However, these matters are unimportant at the present time, for the plaintiffs submit to a most searching inquiry into every item of their claim upon a reference to the proper officer in this action.

As to the second ground of defence, namely, that the contract is *ultra vires* of the defendants, it must, I think, be admitted to the credit of the defendants that this defence is entered at the instance of the corporations of the township of Camden who insist that the lands in Camden should not be held to be liable to contribute to the cost of the work constructed under the contract sued upon.

Whether the township of Camden should or should not contribute to the cost of the work to any, and if any to what, extent is a question with which we are not concerned in this action. The only question with which we have to deal is whether the contract into which the defendants have entered was *ultra vires* or on the contrary is binding upon them. If the latter with what may be the consequences we are not concerned. Now that the construction of a sufficient culvert at the place where the drain was designed to pass under the

railway was an absolute necessity in the construction of the work designed and authorized by by-law, and that it was in point of fact part of the work contemplated to be constructed under the by-law, cannot, I think, admit of a doubt. The residue of the work would have been of no use whatever without such sufficient culvert, its sufficiency consisting not merely in dimensions capable of carrying off the waters brought down to it from the Big Creek but in strength capable of supporting the weight of the superincumbent earth constituting the railway bed. We have the evidence of the engineer who designed the drain that the culvert as contracted for was just such a one and that it was an absolute necessity to the efficient completion of the drain. I am of opinion therefore that the case does, as the township council appear to have been advised, come within sec. 573 of ch. 184 R.S.O., and that the contract under which the work has been executed is binding upon the defendants.

The appeal must be allowed with costs and the case be remitted to the court below to be dealt with by that court by reference to the proper officer or otherwise as the court shall direct for ascertaining what amount if any remains due to the plaintiffs under the contract.

SEDGEWICK, KING and GIROUARD JJ. concurred.

Appeal allowed with costs.

Solicitors for the appellants: *Wells & MacMurchy.*

Solicitors for the respondents: *Pegley & Sayer.*

1895
*Oct. 30.
1896
*Feb. 18

JOSEPH SLEETH (DEFENDANT).....APPELLANT;

AND

JAMES HENRY HURLBERT (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Canada Temperance Act—Search warrant—Magistrate's jurisdiction—Justification of ministerial officers—Goods in custodiâ legis—Replevin—Estoppel—Res judicata.

A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau J. dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.

A judgment on *certiorari* quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau J. dissenting.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), affirming the order to restore goods to the plaintiff in an action of replevin in the court below. Upon an information laid in a case of *The Queen* v. *Hurlbert* (2), the plaintiff's premises were entered under a search warrant issued by a stipendiary magistrate and certain intoxicating liquors with the vessels containing them found there were seized and removed from the premises and kept in legal custody. Upon the hearing, the magistrate made an

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

(1) 27 N.S. Rep. 375. (2) 27 N.S. Rep. 62.

order for the destruction of the goods seized under the provisions of the Act, whereupon they were destroyed, notwithstanding that they had been in the meantime replevied in this action. The proceedings were removed to the Supreme Court of Nova Scotia by *certiorari* and the declaration of forfeiture and search warrant were set aside and quashed. This order was proved on the trial in the present case, and the trial judge adopting the judgment which quashed the warrant and order, as being void for want of jurisdiction in the magistrate issuing them, held that the plaintiff was entitled to recover. The court in appeal also considered itself bound by the judgment which quashed the warrants and affirmed the judgment in the court below.

Orde for the appellant.

The judgment quashing the warrant was not a judgment *in rem*. Taylor on Evidence (1).

If it was it was only conclusive against all the world as to title to the goods, but did not prevent the officer justifying under the warrant. *DeMora* v. *Concha* (2); *Bailey* v. *Harris* (3).

The warrant showed jurisdiction on its face which is all that is necessary. *Howard* v. *Gosset* (4); Chaster on Executive Officers (5).

It was sufficient that the warrant followed the prescribed form. *Reid* v. *McWhinnie* (6); *Truax* v. *Dixon* (7); *Re Allison* (8).

The officer could justify under the warrant after it was quashed. *Codrington* v. *Lloyd* (9).

Roscoe for the respondent. The judgment quashing the warrant was a judgment *in rem*, binding on all the world. *DeMora* v. *Concha* (2); *Geyer* v. *Aquilar* (10).

(1) 7 ed. vol. 2 pp. 1401-2.
(2) 29 Ch. D. 268.
(3) 12 Q. B. 905.
(4) 10 Q. B. 359.
(5) 3 ed. p. 342.
(6) 27 U. C. Q. B. 289.
(7) 17 O. R. 366.
(8) 10 Ex. 561.
(9) 8 A. & E. 449.
(10) 7 T. R. 696.

1896

SLEETH v. HURLBERT.

It is essential that the warrant should give the situation of the premises. *The King* v. *Hazell* (1).

TASCHEREAU J.—I would dismiss this appeal without hesitation. Whether the warrants were void and illegal cannot now be questioned by the present appellant. The judgment declaring them to be so is as to him *res judicata*, whether such a judgment is to be considered as *in rem* or *in personam*, and that with retrospective effect to their inception. He, as an officer of the court or standing in the position of an officer of the court, or one over which the court, as the Court of Queen's Bench in England, has control, has no *locus standi* to controvert the decision of the court in the matter. If any one is bound by a judgment of this nature surely it must be in this case the magistrate, and *a fortiori* the appellant. Upon this ground alone the appeal should, in my opinion, be dismissed.

Were it necessary, I might further say, to determine the point, that the appellant would find it difficult, in my mind, to justify the detention of the goods outside of the jail, under the verbal order of the magistrate to keep them in the jail. Moreover, the appellant has failed to establish the legality of such a verbal order in such a case. He does not justify under any warrant.

Whatever might be his position if this was an action for damages, I do not think that he has any right to these goods, nor ever had any. In fact, as I said, that is conclusively determined by the court in a case where Carrol, the plaintiff, represented him, the present appellant.

The judgment would also seem to me to be a judgment *in rem*. That would make the case still clearer against the appellant.

(1) 13 East 139.

1896

SLEETH v. HURLBERT.

Sedgewick J.

SEDGEWICK J.—The first question to be determined in this appeal is as to the validity of the search warrant under which the goods replevied were seized or held in custody by the appellant. If that warrant was bad then the appeal fails, for I do not propose in this case to discuss the point as to whether in Nova Scotia replevin will lie to regain possession of goods *in custodiâ legis*.

The second question is: Assuming the warrant to be good, does it afford protection to the officer executing it, and those assisting him, even though it may have been subsequently quashed as invalid by a court of competent jurisdiction? And the final question is (in the event of the second being answered affirmatively), as to whether the present appellant is concluded by the judgment of the Supreme Court of Nova Scotia in reference to the legality of the warrant, although he was not a party to, and had no notice of, the proceedings which culminated in its being set aside. In other words, is it *res adjudicata* as to him?

As to the legality of the warrant. The following is the warrant under which the goods were seized:

SEARCH WARRANT—C. T. ACT.

CANADA:
Province of Nova Scotia, County and Town of Yarmouth.

To all or any of the constables or other peace officers in the county of Yarmouth:

Whereas Peter O. Carroll, of Yarmouth, in the said county and town of Yarmouth, inspector, appointed by the town council of the town of Yarmouth, for the purpose of enforcing and carrying out the provisions of "The Canada Temperance Act," hath this day made oath before me, the undersigned, one of Her Majesty's justices of the peace in and for the said county of Yarmouth, and stipendiary magistrate for the town of Yarmouth, that he hath just and reasonable cause to suspect, and doth suspect, that intoxicating liquor is kept for sale in violation of the second part of "The Canada Temperance Act," in the dwelling house, hotel, outhouses and premises of J. Henry Hurlbert, hotel keeper of Yarmouth, in the said county of Yarmouth.

1896

SLEETH v. HURLBERT.

Sedgewick J.

These are therefore, in the name of Our Sovereign Lady the Queen, to authorize and require you, and each and every of you, with necessary and proper assistance to enter in the day time into the said dwelling house, hotel, outhouses and premises of the said J. Henry Hurlbert, and there diligently search for the said intoxicating liquor; and if the same, or any part thereof, shall be found upon such search, that you bring the intoxicating liquor so found, and also all barrels, kegs, cases, boxes, packages and other receptacles of any kind whatever containing the same, before me to be disposed of and dealt with according to the law.

Given under my hand and seal, at Yarmouth, in the said county and police division of Yarmouth, this 17th day of Dec., in the year of our Lord 1891.

NATHAN HILTON, J.P.,
Stipendiary Magistrate.

This document, the appellant contends, follows the form prescribed by the Canada Temperance Act, cap. 106 R.S.C. sec. 108, and form 72 and sec. 10 of the amending Act 51 Vic. (1888) cap. 34. Section 14 of that Act provides that the forms given in the schedule shall be sufficient, section 108 in the original Act only going so far as to enact that the "search warrant under that section may be in the form N." It is for us to say whether it does follow the form within the intention of Parliament, and if it does, then in my view we are bound to hold it sufficient.

Now the ground upon which the document was set aside was that it did not appear on the face of the warrant that "the dwelling house, hotel, outhouses and premises" referred to therein were within the town of Yarmouth, and consequently within the jurisdiction of the stipendiary magistrate who issued it; that therefore the warrant was bad on its face and did not justify the constable acting under it. But does the statute or the form require a description of the premises to be searched as thus contended? I do not think so. There is nothing in the form from which it can be gathered that the premises to be searched are to

be described by metes and bounds, or otherwise. In the form the words are "dwelling house, &c.;" that "&c." undoubtedly refers, and refers only, to the other places set out in the Act, "any dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel or other place or places." It does not, even by implication, direct the magistrate to describe, as is ordinarily done in a conveyance, the boundaries of the suspected premises. I am clearly of opinion that the warrant complies with the statutory form, and inasmuch as the statute declares a warrant in that form to be sufficient I must hold this warrant to be valid on its face, and therefore (subject to qualifications stated below) a justification to peace officers acting under it.

The legality of the warrant was impugned upon another ground not decided by the Supreme Court. That part of sec. 10, cap. 34 of 51 Vic. which authorizes a warrant is as follows:

> Such officer may grant a warrant to search in the day time such dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel, or other place or places for such intoxicating liquor.

The warrant authorized the search of the "dwelling house, hotel, outhouse and premises" of Hurlbert. And it was contended that the warrant was bad, because while the authority of the statute was disjunctive, only authorizing a search of the hotel or premises, the warrant purported to authorize a search of the hotel and premises. I cannot appreciate the force of this contention. The statute is not disjunctive. It authorizes the officer to search "places," more than one place. The magistrate in his warrant may specify the different buildings or premises, or places where the liquor is suspected to be, and authorize a search in each and all. It would be absurd to suppose that the legislature intended that for each place where liquor was suspected to be, a separate search warrant was to issue. If

1896

SLEETH v. HURLBERT.

Sedgewick J.

one has to search for a thing, it is implied that he may have to go to many places to find it. The object is to get the thing and the statutory warrant is made so wide that the officer may go anywhere within his territory to find it.

I feel bound in this connection to observe that in my view, apart from the statute, it is not by common law necessary that the warrant should state affirmatively that the place to be searched is in a place within the jurisdiction of the magistrate who issues it, or the officer directed to execute it. A murder is committed in Ottawa by John Smith of Montreal. A magistrate here by his warrant states that John Smith of Montreal has committed, or has been charged with the crime of murder at Ottawa, and authorizes an officer to arrest him. That officer has jurisdiction only within the City of Ottawa or the County of Carleton. He can exercise his jurisdiction within these limits only, unless a justice in another county backs the warrant. But if within his jurisdiction he finds and arrests the accused, he is not amenable to civil consequences, nor may the accused be discharged on *habeas corpus* because the warrant did not allege that Smith resided or was within the magistrate's or officer's jurisdiction.

The next question is whether the appellant can rely upon the warrant as a defence although it was afterwards quashed by the Supreme Court as being irregularly issued. Before the passing of the Imperial Act 24 Geo. II. c. 44, an Act passed for the security and protection of inferior peace officers, they were placed in the hazardous predicament of being liable to indictment if they refused to execute the warrants of justices of the peace, and to vexatious actions if they did. It was the object of that Act to relieve them from this difficulty and to substitute the magistrate by whom the warrant was granted and who was supposed to be

1896

SLEETH v. HURLBERT.

Sedgewick J.

cognizant of the legality of it, in lieu of the officer who was merely the instrument to execute it, and who was probably ignorant of the grounds on which it was issued.

Paley, page 426, says:

As the law stood before, the distinction was that if the justice had no authority in the matter so that the conviction was *coram non judice*, and void, his warrant afforded no protection to the officer, but if the justice had jurisdiction in the matter the officer was protected, provided the manner of the execution was legal, however erroneous the judgment might have been and though the magistrate himself might be liable.

In the report of the Royal Commissioners upon a draft criminal code submitted to the Imperial Parliament in the year 1880, which commission was composed of Blackburn, Barry and Lush JJ. and Sir James Fitzjames Stephen Q.C., they say:

The result of the authorities justifies us in saying that whenever a ministerial officer who is bound to obey the orders of a court or magistrate (as for instance in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received he is justified, if that order was within the jurisdiction of the person giving it. And we think that the authorities shew that a ministerial officer obeying the order of a court or the warrant of a magistrate is justified, if the order or warrant was one which the court or magistrate could under any circumstances lawfully issue, though the order or warrant was in fact obtained improperly, or though there was a defect of jurisdiction in the particular case which might make the magistrate issuing the warrant civilly responsible, on the plain principle that the ministerial officer is not bound to inquire what were the grounds on which the order or warrant was issued, and is not to blame for acting on the supposition that the court or magistrate had jurisdiction.

And this view of the law was adopted by the Canadian Parliament; see article 18 of the Criminal Code, 1892. In *Savacool* v. *Boughton* (1), a leading American case on the subject, Mr. Justice Marcy, after reviewing many English and United States authorities, says:

(1) 5 Wend. 170.

1896

SLEETH v. HURLBERT.

Sedgewick J.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority. That when an inferior court has not jurisdiction of the subject-matter, or having it has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process in such suit is no trespasser unless the want of jurisdiction appears by such process. Bull. N.P. 83; Willes 32, and the cases there cited by Chief Justice Willes; and he proceeds to say, having reference to the case then under consideration:

> I am of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him by virtue of that process.

The point was incidentally discussed in the celebrated case of *Howara* v. *Gosset* (1), where the validity of general warrants was under consideration. In that case Mr. Justice Colridge refers to what was said by Willes C.J. in *Morse* v. *James* (2): It has always been holden that a constable may justify under a justice's warrant in a matter wherein the justice had jurisdiction, though the warrant be never so faulty, as being "too strong and general to be quite accurate." In my view that contention is well founded, but the circum-

(1) 10 Q.B. 359.

(2) Willes 122, 128.

stances in that case did not demand a precise statement as to the extent of the inaccuracy.

On the whole question further reference may be had to the following cases: *Phillips* v. *Biron* (1); *Parsons* v. *Lloyd* (2); *King* v. *Harrison* (3); *Wolley* v. *Clark* (4); and *Codrington* v. *Lloyd* (5), in which case both counsel conceded that the officer could justify. The general principle running through all these cases and authorities is that even though a warrant may in fact be bad, though it may be or has been set aside by reason of failure to comply with legal requirements if it has been issued by competent authority, by a functionary duly authorized by statute or otherwise, and is valid on its face, it will afford absolute justification to the officer executing it, not only where he is proceeded against criminally but by civil action as well. The result is that upon this point, the appellant succeeds. The warrant being valid on its face, and having been issued by a magistrate with admitted jurisdiction, he was justified in acting under it.

The question still remains:—The Supreme Court of Nova Scotia having by independent proceedings taken at the instance of the respondent, but behind the back and without the knowledge of the appellant, and long after the action against him had been instituted, quashed the warrant under which the appellant acted, is he bound by that judgment—a judgment in a proceeding in which he was neither party nor privy? Is he estopped or precluded in the present action, from asserting that that judgment was erroneous? I am willing, for the purposes of this appeal, to admit that the answer to this question depends upon the answer that can properly be given to the further question—Was the judgment given by the Supreme Court as to

(1) 1 Strange 509.
(2) 2 Wm. Bl. 845.
(3) 15 East 615, note *d*.
(4) 5 B. & Ald. 746.
(5) 8 A. & E. 449.

1896

SLEETH v. HURLBERT.

Sedgewick J.

the sufficiency of the search warrant a judgment *in rem*, or a judgment *in personam* or *inter partes* only? It is a harsh doctrine—a doctrine that may be used to the unjust destruction of individual rights and interests, the jurisprudence as to the universally binding efficacy of judgments *in rem;* but it is a doctrine too firmly established to be successfully impugned. But what is its extent? A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication. (See cases cited in the Duchess of Kingston's case (1). It is true that in the present case, the Supreme Court set aside or quashed the search warrant, but it did not pass upon or adjudicate the question whether the liquors seized had or had not become forfeited to the Crown. By virtue of its general common law jurisdiction to revise and supervise the proceedings of all inferior tribunals within the province with the view of preventing any from acting in excess of its statutory or other power, it may by *certiorari* bring such proceedings before it, examine upon their legality, and determine accordingly. It therefore, had a right to examine and adjudicate upon the sufficiency of the warrant in question It had authority to say whether it was valid or invalid on its face, whether all preliminary steps had been taken justifying its issue; whether in short upon grounds apparent from reading it, or upon grounds determined by evidence, it was in law a valid instrument; but that is an altogether

(1) 2 Sm. L.C. 9 ed. p. 812.

different thing from its right to adjudicate upon the "status" of the property in reference to which the warrant was issued. It has not either by common law or statute the right to adjudicate upon that question. For that purpose Parliament has provided the requisite tribunal and when that tribunal has passed upon it its judgment may be binding upon the world as a judgment *in rem*, subject to the review of the statutory appeal court, but so far as I can see the Supreme Court has not been vested with any right to adjudicate upon the property right, and therefore its judgment as to the legality of process cannot be viewed as a judgment determining status, but only as adjudicating on the legality of procedure.

One consideration, it seems to me, adds force to this argument. Suppose a summons issued against a person charged with offending against the Act, and a search warrant issued at the same time; suppose the warrant bad, and the Supreme Court had quashed it on the day it was issued. I know of no principle that would preclude the magistrate from issuing a new warrant and deciding upon the question of forfeiture when he decided upon the question of guilt. Upon the whole question I refer to *Rex.* v. *Wick* (1); *Reg.* v. *Clint* (2); *Reg.* v. *Evenwood* (3).

In my view the judgment of the Supreme Court as to the sufficiency of the warrant does not create an estoppel.

In the respondent's factum the question is raised as to his right to recover because the appellant tasted or tested the seized goods. The question does not call for much consideration. It was his duty to make a test so as to be able to give evidence as to the character

(1) 5 B. & Ad. 534.
(2) 11 A. & E. 624, note.
(3) 3 Q.B. 370.

1896

SLEETH v. HURLBERT.

Sedgewick J.

of the goods he had seized. On this, as well as on the ground of *de minimis*, that contention fails.

On the whole, I am of opinion that the appeal should be allowed and the action dismissed, the appellant to have the costs of this appeal and all costs in the courts below.

GWYNNE, KING and GIROUARD JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *S. H. Pelton.*

Solicitor for the respondent: *W. E. Roscoe.*

CHARLES A. CLARK *et al* (DEFENDANTS) APPELLANTS; 1895

AND *Oct. 26, 28, 29.

PHINEAS D. PHINNEY (PLAINTIFF) .. RESPONDENT. 1896

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *Feb. 18.

Nova Scotia Probate Act—R. S. N. S. 5 ser. c. 100 ; 51 V. (N. S.) c. 26 —Executors and administrators—License to sell lands—Estoppel—Res judicata.

An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon.

Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion.

Held further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), dismissing the plaintiff's appeal from the judgment of the court below.

The fact and questions raised in the case will be found in the head-note and the judgments reported.

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

(1) 27 N. S. Rep. 384.

1895

CLARK v. PHINNEY.

Roscoe for the appellant. The Probate Court could only revoke the license on grounds mentioned in the statute. *In re Suffield* (1); *In re Walton* (2); *United States* v. *Arredondo* (3). We can, therefore, attack the license in this proceedings on grounds not open to us in the Probate Court as not being in the statute. *Hobbs* v. *Henning* (4); *Castrique* v. *Imrie* (5).

The inherent power of a court to control its own process does not apply to a judgment. *Cocker* v. *Tempest* (6).

There was no election by appellant on receipt of part of the purchase money there being no inconsistent rights calling therefor. *Codrington* v. *Codrington* (7).

If the license was void there could be no election. *Sheddon* v. *Goodrich* (8); *Carratt* v. *Morley* (9).

J. J. Ritchie Q.C. for the respondents. The license cannot be attacked in a collateral proceeding. *Doe d. Sullivan* v. *Currey* (10); *Beauregard* v. *City of New Orleans* (11).

The judgment refusing to revoke is conclusive. *Henderson* v. *Henderson* (12); *Beloit* v. *Morgan* (13).

The appellant having accepted the money is estopped from claiming against the land. *Wood* v. *Reesor* (14).

TASCHEREAU J.—I concur in the judgment of Mr. Justice Sedgewick. The appeal should be dismissed with costs.

GWYNNE J.—I am not prepared to hold that if there had been no petition to revoke the license granted by the judge of probate of the 27th April, 1891, that the license itself, and consequently any sale made there-

(1) 20 Q. B. D. 693.
(2) 26 N. S. Rep. 125.
(3) 6 Peters 725.
(4) 17 C. B. N. S. 791.
(5) L. R. 4 H. L. 414.
(6) 7 M. & W. 502.
(7) L. R. 7 H. L. 854.
(8) 8 Ves. 481.
(9) 1 Q. B. 18.
(10) 1 Pugs. (N. B.) 175.
(11) 18 How. 497.
(12) 3 Hare. 100.
(13) 7 Wall. 619.
(14) 22 Ont. App. R. 57.

under, would be nullities for insufficiency, as is contended, in the affidavit of the executrix and trustee of the will of Joseph Clark upon her application for the license. I cannot say that the affidavit, assuming it to be true as there alleged that the personal estate of the deceased was wholly insufficient for the payment of his debts, was not a sufficient compliance with the statute so at least as to prevent the license granted thereon being an absolute nullity; but in the proceedings taken upon the citation to revoke the license issued upon the petition of the present defendants, who were the executors and trustees of the will of James Clark, deceased, all insufficiency, if any there was, in the affidavit of the executrix and trustee of the will of Joseph Clark was removed, and the adjudication of the probate judge pronounced upon that citation, which was affirmed on appeal, constituted in my opinion an effectual and final confirmation of the grant of the license, which was by the judgment on the citation adjudged to be absolutely necessary and in the interest of the estate, and the executrix and trustee of Joseph Clark was thereby authorized to proceed thereunder.

Then as to the objection that the license is null and void inasmuch as it purports to authorize

> the sale of all and every the real estate of the said Joseph Clark, deceased, which he had held or was interested in or entitled to at the time of his death, or so much and such parts and portions of said real estate as may be found sufficient for the full and final discharge of his said debts,

without specifying some particular piece of real estate, it is to be observed that the license in this respect follows the words of the statute, and cannot therefore, in my opinion, be held to be null and void upon that ground. Then as to the objection raised by the statement of defence to the plaintiff's action, namely, that the said Joseph Clark was not seized in fee

1896
CLARK
v.
PHINNEY.
Gwynne J.

simple absolute of the piece of land, his estate and interest in which was sold to the plaintiff, but only of an undivided estate therein as a tenant in common, the only point raised by this defence was that the interest of a tenant in common in the land held in common could not be sold. The statute says that a sale under the license shall have the same effect as if made by the deceased in his lifetime; and there can be no doubt that if a tenant in common should sell the whole of his interest in land held by him in common with another or others, the estate of the grantor would so pass to his grantee as to make the latter tenant in common with the other, or others, according to the interest of the grantor.

Of this there can be no doubt, that the interest of the grantor so sold was his whole interest in the land in common, and the statement of defence in the present action so treats the case as regards the land, Joseph Clark's interest in which was what was sold to the plaintiff, but in the argument before us the contention was that in point of fact what was sold was Joseph Clark's interest in one half of the land which he held in common with his deceased brother James. This, as I have already observed, was not the point raised by the statement of defence; but regarding the deed as one made by Joseph Clark in his lifetime, and as being of all his interest in only one-half of the estate held in common, although not so put in issue, still such a conveyance by Joseph would have been unquestionably good and binding as against his heirs and devisees and all persons claiming as his or their creditors; it could not, of course, prejudice the co-tenant or co-tenants or affect injuriously their right, but with them we have no concern in the present case; but as regards them I have no doubt that upon a severance of the estate in common by the courts they would have ample power

1895

CLARK v. PHINNEY.

Gwynne J.

to protect the interests of the co-tenants from all injury, as also of the grantee of one of them of his interest in a part only of the estate held in common.

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

SEDGEWICK J.—On the 25th July, 1885, one Joseph Clark died. At the time of his death he was the owner, as tenant in common with his brother James Clark, of certain lands at Granville, Annapolis County, N.S. By his will he appointed his widow, now Hannah Vail, executrix, and he devised his real estate to his brother James Clark for life, remainder to his brother Charles Clark, his sister Rachel Clark, and his nephew James E. Clark, son of James Clark, and Irene Clark, in three equal shares.

On the 27th of April, 1891, the executrix obtained from the Court of Probate for Annapolis County an *ex parte* license to sell the real estate of the deceased for the purpose of paying debts.

On the 15th of May, 1891, T. W. Chesley and Edmund Clark, executors of James Clark, deceased, petitioned the judge of probate to revoke such letters of license, and that an inquiry should be had as to the necessity for a sale of the real estate. Upon this petition a long investigation ensued, all parties interested being represented, which resulted in the dismissal of the application. From the decree of dismissal the petitioners, on their own behalf, as executors, as well as on behalf of the heirs and devisees of their testator, appealed to the Supreme Court, which appeal was dismissed with costs.

On the 10th June, 1891, Hannah Vail, the executrix of Joseph Clark, under the license to sell, now confirmed by the judgment both of the Probate Court and the appellate tribunal, sold certain lands of the de-

1896
CLARK
v.
PHINNEY.
Sedgewick. J.

ceased, the same having been set up at public auction, to the respondent Phineas D. Phinney, for the sum of $1,925, the deed to him being recorded two days afterwards. The respondent's case depends chiefly upon the validity of this deed, or to its immunity from impeachment so far as the appellants are concerned.

The appellants' case is this:—They were, or represented, the personal representatives and devisees under the will of James Clark, brother of Joseph Clark, and on the 8th of November, 1890, had obtained and recorded a judgment against Hannah, the executrix of Joseph Clark, and against his devisees as well, for $827.95. Another judgment between the same parties for the sum of $608 was also obtained and registered. These judgments being personal against the executrix and devisees of Joseph Clark they bound all the interest which they, or any of them, had in the lands of the deceased. It was therefore manifestly against the interest of the persons claiming under James Clark's will that the executrix, Hannah, should under the authority of letters of license sell the lands of the deceased Joseph to pay the debts of his estate, and if they could show that there was sufficient personalty for that purpose, the lands would be left free so that their judgments might operate upon and be satisfied from them.

It was for this purpose that the executors of James Clark, for and as representing these judgment creditors, took the inefficient proceedings in the Probate and Supreme Court above referred to.

As already stated, the lands in question had been sold under the letters of license to the respondent, but the appellants, claiming that no title passed by that deed, having issued an execution against the lands of the devisees of Joseph Clark upon the larger judgment

against them, caused the lands sold to Phinney to be advertised for sale thereunder by the sheriff.

Phinney thereupon had the sale stayed and this action was brought to determine the respective rights of the parties to the lands purporting to be conveyed to Phinney.

One important fact remains to be stated. It was admitted at the trial that "from the proceeds of the sale of land under the license to sell from the Probate Court, $612.50 was paid to the present appellants in satisfaction of a judgment for costs as plaintiffs in *Clark* v. *Clark et al*, and satisfaction was signed by the several defendants in this suit."

The ground upon which the appellants claim their right to succeed is as follows:

The procedure to obtain a license for the sale of the real estate of a deceased person is now governed by section 26 of the Nova Scotia Probate Act, chapter 100, Revised Statutes, fifth series. That section, as amended by the statutes of Nova Scotia for the year 1888, chapter 26, section 6, reads as follows:

In case the personal estate of the deceased shall be found by the judge on affidavit insufficient for the payment of his debts and legacies, costs and the expenses incurred by the executor or administrator for the benefit of or in relation to the estate of the deceased, such judge, on security being given by the administrator or executor to account for the proceeds of the sale or the sum obtained by mortgaging or leasing the same, may at his discretion grant a license for the sale of the whole or such part of the real estate of the deceased as he shall deem necessary, or for the mortgaging or leasing thereof, provided such lease be for a term not exceeding twenty-one years; and such license may be granted to one or two executors, or to the majority of three or more executors, should one of them be out of the province or under any disability. Provided that no such license shall be granted unless the affidavit shall set forth a full and detailed statement of the claims against such estate, and a further statement showing the personal assets collected, and his belief that such claims are *bonâ fide*, and provided further that if any party interested in said estate shall, before the day of sale, mortgaging or leasing of the same, petition the judge

1896

CLARK
v.
PHINNEY.

Sedgewick J.

against the granting of such license, or for the revocation thereof, and praying that an inquiry may be had as to the necessity of such sale, mortgaging or leasing, it shall be the duty of the judge to postpone the sale, mortgaging or leasing for such reasonable time as he may deem proper, and to order the parties interested to be cited before him. If after hearing the parties and the evidence that may be adduced, he shall be satisfied that the granting thereof was unnecessary, he shall forthwith revoke such license; but if he shall deem the objection made to have been frivolous, the party so objecting shall pay the costs of the application, as well as all costs incurred in postponing.

The license in fact granted, it is contended, is not in compliance with the provisions of this section. Neither the instrument itself, nor the proceedings preceding it, and upon which it was based, contained a description of any kind of the lands of the deceased, nor was any information given to the court to enable it to come to a conclusion as to whether it was necessary to sell the whole or only a part, and if so what part, of these lands. Besides, it was contended, the license was invalid and beyond the jurisdiction of the judge of probate because it delegated powers to the executrix which under the statute had to be exercised by the judge of probate himself; that no person having authority to exercise judicial functions can delegate to another any part of such functions unless specially empowered to do so under specified circumstances.

The enabling or operative clause of the license was as follows:

It is therefore adjudged, ordered and decreed that the said Hannah Vail, executrix and trustee as aforesaid, have license, and she is hereby authorized and required, after first giving thirty days' notice of the time and place of the intended sale, by advertising the same in the 'Royal Gazette' at Halifax, and in the 'Monitor' newspaper published in Bridgetown, and by posting up notices thereof in the city, township or settlement wherein such real estate is, or may be situated, to set up and sell at public auction, to the highest bidder therefor, all and every the real estate of the said Joseph Clark, deceased, which he had held, or was in any way interested in, or entitled to, at the time of his death, or so much and such parts and portions of said real estate as

may be found sufficient for the full and final discharging of the said debts.

And it was set up that although the statute imposed upon the judge the duty of determining whether the whole, and if not the whole what part, of the lands of the deceased it was in his judgment necessary to sell, the license in question transferred the exercise of this judgment or discretionary power to the executrix; in other words, that the executrix and not the judge was made the arbiter upon the question of necessity.

Again, it was contended that the license was bad because it limited the application of the proceeds of the proposed sale to the payment of "the debts due and owing by the deceased at the time of his death," whereas the statute contemplated the payment not only of these debts, but the "costs and expenses incurred by the executor for the benefit of or in relation to the estate of the deceased" as well.

These contentions, or some of them at least, were admitted to prevail by the learned trial judge, Mr. Justice Weatherbe, and his views upon appeal were concurred in by Mr. Justice Townshend and Mr. Justice Meagher. Mr. Justice Henry in a most elaborate and able opinion held that the license in question did not infringe the rule as to the delegation of judicial power and his view was approved of by the learned Chief Justice. So that the case comes before us with three judges of the Supreme Court of Nova Scotia against the validity of the license and only two in its favour, there being, however, a unanimous opinion that upon other grounds the plaintiff must succeed, whatever the correct view may be as to the character of that instrument.

In our view it is not necessary for the purpose of determining this appeal that this court should express an opinion upon these particular questions. We are

1896

CLARK v. PHINNEY.

Sedgewick J.

informed, and I believe correctly, that this form of license has been in common use in Nova Scotia from time immemorial (using that phrase in its popular, not in its legal sense), and that were it determined to be invalid innumerable titles to real estate hitherto deemed unassailable would be placed in jeopardy.

I would venture to suggest, in order to settle the manifest doubts and difficulties affecting this question, that it is a fit case for legislative action. Not long ago the legislature of Nova Scotia confirmed all deeds executed by sheriffs under foreclosure decrees, the validity of such deeds having been questioned. The confirmation of judicial sales under letters of license in the form in question here might possibly receive a like favourable consideration.

In our judgment the appellants must fail upon at least two grounds. First, this is a case in which the principle of *res adjudicata* applies.

The judge of probate had granted, upon the *ex parte* application of the executrix of Joseph Clark, letters of license to sell the real estate of the deceased. That real estate had been devised to persons against whom the present appellants had a registered judgment. It was that judgment, and that judgment only (as far as appears), that gave the appellants such an interest in the real estate as would enable them to attack the letters of license. Their *locus standi* in the Probate Court was the fact that they had a charge by virtue of their judgment upon the lands proposed to be sold. The petition to vacate the letters of license, although in the names of Thomas W. Chesley and Edmund Clark, executors of James Clark, expressly states that they, together with the devisees of James Clark, are judgment creditors, and as such interested in those lands. They were acting, not so much on their own as on the behalf of their co-judgment creditors, the devisees of James

Clark, and when they appealed to the Supreme Court, as they did, they appealed not only on their own behalf, but on the behalf as well of "the heirs and devisees of James Clark," who, along with the executors, are the present appellants. There was not at the trial, there was not at the argument, a suggestion that in the proceedings in the Probate Court or in the proceedings upon appeal in the Supreme Court the judgment creditors and all of them were not represented, or that the executors misrepresented their position as acting for all parties. It is too late now to contend that the judgment creditors, the present appellants, were not all of them parties to the proceedings both in the Probate Court and in the Supreme Court. The record makes them parties, and we must assume that they were. There can be no argument as to the other party in the contest. The individual attacked was Hannah Vail, executrix of Joseph Clark, and the present plaintiff, claiming under her, is her privy. So that, substantially within the rule as to parties and privies, we have in the Probate Court the same parties as upon this appeal. Then, what was the issue in the Probate Court? It was simply this:

Were the letters of license valid or invalid? It is contended that the petition to revoke the instrument was in pursuance of the statute, and that revocation could be obtained only upon grounds set out in the statute. I do not agree with this contention. It is elementary law, that all common law courts, *a fortiori* a court like the Probate Court, with its common law powers and all the powers of the old court of Chancery (so far as the administration of the estates is concerned) as well, have inherent power and jurisdiction over their own proceedings, and can in a proper case revoke or set them aside at will. The case in this court of *In*

1896

CLARK v. PHINNEY.

Sedgewick J.

re Sproule (1), was in part decided upon that principle. If the instrument in question was invalid upon its face, as well as invalid by reason of non-compliance with antecedent statutory provisions, it was the duty of the parties attacking it to assert and put forward the grounds of such patent invalidity and obtain a judicial decision upon the merits of such objections. It is clear that, as a general rule, a party after having moved a court to set aside a judicial proceeding upon specified grounds, and having failed upon such motion, cannot afterwards upon a substantive motion attack the same proceedings upon grounds which in the first motion, whether intentionally or inadvertently, he failed to set up. The license in question was manifestly as objectionable when it was attacked in the Probate Court and upon appeal in the Supreme Court as it was when this suit was instituted. In both courts, tribunals resorted to by the appellants themselves for the determination of the question, the decision was in favour of its validity. There was no appeal from the decision of the Supreme Court and that judgment must conclude the parties, and negative the defence here as well upon the ground of public policy expressed in the maxim *interest reipublicæ ut sit finis litium* as upon the ground of individual right. *Nemo debet bis vexare pro eâdem causâ.*

The case of *Law* v. *Hansen* (2), in this court and the authorities cited by my brother King in his judgment, though having reference to the effect of a foreign judgment, are useful upon this point; and see *Nelson* v. *Couch* (3); *Newington* v. *Levy* (4). And this view of the case is the more strong when it is considered that the very objections now set up were also set up when the probate decision came before the Supreme Court,

(1) 12 Can. S.C.R. 140.
(2) 25 Can. S.C.R. 69.
(3) 15 C.B.N.S. 108.
(4) L.R. 5 C.P. 607; 6 C.P. 180.

1896

CLARK v. PHINNEY.

Sedgewick J.

two of the grounds of appeal being, first, "the license objected against was improvidently and illegally granted," and secondly, "the license cannot make a legal title to the estate proposed to be sold under the authority of said license, and no purchaser would pay an adequate price for the same."

Another ground upon which we think the respondent is entitled to succeed upon this appeal is that of estoppel. As already stated, the appellants had obtained two judgments, substantially against the estate of the deceased Joseph Clark, amounting as stated in Hannah Vail's petition to $1,436.14. This claim constituted more than one-half of the unpaid liabilities of the estate. It was for the express purpose of liquidating this claim (as well as the other smaller ones) that the executrix asked for and obtained authority to sell the real estate. The appellants as judgment creditors knew this, and in the name of the executors of James Clark, as representing them, sought, by application to the proper court, to have that authority revoked. They failed. The authority to sell given to the executrix by a tribunal competent to give it was declared not only upon review by that tribunal itself, but upon appeal by the Supreme Court, to be sufficient authority. Upon the faith of these decisions the respondent purchased and paid for the lands. (The case does not show the date of the decision of the Supreme Court, but I think we must presume it was before the present suit began.)

Out of the proceeds of such sale the executrix paid to the appellants $612.50, they knowing (as they must have known) the source from which that money came. The admission made at the trial as above set out in our view implies the fact of knowledge. The claim of the appellants therefore now is; they say to the respondent: "we knew the executrix had no right to

1896

CLARK v. PHINNEY.

Sedgewick J.

sell, that the license upon which she and you relied as giving her authority to sell and you to buy a sufficient title was nothing but waste paper, we knew you bought the land and paid your money upon the faith of the license. From that money which she received, she gave us and we accepted $612.50, but really, as a matter of law, you got nothing by your purchase. No title passed. Get back your money as best you can. For all we know or care your $1,925 are gone. The lands you claim are ours, or bound by our remaining judgment, and we propose to sell them."

Now, I do not consent to the contention that they did not know that the money they all accepted was in the first instance the respondent's money. The admission, as I have said, implies the contrary. Nor is there any more force in the argument that when the money was tendered them they were bound to accept it because the court would have so ordered. The court would not and could not have so ordered were the facts made apparent upon an application to enforce the execution of a satisfaction price. Its receipt, however, was purely voluntary, and in our view inconsistent with an intention of subsequently setting up the claim now put forward, a claim that shocks the conscience and is opposed to the fundamental principles of natural justice. The United States cases are against it. See *Southard* v. *Perry* (1), where a defendant was out of the State at the time when a foreclosure decree was obtained against him and wrote his wife directing her to receive the surplus money from the sheriff. Held, he could not attack the decree because the summons was not served on him; *Tooley* v. *Gridley* (2), where the surplus money was applied by the court upon the motion of the subsequently objecting party; *Merritt* v.

(1) 89 Am. Dec. 587. (2) 41 Am. Dec. 628.

Horne (1); *Deford* v. *Mercer* (2), where the surplus money was got with a full knowledge of all the circumstances; and *Spragg* v. *Shriver* (3), where the person who should have objected said nothing until after the purchaser paid the money.

In *Maple* v. *Kussart* (4), Strong J. expressed himself as follows:

> It is a maxim of common honesty as well as of law that a party cannot have the price of land sold and the land itself. Accordingly, it has been ruled uniformly that if one receive the purchase money of land sold he affirms the sale, and he cannot claim against it, whether it was void or only voidable.

It is likewise opposed to the principle expressed in the maxim *Qui non improbat approbat.* See Wharton's Legal Maxims (5).

In *Birmingham* v. *Kirwan* (6), Lord Redesdale says:

> The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which court of equity particularly have grounded a variety of decisions in cases both of deeds and wills, though principally in cases of wills.
>
> * * * * * * * *
>
> The rule of election, however, I take to be applicable to every species of instrument, whether deed or will, and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect, for in order to enable a court of law to apply the principle the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done, that is, to have elected.

See *Codrington* v. *Lindsay* (7); *Codrington* v. *Codrington* (8).

We are of opinion that the appellants, taking the money referred to, knowing the source from which it came, that it was a portion of the purchase money paid

(1) 67 Am. Dec. 298.
(2) 92 Am. Dec. 460.
(3) 64 Am. Dec. 698.
(4) 91 Am. Dec. 214.
(5) 2 ed. p. 279.
(6) 2 Sch. & Lef. 444, at p. 449.
(7) 8 Ch. App. 578.
(8) L.R. 7 H.L. 854.

1896

CLARK v. PHINNEY.

Sedgewick J.

by the respondent whose title to the lands in question they now seek to impeach, are now precluded from asserting the contrary.

The question as to whether the proceedings of the Probate Court may be collaterally attacked does not (if we are right upon either one or other of the foregoing views) call for determination upon the present appeal. It might require the investigation of a point upon which we deliberately refrain from expressing an opinion, namely, as to whether the license is upon its face a valid instrument.

Neither (if we are right upon the second view) are we necessarily called upon to express an opinion as to whether a sale of the undivided interest of a tenant in common in a portion only of devised lands is valid, but it appears to us that upon that point the reasoning of Mr. Justice Henry is very strong.

On the whole we are of opinion that the appeal should be dismissed and with costs.

KING and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellants: *O. T. Daniels.*

Solicitor for the respondent: *E. Ruggles.*

EMMANUEL ST. LOUIS (SUPPLIANT) ...APPELLANT; 1895

AND *Oct. 11,

HER MAJESTY THE QUEEN (RESPONDENT)..... } RESPONDENT. 1896 *Feb. 18.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Evidence—Presumptions—Omnia præsumuntur contra spoliatorem.

St. L. filed a petition of right to recover from the Crown the balance alleged to be due on a contract for certain public works. On the hearing it was shown that certain time-books and the original documents from which his accounts had been made up and also his books of account had disappeared. The Judge of the Exchequer Court found as a fact that these books and documents had been destroyed in view of proceedings before a commission appointed some time prior to the filing of the Petition of Right to inquire into the manner in which the works done under the contract had been carried on and he dismissed the petition.

Held, reversing the judgment of the Exchequer Court, that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent and to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule *omnia præsumuntur contra spoliatorem* did not justify the learned judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial showing instead that the accounts would have been corroborated.

APPEAL from a decision of the Exchequer Court of Canada (1), dismissing the suppliant's petition of right.

The suppliant claimed payment of $63,642.29 as the balance remaining on a larger amount, due in virtue of several contracts between himself and the Department of Railways and Canals for the Dominion of Canada,

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

(1) 4 Ex. C.R. 185.

1895

ST. LOUIS v. THE QUEEN.

for stone for the construction of a new Grand Trunk Railway bridge on the Lachine Canal, and for labour required upon Wellington bridge, the Grand Trunk bridge, and lock no. 1 on the Lachine Canal in Montreal.

These contracts in the first instance were formed by accepted tenders made by the appellant, addressed to the Department of Railways and Canals; but during the execution of the contracts modifications were made.

The main defence raised by the Crown, and the one which was principally relied on at the trial, was the fraudulent preparation by the appellant of the pay-lists of the men.

The work on the bridges was, of necessity, required to be performed in the winter season, before the opening of navigation on the Lachine Canal, and was performed, and the men and teams supplied by the appellant, between the months of January and the middle of June, 1893, under the direction of the superintending engineer and the superintendent of the Lachine Canal.

The method adopted by the appellant in keeping a record of the men and teams which he sent upon the works, was by keeping the time of these men and teams in time-books and time-sheets, for which purpose time-keepers were employed. The time-books and time-sheets were, at the close of each day's work, handed into the office of the appellant, and a book-keeper and several assistants were employed by the appellant in making up pay-lists or accounts of the men's time, at the prices mentioned in the contracts above referred to. These pay-lists or accounts, when completed for a period of a fortnight or other period at which they were made up, were taken to the government officers in charge of the work, who certified them, after which they were sent to the Department of Railways and Canals at Ottawa for payment. The department em-

ployed a time-keeper, whose duty it was to check over the pay-lists and keep a record and check upon the time of the men employed.

The total amount of the pay-lists of the appellant amounted to the sum of $284,192.50, in which is included a small sum for stone but with respect to which no question arises.

Of this total amount the Crown paid $220,550.21, but refused to pay the balance of $63,642.29, alleging that the appellant had, during the greater part of the time the works were in progress, improperly and fraudulently inserted the names of workmen who were not in fact employed or engaged on the work; and also that a large amount of time of men and teams that were employed had been fraudulently added to the pay-lists, whereby the amounts appearing on the pay-lists were greatly in excess of what was really due to the appellant.

The appellant's evidence, taken upon discovery, disclosed the facts, that prior to a sitting of a commission, which was appointed by the Dominion Government in May, 1893, to investigate and report upon the building of the bridges, he had burnt and destroyed all his books of account, bank pass-books, cheques and the original time-books and time-sheets relating to the contracts in this matter, so that none of the original books and papers were available for evidence at the trial.

The Exchequer Court judgment was to the effect that on account of the presumptions arising against the suppliant through his voluntary and wilful destruction of the evidence, he was not entitled to any portion of the relief sought by his petition.

Geoffrion Q.C. and *Emard* for the appellant. The evidence will show that the suppliant has proved every item of his claim and is entitled to recover unless fraud can be shown.

1895

ST. LOUIS v. THE QUEEN.

There is nothing to justify the finding of the learned Judge of the Exchequer Court that the books were destroyed with the object of embarrassing the commission.

The suppliant was not obliged to keep any books as he would be in France.

The rule *omnia præsumuntur contra spoliatorem* is not one *de juris et de jure*. The presumptions under it are only of fact arising from the evidence and do not make evidence. See arts. 1204, 1227, 1238 C. C.; arts. 1330, 1331 C. N.; arts. 15, 17, Code Com.; Dal. (1); Marcadé (2).

The destruction in this case at the most would only operate to let in secondary evidence. Art. 1239 C. C.; Best on Evidence (3); *Cartier* v. *Troy Lumber Co.* (4); *Bott* v. *Wood* (5).

Osler Q.C. and *Hogg* Q.C. for the respondent. The finding that the books were destroyed in view of the commission must be accepted on appeal and justify the presumptions made against the suppliant. *Hunter* v. *Lauder* (1); *Attorney General* v. *Dean of Windsor* (2); *Harris* v. *Rosenberg* (3); *Joannes* v. *Bennett* (4).

The learned counsel dealt with the evidence, claiming that it showed fraud on the suppliant's part.

TASCHEREAU J.—I would allow this appeal. I think that the court below has carried too far the consequences of the rule *omnia præsumuntur contra spoliatorem* (1). The destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed

(1) Vo. Obligation no. 4238.
(2) Droit Comm. vol. 4 no. 2471.
(3) Par. 1234.
(4) 138 Ill. 533.
(5) 56 Miss. 136.
(1) 8 U. C. L. J. (N.S.) 17.
(2) 24 Beav. 679.
(3) 43 Conn. 227.
(4) 5 Allen (Mass.) 169.
(1) See per Lord Eldon in *Barker* v. *Ray*, 2 Russ. 63; and Best on Evidence, par 414.

it, but that presumption may be rebutted. Now, here the presumption raised by the destruction of papers and books by St. Louis, not unsatisfactorily explained, could not be better rebutted than by proving, as he has done in the clearest manner, that they would, if forthcoming, conclusively establish his claim. Michaud, his head clerk, swears positively, and his evidence not only stands uncontradicted but is fully corroborated, that the appellant's accounts as sent to the government were taken faithfully from the books that have been destroyed. Coughlin, a government time-keeper, swears to the correctness of the pay-lists concerning the work done at the Wellington bridge, to which he more particularly attended, and as to the other works Villeneuve, the head time-keeper, explains the system which was followed so as to keep a faithful and correct account of all the men's time. These men would go to the wicket in the morning and call their respective numbers which he, Villeneuve, would put down, and they would then go to the works; and during the day, three or four times a day, he or his assistants would go on the works and call out their numbers again, and note their presence at or absence from the works, and then transcribe these notes in the book kept by him (Villeneuve) for that purpose. From this book some one from the appellant's office would come and take a copy so as to have a duplicate of the time-keeping at the head-office, which would be a means of keeping the appellant informed and at the same time be a check on the time-keeper. At pay-day, money would come from the appellant's office ready prepared in envelopes for each man, and the head time-keeper would see that such pay in each case corresponded with his own book. The assistant time-keepers, Drolet, Beaudry and McEwan, testify as to the correctness of the returns made by them as such to the head time-

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

keeper, and the copyists, Beaudry, McEwan, Stanton, Proulx and Archambault certify to the correctness of the work they performed in making up the several accounts. Michaud, the head clerk, who was also pay-master for the appellant, swears that he has taken care that all the work done by the above named clerks in preparing the accounts and pay-lists should be done correctly, and that he himself paid all the money for the labour which is charged on the pay-lists in presence of Kennedy, or Coughlin, the government officers. That each and every one of the men returned on the time-lists have been paid by St. Louis there is therefore complete evidence of. And that evidence must be given effect to if all these witnesses have not conspired to commit perjury, a proposition which the Crown itself would not be justified in advancing, and upon which the court below did not rely to reach a conclusion adverse to the appellant's claim.

The witness Villeneuve, whose evidence is important in the case, is, or was when examined, a permanent officer of the government, and at the special request of the superintending engineer he was allowed, in the interest of the government, by the department at Ottawa, to continue to act as time-keeper after the opening of the navigation up to the 14th May. Now, the superintending engineer had seen him every day on the works in the performance of his duties, so that this request to continue Villeneuve's services amounts to a direct approval by the government head officer of the way in which he, Villeneuve, had performed his services, if anything more in that sense was required than this officer's signature at the foot of each list, certifying to their correctness. If, as the Crown contends, he has no personal knowledge of the correctness of what he certified, he unquestionably personally knew Villeneuve, and how he had performed his duties and

how far he could trust him. And this high officer, nor any other officer of the government, it is but just to say, cannot be, under the evidence adduced, and is not, charged with fraud.

The whole of the Crown's attempt to resist the claim seems to be based on a vague idea that there must have been fraud in connection with this work, because it greatly exceeded the original estimates of its officers of what it should actually have cost, and it is mainly to prove this that a number of witnesses have been examined on its behalf. Now it may be questioned if this, of itself, carries with it the least *indicia* of fraud. There are not many public works, not only in this country, but all through the world, I may say perhaps, that do not cost a great deal more than the estimate first made thereof. But assuming that it may give rise to suspicion, the Crown in this case would have to necessarily connect the appellant with the fraud, if any there has been. Now he had nothing whatever to do with the works, nor any control over the men he supplied. That is conceded. As far as he was concerned the men he sent to the government may have been perfectly useless, or 100 per cent more in number than was necessary. And further, he may have made 100 per cent profit on each of the men he so sent. That clearly would be perfectly legitimate.

And then, was it possible for him better to rebut any presumption of fraud than by proving that he had duly himself paid every one of the men he charges to the government for the time each of them worked, as appearing by the time-lists in evidence, where they each of them answered to their names on the works in presence of the government officers, on each pay day?

If the appellant had not received anything on his contract, and was claiming here the whole amount of $284,192.50, as per his pay-lists duly certified by the

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

government officers, would his claim be dismissed *in toto* because he destroyed his books? That is what the respondent would contend for. Now that cannot be. The destruction of the books entitled the respondent to put the appellant on the strict proof of each and every item of his claim, but for each and every item duly proved the appellant is entitled to recover. And the evidence is all one way. Every item of the $284,192.50 has been proved by the best available evidence, and that is conclusive.

I have assumed that the books and documents destroyed by the appellant all had connection with his present claim and would have been evidence if they had not been destroyed. But, as far as I can make out, none of these books, with the exception of the original time-books kept on the works themselves, could at all have any bearing on this issue. And as to these time-books, it is in evidence that they were always destroyed after having been recopied in the office. And, that this is so, is made evident in the case by the respondent whose own time-books kept by its own officers have also been destroyed and could not be produced. As to cheque books and bank pass-books, they would have thrown no light on the case, as it is in evidence that the appellant who had other large contracts going on at the same time as this one used to draw indiscriminately on his bankers for the funds wanted for all his contracts.

And then, the respondent could have got all the information that they ever could have had from these bank books by examining the bank officers and the bankers' books; the appellant gave the names of his bankers. As to the original pay-lists he had these in his hands when examined on discovery. Mr. Justice Girouard will refer more fully to this part of the case.

A man named Doheny under very suspicious circumstances was brought into the witness box by the

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

Crown, to prove that he, Doheny, had counted the stone-cutters at Kennedy's request, and that according to his returns the appellant charged to the government, from the 20th March to the 29th of April, 2,281 more men than he, Doheny, had counted on the works. Now, leaving aside the glaring unreliability of this witness, and the negligent and careless manner in which it is evident at the very inspection of the little book he produced as his voucher that he must have fulfilled his duties as time-keeper, the fact remains proved that whatever the men he sent to the works did, or wherever they were sent to work, he, the appellant, paid these 2,281 men on the works. And he gives the name of each and every one of them. If the Crown had been able to corroborate Doheny's evidence by bringing, if not all, at least a few of these 2,281 men to prove that it was not true that the appellant had engaged them, and had duly paid them, it would undoubtedly have been done. They charged fraud; on them was the *onus probandi* of that charge, and under the circumstances the appellant is justified in asking us to infer from its not having been done that it could not be done, and consequently, that whatever may be the explanation of this discrepancy between these Doheny's lists and the appellant's lists during that period of the works, the fact remains uncontradicted that each and every one of these 2,281 men answered to their names on the works and were duly paid by the appellant the time charged in the lists. And it is in evidence that in some instances he actually charged to the government less men than the government's own time-keepers returned. That is not consistent with the fraudulent system of dealing in the matter that the respondent would charge him with. As to Kennedy, the special overseer of the works, the respondent has not thought fit to examine him. Why, does not appear. It seems to me that, under

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

the circumstances, it is open to the appellant to contend that this should be taken as an admission that he, Kennedy, would not contradict the appellant's statement under oath, nor the evidence of Michaud, Connolly, Villeneuve and others, that each and every one of the men returned in his lists to the government had been supplied at his, Kennedy's, request, and had been paid by the appellant in Kennedy's or Coughlin's presence and with their sanction. He, Kennedy, certified to the correctness of all of the appellant's returns to the government, and he, as directly in charge of the works, was in a position not to be imposed upon by the appellant's lists had those lists been to any extent incorrect.

And were it only to corroborate Doheny's evidence, had it been possible for him to do so, their not calling Kennedy throws an unfavourable light on the respondent's case. A witness of that kind, so willingly keeping back evidence to thrust it at the appellant at the decisive moment, needs all the corroboration that could be got, it seems to me. He would say he acted in the public interest, I presume. I have my doubts about that, to say the least.

However, it may very well be that he did really not see more men on the works than what he returned. It is in evidence that it was impossible for him to ascertain how many were there at a given date in the way he says he tried to do it. The three works, the Wellington bridge, the Grand Trunk bridge and lock no. 1, were all three government works near one another, going on at the same time, with orders to hurry it at any cost, even by night and Sunday work. The appellant supplied the labour for the three works and the prices were the same for the three, so that it must have often happened, and there is evidence of it, that men that are charged to one may have worked part of the time on the other; it was immaterial to the

government whether they were put down on one list or the other, and they were actually often shifted from one of the works to the other in a way that could not be checked by the time-keepers. This may partly explain the discrepancy between Doheny's little book and the appellant's lists; for we have unquestionable evidence from himself on this record, that during the only period to which a reliable test can be applied to its accuracy the result is very unfavourable indeed to his little book.

On the 6th May,	St. Louis charges	38
	Doheny's book	20
7th May,	Sunday, no return by Doheny.	
8th May,	St. Louis charges	44
	Doheny's book	24
9th May,	St. Louis charges	45
	Doheny's book	27
10th May,	St. Louis charges	46
	Doheny's book	28
11th May,	St. Louis charges	39
	Doheny's book	28
12th May,	St. Louis charges	45
	Doheny's book	29
13th May,	St. Louis charges	43
	Doheny's book	29
15th May,	St. Louis charges	32
	Doheny's book	21
16th May,	St. Louis charges	34
	Doheny's book	22
17th May,	St. Louis charges	35
	Doheny's book	25

Now, which of these two sets of figures is, upon the evidence, the accurate one, leaving aside the direct testimony of Michaud, Villeneuve and others. Michael Doheny himself gives the answer. At the foot of St. Louis' lists returning his number of men as per the

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

above sheets with, in addition, the name of each and every man, he, Doheny, under his own signature, certified them "to be correct in all details and particulars," Signed "M. Doheny, time-checker, and James Davin, clerk and time-keeper." He, Doheny, as time-checker, thus himself subsequently certifying, when given each man's name in detail, that his own figures were wrong and his little book, whatever may be the cause of it, not to be trusted or relied upon. And curious to note, this list he so certifies to as correct in all details and particulars has his own name down for $8 on Sunday the 7th, though according to his little book, if it was to be relied upon, he did not work on that day, another striking illustration of the unreliability of the little book. Now if, during the only period that a test of its reliability can be traced in this record, that book is proved to be so deficient, upon what ground would the respondent ask us to see it in a more favourable light, or to give any weight at all to it, for the preceding period of forty or forty-five days that it assumes to cover? The inference is all the other way, it seems to me.

I notice in the appellant's factum a reference to the contention raised in paragraphs 6 and 7 of the statement of defence, as to the difference between skilled labourers and common or good labourers for pick and shovel. That point, however, I assume, has been abandoned by the respondent as no reference whatever is made to it in the judgment of the Exchequer Court, nor in the factum upon this appeal. And I do not see how the respondent could ever have expected to make anything against the appellant's claim out of this difference between these two classes of labourers, as whether from oversight, or from any other causes the contract of the appellant covered only skilled labourers. And from the 25th of January to the 15th of March,

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

the men he sent, all and every one of them, actually worked as skilled labourers and were accepted as such by all of the government officers, Parent, the superintending engineer; Kennedy, the overseer in charge of the works; Desbarats, the engineer of the works. Not one of these government officers, not one of the foremen, ever uttered a word of complaint against the kind of labourers that the appellant was supplying under his contract to supply skilled labourers. And if in March the appellant willingly agreed to classify his men in two classes at the instance of the government, his readiness to give up, even for the past, a right which the strict letter of his contract gave him, rather tends to show his good faith in the matter than otherwise.

The respondent concedes, 1st, that all the labour for this work was to be supplied by the appellant; 2nd, that all the labour required under the original contract was skilled labour; 3rd, that all the men he supplied up to the 15th March were accepted by the officers in charge. It necessarily follows that all the men he supplied were skilled labourers.

And there is not a word of evidence to the contrary. Nay, more, after having accepted these labourers as skilled labourers, and employed them as such, the Crown would hardly have been admitted now to contend that they were not the labourers provided for by the contract.

The Crown, I may remark here, has abandoned its contentions as to the appellant's charges for overtime and night work. The sums charged for stone sold and delivered are also admitted by the Crown upon this appeal.

There are some items of the appellant's charges, as steam derricks, blacksmiths, steam derrick engineers, that are not covered by the contract. However, those

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

special men and articles must have been called for by the government officers in charge of the works, and the government duly ratified their employ and the charges therefor not only by their own officers on the works certifying to them, but by knowingly paying for them in Ottawa without objection. I did not understand the respondent to make any point on this.

The respondent appears to lay some stress on the fact that five or six of the appellant's time-keepers have been charged to the Crown as masons or stonecutters. Now, the appellant did that openly and with the acquiescence of the government officers. These men were really in the government's employ. He paid even the foremen engaged directly by the government as appears by Connolly's evidence. The only fault of the appellant is that he inserted them under a classification so as to have them covered by the contract. I cannot see any evidence of fraud in this. No one with a claim against the government is to be called a thief because he may have illegally charged, in an account of over $200,000 of this intricate nature, a couple of thousand dollars of doubtful legality. If one claims say $200,000 but proves only $190,000, his claim is not to be dismissed *in toto* because he failed to prove the difference of $10,000, even if the claim for these $10,000 were tainted with fraud. Fraud in what is not proved is no defence to what is proved.

Assuming that the appellant would not be entitled, according to the strict letter of the contract, to have these sums charged to the government, the only result would be that that amount would have to be deducted. But it is such an insignificant small sum that the respondent has not insisted upon that. It was only insisted upon as evidence of fraud, and as such, in my opinion, it entirely fails to support such a grave

charge. There was no *covin* in it. It was done with the full knowledge of the government head-officers.

I have alluded to the respondent's contention, based on the presumption from the destruction of the books, and to the complete proof to rebut that presumption that the appellant has brought forward. But in addition to that proof, and in aid of it, is there not another presumption that must not be lost sight of, the presumption that all these witnesses have deposed to the truth? Can a court of justice brand such a number of respectable citizens with the stigma of perjury because the appellant has chosen to destroy his books, or because the government has itself neglected to have the men's time accurately taken? Such would be what the respondent's contentions amount to.

I have also alluded to the fact that beyond the large excess of the cost of the works over the original estimate, or what it has been proved they should have cost, there is not a tittle of reliable evidence in the case to justify any suspicion of fraudulent dealings in the matter by the appellant. Now this excess of cost, I may further remark, is not confined to the appellant's share of the works. It is in evidence that the part of the works with which he, the appellant, had nothing whatever to do had been estimated by the government engineer at $32,997, whilst their actual cost has been $156,932, or more than over four times the estimate, that is to say, more than the difference between the actual cost of the appellant's share of the works and the estimate thereof. This shows clearly that the alterations made to the work by the government must have more than doubled the cost thereof as sworn to by their own officer, Parent. However, this is immaterial. The fact that the cost may have been a great deal heavier than was ever anticipated is no reason not to pay the appellant. He is not responsible for it. He never supplied a single man

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

that was not asked for by the government officers. And it is impossible from the evidence on the record, if credence is to be given to his witnesses, that a single hour's work has been charged to the government that he has not supplied and himself paid for. And were it necessary in this case, the government might perhaps find in the record evidence that should induce them to look elsewhere than to the appellant for the reasons of the heavy cost of these works. Besides the important alterations in the plans ordered from headquarters, the season of the year during which the works had to be done, the fact that the men had often to work in very severe weather and in ice and snow, the very short time allowed to do such a large amount of work, the necessary confusion and loss of time arising from the fact of at times as many as 1,000 men a day, and a large number at night, working in a comparatively limited space, and this under the control of parties who had not the least pecuniary interest to lessen the expenses, it appears on the record, by a letter from Schreiber, the chief engineer at Ottawa, of the 24th of February, 1893, to Parent, the superintending engineer in Montreal that. *ab initio*, the appellant complained that the skilled labour he supplied was thrown idle two or three days in the week. However, I repeat it, that does not in this case concern the appellant.

Mention is made by some of the witnesses of a certain commission in connection with these works. There is no direct evidence in the record of such a commission, except an answer of the witness McLeod in which he states that he was the chairman thereof. What was its purport, its duties, and when such a commission was appointed the evidence does not disclose. However, this is immaterial, except that I notice that McLeod's evidence in this case seems to be based to a great extent on the knowledge he acquired as chairman

1896

ST. LOUIS v. THE QUEEN.

Taschereau J.

of that commission, and as such is altogether illegal. The only other reference to this commission that need be made is in regard to the statement made by the respondents in their factum that the appellant had destroyed his books in view of that commission. I can see in the case no evidence to support this statement.

I see in the appeal book a translation of the French depositions. That is not required on appeals to this court. Such translations are not only unnecessary, they are dangerous. These should not have appeared in the appeal book, and the registrar is ordered to put the cost of the printing thereof against the appellant who is responsible for it.

The appeal is allowed with costs, but from the amount claimed by the appellant we have, after further deliberation, come to the conclusion that the charges for his copyists and time-keepers are not covered by the strict letter of his contract and should therefore not be allowed. The parties have not furnished us with their own figures on this point and I am not satisfied that it is possible for us upon the record to ascertain the precise amount of these charges, but a sum of $1,800 is, we think, amply sufficient to cover them. Judgment will therefore be entered for $61,842.29, with interest from the 2nd of December, 1893, the date of the petition of right, and costs.

GWYNNE J.—I agree in thinking that the learned judge of the Exchequer Court in arriving at the conclusion at which he has arrived in his judgment has carried the maxim, *omnia praesumuntur contra spoliatorem* beyond what is warranted in law upon the evidence which has been adduced. That evidence, unless it be false, seems to exclude all necessity of applying the maxim in the present case. The learned judge does not appear to have formed his judgment upon the

1896

ST. LOUIS v. THE QUEEN.

Gwynne J.

opinion entertained by him upon the credibility of the several witnesses examined before him, nor yet upon a balancing of the weight to be attached to the evidence of the respective witnesses.

If, as the learned judge says, he was of opinion that the fair deduction to be drawn from the destruction by the appellant of the papers, &c., destroyed by him would be to show that the pay-lists upon which he makes his present demand and which he furnished to the government, and upon which he was paid what has been paid to him, did not constitute true and just accounts of the labour supplied under his contract, then those papers if forthcoming would of necessity prove that not only one but several of the witnesses who have given their testimony were perjured, and yet we have no hint in the learned judge's judgment that such an imputation has any other foundation upon which to rest save only this assumption.

This surely is not a presumption which is warranted by the maxim.

In the absence of the papers destroyed the case must be determined upon the evidence which is forthcoming, and for the reasons given in the judgment of my brother Girouard I concur that this appeal must be allowed.

SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Girouard.

GIROUARD J.—I fully concur in the opinion of Mr. Justice Taschereau. I quite agree with him that the judgment appealed from is erroneous, both as to facts and law. His elaborate review of the case will relieve me from the necessity of making any extended remarks on my own account, and in the observations I intend to offer I propose to deal only with the questions

involved in the destruction of the books and papers of the appellant, which seems to be the basis of the judgment.

The maxim *omnia praesumuntur contra spoliatorem* comes down to us from the Romans who applied it with a good deal of severity, because every business man was supposed to keep regular records of his affairs, at least a ledger or codex; but it is remarkable that the blotter or *Adversaria* had no legal value, not being admissible as evidence in courts of justice, and no one was obliged to keep it beyond one month. If a plaintiff, trader or not, refused to produce his *Codex* or other papers in his possession relating to any claim, his action was rejected purely and simply, the plaintiff being then held to have been guilty of fraud upon the defendant *Doli exceptione summoveri poterat* L. L. 5 and 8, *Code de Edendo.* The modern nations, even those governed by the principles of the Roman law, have not been willing to go so far in the application of the maxim, except in matters of international concern. 1 Greenleaf (1); 1 Taylor (2). The Institutes of Justinian by Sandars (3); 2 Toubeau 61; Duranton (4); 8 Toullier (5). Domat, perhaps the most accurate interpreter of the Roman law as accepted in old France, says (6):

Ainsi, une partie ne peut exiger de l'autre qu'elle produise ou représente une pièce, dont cette partie ne veut de sa part faire aucun usage; mais il dépend de sa bonne foi de représenter ou de retenir les pièces dont la communication lui est demandée. Et on n'est obligé de produire que celles sur lesquelles on fonde son droit. Que si dans le refus de représenter une pièce, il y avait quelque juste soupçon de mauvaise foi, comme si un créancier qui demanderait des intérêts ou des arrérages d'une rente, refusait de représenter son livre-journal, où le débiteur prétendrait qu'il serait fait mention de ses paiemens, il dépendrait de la prudence du juge d'ordonner sur ce refus ce que les circonstances pourraient demander.

(1) Par. 31.
(2) Ed. 1878, par. 107.
(3) Ed. 1878, p. 358.
(4). 4 Contrats 315.
(5) No. 404.
(6) Remy's ed. vol. 2, p. 178.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

In modern France, under the Code of Commerce, which requires the keeping of certain books by merchants and traders, their non-production does not constitute a bar to the action, but merely a presumption which justifies the court, according to circumstances, in accepting any other evidence, and even to take the oath of the party injured. Code de Commerce, art. 17. The rule is probably the same for a non-trader, party to a suit, refusing to produce his books or papers, although the point seems to be somewhat doubted by some jurists. C. N. art. 1331; 13 Duranton (1); 8 Toullier (2); 5 Marcadé (3); 19 Laurent (4); 2 Fremy-Ligneville 104; Gilbert sur Sirey (5). The Civil Code of Lower Canada, art. 1227, is similar to the article 1331 of the Code Napoleon. Consequently, with regard to the default by the appellant in not producing his books and papers, it is of little importance to know whether this case is a commercial one or not.

But the appellant cannot seriously contend that this is not a case of a commercial nature. The appellant styles himself "contractor," both in his petition of right and in his evidence on discovery; one of the principal objects of his business is to secure contracts like the present one; he admits, and it is proved, that the present transaction gave him large profits; but whether it did or not, it cannot be denied that he was speculating upon the hiring of workmen, and that an operation of that nature is an act of commerce, just as much as the purchase of wares and goods for resale. Massé (6); Boisel (7); 1 Pardessus (8); 1 Namur (9).

Art. 1206 of the Civil Code reads thus:

(1) Pp. 210 to 213.
(2) No. 404.
(3) Sur. art. 1331.
(4) No. 355.
(5) 3rd ed. 1883, art. 1331.
(6) No. 20.
(7) No. 39.
(8) No. 36.
(9) P. 42 and authorities quoted at page 43 in note 1.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

The rules declared in this chapter (ch. 9), unless expressly or by their nature limited, apply in commercial as well as in other matters.

When no provision is found in this Code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.

In chapter 9 of the Code will be found certain rules respecting presumptions in matters of evidence. They are laid down in arts. 1238 to 1242; they correspond to arts. 1349 to 1353 of the Code Napoleon, though perhaps different in some respects, especially with regard to presumptions *juris et de jure*. For the purposes of this case it is not necessary to examine these differences, as the presumption arising out of the suppression or destruction of papers is not a presumption *juris et de jure*.

It results clearly from the articles of the Code that there are two kinds of presumptions, those which are legal and those which are not (art. 1238). The first are always established by law (art. 1239) and the second are defined by the court or judge according to the circumstances of each case (art. 1242). Legal presumptions can always be contradicted, except:

When on the ground of such presumption the law annuls certain instruments or disallows a suit, unless the law has reserved the right of making proof to the contrary, and saving what is provided with respect to the oaths or judicial admissions of a party. Art. 1240.

The other presumptions are those which are not established by law, but merely result from the facts left to the discretion and judgment of the court, (art. 1242.) The corresponding articles of the Code Napoleon limit this discretionary power to the cases of *présomptions graves, précises et concordantes* or, as the English version of the Code of Louisiana, (art. 2288,) expresses it, "presumptions must be weighty, precise and consistent." The framers of our Code rightly considered that these minor rules were matters of doctrine and judicial inference, rather than of positive legislation (1st Rep. 30); but undoubtedly they would be followed

1896

ST. LOUIS
v.
THE
QUEEN.

Girouard J

in the application of art. 1242, for they are almost as ancient as courts of justice. L'art de Procéder en Justice, by Lassère (1); Danty sur Boiçeau, 243; Pothier (2); 5 Marcadé 218; Menochius (3); Bédarride (4); Carrier (5).

I am of opinion that these articles of the Quebec Code settle the point under consideration without having recourse to the laws of England. The Code has nowhere declared that the destruction of documentary evidence, or the refusal to produce the same, whether they be books or other papers, constitutes a legal presumption against the party so destroying or refusing to produce the same. This presumption is not one of law, but of fact left to the determination of the trial judge or jury, according to the circumstances of each case.

What are the facts in the present instance? The appellant has burnt his books and all his papers, except those relating to the firms of Berger, St. Louis & Cousineau, and St. Louis Brothers, and the pay-lists and rolls produced at the trial. He had done so long before the institution of the present action, at a time when he did not have any cause to suspect that the government would contest his claim. He has himself stated that if he had had any reason to entertain any such suspicion, or that his books and other papers would have been required for the purposes of this suit, he would not have destroyed them.

The Crown has assumed that he has destroyed them for the purpose of avoiding the investigation intended to be made by the commission which was appointed in the spring of 1893. By referring to the pages of the printed case indicated in page 6 of the respondent's

(1) Ed. 1680, pp. 87-96.
(2) Obli., n. 849.
(3) *De Præs.*, lib. I.
(4) 1 Dol et Fraude, 243-249.
(5) Obli., n. 448.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

factum I have not been able to find any proof of this assertion, but were it true it would appear that this destruction was made by the appellant merely to prevent the public from becoming acquainted with his affairs, and not in view of this suit, or to prevent the Crown from verifying the accounts presented by the appellant as being correct or not.

It is very hard to understand how the appellant could have had this alleged fraudulent purpose, at least with regard to the destruction of the books of account, when it is known that these books did not contain a single entry having reference to his contract with the government, a fact which is proved beyond doubt by his book-keeper, Michaud, whose credibility is not even doubted by the learned judge who rendered the judgment of the Exchequer Court.

But, says the respondent, the appellant has also destroyed the original time records. It appears that they were written in pencil on the premises by the various time-keepers on small books or pads, or even sometimes on flying sheets; they were finally delivered to the book-keeper Michaud, for the purpose of preparing the pay-lists or rolls; afterwards they became of no value, or of so little use that Davin and Doheny, two of the time-keepers of the government under Coughlin, the head time-keeper, appointed by the government, and Coughlin himself, have admitted in their testimony that they did not know what became of theirs. One of Coughlin's time books was produced by the respondent, but it covers only a short period, from the 26th January to the 4th February, 1893, and so far it fully confirms the pay-rolls rendered to the government.

It is in evidence that these little time books and sheets were for the most part destroyed immediately or shortly after the pay-lists were prepared, as being

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

mere blotters or "notes," and of no use after the pay-lists were compiled. Coughlin says:

Once it was entered from the pass book to the sheet there was no further attention paid to the book.

Davin says:

Q. What have you done with your time book?—A. I was looking for it. I had it in our own house, but I was looking it up and I couldn't find it; it is round the house some place.

Q. But did you look for it before you came here?—A. Yes.

McEwan, one of the appellant's assistant time-keepers, says:

Q. When you reported, you say you reported from a pad?—A. Yes.

Q. Did you leave the whole pad, or detach the leaf?—A. I detached the leaf. After we had reported to Mr. Villeneuve I detached the leaf and threw it away.

Beaudry, another assistant time-keeper of appellant, says:

Q. Quelles notes preniez-vous?—R. Je prenais mes notes sur un bloc, sur un "pad."

Q. Et puis?—R. Ensuite, je remettais ces notes soit à M. Villeneuve, soit au commis de M. St. Louis, qui venait à l'office pour prendre le temps.

Q. Est-ce que vous remettiez à ces gens la feuille du "pad" détachée ou si vous faisiez rapport verbalement?—R. Quelques fois je remettais la feuille détachée et d'autres fois je dictais ce que j'avais sur ma feuille.

Q. Lorsque vous dictiez vos informations, que faisiez-vous du "pad" sur lequel vous aviez pris vos notes ce jour-là?—R. Je le détruisais, monsieur.

Drolet, another assistant time-keeper, says:

Q. Aviez-vous en votre possession du papier, des livres ou autres documents sur lesquels vous pouviez prendre des notes du temps des hommes?—R. Je prenais mes notes sur des feuilles de papier.

Q. Après que vous aviez ainsi fait votre rapport à M. Villeneuve, que faisiez-vous du livre ou de la feuille de papier sur laquelle vous aviez pris vos notes?—R. Je la déchirais.

The appellant in his examination on discovery says, speaking of the time books, that is, as explained by Michaud and Villeneuve, the books kept by the latter

from his own notes and mainly from the returns of his assistants, and their duplicates made by Michaud principally from the reports of Villeneuve:

Q. Those time books, after the lists were made, were done away with, you say?—A. Yes.

Q. Immediately after the lists were made up?—A. Generally, yes. I cannot state immediately, but not more than a few days.

Q. At all events, a few days after the lists were made up you destroyed those books?—A. Yes; generally.

Q. Was that your general practice, or was it applicable to this case only?—A. No. I copied from my documents so as not to get mixed up with the court-house works and other works that I was working at with three or four hundred men. I did not want them mixed up.

Michaud, referring to the final destruction of the books and papers, says:

Q. Then this is the first burn; this selection was the first lot for a burn?—A. Well, for the books it is the first, but for the time books not the first.

Q. This is the first burn that you have had, so that you are establishing a custom now, this is the first of the custom?—A. Well, of course, when I said that, I meant especially the time books.

The appellant had reason to apprehend that the blotters, partly destroyed or lost, could not but bring trouble to himself, and it is not surprising that he should have destroyed what remained of them with his books of account, some time in May, 1893, shortly before the sitting of the so-called commission. He was naturally confident that the pay-lists or rolls which he had preserved, based as they were upon those blotters, signed by the officers of the government in charge of the works, were the best evidence he could produce. The appellant is not in the position of a plaintiff who has wilfully destroyed his best evidence and asked to be allowed to give secondary evidence, a course which would be sanctioned by no court of justice, nor is it proved that the plaintiff destroyed the best evidence.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

The trial judge was willing to accept the pay-rolls as correct with regard to the Wellington bridge, because, with regard to that work, the time was kept by Coughlin and his assistants; but it is in evidence that Michaud, the book-keeper, made these pay-rolls for the Wellington bridge from the blotters of Coughlin and his assistants, just as he made them with regard to the Grand Trunk bridge and lock no. 1, and the stonecutters and masons from the blotters of Villeneuve and his assistants, not appointed, it is true, by the government, but acting as such with the knowledge and sanction of all the officers of the government in charge of the works. Villeneuve and his assistants swore positively that the time kept by them was correctly kept and delivered to Michaud, and the latter and his assistants likewise swore that the time books and sheets were correctly copied in the pay-lists and pay-rolls filed. I am therefore at a loss to understand why Michaud's statement based upon pay-lists made by him from the missing blotters of Coughlin should be accepted, and those made from the destroyed blotters of Villeneuve rejected.

These pay-lists and rolls contain the names of all the labourers and the number of hours each of them worked. They were prepared in the office of the appellant in several parts; one part was sent every fortnight by the local authorities of the Lachine Canal to the Department of Railways and Canals in Ottawa, similar to another part which the appellant kept, with this difference, that the one sent to Ottawa was extended according to the prices of the contract and the one kept by the appellant contained only the price actually paid by him to the men. The appellant kept duplicates of all these pay-lists or rolls, the duplicates of the ones sent to Ottawa being signed by the government officers

1896

ST. LOUIS
v.
THE QUEEN.

Girouard J.

in charge of the works, which are filed as a *primâ facie* case.

Thus, every fortnight, the respondent had the names of the labourers and the time that was charged by the appellant, and long before the trial and the issue of the commission had full opportunity to ascertain whether these pay-rolls were false or fictitious, or even beyond expectation. No surprise was even expressed at the accounts rendered. At any time, even during the trial, it was an easy thing to examine a few of the workmen, and find out the actual state of facts. In the absence of that evidence there is every reason to believe that the pay-rolls were correct, supported as they are by the direct and positive testimony of all the time-keepers and of Michaud and his assistants, who prepared the lists from their returns.

But there is more. During the examination of the appellant on discovery, which is made part of the case, the appellant was requested to produce his pay-lists. He has done so, and has placed them in the hands of the counsel for the Crown, with the understanding that the prices that he paid to the workmen were not to be made known, a reservation which was perfectly legitimate as it was none of the business of the Crown or of the public to know what the appellant really paid the men he had contracted to supply to the government. It is a very remarkable thing that we have never heard of the result of this production by the appellant, and of the comparison which the respondent had the opportunity to make between the pay-rolls sent to Ottawa and the pay-lists showing what was actually paid to the men; and this alone seems to me a strong presumption that these pay-rolls must be correct. This fact was established beyond doubt during the trial. Michaud again produced these pay-sheets of the appellant; a few of the items were examined and

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

compared with the pay-rolls remitted to the government, and were found correct. Being finally asked by Mr. Osler Q.C., for the Crown: "Then these pay-rolls (referring to appellant's pay-lists) correspond with the government pay-rolls?" Michaud answers: "Yes, sir."

All these facts were proved at the trial, and I cannot understand how any presumption can exist that the blotters or time books, sheets or memoranda were destroyed for the purpose of preventing the verification of the accounts rendered to the government, or that, if produced, they would show that the pay-rolls rendered to the government were not correct. I believe that, under the circumstances, it was the duty of the trial judge, in accordance with art. 1242 C.C., to decide that the destruction of the books and papers of the appellant created no presumption against him, and that even if it did it had been removed by the positive evidence he has adduced.

It is contended by the respondent that the presumption arising from the destruction of the books and papers is not one of those to be left to the discretion of the judge under the Code; that in commercial matters, according to the English rules of evidence to be followed under art. 1206 of the Code, there is a well-known legal maxim *omnia praesumuntur contra spoliatorem*, which is a bar to the action of the appellant.

Let us now see whether the English law supports this contention. The factum for the Crown, quoting Lawson, a recent American writer on Presumptive Evidence, ed. 1886, states that the rule is as follows: "Where the spoliator is the claimant, the fact of spoliation alone raises a presumption against his claim." The learned judge of the Exchequer Court has quoted no authority in support of his judgment, but in reading his notes that would seem to be the rule adopted by him. He says:

If we had the time books and other original material from which the pay-lists were compiled, it would of course be a simple matter to see whether the pay-lists were correct or not.

And he concludes:

The fair presumption to draw from this wilful destruction of the evidence is, I think, that if such evidence were accessible, it would show that the pay-lists which the suppliant has furnished to the government and upon which he makes his present demand, do not constitute true and just accounts of the labour he supplied to the Crown under his contract. The rule of law that justifies such a presumption is, I think, a most wholesome one, especially where the destruction of evidence is accomplished with the deliberation and thoroughness that distinguishes the present one. The petition will be dismissed with costs.

Why punish the appellant for the innocent doings of the time-keepers, who alone and without any suggestion from the appellant have destroyed the so-called original material, or at least the greatest portion of it, as mere waste paper? How could the learned judge come to such a conclusion in the face of the clearest evidence that the pay-lists or rolls were made correctly from the blotters, that is the little time books, pads, sheets and memoranda kept by the head time-keepers and their assistants? The presumption, if any there was, disappears before this additional and express evidence.

The learned judge does not seem to doubt the credibility of all these witnesses. The appellant is not charged by him with any conspiracy or collusion with the time-keepers, or the government officers. They are not even suspected of dishonesty. He remarks:

In these circumstances, he (the appellant) had called so far as was possible all the time-keepers and clerks who were engaged in compiling the lists to testify that they had done their work honestly and faithfully. There may be a question, though none was raised, how far, in such a case as this, such evidence is admissible for the purposes for which it is tendered. But whether admissible or not, the evidence was of necessity of a general character, not touching or directly supporting particular items in the accounts, and cannot, I think, be ac-

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

cepted as excluding all chances of fraud, and as being conclusive of the correctness of such accounts.

The question is not whether there are chances of fraud, but whether as a matter of fact there was fraud in the preparation of the pay-lists from the time books and blotters missing. I have no doubt in my mind that the evidence repels any idea of fraud.

As to the reproach that the evidence was of a general character, it seems to me that it was as precise and direct as the nature of the case would permit. What evidence can be more positive than the testimony of the book-keeper and time-keepers and their assistants, who swear that the labour supplied by the appellant is as stated in the detailed pay-lists and rolls produced, and that the appellant paid for the amount of that labour. His proof, considered independently of the written certificates of the officers in charge, is as direct and precise as it possibly can be, and nothing more is required under the English rules of evidence or article 1204 of the Quebec Code.

With regard to the English jurisprudence, the counsel for the respondent has quoted one English decision; he has relied especially upon American precedents, and no doubt in a case like this, they are entitled to much weight and consideration, although not binding. *Attorney General for Quebec* v. *The Queen Ins. Co.* (1); *Bank of Toronto* v. *Lambe* (2). It is remarkable, however, that nearly all the American authorities cited by the Crown, if not all, do not sustain respondent's contention. True in rule 25, Lawson lays down that the fact of spoliation standing alone may defeat a claim; but on the next page, in rule 26, he adds:

> But the presumption in disfavour of a spoliator does not arise where the document concealed or destroyed is otherwise proved in the case, or the spoliation is open and for cause.

(1) 3 App. Cas. 1090. (2) 12 App. Cas. 575.

Lawson quotes *Bott* v. *Wood* (1), also relied upon by the respondent, where it was said:

> Where there is express and positive evidence there is no place for presumption or inference. It is only in reference to the contents of a paper destroyed or withheld that the maxim can have application, and where the contents are proved there is no occasion for resort to the maxim.

The writer might have quoted more of the opinion of the court in *Bott* v. *Wood* (1). At another page, the court said:

> It is too broad and indefinite in saying that everything may be presumed against the destroyer of the will.

His case evidently must be less favourable than that of the destroyer of his own papers. However, the learned judge, Campbell J., finally observes:

> The principle of the maxim *omnia præsumuntur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance, and therefore slight evidence of the contents of the instrument will usually in such a case be sufficient. There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence, and should be regarded as mere matter of inference in weighing the effect of evidence in its own nature applicable to the subject in dispute.

On page 156, Lawson quotes a decision of the Supreme Court of Indiana in *Thompson* v. *Thompson* (2), decided in appeal in 1857, which is interesting, especially as it is quoted by the respondent as one of the authorities in her favour. The quotation is as follows:

> It is undoubtedly true that a party who destroys the evidence by which his claim or title may be impeached raises a strong presumption against the validity of his claim, and if the plaintiff destroyed papers of the estate, and especially receipts for taxes, which are important documents, involving in many instances the validity of a title, he committed a great wrong; but yet the presumption against him would not be of that

(1) 56 Miss. 136.

(2) 9 Ind. 323.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

conclusive character indicated by the destruction. The jury were told in effect that if the plaintiff destroyed any papers of the deceased the defendant was entitled to a verdict. The law of nations as recognized in continental Europe, under certain circumstances, raises a conclusive presumption against the spoliator of papers indicating the national character of a vessel; but even that rule does not ordinarily prevail in England and the United States.

While reviewing the American jurisprudence, it will not be out of place to point out a few more cases, especially one or two relied upon by the respondent. The first in point is *Askew* v. *Odenheimer* (1), decided in 1831 by the United States Circuit Court. It was a strong case of fraud by a partner against his co-partner. The court carried the doctrine *contra spoliatorem* almost to its extreme limit, though perhaps not too far under the special circumstances of the case. Yet the following language is remarkable:

> These cases fully establish the principle that in cases of fraud, suppression and spoliation, the oath of the party injured is evidence, but not conclusive; the court must judge of the weight it is entitled to under all the circumstances of the case.
>
> The mere circumstance of a party having destroyed or suppressed a deed, book or paper, will not induce a court of equity to decree a penalty against him to deprive him of what may be his just right, to dispense with such secondary proof of the existence and contents of the paper which has been so suppressed or destroyed as may be in the power of the party injured to produce, or to give a decree in his favour without some proof.

In *McReynolds* v. *McCord* (2), decided in 1837 by the Supreme Court of Pennsylvania, the rule is thus laid down at pages 290 and 291:

> Everything is to be presumed *in odium spoliatoris*, and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission of subsequent evidence of its contents * * But before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been. The presumption in favour of innocence which arises wherever there is room for it,

(1) 1 Baldwin 389.

(2) 6 Watts 288.

xcludes intendment that a paper destroyed by a man in a confidential relation was of value to any one. There are few men who have not papers which it would be not only innocent but prudent to destroy.

In *Life and Fire Insurance Co.* v. *The Mechanic Fire Insurance Co. of New York* (1), Sutherland J., for the Supreme Court of New York, said:

There is not a particle of evidence that the defendants ever actually received any portion of this money. It is said, however, that this fact would have appeared if the books called for had been produced, and that the judge erred in not charging the jury that the refusal of the defendants to produce those books afforded presumptive or *primâ facie* evidence of that fact. I do not understand the rule to be that a party has a right to infer, from the refusal of his adversary to produce books or papers which may have been called for, that if produced they would establish the fact which he alleges they would prove. The rule is this: The party in such a case may give secondary or parol proof of the contents of such books or papers if they are shown or admitted to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence.

This ruling was re-affirmed by the Supreme Court of the United States in *Hanson* v. *Eustace* (2).

The respondent has also referred us to *Joannes* v. *Bennett* (3), decided in appeal in 1862 by the Supreme Court of Massachusetts, but here again the decision of the court does support the contention. Bigelow C.J., for the court said:

A person who has wilfully destroyed the higher and better evidence ought not to be permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud, which arises from the act of a voluntary destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case.

Pothier, Obligations no. 815, *Merwin* v. *Ward* (4), and *Duvall* v. *Peach* (5), may be also quoted in support of this rule.

(1) 7 Wend. 31.
(2) 2 How. 653.
(3) 5 Allen (Mass.) 169.
(4) 15 Conn. 377.
(5) 1 Gill (Md.) 172.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

The case of St. Louis is not a parallel one; he has not destroyed his primary or "higher and better evidence" which is before us. He has merely destroyed papers he could not offer in evidence, and which could not be produced at the trial without the consent of the adverse party.

An American decision quoted by the appellant may well be noticed here; I refer to the case of *Cartier* v. *The Troy Lumber Company* (1), decided in appeal in 1891 by the Supreme Court of Illinois. Mr. Justice Wilkin said for the court at page 539:

> It will not be seriously contended that a party is to be treated as a "spoilator of evidence" merely because he does not produce books and papers which he could only offer in evidence by consent of his adversary or because some fact might be developed on the trial which would render them competent. It was said in *Merwin* v. *Ward* (2), "Where a party has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him. But this rule does not apply to such documents as a party has no right to give in evidence without the consent of his adversary."

While I am not prepared to accept this doctrine in its broad terms and without some reservation, I am ready to admit that it has much force in the present instance.

If we direct our attention more particularly to the jurisprudence of England, where merchants, as in the United States and in this country, are not forced to keep books except to avoid certain penalties under the bankrupt laws, we find precisely the same rules of law. It must be remarked that cases of this kind, where parties to a suit stand accused or guilty of withholding or destroying papers or documents which are or may be used in evidence, are not as frequent in England as in the United States, and it is not surprising

(1) 138 Ill. 533. (2) 15 Conn. 377.

that the decisions are not so numerous and do not present as many illustrations of the maxim. The Canadian reports present no case of that description, except one or two in Ontario relating to the election or revenue laws, which can hardly be considered as applicable to a suit like the present one, yet they do not disagree with the English decisions. *Attorney General* v. *Halliday* (1); *Hunter* v. *Lauder* (2). See also *Ockley* v. *Masson* (3).

Armory v. *Delamirie*, reported in 1 Strange 504, and decided in 1721, has been considered as the leading English case on the subject (4), although I must confess it does not seem to be quite in point. The plaintiff, a chimney-sweep boy, found a jewel and carried it to the defendant's shop, who was a goldsmith, to know what it was. The stones in the jewel were taken out, and upon a suit in trover by the boy Chief Justice Pratt directed the jury, and I believe properly so – in fact his direction has been followed in *Lupton* v. *White* (5), 1808, and *Mortimer* v. *Cradock* (6), 1843—that unless defendant did produce the jewel they should presume the strongest against him and make the value of the best jewels the measure of their damage, which they accordingly did. The goldsmith was therefore in the position of a thief, which is the true position of the "spoliator" or "spoiler," and he can hardly be compared to the destroyer of his own property. The appellant is not even in the position of a legatee or heir at law who has destroyed a will or paper of a deceased person, or of a partner who has done away with the books of his firm, or of an agent who has removed the books showing his transactions on behalf of his principal. The appellant is his own master; he has taken nothing

(1) 26 U.C.Q.B. 397.
(2) 8 U.C. L.J.(N.S.) 17.
(3) 6 Ont. App. R. 108.
(4) 1 Smith, L.C. 9 ed. 385: Shirley, L.C. 4 ed. 401.
(5) 15 Ves. 439.
(6) 12 L. J. (C. P.) 166.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

from the respondent; and I cannot understand how the maxim *contra spoliatorem* can generally be applied to a party who withholds or destroys his own papers.

One of the earliest cases reported is, I believe, *Roe* v. *Harvey* (1), rendered by the Court of King's Bench in 1769, when Lord Mansfield presided over that court. He first laid down "that in this action, the plaintiff cannot recover, but upon the strength of his own title," which he had refused to produce. This ruling might be perfectly correct; in fact it is in accord with *Joannes* v. *Bennett* (2) and other cases quoted above. Mr. Justice Yates, who dissented, thought that "the plaintiff's counsel was not obliged to produce this deed; no man can be obliged to produce evidence against himself. The only consequence of notice to produce it would have been the admitting inferior evidence." Mr. Justice Aston, who was also the trial judge, said: "I thought the refusing to produce the deed was a want of fairness, and that the plaintiff had not made a complete title without it." Mr. Justice Willes thought likewise that "the title of the plaintiff was not complete, the deed not being produced." Lord Mansfield concluded by observing "that in civil causes, the court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption to the jury."

No exception has been taken to the decision of the court; but the doctrine laid down by Lord Mansfield has been attacked by eminent jurists and is no longer accepted as law, if it ever was.

It was vigorously assailed as early as in 1806 by Sir William D. Evans, in his notes to Pothier's Obligations, vol. 2, pp. 169, 337, quoted with approbation by Mr. Best in his learned treatise on Evidence. He considers that the language of Lord Mansfield means that

(1) 4 Burr. 2484.

(2) 5 Allen (Mass.) 169.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

" the refusal to produce was regarded as a presumption of something fatal in the contents," and he concludes:

That a party shall be actually forced to produce the evidence so as to be punished for refusal is a proposition totally unwarranted by authority, and I suppose that is not what was meant by the expressions above quoted, and what is said respecting leaving the refusal as a presumption to the jury should be received with considerable qualification; for it cannot be admitted that such a presumption should stand instead of all other evidence, and supply the total deficiency of proof.

Even if the doctrine of Lord Mansfield is as severe as it appears to be, the presumption which he draws from the suppression of evidence, and it cannot be regarded in a more favourable light than the destruction of evidence, has been entirely removed in the case of the appellant by positive and clear evidence to the contrary.

But the doctrine goes too far and is contradicted by a long array of decisions. Chief Justice Holt held in 1701, that "if a man destroys a thing that is designed to be evidence against him a small matter will supply it." And therefore, the defendant having torn his own note, signed by him, a copy was admitted to be good evidence (1).

The next case is that of Sir Edward Seymour, 1711 (2). There the defendant was withholding the title of the plaintiff, who, in consequence, was allowed to prove the contents of the deed by witnesses. A similar decision was rendered in 1718 in *Young* v. *Holmes* (3).

The case of *Cowper* v. *Earl Cowper*, 1734 (4), is an important one. The Master of the Rolls (Sir Joseph Jekyl), after a careful review of all the decisions to date, said:

There have been no cases at law, and these are all the material ones that I have heard cited in equity; but though there may have been others, the names of which I cannot at present recollect, yet do I not remember or believe that there has been any one where there was not

(1) Anon. 1 Ld. Raym. 731.
(2) 10 Mod. 8.
(3) 1 Strange 70.
(4) 2 P. Wm. 719.

1896

ST. LOUIS
v.
THE QUEEN.

Girouard J.

some proof made of the existence of the deed or writing supposed to be suppressed or destroyed.

Then comes *Saltern* v. *Melhuish* 1754 (1), where Lord Hardwicke said:

All cases for relief against spoliation come in a favourable light; but notwithstanding the rule, that things are to be taken *in odium spoliatoris*, yet it ought to have no other consequence but this, that where the contents of the deed destroyed are proved the party shall have the same benefit as he would if the deed itself was produced. This I lay down as a principle.

In *Cooper* v. *Gibbons*, 1813 (2), Gibbs J. said:

The non-production of the plaintiff's books, after a notice to produce them, merely entitled the defendant to give parol evidence of their contents.

In *Lawson* v. *Sherwood*, 1816 (3), Lord Ellenborough said:

Nor can I infer due notice (notice of dishonour of a bill of exchange) from the non-production of the letter; the only consequence is that you may give parol evidence of it.

In *Barker* v. *Ray*, 1826 (4), Lord Eldon observed:

To say that once you prove spoliation you will take it for granted that the contents of the thing spoliated are what they have been alleged to be may be, in a great many instances, going a great length.

In *Bate* v. *Kinsey*, 1834 (5), Lord Lyndhurst said:

It is said that the deed was in court, and that parol evidence of its contents ought to have been admitted. It is not, however, even suggested that the defendant was prepared with any other secondary evidence.

Alderson B.:

I do not give my assent to the case of *Roe* v. *Harvey* (6).

The next case is *Braithwaite* v. *Coleman* (7), decided in 1835 by the Court of King's Bench. The court differed on the application of the principle; it is thus referred to in 1 Smith L. C. 6th Am. ed. at page 539:

(1) 1 Ambler 249.
(2) 3 Camp. 363.
(3) 1 Starkie 315.
(4) 2 Russ. 73.
(5) 1 Cr. M. & R. 43.
(6) 4 Burr. 2484.
(7) 4 Nev. & Man. 654.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

It was an action by the endorsee against the drawer, and the only evidence of notice of dishonour was the following statement made by the defendant: "I have several good defences to the action; in the first place the letter" (containing the notice of dishonour) "was not sent to me in time." A notice to produce the letter had been given, but it was not produced. Lord Denman C.J. thought that as the defendant withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would appear to have been in time. But Littledale, Patterson and Coleridge JJ. thought that the letter might have been dated on the proper day, but sent by private hand, or in some way in which it would not have arrived in proper time; and that the defendant would not be bound to produce a letter which on the face of it might make against him, and which he might not have evidence to explain, and a rule for a new trial was made absolute.

Then comes *Curlewis* v. *Corfield* in 1841 (1), where a letter was shown to have been sent to the defendant the day after dishonour of a bill of exchange, and the defendant, an attorney, afterwards raised the objection of the want of due presentment, but not want of notice. The jury were warranted in inferring that the letter contained due notice of dishonour. Lord Denman C.J. said:

The notice to produce, not complied with, must have some effect. To that is added the conversation of the plaintiff's attorney in which the defendant placed his defence on a different ground from that of omission to give notice of dishonour. The case therefore is like *Wilkins* v. *Jadis* (2).

Patterson J.:

Notice was given to produce that letter and it was not produced. These facts alone would not be sufficient, but then comes the conversation of the defendant with Richards; and the whole evidence forms a case that might properly go to the jury.

Williams and Coleridge JJ. concurred.

The last case I have been able to collect is *The Attorney General* v. *The Dean and Canons of Windsor* in 1858 (3), the only English case quoted by the respondent. The Master of the Rolls (Sir John Romilly) referring to the suppression unexplained of a deed, said:

The next question urged, and which seems, from the reign of James I. to have been always urged by the Dean and Canons as their prin-

(1) 1 Q.B. 814. (2) 1 M. & Robb 41.
(3) 24 Beav. 706.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

cipal ground of defence, is whether the deed of Elizabeth was executed by the Dean and Canons, and if not, whether it had any binding force as against them. If I thought that such execution of the deed was material it would be difficult, in the state of the evidence before me as to the existence of this deed, to hold that it was not executed by the Dean and Canons. It is plain that they had the original in their possession, executed at least by the Queen, and that they made a copy of it in their books. Evidence is always to be taken most strongly as against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle, although it exonerates the present members from blame in that respect. It is true, it is urged, that this deed is lost, and that nothing of wilful suppression is to be presumed against the predecessors of the present corporation, and yet the circumstances undoubtedly require an explanation, which they cannot now receive.

This decision is in accordance with *Crisp* v. *Andersen* (1), where it was held that if a man withhold an agreement under which he is chargeable it is presumed to have been properly stamped. But suppose the Dean and Canons of Windsor had established that in fact their predecessors had refused to accept the trust created by the deed of Queen Elizabeth, can it be supposed that the Master of the Rolls would have applied the presumption against this evidence? The presumption would have been removed just as it was in *Crowther* v. *Solomons* (2), and *The Marine Investment Co.* v. *Haviside* (3), where, reaffirming *Crisp* v. *Anderson* (1), the court held, however, that the presumption of the document being regularly stamped as against the spoliator, was rebutted by the evidence that it had been inspected a short time before the trial and that it was not stamped.

To these decisions a few may be added from old digests:—Petersdorff's Abridgement (4):

Presumptions are not proofs; they stand instead of proof until the contrary is established.

(1) 1 Stark 35.
(2) 6 C.B. 758.
(3) L. R. 5 H.L. 624.
(4) Vo. evidence, p. 170.

1896

ST. LOUIS v. THE QUEEN.

Girouard J.

Comyn's Digest (1):

On refusal to produce an instrument after notice secondary evidence is admissible.

2 T.R. 201; Id. p. 430:

A copy or proof of the contents has been allowed when a deed was embezzled or detained by the other party. 1 Keb. 12; 3 Keb. 2.

Tidd's Practice (2):

On a notice to produce books of account, if they are not produced this circumstance affords no legal ground for any inference respecting their contents, but merely entitles the opposite party to prove their contents by parol evidence.

See also 3 Blackstone (3); Smith, L. C. (4); Broom, Legal Maxims (5); Taylor on Evidence (6); Starkie on Evidence (7); Best on Evidence (8); Phillips on Evidence (9); Stephen (10).

Great stress has been laid upon the cost of the works as compared with the original estimate. Explanations are not wanted for this result, which Mr. Justice Taschereau has incidentally noticed. To my mind this fact creates no presumption against the appellant, and is of no importance in the appreciation of the evidence.

I have not alluded to the memorandum book of Doheny. Mr. Justice Taschereau has done full justice to this branch of the case. I agree with him that his evidence is utterly unreliable.

Taking this view of the law and facts of the case, I have come to the conclusion that under both the Quebec Code and the English law the appellant cannot be regarded as a spoliator, and that even if he could he

(1) Vol. 1, Testmoigne, p. 436.
(2) Ed. 1821, p. 835.
(3) Ed. 1830, p. 371.
(4) Am. ed. 1868, pp. 589 to 592.
(5) 5th Am. ed. p. 633.
(6) Ed. 1895, par. 116, 117.
(7) 5th Am. ed. p. 667, no. 748-756.
(8) Ed. 1893, p. 373.
(9) Ed. 1849, vo. 2 p. 222, vo. 5 p. 424.
(10) Digest of the Law of Evidence, ed. 1895, p. 77.

1896

ST. LOUIS
v.
THE
QUEEN.

Girouard J.

has fully rebutted the presumption resulting from that alleged fact by express and positive evidence to the contrary. The appeal should be allowed with costs and judgment entered for the full amount of the pay-rolls rendered to the respondent, less the charges made for the services of the clerks and time-keepers, the whole as directed by Mr. Justice Taschereau.

Appeal allowed with costs.

Solicitor for the appellant: *J. U. Emard.*

Solicitor for the respondent: *W D. Hogg.*

THE "HENRY L. PHILLIPS" *v.* THE QUEEN. 1895

Maritime law—Fishing within three-mile limit—License—Forfeiture—R.S.C. c. 94, s. 3. *Oct. 26.

1896

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the Crown. *Feb. 18

The appeal was dismissed with costs.

PUDSEY *v* DOMINION ATLANTIC RAILWAY CO. 1896

Negligence—Railway Co.—Act of incorporation—Change of name—Finding of jury—Answers to questions—New trial. *Feb. 22.

APPEAL from a decision of the Supreme Court of Nova Scotia (2) in favour of the defendant company.

After hearing counsel the court, without reserving judgment, ordered a new trial on the ground that the jury had not properly answered some of the questions submitted. In other respects the judgment appealed from was affirmed.

EASTMURE *v.* CANADA ACCIDENT INS. CO. 1896

Master and servant—Insurance agent—Appointment of—Duty of agent—Acting for rival companies—Dismissal. *Mar. 4.

APPEAL from a decision of the Court of Appeal for Ontario (3), affirming the judgment of the Divisional Court in favour of the company.

After hearing counsel for appellant the court dismissed the appeal with costs.

(1) 4 Ex. C.R. 419. (2) 27 N.S. Rep. 498.
(3) 22 Ont. App. R. 408.

1895

*May 6.

THE QUEEN *v.* ROBINSON.

Public work—Wharf property injuriously affected—Evidence.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant awarding him damages for injury to his wharf property in St. John, N.B., by the extension of the Intercolonial Railway.

The appeal was dismissed with costs after counsel for the suppliant had been heard.

---

(1) 4 Ex. C.R. 439.

INDEX.