REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS, Registrar of the Court.

Vol. 5.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.
1882.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

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

" " SAMUEL HENRY STRONG, J.

" " TÉLÉSPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZÉAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

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

ERRATA.

Page 210: note (2), read 5 Ont. App. R.

" 402—in line 13 from bottom, instead of "his lot," read "this lot."

" 415—from 12 lines from bottom, instead of *Kosper*, read *Hooper*.

" 436—1st line, instead of *Bridge's* case, read *Bridger's* case.

" 436—note (1), instead of L. R. 3 Ch., read L. R. 5 Ch.

" 458—note (3), instead of 305, read 805.

Page 471—notes 3, 4, 5 & 6 at foot of page should be numbered 4, 5, 6 & 3 respectively.

Page 532—note (1), instead of 16 H. L., read 6 H. L.

" 544—note (1), instead of 4 Price, read 5 Price.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Almon *v.* Lewin . : . 514
Atty. Gen. of Ontario, Mercer *v* 538
Ætna Life Insurance Co. *v.* Brodie 1

B.

Bellechasse Election appeal — Deslauriers *v.* Larue 129
Brodie, The Ætna Life Insurance Co. *v.* . . . 1
Brunet, Pilon *et al v.* . 318

C.

Charlevoix Election Appeal—Cimon *v.* Perrault 133
Church *v.* Fenton . . 239
Cimon *v.* Perrault (Charlevoix Election) . . 133
Connolly, The Provincial Ins. Co. of Canada *v.* 258

D.

Deslauriers, Larue *v.* (Bellechasse Election Appeal) 129

E.

PAGE

Erb *et al v.* The Great Western Railway Co. of Canada 179

F.

Farmer *v.* Livingstone . 221
Fenton, Church *v.* . . . 239
Fitzgerald, The Grand Trunk Ry. Co. *v.* . . . 204
Frey, The Mutual F. Ins. Co. of the County of Wellington *v.* 82

G.

Gallagher *v.* Taylor . . 368
Gilbert, Jonas *v.* 356
Grand Trunk Ry. Co. of Can. *v.* Fitzgerald . 208
Great Western Ry. Co. of Canada, Erb *et al v.* . 179

J.

Jonas *v.* Gilbert . . . 356

L.

Larue *v.* Deslauriers (Bellechasse Election Appeal) 91

L.

PAGE

Lewin, Almon *v.* . . . 514
Livingstone, Farmer *v.* 221
London Life Ins. Co. *v.* Wright 446

M.

Manning, Nasmith *v.* . 417
Mercer *v.* The Atty. Gen. for Ontario 538
Mowat *v.* McFee . . . 66
Mutual Fire Ins. Co. of the County of Wellington *v.* Frey 82

Mc.

McFee, Mowat *v.* . . . 66
McLeod *v.* The New Brunswick Ry. Co., . 281

N.

Nasmith *v.* Manning . 417
New Brunswick Ry. Co., McLeod *v.* 281

O.

Ottawa Agricultural Ins. Co. *v.* Sheridan . . 157

P.

PAGE

Parsons *v.* The Standard F. Ins. Co. 233
Perrault, Cimon *v.* (Charlevoix Election Appeal) 133
Pilon *v.* Brunet . . . 318
Provincial Ins. Co. of Canada *v.* Connolly . 258

R.

Ryan *v.* Ryan 387

S.

Sheridan, The Ottawa Agricultural Ins. Co. *v.* 157
Standard F. Ins. Co., Parsons *v.* 233

T.

Taylor, Gallagher *v.* . 385

V.

Vaughan, Weldon *v.* . 35

W.

Weldon *v.* Vaughan . 35
Wright, London Lite Ins. Co. *v.* 446

TABLE OF CASES CITED.

A.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Adam's case	41 L. J. Ch. 270	436
"Alice," The	L. R. 2 P. C. 295	124
Allen *v.* England	3 F. & F. 49	390
American Express Co. *v.* City of St. Joseph	27 Amer. R. 383	360
American Ins. Co. *v.* Center	4 Wendell 52	381
"Annandale," The	2 Prob. D. 179	68
Arnold *v.* The Mayor of Poole	8 Q. B. 338	477
Armour *v.* Michigan Central Ry. Co.	22 Amer. Rep. 603	182
Austin *v.* County of Simcoe	22 U. C. Q. B. 73	241
Austin *v.* The M. S. & Lincolnshire Ry. Co.	10 C. B. O. S. 454	209
" "	16 Q. B. 600	213
Atty. Gen. *v.* Garbutt	5 Grant 181	229
Atty. Gen. *v.* McNulty	8 Grant 324	229
Atty. Gen. *v.* Sands	Tudor Cas. Pr. 774	574
Aylesbury Ry. Co. *v.* Mount	4 M. & G. 651	424

B.

Baker *v.* Baker	6 H. L. 616	525, 532
Baker *doe d.* Coombes	9 C. B. 714	395
Bailey *v.* The Universal Provident L. As.	1 C. B. N. S. 557	458
Ballagh *v.* The Royal Mut. F. Ins. Co.	5 Ont. App. R. 87	83
Baltimore & Ohio Ry. Co. *v.* Wickens	22 Amer. Rep. 26	185
Barnstaple case, The	2 O'M. & H. 105	147
Belshaw *v.* Bush	11 C. B. O. S. 205	297
Bench *v.* Biles	4 Madd. 187	535
Bennett *doe v.* Turner	9 M. & W. 643	415
Bewdley case, The	1 O'M. & H. 20	127
Blackburn, *ex parte*	10 Ves. 206	298
Blower *v.* Morrett	2 Ves. 420	524
Bloxam's case	33 Beav. 529	436
Bolchow *v.* Seymour	17 C. B. N. S. 107	41
Bond *v.* Hopkins	1 Sch. & Lef. 413	472
Bordman *v.* Davidson	7 Abbott's Prt. R. 439	11
Boulton *v.* Jeffrey	1 Grant Er. & App. 111	228
Bradford case, The	1 O'M. & H. 30	127
British Amer. Tel. Co. *v.* Colson	L. R. 6 Ex. 108	426
Bridger's case	L. R. 5 Ch. App. 308	436, 455
Brown *v.* Blackwell	35 U. C. Q. B. 239	9
Brown *v.* Kewley	2 B. & P. 518	298
Bruce *v.* Gore Dist. Mut. Ins. Co.	20 U. C. C. P. 207	237

NAME OF CASE.	WHERE REPORTED.	PAGE.
Bryant *v.* Commonwealth Ins. Co.	13 Pick. 543	381
Bunter *v.* Coke	1 Salk. 237	627
Burgess *v.* Wheate	1 W. Bl. 162	540, 569, 584
Burridge *v.* Brady	1 P. Wms. 127	524
Byrne *v.* Van Tienhoven	5 C. P. D. 344	427

C.

Cambridge *v.* Andetson	1 C. & P. 213	372
Cammidge *v.* Allenby	6 B. & C. 381	298
Carpenter *v.* The Providence Washington Ins. Co.	16 Peters 495	236
Calverley *v.* Williams	1 Ves. Jr. 210	9
Carmichael *v.* Gee	5 App. Cases 588	520, 537
Carr *v.* The L. & Yorkshire Ry. Co.	7 Ex. 707	209
Church *v.* Blake	2 Q. L. R. 236	655
Church *v.* Fenton	28 U. C. C. P. 384	240
Cobequid Mar. Ins. Co. *v.* Barteaux	L. R. 6 P. C. 327	372
Cope *v.* The Thames Haven Dock & Ry. Co.	5 Ex. 841	479
Coleman *v.* Riches	16 C. B. 104	184
Cookney *ex parte*	3 DeG. & J. 170	437
Cooper *v.* Blacklock	5 Ont. App. R. 535	210
Cosgrave *v.* Corbett	14 Grant 617	228
Crawthorn *v.* Trickett	15 C. B. N. S. 754	47
Cowell *v.* Simpson	16 Ves. Jr. 279	307
Cox *v.* The Midland Ry. Co.	6 M. & W. 268	479
Crampton *v.* Varna Ry. Co.	L. R 7 Ch. App. 562	510
Crawley's case	L. R. 4 Ch. 322	424

D.

D'Arc *v.* L. & N. Western R. R. Co.	L. R. 9 C. P. 330	211
Davidson *v.* Ross	24 Grant 50	124
Davis *v.* Scottish Prov. Ins. Co.	16 U. C. C. P. 176	209
Davies' case	41 L. J. Ch. 659	436
Day *v.* Day	L. R. 3 P. C. 751	395
Delaware *re*	14 Wallace 601	209
Denison *v.* Leslie	3 Ont. App. R. 536	419
Diggle *v.* The Lond. & Blackwell R. Co.	5 Ex. 442	477
Direct United States Cable Co. *v.* Anglo-American Tel. Co.	2 App. Cas. 394	67
Dougall *v.* Laing	5 Grant 292	229
Durham case, The	2 O'M & H. 135	137
Dyke *v.* Walford	5 Moore 434	557, 677

E.

Elkington's case	L. R. 2 Ch. 535	435
Ellis *v.* Crawford	5 Ir. L. R. 404	390
Emblin *v.* Dartnell	12 M. & W. 830	44
European & N. A. Ry. Co. *v.* McLeod	3 Pugs. N. B. 3	422

NAME OF CASE.	WHERE REPORTED.	PAGE.
F.		
Farnworth *v.* Hyde	L. R. 2 C. P. 204	372
Fenton *v.* McWain	41 U. C. Q. B. 239	243
Fitton *v.* Accidental Death Ins. Co.	17 C. B. N. S. 122	276
Fitzgerald *v.* The Gore Mutual Ins. Co.	30 U. C. Q. B. 97	162
Fletcher's case	17 L. T. 136	424
Ford *v.* Beech	11 Q. B. 852	236
Foster *v.* Emerson	5 Grant 135	392
Fowler *v.* Scottish Eq. Ass. Society	28 L. J. Ch. 228	9
Francis *v.* Clemow	1 Kay 435	535
Fraser *v.* Atty. General	2 Q. L. R. 236	547, 557, 667
Freeman *v.* Tranah	12 C. B. 413	486
Frend *et al.* *v.* Dennett	4 C. B. N. S. 576	480
Furness *v.* Meek	27 L. J. Ex. 34	41
G.		
Garrard *v.* Frankel	30 Beav. 445	32
Gee *v.* Mahood	9 Ch.D.151; 11 Ch.D.891	520, 537
Gibson *v.* East India Co.	5 Bing. N. C. 269	475
Giffard *v.* Whittaker	6 Q. B. 249	41
Glannibanta, The	1 P. D. 283	427
Gloucester case, The	2 O'M. & H. 62	137
Governor & Company of Copper Mines, The *v.* Fox *et al.*	16 Q. B. 298	478
Grant *v.* Norway	10 C. B. 665	181
Gray *v.* Turnbull	L. R. 2 H. L. Sct. App. 54	124
Gray *v.* Richford	1 Ont. App. R. 112	395
Green *v.* Briggs	6 Hare 385	65
Greenstreet *v.* Paris	21 Grant 226	241
Grellier *v.* Neale	Peake 198	471
Greville *v.* Brown	7 H. L. 689	535
Griffiths *v.* Owens	13 M. & W. 64	297
Groves *doe* *v.* Groves	10 Q. B. 491	413
Gunn's case	L. R. 3 Ch. App. 40	424
H.		
Hall *v.* Franklin Ins. Co.	9 Pick. 478	381
Hall *v.* Hill	2 Grants Er. & Ap. 569	240
Halton case, The	11 C. L. J. 273	124
Hardman *v.* Bellhouse	9 M. & W. 596	41
Harris *et al.* Assignees of Foeman *v.* Rickett	4 H. & N. 1	211
Harris *v.* Pepperell	L. R. 5 Eq. 1	32
Harris *v.* G. W. Ry. Co.	1 Q. B. D. 515	209
Harrison's case	L. R. 3 Ch. 638	424
Hart *v.* Nash	2 C. M. & R. 337	297
Hay *v.* Gordon	L. R. 4 P. C. 348	465
Hazard *v.* Agricultural Ins. Co.	33 U. C. Q. B. 419	161
Hatton *v.* The Beacon Ins. Co.	16 U. C. Q. B. 316	237
Heath *v.* Dendy	1 Russ. 543	524
Henderson *v.* Malcolm	2 Dow. 285	228
Hendrikson *v.* Queen Ins. Co.	31 U. C. Q. B. 547	237
Hewison *v.* Guthrie	2 Bing. N. C. 755	307
Heyland *v.* Scott	19 U. C. C. P. 165	390

NAME OF CASE.	WHERE REPORTED.	PAGE.
Holderness *v.* Shackles	8 B. & C. 612	65
Hodgson *v.* Hooper	3 E. & E. 149	391, 415
Hooper *v.* Stevens	4 A. & E. 71	297
Household F. Ins. Co. *v.* Grant	4 Ex. E. 216	427
Hovindon *v.* Annesley	2 Sch. & Lef. 607	472
Homersham *v.* Wolverhampton Waterworks Co.	6 Ex. 137	478
Hubbersty *v.* Ward	8 Ex. 330	185
Hughes *v.* Chester & Holyhead Ry.	7 L. T. N. S. 203	254
Hussey *v.* Horne-Payne	4 App. Cases 311	41
Hunt *v.* The Wimbledon L. B. of Health	3 C. P. D. 203	470

I.

Idle *v.* Royal	8 Taunt. 755	372

J.

James *v.* Williams	13 M. & W. 828	297
Jervis *v.* Berridge	L. R. 8 Chy. 351	209
Jones *v.* Hough	5 Ex. D. 115	427
Jones *v.* Owens	3 D. & Ry. 600	78
Justices of N. Staffordshire, *In re*	23 L. J. Mag. C. 17	241

K.

Kaltenback *v.* McKenzie	3 C. P. D. 467	371
Keffer *v.* Keffer	27 U. C. C. P. 272	390
Keith *v.* Bigelow	2 L. C. R. 175	332
Kelly *v.* The Isolated Risk	26 U. C. C. P. 299	470
Kenney *v.* May	1 Moo. & R. 56	241
King, The *v.* Capper	5 Price 217	544, 559
Kipling *v.* Todd	3 C. P. D. 350	426
Kirk *v.* Bromley	2 Phill. Ch. 640	489
Knight *v.* Faith	15 Ad. & E. 647	371

L.

Laird *v.* Birkenhead R. W. Co.	29 L. J. N. S. Chy. 221	471
Lake Superior Navigation Co. *v.* Morrison	22 U. C. C. P. 217	422
Lamprell *v.* Bellericay Union	3 Ex. 283	477
Lane *v.* Jackson	20 Beav. 539	126
Lapraik *v.* Burrows	13 Moo. P. C. 144	380
Larue *v.* Deslauriers	6 Q. L. R. 100	92
Lawrence *v.* Pomeroy	9 Grant 474	229
Lenoir *v.* Ritchie	3 Can. S. C. R. 575	544, 562, 667
Leprohon *v.* The Mayor of Montreal	2 L. C. R. 180	9
Levitas's case	L. R. 3 Ch. 36	424
Lewis *v.* Marshall	7 M. & G. 745	271
Lewis *v.* G. W. Railway	3 Q. B. D. 195	208
Lindley *v.* Lacy	17 C. B. 578	211
Lixom *v.* Boston Mutual F. Ins. Co.	9 Met. 205	236
Locke *v.* Matthews	13 C. B. N.S. 753	391

NAME OF CASES.	WHERE REPORTED.	PAGE.
Londonderry Case, The	1 O'M. & H. 278	137
London & B. Ry. Co. *v.* Winter	1 Cr. & Ph. 63	471
Longford Case, The	2 O'M. & H. 13	137
London, B. and South Stafford Bank, *In re* The	34 L. J. 420	314
Lucas *v.* Godwin	3 Bing. N. C. 744	477

M.

Maillard *v.* Duke of Argyle	1 Dow. &L.536; S. C. 6 M. & G. 40	297
Malpas *v.* L. & S. Western R. W. Co.	L. R. 1 C. P. 335	211
Mason *v.* The Andes Ins. Co.	23 U. C. C. P. 37	237
Mason *v.* Scott	22 Grant 592	209
Mayor of Ludlow *v.* Charlton	6 M. & W. 815	477
Mayor of Kidderminster *v.* Hardwicke	L. R. 9 Ex. 24	479
Merchants' Bank *v.* State Bank	10 Wall. 604	182
Merchants' Bank *v.* Bostwick	28 U. C. C. P. 465	424
Middleton *v.* Spicer	1 Bro. Ch. 205	541
Mines, The case of	Plowd. 330	559
Moss *v.* Steam Gondola Co.	17 C. B. 180	458
Montreal As. Co. *v.* McGillivray	13 Moo. P. C. 87	470
Monsell, *In re*	5 Ir. Ch. R. 529	240
Moore *v.* Doherty	5 Ir. L. R. 449	390
Moore *v.* Murphy	17 U. C. C. P. 444	424
Morgan *v.* Griffith	L. R. 6 Ex. 70	211
Morgan *v.* Perry	17 C. B. 334	243
Morville *v.* The Gt. N. Rwy. Co.	16 Jur. 528	214
Mowat *v.* McFee	3 Pugs. & Bur. 252	67
Moulton *v.* Blaisdell	24 Maine R. 283	253
Mutual Fire Ins. Co. of County of Wellington, The *v.* Grey	4 Ont. App. R. 293	83

Mc.

McBride *v.* The Gore District F. Ins. Co.	30 U. C. Q. B. 451	237
McCraken *v.* McIntyre	1 Can. S. C. R. 479	427
McDowall *v.* Boyd	17 L. J. N. S. Q. B. 295	44
McDowell *v.* Wheatly	7 Ir. C. L. R. N. S. 569	240
McKay *v.* Chrysler	3 Can. S. C. R. 436	249

N.

Nasmith *v.* Manning	5 Ont. App. R. 126	418
Ness *v.* Angas	3 Ex. 805	426
Newd *v.* Dunnett	27 L. J. C. P. 314	470
Nixon *v.* Hamilton	2 Or. & Wal. 364	424
Nottingham case, The	I O'M. & H. 246	145
Nowell *v.* Mayor of Worcester	9 Ex. 457	482

O.

Oakland R. R. Co. *v.* Oakland & Trent Valley R. R. Co.	13 Amer. R. 185	68
Oliver *v.* Great W. R. Co.	28 U. C. C. P. 143	197

NAME OF CASE.	WHERE REPORTED.	PAGE.
P.		
Paine *v.* The Strand Union	4 M. & G. 860	477
Parsons *v.* Citizens Ins. Co.	4 Ont. App. R. 96	88
Parsons *v.* Queen Ins. Co.	4 Ont. App. R. 103	88
Pellatt's case	L. R. 2 Ch. 527	426
Perry *v.* Henderson	3 U. C. Q. B. 486	390
Perry *v.* Newcastle Mutual Fire Ins. Co.	4 U. C. Q. B. 363	513
Philipps *v.* Clark	2 C. B. N. S. 156	214
Plymouth case, The	3 O'M. & H. 108	148
Portneuf case, The	2 Q. L. R. 283	136
Prince *v.* The Ocean Ins. Co.	40 Maine 487	381
Pritchard *v.* Walker	24 U. C. C. P. 434	424
Proctor *v.* Grant	9 Grant 26	228
Prop. &c. in Dunstable *v.* Hillsborough Mut. Ins. Co.	19 N. Hamp. 580	236
Q.		
Queen, The *v.* Alloo Paroo	5 Moore P. C. 303	559
Queen, The *v.* Keyn	2 Ex. D. 63	67
Quincey *v.* Caniff	5 U. C. Q. B. 602	390
Quintin *v.* Girard	2 L. C. Jur. 141	353
R.		
Randolph, *In re*	1 Ont. App. R. 315	427
Rankin *v.* Potter	L. R. 6 H. L. 83	375
Redpath's case	L. R. 11 Eq. 86	426
Reed *v.* Harvey	5 Q. B. D. 184	427
Reese *v.* Atty. General	16 Grant 467	229
Regina *v.* Jones	12 A. & E. 684	71
Regina *v.* St. Paul's	7 Q. B. 232	471
Rigsby *v.* Dickinson	4 Ch. D. 30	464
Robertson *v.* Clarke	1 Bing. 445	379
Robert *qui tam v.* Witherhead	12 Mod. 92	69
Robinson *v.* Great Western R. Co.	35 L. J. C. P. 123	211
Roux *v.* Salvador	3 Bing. N. C. 266	372
Ryan *v.* Ryan	4 Ont. App. R. 563	389
S.		
Salford case, The	1 O'M. & H. 140	137
Salisbury case, The	3 O'M. & H. 134	146
Sard *v.* Rhodes	1 M. & W. 153	298
Sayer *v.* Wagstaff	5 Beav. 415	298
Schooner Freeman *v.* Buckingham	18 Howard 132	185
Silverthorn *v.* Teal	7 U. C. Q. B. 370	390
Sims *v.* Brittain	4 B. & Ad. 375	47
Shepherd *doe v.* Bayley	10 U. C. Q. B. 310	415
Somerville *v.* Laflamme	2 Can. S. C. R. 260	101
Smith *v.* Hughes	L. R. 6 Q. B. 597	11
Smith *v.* Spencer	12 U. C. C. P. 281	422
Smith *v.* Thompson	8 C. B. 44	41
Sparks *v.* The Liverpool Water Co.	13 Ves. 428	424

NAME OF CASE.	WHERE REPORTED.	PAGE.
Stanway *doe dem v.* Rock	4 M. & G. 30	391
Staleybridge case, The	1 O'M. & H. 69	147
Stevens Hospital *v.* Dyas	15 Jur. Ch. 405	471
Stevens *v.* Cook	10 Grant 410	228
Still *v.* Hindekopers	17 Wall. 384	126
Street *v.* County of Kent	11 U. C. C. P. 255	241
Sumote *v.* London Dock Co.	8 E. & B. 347	470
Swire *v.* Francis	3 App. Cases 106	181
T.		
Talbot *v.* Hodson	7 Taunt. 250	471
Tamworth Case, The	1 O'M. & H. 78	137
Tempest *v.* Ord	1 Madd. 89	298
Terriault *v.* Ducharme	3 Leg. News 354	127
Theberge *v.* Landry	2 App. Cases 106	562, 666
Thomas *v.* Lewis	4 Ex. D. 18	41
Thurburn *v.* Steward	L. R. 3 P. C. 478	125
Tobin *v.* The Queen	6 C. B. N. S. 310	183
Torrey *v.* Milbury	21 Pick. 67	243
Trigge *v.* Lavallée	7 L. C. J. 85	9
Truesdell *v.* Cook	18 Grant 532	395
Tucker's case	41 L. I. Ch. 17	436
Turner *v.* Dodwell	3 E. & B. 140	297
U.		
Ulrich *v.* National Ins. Co.	42 U. C. Q. B. 141	88
Ungley *v.* Ungley	5 Ch. D. 887	484
W.		
Walcott *v.* Northern Rwy. Co	4 Macq. 348	228
Wall's case	L. R. 15 Eq. 18	426
Webster *v.* Cecil	30 Beav. 64	9
Weinaugh, admtrs. of Burgy *v.* The Prov. Ins. Co.	20 U. C. C. P. 405	237
Wheatcroft case	29 L. T. 324	424
White *v.* Western Ins. Co.	22 L. C. Jur. 215	162
Whitney *v.* Clark	3 L. C. Jur. 89	9
Williams *v.* The Chester & Holyhead Ry. Co.	5 Jur. 828	478
Williams *v.* McDonald	33 U. C. Q. B. 423	395
Wilkins *v.* Despard	5 T. R. 112	69
Windsor case, The	1 O'M. & H. 3	137
Wilson *v.* West Hartleford Ry. Co.	2 DeG. J. & S. 475	471
Wood *v.* Scarth	2 K. & J. 33	9
Wright *v.* Rankin	18 Grant 625	126
Wright *v.* Sun Mut. L. Ins. Co.	29 U. C. C. P. 299	493
Wyld *v.* Pickford	8 M. & W. 443	214

THE ÆTNA LIFE INSURANCE COMPANY..... } APPELLANTS;

1879 *Nov. 5, 7, 8.

AND

WILLIAM BRODIE..... RESPONDENT.

1880 *April 10.

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

Life Insurance—Mistake as to amount insured—Premium—Parol evidence—Costs.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000; that as soon as the mistake had been discovered they had offered a policy for $1,000, and that previous to the institution of the action they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy.

Held,—1st. That the insurance effected was for $1,000 only, and that the policy had by *mistake* been issued for $2,000.

2nd. As to costs: that appellants, not having tendered with their plea costs accrued up to and inclusive of its production, should pay to the respondent the costs incurred in the court of first instance.

---

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

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), whereby the judgment of the Superior Court sitting at *Montreal*, in favor of appellants, was reversed, and appellants held as to an insurance of $2,000 on a policy which they claim issued by error for $2,000 instead of for $1,000.

The following special case was agreed to for the opinion of the court:—

"The action is founded upon an endowment participating policy, issued by the appellants, dated the thirteenth of October, eighteen hundred and sixty-six, whereby it is declared that the appellants, in consideration of an annual premium of one hundred and sixty-three dollars and forty-four cents, assured the respondent's life in the amount of two thousand dollars, until eight years from the date of the policy.

"The policy stipulates that the company shall pay the said sum of two thousand dollars to the respondent, his executors, administrators or assigns, within ninety days after due notice of the death of him, the respondent, or if the respondent should survive eight years, then the amount insured should be paid to him.

"The policy entitled respondent to participation in the profits and dividends accruing to persons holding endowment policies in the company.

"The premiums were paid on the half note system; under which the respondent during the eight years following the thirteenth day of October, eighteen hundred and sixty-six, paid half of the premiums in cash, and gave notes for the remaining half, inclusive of interest at six per cent.

"Having survived, the respondent, at the termination of the eight years, claimed upon the company for the sum of two thousand dollars, and such dividends and profits as had accrued in his favor.

"The company resisted payment for the reasons stated below. Thereupon the respondent entered the present action, whereby he prays that appellants be condemned to pay him the sum of two thousand dollars with interest from the thirteenth of October, eighteen hundred and seventy-four, and to render him a true and faithful account of his share and proportion of the profits and dividends made and declared by the company within the said period of eight years, and to pay over to the respondent his share and proportion of said profits, and in default of said account, to pay and satisfy to the plaintiff the further sum of five hundred dollars.

"The appellants plead that they never insured the respondent for two thousand dollars. That the policy issued in error for the sum of two thousand dollars instead of one thousand dollars, for which latter amount alone it is claimed the respondent was insured. The plea sets out the alleged circumstances under which this alleged error occurred. It further set out a tender of the ninth of December, eighteen hundred and seventy-four. With the plea were deposited the following sums: Eight hundred and thirty-two dollars and ninety-seven cents, the result of the statement on the protest of the ninth of December; one dollar and fifty-three cents for interest, and twenty-five dollars and fifteen cents, alleged amount of costs due up to, but not including return.

"The respondent answered specially, alleging that he had always repudiated the pretensions of the tender of the thirteenth day of October, eighteen hundred and sixty-nine, setting out the protest of the day following, and declaring the tender made by the plea insufficient.

"There is a concurrence as to the following facts:

"The receipt for the first premium is contained in the policy.

"The receipt issued by the company for the premium

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

paid on the thirteenth of October, eighteen hundred and sixty-seven, is as follows :—

"ÆTNA LIFE INSURANCE OF HARTFORD, CT.

"Assets, Jan. 1st, 1867, $4,401,833.86.

"*Hartford*, 13th Oct., 1867.

"Received from *W. Brodie*, one hundred sixty-three $\frac{44}{100}$ dollars, premium due Oct. 13, 1867, on policy No. 26,863, insuring $2,000 for 12 months ending on the 13th day of October, 1868, at noon.

"Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal*, *Ca.*

"Premium $163.44.

"(Signed,) *S. Pedlar & Co.*, "(Signed,) *T. O. Enders*,
"Agents." "Secretary."

A like receipt was given on the thirteenth of October, eighteen hundred and sixty-eight.

The subsequent five receipts are in form following:

"*Hartford*, 13th Oct., 1869.

"Received from *W. Brodie*, one hundred sixty-three $\frac{44}{100}$ dollars, premium due Oct. 13, 1869, on policy No. 26,863, insuring $1,000 for 12 months ending on the 13th day of October, 1870, at noon.

"Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal*, *Ca.*

"Premium $163.44.

"(Signed) *S Pedlar & Co.*, "(Signed) *T. O. Enders*,
"Agents." "Secretary."

"On the twelfth October, eighteen hundred and sixty-nine, the company, through *W. F. Lighthall*, N.P., served a notarial protest on respondent, alleging that by an oversight and by inadvertence a policy was issued to him by the company for the sum of two thousand dollars instead of one thousand dollars, and that the error had only very recently been discovered; and the protest further demanded the return of this policy, and tendered another for the sum of one thousand dollars.

The respondent claims that the one so offered was in any event incomplete, through its not being countersigned by the local agents, a formality, according to respondent's pretensions, rigorously required by its terms as a condition precedent of effectiveness.

"On the thirteenth October, eighteen hundred and sixty-nine, the day following the above protest, respondent, by a counter and answering protest served upon the company, maintained his right to an insurance and policy of two thousand dollars, and tendered the premium due on that date; by this protest respondent further declared that he would deposit the premium for the benefit of the company in some chartered bank, in the event of a refusal to receive it, and further that he would hold the policy in full force and effect.

From this date to the maturing of the policy on the thirteenth October, eighteen hundred and seventy-four, the respondent continued to pay, and the appellants to receive, the annual payments, without prejudice to, and under reserve of all rights on either side. A letter to this effect passed from the company to the respondent, as follows:

"Ætna Life Insurance Company,
"Canada Branch Office,
"20, Great St. James St.
"*S. Pedlar & Co*,
"Managers.

"*Montreal*, 13*th Oct.*, 1869.

"*W. Brodie*, Esq., *Montreal.*

"DEAR SIR,—We beg to acknowledge the receipt from you of one hundred and one $\frac{33}{100}$ dollars in cash, and a premium note of $81.72. We herewith hand you the company's receipt, keeping your policy No. 26,863 in force, the company however claiming to be liable thereunder only to the extent of one thousand dollars, for the reasons stated in their tender and protest by

1879
THE ÆTNA LIFE INS. CO. v. BRODIE.

J. H. Isaacson, N. P., of the 12th instant—you, on the other hand, claiming to hold said policy for the full amount of two thousand dollars for the reasons stated in your tender and protest by Mr. *Lighthall*, N. P., of 13th October—this day—the present payment of premium and all future similar payments not in any manner to affect the rights and pretensions of the parties respectively in regard to the amount for which the policy should be held.

"Very truly yours,

"(Signed) *S. Pedlar & Co.*

"Managers."

"This letter was assented to and acted upon by both parties.

"The policy matured on the thirteenth of October, eighteen hundred and seventy-four. Respondent filed his claim for principal and profits as due on a two thousand dollar policy, and on the twenty-sixth of November following, instituted the present action, returnable on the tenth of December.

"On the day previous to the return, appellants, by a notarial tender and protest, served on respondent, set out the details of the profits and of the amounts loaned from their point of view, and tendered respondent the sum of eight hundred and thirty-two dollars and ninety-seven cents, as the balance thus shewn to be due, together with the further sum of one dollar and fifty-three cents for interest.

"It also asserted the appellants' readiness to pay costs incurred.

"The endorsement on the original application was for two thousand dollars; at the time the appellants allege they discovered the alleged mistake, this was altered to one thousand dollars.

"In the Court of Queen's Bench doubts existed in the minds of the Judges as to the exact amount due re-

spondent for profits under either view of the case. To obviate a return of the record to the Court below for the purpose of obtaining more definite evidence on this point, the parties filed the following admissions :—

"1st. That the amount due by appellant to respondents, and to be deducted from any sums payable under said policy, is six hundred and fifty-three dollars and seventy-six cents.

"2nd. That the profits on said policy, regarding it as a two thousand dollar policy, would, under the system of distribution of profits followed by said company at the date of the issue of said policy, amount to four hundred and eighty-six dollars and seventy-three cents, respondents claiming that they were under no obligation to continue said plan.

"3rd. That under the system introduced and adopted by the said Company in the year eighteen hundred and seventy-one, but which appellant protests he never assented to, no profits are divisible in respect of said policy, if it be regarded as for two thousand dollars.

"4th. That if said policy is held to be a one thousand dollar policy, the profits upon it under either of said systems would amount to four hundred and eighty-six dollars and seventy-three cents.

"The foregoing admissions are under the reserve of the right of respondent to appeal from any judgment rendered on the basis that said policy is to be held a policy for two thousand dollars.

"By the judgment in the Court of Queen's Bench, the judgment of the Superior Court was reversed and the company condemned to pay respondent the sum of one thousand eight hundred and thirty-two dollars and ninety-seven cents with interest from the twenty-sixth of November, eighteen hundred and seventy-four, and also the costs of suit in the Superior Court, and Court

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

of Queen's Bench. *Dorion*, C. J., and *Tessier*, J., dissented.

"From the pleadings, admissions, papers and evidence of record, the following question results: Is respondent entitled to recover as upon a policy of two thousand dollars or not, and to receive the amount awarded for profits by the Court of Queen's Bench?

"It is agreed that the original record is to be transmitted to the Supreme Court with right to either party to refer to it."

Mr. *Bethune*, Q. C., and Mr. *Trenholme* for appellants:

Our first proposition is that appellants ought not to be condemned as for an insurance of $2,000 on a policy which they claim it is clearly established issued purely by error for $2,000 instead of for $1,000, and is not in accordance with the antecedent proposal and bargain for insurance as understood by both parties; certainly as understood by appellants, and as it ought to have been understood by respondent.

The company never intended to give more than a $1,000 policy for a yearly premium of $163.44. Although the memorandum of amount of terms in the margin of the application does not alone override the policy, yet it is part of the contract, and that, supported as it is by parol evidence, by the premium paid, the published rates of the company, the contemporaneous entry made by the agent in this register of the correct amount, and other facts and circumstances, entitles the appellants to succeed. *Philipps* on insurance sec. 68, and 2 *Arnould* 588, show the margin notes are to be taken as part of the contract.

The present case stands on a very different footing from that of an insurance company seeking to turn the loss on the assured after irreparable loss has occurred. It is the case of a company, before loss and while the parties can be practically replaced in their former

rights, being compelled to perform a contract it never intended and never did really assent to. The respondent is not contending *de damno vitando* but *de lucro captando*. He seeks to obtain $1,000 at the expense of appellants, for which he never gave any consideration, and to profit to that extent by the inadvertence or innocent mistake of the agent who filled up his application at his request. All the equities are on the side of appellants.

Courts will not compel a party to specifically perform a contract which he never intended to enter into, or which he would not have entered into had its true nature and effect been understood; and will act on purely parol evidence.

Kerr on Fraud and Mistake (1); *Principal of Harris* v. *Pepperell* (2); *Webster* v. *Cecil* (3); *Wood* v. *Scarth* (4); *Calverley* v. *Williams* (5); *Brown* v. *Blackwell* (6).

If appellants reasonably understood the original proposal and bargain for insurance to be for $1,000, and respondent for $2,000, there is error *in corpore* and no contract for want of *consensus in idem*; *Trigge* v. *Lavallée* (in the Privy Council) (7); *Fowler* v. *Scottish Eq. Ass. Society* (8).

The principle of relief against one's own mistake is recognized in every portion of the Civil Code of *Quebec*, which goes further than the English law, and relieves against the negligence implied by ignorance of law.

See Articles 1047—1052; 1245; 2258.

Vide Leprohon v. *The Mayor of Montreal* (9); *Whitney* v. *Clark* (10).

(1) Pp. 411, 418 Am. ed., pp. 343, 349 Eng. ed., and authorities there.
(2) L. R. 5 Eq. 1.
(3) 30 Beav. 64.
(4) 2 K. & J. 33.
(5) 1 Ves. Jr. 210.
(6) 35 U. C. Q. B. 239.
(7) 7 L. C. J. 85.
(8) 28 L. J. Ch. 228.
(9) 2 L. C. R. 180.
(10) 3 L. C. Jur. 89 & 318.

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

Mr. *Laflamme*, Q. C., and Mr. *C. P. Davidson*, Q. C. for respondent:

There is a point as to costs. The action was returned on the 10th Dec., 1874. On the 9th, defendants made a formal offer of $834.50, being $832.97 for insurance, and $1.50 for interest. No sum of money was tendered for costs.

There is an effort made by the plea to conceal this fatal defect. Breaking completely away from the actual contents of the notarial document, it alleges that, in addition to the principal sum, there was by it "also tendered the costs then due, to-wit: $25,15, which said tender of debt and costs the said defendants hereby repeat."

It would, therefore, appear to be incontrovertible that the plea ought to have tendered costs accrued up to and inclusive of its production. These amounted to $50.15 and not $25.15.

No sufficient tender was, as a consequence, ever made to respondent, and it is respectfully submitted that whatever the result of the issues between the parties, the judgment of the Superior Court discloses a manifest error in adjudging costs since plea pleaded against said plaintiff.

On the merits, the only evidence of error is the amount of premium written in the marginal note. Now I challenge the learned counsel for appellants to cite any authority to show that a marginal note not signed or initialed can alter the contents of a signed document. See arts. 294, C. P. C. and Journal du Palais *Verbo* "Renvoi" (1).

In discussing the question of mistake, we contend: First.—The mistake has to be shown by incontrovertible evidence, and must have been mutual. Second.—If a man manifests an intention to another party so as

(1) 11 Vol. p. 298, Nos. 11 and 13.

to induce him to contract, he will be estopped from denying that the intention manifested by him was his real intention. Third.—There has been such acquiescence and *laches* on the part of the appellants, as to prevent them from effectively pleading mistake, even had it existed at the creation of the policy. The evidence of record as to what took place between *Brodie* and *Orr*, at the interview which brought about an agreement to insure, is of the most unsatisfactory kind.

The admissions by *Orr* as to what *Brodie* believed estops him. Meaning one thing and asserting another is not a mistake to be remedied.

The mistake of either party in expressing his intention, or in his motives, of which the other party has no knowledge, cannot affect an agreement. *Kerr* on Mistake and Fraud (1); *Bordman* v. *Davidson* (2).

The appellants have not presented or proved, with sufficient distinctness, the amount due by them for dividends and profits. By the percentage plan of distribution in force at the date of the insurance, the premium, irrespective of amount of policy, or its time of maturity, was the only basis on which profits were calculated, and, as a consequence, respondent's share could not be diminished by any increase in his policy.

But admitting error had been proved, this formal contract could not be rescinded, amended, or disturbed without special conclusions to that effect. To affirm the principle in the words used by appellants' counsel in another case, where a similar point of procedure was under discussion, "as the defendants did not pray for its cancellation, it must stand under the pleas uncancelled."

The learned counsel referred to *Laurent* (3); and *Smith* v. *Hughes* (4).

(1) P. 341.
(2) 7 Abbott's Prt. R. 439.
(3) Vol. 15, p. 561, No. 487.
(4) L. R. 6 Q. B. 597.

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

RITCHIE, C. J.:—

I think the judgment of the Superior Court was, as to the amount, right, and should not have been reversed.

The application, dated 13th October, 1866, states the desire of *Wm. Brodie* to effect an insurance with the *Ætna Insurance Company* in the sum of $2,000, the only reference in the body of the application as to premium being in these words:

And I further agree that the assurance hereby proposed shall not be binding on said company until the amount of premium as stated therein shall be received by the said company, or by an accredited agent thereof, in the lifetime of the said *Wm. Brodie.*

In the margin is the following:

What kind of policy is desired?
Endowment at 30 with profits.
Amount, $1,000—Premium at age 22, $163.44.

Orr, the agent of the defendants through whom this insurance was effected, states the time, place and circumstances under which this application was written by him and signed by plaintiff thus:

The time was on the thirteenth day of October, eighteen hundred and sixty-six; the place was at Mr. *Brodie's* store, corner of Bleury and Craig streets. About a month or so previously, I had spoken to Mr. *Brodie* about taking a policy, at which time he informed me that he would not apply again and risk being rejected as he had been a short time previously by an English company. I did not press him strongly when I learned he had been rejected; for, looking at his size, I felt it would be useless. I called a number of times at his store to try and insure his partner, Mr. *Parkyn*, but I do not remember seeing Mr. *Brodie* again after the first interview until the thirteenth day of October above mentioned. On that day I was pressing Mr. *Parkyn* hard to insure, when he positively refused to do so, but added: "Here is a man that will insure, talk to him." He alluded to Mr. *Brodie*, then sitting at the rear of the front office. I then addressed Mr. *Brodie*, saying to him that I had thought over his case, and believed I could insure him on the endowment plan, so that he could draw the money at the age of forty, if then living, or at previous death. He replied: "That would suit me," or words to

that effect, "come in here," and, so saying, he went into the back office. I followed and explained to him that two thousand dollars, the amount he had applied for to the other company, would cost him about ninety-five dollars the first year, in cash, the gross premium at his age $179.32, payable half in cash, with six per cent. on the balance. He liked this plan of insurance, and authorized me to write up his application therefor.

This I proceeded to do, but while doing so, began to fear that my labour would be in vain with so heavy a man, on so long a term as eighteen years. Mr. *Brodie* was at that time about three hundred pounds weight, and only five feet nine in height. In the course of the writing he assured me again that he would not apply under any consideration, if there was the slightest doubt in my mind of his being accepted. Under these circumstances I told him it would be better to apply on a shorter term, namely, eight years instead of eighteen. He replied that he would rather have it for only eight years, and asked what it would cost. I answered that it would cost him about one hundred and seventy-three dollars in cash the first year, the full premium being $336.88 for two thousand dollars, payable at the age of thirty, his age at that time being twenty-two. He said that that was too much to pay. "Well," I said, "take one thousand on the eight year plan, so as to make sure of being accepted, and then there will be a chance of your being insured again; but if rejected now, there would be no use in applying to any company afterwards." At this time I had written the whole of the application, except the answers to the questions found along the side. Mr. *Brodie* having agreed to take the one thousand dollars on the eight-year term, I struck out the letters "een" which formed part of the word "eighteen" in the fifth line from the top of the application, so as to make it read, term of eight years." I should have also changed the word "two" found at the beginning of the third line, to the word "one," but neglected to do so inadvertently. I then answered the printed questions in the margin, in accordance with the desire of Mr. *Brodie*, to read as follows: "What kind of policy is desired?" Endowment at thirty with profits. Amount $1,000. Premium at the age of twenty-two, $163.44." This completed the application; whereupon I turned it round to Mr. *Brodie*, and he signed it in the two places, at the bottom and near the top, and I signed my name at the lower left hand corner. I then took the application to Dr. Bessey, the examiner of the company, whose report was favorable, and the result was the issue of a policy, which was delivered to Mr. *Brodie*, and the premium was collected by a clerk in the office named Christmas.

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

I am positive that the figures $1,000 after the word "amount" in the margin of the said application were written in the presence of the said *Brodie*, at the same time that the application was made out.

The amount of premiums paid by *Brodie* during the eight years term was in cash $653.76, and in promissory notes $653.76, making a total sum of $1,307.52.

According to the established rates of the company, $163.44 would be the premium on $1,000 on the plan on which plaintiff's policy was issued, and the premium for a $2,000 policy on this same plan would, according to the evidence of *Orr*, have been just double, and this witness also states, what would seem to be a self-evident proposition, that it is not possible for an insurance company to do business without incurring serious loss on every policy on the plan of granting a $2,000 policy payable in the terms of plaintiff's policy for the annual premium therein mentioned, the insured being of the age of 22 at the time of the insurance, and therefore *a fortiori*, there could by no possibility be profits which the endowment plan contemplated accruing due. The witness thus states the principle on which the rate of premium is based:

It is a general principle in life insurance as to endowment policies, which are always for fixed periods, and not for life—that the total amount of premiums to be collected should be sufficient to pay policy at maturity, after defraying all probable losses by death falling to the share of that policy during the term, and an equitable share of all the expenses, together with some considerable margin for possible contingencies, such as extraordinary death losses, losses by investments, or by agents or employees, as well as a failure to receive the rate of interest upon which insurance transactions are based. When the policy entitles the holder to profits the rates are usually from ten to twenty or twenty-five per cent. higher than when a definite contract is made for so much money on so much insurance.

Another witness, *Pedlar*, speaks in these terms of the premium:

Question. Do you know what the premium would be on a thousand dollar policy in your company, issued at the time the plaintiff's

policy in this cause (October, 1866), on the eight year and downward (endowment) plan, and payable in terms of plaintiff's policy, the party insured being 22 years of age at the time of the insurance?

Answer. Yes, $163,44 annual premium.

Question. Could any insurance company issue two thousand dollars (policy) for that premium on the similar plan, payable in the same way, on the terms of plaintiff's policy?

Answer. It could not.

Question. Would there be a loss on such an insurance?

Answer. There would be a loss equivalent to nearly a thousand dollars.

Question. That is, if a company were to issue a $2,000.00 policy payable on that basis of an annual premium of $163.44, and did business on that system, it would lose nearly $1,000.00 on each policy?

Answer. Yes.

Question. How do you make that out? Approximately?

Answer. Without going into the actuarial figures, showing it to a decimal calculation, I would estimate that the policy, making proper allowances for deaths and reasonable expenses, that there would be barely a sufficient premium to guarantee a profit to the company that would undertake the risk for $1,000.00.

Question. What are the funds that a company has, in case of such insurance as that, available?

Answer. A company would only have available the amount of the premiums and interest thereon, less the expenses, including commissions and loss by death. The average deductions for expenses in insurance companies is about 20 p.c. In the case of the company defendant it is lower than the average, say about 15 p.c.

And Mr. *Webster*, Superintendent of Life Insurance Agencies in *Hartford, U. S. A.*, for the defendants, says:

The proper annual premium for a thousand dollar policy issued to a person, in October, eighteen hundred and sixty-six, at the age of twenty-two, payable in eight years, or sooner in case of death, that is, for such a policy as plaintiff's, was one hundred and sixty-three dollars and forty-four cents. This was the established rates of the company, and in no case would or did the company depart from them, unless by error. No insurance company could issue such policies for two thousand dollars each for the above annual premium and remain solvent.

Referring to the policy sued on in this cause, plaintiff's Exhibit No. 1, I can say, without hesitation, that there is an error therein, in

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

that the policy was issued for two thousand dollars, whereas the premium charged therein is only the premium for one thousand dollars; of this there is no doubt.

Had the above error been discovered, I can say the policy in question would never have left the office of the company.

Orr shows how the mistake was first discovered by him, and communicated to the company thus:

It was with the aid of Mr. *Brodie* that the mistake was discovered, from conversation that I had with him one day. The mistake was discovered by me, by the amount of the policy being mentioned as two thousand dollars by him in the course of a conversation at his store. I was congratulating him on his good health, and he said, yes, he was going to live to draw that two thousand dollars himself. I said, "Two thousand! you mean one thousand?" Having a rate table in my pocket, I took it out to make sure that I was correct. I then declared again that it was only for one thousand, and asked him to show his policy, saying that if it was as he said, there was some mistake. The policy was not in the store, and so I promised to call next day, when Mr. *Brodie* said that he would have it there for examination. I called the next day and found it, as he said, written out for two thousand dollars, but with the premium due on a one thousand dollar policy only. I then wrote to the company for a copy of the application in order to discover how the mistake had occurred. So soon as I saw the copy of the application the whole circumstance of my writing the original and the circumstances connected with it came up fresh in my memory. On discovering how the error occurred, the state of the case was communicated to the company, and I was directed to tender the corrected policy, which was done by notarial tender and protest filed.

It is true the witness *Orr* states that he has no doubt, and had not then any, when the discussion as to the policy took place, but Mr *Brodie* believed that he was insured for $2,000. There was no appearance on the part of the plaintiff of wishing to withhold communication of it from him; and he adds:—

I have no doubt that the plaintiff always believed that he was insured for two thousand dollars, or certainly so until the mistake was brought to his knowledge. He has never admitted since then that he was wrong. I believe him to be perfectly honest in his belief, and do not think that plaintiff ever had any intention of defrauding or wronging the company.

This is certainly rather irreconcilable with the fact, if, as stated by *Orr*, that on his suggesting to *Brodie* "to take $1,000 on the 8 year plan" and *Brodie*, as he says, "having agreed to take the $1,000 on the 8 year term," he (witness) altered the application, and then answered the printed question in the margin, in accordance with the desire of Mr. *Brodie*, to read as follows:

What kind of policy is desired? Endowment at 30 with profits, amount $1,000, premium at age 22, $163.44.

It is only reconcilable with the idea that *Brodie*, having been very anxious to have a $2,000 policy, may have forgotten that a $1,000 policy had been finally agreed upon. However this may be, and notwithstanding this apparent discrepancy I cannot avoid the conclusion that there was on the part of the Insurance Company a mistake, that they never could have intended to insure plaintiff for 8 years, for a yearly premium of $163,44, in the sum of $2,000 payable with profits if plaintiff lived.

The policy says:

And the said Company do hereby promise and agree, to and with the said assured, his executors, administrators and assigns, well and truly to pay or cause to be paid the said sum insured, in the same currency in which the premium is paid, to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said *William Brodie*, or if the said *William Brodie* shall survive eight years, then the amount insured shall be paid to him, and in either case all indebtedness of the party to the Company shall be deducted from the sum insured.

I cannot doubt the mistake arose in filling up the policy, and was caused by the amount in the application not having been altered when the terms of the application were finally settled between the agent *Orr* and *Brodie*.

Orr's evidence is corroborated by the entry he produces in his application register; he says:

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

The entry—the defendants Exhibit "A.B.C." filed at my cross-examination—is a folio taken from the application register of the company, defendants, and was used in the Company's office here at the time of taking plaintiff's application, and for some four or five years afterwards.

The entry in said exhibit opposite the date, 13th October, 1866, being the twentieth written line on the page, reads as follows, each separate item of the line being under its appropriate printed heading: "*William Brodie*," "himself," "22," "$1,000.00," "$163.44," and endowment indicated by marks followed by "30."

The said entry or line, and every item thereof is in my handwriting, and was made immediately after having taken Mr. *Brodie's* application, but it was evidently not made with the application before me as the date of birth is not inserted.

I swear positively that I made the entry of "$1,000.00" in said line under the head "amount of policy" at the time, and not later than a day or two at most after I took the application.

The "1,000" indicates and was an entry of the amount for which the policy was to be, and it refers to the same insurance as the application, defendants Exhibit No. 6.

I think it is impossible to doubt that such a transaction as insuring a party for $2,000, on the plan and on the terms contemplated, for the premium named, would, if presented to an insurer or insurance company, be looked on as utterly unreasonable and absurd, and such as no sane business man would, in the ordinary course of business, enter into. Where relief is sought against an instrument signed in due course of business as a legitimate business transaction, and where, from the nature of the transaction, it is obvious a fair *quid pro quo* must have been contemplated, and if the inadequacy of the consideration is so very gross indeed as to shock the conscience and understanding of any reasonable man, the Court, I think, ought to infer, from that alone, mistake, inadvertence, or fraud.

How can we, then, in a case of this kind, where we have positive evidence of the mistake, and a by no means unreasonable explanation of how it occurred, supported by an inference or presumption from the

transaction itself strong if not almost irresistible, reject that evidence and that presumption, and say we think the contract set out in the policy was that which the assurer and assured both understood, agreed on and intended to be the contract between them, and that there was no mistake.

I agree with Chief Justice *Dorion* that the judgment of the Court below should not have been interfered with, except as to costs, that the judgment of the Court of Appeal must be reversed, and the judgment of the Superior Court affirmed.

STRONG, J. :—

I concur with the Chief Justice that the judgment of the Court below ought to be reversed.

FOURNIER, J. :—

L'Intimé *Brodie*, demandeur en Cour inférieure, a poursuivi l'Appelante pour $2,000 sur une police d'assurance sur sa vie pour le terme de huit ans.

L'Appelante a plaidé à cette action que la somme de $2,000 a été insérée par erreur dans cette police, au lieu de celle de $1,000 pour laquelle l'assurance a été faite.

La défense allègue en outre qu'aussitôt que l'erreur a été découverte, la compagnie a offert à l'Intimé par protêt en date du 13 octobre 1869, une autre police pour la somme de $1,000, et que par un autre protêt en date du 9 décembre 1874, la dite compagnie a offert la somme de $832,97, montant qui serait dû sur une police d'assurance de $1,000 d'après le système de participation dans les profits, en même temps qu'une somme de $25.15 pour les frais de l'action que l'Intimé avait alors fait émaner sur sa police de $2,000. Ces deux sommes furent déposées en cour avec le plaidoyer.

La Cour Supérieure, à *Montréal*, qui a rendu le jugement en première instance, a été d'opinion que la preuve

1880
THE ÆTNA LIFE INS. CO. v. BRODIE.
Fournier, J.

établissait l'erreur alléguée. Elle a en conséquence déclaré les offres suffisantes et adjugé à l'Intimé le montant offert, en renvoyant sa demande pour le surplus avec dépens.

Ce jugement porté en appel à la Cour du Banc de la la Reine, par *Brodie*, a été par le jugement de cette cour en date du 13 mars 1879 déclaré erronné, et la compagnie condamnée à payer à l'Intimé la somme de $1,832,97, sur le principe qu'il n'y avait pas eu d'erreur dans l'émission de la police pour $2,000. Les frais d'appel comme les frais de première instance furent adjugés contre la compagnie en faveur de *Brodie*.

C'est de ce dernier jugement qu'il y a appel à cette cour.

Il ne s'élève devant cette cour que les deux questions suivantes :

1o. Y a-t-il eu erreur en émettant une police de $2,000 au lieu de $1,000.

2o. Dans le cas où la police doit être considérée comme n'étant que de $1,000, les offres telles qu'elles ont été faites par le protêt du 9 décembre 1874, sont-elles suffisantes et conformes à la loi ?

Sur la première question, je suis d'opinion qu'il y a eu erreur. Elle me paraît expliquée d'une manière satisfaisante par le témoignage de *William Orr*, l'agent de la compagnie qui a reçu l'application de *Brodie* pour l assurance qui fait le sujet de la présente difficulté. Après avoir dit qu'il avait d'abord été question d'une assurance pour 18 ans, il donne de la manière suivante les raisons qui ont fait adopter le terme de huit ans (1).

On voit par l'application de *Brodie* produite dans la cause que le chiffre de $2,000 y est mentionné comme étant celui du montant d'assurance demandé,—mais à la marge on y trouve celui de $1,000, au sujet duquel l agent déclare :

(1) See extract of evidence p. 12.

I am positive that the figures $1,000 after the words " amount " in the margin of the said application were written in the presence of the said Brodie, at the same time that the application was made out.

Le montant de la prime y est porté comme fixé à $163.34. Ce montant d'après les taux fixés par la compagnie suivant lesquels elle fait généralement ses affaires, est précisément celui d'une assurance de $1,000 dans des conditions semblables à celle dont il s'agit. La preuve établit de plus, d'une manière certaine, qu'il serait impossible à la compagnie de faire des affaires en adoptant le taux que veut faire prévaloir l'Intimé, sans perdre près de la moitié du montant de l'assurance sur chaque police. Pour faire voir qu'il a été adopté, dans ce cas, il faudrait au moins prouver que la compagnie, pour quelque raison de faveur particulière, a dérogé à ses taux ordinaires Au contraire, il paraît que *Brodie*, à cause de son poids excessif, n'était pas considéré comme un sujet favorable pour une assurance sur la vie. D'ailleurs pour déroger aux conditions ordinaires de la compagnie, il aurait fallu à l'agent un pouvoir spécial qu'il n'avait pas.

Cette application ayant été envoyée au bureau principal de la compagnie, la police fut émise conformément à la somme mentionnée dans le corps de la police, $2,000, au lieu de celle de $1,000 qui se trouvait en marge. Dans plusieurs entrées faites au bureau de la compagnie à *Montréal* concernant cette police, *Orr* l'agent, dit qu'elle y est mentionnée comme une police de $1,000. Ces circonstances me portent à croire qu'il y a eu erreur, et que le montant de $1,000 au lieu de $2,000 aurait dû être inséré dans cette police.

Mais si la compagnie ne voulait accorder qu'une police de $1,000 aux conditions ordinaires, et si de son côté l'Intimé ne voulait pas en prendre une de moins de $2,000, pour la même prime, parties n'ayant

1880
THE ÆTNA LIFE INS. CO. v. BRODIE.
Fournier, J.

point donné leur consentement sur le même objet, il ne devrait pas y avoir de contrat. C'est sans doute ce qui devrait être déclaré, si les parties après la découverte de cette erreur n'en était pas venu à un arrangement pour s'en rapporter aux tribunaux pour décider la question du montant d'assurance. Les protêts respectifs des parties en date des 12 et 13 octobre 1869, la lettre de la compagnie du 13 octobre 1869 accusant réception de la prime et déclarant que la police serait continuée sous la réserve en ces termes des droits de chaque partie : " the present premium and all future similar payments " not in any manner to affect the rights and pretentions " of the parties respectively in regard to the amount for " which the policy should be held." Ces termes démontrent de la part de la compagnie une intention d'exécuter un contrat. D'un autre côté, *Brodie* en payant la prime pendant cinq ans, après cette lettre avec l'espoir sans doute de faire maintenir la police pour $2,000 n'entendait certainement soumettre aux tribunaux que la question de savoir si la police devait être de 2,000 au lieu de 1,000 et non pas faire déclarer qu'en conséquence du malentendu existant entre l'agent et lui, il n'y avait eu aucune assurance. Je crois avec les deux cours qui ont déjà été appelées à se prononcer sur cette cause, qu'il y a eu un contrat d'assurance, bien qu'elles n'aient pas été d'accord sur le montant. D'ailleurs le *special case* contient à ce sujet une déclaration des parties qui ne laisse pas de doute sur cette question.

En conséquence je suis d'avis qu'il y a eu un contrat d'assurance entre les parties, et que la preuve établit que le montant de ce contrat était de $1,000. Le jugement de la Cour Supérieure accordant $832.97, comme le montant revenant à l'Intimé sur une assurance de $1,000 d'après le système adopté, me paraît correct sur ce point. Mais il contient une erreur évidente quant aux offres réelles qui sont déclarées légales et suffisantes,

erreur qui a eu l'effet d'entraîner contre l'Intimé une condamnation à tous les dépens.

Cette erreur a sans doute été commise en prenant pour vraie l'allégation du plaidoyer qu'il avait été offert à l'Intimé $25.15 pour ses frais avant l'entrée de l'action, en même temps que la somme de $832.97 pour son assurance. Le dépôt de ces deux sommes accompagnait le plaidoyer. Si ce fait ainsi plaidé était prouvé, le jugement serait correct. Mais en référant au protêt en date du 9 décembre 1874, on y voit que la somme de $832.97 est offerte dans les formes voulues par l'art. 1163 C. C.; et les art. 538 *et seq.* C. P. C., mais quant aux frais, il n'en est pas ainsi. Le protêt ne contient que la déclaration que la compagnie est disposée à payer les frais encourus par le procureur de *Brodie*; elle est en ces termes: " and furthermore the said company are will-" ing to pay and hereby offer to pay the costs incurred " by the said *William Brodie* to his attorney, and which " costs the said company have already heretofore tend-" ered to the said *William Brodie*." Le *special case* soumis par les deux parties contient à ce sujet la déclaration suivante: " It also asserted the Appellant's read-" iness to pay costs incurred." Ainsi il n'y a pas à se tromper sur la nature des offres concernant les frais. C'est une simple déclaration de la volonté de la compagnie de les payer. Mais cela n'est pas suffisant pour des offres légales quant aux frais. Pour que les offres réelles soient valables, suivant l'art. 1163 paragraphe 3, " Il faut qu'elles soient de la totalité de la somme exigible, des arrérages ou intérêts dus, *des frais liquidés, et d'une somme pour les frais non-liquidés, sauf à parfaire*."

D'après cet article, pour que les offres fussent valables il était de rigueur de mentionner une somme déterminée comme offerte pour les frais, avec la déclaration *sauf à parfaire*—avec de plus description des espèces offertes afin de constater, comme pour la somme principale, que

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

cette offre était faite en monnaies courantes et en espèces réglées par la loi.—Cela n'ayant pas été fait, les offres faites étaient insuffisantes et auraient dû être déclarées telles. Le jugement de la Cour Supérieure qui les a déclarées légales est en violation de l'art. 1163. Le jugement de la Cour du Banc de la Reine, les a déclarées insuffisantes, — mais comme cette Cour donnait gain de cause à *Brodie* principalement sur le principe que la police était de $2,000, elle n'est pas entrée dans l'examen de la question de la suffisance des offres quant aux frais. Elle se borne à les déclarer insuffisantes d'une manière générale ; mais cette déclaration portant aussi bien sur l'insuffisance des offres quant aux capital que par rapport aux frais, on doit en faire application aux frais, quoiqu'elle ne puisse l'être au capital, dont les offres, suivant mon opinion, auraient été suffisantes si celle des frais eût été légalement faite.

Etant d'avis qu'il y a eu erreur dans l'insertion de la somme de $2,000, au lieu de celle de $1,000, comme le montant de la police d'assurance, je crois que la Cour du Banc de la Reine aurait dû, en déclarant les offres insuffisantes, ne donner jugement toutefois que pour $832.97 avec les dépens dans les deux cours.

Je suis d'opinion que tel devrait être le jugement de cette Cour.

HENRY, J. :—

The action in this case is on a policy of the appellant company, dated the 13th of October, 1866, on the life of the respondent for eight years, for $2,000 payable to his personal representatives in case of his death before the expiration of the eight years, or, in case of his surviving for that period, to himself.

The defence is founded on a general denial and an allegation that the policy was, by mistake, issued for $2,000 instead of $1,000.

In the margin of the policy is written and printed the following:—" Endowment participating policy—annual premium $163.44. Note for half each year. Term 8 years, sum insured $2,000."

For two years the respondent paid the premiums and gave his notes as provided for by the policy, and receipts therefor were given him signed by the Secretary of the company at *Hartford*, and contersigned by *S. Pedlar & Co.*, agents.

They are dated at *Hartford* in 1867 and 1868. That for 1867 is as follows:—" Received from *W. Brodie* one hundred and sixty-three dollars and forty-four cents, premium due 13th Oct., 1867, on policy No. 26,863, insuring $2,000 for 12 months, ending on the 13th day of Oct., 1868, at noon. Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal, Canada*: Premium, $163.44. *P. & Co.*." The receipt given in 1868 is the same as the previous one, except its date, and by it the insurance is extended to the 15th of Oct. 1869. Thus the company received, altogether, three annual premiums at the rate provided by the policy, and in the two receipts stated. It is shown, however, that the premium paid was that applicable to a policy for $1,000, and consequently only half of that payable for $2,000.

Previous to the falling due of the fourth premium, the appellants, through their agent *Orr* (who was also agent when the policy was issued, being one of the firm of *S. Pedlar & Co.*,) objected to receive the premium as before, and insisted that, inasmuch as the premium paid was that applicable to a policy of but $1,000, they would receive the premium thereafter as for a policy for that amount only, that the insertion of $2,000 instead of $1,000 was a mistake, or error, and that the respondent only applied for,and was entitled to receive,a policy for $1,000. Protests were made on both sides, but it was finally agreed, at the suggestion of the company,

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

that the policy should remain, and that the respondent should continue to pay the same premium as previously, the question of the amount for which the company should be liable to be the subject of a future arrangement or legal decision.

The respondent paid up all the necessary premiums and the company received them under that arrangement.

It is, therefore, a question to be decided by the evidence, whether the application was for but $1,000, as alleged by the appellant, and *that both parties* so understood it. It might have been made a question whether a binding agreement had at all been entered into, for if one understood the agreement and arrangement to have been for $1,000, and the other for $2,000, the appellants by defending on that ground might, if the evidence so warranted, have avoided the contract altogether. That, however, is not their defence, nor could they possibly, after the understanding in 1869, have set it up. We have no reason to doubt that one of two mistakes was made, either as to the amount of the policy, or of the annual premium to be paid. The appellants had the choice when putting in their defence to adopt either, but having made their selection they must prove the defence as alleged. Had the mistake been in reference to the amount of the premium, they could have so alleged either to cancel the policy or to get credit for the difference as a set off to the amount of the policy. That the premium charged was inapplicable to a policy for any amount beyond $1,000, alone proves but little.

If the respondent intended to have a policy for $2,000, and the agent, by mistake, told him and inserted in the papers but half the correct amount of the premiums, the policy would be good for the whole amount and binding, unless relieved from it in equity. If, however, an agreement was reached as to the amount of the policy

and the premiums, and a mistake in the policy was alleged, it would be a matter to be determined by evidence as the case might be. If the mistake, however, was as to the premium, there is no defence to the claims for the $2,000, for the plea only raises the issue as to the amount of the policy. It may be urged that it is hard upon the company to pay double for the amount of the premiums they received, but the mistake whatever it was, was theirs, and if they have chosen to put their defence upon an issue they have not proved, the legitimate legal consequences should result. The principles of law and evidence applicable to a procedure to reform a written contract are those to be applied in this case; and to set aside or vary such by parol testimony the most conclusive evidence is necessary, and it must be clearly shown to have been an error in the contract in reference to what both parties agreed to, and understood.

We are not to enquire, under the defence set up in this action, whether a definite contract was agreed upon, for it is admitted by the plea that such was the case, and our enquiry is therefore limited to the ascertaining what that contract was. The policy is sufficient evidence of it, and under the parol evidence we are to be satisfied, beyond every reasonable doubt, that not only the agent of the company, but the respondent, intended and agreed for a policy for $1,000, and not for $2,000 as stated in the policy. Had the written application been for $1,000 we would have had something reliable to guide us, but the body of that document over the signature of the respondent asks for a policy for $2,000. In the margin, however, it is stated to be for $1,000. That margin was filled in by *Orr*, as he says, in the presence of the respondent before he signed the application. There is however no evidence that the respondent knew what was there written, for *Orr* does not allege that the respondent either read it, or that he (*Orr*) read it to him

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

or told him of it; and when we consider *Orr's* evidence, we, I think, would be justified in concluding that if the respondent had known of it no insurance would have been effected, or the amount in the margin would have been altered. *Orr*, in the first place, states in most positive terms that the final arrangement was for a policy for $1,000 for 8 years. If that statement had not been refuted by what he said subsequently we might have been guided by it, but such a position is to my mind wholly inconsistent with other parts of his testimony. In his evidence, he makes this important statement:

> I have no doubt that the plaintiff always believed that he was insured for two thousand dollars, or *certainly so* until the mistake was brought to his knowledge. He has never admitted since then that he was wrong; I believe him to be perfectly honest in his belief, and do not think the plaintiff ever had any intention of defrauding or wronging the company.

Then again:

> I think Mr. *Brodie* said at that conversation (referring to the time when the application was signed) " that he would have nothing to do with anything but a $2,000 policy, or something to that effect. It certainly was two thousand dollars that he wanted.

It needs no logic to prove that, if the statements in those extracts be true, it is simply impossible that the respondent ever agreed to take an insurance for $1,000 only. So far there is evidence that he understood he was getting a policy for $2,000. But, even if the evidence does not necessarily go that far, the statements in the quoted evidence entirely neutralize the original one that he agreed to one for $1,000. *Orr* is the only witness to sustain the plea that such an agreement was entered into, by which we are asked to vary a solemn written document understood to be deliberately prepared, examined, signed and countersigned, and acted upon for nearly three years.

It must be remembered that this is not an application to vacate or cancel a contract on the ground of a

mistake of one of the parties. The rules and principles of law and equity applicable to such a case are very different from those applicable to this case. When, previous to the receipt of the fourth premium, after the alleged mistake was communicated to the respondent, the company, finding one of two mistakes had been made by their agent and others representing them, had it open to them to have the policy cancelled, and in that case proof of such a mistake on their part, independently of the respondent, would have enabled them to have the policy set aside or cancelled; but they could not get that done except on terms of such equitable relief as the respondent would have been entitled to. Here an attempt is made to avoid the consequences of the gross errors and culpable negligence of the officers and agent of the company without any of the legal consequences. The respondent, who must be presumed to have intended to get and to have agreed for a policy for $2,000, is to be deprived of his right to have the policy he wished and intended, and to have one fastened upon him which, as *Orr* himself says, he said he would not have. It is inequitable and unjust that the respondent should suffer through the mistake or negligence of the other parties, and that he should be kept about three years in the dark.

Orr says that he knew at once, as soon as the respondent said the policy was for $2,000, that there was a mistake; but that he could not tell where it was until he got back the application, and then the circumstances came to his mind. It is, to say the least, a little singular that he countersigned the policy having in the margin conspicuously placed in large figures, and quite near together, the amount of the policy and the annual premium. He also signed two receipts, both stating the policy at $2,000, and the annual premiums paid. One would certainly have thought that the first glance at the

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

margin of the policy or at the receipts which he signed would have shown that there was an error to one who, so soon after, was so immediately affected by the mention of the amount of the policy by the respondent. What, too, can be said of those at the head office? They issued and entered the policy, endorsed and filed away the application, marking it for $2,000 and the annual premium payable, and they filled up and forwarded receipts for two years as for a policy for that amount. I have no hesitation in saying there was culpable and gross negligence in repeating so often the mistake, whatever it was, and after which the company comes with a bad grace, to ask for rectification. When it was at last accidentally discovered that either the policy was too large, or the premium too small, the company, I think, were not justified by the evidence in the position they adopted. That position could only be sustained by clear satisfactory and unsuspicious evidence that both parties agreed for a policy for $1,000. To vary an agreement such evidence has always been considered necessary, and called for. I cannot find it in this case. It is more than doubtful, as I view it, and leaves the strong and irresistible impression that the respondent never agreed to accept a policy for less than $2,000; that both parties intended a policy for $2,000, but that *Orr*, by mistake, inserted the wrong amount of premium. If his statements, which I have quoted, are correct, and being made against his own and his company's interest we must so take them, no other than the conclusion I have drawn can legitimately be arrived at.

If, as *Orr* stated, "the plaintiff always believed he was insured for $2,000," and "that he has never admitted since then that he was wrong;" that he believed him to be perfectly honest in his belief, and that he did not think he ever had the intention of defraud-

ing the company, or wronging the company, and that when effecting the insurance he said "that he would have nothing to do with anything but a $2,000 policy," and that "it certainly was $2,000 that he wanted, and that he has always since contended for it," how can any one conclude that he agreed to a policy for $1,000? If that be the true position, where, then, under the pleading, is the defence to the respondent's claim? I must say I can see none. Besides, the respondent was examined as a witness on the part of the appellants, but his evidence was put aside by them, a fact which should have some weight, when he and *Orr* were alone present at the time of the application. The company took the risk of examining him, and must submit to the reasonable construction to be put upon their excluding his evidence—a matter in itself not, perhaps, of much weight, but significant, when considering the very doubtful and suspicious position created by *Orr's* testimony and the other circumstances in evidence. *Orr* says he (the respondent) always, in good faith, considered himself insured for $2,000, and if so, it is not difficult to divine what his evidence was on that point. If the case otherwise were clear as to the amount of the policy, the rejection of the evidence would, of course, have little weight; but, under the circumstances, I think it is entitled to some consideration. Independently, however, of that consideration, I think the evidence is altogether too suspicious, contradictory and defective to sustain the defence set up by the pleas. I think the appeal should be dismissed, and the judgment of the Court of Queen's Bench affirmed, with costs.

GWYNNE, J.:—

If when the mistake which the appellants insist there was in the amount stated in the policy was first dis-

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Gwynne, J.

covered, and the appellants caused to be offered to the respondents an identical policy for $1,000, instead of for $2,000, and the respondent refused to accept such policy, the appellants had then taken proceedings calling upon the respondent to exercise an option to have the whole contract annulled, or to have the policy for $1,000 in substitution for the one for $2,000, and if upon such proceedings the appellants had satisfied the court that the mistake which they insisted upon did in fact exist, although it may have been unilateral only, that is the mistake of the appellants and their officers only, both upon principle and upon the authority of *Garrard* v. *Frankel* (1) and of *Harris* v. *Pepperell* (2) the appellants would have been entitled to succeed.

When upon the 13th October, 1869, appellants agents, *Pedlar & Co.*, sent to the respondent the letter of that date, wherein they say: "We herewith hand you the company's receipt, keeping your policy No. 26,863 in force, the company however claiming to be liable thereunder only to the extent of one thousand dollars for the reasons stated in their tender and protest by *J. H. Isaacson*, N. P. of the 12th instant, you, on the other hand, claiming to hold said policy for the full amount of two thousand dollars, for the reasons stated in your tender and protest by Mr. *Lighthall*, N. P., of 13th October, this day, the present payment of premiums and all future similar payments not in any manner to affect the rights and pretensions of the parties respectively in regard to the amount for which the policy should be held;" and when this letter was assented to by the respondent, and was acted upon by both parties, we must, in order to give precise effect to this agreement, hold that the parties have assented that the policy shall be treated as a policy for $1,000, if

(1) 30 Beav. 445. (2) L. R. 5 Eq. 1.

the appellants should succeed in satisfying the court that the policy was issued by them by mistake for $2,000, and the same question is now open notwithstanding the additional lapse of time, and notwithstanding that the respondent is plaintiff in an action seeking to enforce the policy as one for $2,000, as if proceedings had been taken in 1869 by the appellants as plaintiffs calling upon the respondent to exercise the option of accepting a substitutionary policy for $1,000, or of wholly avoiding the contract. For the reasons stated by the Chief Justice of the Court of Queen's Bench, sitting in appeal, I think it clearly established that the policy was issued by mistake for $2,000, when one for $1,000 was all that was really intended to have been given for the consideration agreed to be paid. The statement in the margin, which is positively sworn to have been there inserted before the respondent signed the application, is wholly inconsistent with the amount being intended to be for $2,000, as stated in the body, and I can see nothing in the evidence to contradict this statement, for I must say, I attach no weight to the evidence of Mr. *King*. It was argued that the reading the matter in the margin so as to affect what was in the body of the application was a violation of the principle that a marginal note upon an instrument, which marginal note was, as was contended, not signed, could not override the instrument which was signed. But this principle has no application here, for that there was a mistake in inserting the $2,000 in the policy and in the body of the application also, is a fact which the appellants may establish by any evidence they can adduce, parol or otherwise, and the variance between the amount mentioned in the margin and in the body of the application is only referred to as a piece of evidence to assist in establishing the mistake insisted upon; and assuming that marginal entry to have

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Gwynne, J.

been, as it is sworn to have been, made before the respondent signed the application, it is certainly a very strong piece of evidence. But independently of this, the witness *Orr* clearly establishes the mistake, if his evidence is to be relied upon; and, to my mind, the fact, which seems clearly established, that if the policy was sustained as one for $2,000, it would amount to the gift of about $1,000, for which the company (appellants) received no consideration whatever, seems strongly to support *Orr's* evidence. There are other points which also seem to support that evidence. It is, indeed, as it seems to me, uncontradicted in any material point.

I am of opinion, therefore, that the appellants were entitled to the relief sought had they taken proceedings for that purpose in 1869; that they are entitled to the same relief now; and that, therefore, the judgment on appeal should be reversed, and the judgment of the Superior Court restored, except as to the costs, which will follow the judgment delivered by His Lordship the Chief Justice of this Court.

Appeal allowed with costs to plaintiff in the Superior Court, no costs to either party in the Court of Queen's Bench, and costs to appellants in this Court.

Solicitors for appellants: *Trenholme & Maclaren.*

Solicitors for respondents: *Davidson, Monk & Cross.*

CHARLES W. WELDON.....APPELLANT;

AND

JAMES VAUGHAN AND DAVID MAURICE VAUGHAN..... RESPONDENTS.

1880
*Feb'y. 17.
*June 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assumpsit—Contract—Damages—Construction of contract—"Accord and satisfaction."

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in *England*, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent.

On the trial it appeared that *E. V.*, a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shown that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at *Liverpool*, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to *Liverpool*, of which he disapproved.

Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied, that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the *Atlantic*. A correspondence ensued, and finally, on the 17th Nov., 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then re-

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J.

1880

WELDON
v.
VAUGHAN.

asserted his right to control the vessel, stated, in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200, in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant.

Held, on appeal, reversing the judgment of the Supreme Court of *New Brunswick*, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction.

The contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name.

(*Taschereau* and *Gwynne*, J.J., dissenting.)

APPEAL from the decision of the Supreme Court of the Province of *New Brunswick*, discharging a rule nisi obtained by the above named appellant, calling on the respondents to show cause why a non-suit granted in the above cause should not be set aside.

The facts of the case, as stated by the Hon. Mr. Justice *Duff* in the court below (1), are as follows:—

"This is an action of special assumpsit, brought by the plaintiff against the defendants, who are merchants and ship brokers in *Liverpool, England*. The declaration contains but one count, in which it is alleged that the defendants, at the time of the making of the promise, &c., were merchants in *Liverpool, England*, to wit, &c., under the name, style and firm of "*Vaughan Brothers & Co.*," that the plaintiff was interested in and part owner of a certain barque called the "*Ansel*," and had the entire charge thereof as ship's husband; and also had the sole management of the business of the said barque or vessel, and the direction of the voyages thereof; that the said barque was then lying in the port of *Saint John*, about to sail for

(1) 2 Pugs. & Bur. 70.

Liverpool aforesaid; and thereupon, in consideration that the plaintiff would consign her to the defendants on her arrival in *Liverpool*, and would retain and employ the defendants to act as his agents and brokers in *England*, for and in regard to the said barque, and the business connected thereunto, for certain commissions, &c., to be paid to them by the said plaintiff, they, the said defendants, undertook and promised the plaintiff, that whilst they, the said defendants, should be such agents and brokers, they would obey and follow the directions and orders of the plaintiff in regard to the said barque or vessel, and also as to what voyages she should go; and they would not charter or send the said barque on any voyage except as thereto directed and ordered by the said plaintiff, and with his consent and approbation, to wit, &c.

"*Averment*—That the plaintiff, trusting and confiding, &c., did afterwards, to wit, &c., consign the said barque to the defendants on her arrival at *Liverpool*, aforesaid, and did retain and employ them as her agents and brokers as aforesaid, in regard to the said barque, and the business connected therewith, for certain commissions, &c., to be paid to them by the said plaintiff; that on the arrival of the said barque at *Liverpool*, aforesaid, the plaintiff did direct and order the defendants not to copper or sheath her, but as soon as she should have discharged her inward cargo, to charter her on the best terms for a voyage for any port or ports on the Continent of *America*, north of *Baltimore*.

"*Breach*—That defendants, against the directions and orders of the plaintiff, and without his consent and approbation, coppered and sheathed the barque, and thereby and therefor expended a large sum of money, to wit, &c., which the plaintiff was forced and obliged to pay; and further that against the plaintiff's orders and directions, and without his consent or approbation,

1880
WELDON
v.
VAUGHAN.

the defendants chartered and sent the said barque on a voyage to *New Orleans*, in the Gulf of *Mexico*, a port not north of *Baltimore*, but a great distance south of it; and in the course of the said voyage, and in consequence thereof, the plaintiff not only had to expend a large sum of money, to wit, &c., in and about the said barque and her disbursements, which otherwise he would not have done; but he also thereby sustained great loss and damage, and was deprived of great gains and profits, amounting to a large sum of money, to wit, &c.

"To this declaration the defendants pleaded (before "the Common Law Procedure Act, 1873," came into force) the general issue.

"On the trial before the learned Chief Justice, at the *Saint John* Circuit in August, 1876, the following facts appeared in evidence:

"On the 1st June, 1868, the plaintiff was registered owner of 48-64 shares in the barque "Ansel," then lying in the harbor of *Saint John*; and *Richard S. DeVeber* and *James S. Boies DeVeber* were registered owners of the remaining 16-64 shares.

James Vaughan, one of the defendants, being then in *Saint John*, called on the plaintiff and suggested to him the expediency of his having an agent in *Liverpool* to look after the vessel there. He spoke of purchasing an interest in her himself; and the plaintiff, after consulting with his co-owners, finally agreed to sell him one-fourth interest in her for $4,000. And on the part of the plaintiff it also appeared that he then employed the defendants as his agents in connection with the vessel in *Liverpool*, but upon the express and distinct understanding and agreement that he should retain the entire control and management of her; and thereupon by Mr. *James Vaughan's* directions, the plaintiff transferred one fourth of the barque unto the name of *Edwin Vaughan*, on the 26th June, 1868.

"Mr. *James Vaughan* had been informed by the plaintiff, in the course of these negotiations, that there was a leak in the vessel, which the latter had been unable to discover; that he did not intend to have her coppered until it was found out, and that, therefore, she must be kept in the *North-Atlantic* in the meantime.

"She was despatched from *Saint John* about the 29th June, 1868, consigned to the defendants at *Liverpool*, with a letter of instructions from the plaintiff to send an onward freight to *Saint John* or *Boston*, or some port not south of the latter place. On the arrival of the vessel at *Liverpool*, the defendants proceeded to copper her; and against the plaintiff's instructions they sent her to *New Orleans*. An angry correspondence between the plaintiff and defendants ensued, which was continued for about fifteen months; and in the course of which the plaintiff claimed to represent three-fourths of the vessel—that is to say, his own shares and those of Messrs. *De Vebers*. He asserted his right to manage and control her, and charged the defendants with disobedience to his orders. In a letter under date of 31st Aug., 1868, addressed to the defendants, he enumerated a variety of grounds of complaint against them; and amongst others that they had improperly discharged Capt. *Graham*, the master who had taken her to *Liverpool*, and substituted for him a relative of their own—Captain *Thomas Vaughan*; that they had, without any authority, coppered the vessel in *Liverpool* at a heavy expense; and that, contrary to his express instructions, they had sent her to a southern port, viz., *New Orleans*. And against all these things, especially the coppering of the vessel, as well on his own behalf, as for the Messrs. *De Vebers*, he protested, as having been wholly unnecessary and unauthorized. In a subsequent letter, of date 28th Sept., 1868, he informed the defendants that the Messrs. *De Vebers* concurred with him in the

1880
WELDON
v.
VAUGHAN.

view which he had taken of their conduct in relation to the vessel. Again on the 2nd of Nov., 1868, he wrote to them as follows: 'I must reiterate what I have already stated—that in coppering her you did so without the consent of the other owners, incurred a heavy expense *without consulting their wishes;* and also, in sending her to *New Orleans*, you acted contrary to the instructions contained in my letter, which, to my mind, expressed very clearly, upon what voyage I wished the vessel to proceed; and which, *I consider as representing three-fourths of the vessel, I had a right to direct.*' He also told them in that letter that Messrs. *De Vebers* concurred with him in thinking the extra expense, incurred by the dismissal of Captain *Graham*, was unauthorized and was improperly incurred.

"The defendants, on the other hand, denied the existence of any agreement or understanding, whereby the plaintiff was to have the management and control of the vessel. They allege, on the contrary, that they were to manage her in *Liverpool*; and that it was *upon that understanding only that they became purchasers of a share in her;* and having the management of her in *Liverpool*, they say that they acted for the best interest of all concerned in coppering her and sending her to a southern port. They assert that they *never would have purchased an interest in the vessel at all, but with a view to their having the management of her in England.* Finally, on the 17th of Nov., 1869, the plaintiff wrote to defendants a letter, of which the following is an extract:

"'You are well aware that there are other owners who are equally dissatisfied with the conduct of the matters by you, and the loss the barque has sustained by your assuming the responsibility.' 'You complain both in your letter to me, as in that to *Cudlip & Snider*, of the eternal bickerings; and you say it is not your fault. In reply: 'had I not reason to find fault when my instruc-

tions were not only disregarded, but what I requested not to be done was done, and at owners' expense, and the property treated as if neither Mr. *DeVeber* or I had any interest?' 'You were only my agents; and if you acted this way I had a right to complain, and you gave me every occasion.' 'To end the matter; if your brother wishes to dispose of his quarter, I will purchase it, say for $4,200 in cash, on proper transfer, after discharge at *Woolwich*.'

"The defendants accepted this offer, and they procured a transfer to be made by *Edwin Vaughan*, to the plaintiff, of the quarter of the vessel which stood in his name, upon payment by the plaintiff of the sum of $4,200.

"The learned Chief Justice, on the trial, held that this letter, coupled with the acceptance of it by the defendants, and the transfer of his share in the vessel by *Edwin Vaughan* to the plaintiff, operated as an accord and satisfaction of the plaintiff's cause of action; and he thereupon non-suited the plaintiff."

Mr. *Thomson*, Q. C., and Mr. *McLeod* appeared for the appellant and referred to *Taylor* on evidence (1); *Smith* v. *Thompson* (2); *Hussey* v. *Horne-Payne* (3); *Hardman* v. *Bellhouse* (4); *Bolckow* v. *Seymour* (5), and *Thomas* v. *Lewis* (6).

Mr. *Tuck*, Q. C., appeared for the respondents and referred to *Taylor* on evidence (7); *Giffard* v. *Whittaker* (8); *Furness* v. *Meek* (9).

RITCHIE, C.J.: [After reading the statement of facts hereinbefore given proceeded as follows:]

As the plaintiff was non-suited solely on the ground that an accord and satisfaction had been established,

(1) 5 Ed. sec. 36.
(2) 8 C. B. 44.
(3) 4 App. Cases 311.
(4) 9 M. & W. 596.
(5) 17 C. B. N. S. 107.
(6) 4 xE. D. 18.
(7) 5th Ed. sec. 1034.
(8) 6 Q. B. 249.
(9) 27 L. J. Ex. 34.

1880
WELDON
v.
VAUGHAN.
Ritchie, C.J.

it is not necessary on this point to consider the evidence, because in determining this question we must assume that the contract as alleged was proved, and the learned Chief Justice thought there was in connection with the question of accord and satisfaction nothing to leave to the jury, but rested his ruling entirely on a letter addressed by Mr. *Weldon* to the defendants, dated 17th Nov., 1869, containing an offer by plaintiff to purchase back from *Edwin Vaughan* the share transferred by him, holding that when that offer was accepted there was an accord, and when the shares were transferred to the plaintiff, there was a complete satisfaction of this matter. When the case was moved before the full bench, the Chief Justice adhered to the opinion that the non-suit was right, but, he says, "with some doubts, I admit."

As the burthen is on the defendant of establishing an allegation of accord and satisfaction, he is bound to establish it beyond all reasonable doubt, and if the evidence was verbal, and had to be submitted to a jury, it would be the duty of the jury to find against the defendant on an issue of accord and satisfaction, unless defendant's evidence established it to their satisfaction beyond a reasonable doubt. So, if he relies on documents, which the court have to construe, as establishing his defence of accord and satisfaction, and they are so ambiguously worded as to be fairly capable of a construction inconsistent with his contention, I think the court, unless satisfied beyond a reasonable doubt that what is put forward as an accord and satisfaction was intended by both parties as such, and that there was an acceptance in satisfaction as an act of the will of party receiving, should not, by a doubtful construction, deprive a plaintiff of an unquestionable legal right which accord and satisfaction assumes he has.

The only accord that can be set up in this case is

that *Weldon* agreed to accept an agreement that *Edwin Vaughan* should sell his shares in the vessel at their full value, in full satisfaction of all damages sustained by him by reason of defendants' alleged breach of contract, but I cannot bring my mind to the conclusion that the letters clearly establish this.

I take it to be clear that there must be a sufficient satisfaction, and that it must appear to be of some value or advantage to plaintiff, and I question very much whether the unexpressed idea of getting rid of a troublesome partner (which has been suggested) could be considered a sufficient and full satisfaction.

I think that the offer was for the purchase of the defendants' shares in the vessel only. That the consideration paid was for the price and value of the vessel; that the matter "to be put an end to" was the matter which the sale of the vessel would put an end to, viz., bickerings as to her future management. That there was no satisfaction for the breaches of the contract; that the burthen of showing a full satisfaction for the breach of the contract was on the defendants, and that the acceptance in satisfaction must be an act of the will of the party receiving. That the letters show nothing given in satisfaction for the unliquidated damages accruing from a breach of defendants' agreement with plaintiff. Defendants get the value of their shares in the ship and their connection with her ceases, and in their letter of Dec. 9th, 1869, accepting the offer, they do not treat or suggest even that the transaction is in satisfaction of damages, that they designed it as such, or that they considered plaintiff in purchasing the vessel received it as such,—they say

We accept your offer for the fourth we are interested in, being $4,200, after completion of her voyage to *Woolwich*. The transfer and bill of sale will go out by next mail, on receipt of which please hand to our agent, Mr. *Lockhart*, the cash in cash.

1880
WELDON
v.
VAUGHAN.
Ritchie, C.J.

There is not the slightest allusion to any claim of *Weldon* against them, still less to the satisfaction of any such claim, or that the transfer of the vessel was to be accepted in satisfaction of anything but in consideration of the price paid for the shares sold. In effect, we are asked to read the words "to end the matter," not as referring to the "bickerings," but as if they were equivalent to end the matter of the bickerings, and in full satisfaction of all claims and demands that I have against you for all damages, for all breaches of your agreement with me.

In *McDowall* v. *Boyd* (1), an averment that a bill of exchange was given "for and on account of and in payment and discharge" of a debt, is held not equivalent to an averment that the bill was given in satisfaction of such debt. In that case *Wightman*, J., said:

> It is contended that the words express not merely a suspension, but a satisfaction of the debt: that is, that the words "in payment and discharge" are equivalent to satisfaction. I cannot attribute this meaning to these words. I always distrust the use of supposed equivalents, and the effect of the two cases referred to is this: in *Maillard* v. *The Duke of Argyle* (2) "payment" was considered not equivalent to "satisfaction"; and in *Emblin* v. *Dartnell* (3) "discharge" was decided not to mean "satisfaction."

The learned Chief Justice of the court below says:

> I will not say that the plaintiff's letter will not bear the construction which my learned brother *Duff* has put upon it, but I think that is not the natural meaning of the language, nor such a construction as the defendants would probably put and were justified in putting on it.

But notwithstanding this, it was not without some doubts that the learned Chief Justice, as he tells us, came to the conclusion he did. On the other hand, Mr. Justice *Duff* thinks that although the words "to end

(1) 17 L. J. N. S. Q. B. 295. (2) 1 Dowl. & L. 536.
(3) 12 M. & W. 830.

the matter" may certainly bear the construction which the learned Chief Justice has put upon them, he thinks it a somewhat forced and constrained one.

This is not, he says, the most appropriate language to express the satisfaction of a debt or the release of a cause of action.

And in a very able judgment, I think he very forcibly shows that the more consistent and reasonable construction, is to apply the expression "to end the matter" to the bickerings referred to, giving those words "to end the matter" their exact literal meaning rather than construing them as figurative, and as equivalent to the terms "satisfying and discharging." The very able and exhaustive manner in which Judge *Duff* has treated this question leaves nothing more to be said.

This was the only point discussed in the judgments delivered in the court below, but as one of the points taken on the motion for a non-suit was that there was "no contract with the plaintiff alone, but with the owners of the ship," and though this is not put forward in the respondents' factum, and, in fact, was not argued before us, still, as I understand one of my brother judges thinks that if the accord and satisfaction was not an answer still plaintiff could not recover in this action in his own name against the defendants, I do not think it right to discuss the question as to whether plaintiff or defendants supported their respective contentions as to the agreement alleged, in the declaration, nor as to whether plaintiff could, or could not, recover damages for all the matters he alleges he is entitled to. These questions must be tried out before a jury, if the appeal is allowed, but I feel it right to say a few words as to plaintiff's right to bring the action, supposing the allegations in the declaration shall be sustained on another trial.

If this vessel was by the owners placed in the possession and under the sole control of plaintiff,

1880
WELDON
v.
VAUGHAN.
Ritchie, C.J.

one of the part owners and the largest part owner, for the purpose of running and managing the vessel and all business connected with her, as he, in his judgment and discretion, should consider best for the interests of all concerned, which I understand from the case was the position of matters when plaintiff sold by bill of sale to *Edwin Vaughan*, not a member of *Vaughan Bros.*, a small interest in the vessel, $\frac{16}{64}$ shares, and which arrangement appears to have been communicated to *James Vaughan*, a member of the firm of *Vaughan Bros.*, who negotiated the purchase and directed the transfer to be made to *Edwin Vaughan*, and was acquiesced in by the new part owner as well as by *Vaughan Bros.*, as plaintiff alleges, the plaintiff, having the vessel in his possession and under his sole control, and the sole right, by himself and those it should be necessary for him to employ, at home or abroad, to manage and control the movements of the said vessel, and to do and transact all things necessary to the preservation and employment of the vessel, and he did enter into a contract with the plaintiffs such as is set out in the declaration in this case, whereby the vessel was by plaintiff consigned to them and placed under their control, not as part owners if they were interested in her, but as his (plaintiff's) agents and brokers for commission and reward to be paid them by plaintiff, as alleged, and if they broke the agreement, and in defiance of its terms acted in direct opposition thereto, and to the directions of plaintiff, I can see no reason why the plaintiff, the only party to that express agreement on the one side, should not bring an action at law in his own name for such a breach by the defendants; the parties on the other side, to the agreement, in like manner, as defendants, might sue *Weldon* for their commission and reward on their fulfilling their part of the

agreement and so earning such commission and reward (1).

Nor can I understand how they can justify such a breach as is alleged by any authority they may claim to have as claiming to be interested in the vessel, or which they may have received from *Edwin Vaughan*, a registered part-owner, holding a minority of shares in the vessel; having accepted the consignment of the vessel from plaintiff and agreed to act as his agent and broker, they were bound to obey his instructions and deal with the property he had so placed in their hands as his agent and broker, and as he directed them, or have given up the agency and restored the vessel to the possession and control of the plaintiff.

The only privity of contract that existed, as put forward by plaintiff, was with him and the defendants, and the contract was a contract of agency apart from any question of ownership. Mr. *McLachlan*, on the Law of Merchant Shipping (2), thus speaks of the position of the agent of a ship's husband and his non-accountability to the owners:

> The owners cannot reach the earnings of the ship if in the hands of the banker or other agent of the ship's husband, although a separate account of them is headed with the name of the ship; there being no privity of contract with the owners, and the banker being accountable only to his customer, or the customer's assignee, if bankrupt, or his executors, if dead.

And the case of *Sims* v. *Brittain* (3), fully sustains this doctrine; the marginal note of that case is this:

> *A. B.* and others were owners of a ship in the service of the East India Company. *B.* was managing owner, and employed *C.* as his agent for general purposes, and amongst others to receive and pay monies on account of the ship; and *C.* kept an account in his books with *B.*, as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of

(1) See *Crawthorn* v. *Trickett*, 15 C. B. N. S. 754.

(2) P. 176.

(3) 4 B. & Ad. 375.

1880

WELDON v. VAUGHAN.

Ritchie, C.J.

the owners, besides the managing owner, and upon a receipt signed by *B.* and one of the other owners, *C.* received on account of the ship £2,000 from the *East India* Company, and placed it to *B's* credit in his books, as managing owner. The part-owners having brought an action for money had and received, to recover the balance of that account: *Held*, that *C.* had received the money as agent of *B.*, and was accountable to him for it; that there was no privity between the other part-owners and *C.*, and consequently that the action was not maintainable.

FOURNIER, J., concurred.

HENRY, J.:—

There are but two leading questions to be disposed of in this case: 1st. Whether the letter of the appellant to the respondent of the 19th November, 1869, and the acceptance of the offer contained in it, amounted to accord and satisfaction for the damages claimed in the declaration; and 2nd. Whether the appellant, being a part owner and agent of the other owners at the time of the alleged agreement for the consignment of the ship to the respondent's firm, can maintain the suit. It does not clearly appear that the latter objection was taken on the trial, but the consideration of it formed no part of the reason given by the learned Chief Justice, before whom the case was tried, for the non-suit he ordered. His decision was solely on the ground that the letter in question was, when its terms were accepted, evidence of accord and satisfaction. After full consideration of it and the whole of the previous circumstances, and the correspondence between the parties, I am of opinion that the decision was wrong.

To say the least, the expression referred to, "to end the matter," was of very doubtful meaning. It is, and must be, admitted that the words may be read in at least two ways. They may have been meant to be applied to putting an end to the "bickerings" complained of by the respondents' firm, and to prevent dis-

agreements likely to arise from the relative positions the parties occupied in regard to the management and employment of the ship, each differing from the other as to the control of her, both in *England* and in *St. John*. The appellant may be assumed to have felt that the only practical way to prevent the recurrence of such disagreements was by acquiring his former position; to do which, it would be necessary to purchase back the share of the ship he had sold and transferred to the brother of the respondents. As early as August, 1868, and before any claim for damage had arisen, the appellant wrote to the respondents' company that "being desirous of avoiding difficulties in the management of the ship," he and Mr. *De Veber*, the other owner, would sell out to respondents' company their shares on the same terms the appellant had sold the quarter, and for the same reason repeats the offer in a subsequent letter in November of the same year. When, then, the offer was not accepted, he, it may, I think, fairly be assumed, for the same and no other reason, offered to purchase at a higher rate. In his letter of the 19th Nov., 1869, after referring to letters of the respondents' firm to himself and *Cudlip* complaining "of the eternal bickerings, &c.," of the appellant, he at first justifies himself against the charge, and winds up thus:

> You were only my agents, and if you acted in this way I had a right to complain and you gave every occasion. To end the matter, if your brother wishes to dispose of his quarter I will purchase it for say four thousand two hundred dollars in cash on proper transfer, after discharge at *Woolwich*.

From this it is contended the words in question contain an offer to receive, in accord satisfaction of his present claim, the re-transfer of the ship on the terms stated. Not only so, but that that is the only construction to be put upon them, because, to sustain the non-suit, that position is necessary. If such were, at the time, in the mind of the appellant, he, I think, failed to say

1880
WELDON
v.
VAUGHAN.
Henry, J.

so, or at all events to use language necessarily conveying that idea. It must not be forgotten that up to the date of that letter not a word had passed between the parties as to any claim for damages on the part of the appellant, except for the costs caused by the alleged improper dismissal of the master. No reference is made to the subject in the letter itself. There is no evidence even that, at that time, the appellant had determined to make any such claim for damages, except as I before stated. No disagreement in reference thereto then existed, and if not, how can the respondents now contend that they so understood the words? How could the respondents' firm think, when getting their brother to resell the vessel—and for her full value too—to the appellant, they were doing so in accord and satisfaction of a demand and claim that had never been made against them? If the appellant paid, as the evidence shows, the full value for the quarter he repurchased, what consideration had he for the accord and satisfaction of his claim, amounting to as much at least as the value of the shares he got back, and if he got nothing but considered his claim well founded, how can it be presumed or concluded he intended it to be included in his offer? His offer may fairly be said to have been made "to end the matter" in respect of the bickerings he referred to, and nothing more, and I cannot see how the respondents' firm could have understood it as referring to or including anything further. It is shown that when that letter was written, the appellant and the respondent had never had any settlement of accounts in respect of the ship. The appellant wanted further statements and more information, and some charges in the accounts of the respondents' firm he disputed, and at that time the latter claimed a large balance from him. The respondents' firm took legal proceedings to recover that balance. If, then, the words

in question be construed to cover the appellant's claim, why not the counter one? If the expression really meant "to end the matter" as between them—that is, the dealing with the ship-why should it not include the claim on one side as well as the other? It must be construed as a final and full settlement of all their dealings, or it must have a restricted construction. Did the respondents' firm accept it as a final settlement? The evidence shows they did not. I am inclined to conclude there is but one reasonable construction to be put on the offer of the appellant, and that is the very opposite of that put upon it by the majority of the court below. The issue is raised by the respondent; his defence depends on proving it. If his evidence is unsatisfactory the result must be against him. The defence here rests, at the best, upon an ambiguous expression. It is the duty of the respondents, by evidence, to explain that ambiguity before it is sufficient evidence of their plea or defence. They have not done so, and the reasonable conclusions in my mind are against the construction they contend for. It is quite true that every one's language is to be construed against him, but there are limits to that rule, and it can never be applied to force one into a position which the context and surrounding circumstances do not warrant.

Whether the conclusion I have reached be the correct one or not, I fail to see how the non-suit can be sustained. The judge, on a trial, would no doubt have the right to decide upon the legal questions arising, but I can find no authority to warrant a judgment of non-suit in this case. The construction of the letter was, according to all governing authorities, for the jury and not for the judge. If the letter furnished explicit evidence to sustain the defence, the case would be essentially different. Here the meaning is to be gathered from the general terms of the letter, and the whole of

1880
WELDON
v.
VAUGHAN.
Henry, J.

the surrounding circumstances. If a judge had also to assume the functions of a jury, his decision would be a verdict founded on facts as well as law; but when a jury is sworn it is solely their province to resolve as to doubtful evidence and decide upon doubtful circumstances; and a judge has no power or right to usurp their peculiar functions. The authorities are, I think, too clear and decided upon the point to leave any doubt about it.

The second question is as to the right of the appellant to bring the present suit, he being a part owner and ship's husband, and the agent of the other owners. This position was shown by evidence for the appellant on the trial, which, if affected by negative proof, should have been submitted to the jury.

Story in his work on agency (1) says:—

It may be laid down as a general rule that whenever an agent, although known to be such, has a special property in the subject matter of the contract and not a bare custody thereof, or when he has acquired an interest in it, or has a lien upon it, he may, in all such cases, sue upon the contract.

The authorities he cites, and others, fully sustain the position (2). The agreement set up is an oral one, and for a breach of it an action lies as well in the name of the agent having an interest as part owner, as in the name of the owners. In relation to the rights of agents against third persons, *Story*, after giving two positions in which agents may sue on contracts made with them, says (3):—

Thirdly, where by the usage of trade or the general course of business, the agent is authorized to act as the owner or as a principal contracting party, although his character of agent is known. Fourthly, when the agent has made a contract in the subject matter of which he has a special interest or property, whether he professed at the

(1) Sec. 397.
(2) See amongst the later ones *Cawthron* v. *Trickett*, 15 C. B N. S. 754.
(3) Sec. 393.

time to be acting for himself or not. In all these cases the agent acquires personal rights, and may maintain an action upon the contract in his own name without any distinction whether his principal is or is not entitled also to similar rights and remedies on the same contract.

I think the appeal should be allowed, the judgment below reversed, the non-suit set aside, and a new trial granted with costs.

TASCHEREAU, J. :—

I am of opinion this appeal should be dismissed. That the construction of the letters between the parties belonged to the court alone admits of no doubt. That the Chief Justice, at the trial, and the court, in giving judgment upon the appellant's motion to set aside the non-suit granted by the Chief Justice, have properly construed these letters, seems to me also clear. The appellant, in the face of his letter of the 17th November, 1869, and the respondent's answer thereto of the 9th December, 1869, cannot now be allowed to say that he did not accept *Edwin Vaughan's* share in the vessel in accord and satisfaction. He proposed to "end the matter" by the purchase of this share. Now, the *matter to be ended* consisted in the various causes of complaint set forth in the appellant's letter of the 17th November; and the respondents could reasonably expect, when accepting the appellant's offer, that all matters in dispute between them were settled.

GWYNNE, J. :—

It is an invariable rule of law that the construction of all written documents is for the court and not for the jury, unless there are any mercantile terms introduced having a meaning different from what they ordinarily bear (1); or, unless it be shewn *by extrinsic* evidence that the terms are so ambiguous as to require

(1) *Furness* v. *Meek*, 27 L. J. Ex. 34.

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

explanation, in which case, parol evidence being admissible to explain the ambiguity and to shew what was really meant, the whole becomes open for the jury.

In *Hussey* v. *Horne-Payne* (1), it was held that no contract ought to be held established by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract, beyond and beside those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no intention of concluding any agreement; but if the question is, whether or not certain documents produced in evidence contain any, and, if any, what contract; and it is admitted that the documents contain all the terms of such contract, if there be any, and there are no mercantile terms introduced, and there is no extrinsic evidence bearing on the question, beyond and beside what is contained in the written documents, it is not competent for a judge to ask the assistance of a jury in construing the documents (2). Here there was no extrinsic evidence given or offered to shew that any expression in the written documents was used in a particular sense different from what would be its natural meaning—nothing controlling the meaning of the words used—there was no suggestion that the letters did not contain the whole contract, if any there was contained in them. The question was one of construction wholly, namely, did, or not, the letters contain, as the defendants insisted that they did, an agreement for the accord and satisfaction of all claim of the plaintiff in respect of the matters which formed the subject of the action; and that was, in my judgment, a question wholly for the court and not for the jury to deter-

(1) 4 App. Cases 311.

(2) *Bolckow* v. *Seymour*, 17 C. B, N. S. 115.

mine; and as to the construction put upon the letters by the court below, I am not prepared to pronounce it to be erroneous. It was contended that it is erroneous, upon the ground that, as the claim sued for is one in which other co-owners of a ship were interested as well as the plaintiff, it could not reasonably be supposed that the plaintiff was effecting to bind the interests of such other co-owners in the arrangement he was making with the defendants; but assuming this to be so, there could be no doubt that he could bind his own interests, and that is all the defendants insist upon, in so far as regards their contention upon this point. The fact, however, which is involved in this argument, a fact which does not admit of dispute, namely, that the cause of action, in respect of which recovery is sought in this suit, is one in which all co-owners are alike interested, is, to my mind conclusive that this action cannot be maintained, and that the non-suit is supportable upon the other grounds taken at the trial, although the court below has proceeded upon the ground of accord and satisfaction only.

These objections were—that there was no evidence of the contract alleged in the declaration; that the only agreement between plaintiff and the defendants was in writing, and it contained no such terms as those declared upon; that the contract, if any, was not with the plaintiff alone, but with the owners of the ship, and that plaintiff could not sue in his own name only; that the plaintiff proved no damage; that there was no evidence of payment by the plaintiff of any money, as alleged in the declaration, as a consequence of the alleged breach of contract therein stated; and as to coppering the vessel that there was no evidence of that having been done, as alleged, after the plaintiff had given his directions that it should not be done. The evidence was that it was done before these directions were given.

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

Now, the declaration is, that whereas the defendants were merchants doing business in *Liverpool, England*, under the name and style of *Vaughan Brothers & Co.*; and whereas, to-wit, on the 1st day of June, 1868, the plaintiff was interested in and part-owner of a certain barque or vessel called the "*Ansel*," then lying in the port of *St. John*, and about to sail for *Liverpool*, and had the entire charge and control thereof as ship's husband, and also had the sole management of the business of the said barque or vessel, and direction of the voyages thereof, and thereupon, *in consideration* that the plaintiff would consign the said barque or vessel to the said defendants on her arrival in *Liverpool*, and would retain and employ the defendants to act as *his* agents and brokers in *England*, for certain reward and commission to be paid to the defendants *by the plaintiff*, they the defendants then and there undertook, and faithfully promised the plaintiff, that while they the defendants were such agents and brokers they would obey and follow the directions and orders of the plaintiff in regard to the said barque or vessel, and also as to what voyage or voyages she might go, and that they would not charter or send the said barque or vessel for or on any voyage or voyages, except as thereto directed and ordered by the said plaintiff, and with his consent and approbation; and the plaintiff averred that, confiding in said promise of the defendants, he did afterwards consign the said vessel to the defendants on her arrival at *Liverpool*, and did retain and employ the defendants as *his* agents and brokers in regard to the said vessel, and the business connected therewith, for certain reward and commission to be paid to the defendants by the plaintiff; and the plaintiff further saith that on the arrival of the said vessel at *Liverpool*, to wit, &c., the plaintiff did direct and order the defendants not to copper or sheath the said vessel,

but as soon as she discharged her inward cargo to charter the said vessel at the best terms for a voyage to any port or ports on the Continent of *America*, north of *Baltimore* and not south of the said port of *Baltimore*. Yet the defendants, not regarding the said promise and undertaking, and against the directions and orders of the plaintiff, and without his consent and approbation, did copper and sheath the said barque or vessel, and thereby and therefor expended a large sum of money to wit, the sum of $5,000 which the plaintiff was obliged and forced to pay; and further, against the directions and orders of the plaintiff, and without his consent and approbation, chartered and sent the said vessel on a voyage to *New Orleans*, a port on the Continent of *America*, not north of *Baltimore*, but a great distance south of that port, and that in the course of the said voyage, and in consequence thereof, the said plaintiff not only had to pay and expend a large sum of money, to wit, the sum of $5,000, in and about the said vessel, and the disbursments thereof, which otherwise he would not have done, but also thereby sustained great loss and damage, and was deprived of great gains and profits amounting to a large sum of money, to wit: the sum of $10,000, which he otherwise would have made, to the plaintiff's damage of $20,000, and therefore he brings his suit.

It will be observed that the cause of action here stated is rested upon a special agreement alleged to have been made with the plaintiff, a co-owner and ship's husband of the vessel, whereby, in consideration merely of the defendants being appointed agents and brokers in *England* of the plaintiff, as such ship's husband, and in consideration of certain commission and reward to be paid by the plaintiff to them as such his agents and brokers, they (not being otherwise interested in the vessel than as such agents and brokers of the plaintiff)

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

promised as alleged, and that the damage occasioned by the breach of the defendants alleged promise is damage alleged to have been sustained by the plaintiff in his character of co-owner of the vessel, and not as ship's husband. This is the gist and substance of the declaration and of the plaintiff's claim as therein stated.

To this claim the defendants' defence is, that no such contract or promise as is alleged in the declaration was ever entered into or made by the defendants, and that they did the acts which are complained of in right of their being co-owners also of the vessel with the plaintiff, and under the authority also of *Edwin Vaughan*, who, as their nominee, appeared upon the registry as owner of sixteen shares owned by them in the vessel, and in virtue also of their having been, as they claim to have been, ship's husband in *England* of the vessel. Upon the discussion, however, of this question of non-suit we must proceed upon the plaintiff's evidence of the transaction out of which the alleged promise stated in the declaration arose, and the question will simply be: does that evidence, taken in connection with other undisputed evidence which was given by the defendants, support or displace the cause of action set out in the declaration?

The plaintiff's evidence is that on the 1st of June, 1868, he owned 48 shares of the vessel, one *Richard S. DeVeber* owning eight shares, and one *J. S. Boies DeVeber* owning the other eight shares; that on that day the defendant *James Vaughan* came to his office and talked about purchasing an interest in the vessel, and about the advisability of having a person in *Liverpool* to look after her. That he told *Vaughan* that he, plaintiff, was ship's husband, and that if he, *Vaughan*, would take one-fourth he could be plaintiff's agent of the vessel in *England*. That *James Vaughan* said he would purchase the one-fourth share, and would let the plaintiff know

into whose name the transfer should be made, and he afterwards told plaintiff that it should be in the name of *Edwin Vaughan*. That he, plaintiff, drew up a memorandum of the agreement, which was signed by himself and *James Vaughan*, and which he produced, and is as follows:—

Bought of *Charles W. Weldon* sixteen sixty-fourth shares of the ship *Ansel*, 818 tons register, for the sum of $4,000 currency, payable on the proper transfer being duly executed, and the vessel to be taken on discharge of her present cargo in *St. John*, in as good order as she left *Philadelphia*.

St. John, June 1, 1868.

I accept the above terms.

(Signed,) CHARLES W. WELDON.
JAMES VAUGHAN.

The plaintiff also produced a transcript from the registry, by which it appeared that on the 26th June, 1868, there was registered a bill of sale, dated the 4th June, 1868, whereby the plaintiff assigned and transferred to *Edwin Vaughan* sixteen shares in the vessel. The plaintiff further says that the vessel was to be sent to *Vaughan Brothers* and not to *James Vaughan*, to which *James Vaughan* assented. There was no evidence whatever to the effect that *Vaughan* had agreed, or that it was proposed to him, as part of the terms of purchase of the sixteen shares, that such purchase should be in any respect qualified, or that the transfer of those shares should not carry with it all the rights and incidents of ownership without any qualification, nor was any evidence given to the effect that, nor was it suggested that, *James Vaughan* had in terms expressly made any such undertaking and promise as in the declaration alleged. Such promise, therefore, can be established only as arising by implication from the circumstances attending the consignment of the vessel to the defendants and the information given by plaintiff to *James Vaughan* that the plaintiff was ship's husband when

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

on the 1st June, 1868, *Vaughan* was negotiating with him for the purchase of an interest in the vessel.

Now, in so far as this case is concerned, the transfer of the sixteen shares to *Edwin Vanghan*, by the direction of *James Vaughan*, in pursuance of the agreement for the purchase of those sixteen shares by *James Vaughan* upon behalf of *Vaughan Brothers & Co.*, must be regarded as a purchase of those shares by *Vaughan Brothers*, who are, as between them and the plaintiff, to be treated as the owners thereof. That this was the view of the transaction taken by the plaintiff himself at the time of the purchase appears from certain letters from the plaintiff to the defendants, which were produced in evidence, dated respectively the 29th June, and the 13th and 25th July, and 2nd Nov., 1868, and the 20th Jan., 1869. In that of the 29th June, after mentioning the despatch of the vessel to them, he says:

I have made up her accounts to the 10th instant, when she had finished discharging her inward cargo, including seamens' wages, of which I have made a statement, so that all her expenses up to that date will be charged three-fourths to me and the balance to Messrs. *DeVeber;* and in paying the men in *Liverpool*, on her arrival, the amount will be distributed in that way. The mortgage I had given when I purchased *Glasgow* and *Black* out I could not get discharged until Wednesday last, when the transfer to Mr. *Edwin Vaughan* was completed and the money paid over. I hope you will have secured an outward freight for her before her arrival either for this port or *Boston*, as I think for the present she should not go south of the latter port, and I trust you may be able to secure a freight of railway iron for this place. I send you the account of her cargo, *and hoping that you will be fully satisfied with the ship.*

I am, yours truly,

CHARLES W. WELDON.

In the letter of the 13th July he says:

I had the pleasure, on the 29th ult., of informing you of the "*Ansel*" having left, and as we heard of her two days after she left, clear of the Bay, I trust she will be in *Liverpool* before this letter reaches

you. I now enclose you an account of her disbursements for loading here, including repairs; also a memorandum of moneys received by Capt. *Graham*. You will see in the disbursements I only charge him with the balance after settling up his wages to the 10th June, the day the vessel began her outward voyage and discharged her cargo inwards. In paying off the men, in the like manner, the wages up to that date *will be charged* by you, *three-fourths to me, and one quarter to Messrs. De Veber, and after that one-half to me and one-quarter to Messrs. De Veber, and same to yourself.*

In the letter of the 25th July he says:

I am in receipt of yours of last mail and note its contents. I sent you by last mail an account of disbursements outward, as I thought you would not care for the inward account, *you not being liable for it.* I, however, now enclose it as you wish it.

In the letter of the 2nd Nov., he says:

While I am ready to admit that you were fully satisfied you were acting best for the owners, and the expenses certainly do not appear large, yet I must reiterate what I have already stated, that in coppering her you did it *without the consent of the* OTHER *owners*, and incurred a heavy expense *without consulting* THEIR wishes; and also in sending her to New Orleans you acted contrary to the instructions contained in my letters, which, to my mind, expressed very clearly upon what voyage I wished the "*Ansel*" to proceed, and which I consider, *as representing three-fourths of the vessel, I had a right to direct.*

It may be observed in passing that the plaintiff's right of controlling the defendants as owners of one-fourth only of the vessel is claimed only in right of the plaintiff representing the other three-fourths. Again, in the same letter he says:

As we certainly differ very much in our views in reference to the barque and her employment, *a matter always to be avoided between part owners*, and as you seem perfectly satisfied as to her success,

* * * * * * * *

and he repeats an offer previously made that the defendants should purchase the three-fourth parts represented by plaintiff, and he concludes:

Trusting we shall soon hear of her safe arrival at *New Orleans*, I am, yours truly ———

And in his letter of the 20th Jan., 1869, he says:

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

I enclose my account against the ship to the beginning of the year. Trusting she will have a speedy voyage, I am yours, &c.

In this account is a charge of "allowance for half year, acting as ship's husband, $50.00," and the total amount of plaintiff's charge against the ship for the half year ending 1st Jan., 1869, amounting to $158.68 is distributed by him as follows:

Charles W. Weldon	$79.34 =	$\frac{1}{2}$ or $\frac{32}{64}$
L. H. DeVeber & Sons	39.67 =	$\frac{1}{4}$ " $\frac{16}{64}$
Vaughan Brothers & Co.	39.67 =	$\frac{1}{4}$ " $\frac{16}{64}$

It appears, then, from the plaintiff's own evidence, that the consideration of the vessel being consigned to *Vaughan Brothers* was not that laid in the declaration, but that the vessel was consigned to them in consideration of their having become co-owners of the vessel by the purchase from the plaintiff of sixteen shares therein, the agreement for which purchase was produced and contained no terms qualifying the rights incident to co-ownership in a vessel, nor was there any evidence that the defendants, or *James Vaughan* on their behalf, had ever consented that the purchase should be qualified or restricted as to the exercise of any of the rights and priviliges by law incident to co-ownership and vested in a co-owner.

The defendants then, being regarded as the unqualified purchasers of sixteen shares sold to them by the plaintiff, the promise laid in the declaration could not be established without an express agreement made by the defendants in restraint of their claim to exercise the rights and privileges incident to co-ownership, and as no evidence of any such agreement was offered, it follows that the evidence wholly failed to support the cause of action stated in the declaration, and it is unnecessary to enquire to what extent such a promise, if made and proved, would be binding upon a co-owner.

It was proved by the evidence of *James* and *Edwin*

Vaughan, which evidence was not contradicted, that the vessel was coppered and sheathed, and despatched to *New Orleans*, by the authority of the defendants as beneficial owners, and of *Edwin Vaughan* as registered owner of the sixteen shares purchased by the defendants from the plaintiff, and the plaintiff in his letter of the 2nd Nov., 1868, admits this, and that in doing so the defendants were satisfied they were acting best for all the owners, and however much the plaintiff may have been originally opposed to the voyage to *New Orleans*, there are passages in his letters of the 22nd Sept. and Nov. 2nd, 1868, and the 20th Jan., 1869, which seem to show that, however strong that objection may have originally been, he adopted the adventure, and was willing to share in the profits resulting from its proving successful, as the defendants represented they anticipated it would prove. But I do not dwell upon this seeming acquiescence, as the question under discussion is, does this action lie, acquiescence or no acquiescence?

The plaintiff's letters, however, and his evidence clearly show that the defendants, through *Edwin Vaughan* as registered owner, were the real beneficial owners of the one-fourth part of the vessel. Now, as to the coppering the vessel, the expense of which forms one item in the plaintiff's claim, the averment in the declaration is, that the defendants "thereby and therefor expended a large sum of money." By the light of the undisputed evidence, we see that this expenditure was incurred by the defendants in virtue of their authority as co-owners of the vessel, backed by the authority (if that were necessary) of *Edwin Vaughan* as registered owner. The expenditure was, however, that of the defendants. It is not pretended that the plaintiff had ever any demand made upon him for that expenditure, or any part thereof, by the persons who did

1880
WELDON
v.
VAUGHAN.
Gwynne, J.

the work; the expense, therefore, alleged to have been incurred by the defendants in coppering the vessel, is either unpaid to them, and still remains part of the account to be taken between the co-owners, to be adjusted upon the taking of such accounts, or the plaintiff has already paid his proportion to the defendants and is now suing to recover it back.

The allegation in the declaration is that he has been *obliged* and *forced* to pay the monies expended by the defendants in coppering the vessel. It is part of the plaintiff's case, that the defendants incurred that expenditure without any authority whatever or consent of the plaintiff. Now *as ship's husband*, it is plain that he could not be *obliged* and *forced* to pay to any one, much less to the defendants, a sum of money expended upon the vessel by the defendants as co-owners without the authority of and against the will of the *ship's husband*, and the plaintiff, as a *co-owner*, could not be *obliged* and *forced* to pay, or to contribute to the payment of, expenditure authorized by another co-owner in coppering the vessel which is the subject of co-ownership, unless he was legally liable so to pay or contribute; if therefore he was, as is alleged in the declaration, *obliged* and *forced* to pay the expenses incurred by them in coppering the vessel, no action at plaintiff's suit will lie to recover back from the defendants that which he was legally obliged and forced to pay to them. As to the coppering, therefore, the plaintiff is by the evidence placed in this predicament: that he either has as yet paid nothing, and the subject is still matter of account yet to be taken between himself and his co-owners, or, if he has paid anything, he must be taken, upon the allegation in the declaration, to have been legally liable to pay the defendants whatever he did pay them, and so cannot recover back money so paid. The evidence, however, fails to shew any payment whatever made by the plaintiff of

the expense of coppering, and upon the taking of the accounts, if any there be still to be taken, between the co-owners, in respect of the defendant's dealings with the vessel, the plaintiff must assert, if he can, his claim of exemption from liability to contribute to the expenditure attending the coppering and sheathing of the vessel.

Then, as to the loss of profits and alleged expenditure upon the voyage to *New Orleans*. As to the alleged expenditure, the same observations will apply; and as to the loss of profits, it is clear, upon the authority of *Holderness* v. *Schackles* (1), and *Green* v. *Briggs* (2), that, although part owners are but tenants-in-common of a ship, yet they are jointly interested in her use and employment, and the law as to the earnings of a ship, whether as freight, cargo or otherwise, follows the general law of partnership. The question as to the plaintiff's rights in respect of the profit or loss upon the voyage, being one relating to a partnership matter in which all the co-owners are interested as partners, must be alone discussed in a proper suit instituted for adjusting the rights and interests of all parties interested. It is difficult to understand how the plaintiff can claim any damages for the loss of this adventure, without an account being taken of the profits of the adventure, which account can only be taken between the partners; and neither for this cause of action, any more than for the coppering of the vessel, can the plaintiff as ship's husband maintain this action.

For the above reasons, I am of opinion that this action clearly is not maintainable, and that the non-suit must be upheld, and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *E. McLeod.*

Solicitor for respondents: *W. H. Tuck.*

(1) 8 B. & C. 612. (2) 6 Hare 395.

1880
*May 4, 5.
*June 10.

JOHN MOWAT.....APPELLANT;

AND

WILLIAM McFEE.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

The Fisheries Act, 31 *Vic.*, c. 60—*Jurisdiction of Dominion Parliament over Bay of Chaleurs*—14 *and* 15 *Vic.*, c. 63 (*Imp.*)—*Justification, plea of—Fishery Officer, right of, to seize "on view."*

Under the Imperial Statute, 14 and 15 Vic., c. 63, regulating the boundary line between Old *Canada* and *New-Brunswick*, the whole of the *Bay of Chaleurs* is within the present boundaries of the Provinces of *Quebec* and *New-Brunswick*, and within the Dominion of *Canada* and the operation of *The Fisheries Act*, 31 Vict., c. 60. Therefore the act of drifting for salmon in the *Bay of Chaleurs*, although that drifting may have been more than three miles from either shore of *New-Brunswick* or of *Quebec* abutting on the Bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act and of the regulations made in virtue thereof.

2. The term "on view" in sub-sec. 4 of sec. 16 of *The Fisheries Act* (1) is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act.

(1) "All materials, implements or appliances used, and all fish had in contravention to this Act or any regulation or regulations under it, shall be confiscated to Her Majesty, and may be seized and confiscated on view by any fishery officer, or taken and removed by any person for delivery to any magistrate, and the proceeds of disposal thereof may be applied towards defraying expenses under this Act."

*Present.—Ritchie, C. J., and Fournier, Henry, Taschereau, and Gwynne, J.J.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1), discharging a rule *nisi* to set aside the verdict and to enter a verdict for the defendant (appellant), and for a new trial.

This was an action of trespass for seizing and carrying away plaintiff's (respondent's) boat and nets.

The facts and pleadings sufficiently appear in the judgment of the Court hereinafter given.

Mr. *Lash*, Q. C., for appellant:

The first and most important question which arises in this case is, whether or not the Bay of *Chaleurs* is a part of the territory or territorial waters of *Canada*, and thereby comes within the operation and prohibition of *The Fisheries Act*. I claim the whole Bay is subject to the legislative authority of the Parliament of *Canada*.

The Bay of *Chaleurs* is wholly within the jaws of the land, and is a long bay or gulf, running up between the provinces of *Quebec* and *New Brunswick*, and emptying into the Gulf of *St. Lawrence*, which Gulf is the boundary, on the north, of both provinces. The Court will take judicial notice of the configuration and dimensions of the Bay. The Bay of *Chaleurs* then, by the law of nations, is not a part of the high seas, but a part of the territory or territorial waters of *Canada*, and subject to the laws enacted by the Canadian Parliament. *Direct United States Cable Co.* v. *Anglo American Telegraph Co.* (2); *The Queen* v. *Keyn* (3).

Moreover, by an Act of the Imperial Parliament, 14 and 15 *Vic.*, c. 63, entitled "*An Act for the settlement of the Boundaries between the Provinces of Canada and New Brunswick*," Parliament, confirming the award of the Right Honorable *Stephen Lushington*, and *Travers Twiss*, Doctor of Laws, defined the boundaries between *Canada*

(1) 3 Pug. & Bur. 252. (2) 2 App. Cases, 394-422.
(3) 2 Ex. D. 63-289.

1880
MOWAT
v.
McFEE.

and *New Brunswick* (in that respect) as follows: "thence "down the centre of the stream of the *Restigouche* to "its mouth in the Bay of *Chaleurs*, and thence through "the middle of that Bay to the Gulf of *Saint Lawrence*, "etc."

Then, if by the *British North America Act*, the whole of the Bay of *Chaleurs* became part of the territory of the Dominion, *The Fisheries Act* must be held to apply to this particular bay.

The next point is whether the defendant had a right to take the boat and nets for delivery to a magistrate. I claim that the effect of the statute is to confiscate to Her Majesty, immediately at the time of the committing of the illegal act, the materials illegally in use. See The "Annandale" (1).

The same principle is established in the U. S. (2). This is a forfeiture under a statute, and therefore distinguishable from forfeiture at common law, which does not vest *ipso facto*.

But here the boat and nets were afterwards, and after due hearing of the matter, adjudged to be confiscated, and it was while the goods were in Her Majesty's possession, declared by the judgment to be Her property, that the respondent obtained a verdict for $900 for this same property, and for being prevented from carrying on an illegal business.

I will now refer shortly to the appeal from the judgment on the demurrer.

The second plea alleges that the fishing boats and nets being implements and materials which *were being illegally used, &c.*, were taken by the defendant, the

(1) 2 Prob. D. 179.
(2) Oakland RR. Co. *v.* Oakland & Fruit Valley RR. Co., 13 Amer. R. at p. 185,

fishery officer, which would mean that they were seized on view.

The Court below have evidently overlooked that part of sec. 16, sub-sec. 4, which authorizes *any person*, whether a fishery officer or not, to take and remove for delivery to any magistrate, fishing materials used in contravention of the Act or regulations made under it, without any limitation as to doing it on view.

It is clearly alleged in the second plea that defendant did take and remove the boat and nets to be delivered to a magistrate, and did deliver the same to *James S. Morse*, Esq., a magistrate, &c., and it makes no difference that in the plea the defendant is described as a fishery officer. That may be treated as description or surplusage. His rights and powers are none the less as an individual because he has special rights and powers as a fishery officer.

The third plea not only alleges in this respect all that the second plea alleges, but states in addition that a trial was had, and that the magistrate adjudged the boat and nets to be confiscated to Her Majesty.

The plaintiff relies on the fact that the action was brought before the conviction, overlooking the fact that the conviction relates back to the time of the committing of the illegal act. *Robert qui tam* v. *Witherhead* (1), *Wilkins* v. *Despard* (2).

Mr. *Hannington*, for respondent:

My first point is, that drifting for salmon is not an illegal act in places not provided for by the Act. By sub-sec. 7 of sec. 7 of *The Fisheries Act*, power is given to the Minister, or any fishery officer, to define the tidal boundary of estuary fishing, and it is only when this has been done that drifting for salmon in that place is illegal. The regulations made under the 19th section

(1) 12 Mod. 92. (2) 5 T. R. 112.

1880
MOWAT
v.
MCFEE.

only apply to the County of *Restigouche*, and they cannot have force outside of the actual boundaries laid down. It was for the appellant to show the act was committed within the limits of the county covered by these regulations.

Outside of his jurisdiction he had no right to act as fishery officer, and still he sued before the magistrate in his capacity of a fishery officer. The act must be construed strictly, and I say appellant was bound to prove that he was acting as a private subject, and on view of the offence took and removed respondents materials for delivery to the magistrate to obtain a conviction.

The law is, that where a limited tribunal takes upon itself to exercise a jurisdiction that does not belong to it, its proceedings are a nullity. The jurisdiction of the fishery officer being limited, to justify any acts as such officer, he should have alleged that they were done within his jurisdiction, and, therefore, the second plea is bad.

Then the plea was not proved.

I contend, also, that the third plea is bad, in not alleging that defendant seized the nets within his jurisdiction ; if good, it is not proved.

The materials were not being used illegally at the time of the seizure, but were confiscated on a pretended view.

The fishing took place more than three miles from the shore, and there was an important point of law in the case that might have been raised if the Government had defined the limits of a district and professed to give jurisdiction to a fishery officer out into the deep sea, beyond the three mile limit from the shore.

It is contended, on the part of the appellant, that proceedings were had on the delivery to the magistrate. But this has not been proved, for they never were

delivered to the Justice, and the proceedings that did take place were on the complaint of the appellant, after he had confiscated the goods himself. The allegation is, in effect, that the conviction was had before the suit was commenced, whilst the evidence shows the conviction was had after action brought. The appellant having taken and confiscated the respondent's property on a pretended view, he is clearly liable. *Regina* v. *Jones* (1). With reference to forfeiture, all I want to establish is, there was no forfeiture until the seizure. The word *confiscated* does not mean *forfeited*. Forfeiture from the time of the offence cannot arise in this case. *Tomlin's* Law Dic. Vo. Confiscation, and Vo. Forfeiture; *Bouvier's* Law Dic., 1 Vol., 268; 4 *Comyn's* Dig., 404, Title Forfeiture note to B. 7.

Mr. *Lash*, Q.C., in reply:

The conviction shifted the onus, and respondent was bound to prove that his property was not liable to seizure.

The judgment of the Court was delivered by GWYNNE, J.:

The respondent sued the appellant in trespass for taking respondent's goods, namely: a fishing boat and fishing nets, and carrying away the same and disposing of them to the appellant's own use.

To this declaration the appellant pleaded three special pleas, viz.:

And for a second plea the defendant says, that at the time of the defendant's seizing and taking the plaintiff's goods, that is to say, the fishing boat and the ten fishing nets stated in the declaration, the said plaintiff was illegally and wrongfully using, and had been using the same for the purpose of drifting for salmon in the waters of the Dominion of *Canada*, and the said defendant, being a fishery officer duly appointed under the provisions of the *Fisheries Act*, did remove and detain the said fishing boat and fishing nets, being then

(1) 12 A. & E. 684.

1880
MOWAT
v.
McFEE.
Gwynne, J.

materials illegally in use, for the purpose of drifting for salmon, *which is the seizing, taking, carrying away and conversion in the said declaration alleged.*

The plaintiff joined issue on this plea.

Now it is to be observed, that this issue does not dispute the allegation in the plea that the taking therein admitted and justified is the taking and conversion complained of in the declaration. If the plaintiff intended to dispute that averment, the only way in which he could have done so was by new assigning specially what other act or acts he relied upon as the trespass and conversion complained of. So, neither by joining issue did the plaintiff dispute the fact that the defendant acted in virtue of the authority under which he justified. The only issue, in fact, raised by the joinder in issue to the plea, was whether or not the plaintiff was and had been illegally and wrongfully using the boat and nets for the purpose of drifting for salmon in the waters of the Dominion of *Canada*; whether, under such circumstances, *The Fisheries Act* did, or not, authorize the taking of the boat and nets which was admitted by the plea, was a question of law.

The defendant further pleaded:

That the said fishing boat and fishing nets, in the said declaration mentioned, being materials, implements and appliances that had been and were being illegally used, and in contravention of *The Fisheries Act*, for the purpose of drifting for salmon, the said defendant, being a fishery officer duly appointed under the said Act, *did take and remove the said fishing boat and fishing nets to be delivered to a magistrate, pursuant to the provisions of the said Act*, and the said defendant did afterwards deliver the same to *James S. Morse*, Esq., a justice of the peace in and for the County of *Restigouche*, being the county in which the said materials, implements and appliances had been and were being used, *which is the taking, seizing, carrying away, and conversion in the said declaration alleged.*

Upon this plea also the plaintiff joined issue. Now, joinder in issue upon this plea raised no question as to

any of the matters admitted in the plea as coming within the averment of "*quae sunt eadem.*" If the plaintiff intended to raise any issue as to any of these matters, as, for example, that the taking and conversion complained of was not that admitted in the plea; that it was not a taking for the purpose of being delivered to a magistrate under the provisions of the Act; that, as matter of fact, the things taken were not delivered to a magistrate of the County of *Restigouche*, as alleged; or that the illegal uses alleged in the plea was not at all within the County of *Restigouche*, if that was material; or that the defendant, instead of dealing with the things taken as authorised by the Act, had converted and disposed thereof to his own use; the only way in which he could have raised an issue as to any of those matters admitted in the plea, and averred to be the taking and conversion complained of, would be by new assignment. The only issue in fact raised by joinder in issue to this plea was, whether or not the boat and nets had been and were being illegally used in contravention of *The Fisheries Act* for the purpose of drifting for salmon. Whether or not the Act authorised the taking and disposition of them, *admitted* in the plea, was a question of law.

The defendant further pleaded:

That the said plaintiff having used and was using the said fishing boat and fishing nets as materials, implements and appliances for drifting for salmon in certain waters within the County of *Restigouche*, or in the waters forming the boundary between the County of *Bonaventure*, in the Province of *Quebec*, and the said County of *Restigouche*, illegally, and in contravention of *The Fisheries Act*, the said defendant took and removed the same for delivery to a magistrate, in pursuance of the provisions of the said Act, and did deliver the same to one *James S. Morse*, Esq., then being a justice of the peace or magistrate of the said County of *Restigouche*, and such proceedings under the said Act were thereupon had that the said magistrate, upon hearing the matter and the evidence, and what was alleged in his defence on behalf of the said plaintiff, adjudged the said plaintiff to be guilty

1880
MOWAT
v.
McFEE.
Gwynne, J.

of an infraction of the said *Fisheries Act*, and that the said fishing boat and fishing nets had been materials, implements and appliances used for drifting for salmon in the said waters and in contravention of the said *Fisheries Act*, and did adjudge the same to be confiscated to Her Majesty in pursuance of the provisions of the said Act, *and which taking and removal and delivery to the said magistrate and the confiscation thereof is the taking, seizing, carrying away and conversion in the said declaration alleged.*

The observations addressed to the joinder in issue upon the other pleas apply, but with additional force, to this plea, when we observe the peculiar frame of the plea and its difference from the others. It alleges, as did the other pleas, the illegal drifting for salmon in contravention of the *Fisheries Act*, and it admits the taking and delivery to a magistrate under the provisions of the Act, as in the last preceding plea, but proceeds to allege new matter consequential upon these acts, namely, that the plaintiff was convicted before the magistrate of the above offence, and that the boat and fishing nets of the plaintiff, for the alleged wrongful taking and conversion of which this action was brought, were adjudicated to be, and became, confiscated to Her Majesty, in pursuance of the provisions of *The Fisheries Act*. The short substance of the plea is that it confesses the taking the property as property by law liable to forfeiture to Her Majesty for the illegal act of drifting for salmon, but avoids all liability of the defendant to the plaintiff for such taking, for that the plaintiff, by due process of law, was found guilty of the illegal act, and that the property was in due form of law adjudicated to be, and became, for such illegal act confiscated to Her Majesty: and the gist of the plea is, that under such circumstances no action lies at suit of the plaintiff. By merely joining issue upon this plea, the plaintiff has placed himself in this position: that he must be concluded by such conviction and adjudication upon its being pro-

duced. Not having by replication pleaded anything in avoidance of the conviction and adjudication—as that it had been quashed—he could not, even if it had been quashed, have availed himself of that answer, upon joinder in issue to the plea.

Besides joining in issue on the pleas, the plaintiff, also by leave of the Court, demurred thereto, but the issues in fact went down to trial before argument of the issues in law. At the trial the sole question upon the issues joined was as to the legality of the drifting for salmon at the place where it took place, for the fact was not denied, but was admitted to have taken place in the Bay of *Chaleurs* opposite to the River *Charlo*, but, as was contended by plaintiff, at a greater distance than three miles from either shore of *New Brunswick*, or of *Quebec*—the whole defence being, that in such case, as was contended by the plaintiff, *The Fisheries Act* had no operation; the contention being, that if more than three miles from either shore the drifting took place in the open sea, and not within the Dominion of *Canada*, or the jurisdiction of the Dominion Parliament. Attention does not appear to have been drawn at the trial to the issue upon the third special plea, which set up the conviction of the plaintiff for having committed the offence charged *at or near the River Charlo, in the Parish of Colborne, in the County of Restigouche, in the Bay of Chaleurs* in contravention of *The Fisheries Act*, and whereby the plaintiff was adjudged to forfeit the net, fixings and apparatus thereto connected, and also the boat as forfeited under *The Fisheries Act*, to be applied according to law—which conviction, not having been quashed or impeached, remained in full force and conclusive upon the plaintiff as to the facts thereby adjudicated.

The parties seem to have been willing to stand upon

1880
MOWAT
v.
McFEE.
Gwynne, J.

the ground which was the real substantial matter in contest, namely: whether, assuming the drifting to have taken place more than three miles from either shore, if the jury should find that to be the fact, such drifting would come within the operation and prohibition of *The Fisheries Act?*

Much evidence was entered into to establish at what distance from shore the drifting did take place, and at the close of the evidence it was agreed between the parties that the following questions should be submitted to the jury, namely:

1st. Was the fishing by the plaintiff within three miles of any shore of the Dominion of *Canada?*

2nd. What do the jury assess the damages at?

and that a verdict should be entered for the plaintiff upon all the issues, with liberty to the defendant to move the Court to alter the verdict and to enter a verdict for the defendant upon all or any of the issues, and to enter the verdict or judgment for either party, as well upon the finding at the trial and the results of the demurrer, or both, or either, as the Court may think proper.

The jury found that the fishing by the plaintiff was not within three miles of any shore of the Dominion of *Canada*, and they rendered a verdict for the plaintiff with $900 damages.

Upon a rule being obtained in the ensuing term to set aside this verdict and to enter a verdict for the defendant in accordance with the agreement in that behalf entered into at the trial, and the demurrers being argued at the same time, the Court held the second and third of the above special pleas to be bad in law, and that the first was good in law but was not proved in fact, and they discharged the rule for setting aside the verdict, holding that,

Without considering whether the provisions of the Act apply to

persons who may be fishing more than three miles from the shore, the defendant had no power of seizure and detention, unless the offence was committed in his view, which it clearly was not in the present case; and they held that therefore the defendant had entirely failed to prove his justification, and that there is no ground for disturbing the verdict.

These observations apply plainly only to the first of the above special pleas, which the Court held to be sufficient in law, for, as to the others, which they pronounced to be insufficient, they wholly disregarded the issues in fact raised thereon.

From this judgment, both upon the rule *nisi* and upon the demurrers to the above second and third special pleas, the defendant appeals; the plaintiff raises no cross appeal.

That there has been a miscarriage of justice by this judgment will be apparent when we consider its effect to be, that it wholly sets at nought the material point which the parties went down to try, and the issues in fact raised upon the record, namely, whether drifting for salmon in the Bay of *Chaleurs*, at the place in question, opposite the mouth of the River *Charlo*, was an illegal act within the prohibition and operation of *The Fisheries Act*, and damages, which were assessed by the jury at $900, upon the assumption that the act of drifting complained of was not illegal, and that therefore the seizure was wholly unjustified, are sustained by the court, wholly regardless of the fact whether the act was illegal or not, and in the face of a conviction for its illegality not complained of as bad on its face, whereby the plaintiff has been convicted of the offence charged, and the property, for the taking of which this action has been brought, has been adjudicated to be confiscated to Her Majesty by a conviction and adjudication of confiscation which has not been reversed or quashed.

The fourth plea on the record, that is, the third of the

1880
MOWAT
v.
McFEE.
Gwynne, J.

above special pleas, is unobjectionable in point of law, and shows, if true, a clear defence to the action by way of confession and avoidance. *Robert, qui tam* v. *Witherhead* (1), and *Wilkins* v. *Despard* (2), were cited as authorities for the contention, that inasmuch as the Act declares all materials, implements and appliances used in contravention of the Act, or of any regulation under it, shall be confiscated to Her Majesty, and may be seized and confiscated on view by any fishery officer, or taken and removed by any person for delivery to any magistrate, the plaintiff could not maintain trespass against the defendant, although no conviction of the plaintiff for the offence charged, or condemnation of the property, had ensued upon the seizure ; but where, as is pleaded in this plea, the conviction and condemnation did, in due process of law, ensue upon the seizure, there can be no doubt that these judicial proceedings enure to protect the person justifying the taking for the purpose stated, and to defeat the plaintiff's action, the facts alleged in the plea being then admitted by the demurrer, judgment should be for the defendant upon the sufficiency of the plea in law. The case of *Jones* v. *Owen* (3), relied upon by the Court below, was a very different case. There, to an action of trespass, the defendant pleaded, confessing the alleged trespass, but justifying it as authorized by an Act of Parliament, but alleging the act of trespass admitted to have been committed for a purpose which was not warranted by the Act, and it was held bad upon demurrer, the Court, however, holding that the plea well alleged two offences committed against the Act, for either of which the defendant might have convicted the plaintiff on his own view as a magistrate, or might, as a private individual, have apprehended the plaintiff for the purpose of being dealt

(1) 12 Mod. 92. (2) 5 T. R. 112.
(3) 2 D. & Ry. 600.

with according to law, but that instead of doing either of those things, which the Act authorized, his plea attempted to justify the trespass as done under the Act, although alleged to have been done for a purpose not warranted by the Act.

Now, as to the issue in fact joined upon this plea: there being no new assignment disputing any of the matters averred under the *quae sunt eadem*, nor any replication avoiding the conviction and condemnation pleaded, all that remained to be proved was the allegation of the committal of the offence of illegal drifting for salmon in contravention of *The Fisheries Act*, and the plea was proved by the record of the conviction and condemnation of the property which was produced. Independently, however, of the conviction still remaining in force and unreversed, it is clear that the act of drifting for salmon, which was proved, and indeed throughout admitted, although that drifting may have been more than three miles from either shore of *New Brunswick* or of *Quebec* abutting on the Bay of *Chaleurs*, was a drifting in Canadian waters, and was within the prohibition of *The Fisheries Act*, and of the regulations made in virtue thereof, produced in evidence; for the Imperial Statute, 14 and 15 *Vic.*, c. 63, makes the boundary line between old *Canada* and *New Brunswick* proceed from the mouth of the *Mistouche* River, at its confluence with the *Restigouche*, down the centre of the stream of the *Restigouche* to its mouth in the Bay of *Chaleurs*, and thence through the middle of that Bay to the Gulf of *St. Lawrence*; so that the whole of the Bay is within the present boundaries of the Provinces of *Quebec* and *New Brunswick*, and within the Dominion of *Canada*, and the operation of *The Fisheries Act*.

The second special plea also appears to me to be sufficient in law, even if it be necessary to make it good (which I do not feel called upon here to decide), that it

1880
MOWAT
v.
McFEE.
Gwynne, J.

should be averred that the things seized were, at the time of the seizure, in the actual illegal use which exposed them to seizure; for that averment is substantially involved in the allegation, which is, not only that they had been, but *were being* used illegally, in contravention of *The Fisheries Act*, for the purpose of drifting for salmon; and the plea avers that the property was taken for the purpose of being delivered to a magistrate, and was delivered to *Jas. S. Morse*, a magistrate of the County of *Restigouche*, in which county, as the plea alleged, the property had been and *was being* so illegally used, and the plea shows a delivery of the property seized to a magistrate having jurisdiction over the offence charged, and the plea avers that this taking and disposition of the property is the taking and conversion alleged in the declaration; the demurrer admitting all this, the plea, in my opinion, is a sufficient answer to the declaration, and as to the issue in fact joined upon this plea, there being, as before observed, no new assignment, the only question was as to the fact of the committal of the offence alleged as the justification of the taking. Upon the issues in fact, therefore, joined upon both of these pleas, the verdict should have been for the defendant.

We are not called upon to pronounce upon the sufficiency or insufficiency in law of the first of the above special pleas. It has been pronounced by the court below to be sufficient in law, and the plaintiff has not appealed or given notice of a cross appeal from this judgment, so that this is the appeal of the defendant only. At any rate, as it only involves a question of costs we are not bound to interefere, even though it might be open to us to pronounce judgment upon this demurrer. And as to the issue in fact joined upon the plea, there being no new assignment, the joinder in issue

raised only a question as to the fact of the committal of the offence which was pleaded as the justification of the taking admitted, and that fact was clearly established as already shown.

I confess, however, that even if the fact of the offence having been committed *on view* of the defendant had been a matter in issue under the joinder in issue to the plea, the evidence given upon that subject was, in my opinion, sufficient, otherwise a most beneficial Act will be stripped of much of its efficiency. I do not think that the term "on view" in the Act is to be limited to seeing the net in the water while in the very act of drifting; it appears to me if the party acting "*on view*" himself sees what if testified to by him would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. Now the defendant's evidence is that, having been informed by the plaintiff that he intended to drift for salmon three miles out in the Bay of *Chaleurs*, and having heard that he was doing so, and having informed the plaintiff if he should do so he would seize his net and appliances, he came down to look after the plaintiff. The defendant says:

I went twice to *Charlo* before I got the boat and nets; the time I went the boat did not go out. On the night of the 5th July, 1876, I landed below the station, found the boat had gone out, and I went down the *Charlo* River, got a boat and two men and rowed out from *Charlo* up along the coast,—could not find the boat; in the morning about day-break I saw the boat coming ashore at *Charlo* Station. I waited until the boat came ashore, and then I seized the boat and nets. The net was piled upon the boat, wet; they had one fish. I took the nets and boat, the net was between three and four hundred fathoms, and about twenty feet deep, meshes 6 or 6¼ inches—it was a drifting salmon net.

The men also informed him that they had been drifting for salmon. The fish, it is true, was a shad—not a salmon; but the net was wet, and it was sufficiently apparent that the fish was caught with the net. The defendant had therefore ocular demonstration that the

1880
MOWAT
v.
McFEE.
Gwynne, J.

net, which was a drifting salmon net, had been just recently used in that bay, and that the boat with the net had but reached the shore on return from such use when he seized; this evidence appears to me to have been quite sufficient to come within the provisions of the 4th sub-sec. of the 16th sec. of *The Fisheries Act* to justify the defendant to seize the materials, implements and appliances so used.

Our judgment, upon the whole, will be to allow the appeal with costs, and to order that judgment upon the demurrers to the second and third of the above special pleas, being the third and fourth pleas upon the record, be entered for the defendant, and that the rule *nisi* in the Court below be made absolute to enter a verdict for the defendant upon all the issues in fact joined, with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Harrison & Burbridge.*

Solicitor for respondent: *C. A. Palmer.*

1880
*May 31.
*June 21.

THE MUTUAL FIRE INSURANCE COMPANY OF THE COUNTY OF WELLINGTON..... } APPELLANTS;

AND

JACOB FREY.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Mutual Insurance Co.—Uniform Conditions Act, R. S. O., ch. 162, not applicable to Mutual Insurance Companies —Action premature.

Appellants, a mutual insurance company, issued in favor of *J. F.*, a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 *Vic.*, c. 44, sec. 52, O., now R. S. O., c. 161, sec. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning *J. F.* advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to *J. F's.* attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, *J. F.* furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, *J. F.* brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd of July, 1877, and that less than three months elapsed before the commencement of this suit.

Held,—On appeal, 1st. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O., c. 162.

2nd. That the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought.

Ballagh v. *The Royal Mutual Fire Insurance Company* (1) approved

APPEAL from a judgment of the Court of Appeal for *Ontario* (2) affirming a judgment of the Court of Queen's Bench (3).

The action was commenced on the 23rd August, 1877,

(1) 5 Ont. App. R. 87. (2) 4 Ont. App. R. 293.
(3) 43 U. C. Q. B. 102.

1880

THE MUTUAL FIRE INS. CO. v. FREY.

and was brought upon a fire insurance policy issued by appellants. The policy is dated the eleventh day of October one thousand eight hundred and seventy-six. By it the company promise "according to the provisions of said Act, to settle and pay unto the said assured, his heirs, executors, administrators or assigns, all losses or damage, not exceeding in the whole the said sum of two thousand dollars, which shall or may happen to the aforesaid property by reason or by means of fire during the time this policy shall remain in force; the said losses or damage to be estimated according to the true actual value of the property at the time the same shall happen, and to be paid within three months after due notice is given by the insured, according to the provisions of the said Act." The fire occurred the 21st of May, 1877. The respondent stated his loss at thirteen hundred dollars. The subject of insurance was a general stock of goods in a country store.

The declaration alleged a loss by fire on 21st May, 1877, and set up, that the policy having been issued after 1st July, 1876, and not having thereon endorsed the statutory conditions provided by *Ont.* Stat. 39 *Vic.*, c. 24 (R. S. O., c. 162), was a policy without conditions as against the respondent. The appellants pleaded nine pleas, the purport of them being as follows:

1st. Denial of policy; 2nd. Denial of loss; 3rd. Denial of proof of loss; 4th. Denial of particular account of loss; 5th. That policy was made and issued subject to a condition that loss not payable till three months after proof of loss; that proofs of loss were furnished 3rd July, 1877, and that 3 months did not elapse before action brought; 6th. Alleged that the appellants were a mutual insurance company, incorporated under the laws of the province relating to such companies, and set out conditions endorsed on policy, and among others the condition as

to three months for payment after proof of loss; and concludes by averring that the three months had not elapsed; 7th. Non-payment of assessment due on premium note; 8th. Arson; 9th. That more than five gallons of coal oil were kept on premises, contrary to a condition printed on policy, pursuant to the statute in that behalf.

The case was tried before Mr. Justice *Morrison* and a jury on 26th September, 1877, when a verdict was rendered for the respondent on the first six and the eighth issues, and for the appellants on the seventh and ninth issues. Damages were assessed at $700.

At the trial it was proved that on the next morning after the fire, the respondent advised the appellants by telegraph of the fire, and their secretary visited the scene of the fire the same afternoon, when he was informed of the particulars. On the 29th June the secretary wrote to the respondent's attorney, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, the respondent sent in his claim papers or proofs of loss, and on the 13th July, 1877, the secretary wrote, stating, that after an examination of the papers at the board meeting, it was resolved that the claim should not be paid.

In Michaelmas Term, 1877, cross rules were obtained, and on the 15th March, 1878, the Court of Queen's Bench gave judgment affirming the respondent's verdict on the seven issues found for him, and entering a verdict for respondent on the two issues found against him.

From this judgment the appellants appealed to the Court of Appeal of *Ontario*, and on the 27th May, 1879, judgment was given dismissing the appeal, and affirming the judgment of the Queen's Bench.

From this latter judgment the present appeal was brought.

1880

THE MUTUAL FIRE INS. CO. v. FREY.

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

In the case of *Ballagh* v. *The Royal Mutual Fire Insurance Company* (1), it was held that the statutory conditions set forth in the schedule to the Fire Insurance Policy Act, 1876, Rev. Stats. *Ont.*, c. 162, are not applicable to policies issued by mutual insurance companies. If this decision is not overruled, under the terms of the policy, and by statute, c. 161. Rev. St. *Ont.*, the appellants are entitled to succeed under the fifth and sixth pleas.

The plaintiff furnished proofs on 3rd July, 1877, as being proofs called for by his policy. The loss was not payable until three months thereafter. The policy on its face promises payment only according to provisions of the Act.

The policy also provides that the loss or damage should be "estimated according to the true actual value of the property at the time the same shall happen, and to be paid within three months after due notice is given by the insured according to the provisions of the said act."

The action having been brought in August, and the proof papers having been furnished in July, I contend that the action is prematurely brought under the agreement contained in the body of the policy.

Mr. *McCarthy*, Q. C., and Mr. *Clement* for respondent:

The case is narrowed down to the question whether the action has been prematurely brought, and also as to the question of coal oil. Although the conditions are endorsed on the contract, there is no reference made to them in the body of the policy.

Then, what is our contract with regard to time? It is to settle and pay, not after proof but after due

(1) 5 Ont. App. R. 87.

notice is given, unless the words "according to the provisions of the Act" qualify the promise. Now, notice was given three months prior to the bringing of the action, then come the words in the 56th sec.: "And the proofs shall, &c., and such amount shall be payable in three months after receipt by the company of such proofs." This refers to the proofs required by the policy; now, if the conditions are not on the policy, then there are none. This section cannot help the appellants, because that section directs the directors to ascertain and determine the amount of loss, and then goes on to say that the amount shall be payable in three months, &c. The directors having refused to ascertain and determine an amount, that section does not apply. Supposing the insured were dissatisfied with the determination of the directors, there is nothing in that section to say that such insured shall delay action for three months.

Surely this section does not mean that in all cases they shall have three months. The next section shows clearly that the object is to give time to determine what the loss shall be, and not the time to make an assessment. Then, also, by this Act a condition unjust can be declared null.

I further contend that the appellants have waived their claim (if any) to the three months delay, by expressly refusing to pay the claims on the 13th July, 1871.

Then I go further, and say the Uniform Conditions Act c. 162 does apply. This court is not bound by the decision in *Ballagh* v. *The Royal Ins. Co.*

"The Fire Insurance Policy Act, 1876," was passed after the 36 *Vic.*, c. 44, s. 52, and being inconsistent therewith, the latter section is superseded. See remarks of *Harrison*, C. J., at p. 120, of 43 U. C. Q. B.

The conditions in the body of the policy and those

1880
THE MUTUAL FIRE INS. CO. v. FREY.

pleaded in the 5th and 6th pleas, as to three months delay, differ from and are variations of the statutory conditions, and being so, are not binding on respondent, not being indicated and set forth in the manner prescribed by "The Fire Insurance Policy Act, 1876."

There is no difficulty in reading sections 53 and 55 together, leaving out section 52. Was not the object of the whole act to give three months to pay after notice and to collect three months after judgment? The amount which is postponed for payment is the amount to be determined, but not the amount of the loss.

Having refused to arbitrate or to ascertain the amount, we submit we had a right of action for refusal to ascertain.

The only object of sec. 56 is to fix some way of ascertaining the amount. The learned counsel relied upon the judgment of the Court appealed from delivered by *Moss*, C. J. (1), and the judgment of *Harrison*, C. J., in this case (2); and on the judgments of *Harrison*, C. J., and *Wilson*, J., in *Ulrich* v. *National Ins. Co.* (3). See also *Parsons* v. *Citizens' Ins. Co.* (4); *Parsons* v. *Queen Ins. Co.* (5).

RITCHIE, C. J.:

The only point we have now to determine is whether the Act to secure uniform policies applies to mutual insurance companies. I have carefully read the decision of the Court of Appeal in the case of *Ballagh* v. *The Royal Mutual Fire Ins. Co.* (6) decided in March last, and which has been just reported, in which case that court held that policies issued by mutual insurance companies were not governed by the Act to secure uniform policies, and

(1) 4 Ont. App. R. 293.
(2) 43 U. C. Q. B. 111.
(3) 42 U. C. Q. B. 141.
(4) 4 Ont. App. R. 96.
(5) 4 Ont. App. R. 103.
(6) 5 Ont. App. R. 87.

after consideration of the reason there given, I am not prepared to dissent. I agree that the appeal should be allowed, and the rule made absolute.

FOURNIER, J. concurred.

HENRY, J.:

I concur in that judgment. I am certainly convinced that the Legislature did not intend to include mutual insurance companies.

TASCHEREAU, J. concurred.

GWYNNE, J:

For the reasons given at large in my judgment in *The Citizens Insurance Company* v. *Parsons*, I am of opinion that this appeal should be allowed.. I am of opinion, for the reasons already given in the case above referred to, that the *Fire Insurance Act of* 1876, *Ontario*, was *ultra vires* of the Provincial Legislature. I entirely agree, however, with the judgment of the Court of Appeal of *Ontario* in *Ballagh* v. *The Royal Mutual Insurance Company* to the effect that (assuming the Local Legislature to have had jurisdiction to pass that Act) it is difficult to conceive it possible that the Legislature intended by the language used in the Act to repeal or annul the plain provisions respecting mutual insurance companies, so precisely enacted in the *Mutual Fire Insurance Companies Acts*, and that therefore the Courts should not construe the Act of 1876 as repealing or annulling any of such provisions. But I confess that, to my mind, it is easier to construe the Act of 1876 as intended to apply to mutual insurance companies conducting the business of fire insurance purely upon the mutual principle of indemnifying each other by contributions among themselves, over which companies the Local Legislatures might assert jurisdic-

1880

THE MUTUAL FIRE INS. CO. v. FREY.

Gwynne, J.

tion equally as to proprietory or stock insurance companies insuring for cash premiums paid to them, as a matter of business and for profit, over which species of insurance being a branch of trade, they had, in my opinion, no jurisdiction whatever, than it is to give to the language of the Act of 1876 the effect of wholly perverting the operation of a contract to the terms of which the respective parties thereto had mutually agreed, so as to enable one of the parties thereto, who had violated all the terms of the contract, to recover against the other who had violated none of them, and although it was the express agreement of the party violating the terms that in such case he should have no claim whatever against the other, but that such other should in that case be released from all liability. But *quot homines tot sententiæ.*

Upon the settlement of the minutes of the order in appeal the question arose as to whether the court had held the action prematurely brought, and the court intimated that they were of opinion that the appellants under the policy were entitled to three months from the date of the furnishing of the claim papers before being subject to an action, and that therefore the action had been prematurely brought.

Appeal allowed with costs.

Solicitors for appellants: *Guthrie, Watt & Cutten.*

Solicitors for respondent: *Bowlby, Colquhoun & Clement.*

CONTROVERTED ELECTION OF THE COUNTY OF BELLECHASSE.

1880 *Nov. 4, 5.
1881 *Feb'y. 11.

ACHILLE LARUE.....APPELLANT:

AND

ALEXIS DESLAURIERS.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, DISTRICT OF MONTMAGNY, P.Q.

Election Petition—Supreme Court Act, Sec. 44—Right to send back record for further adjudication—Bribery—Appeals from findings upon matters of fact—Insufficiency of return of election expenses—Personal expenses of candidate to be included.

The original petition came before Mr. Justice *McCord* for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned Judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed."

This judgment was appealed from, and the now respondent, under sec. 48 of the *Supreme Court Act*, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice *McCord* had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the said cause proceeded with according to law.

The record was accordingly sent to the prothonotary of the Superior Court at *Montmagny*. Mr. Justice *McCord*, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice *McCord* had no jurisdiction to proceed with the case.

---

*PRESENT: Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

1880

LARUE v. DES-LAURIERS.

Held,—That the Supreme Court on the first appeal, could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court *a quo* to be proceeded with according to law, gave jurisdiction to Mr. Justice *McCord* to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48, *Supreme Court Act*. (*Fournier* and *Henry*, J.J., dissenting).

The charge upon which this appeal was principally decided was that of the respondent's bribery of one *David Asselin*. The learned Judge who tried the case found, as a matter of fact, that appellant had underhandedly slipped into *Asselin's* pocket the $5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the *Election Act*, and this payment was bribery. The evidence bearing on this charge is reviewed in the judgments below.

Held,—That an Appellate Court in election cases ought not to reverse on mere matters of fact the findings of the Judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below that appellant had been guilty of personal bribery.

2. Per *Taschereau*, J.,—That the personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the Returning Officer under 37 *Vic.*, c. 9, sec. 123. [*Fournier* and *Henry*, J. J., expressed no opinion on the merits.]

[The judgment of *McCord*, J., (1) on the other charges was also affirmed.]

APPEAL from the judgment of Mr. Justice *McCord*, of the Superior Court for *Lower Canada*, by which the election of the appellant, as the member representing the County of *Bellechasse* in the House of Commons of the Dominion of *Canada*, was declared void, and the appellant personally found guilty of bribery.

At the general elections of September, 1878, the appellant was returned for the electoral district of

(1) 6 Q. L. R. 100.

Bellechasse, and his election was contested by the respondent.

Mr. Justice *McCord*, before whom the matter of the petition against the return of the appellant was tried, having heard the parties and their witnesses, as well on the merits of the case as on an objection taken to the jurisdiction of the court, on the ground that the *Dominion Controverted Elections Act* of 1874 was unconstitutional, finally, on the 22nd April, 1879, without adjudicating on the merits of the case, decided that he had no jurisdiction, and on that ground alone dismissed the petition of the respondent. The respondent appealed from Mr. Justice *McCord's* judgment to the Supreme Court. Upon that appeal, Mr. Justice *McCord's* judgment was, on the 3rd March, 1880, reversed, the Supreme Court holding that the Act was constitutional, and that Mr. Justice *McCord* had jurisdiction to hear and determine the case, and it was ordered that the record should be transmitted to the officer by whom it had been sent to the Supreme Court, to have the said cause proceeded with according to law. Upon the record being sent back as ordered to the Prothonotary of the Superior Court for the District of *Montmagny*, Mr. Justice *McCord* took up the case, and, on the 10th May, 1880, pronounced the following judgment:

"Having heard the parties and their witnesses, examined into the evidence and documents filed and duly deliberated;

"Considering that it is proven that an agent of the respondent committed corrupt practices at the said election, by treating voters on the day of polling, on account of such voters having voted; that another agent of the respondent also committed corrupt practices in the same manner, and that another agent of the respondent committed corrupt practices at the said election

1880
LARUE
v.
DES-
LAURIERS.

by paying for the conveyance of a voter to and from the poll on the day of polling;

"Considering that it is proved that the respondent himself committed corrupt practices at the said election: 1st. By giving money to a voter in order to induce him to endeavor to procure the return of the respondent; 2nd. By threatening another voter with the loss of his place, and also promising to endeavor to procure for the said voter an employment in order to induce him to refrain from voting at the said election; 3rd. By threatening a voter with a prosecution for damages in order to induce him to refrain from voting at the said election; and, 4th. By threatening another voter with the loss of his employment, in order to induce him to refrain from voting at the said election;

"I hereby declare and adjudge, that the said respondent *Achille Larue* was not duly elected and returned at the said election; and that the said election is void. And I further adjudge and order that the respondent do pay to the petitioner his costs in this cause.

By the Court,

A. Bender, P. S. C. M."

It is from that judgment that the present appeal was taken, and the grounds of appeal were:

1st. That Mr. Justice *McCord* had no right or jurisdiction to take up the case as he did, and give the judgment complained of; 2nd. That supposing he could have taken cognizance of the case, he could not pronounce a judgment upon the merits of the case; 3rd. That the judgment complained of is not supported by the evidence in the case.

Mr. *Langelier*, Q.C., appeared for the appellant, and Mr. *Amyot* for the respondent.

The charges upon which this appeal was decided, and the arguments and authorities relied on by counsel, are reviewed in the judgments.

RITCHIE, C. J.:

(After reading the above statement of the case, proceeded as follows);

I think there is nothing whatever in the two first objections. It has been very strongly urged that the petition having been heard on the merits and dismissed in the court below, it must be assumed to have been dismissed on the merits, and the appellant having expressly confined his appeal in his notice of appeal to the question of jurisdiction, this judgment on the merits was not appealed from. In his factum the appellant thus puts his contention:

2nd. Mr. Justice *McCord*, supposing he could take cognizance of the case as he did, could not pronounce any judgment on the merits of the case.

It will be remembered that the trial of the case had taken place, that after the adduction of their evidence by both parties the case had been argued on the merits and reserved by Mr. Justice *McCord*; that nearly three months afterwards he gave his judgment of the 22nd April, 1879. By that judgment he does not merely say that he declines to act in the matter, but that he dismisses the petition altogether: *the petition of the Petitioner is rejected and dismissed.*

Now the petition could only be rejected and dismissed by him as it had been submitted. viz: on its merits. We, therefore, say that the petition stood dismissed by a judgment not appealed from, nor impugned in any other way, when Mr. Justice *McCord* again took it up and rendered the judgment complained of.

It is true that Mr. Justice *McCord* says, in the said judgment, that he dismisses the petition only on the ground that he has no jurisdiction. But we contend that we have nothing to do with the reasons of the judgment, and that we must consider the judgment itself which dismissed the petition when it had been fully submitted on its merits.

I fail to see the least force in this objection.

The Judge below refused to adjudicate on the petition or on the merits of the case, because he held he had no jurisdiction. As to the now respondent's limiting or confining his appeal, there was nothing to limit or confine, there was no decision on separate distinct

1881
LARUE
v.
DES-
LAURIERS.
Ritchie, C.J.

propositions of law and fact, there was only one decision on one proposition of law—all he could appeal against was that decision, and all he could do was to ask the court to reverse that determination and hold, in opposition to the Judge, that he had jurisdiction, and therefore should have adjudicated on the matter of the petition on the merits; and this is simply what the appellant did do, and all this court did was to say that his contention was right and that the Judge was not without jurisdiction; that he should not have rejected or dismissed or refused to determine the case on the merits, but, instead thereof, should have proceeded to a final adjudication of the matters in controversy on the merits. Suppose we sustained the now appellant's contention, refused to review this case on the merits, and adjudged that Judge *McCord* had no right to go on with the investigation or to adjudicate on the merits of the petition, it could only be on the ground contended for, that the petition had been already dismissed, by the decision of the Judge below, on the merits, when in fact it had not been, and that that decision had not been appealed from, when there was no such decision to appeal from. The petition does not, at this moment, in fact or in law, stand on the records of any court dismissed on any ground whatever; the only judgment of dismissal, if judgment of dismissal it was, that has ever been given, has been reversed. This court has said the Judge was wrong in the conclusion at which he arrived in the only decision or judgment he ever did give, and so this court reversed that decision. If we now say further proceedings in the case, after the reversal of his judgment, cannot be had, to dispose of the real matters in controversy which never yet have been adjudicated on, what is to become of the petition? This court could not certify that it had been dismissed, if the judgment below was really a judgment of dis-

missal, because this court reversed that judgment; for the same reason the Judge below could not certify that the petition had been dismissed by him, because his judgment of dismissal ceased to be a judgment after reversal by this court. But in no case, and under no circumstances, could he truthfully certify that the petition had been dismissed on the merits, because the merits never were adjudicated on by him, or by any other court.

The only true certificate that could be given would be that the Judge of first instance had not adjudicated on the petition on the merits, but had refused to do so for alleged want of jurisdiction; that this court had adjudged that he had jurisdiction and should have decided the case on the merits and transmitted the record to the court below to be proceeded with according to law. This is not the certificate contemplated by the Act, and could not and would not, I should conceive, be accepted by the House of Commons as a final determination of the matter. The Judge having stayed his hand on the ground that he had no jurisdiction to proceed, and having been set right in this, and his judgment thereon having been absolutely reversed, why should not the petition stand as if no such erroneous decisions had been given? When the Judge discovers his error, why should the case not be heard, determined and disposed of on its merits according to law? When the Judge thought he had no jurisdiction he stopped the investigation and adjudication; when he finds he has jurisdiction, why should he not go on and do his duty? This court, having given the judgment the court below should have given, necessarily leaves the case just in the position it would have been had the Judge delivered that judgment in the first instance, and must necessarily be proceeded with after the judgment given

1881
LARUE
v.
DES-
LAURIERS.
Ritchie, C.J.

by this court as it should and would have been had the Judge delivered it himself.

I must say I can see nothing in reason or law to prevent this being done; on the contrary, I think it would be a scandal on the law if he could not and if he did not do so.

Suppose the Judge, at the outset of the hearing, had thought that he had no jurisdiction, or, after having heard part of the evidence in the case, it had occurred to him that he was without jurisdiction, and so he decided not to proceed further in the case, (and that is, in fact, just the present case,) and the party aggrieved comes to this court to get the Judge set right and his jurisdiction affirmed, and it is affirmed, is this court to assume the functions and duties of the Judge and try the case on the merits from the start, or take it up where the Judge left off? This is or must be the respondent's contention, in fact.

In answer to this: section 48 of the Supreme and Exchequer Court Act has been invoked as sustaining the contention that the appellant should have appealed as against a dismissal of the petition on the merits, and that then this court could have heard evidence and adjudicated on the case on the merits under the words of the section, "and in case it appears to the court that any evidence duly tendered at the trial was improperly rejected, the court may cause the witness to be examined before the court or a Judge thereof or upon commission."

I think this has no application at all to the present case. I think this court has no original jurisdiction in election cases, that there can be no appeal to this court except from an adjudication of the Judge who tried the petition on a question of law or fact. The words are: "Any party to an election petition in said Act (Controverted Election Act) *who may be dissatisfied*

with the decision of the Judge who has tried the petition on any question of law or fact, and desires to appeal against the same, may," &c. The latter part of section 48 referred to simply provides that where evidence has been duly tendered, and rejected by the Judge, in a case which he has heard and finally determined, and this court should hold that the evidence was legally admissible and should not have been rejected, and so overrule the decision of the Judge the evidence so rejected may be supplied, on appeal, in the manner pointed out; but surely by no construction can this be held to give this court original jurisdiction to hear and determine a case never determined in the court below, and to examine witnesses never duly tendered at the trial, nor improperly rejected, for the reason that the Judge, though he heard evidence, ultimately refused to try and decide the case on the merits for alleged want of jurisdiction. This court is not a court of first instance, and to give it jurisdiction there must be a decision on a question of law or fact against the decision of which dissatisfied parties desire to appeal.

It was also strongly urged that after the judgment of this court "Judge *McCord* had no right to take up the case as he did." The appellant thus puts his contention on this point in his factum:—

Now the appellant contends that Mr. Justice *McCord* had no right to do so. By his first judgment of the 22nd April, 1879, he had entirely disposed of the case before him; he was by that judgment *functus officio*, and dispossessed of the case. Unless he was then again put in possession of the same by the judgment of this court, he could no more take cognizance of the case unless he was entrusted with it in the usual course of procedure fixed by law.

And he says:—

Nobody will, for one moment, pretend that the judgment of this court did authorize Mr. Justice *McCord* or any other Judge or court to take up the case. That judgment, after having reversed Mr. Justice *McCord's* decision on the ground of jurisdiction, merely

1881
LARUE
v.
DES-
LAURIERS.
Ritchie, C.J.

ordered the transmission of the record to the Prothonotary of *Montmagny to have the said cause proceeded with according to law.*

And yet, strange to say, he adds :—

This, we contend, had the effect of putting the parties in a position to proceed in the court below as if Mr. Justice *McCord's* judgment on the question of jurisdiction had not been rendered.

And he further contends :—

The appellant contends that if anything more could be done as to the merits of the case, it could only have been after an application to the court by one of the parties, pursuant to notice to the other, to have a suitable day and place fixed for the trial of the case or for the hearing of the same upon the evidence already adduced (*Dominion Controverted Elections Act*, 1874, sec. 11).

The only part of all this contention that I can at all appreciate is where the respondent says the transmitting the record to the Prothonotary of *Montmagny* to have said cause proceeded with according to law, was to put "the parties in a position to proceed in the court below as if Mr. Justice *McCord's* judgment on the question of jurisdiction had not been rendered." This states, in my opinion, with the strictest accuracy, just what the effect of the judgment of this court was, namely, saying to Mr. Justice *McCord:* "You should not have given the judgment you did, but instead thereof you should have decided that you had jurisdiction, and assumed jurisdiction in the case, and should have decided it on the merits," which Judge *McCord*, acting on the decision of this court, rightfully, I think, proceeded to do.

As to the want of notice and as to the necessity of an application to the court "to have a suitable day and place fixed for the trial of the case, or for the hearing of the same upon the evidence already adduced under the Dominion Controverted Elections Act, 1874, sec. 11 :"

Before Mr. Justice *McCord* rejected or dismissed the petition for want of jurisdiction, all the evidence of both

parties had been heard, and the case had been argued on the merits and reserved for judgment, and so was in a position to be decided on the merits, and doubtless would have been so decided but for the opinion of the Judge on the question of jurisdiction; but, notwithstanding which, when the record went back for a final adjudication, the learned Judge, in his judgment appealed from and now before us, says :—

On the 31st January, 1879, the trial of this cause was closed, both parties were fully heard, and the case lay before me for a decision upon the merits subject, however, to certain objections to my jurisdiction filed by the respondent.

Being of opinion that I was without jurisdiction, *I abstained from adjudicating upon the petition;* but my judgment, maintaining the respondent's objections, having been reversed by the Supreme Court, the record was sent back "to have the said cause proceeded with according to law," and, consequently, I again found the case before me for a decision upon the merits.

Although, as I have just said, the parties had already been fully heard, I felt that, owing to the length of time which had elapsed since the hearing, they might fairly desire to refresh my memory as to their respective arguments and pretensions. I therefore offered the counsel of each of the parties a re-hearing of the case, but on both sides this was considered unnecessary, and my offer was declined. *It only remains with me now to render my judgment*, and, before doing so, to explain the ground upon which it is founded.

Under these circumstances what pretence can the party, now appellant, have to allege that "the whole case should have been gone through again."

On the merits of the case, I regret to say that after a careful examination of the evidence I cannot come to the conclusion that the learned Judge who tried this petition was wrong in his appreciation of that evidence in the case of *Asselin*, and not being so satisfied, it would not be right for me to disturb the judgment. As applicable to this case, I fully and entirely agree with the observations made by my learned predecessor in the case of *Somerville* v. *Laflamme* (1) where he says :—

(1) 2 Can. S. C. R. 260.

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

In a matter of this kind when the two witnesses appear to be equally respectable, and they positively contradict each other, and the surrounding circumstances do not lead the Judges in the Appellate Court clearly to the conclusion that the decision in the court of first instance is wrong, the Appellate Court ought not to interfere, though they might have decided differently, if they had seen the witnesses.

And I also feel the force of his observations as to the position of the Judge who has tried the case (1):—

But the Judge who tries the cause in the first instance has many advantages over those who are called upon to review his decision, he sees the witnesses, hears their answers, sees whether they are prompt, natural, and given without feeling or prejudice, with an honest desire to tell the truth, or whether they are studied, evasive and reckless, or intended to deceive, &c.

A case such as this is very different from a case at common law; there the witnesses are in general disinterested parties, unconnected with the case and so more or less impartial, while in election cases the witnesses are generally strong partizans, or more or less mixed up with the election. The opinion of the learned Judge who has heard the case is entitled to great weight, and before his decision can be set aside, we must be entirely satisfied that he is wrong. In affirmance of this view, we have the repeated declarations of appellate courts that on questions of facts, such tribunals must be clearly satisfied that the conclusion at which the Judge who tried the case arrived is not only wrong but entirely erroneous.

With respect then to the charge brought against the appellant for bribing *Asselin*, the facts are these: It appears that *Asselin* was an influential man in one of the electoral districts and had been friendly to Mr. *Larue* in a former election. Previous to the election now in question, Mr. *Larue*, while on a canvassing expedition, met *Asselin* on the road and is invited by *Asselin* to go to his house, an invitation which was accepted. *Asselin*

(1) P. 227.

not being at home, Mrs. *Asselin* gave him and his carter a cup of tea and a biscuit. On a second occasion Mr. *Larue* called at the house of *Asselin* and was entertained by *Asselin* himself with a glass of whiskey and a biscuit, and when leaving Mr. *Larue* secretly or clandestinely slipped a $5 bill into *Asselin's* pocket. The witness says: "*Il m'a coulé quelque chose dans ma poche, j'ai cru que c'était un* $5." It was quite clear he never intended to and did not make any charge for this hospitality. When asked what was the value of the refreshments supplied, he answered that he had made no charge, and that the outside value would have been $1, and that when the appellant slipped the money into his pocket, he said: "*Gardez-ça.*" Mr. *Larue* does not admit he slipped the money into his pocket. He says he put it into *Asselin's* hands, but does not deny he put it there clandestinely, and assigns as a reason for not giving it to him publicly that he was afraid he might hurt his feelings. The reason he assigns for giving *Asselin* the money is that it was to pay for the trouble he had given him; to pay his expenses and those of his friends he should send there. No friends were ever sent, no expenses were ever shewn to have been incurred, and it is beyond doubt it never was intended that any part of this sum should be returned to Mr. *Larue*.

It is obvious that *Asselin* received this money not as payment for what he had done, or for what he would do. *Asselin* does not appear to have been an unfriendly witness to the appellant, but the contrary. There can be no dispute, then, that Mr. *Larue* gave *Asselin* $5, and that he gave it clandestinely, whether slipped into his hand or pocket; that at that time no such money was due *Asselin*, nor does any subsequent indebtedness appear to have been incurred.

In addition to which, Mr. *Larue* distributed among different persons throughout the county various

1881
LARUE
v.
DES-
LAURIERS.
Ritchie, C.J.

sums of money amounting to several hundred dollars. He gives to one *Lamontagne* $10 to $15, to *Pouliot* $10, to *Turgeon* $5, to *Plante* $20, to *Labrecque* $50, to *Marcoux* $50, &c., in all, as he himself states, some $400 or $500, there being no debt or liability existing, and it does not appear that any one of these parties rendered any account of the disposition of these funds, or that any account was asked for or expected by the appellant, and we are left with the simple fact that this candidate distributed through the county, to prominent men in the county, sums of money clearly to be used in the election. The law is very clear—that each candidate at an election shall appoint an agent or agents for all his disbursements, and shall furnish the returning officer with a proper statement of his election expenses. In this case there was a return, and according to respondent's own testimony, the amount of his election expenses published by his election agent, with his knowledge and approbation, was not $400 or $500, but $20, and this sum did not include the $5 paid *Asselin*. As appellant says, no account of it was rendered. Can it be said he has not laid himself open to the presumption, which the authorities recognize, that this payment to *Asselin* and these moneys so distributed were not included because they were illegally expended? The reason he gives for not furnishing a statement of the expenditure of this money is that he considered that it was "personal expenses," and that he was, consequently, not bound by the law to pay it out through an agent or to furnish an account of it. But the learned Judge of the court below very properly answers this in this way:—

It is evident that the respondent's pretension that the moneys he expended, which are not included in the published statement of his election expenses, were personal expenses, and such as he was

not bound to make known, is defeated by his own testimony. Common sense alone suffices to show that such expenditures, as I have enumerated, are not personal expenses; but even if this were not as self-evident as it is, the 125th section of the Election Act would render doubt impossible.

Surely Mr. *Larue* cannot say that the clandestine payment of $5 to *Asselin* was a personal expense. But it does not rest there, for *Asselin* adds "that he did no work and performed no service for the benefit of Mr. *Larue*." If the money was intended to be given as money to be spent as agent, Mr. *Asselin* ought to have returned what he had not earned. Mr. *Larue* never asked for it, nor for any account, and very obviously never intended *Asselin* should make any return or furnish any account. What possible avail can any legislation be for the purpose of securing a free and honest vote of the electors if a candidate can slip $5 into the pocket of one voter, give $10 to another and $20 to another, and so on, and these men never render an account of these monies, and the candidate asks for and expects none? Can there be any other conclusion arrived at than that these moneys were corruptly expended,—and where the Judge, who has tried the case and heard the witnesses, has arrived at an honest conclusion that such was the case, how can any appellate court, in the face of all these facts and these surrounding circumstances, say that such a conclusion was erroneous? It is always more pleasant for a Judge to arrive at a conclusion favorable to innocence than one which will bear so hard upon the appellant; but it is impossible for us to say, on the evidence adduced in this case, that the learned Judge who tried this case was wrong in his appreciation of the facts.

There are other cases put forward to which I do not think it necessary to refer, as the effect of my judgment on this case of *Asselin* is to confirm the judgment of the court below and dismiss the appeal.

1881

LARUE v. DES-LAURIERS.

FOURNIER, J.:—

It is the second time that this case comes in appeal before this court. The first appeal, under sec. 48 of the *Supreme and Exchequer Court Act*, was limited to one point, to wit:—whether the *Dominion Controverted Elections Act of* 1874 was constitutional. On this second appeal a very important question, arising from the interpretation to be given to this same 48th section, is submitted to us, *i.e.*—whether after a first appeal, in which the right of appeal has been limited (as it may be under section 48) to certain questions of law or of fact, a second appeal may be had on that part of the case which was withdrawn from the consideration of the court in the first appeal. In other words, could this court, under the existing law, at the time of the first appeal, for any reason whatever, when seized of a case, send it back to the lower court? On the contrary, was it not the duty of this court to give a final judgment and to report its decision to the Speaker of the House of Commons, in conformity with the provisions contained in the 48th section? Or, which would amount to the same thing, at that time could there be two appeals in a controverted election case?

In order to properly understand the position of the parties, it is necessary to give a summary of the facts and procedure of the case. It will be remembered that after the general elections of 1878 the question as to the constitutionality of the *Dominion Controverted Elections Act of* 1874 was raised in a number of cases, and that the judges who where called upon to deliver their opinion dissented from one another. In the court of first instance the parties in this case did not make this objection as a preliminary objection within the delays specified in the

rules of practice, for it was only when the trial commenced that the objection was made; notwithstanding the objection, the judge ordered the trial to be proceeded with. The case was then heard on the merits as well on the question of law as on the questions of fact. On the 27th April, 1879, Mr. Justice *McCord* delivered a judgment, dismissing the petition, with costs. I do not assume that a judgment was rendered on the merits. I have in favour of my position the very words of the judgment, which says the petition is dismissed. To say the reverse, is assuming, in the face of his words, that no judgment was given. The effect of which was to annul the petition made by *Deslauriers* against the return of the present appellant, as member of the House of Commons for *Bellechasse*. The only reason given for this decision was that the *Controverted Elections Act* was unconstitutional. The questions of fact were not dealt with, although by the effect of the judgment the questions of fact as well as the question of law were decided, the petition being finally dismissed with costs. From this judgment the first appeal was taken.

Before referring to the proceedings taken on the first appeal, I will read that part of section 48 under which they were made. This section, after giving a right of appeal to the court, fixing the mode and delays of giving notice of appeal to the adverse party, gives to the appellant the right of limiting his appeal in these words:

In and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the judge, whose decision is appealed from, and the Supreme Court may make such order as to the money deposited as aforesaid, and as to the costs of the appeal as it may think just; and in case it appears

1881

LARUE v. DESLAURIERS.

Fournier, J.

to the court that any evidence duly tendered at the trial was improperly rejected, the Court may cause the witness to be examined before the court or a Judge thereof, or upon commission; and the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the court upon the several questions as well of fact as of law, upon which the judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, and with the same effect, and the judgment and decision of the Supreme Court shall be final to all intents and purposes.

Deslauriers, the then appellant and the now respondent, wishing to avail himself of these provisions, moved on the 22nd January, as follows:—

22nd January, 1880.—Motion on behalf of the appellant that, inasmuch as the present appeal is only upon the question of law raised by the respondent, to wit: whether the *Dominion Controverted Elections Act* 1874 is constitutional, the printing of the record be dispensed with, and further, that the delivery of any factum or points for argument in appeal be also dispensed with.

In support of this motion Mr. *Taillon*, as solicitor for the appellant, made an affidavit, and by the following paragraphs 2, 4, 5, 6, shows what *Deslaurier's* position was on that appeal.

2. That by the said record it appears that the above named appellant's petition has been dismissed on the grounds that *The Dominion Controverted Elections Act*, 1874, is *ultra vires*, because it gives to the judges of the Superior Court of the Province of *Quebec*, and to the said Superior Court of the said Province of *Quebec*, a new jurisdiction which can be conferred only by the Local Legislature of the said province.

4. That the question of law referred to in the second paragraph of this affidavit is the only question of law apparent in the said record.

5. That the said record is very voluminous and contains about 225 pages of foolscap, and that it would be very costly and expensive to get the same printed, and that the printing of the said record and of the lengthy evidence of numerous witnesses on questions different from that before this court would not in any way afford any additional facility in the decision of this case, because the only question is one of law, namely:—whether the said Act is constitutional or not; and I verily believe that the printing of the said record, and of the evidence contained therein on facts and of several documents uncon-

nected with the point in question, now before this court, will be unnecessary in the decision of the point raised.

6. That the appeal has been limited by notice to the question of the constitutionality of the said Controverted Elections Act of 1874.

This proceeding limiting the appeal, accompanied by affidavit to show that the required notice in such a case had been given, as seen above, was authorized by the 48th section, and was subsequently sanctioned by a judgment delivered on the 22nd January, 1880.

Thus, as it was his right to do, the appellant withdrew from the consideration of this court the questions of fact. Whatever were his motives in so doing, and whether by adopting this procedure he well understood his interests or not, whether or not there would be a failure of justice if a second appeal is not entertained, it is not for us to say; all that I need consider at present is whether he was legally right when he thus limited this appeal. It is impossible to deny that by the 48th section he was given that option. His appeal as limited was then heard and adjudged.

In this case, as well as in that of *Valin* v. *Langlois*, this court unanimously decided that the *Dominion Controverted Elections Act of* 1874 was constitutional; and this was the only question upon which the court was called upon to give its decision.

The order to transmit the record to the Lower Court is as follows:—

That the record in the said appeal should be transmitted to the proper officer of the Superior Court for *Lower Canada* in and for the District of *Montmagny*, being the officer by whom the said record was transmitted to this court, to have the said cause proceeded with according to law.

Relying on this order, the learned judge who decided the case in the first instance, for a second time undertook to sit on the case, and delivered the judgment which is now appealed from. The appellant *Larue*, who by this judgment was not only unseated, but was

1881
LARUE
v.
DES-
LAURIERS.
Fournier, J.

also adjudged personally guilty of corrupt practices, in his turn brought the case in appeal to this court. He denies that the judge who had finally decided the case once had jurisdiction to give a second judgment, alleging that the judgment of this court given on 3rd March, 1880, was a final judgment, and that the case could not be sent back to the Lower Court for a judgment upon the facts. Is he right in his contention? I will at once remark that it would be a grave mistake to rely on any analogy or comparison taken from the procedure regulating civil cases, as applicable to election cases; for there cannot be any. In election cases, the right of appeal, such as we have it here, does not exist any where else. It is an exceptional right, heretofore unknown, and which is regulated by special provisions, which are to be found in the 48th section of the *Supreme and Exchequer Court Act*, and in the special rules of practice made by this Court for the prosecution of these appeals, as may be seen by the 50th Rule of the Supreme Court, rules which declare that the rules applicable to appeals in civil cases shall not apply to appeals in controverted election cases.

We must therefore look only to the 48th section of the Act and the special rules, in order to obtain a solution to the question now submitted to us.

Of course, I admit that in ordinary cases this court has not only the power, but very often it may be its duty to send back a cause before the court of first instance for one reason or another, but in election cases, under the circumstances of this case, it seems to me equally clear that we have no such power. There can be no circumstance, I think, no procedure, by virtue of sec. 48, which could authorize this court, once the appeal is brought before the court, to send back the case to the court of first instance, in order to be further dealt with. I have stated already that the necessary proceedings to

limit the appeal in this case had been taken, and that they were subsequently sanctioned by an order of a judge of this court. The case having been agreed on and submitted to us, what were we obliged to do? Our duty is well defined in the 48th section:—

> It was to pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the judge whose decision is appealed from, &c., &c.

The court was bound to give the judgment which ought to have been given, and this is what was done so far as it was in the power of the court to do. The court could not do more. Could the court send back to the judge, who first tried the case, that part of the case which had been withdrawn by the act of the present respondent from the consideration of this court? Certainly not. I cannot understand how a contrary opinion can be seriously entertained. The court was bound to deliver a final judgment, as required by the 48th section;—

> In the same manner as the said judge should otherwise have done, and with the same effect, and the judgment and decision of the Supreme Court shall be final to all intents and purposes.

It will be remembered that this case had been tried upon the merits, argued on the merits, and that a final judgment dismissing the petition was delivered by the judge who tried the case. The case was, therefore, ripe for an appeal on all questions of law and of fact. If the present respondent had not limited his appeal, it would have been the duty of this court to have given a judgment upon the questions of fact as well as of law, even admitting (which I unequivocally say they were), that they were not adjudged upon by the first judgment dismissing the petition.

It is contended that if the appeal had not been limited, this court would have had no power to express an opinion on the questions of fact, because the judge of

1881
LARUE
v.
DES-
LAURIERS.
Fournier, J.

the court below had not given any other reasons for his judgment, than that he was of opinion the Act was unconstitutional, and therefore did not give any judgment upon the facts. This contention certainly cannot be sustained, for, on the contrary, if a judge, as in the present case, is called upon to express his opinion upon a question of fact, does not do so, that alone in my opinion would be a good and valid ground of appeal, and in such a case, the law directs this court, not to send back the record to the judge who has not given a decision, but *to pronounce such judgment as ought to have been pronounced by the judge whose decision is appealed from.*

If it is said that this court would then be a court of original jurisdiction, then I say that we do act, and it is the duty of this court to act as a court of original jurisdiction every time that we reverse a judgment and pronounce the judgment that the court of original jurisdiction ought to have pronounced.

I therefore do not hesitate to say, that I am of opinion, that if the whole case had been submitted to us on the first appeal, our duty would have been to pronounce a judgment upon the questions of fact, which the judge of the court below ought to have pronounced. We are asked also what course would this court have adopted, if the judge, after hearing one or two witnesses at the trial, instead of completing the trial, had refused to hear any more witnesses and pronounced the judgment which was the subject of the first appeal? This objection can easily be answered, for by referring to sec. 48, it is clearly expressed what the duty of the court would be in such a case:

And in case it appears to this court that any evidence duly tendered at the trial was improperly rejected, the court may cause the witness to be examined before the court or a judge thereof or upon commission

Thus, it is clear, that instead of sending back the case to the court below, it is the duty of this court to hear the witnesses. This part of section 48, in my opinion, deprives this court of all power to divest itself of any jurisdiction over the case. On the contrary, upon this court is imposed the duty of completing the trial, no doubt for the purpose of avoiding any delays which would naturally follow the sending back of the case, and also for the purpose of conforming to the spirit of the law respecting Controverted Elections, *i. e.*,—that these cases should be proceeded with without delay and with all possible despatch.

By this same section, the court is directed through its registrar

To certify to the Speaker of the House of Commons, the judgment and decision of the court upon the several questions as well of fact as of law upon which the judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said judge should otherwise have done, and with the same effect.

Once an appeal is brought, this court alone can certify to the speaker in accordance with the provisions of this Act, and the jurisdiction of the judge of the lower court ceases, and there is no law which gives us the power to send back the case to him in order to make the required certificate.

Those provisions of the 48th section, to which I have just referred, immediately follow that provision of the section which gives a party the right of limiting his appeal. These provisions clearly show that there must be a final judgment given on the appeal, and that although permitting an appeal to be limited, there was no intention that it might be divided and have several appeals in the same case. On the contrary, the legislature clearly intended that the one appeal which was granted should be as simple, as expeditious and as cheap as possible. To arrive at the conclusion that, because

1881
LARUE
v.
DES-
LAURIERS.
Fournier, J.

the appeal may be limited, there can be several appeals in the same case, seems to me to put oneself in direct contradiction with the letter and spirit of the law.

I have no hesitation in saying that under the law which we are to look to in deciding this case, there can be no doubt on this point. This court has already decided this question in the case of *Brassard* v. *Langevin*, where it was held that a judgment on preliminary objections dismissing a petition, was not appealable, and that under that section (sec. 48, 38 *Vic.* C. 11) an appeal will lie only from the decision of a judge who has tried the merits of an election petition. I did not concur in that judgment, but since then the interpretation given by this court received the sanction of Parliament by 42 Vic., c. 39, sec. 10.

This section, although allowing an appeal on preliminary objections to an election petition, does not apply to cases then pending, except cases in which the appeal has been allowed and duly filed. This case cannot be governed by the proviso which is at the end of section 10. As I have just stated, if we are to be guided by the law and the decision in force before the passing of 42 Vic., c. 39, which was sanctioned on the 15th May, 1879, there could only be one appeal in an election case. Since, in order to remove the serious inconvenience which might result in having an election petition dismissed for some error in the procedure, which otherwise might have resulted in having the election declared null, the law has wisely given an appeal from a judgment on preliminary objections, but that is all. Section 48 has not been otherwise amended, and there is nothing which gives any additional remedy after the case has been tried on the merits.

I have already shown, when referring to the procedure, that no preliminary objections were filed in this case. The question as to the constitutionality of

the Act was raised at the hearing of the case on the merits. If even it could be said that the first appeal taken on the question of law was in fact such an appeal on preliminary objections as was subsequently allowed by 42 *Vic.*, c. 39, I would be still of opinion that c. 39 could not avail the appellant on this appeal. For by the proviso in that section, the right of appeal is not given in cases in litigation and then pending, except in cases where the appeal has been allowed and duly filed. The only case pending, in which the appeal had been allowed and filed, was that of *Valin* v. *Langlois*, which was filed in this court on the 30th June, 1879, and as the law was sanctioned on the 15th May, 1879, the proviso could only apply to that case, and thus this appellant was able to get a judgment of this court pronounced on an appeal from a judgment on preliminary objections. The same rule cannot apply in this case, as the case does not come within the proviso of sec. 10. The first appeal was only filed on the 23rd June, 1879, so that, if the then appellant had intended to avail himself of that proviso, he should have filed his appeal before the 15th May, 1879, the date on which the bill was sanctioned.

It is very evident that this Act cannot be invoked, first, because there were no preliminary objections; secondly, if there had been any, the appeal not being allowed and filed before the 15th May, 1879, it would not have come within the terms of the proviso of section 10. Now, as under the law there could only be one appeal, it is clear that the judgment which this court has already pronounced on the first was a final judgment, and that it should have been certified to the Speaker of the House of Commons in accordance with the provisions of the 48th section. The Judge of the court below had no jurisdiction over this case a second time, and this court had

1881
LARUE
v.
DES-
LAURIERS.
Fournier, J.

no power to confer upon him any jurisdiction over this case, as it was our duty to pronounce a judgment "final to all intents and purposes." The terms "further proceedings," &c., in our first judgment, relied on by the Judge of the court below, cannot mean anything more than that the record was to be sent back for the purpose of taxing costs, issuing writ of execution, &c., &c.; but surely cannot mean what the learned Judge has thought it did, to give him the power of pronouncing a second judgment.

I am therefore of opinion that the duty of the court in the case now before us would be to declare that the court below had no jurisdiction to pronounce the second judgment which is now appealed from, and that the Registrar of this court should be directed to certify to the Speaker of the House of Commons that, by our judgment of 3rd June, we decided the question of the constitutionality of the *Dominion Controverted Elections Act*, 1874, which was the only question submitted to us by that appeal; and as we were not called upon to give an opinion on the questions of fact, because the appellant had limited his appeal, we had nothing to report upon the facts of the case.

For these reasons I cannot concur in saying that we can entertain a second appeal. I may add also that this is not the first case in which the party has limited his appeal. There have been several cases from *Ontario*, and amongst others the case of *Wheler* v. *Gibbs*. In that case the appellant limited his appeal to the question of disqualification, not appealing from that part of the judgment which declared his election void. Now, on this appeal he succeeded in having the sentence of disqualification set aside. What would be now the duty of this court, may I ask, if the appellant came before this court and asked us to set aside also that part of the judgment which declared the election void?

We would treat his contention as being too absurd to be entertained. Yet this is virtually what we are now asked to do on this second appeal. What must be our answer? I certainly am ready to give the same answer that we would give to *Wheler* on a second appeal.

I do not express any opinion on the questions of fact, although I have carefully considered them, and in consequence I do not take part in the judgment which is to be delivered, keeping my seat only for the purpose of forming a quorum, in order that the judgment of the majority of the court may be delivered.

HENRY, J.:—

The question of the jurisdiction of the learned Judge who tried the merits of the petition in this case, and who, after having given a previous one which was appealed from to this court and decided on the point to which the appeal was limited, has since pronounced the judgment now under our consideration, was formally raised at the hearing before us and calls for our decision. The position of the case is as anomalous as unprecedented, and has demanded and received from me no little consideration and study; and, after briefly referring to the circumstances and law, I will give succinctly my views upon the issues raised.

No preliminary objections were taken to the petition; but, before the petitioner's case was opened, the jurisdiction of the learned Judge to try the merits of a petition, under the Dominion Elections Act, was objected to and argued before, but not decided by, him. He proceeded to try the merits of the petition, and after hearing all the evidence on both sides passed an order *dismissing the petition*, and gave as his reason for so doing the want of jurisdiction. From that judgment the petitioner appealed to this court, but took the necessary

1881
LARUE
v.
DES-
LAURIERS.
Henry, J.

steps to limit the appeal to the question of jurisdiction of the Judge, and obtained an order from me to limit the printing of the case and factums to that point. After argument of the point of jurisdiction (the only one before us) this court unanimously reversed the judgment below. Some time afterwards (the record having been remitted back to the court below) the learned Judge took it up, and, without further hearing of the parties, or further evidence, gave the judgment in question. The question is, therefore, as to his power or jurisdiction.

It is contended that but one appeal can be taken in an election case, and that the Judge who tried the merits could not again have cognizance of the case after dismissing the petition by the order, and that an appeal having been had and determined, the Judge had no further jurisdiction in the case. It is contended, on the other side, that as his avowed reason for dismissing the petition was for want of jurisdiction, and his judgment being reversed, he was remitted to his original jurisdiction by the sending back of the record. We must see what are the legal provisions applicable to the case. The jurisdiction of both the Judge and of this court depends solely on the provisions of the statutes. As a Judge, merely, of the Superior Court he had no jurisdiction; nor had we any as a Court of Appeal. It is a distinct jurisdiction given for purposes and objects very different from those coming within the ordinary powers of the two tribunals, with different rules and provisions, and requiring different treatment and consideration, and the statute provides that, in cases not provided for by the rules of court under it,

The principles, practice and rules on which election petitions touching the election of members of the House of Commons in *England* are, at the time of the passing of this Act, dealt with shall be

observed so far as consistently with this Act they may be observed by courts and Judges thereof.

That and other provisions of the Act show plainly the intention of the Legislature to exclude the ordinary jurisdiction and procedure of the two tribunals created to try the merits of election petitions. The powers vested in the two tribunals must therefore be considered only such as are given specially by the statute, and the special rules made under it, and to be exercised as if the two tribunals had jurisdiction of no other cases or matters. The powers are limited by the statutes and rules made under them, which latter are specially directed to such cases, and other rules of this court declared inapplicable to election cases. The proceedings in appeal therefore cannot be affected by the practice or procedure in ordinary cases.

A majority of this court decided that under the statute first passed there was no appeal from the decision of the Judge on preliminary objections, and the Legislature remedied the difficulty which was felt as the law at first stood. An appeal lies therefore from the decision upon them, but the amended legislation in that respect does not in my view affect at all the question before us. At first sight it appears strange that in a case like this, where the petitioner, by the decision of the Judge against him at the trial, on the question of jurisdiction, should be compromised; and that the subsequent judgment of this court on that point alone, although in his favor, could be of no essential service to him. If, however, he has, by pursuing a wrong course, shut himself out from the benefit of a judgment on the merits, the fault must be found where it existed. By the appeal in the first instance the whole record could have come before this court, and as all the evidence had been taken the merits of the case might have been argued before, and adjudged on by, this court, and we

1881
LARUE
v.
DES-
LAURIERS.
Henry, J.

would have been authorized and required to give the judgment which in our view should have been given by the Judge below. Having in the first place decided in favor of the jurisdiction, we would then have considered and adjudged as to the merits of the petition.

It is, however, contended that as the Judge who tried the petition had not given judgment on the merits we could not assume an original jurisdiction. That contention is, I think, unsupported by reason. Suppose for instance an election petition contains several charges, and proof to sustain some of them is adduced; but in giving judgment the Judge fails to refer to some of the charges proved, but sustains the petition on others, no one will contend that by such omission this court, on appeal, could not consider and decide upon the omitted cases. The Judge had given no judgment as to *them*, and still we could do so, although each charge stands independent of all the others. If, then, for several out of a number of cases, our right and duty would not be affected by the omission of the Judge, should not the same principle apply to all the offences charged? In this case the learned Judge substantially says "I have no jurisdiction, and therefore will pronounce no judgment on the merits." This court decided he had jurisdiction and that he should have given a judgment on the whole case, and, if the appeal had not been limited, we could have given the judgment he should have given. The Judge, no matter for what reason, gave a judgment on the whole case *by dismissing the petition.* He could not give any but a final judgment, and that he did give. If he had not done so, it could not have come to us by appeal. By coming fully to us we would, under his judgment dismissing the petition, have full cognizance of everything before him; and having all the evidence before us, could have pronounced judgment, as well on the merits as on the question of juris-

diction. Suppose the Judge, as he might have done, had merely dismissed the petition, would this court not have jurisdiction over the whole record on appeal? We certainly would, and giving a defective reason for his doing so, does not, in my opinion, alter the case.

It is contended that in a case where only part of the evidence had been taken, this court could not provide for having the remaining evidence taken, and that therefore we could not decide in a case where the whole evidence had been taken. I submit, in the first place, that the proposition is unsound, for if, under the statute, we have jurisdiction when the whole evidence was taken, a defect in providing for the other contingency does not affect our jurisdiction; and, in the second place, the statute gives this court the power, and it would be its duty, to have the balance of the evidence taken, provided it was, as it should be, tendered at the trial. If either party failed to tender the evidence the laches would be his own, and he should suffer the consequences. The words of the statute are so direct and plain that the most ignorant counsel could not be presumed not to understand them. But that difficulty does not meet us in this case, and, but for other references, I would not have thought it necessary to touch upon it.

If there is one feature more prominent than any other in the Act, it is that as little delay as possible should take place in the final decision of election petitions. The time for the different steps or proceedings in them is greatly shortened compared with other cases. The Judge who tries the petition is required, immediately on the expiration of eight days, to report his decision to the Speaker if no appeal has been taken, and the Registrar of this court is required to report in the same way the judgment of this court. This court is authorized to deal with the whole costs in the case, and to order in respect of the money

1881
LARUE
v.
DES-
LAURIERS.
Henry, J.

paid into court as security, so as finally to deal with all matters connecting with it, showing the intention clearly was that the case was not to be remitted back for any purpose. The policy of the Legislature, as exhibited by the Act, was to hasten the final decision as far as practicable, and in order to prevent unnecessary delay by sending the record down to take evidence improperly refused, this court is authorized to have it taken in either of three modes pointed out. It is patent to my mind, from the whole construction of the Act, that the Legislature deliberately intended that when a case once came to this court the functions of the Judge ceased as regards the merits of the case, and this court should fully deal with the case to final judgment; and to show how the intention of the Legislature in regard to the prevention of delay has been frustrated in this case, I need only state that our judgment on the question of jurisdiction was delivered more than eleven months ago; and, but for the limiting of this appeal by the respondent, our judgment on the merits of the petition might have then ended the controversy.

There is no provision in the statutes for sending back the record from this court, and when a judgment has been given by the Judge, final in its nature but for the appeal, I can see no power in this court to authorize the Judge again to assume any jurisdiction in regard to it.

The formal order of this court was to remit back the record to be proceeded with according to law. If the law furnished no further means of proceeding, our order could not create them. The order was made without any hearing of the parties, but if they had been heard and the peculiar position of the case brought out before us, I, if then taking the same view as I now do, would certainly have objected to that course, and would have suggested what appears now to me to have been the

proper course, and that is for the Registrar of this court to have reported the special circumstances by which, through the act of the respondent, we were prevented from giving a judgment on the merits of the petition.

I think, therefore, the appeal should be allowed with costs.

Holding the opinion I have expressed, I do not consider it necessary to express my view as to the merits of the petition, particularly as the majority of the court who differ from me in regard to the question of jurisdiction have agreed as to the merits of the petition also, and any opinion I might express would not affect the result.

TASCHEREAU, J.:

The appellant's contention, that Mr. Justice *McCord* should not have rendered judgment in the case till a new notice of inscription had been given, cannot be now sustained. It would, perhaps, have been more regular if this had been done, but whatever irregularity there may have been in the matter has been waived by the appellant's conduct in the court below. Having been informed by Mr. Justice *McCord* that the case was to be proceeded with, the appellant made no objection to it. He cannot here avail himself of irregularities which he was aware of, and to which he did not object in the court below.

On the merits, I am of opinion to dismiss the appeal. Indeed I do not see upon what grounds this case has been brought to appeal. *Couture's* case, did it stand alone, is so clearly proved by *Couture* himself, that the appellant's only hope of success before this court must have been based upon the assumption that this court would be disposed to review the judgment of the court below as to the credibility of this witness. Now when the Judge who presided at the trial, who heard this

1881
LARUE
v.
DES-
LAURIERS.
Taschereau, J.

witness, who saw his demeanor in the box and the manner in which he gave his evidence, has believed him and has accepted his evidence as entirely reliable, can we here reject his testimony as unreliable and decide that he is not a credible witness? Is there anything in the record which would authorize us to do so? The general rule is, as stated by Lord *Chelmsford* in *Gray* v. *Turnbull* (1), that upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal, it must be shown irresistibly that the judgment complained of on a matter of fact is not only wrong but entirely erroneous.

In the *Halton* case (2) *Richards*, C. J., said:—

We do not think we can properly interfere with the decision of the learned Chief Justice as to the facts found by him, the general rule being that the finding of the Judge who hears the witnesses where there is conflicting evidence, and the decision turns on the credibility of the witnesses, should prevail. He sees the witnesses, hears their testimony, observes the way in which they answer questions, and is in a much better position to decide on conflicting evidence than those who merely read the statements of the witnesses, as they have been taken down. We are all of opinion that we ought not to interfere with the finding of the learned Chief Justice as to the matters of fact.

And *Strong*, J., added:—

The question of fact argued on this appeal must, I am of opinion, be held to be concluded by the determination of the learned Judge who tried the petition. * * * It is a principle well established in the procedure of appellate tribunals, including the highest court of the Empire—the House of Lords—that questions of fact depending on the veracity of witnesses, and the credit to be given to them, are concluded by the finding of the Judge of first instance, in whose presence the testimony is given (3).

Of course, this rule does not apply where the case

(1) L. R. 2 H. L. Sc. App. 54.
(2) 11 C. L. J. 273.
(3) See also *Davidson* v. *Ross*, 24 Grant at p. 50; and the *Alice*, L. R. 2 P. C. 295.

depends upon the drawing of inferences from the facts in evidence (1), but there is nothing of the kind here.

Take *Couture's* case. *Couture* had been mayor of *Buckland* for seven years and was in the employ of the Local Government as a forester (*garde-forestier*). He was a Conservative, had worked against Mr. *Boutin*, the local member, at the last previous election, and had also worked actively against *Larue* during the election of 1875. On the 10th June, 1878, just three months before the nomination day for the present election, he met the respondent at Mr. *Swiberg LaRue's* at St. *Charles*. He states that *LaRue* then told him that Mr. *Boutin* had been doing his best to get him (*Couture*) turned out of place, but that he (*LaRue*) had done all he could to keep him in office; that an election was about to take place, and that if *Couture* acted as he had done during the previous election, it was pretty sure that he was done for, "*que son affaire était cuite*;" that he (*LaRue*) had stood by him and that it was on that account that he had not lost his place. He then says:

Je dis alors là à M. *LaRue* que je serais pour lui. Il me dit alors que si les gardes-forestiers tombaient, il me ferait avoir quelque chose de méilleur que ça; j'ai compris une position meilleure du gouvernement fédéral.

He swears that *LaRue* promised:

De sauver ma position, et que si les gardes-forestiers étaient abolis, j'aurais quelque chose de mieux que ça.

Further on he says:

Il ne m'a pas dit quoi; j'ai compté sur sa parole; il m'a dit que ses amis il en aurait soin; c'était pendant la dernière élection, je me suis rencontré avec M. *Achille LaRue* pendant la lutte, je ne suis pas capable de dire la date, et là M. *LaRue* me dit qu'il aurait soin de ses amis, et mille autres témoignages de même.

If *Couture's* testimony is to be relied upon, the judg-

(1) *Thurburn* v. *Steward*, L. R. 3 P. C. 478.

1881
LARUE
v.
DES-
LAURIERS.
Taschereau, J.

ment of the court below is unimpeachable, and the court below having relied upon it and given credence to it, there is nothing in the record which would warrant us here to say that it must be rejected as unworthy of belief.

The appellant seems to think that because he, on oath, as he pretends to have done, positively denied the conversation with him, sworn to by *Couture*, *ipso facto* *Couture*'s testimony ought not to have been relied upon by the Judge who presided at the trial. Now, we cannot interfere in such a case with the finding of the learned judge on a question of fact. He found *Couture* a reliable and respectable witness and gave full credit to his testimony, and, without imputing anything derogatory to the character of the appellant, he, the said Judge, was of opinion that he, the appellant, must have forgotten a promise made in the heat of an electoral contest. Now, I do not see how the learned Judge could act otherwise. To believe *Couture* was not to impute perjury to *Larue*, whilst to reject *Couture*'s evidence would have been imputing perjury to him, *Couture*.

It is a recognized rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, whilst it is impossible to remember what never existed. This rule has received a frequent application. I will only refer to the case of *Lane* v. *Jackson*, in *England* (1), to the case of *Wright* v. *Rankin*, in *Ontario* (2), and to the case of *Still* v. *Hindekopers*, in the *United States* Supreme Court (3). In *Lane* v. *Jackson*, the Master of the Rolls said:

I have frequently stated that where the positive fact of a particular

(1) 20 Beav. 539. (2) 18 Grant 625.
(3) 17 Wall. 384.

conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties. An axiom of the civil law, originated at a time when the rule *testis unus testis nullus* prevailed, said in the same sense: "*Magis creditur duobus testibus affirmantibus quam milles negantibus.*"

I also agree with the Chief Justice that the *David Asselin* five dollars case has been made out against the appellant. The fact that the appellant did not include this sum in the return of his expenses required by the Act is a strong presumption that, in his own mind, this payment could not bear scrutiny (1). The contention that he was not bound to return this payment, because it was a personal expense, cannot be sustained. Mr. Justice *McCord* demonstrates clearly that, according to the appellant's own evidence, a part at least of these five dollars was not for personal expenses, and then the statute requires personal expenses as well as all other expenses to be included in the return required (2).

In fact, sec. 123 clearly says so; the word *expected* therein is a misprint for *excepted*; 26-27 *Vic.*, ch. 29, sec. 4, Imperial. But even as it reads it includes personal expenses: "A detailed statement of *all* expenses incurred *by* or on behalf of any candidate" must include personal expenses.

I am of opinion to dismiss the appeal with costs.

GWYNNE, J.:—

Upon the hearing of this appeal, it was objected that, after the case was remitted from this court to be pro-

(1) *Bewdley* case, 1 O'M. & H. 20; *Bradford* case, 1 O'M. & H. 30.

(2) See *Terriault* v. *Ducharme*, before the Court of Review, Montreal, 3 Legal News, 354; Rogers on Elections, 12th edition 348; Bushby's Election Law 97.

1881
LARUE
v.
DES-
LAURIERS.
Gwynne, J.

ceeded with according to law, Mr. Justice *McCord* had no jurisdiction to take up the case and to pronounce a judgment upon the merits.

But for the countenance which this objection has received in this court I should have thought the point to have been free from all doubt.

The election petition came originally before Mr. Justice *McCord* for trial, when the then respondent, the now appellant, on the 27th January, 1879, before the trial of the petition was entered upon and any evidence tendered, filed, as a preliminary objection to the judge entering upon the case, a formal paper, insisting that he had no jurisdiction to entertain the petition. The learned judge did not at once pronounce judgment upon this objection, but reserved it for his consideration until the evidence upon the merits should be taken, when, if he should be of opinion that he had jurisdiction, he would, of course, proceed with the case upon the merits; but, if he should be of opinion that he had no jurisdiction, he, of necessity, must decline to enter into the merits, for in such case, in his judgment, the evidence which had been taken must needs be evidence taken *coram non judice*. At the close of the evidence, the learned judge, having taken *en delibéré* the objection to his jurisdiction, arrived at the conclusion that he had no jurisdiction in the case, and he therefore declined to enter into it upon its merits, and he made an order in the following terms:

> Having heard the parties on the objections made by the defendant to the petition of the petitioner, and after mature deliberation, *the objection made by the defendant to the jurisdiction of the Superior Court and its judges is declared well founded, and, in consequence, the said objection is maintained*, and the petition of the petitioner is rejected and dismissed.

Now, it is contended that this word "dismissed" being used here, the petition has been dismissed absolutely, and that the merits were therefore disposed

of, and that the judgment given by the learned judge having been appealed it would have been open to this court, upon the former appeal, to have decided the case upon the merits, if the then appellant had not, as is said, limited his appeal to the question of jurisdiction. This contention, as it seems to me, is based upon a very apparent fallacy; and, indeed, if the objection were well founded, it would be one to the order made by this court, upon the former appeal, when, for the reason that the merits had not been entered into at all by the court of first instance, this court remitted the record to be proceeded with according to law, that is, to be adjudicated upon by the constitutional tribunal of first instance upon the merits. As matter of law and of fact we know that the petition was not *dismissed*, and the order itself in which the word is used shows that it was not, in any other sense than that it was dismissed from the consideration of the learned judge, as the necessary consequence of his having maintained the objection taken to his jurisdiction, thereby holding that he had no jurisdiction to adjudicate upon the case, and having no such jurisdiction he could not adjudicate by dismissing the petition. It is to the substance that we must look, and not criticise too closely the accuracy of the formal expressions used. The appeal taken against this order was not, in truth, an appeal against an order dismissing the petition, but against an order maintaining objections taken to the judge's jurisdiction, the consequence of maintaining which objection was that justice had been frustrated by the petition not having been adjudicated upon at all. It is said that the appellant in that appeal limited the appeal to the question of jurisdiction; but there was nothing for him to limit,—that was the sole point which could have been appealed, for it was the sole point adjudicated upon, or professed or intended so to be, and the limitation was affixed by

1881
LARUE
v.
DES-
LAURIERS.
Gwynne, J.

the learned judge from the nature of his judgment. In that case, the evidence taken before Mr. Justice *McCord*, and which his judgment in effect held to have been taken *coram non judice*, could not properly have been brought before this court, and on motion of the then appellant, that as the appeal was only upon the question of law raised by the respondent, to wit, whether the *Dominion Controverted Elections Act* of 1874 was constitutional, there was no occasion for printing anything, the printing of the record and the delivery of factums were dispensed with. This order was a proper one to have been made, not because of the appellant (when in a position to appeal against an adjudication upon the merits) having limited his appeal to a point of law, but because the adjudication of the learned judge to the effect that he had no jurisdiction to entertain the petition, was the only thing which was decided and which was open to appeal. The 48th section of the *Supreme and Exchequer Court Act*, which enables this court to give such judgment as the Judge in the court below should have given, plainly applies to the case of an appeal from a judgment on the merits after trial. The whole frame of the section shows this, there is nothing in the Act to warrant this court in constituting itself a court of first instance to hear and determine the merits of an election petition in a case in which the constituted tribunal of first instance has refused to adjudicate upon the petition on the ground that it had no jurisdiction. The former appeal having been, as it only could have been, against the decision of the Judge, which was, that he had no jurisdiction, this court pronounced the only judgment which it could have pronounced, when it allowed the appeal, and held that he had jurisdiction, and remitted the record to him to be proceeded with according to law, and this only could be by his exercising the jurisdiction which he had declined to exercise, upon

the ground that, in his opinion, he had it not. This he did by offering to the counsel of each of the parties a rehearing of the case, which both parties, considering it to be unnecessary, declined, and he proceeded to adjudicate on the petition upon its merits. From this adjudication this appeal is taken, which now for the first time brings the merits before this court to be dealt with under section 48 of the Act.

I am of the opinion, which I have invariably entertained in these election cases, that if there are any cases in which more than in others we should inflexibly adhere to the rule that we should never reverse upon mere matters of fact the findings of the learned Judge who sees and hears the witnesses and tries the case, unless we are convinced beyond doubt that his conclusions are erroneous, it is in these election petitions, where so much of necessity depends upon the manner in which the witnesses give their evidence.

I am of opinion, therefore, that the judgment of the learned Judge should be maintained, and that the election should be voided upon all the grounds upon which it has been pronounced to be void in his judgment.

As to the case of *Eusebe Couture*, it is urged that such a judgment would be at variance with the judgment of this court in *Somerville* v. *Laflamme*, but there is nothing in that case to the effect that where there is but one witness speaking directly to a charge of personal corruption which is denied by the accused person on oath, a Judge is relieved from the duty of seeking for other matter in the evidence which may incline his mind to believe the one in preference to the other, or to reject the testimony of one and believe the other for the manner in which they may have respectively given their evidence, or which relieves him from the duty of determining whether he finds anything in the evidence corroborative of the testimony of the one or of the other. In the

1881
LARUE
v.
DES-
LAURIERS.
Gwynne, J.

case before us, the learned Judge has taken great pains to show that in truth the present appellant did not in his evidence under oath contradict *Couture* in the material points, but that it appeared to the learned Judge that the appellant's counsel so framed the questions put to him as to evade eliciting an answer in reality in contradiction of *Couture*, although upon a hasty view it might seem to be so, and he explains his reasons for believing *Couture*, and for attributing the appellant's contradiction of *Couture*, if he intended to speak in actual contradiction of him, to forgetfulness of what occurred in the excitement of his canvass. I confess that looking at the loose manner in which the contest, upon the appellant's part, appears to have been conducted, in many matters open to the imputation of corrupt intent, there is abundant matter in the evidence which might be referred to as supporting and justifying the conclusions arrived at by the learned Judge.

The appeal therefore should be dismissed and the result certified to the House of Commons, and *Nicolas Pouliot* and *Anselm Plante* should be reported as having been guilty of corrupt practices.

Appeal dismissed with costs.

Solicitors for appellant—Messrs. *Montambault, Langelier & Langelier.*

Solicitor for respondent—Mr. *Amyot.*

CONTROVERTED ELECTION OF THE COUNTY OF CHARLEVOIX.

1880 *Nov.9,10,11.

1881 *Feb'y. 11.

SIMON XAVIER CIMON.....APPELLANT;

AND

JOSEPH STANISLAS PERRAULT.....RESPONDENT.

The Dominion Elections Act, 1874, *secs.* 82, 83 *and* 84—*Public peace—Colorable employment—Liability of candidate for the acts of persons employed by agent—Bribery.*

On a charge of bribery against one *T.* and one *A.*, upon which this appeal was decided, the Judge who tried the petition found as a fact that *A.* had been directed by *T.*, an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of *Bay St. Paul* on the polling day, and had bribed four voters previously known to be supporters of the appellant, by giving them $2 each, but held that *A.* was not agent of the respondent, and, therefore his acts could not avoid the election. The facts of this case are fully set out below.

Held, on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colorable, and these voters having changed their votes in consequence of the money so paid to them, and the sitting member being responsible alike for the acts of *A.*, the sub agent, as for the acts of *T.*, the agent, and they having been guilty of corrupt practices, the election was void. (*Taschereau* and *Gwynne*, J. J., holding that *A*, the sub-agent alone, had been guilty of bribery.)

THIS was an appeal from the decision of Mr. Justice *Routhier*, of the Superior Court of the Province of *Quebec*, District of *Saguenay*, delivered the 15th day of September, 1880, dismissing the petition against the return of *Joseph*

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

1880
CIMON
v.
PERRAULT.

Stanislas Perrault, as member of the House of Commons for the Electoral District of the County of *Charlevoix*, in the Province of *Quebec*.

The appellants limited their appeal to four charges of corruption by the candidate and sixteen charges of corruption by agents.

This appeal was determined upon the fifth charge known as the *Tarte* and *Allard* case.

One *P. Allard* was charged with having, under the authority of one *Tarte*, bribed four voters, viz : *A. Bouchard*, *E. Martin*, *S. Boivin* and *J. Gagnon*—previously petitioner's supporters—by the payment of $2 to each of them. *Tarte*, who was the brother-in-law of the respondent, and admitted to be his general agent in the western part of the county, on the receipt of certain letters and telegrams, informing him that roughs were coming down from *Quebec* to interrupt the peaceable voting of the electors, did not enquire to ascertain whether the reports in these telegrams and letters were well founded or not, nor take the proper steps to secure by legal means the public peace, but stated that he had applied to Hon. Mr. *Langevin* or Hon. Mr. *Masson* for a detachment of "B" Battery, and, receiving no reply, asked the captain of the volunteer company at *Baie St. Paul* if he could keep order with his men, and that the latter replied he did not consider himself authorized to do so. *Tarte* thereupon gave *Allard* money, and asked him to employ persons to act as policemen, and further induced him to advance money for the same purpose, promising to return it. No roughs came, and there was no disturbance. *Allard* employed the above named four voters who were known to be appellant's supporters, and they all swore that, in consequence of the money they received from *Allard*, they changed their vote, and voted for respondent. This expenditure was not included in the official return of respondent's legal expenses, made by his agent.

Mr. *C. P. Davidson*, Q. C., and Mr. *Mackay* with him, for appellant:

Mr. Justice *Routhier* regarded the payments as direct acts of bribery, but refused to make the respondent liable for them, on the ground that *Allard* was not a general agent, and that his authority was limited to the hiring of a number of men for the pretended purpose of preventing violence at the polls. As a matter of fact, these men performed no such duty, and did nothing in return for the money thus received. *Allard* was active in the election. Some witnesses speak of his having been known as a vigorous partisan. He attended committee and other meetings. Mr. *Tarte*, the brother-in-law of respondent, his chief manager and recognized agent, was heard to have specifically requested *Allard* to take charge of the very concession where the men so bribed resided. Mr. *Tarte* also furnished the larger part of the money thus illegally used. That is a fact upon which no dispute exists. But Mr. *Tarte* claims that *Allard's* instructions were limited to the employment of men, and that there was no question of buying voters. The hiring was a flimsy pretext for their purchase. I contend the candidate is responsible for the acts of persons specially employed by his agent. The case seems irresistible, as well in respect of the deliberate and flagrant act of bribery which it involves, as of the direct connection with it of persons for whose acts respondent must be held responsible.

Mr. *Angers*, Q.C., for respondent:

P. Allard is a peaceful citizen of *Baie St. Paul*, who is little accustomed to mix himself up in election contests. Some days before the voting, Mr. *Tarte* requested him to hire some men to keep the peace, without naming any one. This request is not, in law, an offence, and Mr. *Tarte*, who had already gone through several elections in the county, had good reasons for

1880
CIMON
v.
PERRAULT.

doing as he did. *Allard* had no other mission to perform; if he went beyond his instructions, his so doing cannot do any harm.

Abraham Bouchard, Jean Gagnon, Samuel Boivin, Israel Gagnon, admit that they sold themselves for two dollars. But this avowal establishes nothing. It must be proved that there was really bribery. The cynicism displayed by these four witnesses is far from giving any weight to their evidence.

P. Allard possesses the confidence of the petitioner, who twice brings him forward under oath to explain. Now, this witness, whose reputation is blameless, flatly contradicts these four electors who were ready to sell themselves for two dollars. He hired these people to keep the peace on the eve of the polling day, and that was all. No one proves that *Allard* canvassed them; on the contrary, all declared themselves supporters of the respondent. But, supposing they were really bought, as they say, what would be the consequences of *P. Allard's* conduct? We have already seen that the mission confided to him by Mr. *Tarte* could not make him an election agent. But, of his own accord, by his actions and his relations with him, can he have become the agent of the respondent to the extent of being able to compromise him? When there is no general system of bribery proved, it is necessary that the isolated cases and the mandate be clearly proved.

There are no precise rules for determining agency; each case rests upon the evidence; but it must be borne in mind that an election is a serious matter, and should only be set aside for the weightiest reasons This question of agency has already been discussed at length before our Courts; we will but refer to a few decisions already given on this point: The *Portneuf* case (1), and the *Jacques Cartier* case (2).

(1) 2 Q. L. R. 283.

(2) 2 Can. Sup. C. R. 307-311, 1 Q. L. R. 295.

Allard did not canvass ; he made no speeches ; in a word, he took no part in this election.

What is *Allard's* position, compared to that of *Bellerive* and *Terreau* in the *Quebec* East case, to that of *Conway*, *Cardinal St. Denis*, *St. Jean*, *Dufour* in the *Jacques Cartier* election ? and yet all these men, who mixed in these elections, who were in a position to use their influence, and who, in fact, did so, have not been considered as agents.

The learned Counsel also referred to the *Tamworth* case (1) ; *Salford* case (2) ; *Longford* case (3) ; *Gloucester* case (4) ; *Durham* case (5) ; *Windsor* case (6) ; *Londonderry* case (7).

RITCHIE, C. J. :—

This was a petition against the return of the respondent as the member of the House of Commons for the County of *Charlevoix*. The learned judge, whose judgment is appealed from, dismissed the petition, holding that the charges against the respondent had not been sustained.

With reference to the personal charges against the respondent, the principles enunciated by my learned predecessor, and to which I have referred in the case of *Larue* v. *Deslauriers* (8), are very applicable to this case, because there was considerable weight given by the judge who tried the case, to the manner in which some of the witnesses brought to prove the personal charges gave their evidence.

But there is a charge against the respondent's agent which, in my opinion, must avoid the election.

It is the fifth case treated in the appellant's factum, by which *Pamphile Allard* is charged with having, under

(1) 1 O'M. & H. 78.
(2) 1 O'M. & H. 140.
(3) 2 O'M. & H. 13.
(4) 2 O'M. & H. 62.
(5) 2 O'M. & H. 135.
(6) 1 O'M. & H. 3.
(7) 1 O'M. & H. 278.
(8) 5 Can. Sup. C. R. 91.

1881
CIMON
v.
PERRAULT.
Ritchie, C.J.

the authority of Mr. *Tarte*, bribed *Abraham Bouchard, Samuel Boivin, Israel Gagnon and Jean Gagnon*, previously petitioner's supporters, by the payment of $2.00 to each of them.

Mr. *Tarte* was the brother-in-law of the respondent, his agency is admitted, and, indeed, it could not be denied, for he was obviously entrusted with and had, it may be said, the entire management and conducting of the election on respondent's behalf in that part of the county. He states that he received letters and telegrams from certain parties in *Quebec*, informing him that certain roughs were coming down to interfere with the peaceable voting of the electors, but he does not appear to have made any enquiries, or taken any steps to ascertain whether the reports in these telegrams and letters were well founded or not; thereupon he gives *Allard* money and asks him to employ persons to act as policemen, and he further induces him to advance money for the same purpose, promising to return it. With this money the judge below finds *Allard* bribed certain voters. There is no satisfactory evidence to show that any extraordinary measures whatever were necessary to be taken with a view to the preservation of the peace; and if such a course had seemed necessary no proper steps were taken to secure by legal means the public peace, nor do the proper authorities appear to have had the slightest intimation from *Tarte* or *Allard*, or indeed from any source whatever, that trouble was anticipated.

The personal application of Mr. *Tarte* to Hon. Mr. *Langevin* and Capt. *Gauthier*, unsupported by affidavit or evidence of any kind, were perfectly futile, because neither of the parties applied to had any authority in the matter, and if they had authority, no verified facts were laid before them to justify their acting.

The law makes ample provision in such a case, and points out how and to whom the application should be

made, and the steps that should be taken in such an emergency, and provides upon whom the duty and responsibility in such a case is cast of preserving the peace, and the means by which this shall be accomplished. Thus by sec. 81 of the *Dominion Elections Act*, 1874 "every returning officer and every deputy returning officer, from the time of the taking of the oath of office until the day after the closing of the election, shall be a conservator of the peace invested with all the powers appertaining to a justice of the peace," and by sec. 82, such officers "may require the assistance of justices of the peace, constables or other persons present to aid him in maintaining peace and good order at such election, and may also, on a requisition made in writing by any candidate, or by his agent, or by any two electors, swear in such special constables as he deems necessary"; and by sec. 83, "such returning officer or deputy returning officer may arrest or cause to be arrested by verbal order, and place in the custody of any constable or other persons any person disturbing the peace and good order at the election, and may cause such person to be imprisoned under an order signed by him until any period not later than the close of the poll"; and by sec. 84, such returning or deputy returning officers may require any person within one half mile of the place of nomination or of polling station to deliver to him any fire-arm, &c., and any person refusing to deliver such weapon shall be liable to a fine, &c.

All which was entirely disregarded by Mr. *Tarte*, and not the slightest excuse, still less justification, is offered for his thus ignoring the law, and taking upon himself, an active partizan, the duty and responsibility of preserving the public peace; no evidence whatever was offered to show that the slightest grounds existed justifying the sending of the telegrams or letters, nor does there appear to have been any persons sent from

1881
CIMON
v.
PERRAULT.
Ritchie, C.J.

Quebec, nor does there appear to have been any disturbance whatever at the election.

I can, therefore, come to no other conclusion than that there were no reasonable grounds for any extraordinary measures being taken for preserving the public peace, and, if there had been, that there were no reasonable grounds whatever for Mr. *Tarte* taking upon himself the employment of 30 unauthorized persons, and that there was no excuse or justification for employing and paying voters, as was done by *Allard*, by the direction of Mr. *Tarte*.

If trouble was really anticipated, I feel it quite impossible to believe that Mr. *Tarte* would have employed 30 men on his own account, and at his own expense, without calling on the proper legal authorities whose especial duty it was to preserve the peace, or without even hinting to them that trouble was feared, so that proper, unobjectionable and legal precautions might be taken to provide against any unlawful disturbance.

I may here say that I find that on the trial a question was put to Mr. *Tarte* which was objected to by the respondent, viz., whether the 30 men, which he alleged he had employed were paid? This objection was sustained. And again, whether these men were voters? Also objected to, and objection sustained. These were, in my opinion, most pertinent and proper questions, and I cannot conceive on what valid grounds they were rejected, for, if the transaction had been an honest one, it is to be presumed the agent would have been only too glad to give such an answer as would dispel any unfavorable inference.

The questions having been objected to and not answered, the only reasonable inference is that the questions were objected to and not answered because the answers would militate against the witness and the respondent.

Then, how do these men, who are charged with

having been bribed, state the case as to *Allard's* dealing with them?

We have first:

Jean Gagnon:

Q. Vous rappelez-vous de l'élection qui a eu lieu entre M. *Simon Xavier Cimon* et *M. Joseph Stanislas Perrault*, dans l'année (1879) mil huit cent soixante-dix-neuf, dans le mois de février?—R. Oui.

Q. Etiez-vous électeur à cette élection-là? R. Oui.

Q. Avez-vous eu de l'argent de *Pamphile Allard*? R. Oui, j'en ai eu.

Q. Combien? R. Dix chelins, je ne peux pas dire autrement, j'ai eu dix chelins.

Q. Avez-vous fait quelqu'ouvrage pour cet argent-là? R. Non, je n'en ai pas fait.

Q. Avez-vous voté? R. Oui j'ai voté.

Q. Avez-vous objection de dire pour qui vous avez voté? R. J'étais pour *M. Cimon* auparavant que j'ai eu les dix chelins; ça m'a fait voter pour M. *Perrault*, c'est cela.

Q. Avez-vous vu M. *Tarte* dans l'élection? R. Oui.

Q. Avez-vous eu connaissance s'il s'est mêlé généralement de cette lection-là? R. Je l'ai vu passer quelquefois. Je ne reste pas dans le village, je reste dans *St. Joseph* à une lieue et demie de l'église, je l'ai vu passer plusieurs fois par exemple.

Q. Il marchait pour l'élection? R. Dans le temps de l'élection il marchait pour l'élection.

Q. L'avez-vous vu, M. *Tarte*, vous? R. Oui, je l'ai vu, j'ai été moi même chez lui, lorsque mon frère a voté.

Abraham Bouchard:

Q. Vous rappelez-vous de l'élection qui a eu lieu entre M. *Joseph Stanislas Perrault* et M. *Simon Xavier Cimon*, dans le mois de février mil huit cent soixante-dix-neuf? R. Oui.

Q. Avez-vous reçu de l'argent dans cette élection? R. Oui.

Q. Combien avez-vous reçu? R. Deux piastres.

Q. De qui avez-vous reçu cet argent-là? R. De *Pamphile Allard*, marchand.

Q. Pour qui étiez-vous avant d'avoir reçu cet argent? R. Pour M. *Cimon*.

Q. Avez-vous fait quelqu'ouvrage pour cet argent-là? R. Non, monsieur.

Q. Voulez-vous dire pour qui vous avez voté? R. Pour M. *Perrault*.

1881
CIMON
v.
PERRAULT.
Ritchie, C.J.

Q. Auriez vous voté pour M. *Perrault* sans cet argent-là? R. Non, monsieur.

Transquestionné.—Q. Vous vous êtes vendu, vous avez vendu votre voix pour deux piastres? R. Oui, monsieur.

Samuel Boivin:

Q. Vous vous rappelez de l'élection qui a eu lieu entre M. *Simon Xavier Cimon* et M. *Joseph Stanislas Perrault*, dans le mois de février (1879) mil huit cent soixante-dix-neuf? R. Oui.

Q. Veuillez dire si vous avez reçu de l'argent et de qui dans ce temps-là.

(Objecté par le défendeur à cette question parce qu'elle est trop vague. Question retirée.)

Q. Avez-vous reçu de l'argent de M. *Pamphile Allard*? R. Oui, monsieur.

Q. Combien avez-vous reçu? R. Deux piastres ($2.)

Q. Pour qui étiez-vous avant d'avoir reçu cet argent-là? R. Pour M. *Cimon*.

Q. Avez-vous fait quelqu'ouvrage pour cela? R. Oui, j'ai fait une commission qui pouvait valoir environ trente sous.

Q. Avez-vous objection à dire pour qui vous avez voté? R. Oui, pour M. *Perrault*.

Q. Auriez-vous voté pour M. *Perrault* sans cet argent-la? R. Non, monsieur.

Q. Avez-vous eu connaissance si M. *Pamphile Allard* s'est bien occupé d'élections généralement? R. Cela, je ne connais rien ladedans.

Q. L'avez-vous vu marcher pour l'élection? R. Non, monsieur.

Q. Lui avez-vous parlé?—R. Oui, je lui ai parlé à lui-même. Vous me demandez si je l'ai vu, je vous le dis.

Q. Veuillez dire ce que M. *Tarte* vous a dit par rapport à M. *Pamphile Allard*?—R. Oui. (Objecté par le défendeur à cette preuve comme tendant à faire une preuve de oui-dire, n'étant pas prouvé que M. *Tarte* soit un agent, ou que dans cette circonstance, il agisse en sa qualité d'agent du défendeur. Preuve prise sous réserve de l'objection.) R. Je vais vous le dire. Lorsque mon frère a eu voté devant *Pamphile Allard*, *Pamphile Allard* a sorti, il lui a donné ($1.00) une piastre. Je lui ai vu donner la piastre. Il a dit: Tu as perdu une piastre ($1.00). La veille de la votation, *Pamphile Allard* me l'avait dit auparavant. Il doutait qu'on était pour M. *Cimon*, c'est cela qui l'empêchait de nous donner de l'argent, il dit: Si tu étais pour nous on te donnerait de l'argent, si tu votes devant moi... j'ai dit: je suis capable de voter tout seul, je sais lire et écrire; le

jour de la votation, mon frère a voté, il a eu une piastre ($1.00) lorsqu'il est sorti.

Q. On demande ce que M. *Tarte* a dit?—R. Lorsque j'ai vu cela j'ai parti, j'ai descendu dans le village, j'ai été voir M. *Tarte* qui restait chez M. *Bois*, j'ai rentré dans sa chambre; il m'a demandé ce que je venais faire, j'ai dit: je viens parler un peu; j'ai dit: j'ai su que tous ceux qui votaient au nom de *Pamphile Allard* avaient une piastre ($1.00). J'ai dit: J'ai perdu ma piastre. Il dit: Si je peux vous avoir votre piastre, je l'aurai; mais je ne lui en ai pas parlé.

Q. Vous a-t-il dit que c'était vrai?—R. Il m'a dit que tous ceux qui votaient au nom de *Pamphile Allard* avaient une piastre ($1.00.)

Q. Vous lui avez demandé ceci: tous ceux qui votent au nom de *Pamphile Allard* ont une piastre?—R. Oui, j'ai dit: j'ai perdu ma piastre, M. *Tarte* a dit: Si je peux vous la faire donner je vous la ferai donner. C'est tout ce qu'il a dit, je n'ai rien que cela à vous dire. La veille de la votation *Pamphile Allard* m'avait dit cela lui-même, ce que je vous ai dit, que si je votais devant lui que j'aurais.....

Israel Gagnon:

Q. Vous rappelez-vous de l'élection qui a eu lieu entre M. *Simon Xavier Cimon* et M. *Joseph Stanislas Perrault* dans l'année (1879) mil huit cent soixante-dix-neuf, dans le mois de février? R. Oui.

Q. Etiez vous électeur dans cette élection-là?—R. Oui.

Q. Veuillez dire si vous avez eu de l'argent de M. *Pamphile Allard* à cette élection?—R. Oui, Monsieur.

Q. Combien avez-vous reçu?—R. ($2.00) Deux piastres.

Q. Pour qui étiez-vous avant d'avoir reçu cet argent-là?—R. J'étais pour M. *Cimon*.

Q. Avez-vous fait quelqu'ouvrage pour cet argent là?—R. Rien du tout. Je n'ai pas fait aucun ouvrage.

Q. Avez-vous voté?—R. Oui, monsieur.

Q. Auriez-vous objection à dire pour qui vous avez voté?—R. J'ai voté pour M. *Perrault*.

Q. Auriez-vous voté pour M. *Perrault* sans cet argent-là?—R. Non, pardonnez, j'aurais voté pour M. *Cimon* si je n'avais pas eu cet argent-là.

Q. Connaissez-vous M. *Pamphile Allard*?—R. Oui.

Q. Se mêlait-il d'élection dans ce temps-là?—R. Je ne peux pas dire bonnement; M. *Allard* ne m'a pas parlé beaucoup de cela, mais ce qu'il m'a dit avant de voter, il dit: vote devant moi, il dit: Si tu votes devant moi, tu auras ton argent. Après avoir voté il m'a fait donner ($1.00) une piastre de suite. L'autre piastre il me l'a donnée après. Ça fait dix chelins que j'ai eus.

1881

CIMON v. PERRAULT.

Ritchie, C.J.

Q. Savez-vous si M. *Al'ard* a représenté quelque part M.....? —R. Il représentait M. *Perrault* à un poll, il était officier-rapporteur.

Q. Avez-vous vu M. *Tarte* après ?—R. Non, monsieur, je ne l'ai pas vu après.

Q. L'avez-vous vu avant ?—R. Non, je ne lui ai pas parlé.

Transquestionné.—Q. Avez-vous un cheval et une voiture ?—R. Pardonnez, je n'avais ni chevaux ni voitures dans ce temps-là, maintenant j'en ai une.

The coolness and frankness with which these men admit the bribery is somewhat astonishing. They do not pretend that they ever did anything for this money, they simply took the money and changed their vote; they do not appear to have had the least idea that they were acting as peace officers, or preservers of the peace, or were expected so to act, or had been employed for any such purpose; having voted as they agreed, no further notice appears to have been taken of them. Added to this we have the fact, that not one penny of this money and expenditure was accounted for, as the law required, if legal and proper; the inference from which, in connection with the other circumstances of the case, is irresistible. Therefore, I am forced to the conclusion that the employment of these men, if employment it can be called, was merely colorable, or as a cloak for bribery and undue influence; but from the testimony of those who were examined it would appear that the money can scarcely be said to have been given for colorable employment, but was a direct and open purchase of their votes; that the payments were not with any view to their acting as peace officers, but to induce them to vote for *Perrault* instead of *Cimon*, and therefore I think that the judge was right in deciding that they were actually bribed, as they swore they were, and that by reason of such bribery they changed their vote and instead of voting for *Cimon* voted for *Perrault*.

If the law would tolerate and treat as uncorrupt and legal what was done in this case by Messrs. *Tarte* and

Allard, and if parties disposed to resort to undue practices could hide their corrupt intentions and make innocent their expenditures under such a flimsy pretext as has been put forward in this case, all legislative efforts hitherto made to put down corrupt practices would be entirely futile. For if this can be done with reference to voters at one polling place, why not at all the other numerous polling places in the county? and if $2 is paid, why not a larger sum? and if thirty men can be so paid, why not more? It is not easy to conceive how a much more general and effective system of corruption could be established. It may be as well to cite two or three cases on this point.

As to the employment of watchers, Mr. Justice *Blackburn* said in the *Bewdley* case (1):

> It comes within all the mischief of treating. In the first place it indirectly influences the men whether voters or not; if they are not voters, it indirectly influences all their friends and other voters. In the second place, when it is given to voters, it would, in all human probability, lead to an expenditure by them in public houses and elsewhere, which would indirectly influence voters. In that way it falls within all the mischief of treating, but no statute has yet been passed rendering it of the same effect as treating.

He subsequently said that he considered this to be a corrupt practice, and that as such he must report it to the Speaker.

Martin, B., in the *Nottingham* case (2), as to the hiring of persons on behalf of the candidates for the purpose of keeping the peace and protecting the voters, said:

> I must protest against the employment of such persons at all. The proper course to pursue is to go to the Mayor and communicate to him that there is a probability of the peace of the town being disturbed, and to tell him that he must perform his duty and swear in a sufficient number of special constables to preserve the peace.

Then, also, in a very late case, arising out of the last

(1) 1 O'M. & H. 20. (2) 1 O'M. & H. 246.

1881
CIMON
v.
PERRAULT.
Ritchie, C.J.

general elections, with regard to the employment of watchers, Baron *Pollock* in the *Salisbury* case (1) said as follows:

In every borough the greatest caution should be used before any person employs others in a private character to preserve the quiet of the town, to prevent breaches of the peace, or to protect even the property of individuals. This is a matter of very serious importance, because it reflects, not merely upon the purity of the election, if such a thing is done to a great extent, but it reflects also upon the credit and reputation of the town. I should be very sorry to think that it could ever be necessary, even in an election time, to resort to anything like a private body for the purpose of protecting either persons or property. The proper course, whenever such an occasion should arise, and a reasonable fear exists, would be to apply to the mayor and magistrates and the police authorities, and if there are not a sufficient number of men already serving in the police, we well know by experience that the services of well conditioned honest persons can always be obtained as special constables, who are ready to protect property in their own town.

Now, independent of Mr. *Tarte's* personal direct connection with this transaction, the learned judge, in my opinion, though he correctly arrived at the conclusion that the parties named had been bribed, came to a conclusion of law entirely erroneous in respect to Mr. *Allard*, viz.: That although Mr. *Tarte* was unquestionably the agent of the respondent, Mr. *Allard* employed by him was not, and therefore respondent's seat could not be affected by Mr. *Allard's* acts.

This pretension cannot be, in my opinion, for one moment sustained. The law would, indeed, be childlishly weak, were it not able to reach the corrupt acts of a sub-agent. The law as to employment of sub-agents seems to me to be very clear.

In the *Bewdly* case (2), *Blackburn*, J. says:

I can come to no other conclusion than that the respondent made *Pardoe* his agent for the election to almost the fullest extent to which agency can be given. A person proved to be an agent to this

(1) 3 O'M. & H. 134. (2) 1 O'M. & H. 18.

extent is not only himself an agent of the candidate, but also makes those agents whom he employs. The extent to which a person is an agent differs according to what he is shown to have done. An agent employed so extensively as is shown here makes the candidate responsible, not only for his own acts, but also for the acts of those whom he, the agent, did so employ, even though they are persons whom the candidate might not know, or be brought in personal contact with. The analogy which I put in the course of the case is a strong one, I mean that of the liability of the sheriff for the under sheriff, when he is not merely responsible for the acts which he himself has done, but also for the acts of those whom the under sheriff employs, and not only responsible for the acts done by virtue of the mandate, but also for the acts done under colour of the mandate, matters which have been carried very far indeed in relation to the sheriff.

Applying the principle thus laid down to the case of one *Burmish*, a clerk to *Pardoe* (the agent), he said:

Every person employed in the election of *Pardoe* is an agent of the respondent. *Burmish* was so employed, and if he had ordered drink and treating without authority from anybody, and had paid for it out of his own pocket, that of itself would have been sufficient to avoid the election.

Again in the *Staleybridge* case (1), *Blackburn*, J., says:

I have already in the *Bewdley* case had occasion to decide this much. There it appeared that the sitting member had put a sum of money into the hands of his agent, and that he exercised no supervision over the way in which that agent was spending that money; that he had given him directions, and I thought really intended, that none of that money should be improperly spent; but that he had accredited and trusted his agent, and left him the power of spending the money; and I came to the conclusion upon that, that there was such an agency established as that the sitting member was responsible to the fullest extent, not only for what that agent might do, but for what all the people whom that agent employed might do; in short, making that agent, as far as that matter was concerned, himself, and being responsible for his acts. I see no reason to doubt at all that that is perfectly correct.

In the *Barnstaple* case (2) Mr. Justice *Mellor*, as to the law of agency, said:

I quite think the election law is a cruel and somewhat hard law,

(1) 1 O'M. & H. 69. (2) 2 O'M. & H. 105.

1881
CIMON
v.
PERRAULT.
Ritchie, C.J.

yet it is too well settled for an election judge to act contrary to it. I say that if an agent, although he may be no agent to the candidate, be employed by the agent of a candidate, he is a sort of subordinate agent, and if he is employed by persons who have authority to employ people to further the election of a particular individual, and in the course of canvassing makes use of a threat or a promise, such an act will make the candidate liable, however innocent the candidate may be, or however careful the candidate may have been to avoid such conduct. As Mr. *Harrison* very fairly puts it, he cannot take the benefit of the services of the individual and repudiate them at the same time.

In the *Plymouth* case (1), it was proved that one of the principal agents of the respondent authorized one *Stebbs*, who was an active member of the respondent's committee, to go to *Penzance* and bring up any *Plymouth* voter he could find. *Stebbs* found, among others, one *Willis*, a fisherman, and as *Willis* declined to come up and vote unless not only his travelling expenses were paid, but also a substitute found to do his share in the fishery during his absence at *Plymouth*, *Stebbs* paid a substitute for this purpose, and *Willis* came up and voted.

Mr. Justice *Lush*, after holding that the case was within the very words, as well as within the spirit of the Act, said:

The only remaining question is—was *Stebbs* authorized to make this engagement with *Willis*? I am clearly of opinion that he was. He was sent to *Penzance* for the purpose of getting those men to go to the poll, and that involved an authority to make such reasonable terms as *Willis* might require. It is clear law that if an agent of the candidate employed a sub-agent to negotiate with a voter going to the poll, and the sub-agent commits an act of bribery in carrying out his commission, the candidate is as responsible as if the act had been done by the agent himself; the sub agent here is not in the position of a messenger sent upon a mere ministerial duty, he was to negotiate with *Willis* and arrange for his leaving his work and coming up to the polls; I am, therefore, constrained to hold that by this act *Stebbs* has rendered the seat untenable.

(1) 3 O'M. & H. 108.

It is abundantly clear to my mind that the sitting member must be affected by the acts of both *Tarte* and *Allard*, and that for and by reason of the corrupt acts of the bribery of these four voters, the election must be declared void.

FOURNIER, J., concurred.

HENRY, J.:—

After a very careful consideration of the evidence in this case, and of the law by which the several issues are to be decided, I think it unnecessary to refer to more than two of them; they, in my opinion, being sufficient to decide the case before us.

The first is the case of the alleged bribery by *Pamphile Allard* and *Joseph Israel Tarte* by payments of money to *Abraham Bouchard*, *Samuel Boivin*, *Israel Gagnon* and *Jean Gagnon*, all of whom were electors. By the evidence it is shown that *Allard* and *Tarte* were active supporters of the respondent, and the latter is shown to have been his agent.

It also satisfactorily appears that the four persons alleged to have been bribed, up to the time of the payments of the money to them respectively by *Allard*, were known to be supporters of the appellant. *Tarte* and *Allard* both in their evidence admit the payment of the money, and that *Tarte* requested *Allard* to hire them as policemen for the polling day. *Allard* in hiring the men did no more than he was ordered to do by *Tarte*.

The learned judge who tried the petition in his judgment says:

> I therefore believe *Allard* when he says he hired them as policemen, but I equally believe them when they declare that the two dollars they received caused them to vote for the respondent. I am also of the opinion that *Allard* in hiring them was guilty of an act of bribery under the circumstances proved by *Allard* himself.

The learned judge also says:

1881
CIMON
v.
PERRAULT.
Henry, J.

In the present case Mr. *Tarte* was a general agent, but *Allard* was not.

I entirely agree with the conclusion as to both points drawn from the evidence by the learned judge.

It is not, however, necessary, as assumed by him, that to make *Tarte* responsible for *Allard's* acts the latter should be an agent of the respondent. On the contrary, he may not have been a partizan at all. If he is guilty of a corrupt practice, it would be no justification for him to allege he acted by the command or at the suggestion of *Tarte*. He is, therefore, guilty of the corrupt practice charged, but how can his guilt be a justification for the man who engaged him to commit it? *Tarte* is, therefore, the principal, and *Allard* the agent—the conduit pipe between *Tarte* and the bribed parties. Under the law the respondent is answerable for *Tarte's* corrupt practices, and the case, as shown against *Tarte*, is as effectual as if the acts of which he has been shown to be guilty had been done by the respondent himself. If the latter had got *Allard* to do what is proven against him, no one would say for a moment that if *Allard* were guilty of a corrupt practice in carrying out directions he, the respondent, would not be responsible also. If a man engages another to commit a crime, he, as well as the active agent, is guilty.

The reason assigned by *Tarte* for hiring policemen is no justification, even if satisfactorily shown. It is in evidence that thirty men (I believe all electors) were hired as policemen, although the cases of but four of them have been investigated. If a candidate, or agent, for a real or imaginary cause, or fear of a riot, could be permitted to hire to the extent of the number just stated, he might hire and thereby bribe half a constituency. The law very properly is against such being done by the candidate or his agents. It has provided other means to secure the

peaceful conduct of an election by arming the presiding officers, when necessary, with power to employ and swear in constables and others to prevent force, violence or riot, and effectually, though impliedly, forbid such to be hired or engaged by any of the contesting parties or their agents. Besides, the evidence of the existence of any reason or necessity for employing those men is by no means satisfactory. It is all hearsay on the part of *Tarte*. The idea that violence was to be apprehended rests upon nothing in the shape of any threat or any overt act of the opposite party. No document was produced by *Tarte* to show that any such threat had been made in *Quebec*, or in any other place, to induce the belief that any body of men were going from there to commit violence. None went, and no riot or disturbance took place. How such defective and objectionable evidence as the record shows was admitted I cannot understand. I feel bound to declare that, under the law and evidence, *Allard* and *Tarte* were both guilty of corrupt practices in hiring the four men above named, and that as *Tarte* was the acknowledged agent of the respondent, his election is therefore void.

The other case is that preferred against the respondent himself in attempting to bribe *Thomas Lapointe* by an advantageous offer to him accompanied by a threat. It is shown that *Lapointe* intended to and did support the appellant, and the object alleged was to induce him to vote for the respondent. The respondent is alleged to have made the attempt charged at *Lapointe's* house. The charge was proved by *Lapointe* who says no one else was present. The respondent contradicted him, and says in addition that he was not at his (*Lapointe's*) house during that election, but during one some months previous. *Lapointe* is sustained by two witnesses as to the fact that the respondent was in his house during the election in question. *Ferdinand Desmeule* says he

1881
CIMON
v.
PERRAULT.
Henry, J.

was with respondent at *Lapointe's* house at the previous election, but does not to my mind contradict *Lapointe* and the two other witnesses. There are, then, three witnesses who contradict the respondent, and sufficiently so in my mind to sustain the charge. The learned judge, however, decided in favor of the respondent, and I cannot, without some doubt, say he was so far wrong that I would be justified in reversing his decision. The respondent has contradicted the statement of *Lapointe* as to the offer, and, as the disqualification of a member or candidate for so long a period is a serious penalty which should not be inflicted when any reasonable doubt exists, I feel bound, under all circumstances, to confirm the finding, on this charge, of the learned judge. I think the evidence in such cases, as in criminal prosecutions, should leave no reasonable doubt of the guilt of the party charged, either as to his acts or the object of them.

I think it right to add that the evidence shows other pretty strong cases of bribery against *Tarte*, but I have not considered it necessary to make special references to them.

For the reasons given, I think the appeal should be allowed with costs.

GWYNNE, J.:—

If there are any cases in which more than in others we should inflexibly adhere to the rule that we should not in appeal reverse upon mere matters of fact the judgment of the judge who tries the cause, having himself heard all the evidence, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong but is erroneous, they are these election cases, in which so much depends upon the manner in which the witnesses give their evidence, and upon the degree of credit to

be attached to them respectively. A judge sitting in appeal, not having before him the demeanor which the judge who tried the petition had, assumes a grave responsibility, and indeed, as it seems to me, exceeds the legitimate functions of an appellate tribunal when he pronounces the judgment of the judge of first instance in such cases to be erroneous upon anything short of the most unhesitating conviction.

Proceeding upon this principle, as I consider to be my duty, I am not prepared to differ with the findings, upon mere matters of fact, of the learned judge who tried the petition in this case. It is, however, the privilege and the duty of this court to question the conclusions, whether of fact or of law drawn by him from facts in evidence as to which there is no dispute, as to the agency of *Pamphile Allard*, upon the question arising whether or not the respondent is to be held responsible for certain acts of *Allard* which the learned judge has found to have been corrupt.

The learned judge has found, as matter of fact, that money was paid corruptly by *Allard* to one *Bouchard*, one *Boivin* and two persons named *Gagnon*, who were voters and who voted at the election. I confess that upon the evidence, unless we do violence to common sense, and close our eyes to the inferences which men of ordinary understanding would naturally, and which the persons to whom the money was paid did, draw, it appears to me to be impossible to come to any other conclusion than that these payments were bribes, thinly concealed under the pretence of the engagement of the persons to whom the money was paid as police.

There cannot be a doubt that these persons went to see *Allard* two or three days before the polling day, for the purpose of obtaining money from him for their

1881
CIMON
v.
PERRAULT.
Gwynne, J.

votes for the respondent, having been informed that he was paying money to persons to vote for the respondent. *Allard's* own account is that they came to his shop and told him they had been at the house where the appellant lodged; that on their way from there they had stopped at the house of *Joseph Lavoie*, who sent them to *Allard*, saying that he (*Allard*) had money to give them; that *Allard* replied "We do not pay any one;" *Allard* asked them if there were many people at the appellant's boarding house, to which *Jean Gagnon*, one of the four replied, "There were "scarcely any, that they were a party of children." "Stay," then said *Allard* "are you for Mr. *Perrault?*" To which *Jean Gagnon* again replied "Yes, it is true they "do not like him much and *Cimon* is not much better, "but they are good enough to vote for *Perrault;*" and thereupon they asked *Allard* if he had anything to give them, and in reply he told them that Mr. *Tarte* had given him some money to maintain the peace the day of the polling, and that they could engage themselves that day, and he admits that he paid them $2.00 each to keep order in case of a disturbance. He adds that Mr. *Tarte* had authorized him to engage men to keep order on the polling day, and that he gave to him (*Allard*) $8 or $10 for the purpose, saying at the time of giving it—"I know it is not sufficient, you will furnish "the rest yourself and I will repay you." Besides the above four, *Allard* says he thinks he engaged two others, and although he says he has a bill against Mr. *Tarte* for something over $30, he does not particularize the items. Now whether the idea of engaging men as police on polling day was or not a scheme devised by *Tarte* to cover bribes matters not, but that *Allard* was covering a bribe to these men under this thin pretext, cannot, I think, admit of a doubt in the minds of men who allow themselves to be governed by common

sense. I entirely agree, therefore, with the finding of the learned judge, that *Allard's* conduct in this matter was corrupt, but I am compelled to differ with him upon the point of *Allard's* agency and the responsibility of the respondent for his corrupt conduct. That Mr. *Tarte* was the confidential agent of the respondent, and the person managing the contest on his behalf in that part of the county is unquestionable; that *Allard* was seen in company with *Tarte* several times at his lodgings and elsewhere upon election matters; that he acted in such a manner as to be regarded by the people generally as an agent of the respondent; that he attended meetings held for respondent on several occasions, at which Mr. *Tarte* was also present, and that he had the appearance of being an agent and zealous partizan of the respondent at those meetings, and generally, is testified by Dr. *Clement* and others, and not denied; but there is no doubt that, and this appears to me to be sufficient for the purpose, Mr. *Tarte*, who was the respondent's confidential agent and manager of the contest for him, gave *Allard* $8 or $10, with instructions to engage men as police on the polling day, and authorized him to spend of his own moneys more money for the like purpose, promising to repay him what he should expend. Now, whether this engagement of police was, or not, a scheme devised by *Tarte* to cover bribes matters not, for it is plain upon the evidence that the manner of expending the money entrusted to *Allard*, and that which he was authorized to pay out of his own pocket upon the promise of repayment for the like purpose was left to his discretion, qualified only with the direction that it was to be expended in engaging men as police. *Allard*, as he himself says, expended the money given to him in the manner directed, and he exercised the discretion which was left to him in giving it to the four persons above named to secure their votes

1881
CIMON
v.
PERRAULT.
Gwynne, J.

for the respondent, that is to say, in bribes in the respondent's interest. Now, for money so expended by the person who was so far an agent of the respondent as to be entrusted with the outlay of this sum entrusted to him by the confidential manager of the respondent's election contest, to be expended at the discretion of the agent so employed as to the persons to whom it should be given, the respondent must be held responsible for the indiscretion and corrupt conduct of the person so employed to lay out money on his behalf. It is the common case of a person to whom money is entrusted to be expended in the interest of a candidate and for the promotion of his election, and whose discretion is confided in as to the manner of the outlay. I am of opinion, therefore, that upon this point the judgment of the learned judge, who tried the petition, should be reversed, and that the election should be avoided for this conduct of *Allard*, who, in the particular matter, is sufficiently proved to have been respondent's agent, so as to make the respondent's election invalid, although the respondent be not personally affected with the criminality of the agent.

As to the costs, there are so many of the cases which appear to be so very suspicious that I think there was reasonable cause for investigating them. In such cases I think, in the interest of justice, that the party whose conduct, or the conduct of whose agents, gives cause for such suspicion, should, as a general rule, pay the costs attending the investigation, although the evidence when taken falls short of convincing proof; but in view of the fact that there were very many cases urged at the trial which were abandoned before us as wholly defective in proof, I am not prepared to say that the learned judge's mode of apportioning the costs is erroneous in directing each party to pay his own costs of the *enquête*, save only as to the costs of the cases in which

the appellant should succeed, that is to say: the four cases of payment made by *Allard* above mentioned, as to which the respondent should be ordered to pay the appellant's costs in the court below as well as the costs of the appeal.

The report should, I think, be to the effect that the respondent's election is void for bribery committed by an agent of the respondent named *Pamphile Allard*, but that there is no evidence of the respondent having had knowledge of such bribery.

TASCHEREAU, J., concurred.

Appeal allowed with costs of appeal and also with costs of court below to appellant, except one-half the costs of appellant's enquête.

Solicitor for appellant: *P. Mackay.*

Solicitor for respondent: *H. Cyrias Pelletier*

THE OTTAWA AGRICULTURAL INSURANCE COMPANY..... } APPELLANTS;

AND

THOMAS SHERIDAN.....RESPONDENT.

1879
*Nov. 8.
1880
*April 10.

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

Insurance—Transfer of Insurable Interest—Art. 2482 *C. C. L. C.*

The appellants granted a fire policy to one *T.* on divers buildings and their contents for $3,280. In his written application *T.* represented that he was the owner of the premises, while he had previously sold them to *S.*, the respondent, subject to a right of redemp-

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

1879

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

tion, which right *T.*, at the time of the application, had availed himself of by paying back to *S.* a part of the money advanced, leaving still due to *S.* a sum of $1,510. Subsequent to the application, and after some correspondence, the respective interests of *T.* and *S.* in the property were fully explained to the appellants through their agents. Thereupon a transfer for—(the amount being in blank) was made to *S.* by *T.* and accepted by the appellants. The action was for $3,280, the amount of insurance on the buildings and effects.

Held,—That at the time of the application for insurance *T.* had an insurable interest in the property, and as the appellants had accepted the transfer made by *T.* to *S.*, which was intended by all parties to be for $1,510, the amount then due by *T.* to *S.*, the latter was entitled to recover the said sum of $1,510.

2. That *S.* having no insurable interest in the movables, the transfer made to him by *T.* was not sufficient to vest in him *T.'s* rights under the policy with regard to said movables (1).

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side). This was an action to recover $3,280 from the appellants, under a policy of insurance issued by them in favor of one *Thomas Thomson.*

The facts of the case, as set forth in the pleadings, are briefly as follows :—

The plaintiff's (respondent) declaration sets forth, that on or about the 25th of April, 1876, *Thomas Thomson*, of the Parish of *St. Brigide*, in the County of *Iberville*, made a contract of insurance in the said Parish of *St. Brigide*, with the defendants (appellants) to insure against fire divers buildings and their contents for a total sum of $3,280; that a policy of insurance was issued by appellants to the said *Thomas Thomson*, which covered the said buildings and effects; that on the 23rd of August, 1876, the said *Thomas Thomson* transferred to respondent the said policy of insurance and his interest therein; that the appellants accepted of this transfer; that the said buildings and effects were

(1) Art. 2482 C. C. L. C.

destroyed by fire on the 27th September, 1876; that the loss suffered by the insured, in consequence of the fire, amounted to $3,735; that respondent notified the appellants of the fire, and fyled with the company a sworn statement of the said loss.

The appellants fyled several pleas, but on this appeal relied on the third plea setting forth that *Thomson* obtained said policy of insurance on the representation that he was proprietor of the said immovable property insured, whereas, in truth, he was not the proprietor thereof, and said policy was void *ab initio*; that on or about the 25th of August, 1876, said *Thomson* transferred said policy to respondent, whom said *Thomson* represented to be the mortgagee of said property for $1,000; but, inasmuch as said policy was void *ab initio*, no interest or title was transferred to respondent; that, if said policy had any effect (which appellants denied) no interest or benefit could accrue or be transferred to respondent as regards the movables covered by said policy, inasmuch as respondent had no interest in said movables, respondent's mortgage, if any existed, applying only to the immovables, and the cash value of the immovables was not more than $900, and by the terms of said policy appellants would only be liable for two-thirds of that sum, viz., $600; that, in any event, respondent had no claim or right to recover from appellants the value of the contents of stables Nos. one and two, and that of the sewing machine mentioned in said policy, inasmuch as respondent had furnished no proofs of the contents of the said two stables, nor of the value thereof; nor of the value of the sewing machine alleged to have been destroyed by the fire in question.

The respondent replied that *Thomson*, in stating in his application that he was proprietor of the buildings insured, and that they were mortgaged for $1,000, stated what was correct; that although said *Thomson* had sold

1879

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

the property to respondent 5th Dec., 1871, he did so subject to redemption, as appeared by a *contre lettre* fyled; that he paid no rent therefor; that the transfer to respondent was made long before the fire, and with the consent of the company, and that appellants had no interest to plead that *Thomson* was not proprietor at the time the insurance was effected; that a regular claim was made out in one of the company's blanks; that this claim was correct and made in good faith; that respondent admitted that he had no right to claim for the contents of the two stables; that it was by error that a demand had been made for them in the present action, and respondent made the same admission regarding the sewing machine, excepting $5 as part of the value of it.

By the judgment of the court in the first instance, the company was condemned to pay $140, the value of a part of the movables insured, namely, $60 for a reaper and mower, and $80 for a threshing machine; this court specially holding that the insurance on the immovables was void. The reasons for so holding being "that *Thomson* must be held under his application and the policy to have so warranted that he was possessor and proprietor of the buildings insured; that so far from that condition warranted being true, he (*Thomson*) was not the owner of the property and buildings alluded to, either at the date of the insurance or of the fire, and so the policy, as regards said buildings, was by its proper conditions void; and that the company never took *Thomson* to be other than proprietor of the buildings insured, and had no knowledge before the fire of *Thomson's* sale to plaintiff.

The Court of Queen's Bench, by its judgment, held that the plaintiff (*Sheridan*) should recover for the value of the immovables, but that he had no right to recover the insurance on the movables, as he (*Sheridan*) had

no insurable interest therein. It is from this judgment of the Court of Queen's Bench that the present appeal was taken.

Mr. *Bethune*, Q. C, and Mr. *Hutchinson* for appellants:

By the written application made and signed by *Thomson*, and by the policy, any misrepresentation of facts in the application made by *Thomson* amounts to a breach of warranty, and is fatal to any claim of the insured.

That *Thomson*, in his application, misrepresented the facts, and made statements therein which were entirely untrue, is very evident. In his application he states that he is the owner of the property insured in fee simple, or in his own right, and that the property in question was mortgaged for $1,000.

[The learned counsel then contended upon the facts of the case that it was impossible to avoid the conclusion that *Thomson* was guilty of gross misrepresentation]

Then it is contended that the sale to respondent was subject to a right of redemption. The law on this point is very clear, and is laid down in Articles 1549 and 1550 C. C. L. C., which declare that the Court cannot extend the stipulated term for redemption.

As to the movables respondent had no insurable interest and cannot recover on the transfer. See Art. 2472 C. C. L. C. The learned counsel also referred to Art. 2485 and 2487 C. C. L. C.; *Hazard* v. *Agricultural Insurance Co.* (1); *Wood* on Fire Insurance (2).

Mr. *Pagnuelo*, for respondent:

Contended that there was no misrepresentation, and that the company was made aware of the real interest of both *Sheridan* and *Thomson* in the property, and

(1) 39 U. C. Q. B. 419. (2) Sec. 103.

1879

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

with this knowledge accepted the insurance and issued the policy in the form they adopted.

As to the transfer with regard to the movables, that the transfer was made as a collateral security for a debt, and that in such a case the transferee had an insurable interest in the object of the policy, and cited *White* v. *Western Insurance Co.* (1); *Troplong vo. Mandat* (2); and *Fitzgerald* v. *The Gore Mutual Insurance Co* (3).

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

RITCHIE, C J., concurred with *Fournier*, J.

STRONG, J..—

I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed for the reasons given by the Chief Justice of that Court, and also for those expressed by my brother *Fournier*, in whose judgment I concur.

FOURNIER, J:

Le 25 avril, 1876, l'appelante a émis en faveur de *Thomas Thomson* une police d'assurance au montant de $3,280, sur certaines bâtisses et leur contenu, détruits par un incendie qui a eu lieu le 27 septembre de la même année.

Du consentement de la compagnie, cette police fut ensuite transportée à l'intimé *Sheridan*, qui en a réclamé le montant par son action en cette cause.

La compagnie lui oppose pour moyens de défense:

1o. Nullité de la police, parce que le billet promissoire donné pour la prime n'avait pas été payé à son échéance.

2o. Que *Thomson* avait trompé la compagnie sur la valeur et le titre de propriété des bâtisses assurées.

(1) 22 L. C. J. 215. (2) No. 43 & No. 738.
(3) 30 U. C. Q. B. 97.

3o. Qu'il n'était pas propriétaire des bâtisses assurées en son nom.

4o. Que l'incendie des dites bâtisses avait été causé par sa négligence.

La compagnie peut, d'après ses conditions, accepter un billet promissoire pour le paiement de la prime d'assurance, mais à défaut de paiement de tel billet à son échéance, il est stipulé que la police devient caduque. Par une autre condition de la police, il est déclaré qu'il n'est pas permis aux agents de donner leur consentement à aucun transport de police ni de dispenser (*waive*) de l'exécution d'aucune stipulation ou condition y contenue. Le billet que *Thomson* avait donné pour la prime était dû depuis deux mois lorsqu'il a été payé. *Patterson*, l'agent de la compagnie à *Montréal*, en a reçu le montant sans faire aucune observation sur l'expiration du délai ni sur la condition de déchéance en pareil cas. L'argent ainsi payé a été ensuite reçu par le bureau principal de la compagnie à *Ottawa*. La compagnie n'a jamais offert de rendre ces deniers, ils sont encore dans sa caisse. Sous ces circonstances il est impossible de ne pas considérer la compagnie comme ayant donné son consentement à l'exécution d'un contrat qu'elle aurait pû considérer, il est vrai, comme ayant cessé d'exister faute de paiement dans le délai fixé. Mais pour se prévaloir de ce défaut, il était d'abord du devoir de son agent à *Montréal* de ne pas recevoir les deniers, puis lorsqu'ils furent plus tard transmis au bureau principal, la compagnie elle-même aurait dû répudier l'acceptation qui en avait été faite par son agent. Rien de cela n'a été fait. C'est avec les deniers dans ses mains que la compagnie se présente en cour pour se plaindre de n'en avoir pas été payée. Il n'est pas surprenant que cette objection ait été rejetée comme futile par les deux cours qui ont déjà été appelées à se prononcer sur cette cause.

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Fournier, J.

Lors de l'argument, cette cour a été du même avis, et c'est mon opinion que le défaut d'avoir offert de rendre les deniers aussitôt que le paiement en est parvenu à sa connaissance, doit nécessairement faire présumer le consentement de la compagnie à l'exécution du contrat d'assurance.

Quant à l'exagération de l'évaluation des propriétés, il serait injuste d'en rendre *Thomson* responsable, car elle n'a pas été faite par lui, mais par *Valois*, l'agent de la compagnie. Il était tout naturel pour lui de croire qu'une évaluation ainsi faite serait de nature à donner plus de satisfaction à la compagnie que celle qu'il pourrait faire lui-même. Aussi, s'est il contenté d'adopter celle qui a été faite par *Valois*. Il y a eu erreur dans cette évaluation, mais il n'y a pas eu dessein de tromper. La compagnie ne se plaint pas qu'il y a eu pour cela une entente frauduleuse entre *Thomson* et *Valois*, et elle n'a pas tenté d'en faire la preuve.

L'objection la plus sérieuse est celle faite au sujet du droit de propriété dans les bâtisses assurées. Dans son application pour obtenir une police d'assurance, *Thomson* s'est déclaré le propriétaire des immeubles y désignés, et il a ajouté qu'ils étaient affectés par hypothèque au montant de $1,000. C'est sur ces déclarations que la compagnie considère fausses et comme ayant été faites dans le but de la tromper, qu'elle s'appuie principalement pour refuser le paiement réclamé.

Ces déclarations ne sont certainement pas exactes; mais l'explication que *Thomson* en a donnée fait voir que s'il était en erreur sur la nature de ses droits concernant les immeubles en question, il n'agissait nullement avec l'intention de commettre une fraude au détriment de la compagnie. Voici, d'après les faits en preuve, quelle était sa position :—

En 1871, *Thomson*, se trouvant endetté envers plu-

sieurs personnes, et, désirant les payer toutes pour n'avoir plus affaire qu'à un seul créancier, fit avec l'Intimé *Sheridan* un arrangement par lequel celui-ci s'engagea d'avancer les deniers nécessaires pour l'exécution de ce projet. Les parties donnèrent à cette convention la forme d'un acte de vente par lequel *Thomson* vendait à *Sheridan* (5 décembre 1878) sa propriété de neuf arpents de front sur trente de profondeur pour $4,000 que ce dernier devait, dans le délai de trois ans employer à payer les hypothèques affectant la propriété vendue,—tenir compte des paiements faits et remettre la balance au vendeur. *Sheridan* ne devait prendre possession que d'une partie de la propriété vendue, savoir : les deux arpents adjoignant la propriété de *F. X. Paquet*. Le vendeur *Thomson* devait demeurer et est de fait toujours demeuré en possession du reste de la propriété, à condition de payer un loyer de $400 par année, et de remplir certaines autres charges.

Le même jour *Sheridan* signa une contre-lettre par laquelle, sur remboursement de ses avances, dans le délai de trois ans, il s'obligeait à revendre à *Thomson* la propriété achetée comme on vient de le voir.

Le loyer stipulé n'a jamais été payé, et *Thomson* a continué de jouir de sa propriété comme auparavant. Quelques jours seulement après cette vente, le 11 novembre 1871, *Sheridan* a revendu, pour $2,200, deux arpents sur trente, c'est-à-dire moins du quart de la propriété pour le total de laquelle il avait promis de payer $4,000. Par cette vente, *Sheridan* touchait immédiatement $1,200 et devait recevoir la balance de $1,000 dans un court délai. Il rentrait ainsi très promptement dans plus de la moitié des avances qu'il avait promis de faire. D'autres remboursements furent faits par *Thomson* qui, à l'époque de son application ne devait plus à *Sheridan* que $1,500.

Bien que le délai de trois ans fixé pour le rachat fût

1880
THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.
Fournier, J.

alors expiré, *Sheridan* n'ayant manifesté aucune intention de s'en tenir à la lettre du contrat de vente, ayant au contraire laissé *Thomson* en jouissance comme auparavant, il n'est pas surprenant que celui-ci se soit, lors de son application, cru justifiable de se considérer comme le propriétaire. L'acceptation que *Sheridan* a faite plus tard d'un transport de partie de la police d'assurance où *Thomson* se déclarait propriétaire, prouve bien que telle était aussi sa manière de voir à cet égard. Cependant *Thomson* et son fils déclarent positivement dans leur témoignage qu'ils ont informé l'agent *Valois* que le titre de propriété était au nom de *Sheridan*, comme sûreté du paiement d'une somme d'environ $1,000. Il paraît d'après la preuve qu'il y a eu entre eux un malentendu à ce sujet. Cela s'explique facilement par le fait que *Thomson* comprend peu le français et que *Valois* parle peu la langue anglaise. Ce dernier ayant demandé le montant exact de la créance de *Sheridan*, *Thomson* lui déclara qu'il n'était pas alors en état de le lui dire exactement et demanda à retarder l'assurance à un autre jour afin de s'en assurer. Sur cette réponse *Valois* lui dit que ce n'était pas nécessaire, et il compléta lui-même l'application. C'est sous ces circonstances que la déclaration de *Thomson* a été faite et que le montant dû à *Sheridan* a été porté à $1,000, au lieu de $1,500 qu'il était réellement.

Si les choses en étaient restées là, on pourrait dire, sans toutefois pouvoir en rejeter la responsabilité morale sur *Thomson*, que la compagnie a été induite en erreur par ce malentendu et qu'elle n'est par conséquent pas tenue d'exécuter un contrat fondé sur l'erreur. Mais telle n'est pas sa position. L'erreur commise par l'entrée du nom de *Thomson* au lieu de celui de *Sheridan* ayant été découverte, elle fut rectifiée lors du transport de la police que *Thomson* a fait à *Sheridan*,

du consentement de la compagnie. La véritable position des parties concernant leurs droits respectifs dans la propriété en question est exposée dans tous ses détai's dans la correspondance échangée entre *Valois* et *Patterson*, l'agent général de la compagnie, à propos de ce transport Cette correspondance étant de la plus haute importance pour la décision de cette cause, je crois devoir en donner l'analyse aussi correcte que concise qui se trouve dans les notes de *Sir A. A. Dorion.*

As regards the ownership of the property, it is true that in his original application, *Thomson* represented that he was the owner of the premises which he sought to insure, while he had previously sold them to the appellant subject to a right of redemption.

This was evidently the result of a misunderstanding, and the respective interests of *Thomson* and of the appellant in the property in question were fully explained to the Company through its agents, before the policy was transferred, and the transfer was accepted after all the circumstances had been fully disclosed. *Valois*, in a letter of the 8th August, 1876, wrote to *Patterson*, the general agent of the Company at *Montreal*, that the property belonged to *Sheridan*, and that *Thomson* wanted to know if, in case of fire, he would be entitled to receive the insurance without this being mentioned in the policy.

On the 14th of the same month, he again writes to *Patterson* that *Thomson* was not the proprietor of the premises, at the time the insurance was effected; that in order to pay his debts, *Thomson* had previously transferred his property to the appellant, on condition that he would get it back on payment of what he owed him; that he had already paid a large amount and expected to have his property returned to him. In this letter, *Valois* says: "Now these two gentlemen" (alluding to *Thomson* and to *Sheridan*), "wish to have their property insured – is it necessary to make two policies, one for the buildings in the name of *Sheridan*, and one for the contents in the name of *Thomson*, or will one policy containing all the facts be sufficient? do what you think proper."

Patterson answers on the 16th: "If I understand well the position of this matter, *Thomson* is the owner of the real estate, but he owes something to Mr. *Sheridan*; if it is so, the policy is good as it is, excepted that to enable *Sheridan* to claim the insurance the policy must be transferred to him by *Thomson*."

After indicating how the transfer is to be made, *Patterson* adds;

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Fournier, J.

"This plan dispenses with the necessity of making two policies, it will save expenses. I believe it is all that is required."

Finally, *Valois* writes to *Patterson*, on the 22nd August: "I return the policy of Mr. *Thomson* after getting him to sign, and having signed myself; the sum which is to be transferred is one thousand, five hundred and ten dollars ($1,510), being the amount for which the buildings are insured."

It was after this correspondence had taken place, that the transfer was made by *Thomson* and accepted by the Company. The intention of both *Thomson* and *Sheridan* on the one part, and of *Patterson* acting for the Company on the other, was unmistakably to insure *Sheridan's* interest in the property described, and if after the explicit statement made by *Valois*, that *Sheridan* owned the buildings, and *Thomson* the chattel property they contained, the agent of the Company made a mistake by causing a transfer to be made by *Thomson* to the appellant, instead of issuing a new policy to cover *Sheridan's* interest in the buildings, the latter should certainly not suffer, as the Company cannot take advantage of its own agent to resist the claim of the appellant. It is to be noticed that whether the property was insured in the name of *Thomson* or in that of *Sheridan* made no difference in the risk, since the property was all the time occupied by *Thomson*.

Il est évident d'après cette correspondance que c'était l'intention des parties d'assurer les intérêts de *Sheridan* dans la propriété en question. Si la chose n'a pas été faite comme elle aurait dû l'être au moyen de deux polices, une pour *Thomson* et une pour *Sheridan*, la faute n'en peut être attribuée qu'à l'agent de la compagnie qui n'a pas donné aux faits qui lui ont été communiqués leur véritable signification. Adoptant sur ce point le raisonnement de la Cour du Banc de la Reine, je crois qu'il serait injuste de rendre *Sheridan* responsable de l'erreur de la compagnie. C'est à cette dernière à en supporter les conséquences, puisque c'est après avoir été spécialement informée de tous ces faits qu'elle a accepté un transport de la police dans laquelle *Thomson* est désigné comme le propriétaire. Pour cette raison le jugement accordant à l'intimé $1,510, balance qui lui était due lors du transport, devrait être confirmé,

Malheureusement pour *Thomson* il s'est glissé dans le transport de la police une autre erreur qui, suivant le jugement de la Cour du Banc de la Reine, doit être fatale à ses prétentions de retirer sous le nom de *Sheridan* le surplus de la somme transportée à ce dernier, Cette erreur, aussi commise par l'agent de la compagnie, consiste dans l'oubli d'avoir inséré dans le transport la somme pour laquelle la compagnie donnait son consentement, ce qui a l'effet de constituer *Sheridan* cessionnaire non seulement de l'assurance sur les bâtisses, mais aussi de celle sur les meubles de *Thomson*. La correspondance citée plus haut démontre à l'évidence que l'intention de toute les parties était de ne transporter à *Sheridan* qu'un montant suffisant pour garantir sa créance. En conséquence de cette omission le transport se trouve être de tous les intérêts de *Thomson* dans la police. Ce n'était certainement pas son intention.

D'ailleurs *Sheridan* n'avait point dans les meubles assurés qui étaient toujours restés la propriété de *Thomson*, d'autre intérêt que celui d'un créancier ordinaire, dans le cas où la balance qui lui était due n'aurait pû être payée en vertu de son transport. Il pouvait dans ce cas exercer son action personnelle sur ces meubles comme sur tous les autres biens qui restaient encore à *Thomson*, ou faire saisir entre les mains de la compagnie ce qu'elle aurait pû devoir à *Thomson* en vertu de cette police. Mais cet intérêt n'est pas suffisant pour rendre légale l'acceptation d'un transport d'assurance. Il faut, d'après l'art. 2482 C. C., pour qu'un transport soit valable que la personne à qui il est fait ait un intérêt dans la chose assurée, c'est-à-dire que dans le cas actuel, pour la validité du transport, il aurait fallu faire voir que *Sheridan* avait un intérêt dans les meubles en question, comme propriétaire, gagiste ou usufruitier, etc. A défaut d'un intérêt

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Fournier, J.

de ce genre, le transport se trouve nul d'après l'article du code cité plus haut, et cette cour doit le considérer comme tel.

La dernière objection, celle par laquelle *Thomson* a été accusé d'avoir causé l'incendie par sa négligence, a été unanimement rejetée par la Cour du Banc de la Reine. La preuve établit que le 27 septembre, jour de l'incendie, *Thomson* et sa femme sont partis dans l'après-midi, pour aller dans une paroisse voisine visiter un de leurs enfants. Après leur départ les deux fils de *Thomson* et sa fille ont aussi laissé la maison vers 6 heures du soir pour aller passer la veillée chez des amis. Au moment de leur départ pour le retour ils s'aperçurent que la maison et les autres bâtisses étaient en feu. Lorsqu'ils arrivèrent, elles étaient déjà à moitié détruites.

Il n'y avait certainement rien d'extraordinaire et d'inusité dans l'absence de *Thomson* et sa famille. Ces courtes absences d'une famille entière, à la campagne sont assez fréquentes. Celle qui a eu lieu dans ce cas-ci ne peut établir contre *Thomson* le fait d'une négligence qui le rendrait responsable de l'incendie, et encore moins créer une présomption qu'il en soit l'auteur, puisque le plaidoyer n'a pas porté contre lui cette grave accusation.

Il y a bien quelques circonstances qui portent à croire que le feu est l'œuvre d'un incendiaire, mais rien dans la preuve n'implique *Thomson* comme y ayant eu la moindre participation. Telle a été l'opinion unanime de la Cour du Banc de la Reine, et c'est aussi celle que j'ai adoptée après un examen sérieux de la preuve.

HENRY, J.:—

This is an action on a policy of Insurance for loss and damage by fire to a dwelling house, a barn and

shed, with their contents, insured by a person named *Thomson*, who, subsequently, with the assent of the appellants company, assigned it to the respondent, being, as he was shown to have been, interested in the real estate covered by it.

Before determining the legal questions involved, it is necessary to look at the facts as they existed before the policy sued on issued.

On the 25th of April, 1876, *Thomson* signed a written application in which the property is described. A number of questions submitted by the company are printed in and form part of the application; but it is only necessary to refer specifically to two of them. One is: "Does the applicant possess in fee simple, or in his own right, and if not, who possesses? The reply to it was "Yes." The other is: "State if is mortgaged or otherwise affected, and if so, how, and for what amount?" The answer is "$1,000."

It thus appears that although the first answer was incorrect, the subsequent statement that the property was mortgaged or otherwise encumbered, effectually corrected the first and clearly showed the state of the title, and that the party intended no misrepresentation. He could not, therefore be said, as alleged in some of the pleas, to have falsely and fraudently made the representations by which it is sought to avoid the policy.

We find, however, that *Thomson*, in August following, fearing that the transfer to the respondent might affect the insurance, applied to *Valois*, the local agent; and, after giving him full knowledge of the transfer and its objects, got him to communicate the same, which he did, to *Patterson*, the general agent at *Montreal*. A correspondence, commenced by a letter from *Valois* to *Patterson*, of the 8th August, and which terminated on the 29th of the same month, shows that the relative position of the respondent and *Thomson*

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Henry, J.

in regard to the property was fully made known to *Patterson*. On the 14th *Valois* wrote *Patterson*, fully explaining the matter. On the 16th *Patterson* acknowledged the receipt of the letter, and his letter shows he understood the nature of the transfer, as it came out in evidence, and says:

If that is the case, then the policy is all right as it is, except that Mr. *Sheridan* may be able to claim the insurance the policy must be transferred and made over to him by Mr. *Thomson*. I return you the policy, having made up another because the other did not look right. Please destroy the old one so soon as you shall be satisfied that the new one is similar. You will make Mr. *Thomson* sign his name in the interior of the policy opposite and return it to me with fifty cents for the transport. I shall then enter it in my books, and I'll send it to you immediately. This plan will obviate the necessity of making two policies, and will save expense. I believe that is all that is required. Please collect the amount of Mr. *Thomson's* note, and I'll send him his.

On the 22nd, *Valois* wrote *Patterson*:

I return Mr. *Thomson's* policy, which we have both signed. The sum to be made over to Mr. *Thomas Sheridan* is fifteen hundred and ten dollars, that is to say, the amount for which the buildings are insured.

On the 29th *Patterson* wrote again to *Valois*:

I send you this day Mr. *Thomson's* policy transferred.

Thus, then, the old policy was cancelled in consequence of the correspondence just referred to, and a new one issued some time between the 8th and 16th of August. It is, however, dated the same as the previous one—the 25th of April, 1876. The issuing of that second policy is therefore the act, not merely of the two agents, but that of the company itself by the signatures of its president and secretary, countersigned by "*H. Patterson*, general agent at *Montreal*," and under the corporate seal. The consent of the company to the transfer, dated 25th August, is signed by the secretary of the company.

The insured in the early part of that month, through

the local agent, asked that "General Manager," if under the circumstances two policies were necessary? (one for *Thomson* to cover the movables, the other to *Sheridan* to cover the buildings.) He had paid for a full insurance on both, and wished to have no doubt of all being in order. *Patterson* makes out a new policy and tells him that by transferring the interest in the policy which covered the buildings it would be all right; that *Sheridan* would then be insured as to the latter and *Thomson* as to the chattel property. A loss as to both takes place. The company refused to pay either, and charge *Thomson* with false and fraudulent representations, and invoke in their attempt to evade payment, a clause in the policy providing that "agents of the company are not permitted to give the consent of the company to assignments of policies, or to waive any stipulation or condition contained therein."

The general agent was fully informed of everything before the issue of the second policy, and through his management and direction it was issued by the company, and intended by all parties to cover the buildings for *Sheridan* and the movables for *Thomson*. The respondent does not, however, claim by virtue of an assignment of the policy made by an agent or through any waiver since the policy issued. The provision of the policy just noticed does not therefore apply.

Conditions in policies are intended to prevent injustice to companies by false and fraudulent representations, but not to enable them to act dishonestly, dishonorably, or fraudulently towards others whose money they have received, and who are by the acts of their authorized agents lulled into security, to find subsequently the company endeavor to repudiate the acts of those who are held out by them, not as mere local, but general agents. If any wrong was in this case done to the company by their general agent withholding the

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Henry, J.

information he had obtained before the second policy was issued, it certainly would be most unjust, and contrary to all legal and equitable principles, to make the insured to suffer. It was the duty of those at the head office to know, and they must be presumed to have known, everything, before they signed the second policy, and if, instead of which, they relied on the general agent and accepted his suggestions, they virtually adopted his acts and must be held bound by them.

In all cases, except those to which I have referred as a condition of the policy, a general agent has implied authority to act for and bind his principal, so far as is necessary to the performance of his duties, and the principal is no less bound by his acts than those with whom on behalf of his principal he enters into agreements. His acts and knowledge are necessarily in such cases deemed to be the acts and knowlege of his principal. *Patterson* was fully authorized as the general agent of the company to receive applications and represent them in every respect, at all events up to the issue of the policy. Notice to him in respect of the property and otherwise, is in law notice to the company. Local agents are considered to occupy a more subordinate position, and their powers are generally more limited. To bind a company for all the acts of local agents, often of little experience, in every hamlet or village, would be widely different from binding them for the acts and dealings of a general agent selected on account of his special business knowledge. The latter often act under powers of attorney and issue policies without consulting the head office, and in other cases policies are issued to them in blank fully executed by officers of the company, and requiring only to be filled up and countersigned by the agent. In the latter cases, also, policies are issued without consulting the head office. In such cases the agent is virtually the company. I presume,

as the policy in this case is countersigned by *Patterson*, as such general manager, he had authority to issue policies in that way. I draw this conclusion from his letters to *Valois*, in which he does not speak of referring the matter to the officers of the company, but in such a way as to shew he alone could deal with the matter. To contend, therefore, that a party dealing with the company through the agent, should duplicate his negotiations by directly communicating with the head office would, in my opinion, be simply absurd. The notice, then, to the general agent binds the company, and the policy being issued after that notice, no defence can be set up for any representation in the application. That under the circumstances the company should endeavor to evade responsibility for the loss by pleading as they have done in this respect is, I think, not justifiable. To give legal effect to such pleading would be, I think, subversive of every legal principle. With a full knowledge of the transfer to the respondent the company not only admits *Thomson's* insurable interest, but with that same knowledge, suggesting and approving of the assignment of the interest in the policy which covered the buildings to *Sheridan*, they would, I think, be estopped from setting up against *Sheridan* the absence of the insurable interest in *Thomson* if he had none. They substantially say to *Sheridan*: "We know your relations with *Thomson* as to the property, and whether his right to insure was good or not, which question we waive, if you get an assigment of his interest in the buildings, we will consent to it as provided in the policy, and in case of loss will pay you." The assignment was made and the company having consented to it, their compact was from that with *Sheridan*, and they are estopped from setting up the absence of the insurable interest in *Thomson*.

Independently, however, of that position, I think

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Henry, J.

Thomson had all along an insurable interest. The transfer to *Sheridan*, although on its face absolute and final, was nevertheless agreed upon only as lien or mortgage, as by the declaration in writing of the latter, signed at the same time, appears. The time for redemption as stated in the latter was three years, and possibly *Sheridan* might at the end of that time have refused to permit redemption by *Thomson*, but it is plain that the transfer was intended by the parties to it to be only a security for monies to be subsequently paid and advanced for *Thomson*, which *Thomson* was to repay with interest. It appears that up to the time of the issuing of the second policy, the same relations existed between *Sheridan* and *Thomson*, as it is shown that the one had been paying off the advances and the other receiving them. The understanding when the assignment was made, was that *Sheridan* was, in case of loss, to recover the insurance on the buildings as the assignee of *Thomson*, then acknowledged and understood to have the beneficial interest in the policy, and *Sheridan*, in accepting it, admitted the position. He would therefore be held to receive the amount of the policy so assigned to the credit of *Thomson* in repayment of his advances. If by the receipt of direct payments by *Sheridan*, and the recovery of the amount of the policy so assigned to him, he should be paid in full, he would be held bound to reconvey to *Thomson*. *Thomson* had therefore a good insurable interest as long as the relation I have stated remained understood and acknowledged by and between him and *Sheridan*, and the absolute nature of the transfer could not be insisted on by outside parties. That relation existed when the application was made and has since continued. I am of the opinion that had the policy not been assigned, *Thomson* could himself have recovered for the loss on the buildings.

There is one feature in the case to which it is desir-

able to refer. *Thomson* became by lease the tenant of *Sheridan*, but the holding under it did not in my view in any way affect the nature of the transaction or the legal right of *Thomson* to redeem the property. The understanding, or rather agreement, was that *Thomson* was not to give up possession of the property, but to pay in the shape of rent $400 a year. How that rent, if paid, would have been credited to him by *Sheridan* is not stated, but as I understand the agreement, he would be credited, as against the advances and interest and costs, any sums paid by him on a final account between the parties. That would be in accordance with the memorandum or declaration of trust signed by *Sheridan*, in which, on payment of "all moneys, interests and costs, &c.," by him "advanced or to be advanced and paid under the terms and conditions of a deed of sale passed between us this day," he engaged "to remit, return and re-sell unto him the property by me purchased under said deed." The execution of the lease by which *Thomson* became for the time tenant to *Sheridan* did not affect the right of redemption of the former. His position, as communicated to and considered by *Patterson*, was that of a mortgagor.

An objection to the whole action is taken under a clause of the policy which provides that "in case of loss the assured shall give immediate notice thereof to the company, stating the number of the policy and name of the agent, and shall deliver to the company as particular an account or statement of such loss or damage as the nature of the case will admit, and shall sign the same and verify by oath or affirmation, &c." The issue raised by the plea is not one applicable to the provision or condition of the policy just referred to. It alleges "that said *Thomson* has violated the terms and conditions contained in said policy, inasmuch as he has not delivered to said defendant a particular account or

1880

THE OTTAWA AGRICULTURAL INS. CO. v. SHERIDAN.

Henry, J.

statement of the loss or damage which he alleges he suffered." The plea therefore raises an issue not justified by the condition. He (*Thomson*) did not bind himself, as a condition precedent to his right to recover, to furnish in any event or under all circumstances any "particular account or statement" of loss, but only such an one as the case admitted of, and the plea does not allege or aver that the case admitted of a more particular account. He made an account, attested to in general terms, and, if objected to, the plea should have alleged that it was not as particular as the nature of the case admitted. Without such an allegation in the plea, no proof could be regularly admitted that a more particular account could have been given. It is not, however, contended that the plea applies to the buildings, or that, if it did, any more particular account was necessary. There are many cases in which anything more than a general estimate of loss could not be be given, and in others where only a partially particular account could be made out, and therefore in such cases the party can be called upon to furnish only such information as is in his power. The plea for the reasons stated, in my opinion, is no defence to the action.

There are one or two minor points which I have not thought it necessary to refer to, further than to say that, in my judgment, they don't affect the right of the respondent to recover according to the judgment of the court appealed from to this court. I think the appeal should be dismissed and the judgment referred to affirmed with costs.

TASCHEREAU, J., concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Hutchinson & Walker.*

Solicitors for respondent: *Duhamel, Pagnuelo & Rainville.*

EPHRAIM ERB *et al.*.....APPELLANTS; 1881

*March 3.
*June 10.

AND

THE GREAT WESTERN RAILWAY COMPANY OF CANADA... ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Shipping note—Fraudulent receipt of agent—Liability of company.

C., freight agent of respondents at *Chatham*, and a partner in the firm of *B. & Co.*, caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favor of *B. & Co.*, for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from *B. & Co.* the flour addressed to the appellants, and were attached to drafts drawn by *B. & Co.*, and accepted by appellants. *C.* received the proceeds of the drafts and absconded In an action to recover the amount of the drafts:

Held (*Fournier* and *Henry*, J.J., dissenting), that the act of *C.* in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable.

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a judgment of the Court of Queen's Bench, setting aside a verdict obtained by the plaintiffs and ordering a non-suit or verdict to be entered for the defendants.

This was an action brought by the appellants (plaintiffs), commission merchants at *St. John, N. B.*, against the respondents to recover the value of certain drafts made by *T. Brown & Co.*, dealers in flour at *Chatham, Ontario*, which were accepted by them and

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

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
CO.

afterwards paid, and to which were attached bills of lading or shipping notes signed by one *W. C. Carruthers*, freight agent of the respondents at *Chatham, Ont.*, acknowledging that the company had received from *T. Brown & Co.* 1,200 barrels of flour.

The declaration, pleadings and facts are fully set out in the judgment of Sir *W. J. Ritchie*, C. J., hereinafter given.

The cause was tried before Mr. Justice *Wilson*, at the *Toronto* Assizes, without a jury, when a verdict was rendered for the plaintiffs for $5,524.64.

The respondents afterwards moved against the verdict in the Court of Queen's Bench, and Justices *Morrison* and *Wilson* concurred in making absolute a rule to enter a verdict for the defendants, *Harrison*, C. J., dissenting.

The cause was then carried to the Court of Appeal, the Judges of which were equally divided, and the judgment of the Court of Queen's Bench was affirmed.

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

Upon the faith of the bills of lading signed by the appointed agent of the respondents, the appellants in the ordinary course of their business, without any notice of the non-receipt of the flour by the respondents, advanced their money, and we now ask the Court to determine whether the loss is to be borne by the appellants or the respondents.

The act of *Carruthers* was within the scope of his authority.

The respondents appointed *Carruthers* as their agent, and furnished him with blank forms of bills of lading, and empowered him to sign these bills of lading. A large part of the commerce of the country is carried on by means of these instruments, and whenever bills of lading are signed, these documents are accepted by

banks, and advances made upon the faith that the goods referred to therein have been actually shipped. The respondents set up that the goods were never received by them, and therefore that they are not liable, and rely upon the authority of the case of *Grant* v. *Norway* (1), but it is submitted that that case is not parallel with this. It did not appear there, as it does here, that it was known to the owner of the vessel, as it must be taken to have been known to the respondents, that advances were usually made upon the faith of the bills of lading. It turned upon general usage known to all persons dealing with masters of vessels. The point in question in *Grant* v. *Norway* does not seem to have been considered in *England* since the date of that judgment in connection with the signing of a bill of lading by a station agent.

The most apposite case I can find is that of *Swire* v. *Francis* (2), decided since the judgment of the Court of Queen's Bench. The only difference is that the defendants were a firm instead of a corporation, and it would appear that every element which is here was in the case of *Swire*. That it is a corporation in this case makes no difference. The tendency of the modern decisions is to increase the liability of corporations in just such matters as these. *Cooley* on Torts (3).

The general rule of law now acted upon in almost all cases is that where one of two innocent persons must bear a loss, that one of them who could, by care, have avoided the loss, should bear it, and it is submitted that the company could, by a system of checking, have guarded against this representation having been made; or could have taken security against the fraudulent deeds of their agent.

In the State of *New York* the Court of Appeal of that

(1) 10 C. B. 665. (2) 3 App. Cases 106.
(3) P. 120-122.

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
CO.

State has refused to follow the judgment in *Grant* v. *Norway*, because it was felt that the meaning was not the same as applied to bills of lading signed by the agents of railway companies. See *Armour* v. *Michigan Central Ry. Co.* (1).

Then again the same point has been up in *Merchants' Bank* v. *State Bank* (2), where all cases are reviewed.

This must be treated as a case of apparent authority. See *Evans* on Principal and Agent (3).

The respondents contend that the appellants had no right to rely upon the representation of the receipt of the goods, and that they ought to have inquired whether the goods had actually been received. The appellants submit that having regard to the fact that *Carruthers* was the chief agent of the defendants at *Chatham* station, at which place enquiry would have to be made, such enquiry would have been useless, and that in any event the appellants, who carried on their business at *St. John, N. B.*, could not be expected to make any enquiry as to the shipment. The railway companies in fact do their most profitable business in this way, and no one will suggest that the directors are ignorant of the use made of the bills of lading signed by their agents. A corporate body may bind themselves without the solemnity of a seal, that is the universal way in which bills are authenticated, and such documents must be held as binding as if they had affixed to them the corporate seal.

We complain that the respondents have armed their agent with the power to practice this fraud on us, and therefore they are responsible.

The appellants also submit that the respondents are estopped by the statute of the Legislature of *Ontario*, 33 *Vic.*, ch. 19, from disputing the receipt of the goods.

(1) 22 American Rep. 603. (2) 10 Wall. 604.

(1) P. 140.

Mr. *Robinson*, Q. C., for Respondents:

No doubt where a person has put another in such a position as to allow him to commit a fraud he should suffer. But to make a railway company liable under such circumstances as these would be to throw upon them a liability which would be ruinous, and certainly was never contemplated. Now, the cases show that an agent must be doing something within the scope of his authority and within the class of business he is authorized to transact. The class of business Mr. *Carruthers* was authorized to transact was to receive goods for transport, and to give bills of lading for such goods, and his authority did not extend to giving false and fraudulent receipts as for goods received, when, in fact, none have been received. See *Tobin* v. *The Queen* (1).

Then, it is said that this bill of lading, signed by a clerk of *Carruthers* as agent, is the same as if it had been a document under seal. If it was it would be the act of the company, but it is not. Then the whole matter is reduced to this, is the act of *Carruthers* the act of the company? I refer to *Brice* on *ultra vires* (2) to show that the powers of an agent are not even so wide as those of the corporation; in other words, an agent is not an *alter ego* of the corporation, and that for the simple reason that some things can be done but by the corporation. Then, it has been contended that the statute assists the appellants. The statute only professes to deal with documents signed by the company. If the company did not sign, then there is an end of it.

Then, as to the right to recover under the peculiar circumstances of the case. When the bills of lading were signed, no harm had been done. Then, when was the overt act of fraud committed? As the Chief Justice puts it:

(1) 6 C. B. N. S. 310, 349. (2) Ed. 1880, p. 322.

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.

"It is not a little curious to notice precisely what *Carruthers* did in this matter, and to endeavor to fix the point at which his wrong doing commenced. In procuring *Neville* to sign the bills of lading or receipts, he was not actually doing more than wasting so many of the company's forms. It is true that he was then starting the train of circumstances which was to end in the plaintiffs being defrauded. But if he had repented before acting, or if the bank had declined to cash his drafts no mischief would have been done. The first overt act of fraud was the use of receipts to obtain money from the bank. Now, the manager knew perfectly well that *Carruthers* was to all intents *T. Brown & Co.* Therefore, when he accepted these receipts he knew that they represented nothing more than that *Carruthers*, the miller, had delivered to *Carruthers*, the railway agent, a certain quantity of flour. In what capacity was *Carruthers* acting when he first committed the direct fraud, which led to the plaintiffs' injury? Certainly as *T. Brown & Co.* and not as the defendants' agent. I have grave doubts whether the bank could possibly in this state of facts, and apart from any other objection, have fastened any responsibility upon the defendants, and if they simply passed on the representation to the plaintiffs it may be that they occupy no better position."

Respondents are not estopped from stating the true facts, and saying that when *Carruthers*, not as their agent, but in fraud of them and for his own benefit, signed or procured to be signed certain fictitious receipts, he was not acting as their agent but for himself and for his own benefit and entirely outside of the scope of any employment which had been entrusted to him. He himself drew for his own use the money raised on the bills or drafts, and no benefit directly or indirectly accrued to the defendants, nor was anything

done by them to adopt or sanction what he had done.

It may be said that *Carruthers* knew that the receipt he was signing would be used in the bank and money advanced upon it. But the fraudulent intention of *Carruthers*, to make that dishonest use of the receipt, cannot be called the act or knowledge of the defendants, nor can it be called a misrepresentation by the defendants.

The defendants submit that the documents issued by them as bills of lading or shipping receipts are not intended by them to have the two-fold character assigned to them by Mr. Justice *Patterson*, in his judgment. They are intended to be a receipt to the shipper. They are not intended by them to be used as a representation to the consignees or the banker. *Grant* v. *Norway* (1), *Coleman* v. *Riches* (2) and *Hubbersty* v. *Ward* (3) ought to decide this case. The defendants referred also to *Baltimore and Ohio Ry. Co.* v. *Wickens* (4); *Schooner Freeman* v. *Buckingham* (5).

Sir W. J. RITCHIE, C. J.:—

The plaintiffs on the argument did not rely on the first six counts of the declaration which were based on contract, but relied on the other counts, which were on several bills of lading, and were substantially the same.

The seventh count sets out that plaintiffs were commission merchants doing business at *St. John, N. B.*, and were in course of their business accustomed to make advances upon consignments of flour consigned to them upon production to them of bills of lading or shipping receipts of defendants for such flour, such advances to be made by plaintiffs accepting bills of exchange drawn upon them on account of the price of

(1) 10 C. B. 665.
(2) 16 C. B. 104.
(3) 8 Exch. 330.
(4) 22 American Rep. 26.
(5) 18 Howard 132.

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.
Ritchie, C.J.

such flour with such bills of lading or shipping receipts attached thereto. The declaration then avers that the plaintiffs contracted with certain persons carrying on business under the name of *T. Brown & Co.*, that if the said *T. Brown & Co.* would procure from defendants a bill of lading or shipping receipt of the defendants for two hundred barrels of flour marked "Creek Mills," the plaintiffs would, upon production to them of such bill of lading or shipping receipt of the defendants, accept a bill of exchange for $800 to be drawn upon them by the said *T. Brown & Co.*, on account of the price of such flour, and the defendants falsely and fraudulently by their bill of lading or shipping receipt represented that they had shipped on their railway at *Chatham* 200 barrels of flour marked "*Creek* Mills," in apparent good order, consigned to plaintiffs at *St. John*, and defendants, at the time they so made said false and fraudulent representations, well knew that the same were untrue, and that the same would be relied upon by the plaintiffs in their dealing with the said *T. Brown & Co.* The declaration then avers that plaintiffs, relying on the representations on said bill of lading, and believing the same to be true, and believing that the flour had been shipped on defendant's railway, plaintiffs accepted a certain bill of exchange drawn upon them on account of the price thereof by *T. Brown & Co.*, payable to the order of *T. Brown & Co.* for $825, which plaintiffs would not otherwise have done. It then alleges that at the time the defendants made the representations they had not received the flour from *T. Brown & Co.*, that bills before due were endorsed by *T. Brown & Co.* for valuable consideration to the *Merchants Bank of Canada*, who became holders for value without notice of such false and fraudulent representations, and by reason whereof and of such false, &c., plaintiffs became liable to pay the amount to the said bank, and they

lost certain commissions which they would have made if representations had been true.

The contract set out in the declaration as the foundation of the claim now put forward is, that plaintiffs contracted with *T. Brown & Co.*, that if *T. Brown & Co.* would procure from defendants a bill of lading, &c., the plaintiffs would, on production to them of such bill of lading, accept a bill of exchange for $825 to be drawn upon them by *T. Brown & Co.*, on account of the price of such flour. This contract with *T. Brown & Co.*, obviously was that *T. Brown & Co.* should actually ship the flour, and, on obtaining a bill of lading or shipping receipt, and drawing for the price of the flour so shipped, plaintiffs, on production of such bill of lading or receipt, would accept the bill so drawn. The action against the defendants is, however, immediately based on fraud, viz.: That plaintiffs having such a contract, defendants made false and fraudulent representations, knowing that the same were untrue; that is to say, that defendants falsely and fraudulently, by their bill of lading, represented that they had shipped on their railway certain flour consigned to plaintiffs at *St. John, N.B*, and at the time they so made said false and fraudulent representations they well knew the same were untrue, and that the same would be relied on in their dealings with *T. Brown & Co.*; and that so relying and believing the same to be true, and that the flour had been so shipped by *T. Brown & Co.*, they accepted the bill drawn by *T. Brown & Co.*, which they would not otherwise have done; that defendants, at the time they made the representations, had not received the flour from *T. Brown & Co.*, and that *T. Brown & Co.*, before the bill became due endorsed the same to the *Merchants' Bank of Canada*, who became holders for value without notice of defendant's false and fraudulent representations, whereby plaintiffs became liable to pay and

1881
ERB
v.
THE GREAT WESTERN RAILWAY CO.
Ritchie, C.J.

did pay the said bill to said bank, and so lost the amount thereof and certain commissions, &c.

The sole evidence on which the plaintiffs rely to establish against the defendants this fraudulent conduct, is that *Carruthers*, a partner of the firm of *T. Brown & Co.*, and also defendants' freight agent at *Chatham*, issued, without the acquiescence or knowledge of the defendants, the bill of lading or receipt in question, and made the said bill of lading without the said goods being shipped on the defendants' railway, or received by defendants or their officers or agents for shipment, claiming that the act of *Carruthers* was the act of the company, and the knowledge of *Carruthers* of the false and fraudulent character of the receipt and bill of lading was the knowledge of the defendants, and so the representations contained in the bill of lading were the representations of the defendants made with a knowledge of their false and fraudulent character.

The contract as thus set out between *T. Brown & Co.* and plaintiffs, it is clear *T. Brown & Co.* never fulfilled; they never did ship the flour for the price of which the bill was accepted, and *T. Brown & Co.* never did procure from defendants a bill of lading or shipping receipt, but on the contrary; in fact *T. Brown & Co.* by *Carruthers*, one of their partners, falsely and fraudulently drew a bill for the price of flour never shipped by them, and falsely and fraudulently made and transmitted simulated bills of lading or receipts, and on the strength of which plaintiffs accepted the bill so fraudulently drawn on them.

We must then consider whether the defendants are to be bound by the acts of *Carruthers* as the agent, and are to be held responsible in like manner as if they, with knowledge that the goods had not been received or shipped, had issued or directly authorized the issuing of this receipt or bill of lading, or after its issue had

acquiesced in the act and derived benefit and advantage therefrom.

The mere giving a receipt for goods and issuing a bill of lading without any goods having been received was clearly not within the usual scope of the employment of a freight agent, such as *Carruthers* is shewn to have been; it was only when he had actually received goods to be shipped that the giving a receipt and bill of lading for such goods was within the usual scope of his employment. It was never within the scope of his employment that he should create, for his own illicit gain, as instruments of fraud, "false pretences of contracts having the semblance of bills of lading." Such bills of lading as he issued did not grow out of any transaction between *T. Brown & Co.* and defendants, or between the plaintiffs and the defendants, or out of the use of the railway as a means of transportation by either *T. Brown & Co.* or the plaintiffs; they were simulated bills of lading, the result of the direct fraud and forgery or deceit of *T. Brown & Co.*, by their leading partner *Carruthers*, and if plaintiffs accepted and paid bills on the faith of such documents, their doing so was induced by the act of *T. Brown & Co.*, and not by any act of the defendants either directly or by *Carruthers*, as their agent, while acting within the scope of the authority conferred upon him by the defendants. I fail to see how such a wilful fraud committed by *T. Brown & Co.*, through their partner *Carruthers* on plaintiffs, with whom they were dealing, can be considered an act within *Carruther's* agency. The authority of *Carruthers* was a limited authority; his power and authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the power depended did not exist, the authority could not exist.

The cases of *Grant* v. *Norway* (1), *Hubbersly* v. *Ward*

(1) 10 C. B. 665.

1881
ERB
v.
THE GREAT WESTERN RAILWAY Co.
Ritchie, C.J.

(1) and *Coleman* v. *Riches* (2) appear to me in principle directly in point.

In *Grant* v. *Norway* (3), the marginal note is as follows:

The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed.

During the argument, *Jervis*, C. J., says:

If the master's authority is to sign bills of lading only upon receiving the goods on board, the owner does not hold him out as his agent until he receives the goods.

After pointing out the very large authority of a master of a ship and adopting from *Smith's Mercantile Law* (4) that "the master is a *general agent* to perform all things relating to the usual employment of his ship; and the authority of such an agent to perform all things *usual in the line of business in which he is employed* cannot be limited by any private order or direction not known to the party dealing with him" asks, is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? For, all parties concerned have a right, he says, to assume that an agent has authority to do all that is usual.

He then points out that, "the very nature of a bill of lading shows that it ought not to be signed until the goods are on board," for it begins by describing them as shipped. He says:

It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

He then adds:

(1) 8 Exch. 330.
(2) 16 C. B. 104.
(3) 10 C. B. 665.
(4) P. 59.

If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.

This case was followed by *Hubbersty* v. *Ward* (1):

The master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board.

The authority of *Grant* v. *Norway* was conceded, but it was attempted to distinguish this case from *Grant* v. *Norway*, but *Pollock*, C. B., delivering judgment of the Court, says:

We think that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner.

This case was followed by *Coleman* v. *Riches* (2), where the same principle was applied to the agent of a wharfinger who signed a receipt in the usual form for the delivering of corn at defendants' wharf. In the course of the argument *Jervis*, C. J., says:

The authority of this man was of a limited character. He was only authorized to give receipts when the wheat was actually delivered.

In delivering judgment:

This, however, is simply the case of a wharfinger's receipt note, and, that being so, the case is disposed of. *Board*, the defendants' agent, had only authority to give receipts for goods which had in fact been delivered at the wharf. And again, when *Board* gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority; he was not acting for his master, but contrary to his duty and against his master's interest.

With how much more force does this reasoning and the conclusions arrived at in these cases apply to the

(1) 8 Exch. 330. (2) 16 C. B. 104.

1881

ERB v. THE GREAT WESTERN RAILWAY CO.

Ritchie, C.J.

present case? The authority of the freight agent cannot, in my opinion, be compared in extent with the general authority of a master of a ship who is entrusted with the whole control and management of the property, and that for the most part in the absence of the owner, and when the vessel is out of his reach. Here the authority of the agent was necessarily of a most limited character; he was to receive and ship and give receipts and bills of lading for goods actually received and shipped; outside of this he does not appear to have possessed any authority whatever, nor was any other or greater authority necessary to enable him to manage and conduct that part of the business of defendants railway confided to him. He certainly was not authorized to grant receipts for goods unless the goods were actually received, nor was he empowered to contract for the company that goods should be sent by the company, when no goods were ever received by the company to be sent, and consequently never could be sent. Nor, in like manner, had he any authority to sign a bill of lading declaring the property was shipped in apparent good order, when it never was shipped, and declaring the property was to be delivered in like good order, when there was no property in the possession of the company or of their agent to be delivered.

It may be even questioned whether the general manager of this railway could legally issue or authorize to be issued bills of lading for goods never received and never shipped, such an act being wholly inconsistent with the object of a railway company, which is incorporated to transport goods delivered to them for transportation, not to issue feigned and fraudulent receipts and bills of lading for goods never received to be forwarded.

Be this as it may, it cannot be doubted that every person in business who deals with a railway company knows

that, in the ordinary and usual course of business, no such receipts and bills of lading are ever given or issued unless the goods have been actually received to be shipped, and nobody so dealing but must know that if a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipts and bills of lading without the goods having been delivered, he would be acting in direct opposition to his duty and in fraud of his principals, and no one would knowingly act on a bill of lading so issued, when goods had never been delivered or actually shipped, unless indeed it could be shewn that some specific authority had been given to the agent outside of the ordinary course of business, authorizing the signing of such documents without delivery of the articles.

I cannot conceive it possible, in the usual course of business, that any business firm would accept drafts on their mere production, with bills of lading attached, without any notice or advice, or without anything indicating the nature of the transaction. It is very different from the buying or negotiating a bill of exchange, and the position of a holder for value of a bill of exchange purchased on the market is very different from that of a person accepting a bill of exchange drawn on him. No one, I take it, in the usual and ordinary course of business, draws on another in whose hands he has no funds, but on the strength of funds to be supplied, without advising that the funds against which he draws will be forthcoming; and, therefore, in a case like the present, where the plaintiffs allege that the transaction originated on a contract with the drawers, that on certain conditions they would accept, that is on goods consigned they would advance by accepting drafts, can it be supposed that those who were to draw drew without advising the shipping of the goods and the drawing against them through the bank for their

1881

ERB v. THE GREAT WESTERN RAILWAY CO.

Ritchie, C.J.

value? Can it be doubted that the acceptance of the bills so drawn was on the strength of such advice rather than on that of the bill of lading. Bills of lading attached are generally more for the security of the drawer than the drawee—it is that the goods shall not be delivered over till the bills are accepted; in other words, that the consignees shall not receive the goods till they have secured the payment by accepting the bills drawn for their price. In this case the transaction in connection with the bills, with which the railway had nothing to do, was an illusion and a fraud; the consideration on which the bills were drawn, and the consideration on which the plaintiffs accepted the bills never existed, the bills were drawn against flour to be shipped and for the price of the flour, on the sale of which the plaintiffs were to make a commission; the flour never was shipped, there never was any property on the sale of which the plaintiffs could make a commission, and the reason was that the parties with whom the plaintiffs dealt deceived them, and have endeavored to cover their deceit by transmitting to their dupes feigned documents as purporting to have been legitimately issued by defendants' authority.

I can only look on this as a case of fraud pure and simple. *Carruthers*, in signing these receipts and bills, was not acting within the scope of his authority or in the course of his employment, or for his employers' benefit, and the company never adopted *Carruther's* act or profited by his fraud. *Carruthers* had no authority to make statements or representations. He was employed to receive goods, and on receipt to give acknowledgments therefor, and to ship the goods so received, and on such shipment to give bills of lading; in other words, sign a contract for their transportation and delivery. As said by *Cresswell*,

J., in *Coleman* v. *Riches* (1): "he was not employed to represent that to be true which he knew to be false."

His position was, as described by *Crowder*, J., in the same case that "of a servant whose only duty was to give a receipt when the goods had been delivered."

The case we are dealing with is, in my opinion, much stronger against plaintiffs than those I have referred to, because it is quite impossible in this transaction to separate plaintiffs from *T. Brown & Co.*, and equally impossible to separate *T. Brown & Co.* from *Carruthers*, who unquestionably was the leading partner, in fact substantially the firm of *T. Brown & Co.*, and therefore, so far as the defendants are concerned, plaintiffs must be looked upon as, if not identical with *Carruthers*, as immediately connected with him, and cannot fix on the defendants a liability growing out of a breach of *T. Brown & Co.'s* contract with them as set out in the declaration, and out of the fraudulent conduct of *T. Brown & Co.* in drawing against goods they never shipped, and fraudulently transmitting bills of lading of their own fraudulent concoction. No doubt *T. Brown & Co.*, were, by reason of the employment of their leading member, enabled the more easily to perpetrate and carry out successfully this fraud; still I think this fraud of *T. Brown & Co.* in their dealing with plaintiffs, cannot be attributed to the company. The defendants had no knowledge of the transaction between *T. Brown & Co.* and plaintiffs. The falsehood, fraud and knowledge, was on the part of *T. Brown & Co.*, with whom plaintiffs contracted, and who, instead of shipping the flour to plaintiffs, on the security of which the advances were to be made, and procuring *bonâ fide* bills of lading or shipping receipts therefor from defendants, in fulfilment of their contract with plaintiffs, falsely and fraudulently, by their senior and

(1) 16 C. B. 104.

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.
Ritchie, C.J.

principal partner, made out a false and fraudulent bill of lading or shipping receipt purporting to be the bill of lading or the receipt of the defendants, and thereby falsely and fraudulently represented to plaintiffs that they had fulfilled their contract and had shipped and consigned to them the flour in question, and had procured from defendants a bill of lading and shipping receipt therefor, when in truth and in fact the flour never had been consigned and shipped to plaintiffs, nor delivered to be shipped, and defendants never had given any bill of lading or shipping receipt therefor. This was a roguish transaction on the part of *T. Brown & Co.* through their senior and principal partner, whereby they sought and obtained advances from the bank, not on the strength of flour consigned by them to plaintiffs, but on the strength of a false bill of lading concocted by themselves, handed to the bank with a draft on plaintiffs, which the bank, in ignorance of the fraud, transmitted to the plaintiffs as genuine documents, representing a real transaction, namely an actual shipment by *T. Brown & Co.*, of 200 barrels of flour to plaintiffs, when, in fact, they never had shipped a barrel, and, upon being so transmitted, the plaintiffs, in like ignorance of the fraud and believing such documents represented to be a *bonâ fide* transaction, accepted and paid the bill.

By what process of reasoning can this be said to be a transaction of defendants, or with which defendants are in any way connected in the due course of business?

I think, therefore, that *Carruthers* was in this transaction between plaintiffs and *T. Brown & Co.*, and to which defendants were no party, acting as and for the firm of *T. Brown & Co.*, to enable that firm to raise money by false and fraudulent means and pretences in their dealings with plaintiffs, and that defendants are in no

way responsible for a transaction of such a character concocted for the benefit of *T. Brown & Co.*, and carried out by *Carruthers* wholly outside of and apart from and contrary to his authority and duty as freight agent of defendants.

STRONG, J.:—

Concurred in the judgment of the majority of the Court of Common Pleas in *Oliver* v. *Great Western Railway Co.* (1).

FOURNIER, J.:—

I am in favor of allowing this appeal, for the reasons given in the judgments of Mr. Justice *Patterson* and ex-Vice Chancellor *Blake* (2).

HENRY, J.:—

This is an action brought by the appellants, who reside at *St. John, N.B.*, upon six bills of lading or freight bills dated at *Chatham*, in the Province of *Ontario*, in August, 1876. The declaration contains twelve counts six of which are based on the contract contained in the freight bills to deliver the goods to the appellants at *St. John, N.B.*, and the other six are founded on the alleged fraudulent representations of the respondents, of having received the goods, when, in fact, they had not so received them.

The respondent pleaded seven pleas.

To the first six counts: 1st. That they did not promise as alleged. 2nd. Denies the delivery to them of the goods for the purpose and on the terms alleged. 3rd. That the bills of lading were not for a valuable consideration delivered to the appellants, and that the plaintiffs were not the *bonâ fide* holders of the same for valuable consideration, as alleged, nor entitled to the property in and possession of the goods.

(1) 28 U. C. C P. 143. (2) See 3 Ont. Ap. R. 448.

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.
Henry, J.

4th. Alleges the delivery of goods to the appellants at *St. John, N.B.*, according to the alleged contracts. 5th. Denies delivery of the goods to the respondents, and alleges that the appellants had actual notice when they received the bills of lading that the goods had not in fact been delivered to the respondents. 6th. Denies the delivery of goods to the respondents by *T. Brown & Co.*, and alleges that the bills of lading were, without any default on the part of the respondents, obtained from them wholly by the fraud and collusion of *T. Brown & Co.*, and of the appellants and of others through whom the appellants claim. To six remaining counts "not guilty."

The six bills of lading or freight bills were put in evidence. Each embodies a receipt of the goods and an undertaking to deliver them to the appellants at *St. John, N.B.* All are signed by *W. Carruthers*, the acknowledged shipping agent of the respondents at *Chatham*, and are filled up on the printed forms of the respondent's company.

The goods in fact were never delivered to the company, or to any of its agents or servants, and, as between the alleged shippers and the respondents, there would be no liability on the latter. It would appear that the agent, *Carruthers*, was a partner or had some interest in the firm of *T. Brown & Co.*, or partially managed it. The evidence is anything but conclusive on that point; but that would not, in my view of the matter, make any great difference. It would not affect the rights of the parties in this suit whether *Carruthers* really was a partner. If it were a question between the shipper and the respondents it would be important and essentially different. It is clear the appellants thought *bonâ fide* they were dealing with a responsible firm. They had previous consignments from them all in order, and they had also

received consignments when the business was done under the name of *A. D. Bogart & Co.* before the firm of *T. Brown & Co* was formed. In the usual order of business, the way bills were givenfor the goods in question as had been done previously, and signed and executed as the preceding ones. For the later shipments the respondents would have been accountable if the goods had been delivered, and were not delivered through the negligence or default of the respondents or their agents or servants. But for the non-delivery, in this case, of the goods, there should be, in my opinion, no question of the liability of the respondents. Under the statutes passed for the purpose of enabling parties to obtain advances on goods about to be moved from one part of the country to another, such receipts, when executed by the proper officer of the railway company, are made evidence of transfer of ownership, and a lien is created in favor of any party making advances on the security of such bills of lading (see 31 *Vic.*, c. 11, sec. 7, *D.*). That section provides that any carrier may give a bill of lading or freight receipt in his capacity as such carrier even for his own goods, and makes the transfer of it for advances as effectual as if the goods belonged to another. Such receipts are then, by the statute, made evidence of title as between the parties. The bills of lading in this case made the appellants the consignees, and the property in any goods forwarded under them would pass to them subject to the shippers' right of stoppage *in transitu.* In consequence, then, of the acknowledgment of the receipt of the several shipments of the goods in question by the respondents, through their long accredited agent, the bank and the appellants were induced to do what they otherwise would not have done. The bank discounted the bills drawn by *T. Brown & Co.*, as they had often done before, and the appellants accepted and paid them. The bills of lading were signed for the

1881
ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.
Henry, J.

respondents by their duly authorized agent for that purpose, which makes it their act. They were bound to know the consequences of giving powers to their agent, and to remember, when appointing or continuing one, that his receipts in their name for property to be moved from one part of the country to another, were made evidence of the property in the goods upon which banks and others would, from time to time, be induced to advance immense sums of money. There was, then, thrown upon railway companies and other carriers, the duty and responsibility of having faithful and honest agents, and, independent altogether of the common law obligations of principals to answer for the fraud of their agents, I am of the opinion that their obligation under the terms, provisions, purview and spirit of the statute I have quoted, includes that of making good to the appellants the loss they have sustained. The law which, in my opinion, should govern our decision in this case, is clearly and properly expressed by *Story* in his work on Agency (sec. 127), where he says:—

> The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him. The maxim is founded on the soundest ethics and is enforced to a large extent by Courts of Equity.

In a note to the section just mentioned, he says:—

> The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess. * * * *
> And this is founded on the doctrine that where one of the two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence and having authority in the matter shall be bound by it.

This is the admitted doctrine in all courts in *England*, and the law in *France* holds the principal liable for the

fraud of his agent in cases similar to this. See 20 *Laurent*, p. 609, where he approves this doctrine as held by *Pothier*. I might also cite in confirmation of it from the Roman law.

I have fully considered, as alleged to be applicable to this case, the law as between the endorser of a bill of lading for value signed by the master of a ship and the ship owner, which holds the latter not responsible for goods not shipped on board, but I think a different principle is involved in respect to bills of lading signed by a general receiving agent of a railway company. In *Grant* v. *Norway* (1), Chief Justice *Jervis*, in giving the judgment, gives reasons why a ship owner should not in such a case be held responsible, and says :—

> The very nature of a bill of lading shows that it ought not to be signed until goods are on board; for it begins by describing them as *shipped*.

And adds :—

> Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he (the captain) had authority to sign such bills whether the goods were on board or not.

He then shows that from the usage of trade and the general practice of shipmasters it is generally known that the master has no authority to sign bills of lading, except for goods on board. It is, however, only by mercantile law and the usage of trade that bills of lading become negotiable by assignment or indorsement, and although as binding as if regulated by statute the ruling in such cases should not necessarily determine the rights of parties under the statutory provisions referred to. The case of traffic by railways from its nature and peculiarities may be essentially different from that by means of a ship.

The legislature has provided as a means of enabling the trade of the country to be effectively carried on, that those who advance means for that purpose shall

(1) 10 C. B. 665.

1881

ERB
v.
THE
GREAT
WESTERN
RAILWAY
Co.

Henry, J.

be secured in the way provided by the acts referred to. The statute before referred to created new responsibilities and liabilities, without which it would be ineffectual for the intended objects. Having expressly given to the delivery receipts of railway companies and others an importance and value which they would not otherwise possess, it necessarily enjoined the obligation for faithfulness regarding them, and called upon those who issued them, either by themselves or their agents, to exercise the necessary caution, so that the public relying upon them would be justified in advancing funds on their security. If, therefore, railway and other companies and proprietors are not to be held answerable for the acts of their duly authorized agents or servants there would be really no security in such cases, and railway and other forwarding companies or associations might retain the services of irresponsible and unreliable agents and servants, the certain results of which would be to render such receipts as those in this case comparatively worthless and require every person, before advancing or paying on the strength of them, to verify the truth of them, which, in a great many cases, would be impracticable and a drag upon the operations they were intended to promote. When we are bound to know that large advances are, and were intended to be, made on the faith of them, even by parties at great distances from the point were they are issued, we are, I think, equally bound to conclude that the legislature intended to enjoin and require that those who issued them should *bonâ fide* do so. It will not be questioned that if the delivery receipts in question in this suit had been issued directly by the respondents they would be answerable for the misrepresentations complained of. I think the obvious intention of the legislature was to make them equally answerable for the agent they employed to perform faithfully on their part the duty imposed by the

act upon them. If they are not so responsible the object of the legislation must be to a great extent frustrated, and its benefits relatively curtailed and diminished. It is our duty in construing an act to give the fullest effect to its manifest objects and intentions, and we cannot do so if we do not hold the principals answerable for the fraud or negligence of their agents or servants, through whose misrepresentations losses are occasioned to persons induced by the legislature to place confidence in them. I am of the opinion, that by a contrary decision we would lessen, if not wholly destroy, the security the legislature intended to give to outside parties when making advances on the security of such delivery receipts, and thereby to a great extent frustrate the object the legislature had in view to foster when passing the act in question. I think myself bound by motives of public policy to adopt this view, and, for the reasons I have given, I think the appeal should be allowed and that our judgment should be for the appellants with costs.

TASCHEREAU, J.:—

In this case, I am of opinion to dismiss this appeal with costs.

GWYNNE, J.:—

I desire to add nothing to what was said by me in *Oliver* v. *G. W. Ry. Co.* (1), with which case the present is identical, and between which and the cases upon the authority of which the judgment of the majority of the court in that case was rested I am unable to perceive any distinction.

Appeal dismissed with costs.

Solicitors for appellants: *Bethune, Moss, Falconbridge & Hoyles.*

Solicitors for respondents: *McMichael & Hoskin.*

(1) 28 U. C. C. P. 143.

1881
*March 4.
*June 11.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND

FREDERICK A. FITZGERALD *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Agreement—Additional parol term—Conditions—Carriers—Wilful negligence—"At owner's risk."

The respondents sued the appellants for breach of contract to carry petroleum in covered cars from *L.* to *H.*, alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, a verbal contract between plaintiffs and defendants' agent at *L.* was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk."

Held, per Sir *W. J. Ritchie*, C. J., and *Fournier* and *Henry*, J. J., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers.

Per *Strong*, *Fournier*, *Henry* and *Gwynne*, J. J.:—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at *L.* was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars, prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability.

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

APPEAL from a judgment of the Court of Appeal for *Ontario* dismissing the appeal of the above named appellants to the said Court of Appeal from the decision of the Court of Common Pleas of the said Province on the 28th day of June, A.D., 1878, as of Easter Term 41st *Vic.*, discharging a rule *nisi* made in the said Easter Term in a certain cause in the said Court of Common Pleas, whereby respondents were ordered to show cause why the verdict obtained in the said cause should not be set aside, and a verdict entered for the said defendants or a non-suit, pursuant to The Common Law Procedure Act, or why a new trial should not be had between the parties on the ground that the said verdict is contrary to law and evidence, and for admission of improper evidence.

The action was commenced by the respondents against the appellants on the 21st March, 1875, to recover the value of oil said to have been lost in the course of transit from *London* to *Portland* upon the appellants' railway.

The facts of the case are as follows (1):

The respondents, having a contract with the Government of *Canada* for supplying oil at *Halifax*, in the Province of *Nova Scotia*, for the use of the Government, towards the end of April or beginning of May, A.D., 1873, entered into a verbal agreement with the appellants, through their general agent at *London*, for the carriage of the oil from *London* to *Halifax*. In the agreement it was expressly stipulated that, at a certain fixed rate per barrel then agreed upon, the oil should be carried in covered cars, and with as quick dispatch as possible. Afterwards it was discovered that owing to the gauge of the appellants' railway between *London* and *Stratford* differing from the gauge on the remainder of their road, that they could not get a sufficient num-

(1) For pleadings see report of the case, 28 U. C. C. P. 587.

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

ber of covered cars at *London* to carry the oil to *Stratford*, whereupon the respondents consented to vary the original agreement in this, that the appellants might carry the oil, from *London* to *Stratford*, on open or platform cars, taking the same from *London* in the evening, so as not to expose the oil to the heat of the sun in the daytime, and that the oil should be transhipped into covered cars at *Stratford*, and should be carried in covered cars from *Stratford* with quick dispatch. The agreement was to apply to, and did apply to, all the oil the respondents would ship to *Halifax* for the Government during the year.

At the time that each of the shipments of oil was made a request or shipping note for the same was signed by the respondents, and a receipt given by the appellants; neither notes nor receipts say anything about covered cars, the mode of carriage, nor do they fix the rate of freight to be paid, but on the back of each of them was indorsed a condition or proviso that "Oil and Molasses will under no circumstances be carried save at the risk of the owners, or parties by whom the same are consigned," and another condition or proviso that "no claim for loss or damage for which this company is accountable, will be allowed unless notice in writing is given to the Station Freight Agent within 24 hours after the goods are delivered," together with other conditions, and the appellants contend that under these conditions they are not responsible for any loss to the respondents' oil.

The respondents shipped oil to *Halifax* by two shipments, one on the 6th of May, 1873, and one on the 10th of June, 1873. Both shipments were sent out from *London* on open or platform cars, and no part of either shipment was transhipped into covered cars at *Stratford*, as agreed by the appellants, but both shipments were carried over the whole line of the appel-

lants' railroad on open or platform cars, and were also greatly delayed on the way, and exposed to the sun and weather on the way, and on the sidings of the appellants' railway at *Montreal* and elsewhere, and on the wharf at *Portland*, and in consequence of such delays and exposure, great loss and damage was sustained by the respondents, and this action was brought to recover compensation for such loss.

The learned Judge who tried the case found, as a fact, that the verbal contract with the appellants' agent was to carry in covered cars as alleged, and rendered a verdict for the plaintiffs, with $1,114 damages.

Dr. McMichael, Q. C., and *Mr. Bethune*, Q. C., for appellants :—

The complaint is for leakage of oil carried by the appellants. The ordinary letter of request to the appellants to forward the oil upon the basis of the conditions of the appellants as railway carriers was filled up by the respondents, and they accepted from the agent a receipt for the same, given to them upon the terms of the ordinary bill of lading of the appellants. Now, one of the special conditions of the contract was that they should not be liable for leakage, and "oil and molasses will, under no circumstances, be carried save at the risk of the owner or parties by whom they are consigned." The only question therefore for enquiry is, whether or not the appellants bring themselves within the conditions of the contract which absolve them from the liability and whether these conditions have that effect.

The appellants submit that the effect of the notice contained in these printed documents has freed them from any liability they would otherwise have had as common carriers with regard to these commodities. For a carrier can relieve himself from the common law liability by notice. In this case it was impossible to

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

use more comprehensive language. See *Lewis* v. *G. W. Railway* (1).

But then the respondents also contend that the contract sued on was not simply a contract containing ordinary conditions of the appellants' usual shipping notes, but was either partly verbal and partly written, having certain stipulations outside of these conditions, which either controlled or were incorporated with them, or that there was an independent verbal contract, and that the appellants were not entitled to the benefits of the conditions, and so the case, as launched by the respondents, proceeded upon this special contract, stated to have been made with *Mr. Thorpe*, the appellants' agent at *London*, to be read by itself, or that the special contract should be read as having this verbal contract forming part of it.

We deny that any contract was made with *Thorpe*, the agent, except one upon the basis of the ordinary conditions of the appellants, and that if he made any such contract it was beyond the scope of his powers as an agent.

Parol evidence is inadmissible for the purpose of varying the terms of the contract; and *Mr. Thorpe* had no power to make a new or any other contract than this written one, or to vary that contract.

What the respondents desire, is to vary that term of the contract which provides that "oil and molasses will under no circumstances be carried save at the risk of the owners or parties by whom they are consigned," making that passage read as if it were as follows: "In case the oil and molasses are carried in covered cars the Company will, under no circumstances, be liable for oil and molasses carried save at the risk of the owners or parties by whom they are consigned."

(1) 3 Q. B. D. 195.

Mason v. *Scott* (1), *Jervis* v. *Berridge* (2), *Harris* v. *G. W. R.* (3), *re Delaware* (4).

In any event the appellants submit that it is clear from the evidence, that there was no power on the part of *Mr. Thorpe* to make any contract on behalf of the appellants on any other terms than those embodied in the terms and conditions of the ordinary bills of lading of the appellants.

The cases which have been referred to in the English Courts in the Court below afford no guide as a proper rule of decision in a case in this country, because the English statute, 17 and 18 *Vic.*, ch. 31, has laid down a rule so entirely different from the rule for interpretation of carriers' contracts at Common Law as to make these decisions entirely inapplicable. That statute avoids all conditions except such conditions as shall be adjudged by the Court or Judge, by whom the question relating thereto shall be tried, to be just and reasonable.

The learned counsel also referred to *Carr* v. *The L & Yorkshire Ry. Co.* (5); *Austin* v. *The M. S. & Lincolnshire Ry. Co.* (6).

Fitzgerald had notice that *Thorpe* had no authority to vary the contract, for the railway authorities had furnished him, as well as the public dealing with them, with the forms of contract containing the conditions upon which they were willing to carry such goods. Surely it is not an unjust inference to say that under these circumstances *Fitzgerald* was affected with notice of the limited authority of *Thorpe*. See *Davis* v. *Scottish Provincial Ins. Co.* (7).

Mr. *Glass*, Q. C., and Mr. *W. W. Fitzgerald* for respondents:

(1) 22 Grant 592.
(2) L. R. 8 Chy. 351.
(3) 1 Q. B. D. 515.
(4) 14 Wallace, 601.
(5) 7 Ex. 707.
(6) 10 C. B. O. S. 454.
(7) 16 U. C. C. P. 176.

1881

THE GRAND TRUNK RAILWAY Co. v. FITZGERALD.

The contract and agreement relied on by the respondents was separate and distinct from the said shipping note relied on by the appellants; the contract was a distinct and complete contract in every respect, stating the mode of carriage, viz, in covered cars, and the rate of freight to be charged for the through rate, the place of shipment and of destination, and that the goods should be carried with all possible expedition, and was such a contract as a general agent had full power and authority in the scope of his business to enter into and to bind his principals for the fulfilment of. The evidence shows that *Thorpe* was such general agent, and was accustomed to enter into such contracts on behalf of the appellants, and that as such general agent he did actually enter into the said contract with the respondents.

The case of *Lewis* v. *G. W. Ry.* (1), referred to by the learned counsel for appellants, was entirely a different case from this, because there was a specific provision that the carriage was for a lower rate than was ordinarily charged. In this case there was no reduction, but the appellants were told by the respondents, when the agreement was entered into for the carriage, that unless they would undertake to carry them in covered cars, the goods would not be delivered to them for carriage, as the respondents could have the goods carried in covered cars by the *Great Western Railway*, whereupon the appellants covenanted and agreed to carry the said goods in covered cars, and this express stipulation or agreement was the chief and paramount consideration moving and inducing the respondents to enter into the said contract. In addition to this the learned judge who tried the case, found it as a fact that the contract was to carry in covered cars. See *Cooper* v. *Blacklock* (2); *Broom's* Common Law (3); *Smith* on Contracts (4).

(1) 3 Q. B. D. 195.
(2) 5 App. R. 535.
(3) 6 Ed. 375.
(4) 5 Ed. 521.

As to clause number four in the special conditions relied on by the appellants, it only binds the respondents to assume and bear the risks ordinarily incurred in the carriage of goods of the class specified in said condition, and does not excuse the appellants from wilful negligence, misconduct, or malfeasance, and does not operate so as to excuse the appellants from wilful destruction of property delivered to them for carriage, by exposing it in such a manner as to render its destruction inevitable, as the appellants did in this case, it being shewn by the evidence that goods of the class and quality in this case could not be safely carried in open or flat cars at the season of the year when these goods were carried, nor does this condition release them from the consequences of the breach of their special contract to carry in covered cars: *D'Arc* v. *London and North Western R. R. Co.* (1).

We also contend the appellants were guilty of gross and inexcusable negligence and malfeasance in carrying the respondents' goods in open or platform cars at the season of the year when they did, and in leaving the same exposed to sun and weather at *Montreal* and elsewhere on the line of their railway and on the wharf at *Portland*, as shewn in the evidence, and the great delay in the carriage from *London* to *Halifax*.

The following, with the authorities already quoted, will be relied on by the respondents: *Morgan* v. *Griffith* (2); *Lindley* v. *Lacy* (3); *Harris et al., Assignees of Foeman* v. *Rickett* (4); *Parsons* v. *Queen Ins. Co.* (5); *Malpas* v. *London and South Western R. W. Co.* (6); *Robinson* v. *Great Western R. Co.* (7).

Dr. *McMichael*, Q. C., in reply:

We say our agent had no general authority to carry

(1) L. R. 9 C. P. 330.
(2) L. R. 6 Ex. 70.
(3) 17 C. B. 578.
(4) 4 H. & N. 1.
(5) 43 U. C. Q. B. 271.
(6) L. R. 1 C. P. 335.
(7) 35 L. J. C. P. 123.

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

oil or molasses, and that the respondents had notice of his limited authority, and the court of appeal have come to the conclusion that the agent had no authority to make a verbal contract. If the respondents wanted to bind the company on the agent's agreement, they should have got a different receipt. As to the written contract there has been no breach proved.

Sir W. J. RITCHIE, C. J.:—

In the view I take of this case, it is wholly immaterial whether the alleged verbal contract is imported into and incorporated with the printed receipt or not, for, without reference to any verbal agreement, I think the evidence very clearly shows that both the shipper and the company knew that open cars were not proper to be used, and the company, through its agent, had direct notice that the plaintiffs would not allow their goods to be shipped in open cars, and the company, through their shipping agent, in the usual course of business, received the goods to be conveyed in covered cars, and the contract, if it rested alone on the printed receipt, must be read in connection with these considerations to enable the Court to put on it the proper construction. It cannot be supposed possible that plaintiffs could have agreed that their goods should be shipped in vehicles which, if the uncontradicted evidence is correct, would, to the knowledge of both parties, assuredly involve almost certain injury. I therefore think both parties contracted on the assumption that the railway company would provide cars fit for the service; that in undertaking to carry the goods from one place to another, the company bound itself to provide proper vehicles and means of conveyance to enable it to do what it undertook, otherwise there would be a total abandonment of its character as a carrier, and that their not doing so, was not mere neglect in

the course of the performance of the contract, but the company's conduct amounted to a refusal to execute the engagement entered into. The written contract therefore was, in my opinion, to send these goods in a proper conveyance. Any other construction would be most unreasonable and unjust, and there is nothing whatever in the contract to absolve the company from the consequences of neglecting to perform a duty that naturally and rightfully belongs to them, nor any stipulation exempting them from gross negligence or misconduct. If sent in proper conveyances the goods would, under the provision that oil was only to be carried at the risk of the owners, be at the risk of the owners, that is, the owners would be responsible for the ordinary risks incurred by the goods in the course of transit along the railway, but not for losses arising from the gross negligence of the carriers. But instead of so sending these goods, the defendants sent them, not in fit and proper conveyances, but in cars wholly unsuited and unfit for the carriage of such goods, and therefore did not carry in pursuance of, but in direct contravention of, their duty and their contract. The case is therefore not one of mere negligence, but of wilful negligence amounting to direct misfeasance. When these goods were placed on open cars, the company divested themselves of the ability to carry the goods as they were bound to do, and the loss arose from the wrongful act of defendants inconsistent with the contract they had entered into, and in contravention as well of their undertaking as of their duty as carriers.

This does not at all resemble the case of a Railway Company charging for the use of cars and the locomotive power only, as in the cases of *Austin* v. *The Manchester, Sheffield, &c., Railway Co.* (1), and *Morville* v. *The Great*

(1) 16 Q. B. 600.

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

Ritchie, C.J.

Northern Railway Co. (1); but much more like *D'Arc* v. *London & N. W. Railway Co.* (2), *Philipps* v. *Clark* (3), *Lewis* v. *Great Western Railway Co.* (4), and *Wyld* v. *Pickford* (5).

In *D'Arc* v. *The London & N. W. Railway Co.* (6), Lord *Coleridge*, C. J., says:

This Court, in *Robinson* v. *Great Western Railway Co.* (7), determined upon a contract in terms very similar to those of the contract in the present case, that the words "at owner's risk" only exempted the company from the ordinary risks incurred by goods going along the railway, and does not cover injury from delay caused by the negligence of the company.

In *Philipps* v. *Clark* (8), the marginal note is:

A stipulation in a bill of lading that the ship owner "is not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss arising by these means from *gross negligence.*

Cockburn, C. J., says (9):—

He stipulates to be exempted from the liability which the law would otherwise cast upon him in other respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence.

And *Crowder*, J., (10):—

It is clearly not intended to relieve him from responsibility for leakage or breakage, the result of his negligence and want of care.

In *Lewis* v. *Great Western Railway Co.* (11), *Bramwell*, L. J., says:—

There is such a mass of authorities to show what "wilful misconduct" is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the

(1) 16 Jur. 528.
(2) L. R. 9 C. P. 325.
(3) 2 C. B. N. S. 156.
(4) 3 Q. B. D. 195.
(5) 8 M. & W. 443.
(6) L. R. 9 C. P. 325.
(7) 35 L. J. C. P. 123.
(8) 2 C. B. N. S. 156.
(9) At p. 162.
(10) P. 163.
(11) 3 Q. B. D. 195.

conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But, to my mind, there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct," because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be "wilful misconduct."

Brett, L. J., says:

Now I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the Court is entitled to ask for these facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk."

Brett, L. J., again says:—

In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do, or to omit, where the person who is guilty of the act or the omission knows that the act, which he is doing or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do, and also, as my lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

Ritchie, C.J.

are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then, I think, he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct, or, if he does or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.

Cotton, L. J., says :—

Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction. It was asked by counsel, in argument, would it not be wilful misconduct on the part of the servants of the Great Western Railway to put a horse into an open truck? Certainly it would, because every one must be aware that putting a horse into an open truck, out of which he could jump, would, in all probability, lead to the consequence that as soon as the train started, the horse would try to jump out, and be seriously injured.

In *Wyld* v. *Pickford* (1), the marginal note states that a carrier is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.

Per *Parke*, J., delivering judgment :—

But still he undertakes to *carry* from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage.

(1) 8 M. & W. 443.

And surely if the owner takes on himself all risk of accident and injury of conveyance, the railway companies are bound to find proper carriages.

I therefore think the Court of Common Pleas and the Appeal Court of *Ontario* were quite right in holding that defendants must bear the loss which obviously resulted from their improper dealing with the goods, and not from any of the risks by their contract imposed on the owners.

STRONG, J., concurred in the judgments delivered in the Court of Common Pleas.

FOURNIER, J., concurred in dismissing the appeal.

HENRY, J.:—

I think the appeal in this case should be dismissed. The parties, through their agents duly authorized, entered into a contract to carry this oil from one point to another, and in doing so undertook impliedly to carry it in a proper manner. They undertook to provide the proper means of transport, so that it should not be subject to damage ordinarily occasioned to such property when exposed to the weather. Oil has been shown, on this trial, to be of such a nature that it loses very largely by absorption into the material of the cask which contains it. To prevent that it is necessary that these casks should be all glued inside before the oil is put into them. The effect therefore of exposing them to the hot sun is to melt this glue, and the oil, though the cask may be apparently tight, will lose largely by absorption. The parties who undertake to carry articles of that kind are to be presumed to carry them in a way that they will not be necessarily injured. The oil in this instance was stipulated to be carried in covered cars, so as to be kept from the action of the sun. That is evidence of the necessity of carrying it in

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

Henry, J.

that way. I think the parties entered into an implied contract to carry it in cars, by which the casks would be protected from the effects of the sun. I am of opinion that, notwithstanding the conditions, that is a part of their contract. The written condition that oil and molasses were to be carried at the owner's risk would not apply to that portion of the risk which was to be provided for by the undertaking to furnish covered cars. Carriers are bound as part of their contract to provide proper means of transportation, and the party dealing with them says, "you have undertaken to furnish proper means of transport I will run the other risks." It was no part of the risk therefore, under that condition, that the casks of oil should be subjected to the rays of the sun, by which great damage was done, and loss incurred. I am of opinion, that that was a part of the original contract independently of the special contract made with the agent. Now, it has been objected, that the agent had not the authority to enter into that contract because he had private instructions against it. The public know nothing of those private instructions, and the rule is, where one man authorizes another, and holds him out to the world as his agent to carry on any particular kind of business, there is an implied authority on his part to do everything within the compass of his authority to carry on the business. Parties outside know nothing about private instructions, and are not governed by them. If they had known of the private instructions in this case, the parties, it is clear, would not have sent the oil in that way, and it would be unjust in the extreme that they should suffer loss by private instructions given to agents of which they knew nothing.

I am of opinion, that the agent had full authority to

enter into that contract, and I can see nothing that at all militates to alter or vary the written contract. The latter provides only for the carrying without any particular mode or means; the other is additional to the contract. The shipper says: "I will enter enter into that contract with you provided you will carry the oil in covered cars." He undertakes to do so. The other party agrees to it. It would be a fraud, then, upon the man who was induced to enter into the contract, to allow the parties to say that there was a variation, or that the one contract was not supplementary to the other. I think it is, and the parties are responsible for the contract made by the agent. There is no doubt about the damage being done through the wilful misconduct of the servants of the company, but independently of that wilful misconduct, independently of negligence, I hold it is part of the contract, that the company is answerable for it, on the principle that every one who undertakes to perform a service for another undertakes to perform it by proper and ordinary means. If he does not do so the contract fails, and I think they might as well ask to be held harmless in this case, for no better reason than they would if they put quarters of fresh beef beside a hot stove and kept them there for days, or put eggs in an ice box. In those cases there is no question it would be gross and wilful misconduct, and even if the shippers did undertake to run the risk in shipping eggs, they would only run the risk of being broken or injured in the usual manner; but certainly it is not to be imagined that running the risk includes that for which the other parties would be answerable, and through their improper conduct caused damage. I think therefore this case is as strong as that. This oil was shown to have been for days and days left at different stations on the

1881

THE GRAND TRUNK RAILWAY CO. v. FITZGERALD.

Henry, J.

road exposed to the operation of the sun's rays, the very thing that the party undertook to guard against, and for which, we have reason to suppose, he paid extra. Under all the circumstances the merits are all in in favor of the respondent, and law in his favor, and therefore I think the appeal should be dismissed with costs.

GWYNNE, J.:—

I should not think it is necessary to add anything to what appears in the judgment of the Court of Common Pleas, if it were not that some observations made in the judgment of the Court of Appeal for *Ontario*, calculated to throw doubt upon the applicability of *Malpas* v. *L. & S. W. Railway* (1) to the determination of this case, if not also upon the soundness of the judgment in that case, seem to me to call for remark. The principle upon which that case proceeded, in my opinion, plainly justified the reception in this case of oral evidence, to shew that the contract entered into between the parties was for the carriage of the oil in covered cars. Such evidence, not being in contradiction of anything in the delivery bill, but an addition to it, and indeed relating to matter not necessary to be in a delivery bill, was clearly admissible, and equally so whether the oil was intended to be forwarded in one, two, or more carloads. The result is, that the conditions endorsed on the delivery bill could only be applied to qualify the liability of the defendants conditional upon their carrying the oil in covered cars, in accordance with the essential term of the contract, upon the faith of which alone they were given the oil to carry.

Appeal dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitor for respondents: *W. W. Fitzgerald.*

(1) L. R. 1 C. P. 336.

ALEXANDER FARMER.....APPELLANT;

AND

WILLIAM GUY LIVINGSTONE.....RESPONDENT.

1880
*May 12.
*June 10.

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

Ejectment—Letters Patent—Parliamentary title—Equitable defence—38 Vic. c. 12 (Man.) 35 Vic., c. 23 (D.)

L., in 1875, applied for a homestead entry for the S. W. ¼ of sec. 30, township. 6, range 4 west, pre-empted by *F.*, and paid $10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the $10 he had paid. *F.* subsequently paid for the land by a military bounty warrant in pursuance of sec. 23 of 35 *Vic.*, c. 23. *L.* entered upon the land and made improvements. In 1878, after the conflicting claims of *F.* and *L.* had been considered by the officers of the Crown, a patent for this land was granted by the Crown to *F.*, who brought an action of ejectment against *L.* to recover possession of the said land. *F.*, at the trial, put in, as proof of his title, the Letters Patent, and *L.* was allowed, against the objection of *F's* counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant.

Held, on appeal, reversing the judgment of the Court of Queen's Bench (*Man.*), that *L.*, not being in possession under the Statute, had no parliamentary title to the possession of the land, nor any title whatever which could prevail against the title of *F.* under the Letters Patent.

Per *Gwynne*, J.:—That under the practice which prevailed in *England* in 1870, which practice was in force in *Manitoba* under 38 *Vic.*, c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment.

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau, and Gwynne, J. J.

1880

FARMER v. LIVINGSTONE.

APPEAL from the judgment of the Court of Queen's Bench of the province of *Manitoba* discharging a rule nisi obtained by the appellant to set aside a verdict rendered for the defendant.

The action was one of ejectment to recover possession of the south-west quarter of section thirty, in the sixth township, in the fourth range west of the principal meridian, in the province of *Manitoba*.

The case was tried before *Wood*, C. J., without a jury.

The plaintiff (appellant) at the trial put in as proof of his title, letters patent, under the Great Seal of *Canada*, granting the land in question to him in fee simple.

The defendant, in pursuance of an order made at the trial, filed an answer in which he maintained that the issue of the said patent to the plaintiff was, as against him, fraudulent and void, and that he is, as against the plaintiff, entitled to the possession of the lands in question, and in which he prayed by way of cross relief, that the said letters patent might be decreed to be void for having been issued through fraud, or in error or improvidence.

The learned Chief Justice found that the letters patent issued to the plaintiff were void as having been issued in error and mistake, and on that ground rendered a verdict for the defendant, and that the defendant was entitled to a decree declaring the said letters patent to be void.

The plaintiff in the following term moved to set aside the verdict and for a new trial on the grounds. 1. That the production by the plaintiff of the Crown patent was conclusive of his right to recover. 2. That it was not competent for the defendant to impeach the validity of the patent on the ground of fraud, error, improvidence, or otherwise. 3. That there was no evidence given at the trial of such fraud, error or improvidence

in respect of the issuing of the said patent to the plaintiff. A rule nisi was granted accordingly.

The Court of Queen's Bench gave judgment in favour of the defendant, and discharged the rule nisi with costs.

From that judgment the plaintiff appealed to the Supreme Court.

The following are the material facts of the case:—

In 1875, after the defendant had been some short time in the *Boyne* settlement, he conceived the idea of erecting a saw-mill on the *Boyne*; and, to carry out the design, he required the sw ¼ of section 30, tp. 6, range 4 west.

On the 15th February, 1875, the plaintiff, who had entered an adjacent quarter section as a homestead, got from the Dominion Land Agent at *Emerson* the following pre-emption receipt:

"DOMINION LANDS OFFICE,
"*Emerson*, Feb. 15th, 1875.

"*Wm. Alexander Farmer* has entered to pre-empt the sw ¼ of section 30, township 6, range 4 west.

"GEO NEWCOMB,
"In charge District No. 2."

In May, 1875, defendant filed certain affidavits to prove that plaintiff had abandoned his homestead, or had forfeited it by not making sufficient improvements upon it, and claimed the right to a homestead entry for the sw ¼ of section 30, (plaintiff's pre-emption), and a pre-emption entry for plaintiff's homestead. Immediately after leaving the affidavits and signing the application and making the affidavit for a homestead entry of the lands in question and handing in the fee of $10, the defendant returned to the *Boyne* settlement, and went into actual possession and occupation of the lands.

About the same time plaintiff applied to purchase his

1880
FARMER
v.
LIVINGSTONE.

pre-emption claim, tendering a Military bounty warrant in payment.

Both these applications were made to the local agent at *Emerson*, within whose district the land in question is situated. The case being referred to the general agent he found that defendant had already been entered for two homesteads, and that this application, if granted, would make the third homestead he had obtained. He therefore instructed the local agent that defendant had forfeited all right to a homestead entry, and that his application was null and void, and that he would act regarding plaintiff's application precisely as though no conflicting application had been received.

Mr. *Newcomb*, the local agent, in consequence of this decision, sent the following letter to the defendant:

"OFFICE OF DOMINION LANDS,
"*Emerson*, June 2nd, 1875.

"SIR,—I have the honor to acknowledge the receipt of your application to homestead sw 30, 6, 4 w., and affidavits in support of same, also your $10 fee and abandonment of previous claim, and to inform you that it is impossible for me to give you the entry applied for without special instructions, as my books show that you have already made two homestead entries, and that is all the law allows any person to make.

"Your $10 will be here awaiting instructions from you.

"I have the honor to be, Sir,
"Your obedient servant,
"GEO. NEWCOMB.

"W. G. LIVINGSTONE, Esq.,
Headingly."

On June 5th, 1875, defendant wrote as follows:

"WINNIPEG, June 5th, 1875.

"G. NEWCOMB, Esq.,
"*Emerson.*

"DEAR SIR:—I received yours of June the 2nd, No.

473, and in reply would say, that I have not made more than one entry. The lot which was entered for me at *High Bluff* was taken away from me by the Department, and the other given in *lieu* of it; so I have only abandoned one lot. I spoke to Mr. *Codd* about the matter, and he told me I would be allowed to make the entry, so I hope this will be satisfactory, and that you will forward me receipt at once.

"And oblige,
"Yours,
"W. G. LIVINGSTONE."

The agent then answered:

"OFFICE OF DOMINION LANDS,
"*Emerson*, June 7th, 1875.

"SIR,—I have the honor to acknowledge the receipt of your letter of 5th June, and to inform you that your application to enter the s. w. ¼ of 30, tp. 6, range 4 west, cannot be recognized.

"I therefore return your $10 enclosed.

"I have the honor to be, sir,
"Your obedient servant,
"GEO. NEWCOMB.

"To W. G. LIVINGSTONE, Esq.,
"Headingly."

Thereupon defendant proceeded immediately to *Winnipeg* to lay his case before the agent, *D. Codd*, at the same time placing in Mr. *D. Codd's* hands a letter, showing under what circumstances a lot had been withdrawn from him, and another given. This claim was forwarded to *Ottawa* to the honorable the Minister of the Interior about the same time, and a receipt was acknowledged of the same, bearing the date of the 25th June, signed by *J. S. Dennis*, Surveyor General.

On the 25th April, 1876, defendant was informed by a letter signed by the agent of the Dominion Lands

1880

FARMER v. LIVINGSTONE.

Office, *Winnipeg*, that the title of the land in question was legally vested in the plaintiff.

On the 8th May, 1876, defendant forwarded a petition to the Minister of the Interior, alleging that he had occupied the said lot since the 7th May, 1875, to the present day; that he had been living with his family on the said lot; that he had built a house, stables, &c., and had six acres under crop; and that all these improvements were made by him *bonâ fide*, and considering all the time that his claim was legal, just, and could not be set aside upon any ground whatever; that the reason alleged by Mr. *Newcomb* was not supported by the facts; that he never abandoned two homesteads; that the plaintiff, at the time he made application for the said lot, had not complied with the law; that he had no improvements whatever made upon the lots claimed by him (plaintiff) as homestead and pre-emption, and therefore had lost all claim upon the same and prayed that his entry for the said lot s w. ¼ of 30, township 6, range 4 west, be confirmed, and that justice be done in the premises.

This petition was acknowledged on the 30th June, 1876.

The case was then considered by the Minister and the officers of the Department, and on the 10th July, 1878, the Surveyor General informed the defendant that the Minister could not sustain his action in the matter in deliberately settling upon the land after he had been notified by the agent of the prior claim thereto by the plaintiff, and on the 12th Sept, 1878, letters patent were issued by Crown for these lands in favor of the plaintiff.

Mr. *Bethune*, Q. C., for appellant:

The first point I will argue is, that the Chief Justice had no jurisdiction to entertain the equitable defence

set up to this action. By the statute of the Legislature of the province of *Manitoba*, 34 *Vic.*, c. 2, sec. 1, it is, amongst other things, enacted "that the Court of Queen's Bench shall possess such powers and authorities in relation to matters of local or provincial jurisdiction as in *England* are distributed amongst the Superior Courts of Law and Equity and of Probate," and by section thirty of the same statute it is enacted "that the Chief Justice shall make rules to regulate the practice of the court, and shall prescribe the forms of proceeding to be used, but until such rules are made, the practice and proceedings shall be regulated by the rules in force in *England* at the time of the transfer of this province to *Canada*, in so far as such rules can be applied to the circumstances of this province," but by a subsequent act the other judges must concur with the Chief Justice. And by the subsequent statute of the same Legislature, 38 *Vic.*, c. 12, s. 1, it is in substance enacted that the forms and practice of the Queen's Bench in *Manitoba* are to be regulated by the rules of evidence and practice and procedure as the same were on the 15th July, 1870.

The practice therefore is the same as that which prevailed in *England* in 1870; by that practice no equitable defence could be set up to this action.

The letters patent remain valid until the pronouncing of a judgment or decree of a court of competent jurisdiction made in a suit brought for the purpose of setting it aside. Such a decree or judgment could be pronounced only upon a bill in Equity or upon a *scire facias* at the instance of the Attorney General, or some person having such an interest in the land as gave him a right to maintain such a suit.

Then as to the Dominion statute 35 *Vic.*, c. 23, s. 65, it was not intended to prescribe any mode of procedure in the provincial courts, and even by s. 69 of 35 *Vic.*,

1880
FARMER
v.
LIVINGSTONE.

c. 23, it is clear that a direct proceeding ought to be taken for the purpose of setting aside the patent. The terms "upon action, bill or plaint," show that it is at the instance of a plaintiff that the jurisdiction is to be exercised and not by way of defence or cross-relief.

This brings me to the second point, that the respondent had no *locus standi* to impeach the issue of the patent to the appellant as he never acquired any interest in the land.

The learned counsel then contended upon the facts that the respondent's claim was merely on the bounty of the Crown, and could not have been enforced against the Crown even if no patent had been issued.

The respondent is a mere volunteer, having given no consideration, and could not therefore ask the interposition of the court against the Crown, and cannot now ask the aid of the court against the appellant, who is a purchaser from the Crown. *Boulton* v. *Jeffrey* (1); *Proctor* v. *Grant* (2); *Stevens* v. *Cook* (3); *Cosgrave* v. *Corbett* (4).

Mr. *Boyd*, Q. C., for respondent:

I will first deal with the objection taken by the plaintiff at the trial, that it was not competent for the defendant in this form of action to introduce evidence impeaching the patent to the plaintiff under 35 *Vic.*, c. 23, sec. 69. I contend that an appeal will not lie to this court in a matter of practice. The evidence was taken in accordance with precedent in the Court of Queen's Bench, *Manitoba*; and in *England* an Appellate Court will not interfere in a matter of practice. *Henderson* v. *Malcolm* (5); *Walcot* v. *Northern Ry. Co.* (6). The court has only declared that the Crown has issued

(1) 1 Grant's E. & A. R. 111.
(2) 9 Grant 26.
(3) 10 Grant 410.
(4) 14 Grant 617.
(5) 2 Dow. 285.
(6) 4 Macq. 348.

a patent in error. In *Reese* v. *Attorney General* (1) it was held that the Attorney General was not necessarily a party to a proceeding to set aside a patent. In *Manitoba* there is but one court, and the course of procedure sanctioned by the Chief Justice avoids circuity of action and multiplicity of suits.

The learned counsel then reviewed the facts of the case and contended that assuming the facts to be fully known to the Crown, there was manifest error in law; assuming the facts not to be known, there was error as to facts; in either case the patent was issued in error or improvidence, and relied on the following as authorities for setting aside patents issued under such circumstances: 35 *Vic*, c. 23, sec. 69; *Dougall* v. *Laing* (2); *Attorney General* v. *McNully* (3); *Lawrence* v. *Pomeroy* (4); *Attorney General* v. *Garbutt* (5); *Stevens* v. *Cook* (6); *Boulton* v. *Jeffrey* (7).

Mr. *Bethune*, Q. C., in reply:

This case is not within *Lawrence* v. *Pomeroy* (8), because the actual settlement was within the knowledge of the Crown. The line of decisions in *Ontario* proceed upon statutes which are applicable to the province of *Manitoba*.

RITCHIE, C. J.:—

I think it quite unimportant whether a defendant in *Manitoba* could or could not avail himself of an equitable defence in an ejectment suit, because the plaintiff made out a clear case under a Crown grant, and the defendant did not show that he had any legal or equitable defence to the action, he did not show any grant or conveyance from the Crown, nor any legal title

(1) 16 Grant 467.
(2) 5 Grant 292.
(3) 8 Grant 324.
(4) 9 Grant 474.
(5) 5 Grant 181.
(6) 10 Grant 410.
(7) 1 Grant's E. & A. R. 117.
(8) *Ubi supra.*

1880
FARMER v. LIVINGSTONE.
Ritchie, C.J.

or equitable interest in the land under any statutory provision; in other words, he showed no *locus standi* enabling him to attack the letters patent, even if they could be impeached in such a proceeding.

I think the defendant is not in possession under the statute, not having complied with its terms, and that he has therefore no parliamentary title to the possession of the land, nor any title whatever that can prevail against the title of the plaintiff under the letters patent. Therefore, the letters patent should have been received and acted on as conveying a good and valid title to the plaintiff; on this simple ground, I think the judgment should be reversed.

FOURNIER, HENRY and TASCHEREAU, J. J., concurred.

GWYNNE, J.:—

I have read with the greatest attention the very able judgment of the learned Chief Justice of the province of *Manitoba* in this case, especially that accompanying his verdict rendered in favor of the defendant, which contains his criticism of the evidence as taken before him, as also the evidence so taken. Adopting, then, in this case the conclusions of facts arrived at by the learned Chief Justice of *Manitoba*, I am free to admit that, assuming the evidence before him to be all the evidence that could be offered affecting the points decided by him, he has made out a very strong case to justify the Dominion Government in taking proceedings to recall and avoid the letters patent under which the plaintiff claims, as issued improvidently and in error and mistake of facts, occasioned by wrong information as to the true state of the case communicated by the local officials to their superiors at *Ottawa*; but I am at the same time unable to concur in the conclusions of law arrived at by the Court, that in this case the

defendant is entitled to judgment, or that in this action the letters patent can be declared to be null and void.

By the statute law of the province of *Manitoba* it is enacted that the Chief Justice and Judges of the Court of Queen's Bench of the province shall make rules to regulate the practice of the Court and shall prescribe the forms of proceeding to be used, *but until such rules are made* the practice and proceedings shall be regulated by the rules in force in *England* on the 15th July, 1870.

It was admitted in argument that no rules have been made by the Judges under this authority. This case must therefore be governed by the rules prevailing in *England* in July, 1870, and as no such defence could be set up in ejectment in *England*, so neither can it in *Manitoba*. The evidence as taken therefore cannot affect or prejudice the plaintiff's rights in this suit, nor until he shall be called upon under the Act to support the letters patent when assailed by action, bill, or plaint, under 35 *Vic.*, c. 23, sec. 69, can he be required to offer evidence in support of them. Whether the Courts in the province of *Upper Canada* (upon the authority of the judgments of which Courts the learned Chief Justice of *Manitoba* wholly rests his argument in the case before us, and in which province the statute law does authorize equitable defences in actions of ejectment,) would entertain, as an equity capable of enforcement by way of defence to an action of ejectment, a claim of the nature of that of the defendant in the case before us, we are not called upon to determine. I express no opinion upon that question, reserving all consideration of it until it shall arise. I may observe, however, that hitherto no such case has presented itself in the courts, that I am aware of. Moreover, it is to be observed that the language of the statute law of old *Canada*, which vested in a person interested in land *under contract*

1880
FARMER v. LIVINGSTONE.
Gwynne, J.

with the Crown, *an estate* in the land recognizable in the Courts both of law and equity, is very different from the language of the *Dominion Lands Acts*, which constitute the sole authority regulating the disposition of the Dominion Lands in the province of *Manitoba*. What, then, is meant in the learned Chief Justice's judgment by the expression "the common law of the Crown Lands Department," "by which law" he says, "it was incompetent for the Crown to sell or for the plaintiff to purchase these lands," I confess I do not very clearly apprehend. The application of the term "squatter sovereignty," also made use of by the learned Chief Justice, does not appear to me to be more accurate. The claims of squatters in old *Canada* were recognized upon the principle of its having been a usage of the Crown for many years in disposing of its lands to give, purely *ex gratiâ*, a preference to persons who had actually cleared and cultivated land, in ignorance of any prior claim, although they had originally entered without title. But it is obvious that inasmuch as the disposition of the land in question was wholly governed by the Dominion Lands Act of 1872 and the practice and regulations of the Department under that Act, upon which alone the defendant must rely for any title he has, no usage can have yet grown up of the nature of that referred to in *Cosgrove* v. *Corbett* (1), and other like cases; moreover, the Courts have in no case that I am aware of recognized and enforced against a patentee of the Crown a claim set up by a squatter who had entered in direct opposition to the authority of the Department and with knowledge that the subsequent patentee set up a claim to the lot which the officials in the Department rightly or wrongly recognized, and recognizing subsequently granted him letters patent.

(1) 14 Grant 620.

In fine, whether the local officials acted rightly or wrongly in refusing to entertain the defendant's application and to enter him as a homestead claimant on the lot in question and to keep his money and to give him a receipt therefor under the provisions of the Act, it is plain upon the evidence that they did so refuse, and although that refusal may, under the circumstances, justify the Crown in taking proceedings under the Act to repeal the letters patent, I cannot see in the Dominion Lands Act of 1872 anything that can be said to justify the judgment that it has given to the defendant either at law or in equity a parliamentary title which the Courts can, in this action, pronounce to be preferable to the title vested in the plaintiff under his letters patent. In my opinion, therefore, the judgment of the Court below must be reversed, and a verdict and judgment in the action of ejectment be ordered to be entered for the plaintiff.

Appeal allowed with costs.

Solicitors for appellant :—*Ross and Killam.*

Solicitor for respondent :—*Frederick McKenzie.*

WILLIAM PARSONS.....APPELLANT;

AND

THE STANDARD FIRE INSURANCE COMPANY..... } RESPONDENTS.

1880
*May 14.
*June 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Subsequent and further insurance—Substituted Policy.

The appellant sued upon a policy of insurance made by the respondents on the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, $8,000," and the policy

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

1880

PARSONS v. THE STANDARD FIRE INS. CO.

had endorsed upon it the following condition, being statutory condition No. 8, R. S. O. ch. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances, which formed a portion of the "*further* insurance" for $3,000 mentioned in the policy, was one for $2,000 in the *Western Insurance Company*, which appellant allowed to expire, substituting a policy for the same amount in *The Queen Insurance Company*, without having obtained the consent of or notified the respondents.

Held,—Reversing the judgment of the Court *a quo*, that the condition as to *subsequent* insurance must be construed to point to *further* insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the $2,000 insurance in *The Queen Insurance Company*.

APPEAL from a judgment of the Court of Appeal for *Ontario*.

The action was brought in the Court of Queen's Bench, for *Ontario*, on a policy of insurance made by the defendants, dated 28th April, 1877, insuring plaintiff against loss or damage by fire to the amount of $2,000, on a general stock of hardware, &c.

The property was destroyed by fire on the 3rd August, 1877.

The case was tried at the Fall Assizes of 1878, at *Guelph*, before Mr. Justice *Galt*, without a jury, and a verdict entered for the plaintiff for $2,142.50.

In Michaelmas Term, 42nd *Vic.*, *Bethune*, Q. C., obtained a rule *nisi*, calling upon the plaintiff to shew cause why the verdict for plaintiff obtained at the trial should not be set aside and a verdict rendered for the defendants, on the ground that the plaintiff was not entitled to recover, and on the grounds that the defendants established the defence relied upon by the defen-

dants at the trial; that is to say, that the plaintiff did not disclose, at the time of the making of the application, the existence of the policy in the *Provincial Insurance Company*, and that there was a breach of warranty in not disclosing buildings within one hundred feet of the risk, and that there was no notice to defendants of the subsequent insurance in the *Queen Insurance Company*.

The rule *nisi* was discharged by the Court of Queen's Bench. The defendants appealed to the Court of Appeal, and the appeal was allowed.

The principal point argued on this appeal was whether or not an insurance effected with the *Queen Insurance Company* subsequently to the granting of the policy sued upon, and which was in substitution only for a lapsed policy for the like amount which was in existence with the *Western Insurance Company* at the time of the policy sued upon being effected, was a *subsequent* insurance and within the meaning of statutory condition No. 8, R. S. O. c. 162.

Mr. *McCarthy*, Q. C., for appellant:—

The only ground upon which the respondent's counsel can rely before this court is, that the Court of Appeal were right in their construction of the condition as regards *subsequent* insurance. Now what are the facts:

1. The respondent company assented to other insurances on the property covered by their policy, to the extent of $8,000; 2. The appellant never had insurance on this property beyond that amount at one time, exclusive of respondent's policy; 3. The respondents make no pretence that the *Queen Insurance Company* was not as respectable and as well managed a company as any of the companies with whom the appellant was insured to their knowledge.

Can it be fairly said that if one of these policies

1880

PARSONS v. THE STANDARD FIRE INS. CO.

lapse, the re-insuring for the same amount in the same company, on precisely the same terms, is a "subsequent insurance," within the meaning of the condition? It is the rule of insurance offices, when the insurance is for three years, not to renew, but to require a new application, and to issue a new policy; this is clearly a new contract of insurance, and in every such case, unless the consent of the other insuring companies be obtained, vitiates every other insurance.

And if the making of a new contract of insurance in the same company cannot in reason be deemed a subsequent insurance, why should insuring in a different company be differently viewed?

In the construction of contracts, it is the spirit and not the letter that governs, and it is the business of courts to ascertain the spirit, or, in other words, what was intended by, or the intention of, the parties, and that being ascertained, it overrides every other consideration. *Verba intentioni debent inservire. Per cur., Ford* v. *Beech* (in error) (1), and, as observed by Lord *Hale*, the Judges ought to be anxious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties. *Broom's* legal maxims, (2).

The learned counsel also cited: *Carpenter* v. *The Providence Washington Ins. Co.* (3); *Prop., &c., in Dunstable* v. *Hillsborough Mut. Ins. Co.* (4); *Lixom* v. *Boston Mut. F. Ins. Co.* (5).

Mr. *Bethune*, Q. C., for respondent:—

After stating that he relied also on the construction put on the eighth statutory condition as varied in the case by the court below, contended that the insurance with the *Queen Insurance Company* was a subsequent

(1) 11 Q. B. 852, 866.
(2) 540-41-42, 5th Ed.
(3) 16 Peters U. S. 495.
(4) 19 N. Hamp. 580.
(5) 9 Met. (Mass.) 205.

insurance, and was within the meaning of the condition already referred to, and that its having been effected without the consent of the respondents having been obtained, made the policy void.

The respondents had an interest in knowing in what other companies insurances were effected, as the respondents were entitled to cancel the contract of insurance made by them, and might have done so if they had known that the insurance had been effected in a company with the management of which the respondents were not satisfied.

It seems quite clear that the respondents were entitled to withhold their assent to this subsequent insurance, and the simple withholding of such assent avoided the policy.

The learned counsel cited: *McBride* v. *The Gore District Fire Ins. Co.* (1); *Hatton* v. *The Beacon Ins. Co.* (2); *Mason* v. *The Andes Ins. Co.* (3); *Weinaugh, Administrator of Burgy* v. *The Provincial Ins. Co.* (4); *Hendrikson* v. *Queen Ins. Co.* (5); *Bruce* v. *Gore Dist. Mut. Ins. Co.* (6).

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

The judgment of the Court was delivered by

GWYNNE, J.:—

The argument before us became reduced to the question whether or not an insurance effected in the *Queen Insurance Company* subsequently to the granting of the policy sued upon, and which was in substitution only for a lapsed policy for the like amount which was in existence with the *Western Insurance Company* at the time of the policy sued upon being effected, avoided this latter policy? The policy sued upon in the body of

(1) 30 U. C. Q. B. 451.
(2) 16 U. C. Q. B. 316.
(3) 23 U. C. C. P. 37.
(4) 20 U. C. C. P. 405.
(5) 31 U. C. Q. B. 547.
(6) 20 U. C. C. P. 207.

1880

PARSONS v. THE STANDARD FIRE INS. CO.

it contained a recognition of $8,000 further insurance, (in addition to the amount secured thereby) being in existence and allowed. The contention of the respondents was, that the $8,000 thus allowed included the policy in the *Western*, which was for $2,000, and that the effecting a policy in the *Queen* for $2,000, although merely in substitution for this in the *Western*, which was allowed to lapse, without the consent of the respondents, was in breach of a condition on the policy to the effect that

> The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto in writing signed by a duly authorized agent.

The body of the policy must be read with the conditions endorsed, so as to give to the whole a rational construction; and, in my opinion, the construction put upon it by the Court of Common Pleas is the correct one.

In view of the fact that the policy on its face allows additional insurance to the amount of $8,000, over and above the amount covered by the policy sued on, the condition as to subsequent insurance must, I think, be construed to point to *further* insurance beyond the amount so allowed, and not to a policy substituted for one of like amount allowed to lapse.

The respondents, if they desired to avoid their policy in the event of such a substitutional policy being effected, should be more precise in the language used.

The appeal should, in my opinion, be allowed with costs, and the judgment of the Court of Common Pleas be re-affirmed.

Appeal allowed with costs.

Solicitor for appellant: *Maitland McCarthy.*

Solicitor for respondents: *Thomas C. Haslett.*

RICHARD CHURCH ..... APPELLANT;

AND

WILLIAM JOHN FENTON ..... RESPONDENT.

1880
*March 23.
*June 21.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of lands for taxes—Indian lands—Liability to taxation—Lists of lands attached to warrant—32 Vic., ch. 36, sec. 128, O., and sec. 156, ch. 180 R. S. O.

In September, 1857, a lot in the Township of *Keppel*, in the County of *Grey*, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to '69 to one *D. K.*, who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land *hereinafter mentioned* for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county.

By sec. 128 of the Assessment Act, 32 *Vic.*, ch. 36, *O.*, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, affirming the judgment of the Court below (1), that upon the lands in question being surrendered to the Crown, they became

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

(1) 4 Ont. App. Rep. 159.

1880

CHURCH v. FENTON.

ordinary unpatented lands, and upon being granted became liable to assessment.

2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th sec., ch. 180 Rev. Stats. *Ont.* (*Fournier* and *Henry*, J. J., dissenting.)

THIS was an appeal from the judgment of the Court of Appeal for *Ontario*, affirming the judgment of the Court of Common Pleas (1), discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiff.

The facts appear in the judgments.

Mr. *Boyd*, Q. C., for appellant:—

The sales were not legal, there having been no proper authority to the treasurer to sell. Both sales were had under the Assessment Act of 1868-9. Sec. 128 of the Act requires the warden to authenticate the lists of lands in arrears with his signature and the seal of the corporation, &c. Here there was no authenticated list, and all the warrant directs is the sale of "the land hereinafter mentioned," and there is no lands in it; the warrant is a complete instrument in itself, it makes no reference to any list attached, and the list that is attached, which is without seal or signature, makes no reference to any warrant. You cannot prove by parol evidence that the statutory provisions have been complied with. Where the statute requires a particular thing to be done, you cannot deprive a man of his property until it is done. *Hall* v. *Hill* (2); *in re Monsell* (3); *in re McDowell* v. *Wheatly* (4).

The warrant was the foundation of the sale, and we contend that the authentication of the list as required by the statute is a condition precedent to and the

(1) 28 U. C. C. P. 384.
(2) 2 Grant's E. & A. R. 569.
(3) 5 Ir. Ch. Rep. 529.
(4) 7 Ir. C. L. R. N. S. 569.

foundation for the warrant. *Kenney* v. *May* (1); *Greenstreet* v. *Paris* (2).

The English authorities with regard to the poor rates are also very applicable. *Re Justices of North Staffordshire* (3).

The 156th section of the Assessment Act is relied on as to the first deed. This section does not make valid all deeds. See *Harrison's* Manual 4 ed., p. 748, and authorities there collected.

Then the lands in question were Indian lands, or lands held in trust for the Indians by the Crown, and were not liable to sale for taxes.

In *Street* v. *The County of Kent* (4) it was held that there was no law rendering liable to assessment Crown lands in *Upper Canada*, except such provisions as were contained in the Acts relative to the assessment of property. 16 *Vic.*, ch. 159, sec. 24, Con. Stat. Can., ch. 22, sec. 27, and 23 *Vic.* ch. 2, sec. 27 only applied to *Lower Canada*, and crown, clergy and school lands, although sold or agreed to be sold, were not liable to taxation unless a lease or license of occupation had been issued to the purchaser, and the section of the Public Lands Act, authorizing the issue of leases and licenses of occupation, was mandatory and imperative; also see *Austin* v. *Co. Simcoe* (5).

The Act 27 *Vic.*, ch. 19. upon which respondent relies, was passed to meet the case of *Street* v. *Co. Kent.*

It is admitted by the Courts below that, prior to this Act, Indian lands, whether sold or unsold, were not liable to taxation; but the learned judges were of opinion that the language of sec. 9 of this Act was broad and general enough to cover them. The appel-

(1) 1 Moo. & R. 56.
(2) 21 Grant 226.
(3) 23 L. J. Mag. C. 17.
(4) 11 U. C. C. P. 255.
(5) 22 U. C. Q. B. 73.

1880
CHURCH
v.
FENTON.

lant, however, contends that sec. 9 of the Act in question was only intended for public lands, and must be read in connection with the exemption clause of the Assessment Act, to which it is an exception, and this view is supported by sec. 11 of the same Act which amended sec. 108 of the Assessment Act (ch. 55 Con. Stat., U. C.) so as to include the lands made liable by the 9th sec.; and the 108th sec. of the Assessment Act refers only to the Commissioner of Crown Lands and not to the Chief Superintendent of Indian Affairs.

The object was to make these lands free from taxation in order to get a larger amount when sold.

I also contend that the land, by the Confederation Act, was in the Crown as represented by the Dominion Government, and was granted by the Crown after the alleged taxes accrued; the Crown therefore could disregard the taxes, and the patent from the Crown must, in a court of law, prevail against the tax title until the patent has been cancelled or vacated in a proceeding to which the Crown is made a party.

Then my last point is that, as to the two acres, appellant has a statutory right to have a finding in his favor. Until the sheriff executes the conveyance and gives deed, the title remains in the patentee of the Crown.

Evidence that he was purchaser at the tax sale is no title; he was bound to produce the certificate of sale. As a matter of law, our case was complete when we put in our patent from the Crown, and it is for him to prove title.

Mr. *Reeves* for respondent:—

As to this last point, if the objection had been made at the trial, then the defendant would have been entitled to an equitable plea. Here we have a valid deed, and it must be presumed there was a certificate of sale. The deed can only be issued after the certificate has been issued.

The principal point on which my learned friend relies is, that because the list of lands was not authenticated by the signature of the warden and the seal of the corporation, the sale is invalid, and they say sections 156 and 131, ch. 180 Rev. Stats, *Ont.*, cannot cure an invalid warrant. The cases of *Morgan* v. *Perry* (1) and *Fenton* v. *McWain* (2) show such a defect or irregularity would be cured by sec. 156 ; but the manner in which the warrant and list of lands were incorporated made them one instrument, and the list was, under the circumstances, authenticated by the affixing of the seal to the warrant, and there has been a substantial compliance with the statute. The object of the legislature in requiring the seal of the corporation to be affixed to the list, was to identify the list as being the list of lands liable to be sold, and if it is established, either from the construction of the warrant or from other evidence, that the list in question was the list of lands liable to be sold which had been forwarded by the treasurer to the warden, and by him returned to the treasurer with the warrant, this will be sufficient.

The learned counsel also referred to *Cooley* Const. Limit. (3), and to *Torrey* v. *Milbury* (4).

Now, as to the question raised, whether these lands, having been held in trust by the Crown, as Indian lands, should not be liable to taxation, it has been sought to limit the words *public* lands in the Act 27 *Vic.*, ch. 19 ; but why not give a full meaning to these words? This Act was expressly passed for the purpose of doing away with all such distinctions. These Indian lands were present to the mind of the legislature when this Act was passed, and surely some limitation would have been made as to this interest, if they had intended it to be exempted.

(1) 17 C. B. 334.
(2) 41 U. C. Q. B. 239.
(3) 4th ed. p. 648.
(4) 21 Pick. 67.

1880
CHURCH
v.
FENTON.

The argument based on the fact that the patent was issued by the Dominion Government after the accrual of the taxes, and, therefore, in a court of law, must prevail against the tax title until the patent has been cancelled in a proceeding to which the Crown is made a party, can have no weight, for the patent was issued more than a year before the sale. At the time the taxes were properly assessed, and there was no reason to suppose the land would be sold for the payment of taxes.

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

RITCHIE, C. J.:—

This was an action of ejectment brought to recover possession of lot No. 22, in the 13th concession of the Township of *Keppel* in the County of *Grey*.

The writ issued on the 28th September, 1877, and was served 13th same month. Plaintiff claims title under letters patent issued by Dominion Government, dated 4th June, 1869.

The defendant appeared, 28th September, 1877, defended for the whole of the land, denied plaintiff's title, asserted title in himself, except as to two acres by virtue of a deed dated 26th September, 1873, from *David Kellie*, who claimed under a tax deed from Warden and Treasurer of the County of *Grey*, dated 10th February, 1872; and as to the two acres, as purchaser thereof at a sale for taxes by the treasurer of the County of *Grey*, on the 18th November, 1873.

The cause was tried on the 11th October, 1877, when verdict was rendered for the defendant. In Michaelmas Term, November 21, 1877, plaintiff obtained a rule *nisi* to set aside the verdict as being contrary to law and evidence, and to enter a verdict for plaintiff. In Hilary Term, February 4, 1878, the rule *nisi* was discharged.

The plaintiff appealed from the judgment of the Court of Common Pleas to the Court of Appeal for *Ontario*,

and on 22nd March, 1879, that court dismissed the appeal with costs. Against this judgment plaintiff now appeals.

As to the first sale, if it had been irregular for the cause assigned, I think the 155th section, 32 *Vic.*, c. 36, Ont., applies and cures the irregularity. As to the second deed: as to the want of the corporate seal and signature of the warden, while it is much to be regretted that officers who have plain and explicit directions given them do not follow the terms of the statute and literally fulfil its injunctions, still I think, in the case where the statute has been unquestionably substantially complied with, I am not prepared to differ from the Court of Common Pleas and the Court of Appeal and to say that the warrant and list are not to be regarded as one entire instrument, and that the words "hereinafter mentioned" is not such a reference to the list as to incorporate it in the warrant, and so make it form part of the warrant, and so be under the corporate seal and signature of the warden. For the reasons given by the Court below, I am of opinion that, although the lands in question had been Indian lands, they were in the hands of grantees liable to be sold for taxes.

The appeal should be dismissed with costs.

FOURNIER, J.:

Les faits de cette cause donnent lieu aux deux questions suivantes: 1o Le lot de terre en question en cette cause, faisant partie des terres reservées et détenues par la couronne en fidéicommis pour le bénéfice des sauvages, était-il sujet à être vendu pour taxes?

2o La vente qui en a été faite en cette cause était-elle légale et conforme aux dispositions du statut à cet égard?

Quant à la première question je n'hésite pas à déclarer que je concours pleinement dans les raisons données

1880
CHURCH
v.
FENTON.
Fournier, J.

par l'honnorable juge en chef *Moss* pour en arriver à la conclusion que le terrain en question était cotisable et partant sujet à être vendu pour arrérages de taxes. Sur la seconde question concernant la légalité des procédés adoptés pour effectuer cette vente, j'ai le malheur de ne pas être du même avis.

En cas de vente pour arrérages de taxes, les procédés à suivre sont indiqués par la sec. 128, 32 Vict., ch. 36 (1). Le trésorier doit d'abord d'après cette section faire une liste en double de toutes les propriétés qui doivent être vendues pour taxes, avec le montant dû par chaque lot mis en regard de tel lot.

Chaque double de cette liste doit être authentiquée par la signature du préfet et le sceau de la corporation, l'un doit être déposé au bureau du greffier du comté et l'autre renvoyé au trésorier avec un warrant y annexé ; ce warrant doit aussi être sous la signature du préfet et le sceau du comté. Ainsi, deux conditions sont impérativement exigées avant de pouvoir procéder à une vente pour taxe—la 1ère, la préparation de la liste qui doit être authentiquée par la signature du préfet et le sceau de la corporation—la 2me, la préparation d'un warrant authentiqué de la même manière par la signature du préfet et le sceau de la corporation. Ce sont deux documents distincts et séparés qui après leur complète confection doivent être annexés l'un à l'autre pour être remis au trésorier. Mais chacun d'eux doit être complet suivant la disposition du statut. Ces formalités sont essentielles pour la validité de chaque document, et elles ne sont pas moins importantes pour l'un que pour l'autre. Un warrant qui ne serait pas

(1) And the warden *shall authenticate each of such lists by affixing thereto the seal of the Corporation and his signature*, and one of such lists shall be deposited with the Clerk of the County, and the other shall be returned to the treasurer, with a warrant thereto annexed, *under the hand of the Warden and the seal of the County*, commanding him to levy upon the land for the arrears due thereon, with costs.

revêtu de la signature du préfet et du sceau du comté serait sans doute considéré comme absolument nul. Pourquoi n'en serait-il pas de même pour la liste qui doit être faite absolument de la même manière et dont la confection doit précéder la préparation du warrant ? Il y a de fort bonnes raisons pour qu'il en soit ainsi. C'est afin sans doute qu'il ne puisse être fait aucune addition quelconque à cette liste et pour protéger les contribuables contre la fraude que la loi exige cette formalité importante de l'apposition de la signature du préfet et du sceau du comté. La loi ayant imposé la même formalité à ces deux documents, dans des termes précis qui n'admettent point de doute, je n'ai pas le droit de faire une distinction et de dire, que nécessaire pour le warrant elle ne l'est pas pour la liste.

Dans le cas actuel la liste des propriétés qui devaient être vendues n'a pas été faite conformément aux dispositions de la sec. 128 ; elle n'est ni signée par le préfet ni revêtue du sceau du comté. Ces formalités n'ont été accomplies que pour le warrant, la liste des propriétés n'est ni signée ni scellée comme le veut le statut,—mais comme elle est annexée au warrant on veut considérer les deux comme ne faisant qu'un seul document. Cette annexion étant aussi une formalité requise par le statut—il m'est impossible de comprendre comment son accomplissement peut dispenser de remplir une autre formalité plus importante exigée par le langage impératif de la loi. Lorsqu'il s'agit de procéder à l'expropriation des individus toutes les formalités nécessaires pour constituer l'autorisation de vendre doivent être remplies. On ne peut y substituer des équivalents. En vain argumenterait-on qu'il arrive souvent que les tribunaux admettent comme valables des écrits privés dont les signatures ont été irrégulièrement apposées,—que même des documents solennels,

1880
CHURCH
v.
FENTON.
Fournier, J.

comme les commissions des plus hauts fonctionnaires publics, sont attestés par la signature de Sa Majesté ou du Gouverneur-Général, mise le plus souvent au commencement de ces documents ; la loi n'ayant pas dans ces cas prescrit un mode particulier, il n'y a pas de raison pour déclarer illégale ces sortes d'attestations. Mais la pratique suivie dans ces cas ne saurait justifier une violation aussi manifeste de la loi que celle qui a été commise dans la confection de la liste des propriétés qui devaient être vendues par la municipalité du comté de *Grey*.

Cette liste est la preuve exigée par la loi de l'existence d'une taxe pour laquelle la propriété peut être vendue; elle tient lieu d'un jugement, et avant de lui en donner l'effet, la loi a voulu qu'elle fût non seulement préparée par le trésorier, mais qu'elle ne pût être mise à exécution par warrant qu'après avoir reçu l'attestation du plus haut officier municipal, afin, sans doute, de mettre les intérêts des contribuables sous la protection de cet officier. Ce n'est pas le trésorier qui est responsable de l'exactitude de cette liste—ce n'est pas à lui que le contribuable lésé, parce que sa propriété y aurait été mal à propos insérée, pourrait s'adresser pour une réparation, mais bien au préfet auquel la loi a imposé ce devoir. C'est lui qui serait tenu responsable des conséquences de toute faute ou négligence à cet égard. La liste en question, est suivant moi, la base de l'autorité pour vendre, c'est le jugement, et le warrant tient lieu du *fi. fa.* dans les cas ordinaires. Le warrant, bien que régulier dans sa forme, ne peut pas plus dispenser d'une liste authentiquée comme le veut la loi, qu'un bref de *fi. fa.* parfait dans sa forme ne pourrait dispenser d'un jugement avant de pouvoir exécuter les biens d'un défendeur.

En l'absence de la liste exigée, il n'y a pas de preuve légale de l'existence d'une taxe, et par conséquent point

d'autorité pour vendre. Cette cause de nullité se rencontre dans les deux ventes qui ont été faites du lot No. 22. Dans la cause de *McKay vs. Chrysler* (1) cette cour a décidé qu'une vente pour taxe était nulle, parce qu'il n'y avait pas de preuve que la propriété vendue avait été cotisée. Le principe de cette décision est applicable à cette cause. Il n'y a pas ici, non plus, de preuve de l'existence d'une dette pour taxe, parce que la seule preuve faite n'est pas celle que la loi requiert pour autoriser une vente. Quant à la nécessité de faire cette preuve, je me borne à référer aux autorités citées dans la cause mentionnée plus haut de *McKay vs. Chrysler* comme parfaitement applicables à celle-ci. Je me fonde aussi sur les autorités citées dans la même cause pour établir que la sec. 156 du ch. 180, R. S. O. ne peut être invoquée pour couvrir la nullité résultant du défaut d'autorisation de procéder à la vente, autorisation qui ne peut résulter que de la préparation d'une liste en la forme imposée par la loi.

Pour ces raisons, je serais d'opinion d'admettre l'appel, mais la majorité de cette cour est d'un avis contraire.

HENRY, J.:—

In consequence of the conclusion which I have arrived at in regard to the warrants under which the lands of the appellant were sold, it is unnecessary for me to discuss the question whether, under the circumstances, they, having been at one time Indian lands, were, when in his possession before his patent, liable to be taxed. I have, however, considered the subject, and have discovered strong reasons why they were not so liable, but as to that part of the case I need give no opinion.

Without the operation of the validating acts the common law throws upon the claimant under a tax deed

(1) 3 Can. Sup. C. R. 436.

1880
CHURCH
v.
FENTON.
Henry, J.

the onus of proving every link in the chain of legal provisions to divest the title of the owner. It is, however, necessary for me to refer but to some of them. The warrants for the sale of the lands were signed and sealed by the warden as prescribed; but they, to my mind, are void for a patent ambiguity on the face of them. They are both in the same form, and each is written on a page of foolscap paper, and bears at the foot the signature of the warden and the seal of the corporation of the County, and

> Authorize, require, empower and command you (the Treasurer) to levy upon the various parcels of land *hereinafter* mentioned for the arrears of taxes due thereon and set opposite to each parcel of land with your costs.

These documents in no other way point to the lands to be levied on, and are, therefore, imperfect. There is no reference in them to any other paper or writing by which the lands could be identified, and the warrants are therefore defective. No lawyer would claim that a warrant for the arrest of a criminal, so referring to the charge made against him, would be good merely by annexing the information to it. No oral testimony can be admitted to supply such a patent defect. The same rule is applicable to the warrants in this case, and the wardens could no more be permitted to say they meant, in them, to refer to the lands mentioned in the lists, than a justice to say he referred in his warrant to the charge made in the information annexed to the warrant. But even if such evidence were admissible, it was not given in this case. Neither of the wardens was examined, and there is no evidence that at the time the warrants were signed or issued the lists were annexed to them. The only persons who could satisfactorily state whether or not, are the wardens themselves—all else is mere hearsay. The treasurers who were the only witnesses examined as to this point

were incompetent to speak to it. There is, too, another fatal objection. No lists as required by the statute were authenticated, and therefore there was no authority at all to issue a warrant.

Section 128 of the Assessment Act of *Ontario*, 32 *Vic.*, ch. 36, required that the treasurer of the county should

> Submit to the warden of such county a list in duplicate of all the lands liable under the provisions of this Act to be sold for taxes with the amount of arrears against each lot set opposite to the same, and the warden *shall* authenticate each of such lists by affixing thereto the seal of the corporation and his signature, and one of such lists shall be deposited with the town clerk, and the other shall be returned to the treasurer with a warrant thereto annexed under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs.

Before, then, the warden had authority to issue a warrant, his duty was first to authenticate the lists. To give himself jurisdiction the statute provided that he should so authenticate them. He had no right to question the wisdom or necessity of the peremptory legislative direction, nor have we. Many good and sufficient reasons might be shown for the provision, but that is unnecessary, for we have no right to speculate as to the sufficiency of them. That was for the legislature to decide, and having done so, it is not permissible for any one to question the decision. To give life or vitality to the lists as records on which to found subsequent proceedings the legislature has provided for doing so in a particular manner, otherwise the lists are in themselves no better than waste paper. They may be correct, or grossly the opposite; and may be the production of an unauthorized person. They are not vouched by any responsible officer, and the legislature has wisely provided that before lands shall be sold the lists must be authenticated in a particular way and the highest official in the county held responsible for its correctness. This is necessary, and was intended for

1880
CHURCH
v.
FENTON.
Henry, J.

the due protection of property from the errors, negligence or frauds of municipal officers. The act of previous authentication of the lists by the warden is as necessary to give him jurisdiction to issue a warrant as if the statute had required that authentication by the act of another—just as necessary as if the provision had been for it to have been by the treasurer, in which case without it the issue of a warrant by the warden would be wholly unauthorized and unjustifiable. Before authentication in the solemn manner prescribed, a duty was thrown upon the warden by a proper inquiry to ascertain the correctness of the list; but that legislative check was wholly withheld in regard to the warrants in this case. Did the legislature intend to leave it as a duty to be performed or not? If it was intended to leave it optional, why require it at all? Independently of the accepted construction of "shall," when employed in a statute by which it is held to be imperative, we are in this case bound by the statutable provision. In sub-sec. 2 of sec. 8 of ch. 1 of the Revised Statutes of *Ontario*, the legislature plainly guides us. It provides that:

The word "shall" shall be construed as imperative, and the word "may" as permissive.

To make a good and valid list it therefore became necessary to be authenticated as the imperative provision requires, and if not so authenticated a warrant might as legally be issued without any list at all. An execution extended on land without being founded on any judgment would be quite as effectual to sell and convey a man's property as the warrants in this case without the lists being authenticated. I feel bound to say that the warrants in this case gave no authority to sell. It is, however, urged that by sec. 155 of ch. 36 of 32 *Vic.* a title passes by the deed alone, or, at least, that the validity of the deed cannot be questioned after two years from the sale. That section provides that:

Whenever lands are sold for arrears of taxes and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some court of competent jurisdiction by some person interested in the land so sold within two years from the time of sale.

It has been judicially settled in *Ontario* and by this Court in *McKay* v. *Chrysler* (1), that arrears of taxes must be shown before the sale, and that the provision does not include a case wherein it is not shown such arrears existed. I refer particularly to the judgment of my learned brother *Gwynne* in that case, where in addition to his own views forcibly expressed he cites judgments from the appeal and other courts in *Ontario*. He cites approvingly at page 473 this language used by *Draper*, C. J., in a judgment delivered by him in reference to this statute.

The operation of this statute is to work a forfeiture. An accumulated penalty is imposed for an alleged default, and to satisfy the assessment charged, together with this penalty, the land of a proprietor may be sold, though he be in a distant part of the world and unconscious of the proceeding.

To support a sale under such circumstances *it must be shown that those facts existed which are alleged to have created a forfeiture, and which are necessary to warrant the sale.*

I hold that the perfecting the lists by the authentication prescribed and a valid warrant are necessary. *Blackwell*, in his treatise on tax sales on the subject of similar validating statues, and after discussing the constitutionality of such statutes, says (2) :—

Whatever may be the decision upon the question of power, when it properly arises the moral injustice of such legislation cannot be denied, and it will be seen upon an examination of the authorities that when such arbitrary power has been exercised by the legislature, the courts have given a *strict construction* to the law and not extended its unjust operation beyond the very words of the statute (3).

(1) 3 Can. Sup. C. R. 436. (2) P. 103 Ed. 1855.
(3) *Moulton* v. *Blaisdell*, 24 Maine R. 283.

1880
CHURCH
v.
FENTON.
Henry, J.

See also *Hughes* v. *Chester & Holyhead Railway* (1); and the remarks of *Turner*, L. J., in the same direction:

> This is an act which interferes with private rights and private interests, and ought, therefore, according to all decisions on the subject, to receive a strict construction, so far as those rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases on the subject. They might be cited almost without end.

I shall hereafter apply this doctrine, and particularly when I come to refer to section 155, and the absence of evidence of a sale within the purview of that section.

By an Act of the *Illinois* Legislature it was declared that the deed should vest a *perfect title* in the purchaser, *unless* the land shall be redeemed according to law, or the former owner shall show that the taxes were paid, or that the land was not subject to taxation; but the Supreme Court of that state, in giving a construction to that statute, state the rule of the common law as to the burthen of proof and the strictness required in this class of cases, and that under that statute several preliminary facts to a legal sale are to be inferred by the deed, and the responsibility of proof shifted from the purchaser to the original owner, but the court deny that that statute will by any fair construction warrant the opinion that the auditor (here the Treasurer) selling land *without authority*, could by his conveyance transfer the title of the rightful owner.

In that case it was not shown that the land had been advertised as prescribed by the statute. The court held that "the publication of notice of sale as required by law was not one of those facts inferred from the deed, nor is the proof thereof thrown upon the former owner. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser." The

(1) 7 L. T. N. S. 203.

case before us is a much stronger one, for, if my contention as to the warrant is right, there is not merely the absence of proof of some necessary fact, but a deed from a party without legal authority to convey. To conclude that a deed of land in the words of the section "sold for arrears of taxes" is not to be questioned at all after two years is, to my mind, a monstrous proposition. I can imagine dozens of cases where the most unjust and improper results would necessarily flow from such a conclusion. It will be only necessary to state one case. It is largely the interests of non-resident owners that have been, or will be, affected. Without any knowledge of arrears existing a sale for (alleged) arrears of taxes takes place by no one authorized to make it, and the treasurer subsequently gives a deed. It would certainly be monstrous to hold that such a conveyance would pass the title, and still the clause in the statute, if literally construed, would make the conveyance available for that purpose. The clause must mean a sale as provided for, and it therefore becomes necessary to show by extrinsic evidence that a sale took place. To invoke the aid of the statute, such is necessary, but here we have no evidence at all that any sale took place. The only witness who refers to the sales says he was not treasurer in 1870, when the first is alleged to have taken place; does not say he was present; no date given or purchaser named, or who the land was sold by. There is no evidence to show the sale took place at the time and place named in the advertisements, and it is equally defective as to the second alleged sale. The newspapers to show the advertisements required by the statute were not put in evidence, except four numbers of the "Gazette" in 1873. No paper or advertisement for the sale in 1870 was produced. No assessment rolls were put in to show the land was taxed, and, in fact, little but hearsay and improperly received evi-

1880
CHURCH
v.
FENTON.
Henry, J.

dence of any taxing at all. In my opinion, it would be a mockery of justice to deprive a man of his real estate by such evidence.

In addition to the objections I have suggested, I think it is necessary to show a legal sale by extrinsic evidence, that is, that it was made by the proper officer at the time and place mentioned in the advertisements, and that the grantee or his assignee became the purchaser. The statute provides that the deed shall be made to the purchaser at the sale or his assigns. The conveyance of the 98 acres is to *David Keltie*, who is represented in the deed as the assignee of *Fenton*, who in it is alleged to have been the purchaser. To this there are two objections. If *Fenton* was the purchaser, that fact should have been proved, otherwise than by the mere statement of it in the deed, and secondly no assignment from him to *Keltie* was shown in compliance with the statute.

If, however, the appellant is considered as not entitled to recover for the 98 acres, I can see no reason why he should not recover for the remaining two acres. At the commencement of the suit he was entitled to recover for those two acres. Until the subsequent deed to the respondent, he had no defence for them. By the common law, as well as by the statute of *Ontario*, he was entitled to a judgment for his costs; and how he can be deprived of them I must say I have failed to discover.

By section 31, c. 51, of the Revised Statues of *Ontario*, it is provided that:

> In case the title of the plaintiff, as alleged in the writ, existed at the time of service thereof, but had expired before the trial, the plaintiff shall notwithstanding be entitled to a verdict according to the fact, that he was entitled at the time of serving the writ and to judgment for his costs of suit.

This was adopted from C. S. U. C. c. 27, sec. 22. Clause

155 does not in any way affect his right to recover *pro tanto*, and as, I think, the necessary proof of the legality of the sale or of the rating was not given, and the warrant and list were defective, he is, under any circumstances, entitled to recover for the two acres.

The views I entertain and have expressed as to the operation of section 155 are in accordance with principles laid down by *Blackwell* on Tax Titles before alluded to in the third chapter, founded on and derived from judgments and decisions of the Supreme Courts in the States of *New York*, *Illinois*, *Michigan*, *Tennessee* and *Ohio*. Those judgments are cited as unanimous in every instance, and are recommended by the able manner in which the cases were considered and disposed of, and in the absence of authorities to the contrary I feel quite safe in following the decisions.

After full and mature consideration I think the appellant is entitled to recover for his whole claim; that the appeal should be allowed and judgment given in his favor with costs.

TASCHEREAU, J., concurred in dismissing the appeal.

GWYNNE, J.:—

I concur that the appeal should be dismissed, but I desire to add, that I am unable to perceive any bearing that my judgment in *McKay* v. *Chrysler* can have upon the present case. I should be very much surprised if anything could be found in that judgment in support of the position that it is competent for this court to suggest, and to act upon the suggestion, that the case of either a plaintiff or defendant was defective for insufficiency of evidence upon a point, not only not made a ground of appeal, but not suggested even in argument as an existing fact in any of the courts through which the case was passed, nor at the trial; if there had been

1880
CHURCH v. FENTON.
Gwynne, J.

any foundation for the suggestion, no doubt, counsel would have made the point. As to the quotation which has been made from my judgment in *McKay* v. *Chrysler*, those observations were applied by me to a point which did arise in that case, and obviously they can have no bearing upon this case, wherein no such point has been made.

Appeal dismissed with costs.

Solicitors for appellant: *Jackes & Galbraith.*

Solicitors for respondent: *James Reeves.*

1879
*June 7.
*Dec. 12.

THE PROVINCIAL INSURANCE COMPANY OF CANADA..... } APPELLANTS;

AND

JAMES CONNOLLY.. ... .RESPONDENT.

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

The appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1875, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*. The policy contained the following clause: "*J. C.*, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance, and cause three thousand dollars to be insured, lost or not lost, at and from *Quebec* to *Greenock*, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near *Indian Cove*, which forms part of the harbour of

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

Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the *Traverse*. On an action upon the policy it was:

Held, (*Fournier* and *Henry* J. J., dissenting,) that the words "from *Quebec* to *Greenock*, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of *Quebec* on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.

Per Ritchie, C. J,: The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Per Gwynne, J.: The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily, at the date of the departure of the plaintiff's vessel, at least as far as the *Traverse*.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada*, (appeal side), maintaining the respondent's action on a marine policy against the appellant.

The declaration of the respondent alleged:

That the appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1871, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*; that the vessel, while covered by the policy, was lost in the *St. Lawrence*, with her cargo; and that the respondent, who had fulfilled all the conditions of the policy, had sustained loss over and above the amount insured.

The defendants pleaded that the policy contained a warranty that the vessel should "go out in tow"; which meant, according to the usage at that season of the year, that the *Emigrant* was to proceed down the river with the aid of steam power, at least as far as the

1879
THE PROVINCIAL INS. CO. v. CONNOLLY.

foot of the *Traverse;* and that the vessel had not gone out in tow.

The plaintiff, at the trial, tendered evidence of a conversation between him and the defendants' local agent at *Quebec*, previously to the issuing of the policy, as to the meaning to be put on the words "vessel to go out in tow," but this was rejected by the Judge presiding at *enquête*.

The Superior Court confirmed that ruling, and the plaintiff's action was dismissed upon the merits.

The judgment of the Court of Queen's Bench reversed the judgment of the Superior Court; three of the honorable Judges being in favor of the plaintiff, and two in favor of the defendants.

The loss of the plaintiff not being disputed, the question upon the whole case is whether or not the vessel did go out in tow, and whether a legal liability for the loss has attached to the defendants upon a proper construction of the words "vessel to go out in tow."

The evidence as to the usage is reviewed at length in the judgments hereinafter given.

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

The whole question in this case turns on the construction to be put on the words "to go out in tow." The rule of law in matters of this kind is that words ambiguous in a contract may be interpreted by usage.

It can hardly be asserted that the engagement to tow, although expressed in short and somewhat vague terms, did not present to the minds of both parties to the contract an act of a continuous nature, *materially affecting the risk.* The peculiar perils of the *St. Lawrence* at the end of the month of November, and the absence of sea room between *Quebec* and the foot of the *Traverse*, were elements of danger against which no

prudent insurer would fail to protect himself; and if the Court has before it, in evidence, the matters of fact which indicate the risk which the appellants were unwilling to assume, the means are afforded, in accordance with well known rules of evidence, of affixing to the words used their true meaning. The introduction of parol evidence, to explain those terms, was not opposed, and there is little or no contradiction as to the main facts which the parties have thought fit to present.

My contention is, that the evidence is conclusive to prove that the custom was, at that season of the year, to tow all vessels to the foot of the *Traverse*. But the appellants do not rely upon the meaning given by particular witnesses to the words so much as upon the *fact*, well known to all persons connected with shipping at *Quebec*, that, *as a general rule*, all vessels leaving late in the fall are towed to the foot of the *Traverse*, as the *minimum* distance. It is a matter of no consequence whether or not this amounted to a "*usage of trade, of universal notoriety*;" it is sufficient, if it was so general, as to serve as a basis of interpretation when the applicant for insurance stated that he intended "*towing out*."

The parties must have had an intention, and the question is, have they expressed themselves sufficiently unambiguously? The mere towing into the stream would be of no avail, and the fact that the vessel was towed from her loading berth into the stream, within the harbor of *Quebec*, had nothing whatever to do with the question of insurance; and I contend that, in view of the circumstances and the custom, it is clear the intention of the parties was that the vessel was to be towed out of the harbor. The learned counsel cited *Greenleaf* on evidence (1), *Taylor* on evidence (2),

(1) 1 Vol. sec. 277 & 282. (2) Sec. 1082, 1085.

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Arnould on Marine Insurance (1), *Maude & Pollock* on the law of Merchant Shipping (2).

Mr. *Fitzpatrick* for respondent:

The turning point in this case is this: Did the vessel go out in tow?

Now the phrase "vessel to go out in tow" is perfectly ambiguous and indefinite as to the distance of such towage, and being so, in case of doubt should be interpreted against the insurers, who made use of it and omitted to express themselves in words the meaning of which would be clear.

They had no right to make a stipulation in their own favor in words of questionable import, when the matter could easily have been placed beyond a doubt by a mention of the point in the river to which it was intended the ship should be towed. The only expressed idea is, that the ship was to go out in tow, and that she did go out in tow, is beyond all doubt. But the appellants, however, negative this by saying that according to the usage of the port of *Quebec*, this phrase imports that the vessel should be towed at least as far as the *Traverse*.

[The learned counsel then referred to the evidence, and contended that in cases where a vessel is towed out, there is no custom or universal understood usage amongst merchants whatever in the port to tow to any particular point, and none was proven to exist.]

The questions put to the witnesses only tend to elicit opinions and not the actual practice of trade, which alone can establish a usage.

The words used are the insurers own words, and they must be strictly construed against them. The vessel went out in tow from her loading berth, and the condi-

(1) 1 Vol. pp. 489, 493, 496, 502, 511.

(2) 3 Ed. p. 397.

tion of the policy has been complied with. There is not a word in the policy fixing the distance, and in the absence of proof of a general usage, the respondent is entitled to succeed.

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

RITCHIE, C. J.:—

The case states that the declaration of the plaintiff below (respondent) alleged that the appellants issued a marine policy of insurance dated the 28th November, 1871, in his favor for $3,000 upon a cargo of wooden goods laden on board the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*, and alleged that the vessel, while covered by the policy, was lost in the *St. Lawrence* with her cargo, and that respondent had fulfilled all the conditions of the policy and had sustained loss over and above the amount insured. That the defendants pleaded that the policy contained a warranty that the vessel should 'go out in tow,' which meant, according to the usage, at that season of the year, that the *Emigrant* was to proceed down the river with the aid of steam power as far as the foot of the *Traverse*; and that the vessel had not gone out in tow.

The circumstances of this case, as will be seen, I think, renders it wholly unnecessary to determine the *distance* the assured would be bound to tow, but simply whether the vessel did or did not "go out in tow."

The judgment of the Superior Court was in favor of the defendants, which judgment was reversed by the Court of Queen's Bench, three of the learned judges of that court being in favor of the plaintiff, and two in favor of the defendants. The case states: "The loss of the plaintiff not being disputed, the question upon the whole case is whether or not the vessel did 'go out in tow,' and whether the legal liability for the loss has

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Ritchie, C.J.

attached to the defendants upon a proper construction of the words 'vessel to go out in tow.'"

The vessel did not go out of the harbour or port of *Quebec* in tow, and she was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the *Traverse*.

A good deal of evidence was given as to the custom of the port of *Quebec* in reference to the distance vessels were usually towed at the season of the year this vessel left; but under the circumstances, and in the view I take of this case, I think such evidence wholly unimportant, the only question being, as I have said, in the words of the case, "whether or not the vessel did go out in tow?" and not, if she had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent, in my opinion, on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Should it become necessary on any future occasion to decide this question, the very valuable and forcible observations of Mr. Justice *Casault* in his judgment on the point, and especially the reasons he assigns why a definite length of towage could not reasonably be fixed in a policy, will, in my opinion, be worthy of the greatest consideration by whomsoever the duty of discussing and determining the matter may be cast; as at present advised they commend themselves to my mind with great force.

I think the warranty had reference to the voyage and not to the position of the vessel in the harbour, that the primary meaning of the words "to go out in tow" is to go out from some limits, and that the words of the policy "from *Quebec* to *Greenock*, vessel to go

out in tow;" meant that she was to go out in tow from the limits of the port or harbour of *Quebec* on said voyage, which she clearly did not do.

The captain in his protest says they got the pilot on board at 2 o'clock p.m (25th November), and proceeded in tow of a steamer from the loading berth to abreast of the town, where they came to anchor, the wind being contrary, the people being employed clearing up the decks and filling the water casks. On the 26th, at 7 a. m., they hove short, but the wind being light and variable from south-east to eastward, they remained at anchor during the day. The 27th commenced with light variable winds and snow; the wind increasing at 9 o'clock a.m. they got under way, and set all possible sail and proceeded down the river under the pilot's directions; that she subsequently got into the ice, and on the 30th November was abandoned.

The pilot who took the vessel down the river says:—

The *Emigrant* was lying at *Hall's* booms when I went on board. She was taken out from the booms by a steam tug. She had the same crew that she came into port with. None of her crew left her. She was moved out from the booms by one of the little harbour tugs that move ships out into the harbour. She was moved by the tug as far as Indian Cove, which was an hour and a half or two hours' work. There was a light easterly wind, and we cast anchor. The tug went back again, because with that tug we could not go any further; it was no use. That same evening the master went ashore to see if he could get a good steamer.

It was shown on the trial and admitted on the argument that the place where the vessel anchored and remained till the 27th November was in the harbour of *Quebec*, some four or five miles from its limit. It is, to my mind, very clear from this testimony that the vessel was towed from her loading berth to another part of the harbour where she came to anchor preparatory to proceeding on her voyage, and that she did not leave her loading berth with the intention then and

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Ritchie, C.J.

there of commencing and continuing her voyage without further delay, but merely changed her position in the harbour with the intention of remaining in the port till everything was ready to enable her to go to sea, that is, until her water casks were filled and the captain had obtained, what he evidently thought could be got, a suitable steamer to tow him out. The captain says after she came to anchor in the harbour the men were employed filling the water casks, and it is clear without water the vessel could not have been in a seaworthy condition to proceed on her voyage, and the captain left the vessel and, in the words of the pilot, "went ashore to see if he could get a good steamer," that is, to get just what, in my opinion, the warranty in the policy required him to have, viz.: a steamer fit and competent to tow the vessel from the port and harbour of *Quebec* out on her voyage to *Greenock*, the harbour tug which had taken the vessel from her loading berth to another position in the harbour not being of sufficient capacity or ability to tow him out on his voyage, as the pilot says:—"the captain went back again, because with that tug we could not go any further, it was no use."

The unreasonableness of the construction contended for, that the towing out was only intended to be from the loading berth into the stream in the harbour, because of the uselessness of such a warranty to the assurer, is so forcibly pointed out in the judgment of Mr. Justice *Casault*, and with which I entirely agree, that further observations are not required from me.

As therefore, in my opinion, the vessel had never got under way with the *bonâ fide* intention of prosecuting her voyage at once and without any further delay until the 27th Nov., when she sailed out of the harbour and port of *Quebec*, with the then intent of commencing and prosecuting her said voyage, and as she did not then go out in tow there was a clear breach of the warranty,

and the plaintiff cannot recover. In other words, the towing from the loading berth to another part of the harbour was not a compliance with either the letter or the spirit of the warranty. I think the appeal should be allowed.

STRONG, J., was of opinion that the judgment of the Court below should be reversed, and read a written judgment stating his reasons for that conclusion.

FOURNIER, J., was of opinion that the judgment of the Court below should be affirmed.

HENRY, J.:—

This is an action on a policy of insurance, and the respondent's right to recover is only contested on one point. The policy makes insurance to the extent of $3,000 on wooden goods on board the barque *Emigrant*, which sailed from *Quebec* to *Greenock* on the 24th November, 1871, "*the vessel to go out in tow*." She took in her cargo and was towed out from her loading berth as far as *Indian Cove*. From that point she proceeded under sail, but was met by easterly storms and drift ice which effectually barred her further passage down the river, and she was subsequently in a few days lost. The loss of the respondent is admitted, and the question upon the case presented arises upon the issue raised by the appellants' plea, that the vessel did not *go out in tow*, within the terms of the contract as evidenced by the requirement of the policy in the words before stated. This defence does not arise upon any representation, written or verbal, of the respondent, nor need the words in question, although technically characterized as a warranty, be so construed We have no representation made by him, or any contract signed by him, and technical rules of construction of representations or warranties are not strictly applicable. In both they

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

are in doubtful cases construed against the parties whose language is used. Their insertion in the policy operates simply, in my view, as a condition imposed by it, the failure to perform which would render it voidable. Its embodiment in the policy is no evidence that the respondent previous to its issue made any representation, promise or warranty whatever; but his acceptance of the policy amounts to an agreement on his part, that unless the condition be fulfilled the policy may be held void, and that his right to recover shall be contingent on the performance of the prescribed condition. There are cases where a transfer of the possession of property takes place, and where a party otherwise derives a benefit or advantage from the contract, and a condition imposed by the agreement is held to be a warranty, but that feature is absent from the present case, for the party has no insurance or other benefit, except that arising from the policy with the condition annexed to it. Although I have thought it proper to distinguish as I have done, I am not the less ready to say that in the shape of a condition precedent it is binding upon the respondent to the extent it legally goes. Taking then, the words in question as a condition precedent in the way I have stated, we must first ascertain their extent and meaning, and, in doing so, consider how the parties to be affected by them must be concluded to have used and understood them, if, from their vagueness, that is possible. It is not sufficient to arrive at a conclusion only as to how the insurer used them, as, the condition forming as it does a substantial part of the contract we must also see that the insured understood them in the same way. It cannot be a contract without the express or implied agreement of both parties to it.

The expression "to go out in tow" is, *per se*, unintelligible, and, in this case, the onus of proving its mean-

ing and application is upon the appellants. Failure on their part by legal evidence to establish an agreement, the breach of which is sufficient to avoid the contract, must enure to the success of the respondent.

Parol evidence is not admissible to vary, control, or contradict a written agreement; but is admitted, as in other cases of mercantile instruments, to explain the language of a policy according to the known usage of trade. Usages of trade are local as well as general, and are known, or presumed to be known, in any locality, to or by every one engaged in any particular trade or business to which they are applicable. So, particular terms, or provisions employed or made, have authoritative and prescribed application, and, when used in contracts, are as well understood as if specially recited or explained. That is why evidence of them is admitted. The well known and fully accepted technical meaning of such terms is properly assumed to have been in the minds of contracting parties when using them, and their presence in a contract manifests their intentions as fully as if stated at length, embracing, as it does, the principle that that is certain which can legitimately be made certain. The appellants' plea is that "'the vessel to go out in tow' meant, according to the usage in the port of *Quebec*, that the said vessel should be towed by a tug from *Quebec* to some point in the River *St. Lawrence below the Traverse*." Has he proved that? I have read and studied the evidence he adduced in the trial, and so far from proving any usage of trade, it has shown that *no such usage existed*. The great majority of his witnesses distinctly say there was no such usage of trade. It appears that late in the season it was usual for vessels, *if a fair wind did not prevail*, to use a tug, sometimes below the *Traverse* (about 60 miles), other times to the *Brandy Pots* (about 100 miles), and again sometimes to *Bic* (about 150

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

miles; but the witnesses of the appellants, as well as those of the respondent, say there was no *usage of trade* applicable, or, indeed, any at all, on the subject of towing. After so stating, they were, as I think, very improperly permitted to give each his own interpretation of the words used. Some of them said the term "to tow out" meant below the *Traverse*, another "as far as the *Traverse*, *Brandy Pots* or *Bic*." The issue was not dependent on the ideas of those witnesses as to the application of the words, and the various views given even by the appellants' own witnesses show how absurd it was to have admitted such evidence at all. The condition is not to be affected by the mere opinions of witnesses as to its legal effect. The evidence must be sufficient to enable us to draw a necessary and irresistible conclusion as to the certainty of what was meant by the condition, arriving at it without any mere *speculations* as to the understanding of the parties to the contract, but on proof of the existence of a custom or usage. *Taylor* in his work on evidence (1) referring to the subject of customs and usages of trade, says:

> But in all these cases it is the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence, and that is without doubt the rule and law.

And at page 1024 says:—

> Before quitting this subject, it may be observed that much injustice is frequently occasioned by the daily habit of admitting evidence of usage, which though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is at variance with their real intentions. In this view some of the highest legal authorities, both in *England* and *America*, concur.

If then experience has shown injustice resulting from permitting evidence even of known custom and usage

(1) P. 1023.

to prevail in the construction of written documents, how much greater injustice might be fairly expected to result in cases where no such custom or usage existed, but decisions were to follow, as in this case, the mere opinion of witnesses as to the meaning of the condition set up by the appellants.

The appellants have undertaken in their plea to give satisfactory evidence of a custom or usage, but they have signally failed to do so. Their defence does not rest upon the mere *opinions* of witnesses, but upon evidence of a generally adopted and well recognised *usage of trade.*

The doctrine laid down by *Tindal*, C. J., in *Lewis* v. *Marshall* (1), as to the proof necessary in such cases entirely sustains the position I have taken:

> In order therefore to vary the ordinary meaning of such plain words and to make them comprise passengers and passage money as well as goods, we think the evidence ought to have been clear, cogent and irresistible. Whereas at the trial, although two witnesses spoke of the usual course and practice of the trade, the third spoke of his own judgment only; no instance *of such construction* is stated by any of the witnesses within his own knowledge. * * * * The fair inference to be drawn from their testimony at the trial appears to us to be—that it is customary, in calculating the earnings of a ship, or making up the account of the earnings, to include money paid for steerage passengers, but *there is no general usage* that in a contract of this description such meaning should prevail.

It will be observed that, although two witnesses "spoke of the usual course and practice of the trade," it was considered insufficient. In this case all the witnesses show there was no such usage at all.

We must in this case construe the word "out" from the position of the vessel at the time and from a consideration of the maritime features of the voyage she had to perform. If she were at anchor or at a wharf in a harbor within a few miles of the open sea, we would necessarily assume it to mean out side of that harbor

(1) 7 M. & G. 745.

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

because there would be but one "out" that could have been intended, but "out" in reference to the passage of a vessel from her loading berth at *Quebec* from which vessels are usually towed to the main part of the *St. Lawrence* River, and thence down it, requires proof as to the meaning of the term, if anything more than towing out from the wharf into the stream is meant. One party using it might mean, as one of the appellants' witnesses stated, only from the loading berth into the stream. He says: "many times even in that season," referring to the last week in November, "they only get towed out from their berth into the stream, and if the wind is fair I do not see that they have any occasion to be towed further." What evidence have we, then, that either of the parties intended to prescribe for anything further? What evidence that even the insurer meant anything else? What twenty witnesses, or any number, might think the words meant cannot be used to bring home to the minds of the contracting parties when the policy was issued a similar understanding and use of them. The respondent does not rest his defence of the charge of the breach of the condition as construed by those witnesses, but on their and other evidence to sustain the allegation that the policy should be voidable by satisfactory proof of the existence *of the usage of trade at Quebec.*

One of the appellants' witnesses, *Alexander Frazer*, in his direct evidence, when asked about a "general usage as to the towing of vessels in the latter part of November," says:

> I do not know that there is any special distance regulated by usage. It is entirely a matter of bargain between the parties. The towage extends any distance you please.

Here, then, is a witness of the appellants who says he has "been doing business in *Quebec* as a marine insurance agent for upwards of twenty years, and

covered a great many risks *via* the *St. Lawrence*," and he never heard of *any such usage of trade*, and I ask who could have been placed in a more favorable position to have heard of and known it, had any such existed. Another witness (also an insurance agent for over 25 years) says: "The terms are ambiguous, and the ambiguity consists in no distance being mentioned;" and further as to policies: "*There is generally a point mentioned* to which the vessel should be towed. *In the absence of any distance being mentioned*, I would understand that the vessel should be towed clear of the wharf. I should understand the vessel was to be hauled out from her loading berth by a tug." Is the testimony of those two witnesses to prevail, or that of others who think the words of the condition would necessitate a towing as far, at least, as the *Traverse*? Or, in the uncertainty, what can we say was intended by the parties to the policy? Does it not, with such evidence, amount to the wildest speculation to declare in favor of such a position as that contended for by the appellants? Or, even if we could speculate satisfactorily, do not the rules of evidence and for the construction of written documents interpose wise and salutary bars against such a course? What is there in the whole evidence to show the insured intended to be bound to tow beyond the towing into the stream, or, if further, which of the other distances did the insurer mean? The latter desires by his plea to be governed by an alleged general usage of the port, which is proved not to exist. It is not the province of a court to make issues for parties, but to determine their rights under those submitted. Who can say, then, that the only issue tendered by defendant should not, on the evidence, entirely fail? But the former is not to be deprived of his insurance for which he paid, in the absence of clear proof that it is not in

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

accordance with his agreement. The condition, in the bald state it appears, and the evidence produced, launch us upon a broad sea of doubtful and difficult speculation through the want of the necessary proper direction and reference; and we are left to find safety from the fogs and mist which the evidence has created by recourse to the only legitimate means open to us, and that is, to steer by rules wisely adopted for such cases. The abnormal atmosphere should never have been permitted to encompass or perplex us, but, having done so, we must shake off all improper influences and seek an atmosphere where legal lights and provisions will enable us to proceed more securely and satisfactorily.

In what I have already said is included the declaration that the greater portion of the evidence herein, besides having been improperly received, is wholly immaterial, as inapplicable to the issue; but if even we were permitted to consider it, we would not be justified in concluding that the weight of it is with the appellants. Taking it, as given, for both parties, the weight of it is wholly with the respondent. The insurer may, for argument's sake, be assumed to have meant that the towing "out" should be at least as far as the "*Traverse*;" but to bind the insured we must have evidence that *he* so understood it, for he may have considered it but as a provision for towing into the stream—for that would in the ordinary construction of the words be sufficient—and upon that understanding paid the premium and accepted the policy. The onus is therefore on the appellant to prove that the respondent must have understood the condition as requiring a towage at least *as far as the* "*Traverse*." The plea is not that the words "to go out" in tow mean a reasonable distance. If it were, we should consider what was a reasonable distance all things considered, but, not being so, the

question submitted does not permit us to consider that matter as the appellants have not asked us to consider it. We are asked what under such an issue would be legitimate, but not otherwise to consider the lateness of the season and the danger, not only of delay and the consequent impracticability of the voyage during the season, but the additional risk to insurers. There is, however, nothing in the evidence to show the existence of any custom or usage of trade applicable at all, and therefore no more so in November than in June. It is urged in favor of the appellants' contention that higher premiums are demanded during the late season, but as far as the evidence enlightens us we are justified in the conclusion that in this case the higher rate applicable was paid. It was received by the appellants, and the policy having been issued upon the condition in question, we are not justified, in construing it, to consider the nature or extent of the risk otherwise covered by it, or to give to words a construction they cannot otherwise bear. In the absence of any usage of trade specially applicable to the late season, as distinguished from the earlier and finer one, the words in question cannot have any application in November, that they would not have in June or July. We are not only not bound but prohibited from entering into any consideration of what might or might not possibly have been in the mind of the appellants when issuing the policy, but must be guided solely by the terms they have employed in it, and if they meant "out" to be as far as the *Traverse* they were bound to say so in definite terms to the respondent, and not leave him trusting for his insurance in case of loss to a contingency to arise from the conflicting speculative opinions or views either of witnesses, jurors, or judges, as to the meaning of the condition he attaches.

Lord *St. Leonards*, in one of his judgments, says:

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

A policy ought to be so framed that he who runs may read. It ought to be framed with such deliberate care that no form of expresssion by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it. Nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be framed in a manner to perplex the judgments of the first judges in the land, and to lead to such serious differences of opinion amongst them.

In *Filton* v. *Accidental Death Insurance Co.* (1), *Willes*, J., says:

It is extremely important, with reference to insurance, that there should be a tendency rather to hold for the assured than the company, where any ambiguity arises on the face of the policy.

The appellants in this case have inserted a condition in the most ambiguous terms. They, having put their own construction upon it in their plea, have estopped themselves from urging any other, but they have signally failed to sustain it by legal evidence.

To show, under the evidence, how ineffectual and uncertain the condition is, it is not amiss to make a further reference or two to its terms. It has been stated by some of the witnesses that it is sometimes considered necessary that a "tow out" should extend, not only to the *Traverse*, but to the *Brandy Pots*, and even as far as *Bic*. With the wind ahead, independently of the terms of any insurance policy, it would, no doubt, to hasten the voyage and lessen the risk, be often advisable to tow beyond the *Traverse*, or the *Brandy Pots*, or sometimes as far as *Bic*, or further, even; but the evidence clearly shows the course a straight one, and that with a leading wind no towing at all is absolutely necessary. There are no crooked channels to pass, and therefore in the ordinary state of things no absolute necessity for towing.

(1) 17 C. B. N. S. 122.

Suppose this vessel went altogether under sail from her place in the stream, got safely and expeditiously to the ocean and was subsequently lost on her voyage, it would seem hard that the insurer should have no recourse under his policy; but if the appellants contention is right he would have to suffer the loss—for the policy would be avoided in that case as in the present circumstances. Suppose, however, she had been towed so as to clear the *Traverse*, but the tug there left her and she, proceeding under sail, was lost before she reached the *Brandy Pots*, and to an action on the policy the insurer pleaded that she should according to general usage have been towed past the *Brandy Pots*, would not the evidence on this trial be wholly insufficient to sustain such a contention? Or why, if a good defence, as far as the "*Traverse*," or the "*Brandy Pots*," would it not in the absence of any controlling usage be as good as far as "*Bic*," or why limit it even to the latter, for that is still the river *St. Lawrence*; and, in the case of adverse wind or weather, it might be advisable, to shorten the voyage and lessen the risk, that the towing should be extended much further? These are very proper considerations for owners and navigators of ships in balancing the advantages against the necessary additional risk incurred. The insurer, who takes, to the amount of a policy, the place of the owner in that respect, has, no doubt, the right to prescribe his own conditions, and in doing so directs the owner as the latter would his sailing master. The latter is answerable for disobedience of his owner's orders when explicitly given, and if the master of this ship had received orders that the vessel should *go out in tow* merely without stating or limiting any point or distance, and that there existed no generally acknowledged usage of the port to fix the one or the other, the master might fairly assume the directions to be followed by a towing to the nearest

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Henry, J.

usual point from his loading berth, where the voyage commenced. And, in case of loss or damage, if the owner sought legal redress, he would be very properly told that if he wished the towing to have extended further, he should have given directions to that end in unmistakable and unambiguous language. For similar reasons a like ruling should appear in our decision in this case.

The language of such a condition should be in itself certain, or be governed and explained by some existing usage by reference to which it would become certain. How can we say that if terms such as pleaded had been distinctly stated, the respondent would have agreed to them or accepted the policy on them?

Addison in his work on contracts says (1):

> Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. * * * And parol evidence thereof may consequently be brought in aid of the written instrument. * * * The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication and tacit understanding all those general and *unvarying* incidents, which a *uniform* usage would annex, and according to which they must be considered to contract, unless they expressly exclude them.

And cites eight authorities to which it is unnecessary to refer.

In this doctrine is contained the rule of law by which we and parties interested are bound.

The appellants were bound under the plea to have shown those "unvarying incidents which a uniform usage would annex" to the words of the condition, and having totally failed to do so, I think the appeal should

(1) 7th Ed. vol. 1, p. 184.

be disallowed and the judgment of the Court below affirmed with costs.

TASCHEREAU, J.:—

I am of opinion that this appeal should be allowed. The facts of the case have been fully gone into by the judgments of the other members of the court, and I will not enter into useless repetitions. I fully concur in the opinion that the words "vessel to go out in tow" in this policy constituted an engagement *affecting the risk.* Now, it is not, and cannot be pretended, that the mere moving out of the vessel from her loading berth to any other place within the harbour was an act by which the risk was in any manner affected. I cannot bring my mind to believe that the insurance company inserted these words in the policy for the mere purpose of obliging *Connolly* to have the ship towed from her wharf into the stream, and that *Connolly* can ever have been under the impression that he, by these words, merely warranted that the ship should be towed out a few hundred feet from her wharf, or to any place within the harbour. I am of opinion to allow the appeal with costs.

GWYNNE, J.:—

I confess it appears to me that we have only to regard the nature and subject of the contract, and the season of the year when it was entered into, to enable us to pronounce our judgment that it was not the intention of the parties to the contract that the condition contained in the policy, that the ship insured upon her intended voyage from *Quebec* to *Greenock* should "go out in tow," should be satisfied by her being towed out from her berth at the quay or dock where she lay into the middle of the river. We can have no difficulty in saying that nothing short of her being towed out of the harbour of *Quebec* would be sufficient. If she had been

1879

THE PROVINCIAL INS. CO. v. CONNOLLY.

Gwynne, J.

towed out of the harbor, the question would have arisen whether towing her just out of the limits of the harbor and leaving her there would have satisfied the condition, but, as she was not towed even so far, there can be no doubt that the condition was not fulfilled, and that the defendants were entitled to judgment. The defendants pleaded to the action on the policy that the words, "the vessel to go out in tow," meant, and was a warranty that, according to the usage of trade in the port of *Quebec*, the vessel should be towed by a tug from *Quebec* to some point on the river *St. Lawrence* below the *Traverse*, and that the vessel did not go out in tow. The question involved in this issue was,—whether or not at the particular season of the year, namely the 25th Nov., the latest date at which risks are assumed at all, there was a usage in the Port of *Quebec* that vessels going to sea should be towed out of the harbour, and for some distance down the river on their way? That question being answered in the affirmative, it is for the court to construe the contract, in the light of that usage, as one of the circumstances surrounding the contract. The plaintiff in the court below, wholly, as it appears to me, misapprehended the issue. By the manner in which he interrogated his own, and cross-interrogated the defendants' witnesses,it is apparent that his object was to establish that the words "the vessel to go out in tow" have acquired no special meaning in mercantile phraseology requiring a vessel to be towed *to any particular point* down the river; but whether they had or not was not the question; the sole and simple question was: at the particular season of the year when this policy was effected, was there any usage prevailing at *Quebec* that vessels going to sea should be towed down the river on their voyage? That there was such a usage was established, I must say, by what appears to me the most

undoubted, and almost uncontradicted, evidence, and that the usage was to tow down as far as might be deemed necessary having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily at the date of the departure of the plaintiff's vessel at least as far as the *Traverse*.

I have no difficulty whatever upon the evidence in finding as a fact such to be the usage; and so finding, it follows, as a point of law that the condition subject to which the policy was granted was not fulfilled, and that the judgment of the Superior Court in favor of the defendants should be affirmed.

Appeal allowed with costs.

Solicitors for appellants—*Holt, Irvine & Pemberton.*

Solicitors for respondent—*Andrews, Caron & Andrews.*

EZEKIEL McLEOD, ASSIGNEE OF JEWETT & CO. ..... } APPELLANT;

AND

THE NEW BRUNSWICK RAILWAY COMPANY ..... } RESPONDENTS.

1879 *June 2, 3.
1880 *Feb'y. 3.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Construction of agreement—Property in lumber—Ownership and control of lumber until payment of draft given for stumpage under the agreement.

The respondents, owners of timber lands in *New Brunswick*, granted to *C. & S.* a license to cut lumber on 25 square miles. By the license it was agreed *inter alia:*.

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

1879

McLEOD v. THE NEW BRUNSWICK RAILWAY Co.

"Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid.

"And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid.

"And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages."

For securing the stumpage payable to respondents under this license *C. & S.* gave to the respondents a draft upon *J. & Co.*, which was accepted by *J. & Co.*, and approved of by the respondents, but which was not paid at maturity. After giving the draft *C. & S.* sold the lumber to *J. & Co.*, who knew the lumber was cut on the plaintiff's land under the said agreement. *J. & Co.* failed, and appellant, their assignee, took possession of the lumber and sold it.

Held—Per *Strong*, *Taschereau* and *Gwynne*, J. J., (affirming the judgment of the court below,) *Ritchie*, C. J., and *Fournier* and *Henry*, J.J., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to *C. & S.* im-

mediately upon the receipt by the company of the accepted draft of *C. & S.* on *J. & Co.*, and that appellant was liable for the actual payment of the stumpage.

The court being equally divided, the judgment of the court below was affirmed.

THIS was an appeal from the Supreme Court of *New Brunswick* on a special case submitted to that Court, as follows:—

"The *New Brunswick Railway*, plaintiffs, and *Ezekiel McLeod*, assignee under the Insolvent Acts of 1869 and 1875 of the estate of *Edward D. Jewett* and *George K. Jewett*, insolvents, defendant. The plaintiffs, being the owners in fee of certain lands in the County of *Madawaska*, granted to *William H. Cunliffe* and *S. Walter Stephens* a license to cut lumber thereon, of which license a copy is hereunto annexed, marked "A."

"The said *Cunliffe* and *Stephens* under such license entered upon the lands of the said plaintiffs therein described, and cut thereon a large quantity of lumber, viz., 2,819,450 superficial feet of spruce logs, and 169,820 superficial feet of pine logs. That the quantity of such lumber was scaled by a person appointed by the said plaintiffs, and a return thereof duly made to them. That the correctness of such scaler's return was admitted by the said *Cunliffe* and *Stephens*. That the stumpage payable to the said plaintiffs for such lumber amounted to the sum of two thousand nine hundred and nine dollars and nine cents ($2,909 09), and for securing the payment of the same on the 15th day of July, 1875, in terms of the said license, the said *Cunliffe* and *Stephens* gave to the said plaintiffs a draft of date the 29th of April, 1875, in favor of *Alfred Whitehead*, Esq., the land agent of said plaintiffs, or order, upon the firm of *E. D. Jewett & Co.*, of *Saint John*, for the said sum of $2,909.09, of which draft a copy is hereunto annexed, marked "B."

1879
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.

"That the said *E. D. Jewett & Co.*, upon whom the said draft was drawn, duly accepted the same. That the said *Alfred Whitehead*, land agent for the said plaintiffs, accepted and approved of the said security for the said plaintiffs, and endorsed the said draft to the *Bank of British North America, Saint John*, for the purpose of making collection of the amount of the said draft for the said plaintiffs. That on the 15th day of July, A.D. 1875, when the said draft became payable, it was duly presented for payment, and payment thereof was refused, the said draft dishonored, and notice of such dishonor duly given. That the said *E. D. Jewett & Co.* claim that, after their acceptance of the said draft of the 29th day of April, 1875, and prior to the 15th July, 1875, the said *Cunliffe* and *Stephens* made a sale and delivery to them, and the said *E. D. Jewett & Co.* paid for the same before the said draft (a copy of which is hereunto annexed, marked "B.") matured, the said *E. D. Jewett & Co.*, both at the time they accepted the said draft and got such delivery, being fully cognizant that the said lumber had been cut on the lands of the said plaintiffs under the said license, marked "A." That after the said sale and delivery of the said lumber to the said *E. D. Jewett & Co.*, and before the said draft matured, the said lumber, cut under the said license, was driven into the *Fredericton Boom*, so called, and was held by the *Fredericton Boom Company* for the said *E. D. Jewett & Co.*, until after the said 15th day of July, 1875, under an order given by the said *Cunliffe* and *Stephens*, dated the 18th day of June, 1875, a copy of which order is hereunto annexed, marked "C" That on the 13th day of October, A. D. 1875, the estate of the said *E. D. Jewett & Co.* was placed in compulsory liquidation under the Insolvent Acts of 1869 and 1875, and the defendant,

Ezekiel McLeod, was appointed by the creditors the assignee to the estate of the said insolvents. That the said lumber, cut under the said license, was taken possession of by the said defendant as part of the estate of the said insolvents, and has since been sold and disposed of absolutely by him as such assignee. That the proceeds of such sale are still in the hands of the said defendant, as such assignee, and amount to much more than will pay the said sum of $2,909.09 and interest. That the said plaintiffs have never been paid the said sum of $2,909.09, the amount of their said stumpage. That the said *Edward D. Jewett* and *George K. Jewett* constituted the members of the said firm of *E. D. Jewett & Co.*

"Upon the aforegoing facts the plaintiffs claim that the property and right of property in the said lumber has always remained in them the said plaintiffs, and that when the defendant, as such assignee, sold the said lumber, he converted the property of them the said plaintiffs. The defendant, as such assignee, denies, that under the aforegoing facts, the property in the said lumber remained in them the said plaintiffs, and contends that when the said draft of the 29th of April, 1875, was accepted by the said *E. D. Jewett & Co.*, the plaintiffs right of property in the said lumber was divested.

"Should the Court be of opinion that the plaintiffs' right of property in the said lumber would continue until payment of the said draft, given to secure the said stumpage, their judgment to be entered for the said plaintiffs, with costs and damages to be assessed at $2,909.09, with interest thereon from the 15th July, 1875, should the court be of opinion that the plaintiffs are entitled to the interest as damages. Should the Court be of opinion that, upon the acceptance of the

1879
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.

said draft by the said *E. D. Jewett & Co.*, the plaintiffs were thereby divested of their right of property in the said lumber, then judgment to be entered for the defendant with costs."

The parts of the license referred to in the case which bear particularly on the questions raised, are as follows: After providing for the landing of the lumber in a suitable place, for scaling part thereof, and for hauling it, it is then to be taken to market as early as practicable, the first stream-driving or rafting season after being cut. In cutting and managing said lumber while in their possession, grantees will not, directly or indirectly, conceal from the scaler, or *dispose of* any of the timber, logs or lumber, of any kind, until all dues, stumpage and damages are paid *or secured, without the consent of the said company in writing*, otherwise they shall forfeit the whole of the lumber cut under this contract.

"It is hereby agreed that the said grantees shall pay the said company, at the time of executing this license, a mileage rate of ten dollars per square mile of the entire area of the land hereby licensed. It is also further agreed that the said grantees shall pay the said company as stumpage one dollar per thousand superficial feet for all the spruce logs and $2 per thousand superficial feet for the pine logs, and at the said company's scale of rates of stumpage for the present season for all such other lumber as they may cut on the said lands hereby licensed or permitted, said stumpage to be paid in the following manner: Said company shall first deduct, from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remaider, if any, shall, not later than the 15th April next, be secured by good indorsed notes, or

other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license *shall be settled and adjusted*, and all sums due or to become due, for stumpage or otherwise, *shall be fully paid*, and any and all damages for non-performance of this agreement, or stipulations herein expressed, *shall be liquidated and paid*. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be *paid or secured* in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of the said lumber, wherever or however situated, and to absolutely sell and dispose of the same, either at private or public sale, for cash, and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due, from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages."

The paper marked B, which was annexed to the said special case, was as follows:

"*Middle St. Francis*, April 29th, 1875.

"$2,909.09.

"On twelfth day of July next, please pay *Alfred Whitehead*, or order, the sum of twenty-nine hundred and

1879
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.

nine dollars and nine one-hundredths, and charge the same to account.

Yours truly,

"*Cunliffe & Stephens.*"

"To Messrs. *E. D. Jewett & Co.*,

"Indorsed,

Saint John, N. B."

"Pay the Manager Bank of *British North America, St. John*, or order.

"*A. Whitehead.*"

The paper marked "C," annexed to the special case, was as follows:

"*St. John, N.B.*, June 18th, 1875.

"*W. H. S. Estey,*

"Dear Sir,—You will please raft and deliver to Messrs. *E. D. Jewett & Co.* all logs marked as usual, the lumber being their property, and oblige,

"Yours truly,

Cunliffe & Stephens."

On this case the Supreme Court of *New Brunswick* held "that the respondent's right of property in the said lumber continued until payment of the draft given to secure the stumpage," and directed judgment to be entered for the respondents, with costs and damages to be assigned at $2,909.09, with interest thereon from the 15th July, 1875.

Mr. *Weldon*, Q. C., for appellant:

By the agreement set out in the special case, the payment for stumpage is to be in cash, or by security in one of the modes expressed in the agreement.

It is not claimed by the respondents that all matters and things appertaining to or connected with the license had not been settled and adjusted by the draft of $2,909.09 on the 29th day of April, 1875, and it is admitted that this sum was secured in one of the modes

expressed by the agreement, and the security was accepted and approved by the company. Now, the moment this sum was secured to the company, I contend the property in the logs passed to the grantees.

The clauses are all inconsistent when read separately, but if you read the whole agreement, it is clear the intention of the parties was that security approved was equivalent to payment. If stumpage is once secured it is immaterial to the company what became of the property, they got their security, and the *jus disponendi* was in the grantees. If otherwise, how inconsistent the agreement would be.

The plaintiffs having received in April security payable the fifteenth day of July passed that security beyond their control by endorsement to the *Bank of British North America.*

The grantees were to have power at any time after the dues were secured (*i. e.*, after the fifteenth day of April), to dispose of the lumber. But to make an effectual sale the note or acceptance must be first paid. Say a sale was made the first of June. How could the purchaser pay the company? The grantees owed the company nothing; they, after the endorsement, owed the *Bank of British North America.*

The company could not receive the payment and release the grantees from the claim of the *Bank of British North America.* The latter could not be compelled to receive payment until the fifteenth of July. Was the purchaser not the owner of the property? If not the owner, could he sell? could he transfer? could he ship the lumber?

If the company continued owner after the security was given, or held the lumber, why was the security required?

Or was it intended that if they got the logs to market early, they must remain idle till the 15th of July?

1879
McLEOD
v.
THE NEW BRUNSWICK RAILWAY CO.

No doubt there would be great force in the contention of the respondent if the clause retaining the ownership stood by itself, but by reading it in connection with the whole agreement there is no doubt the respondent's control over the property ceased after the 25th April, if the stumpage was then secured. The company had to approve of the security, and they could insist on undoubted security. The delay till July arises out of the fact of a note being taken, and cannot affect the *jus disponendi.*

Mr. *Thomson*, Q. C., followed:

This agreement must be read as a whole. *Cunlife & Stephens* would have no object in moving this lumber before July if they had no power to dispose. At that time the acceptance of *Jewett & Co.* was equivalent to gold. What was the necessity of approving of the security, if it was not to be synonymous with *payment.* If they could not refuse the note then there would be force in arguing it was not a payment.

Moreover, the circumstances under which the company are to have power to take and sell, are expressly stated, and, upon the principle of *expressio unius exclusio alterius*, the express excludes an implied power, the express power is given only when the sums payable are not *paid* or *secured*, and this applies only to a time and as to such sums for which the licensee could require the company to accept security, but the licensee could not, when the endorsed note fell due, require the company to accept security for it, and therefore the express power could not be exercised on default of the payment of the said note.

Another point also is that the agreement set out in the special case, so far as it gives the exclusive right to cut, operates as a license; so far as trees are cut under the agreement it operates as a grant of and passes the property in the trees to the grantees, so soon as all

matters and things appertaining to or connected with the license are settled and adjusted, and all sums due for stumpage are fully paid, and any and all damages for non-performance of the agreement or stipulations therein expressed, are liquidated and paid.

Mr. *Wetmore* for respondents:

In construing this agreement we must bear this in mind, that the trees belonged to the company, the right of property could only be divested by their own consent, and whatever agreement they choose to make is a good agreement. Now, the right of property in any lumber cut under this license was to remain in the respondents, who were to retain full and complete ownership and control of the same wherever and however such lumber might be situated, until all matters and things appertaining to or connected with the license should be settled and adjusted, and all sums due or to become due for stumpage or otherwise should be fully paid, and any and all damages for non-performance of the agreements in the license or stipulations therein expressed should be liquidated and paid.

The draft upon *E. D. Jewett & Co.* was taken as security only: the license provided that it might be so taken: how then can the appellants, under the facts, claim that it was either given by *Cunliffe & Stephens* or accepted by the respondents as payment for the stumpage? There is nothing to support their contention in this respect.

The words are *due* or *become due.* Surely the money does not *become due* for stumpage until the 15th July, and is not the reservation of the right of property clear and unequivocal as words can make it? Until it is removed from the brows the right of property is held by virtue of a prior clause in the agreement. What is the sense of this clause, then, if, when the lumber is removed from the landings, which is only when the

1879
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.

security is given, the absolute property vests in the licensees? Does it not clearly intend they shall hold their property until the security is paid?

The words "paid or secured" relied on by appellant in the first part of the contract are not to govern the rest of the contract, but are rather to be governed by the rest of the contract. The whole scope and intention of the license is this: If before either paying or giving security the lumber is disposed of, a forfeiture is worked. If the party instead of giving security, chooses to pay and the company to accept, there is an end to company's right of property. If security is given the company retains the right of property until it is paid, and any disposal that the licensee makes after that must be subject to such right of property. It cannot be successfully denied but that on reading the whole agreement this is the intention of the parties.

The special case, as Judge *Duff* puts it, recognizes that the note was given as security and not as payment, viz.: "That the stumpage shall be paid in the following manner, namely, by deducting a sum equal to the mileage already paid; and the whole of the remainder shall not, later than the 15th day of April, be secured by good endorsed notes or other sufficient security, payable on the 15th July next; and until the stumpage is so secured as aforesaid, the lumber cannot be removed from the brows.

The respondents also contend that the appellant, who must stand in the same, but who cannot stand in any better, situation than *E. D. Jewett & Co.*, of whose estate he is assignee, is bound by their knowledge that the draft accepted by them was for the stumpage of the lumber cut under the said license, of the terms of which license they were fully cognizant, and therefore, unless the taking of such draft as security was a virtual release of the respondents right of property in the lumber, they

cannot set up that they were purchasers without knowledge that under the license the respondents ownership of the lumber could not be divested until all sums to become due for stumpage should be fully paid, for they well knew that, until the draft for the amount of the stumpage accepted by them was paid, all sums to become due for stumpage could not be paid.

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

RITCHIE, C. J.:

[After stating the special case, and reading the parts of the license above given, proceeded as follows :]

These provisions, which in the license are not in immediate consecutive order, but respectively at the beginning, in the middle, and at the end of the contract, must be read and reconciled as if in immediate connection one with the other, and from the whole read together, and not from either separately, must the intention of the parties be sought and discovered in respect to the settlement for and payment of the stumpage. Thus, immediately preceding the first reference to any satisfaction of the stumpage, we find that the lumber having been "cut and landed in a suitable place for scaling," and marked as provided, it is to be taken to market as early as practicable the first stream driving or rafting season after being cut, and we naturally ask why that provision should be made for getting it to market as early as practicable if it was not contemplated that when it reached the market it might, under the subsequent provisions of the license, be in a position to be disposed of when at the markets? That this was so, the provisions as to the "managing" or dealing with the lumber, while in the grantees' possession, would seem very distinctly to indicate, for they are not directly or indirectly to conceal from the scaler, *or dispose* of any of the timber, logs, or lumber of any kind,

1880

McLEOD v. THE NEW BRUNSWICK RAILWAY CO.

Ritchie, C.J.

until all dues, stumpage and damages are paid *or secured*, without the consent of the company "in writing." Is not the irresistible inference from this language that if all dues, *stumpage* or damages are paid *or secured* they then might, without consent of the company, *dispose* of any of the property? If the right of the grantees to deal with the property rested on this clause of the contract, is there room for any, the slightest, doubt that when the dues, stumpage, or damages were either paid *or* secured, the disposing powers of the grantees accrued; let us then see if the exercise of their apparent right to dispose is controlled by the subsequent provisions of the license. The next reference to the stumpage is preceded by a provision for a payment of $10 per square mile at the time of the execution of the license, and as to stumpage, $1 per 1,000 superficial feet for spruce and $2 for pine, said stumpage to be *paid* in the following manner; the company to deduct from the amount of stumpage an amount equal to the mileage paid:—

And the whole of the remainder, if any, shall be *secured* by good endorsed notes or other sufficient security to be approved of by the said company, and payable on the 15th July next, and the lumber is not to be removed from the brows or landings till the stumpage *is secured as aforesaid.*

Now, if this is read in connection with the clause before referred to, must not the words, "to be paid in the following manner," mean that the good approved endorsed notes are to be in payment and satisfaction of the stumpage? Otherwise, why would the words "secured in the following manner," not have been used instead of "paid in the following manner;" and if this is to be construed as a security only and not as vesting the property in the grantees, how can such a construction be reconciled with the provision, which, as we have seen so clearly contemplates a disposing power in the grantees on the stumpage being "paid *or secured.*"

But it is contended that the subsequent provision for the reservation and retention of the ownership of the lumber, "until all matters and things appertaining to or connected with the license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement or stipulations herein expressed shall be liquidated and paid, prevents the property passing." To construe the whole agreement consistently, and give effect to every stipulation, the latter part of this provision must, I think, be read as nothing more than an elaboration of the first part and means substantially "until all matters appertaining to or connected with the license were settled and adjusted;" and this is, to my mind, very evident from the language which immediately follows, and which is, that "if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid *or secured* in some of the modes herein expressed within 10 days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wheresoever and howsoever situate, and to absolutely sell and dispose of the same," &c. Does not this clearly imply that if the stumpage has been paid *or secured* then there is no right to take possession or sell? and this brings us to just where we started from, and is consistent with the provision first referred to, which gives the disposing power over the lumber to the grantees when all dues, stumpage and damages are paid *or secured*, and to the second provision referred to, which provides how the stumpage shall be "paid," viz., by deducting the mileage, and the remainder being secured not later than 15th April by good approved indorsed notes, or other sufficient security, payable on 15th July. Read in this way, the different clauses appear to me quite reconcilable and consistent.

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Ritchie, C.J.

I cannot think it was ever intended that the plaintiffs should have their stumpage secured to their satisfaction and approval apart from the logs, and at the same time hold the logs also. I think the giving the approved indorsed notes was to enable the grantees to avail themselves of the earliest market by dealing with and disposing of the logs so soon as they could be got to market to enable them to meet the notes when they should fall due on the 15th July, and respondents be enabled at any time after the 15th April, and before the 15th July, to realize on the notes, and so to make the lumber in the hands of the one, and the proceeds of the notes in the hands of the other, immediately available, and that it could not have been intended to place the grantors in a position to realize the stumpage while the lumber should be kept in the hands, and at the expense and risk of the grantees, locked up, entirely useless, for the time being, for any purpose.

Mr. Justice *Fisher* in the court below takes very much the same view, for he says:

> By the device of taking a negotiable note, when the logs were removed from the immediate control of the plaintiffs, the stumpage was secured. The license requires that the stumpage should be secured by the 15th of April, and before the lumber was removed from the brows, and in computing the stumpage to be secured the mileage already paid was to be deducted. The licensees, *Cunliffe & Stephens*, were enabled to carry the lumber into the market *and have it in course of manufacture or sale before any actual payment was made.* The plaintiffs, the grantors, by the acceptance of the negotiable note would be enabled, if they required, to make it available for the purpose of their business before the 15th of July, the period fixed for the final payment of the stumpage.

Though it is true the same learned Judge decided in favor of the respondents, holding that "no change of property took place" until the stumpage was actually paid. How this could be and the grantees at the same time, on giving the notes, be enabled to carry their lumber into the market and have it in course of manufacture

or sale before any actual payment was made, I am at a loss to conjecture; if no change of property took place, what possible right could the grantees have to manufacture or sell the property; therefore while I appreciate the reasoning of the learned judge, it leads me to a conclusion the exact opposite of that at which he arrived (1).

There can be no doubt that in many cases the effect of giving a bill of exchange on account of a debt is only that of a conditional payment, and that the word payment as applicable to many transactions, even when used in a plea, does not mean payment in satisfaction, for, as said by Mr. Justice *Maule* (2):

> Payment is not a technical word, it has been imported into law proceedings from the exchange and not from law treatises. When you speak of paying in cash, that means in satisfaction, but when by bill that does not import satisfaction, unless the bill is ultimately taken up.

And as said by Lord *Campbell* in *Turner* v. *Dodwell* (3):—

> In mercantile transactions nothing is more usual than to stipulate for a payment by bills where there is no intention of their being taken in absolute satisfaction.

On the other hand it is equally well established that a bill of exchange may be given and accepted as an absolute payment in satisfaction, so as to be a discharge if the bill were dishonored. Thus on the counsel in *Turner* v. *Dodwell*, saying "anything taken in reduction of the debt is payment," and citing *Hooper* v. *Stevens* (4), and *Hart* v. *Nash* (5), *Erle*, J., replies:

> There can be no doubt of that, if the bill was taken in payment

(1) See *Turner* v. *Dodwell*, 3 E. & B. 140; *Belshaw* v. *Bush*, 11 C. B. O. S. 205; *Griffiths* v. *Owen*, 13 M. & W. 64; *James* v. *Williams*, 13 M. & W. 828, 833.

(2) See *Maillard* v. *The Duke of Argyle*, 6 M. & G. 40.

(3) *Ubi supra.*

(4) 4 A. & E. 71.

(5) 2 C. M. & R. 337.

1880

McLEOD v. THE NEW BRUNSWICK RAILWAY Co.

Ritchie, C.J.

in the sense that it was accepted by the creditor as equivalent to so much money.

Mr. *Chitty* in his work on contracts (1), thus enunciates the principle:—

> Where a debtor delivers a negotiable bill or note to his creditor, and the latter at the time of receiving the same agrees to take it in *payment* of the debt, and to take upon himself the risk of the bill or note being paid, *or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is to be implied, the effect of it will be to destroy the right of action for the debt, and to leave the creditor without remedy except upon the instrument* (2).

We must put the best construction upon this contract that we can to ascertain what the intention of the parties was, and I have, after a very careful consideration of this case, arrived at the conclusion that the words of the instrument import that on the giving of the approved bill the plaintiff was to look to it as constituting his remedy; that the approved bill was not taken simply on account of the stumpage, but so far as the stumpage was due under the contract in satisfaction and discharge thereof; that it was substituted in lieu of the security of the logs themselves, and all future liability rested on the bill, to which alone the grantors could look for actual payment; that the interest of the grantors in the logs thereupon ceased and the property vested in the licensees, and on their insolvency passed to the appellant, the assignee of their estate, for the benefit of their creditors generally; and I cannot avoid being strongly impressed with the conviction that the plaintiffs themselves, in the first instance, took this view of the contract. Otherwise, I cannot think they would, if they really believed they were the true owners of the property, have allowed their claim to

(1) P. 848.

(2) *Sayer* v. *Wagstaff*, 5 Beav. 415; *Sard* v. *Rhodes*, 1 M. & W. 153; *Brown* v. *Kewley*, 2 B. & P. 518; *Exp. Blackburn*, 10 Ves. 206; *Camidge* v. *Allenby*, 6 B. &. C. 381 2, 4. *Tempest* v. *Ord*, 1 Madd. 89.

have lain dormant from the 15th July till the 13th October, and, on the failure of *Jewett & Co.*, permitted defendant, their assignee, to take possession of this lumber as the property of the estate of these insolvents, and to sell and dispose of the same absolutely as such assignee, as the case alleges, without apparently any claim or remonstrance, and without any attempt to assert or enforce their rights till the bringing of this action.

I think the appeal should be allowed and judgment entered for the appellant, the defendant in the court below, with costs, and with the costs of this appeal.

STRONG, J.:—

Was of opinion that the judgment of the court below should be affirmed, and read a written judgment stating his reasons for that conclusion.

FOURNIER, J.:—

La question soulevée par les faits exposés dans le *cas spécial* soumis par les parties en cette cause, est, de savoir si le bois coupé par *Cunliffe* et *Stevens*, conformément aux conditions de la licence ou concession que l'intimée leur a consentie, en date du 15 octobre 1874, doit demeurer la propriété de cette dernière jusqu'au paiement de la traite tirée par *Cunliffe* et *Stevens* sur *E. D. Jewett et Cie* en faveur de l'intimée et acceptée par elle pour assurer le paiement de ses droits de coupe de bois, ou bien si le droit de propriété dans le bois coupé et manufacturé a cessé du moment de l'acceptation de cette traite.

La solution de cette question repose entièrement sur l'interprétation à donner aux stipulations contenues dans la licence afin de considérer la réserve du droit de propriété de l'intimée avec le pouvoir de *Cunliffe* et *Stevens* de disposer du bois fait dans les limites comprises dans leur "license" ou concession.

1880

McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.

Fournier, J.

Les principales stipulations concernant la question dont il s'agit, sont:

1o. *Said stumpage to be paid* in the following manner: Said Company shall first deduct from the amount of stumpage on the timber or lumber cut by Grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, *be secured by good* indorsed Notes, or other *sufficient security*, to be approved of by the said *Company, and payable* on the 15th July next, and the lumber not to be removed *from the brows or landings* till the *stumpage is secured as aforesaid.*

2o. And the said Company reserves and retains full and *complete ownership* and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this License *shall be settled and adjusted, and all sums due or to become due* for stumpage or otherwise, shall be *fully paid*, and any and all damages for non-performance of this Agreement, or stipulations herein expressed, shall be liquidated and paid.

3o. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be *paid or secured* in some of the *modes herein* expressed within ten days thereafter, then, in such case, said Company shall have full power and authority to take all or any part of said lumber *wherever or however* situated, and to absolutely sell and dispose of the same either at private or public sale, for cash.

D'après ces conditions il est évident que les *licensees* " concessionnaires " n'ont jusqu'au règlement de compte avec la compagnie du chemin de fer et le gouvernement fait en la manière convenue, que le droit de faire le bois dans l'étendue des limites concédées, en se conformant à cet égard aux conditions de la licence. Jusque-là ils n'ont pas même le droit d'enlever des jetées et de mettre à l'eau le bois manufacturé par eux. La conséquence logique de cette condition n'est-elle pas que, du moment que les droits de coupe ont été payés et les dommages pouvant résulter de l'inexécution de quelqu'une des conditions, liquidés et payés par l'un des modes convenus, la propriété cesse d'appartenir à la

compagnie et que les *licensees* (concessionnaires) en peuvent alors disposer.

D'après les faits du *special case* la traite tirée sur *E. D. Jewett et Cie* paraît avoir compris tout ce qui pourrait être dû à la compagnie pour les opérations de *Cunliffe* et *Stevens* pendant l'hiver

Ainsi dans ce règlement se trouverait compris le compte des droits de coupe de bois, déduction faite de la rente par chaque mille en superficie de l'étendue des limites, compte dont le paiement d'après la 1re condition doit être pas plus tard que le 15 avril, assuré par de bons billets avec endossement, ou par d'autres garanties suffisantes, le tout sujet à l'approbation de la compagnie.

Dans le montant de cette traite doit également se trouver compris le règlement de tous les dommages que la compagnie pourrait avoir à réclamer pour l'inexécution de quelques-unes des conditions de la licence. C'est un règlement complet et final, du moins la compagnie n'élève aucune prétention au contraire. Si l'acceptation de cette traite peut être considérée comme l'un des modes de paiement établis par la convention des parties, il s'en suivrait que *Cunliffe* et *Stevens* pouvaient disposer de ce bois comme ils ont fait, en le vendant à *Jewett et Cie.*

Si l'intention de la compagnie eût été de ne se départir de sa propriété que sur paiement comptant de ses droits de coupe de bois, elle n'aurait certainement pas donné à ses concessionnaires (*licensees*) l'alternative de payer ou d'offrir un billet négociable sujet à son approbation comme étant pour elle l'équivalent d'un paiement en espèces. Cette facilité de régler par billets était sans doute pour l'avantage commun des parties, et a dû être pris en considération dans la détermination du prix de la concession. La compagnie, certaine de n'accepter que des billets qui équivaudraient à un paiement en espèces, devait nécessairement comprendre

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Fournier, J.

que l'accomplissement de cette condition mettrait *Cunliffe* et *Stevens* non-seulement en position de transporter le bois au marché, mais qu'ils acquéraient aussi par ce moyen la propriété du bois et le pouvoir d'en disposer. Elle ne pouvait alors avoir l'idée qu'elle conserverait sur ce bois, acheté pour le commerce et qui devait en conséquence passer par un grand nombre de mains, un droit de propriété qui lui permettrait d'aller le revendiquer jusque sur le marché d'Angleterre. L'intention évidente des parties était de faire dépendre le transport de la propriété de l'une des deux conditions arrêtées entre elles, le paiement ou la remise d'effets négociables acceptés par la compagnie.

La 3ème condition confirme cette interprétation en stipulant dans quel cas la Cie exercera le droit de propriété qu'elle s'est réservé par la seconde. Il y est formellement déclaré que dans le cas où les réclamations de la Cie n'auront pas été réglées suivant l'un des modes convenus "*shall not be paid or secured in some of the modes herein expressed*" alors elle aura le pouvoir de s'emparer du bois, et elle pourra le vendre et en disposer par vente publique ou privée. Mais pour qu'elle puisse exercer ce droit, il faut nécessairement qu'il y ait eu négligence de régler de la manière convenue dans les dix jours qui suivent l'époque de l'exigibilité d'une réclamation. Cette clause exclut toute idée de l'exercice d'un semblable pouvoir dans le cas de règlement par billets approuvés. Elle est faite dans la vue de pourvoir au cas où la Cie n'a pas reçu les garanties qu'elle a stipulées. Ce serait certainement enfreindre la lettre et l'esprit de cette convention que de reconnaître à la Cie le droit d'en faire l'application lorsque les garanties convenues lui ont été données à sa satisfaction comme dans le cas actuel.

D'après le genre d'affaire dont il s'agit et la nature des conventions au sujet du paiement, la Cie me paraît

être convenue d'adopter comme un des modes de paiement la remise de bons billets endossés dont l'acceptation ou le rejet était laissé à son entière discrétion. Lorsqu'elle a accepté la traite en question, la solvabilité de *Jewett et Cie* était notoire et considérée comme égale à celle des banques. Personne n'avait de doute à cet égard. On doit considérer que dans les circonstances de cette cause, il y a eu, d'après le mode convenu, un paiement suffisant pour transférer le droit de propriété.

C'est en considérant ces diverses stipulations séparément et dans leur ensemble, conformément à la règle qui veut que "toutes les clauses des conventions s'in-"terprètent les unes par les autres, en donnant à chacune "le sens qui résulte de l'acte entier," que j'en suis venu à la conclusion que le droit de propriété de l'Intimée a été transféré à *Cunliffe* et *Stevens* par l'acceptation de la traite de *Jewett et Cie.*

HENRY, J. :—

The issue in this case turns upon the construction of the license to cut the timber given by the respondents to *Cunliffe & Stephens*, taken in connection with the subsequent acts and dealings of the parties.

The respondents, owners of wilderness or timber lands in *New Brunswick*, agreed to sell to *Cunliffe & Stephens* all the pine and spruce logs they might cut on certain lots of the respondents' lands up to the first of April next following the date of an agreement entered into between them, dated the 15th of October, 1874. The document calls itself a "memorandum of agreement and conditional license." By its terms the grantees were to pay at the rate of one dollar for every thousand superficial feet of spruce logs, and two dollars for every thousand feet of pine logs. By it the grantees (for such they are called in the agreement) were required to pay the respondents at the date of the

1880

McLEOD v. THE NEW BRUNSWICK RAILWAY CO.

Henry, J.

agreement at the rate of $10 for each square mile, amounting to $250 on account; but which sum was to be forfeited if the grantees failed to cut any of the logs. The agreement contained a clause by which the grantees were prohibited from moving the logs from the property upon which they were to be cut, or in any way disposing of them, without first paying or securing the payment of the stumpage as agreed upon. The legal result would be that the grantees became the owners of the logs subject to the lien of the respondents. The grantees were not to cut the logs *for the respondents* as *their contractors* or *employees* but *for themselves*. On the execution of the agreement and the payment of the $250, the grantees acquired a vested interest in the sole right of cutting and appropriating to their own use all the logs on the 25 square miles during the prescribed time. As each log was cut and deposited at the place for scaling it became, if not previously, the property of the grantees subject to the lien before mentioned, and the other conditions and provisions of the contract. It is not contended that any of the other conditions were broken or unfulfilled by the grantees. It appears to me that a different view has been taken of the rights as to the logs in question, and it has been considered that the respondents did not convey anything more than a naked right to cut the logs, and that the whole property always remained in the respondents. I cannot so consider it. The logs were to all intents and purposes *purchased*, and the property in them passed to the grantees subject to the respondents' lien. If the grantees, then, paid the balance due that lien was discharged, and the logs, relieved from it, would become the unencumbered property of the grantees.

The agreement contains three or four provisions necessary to be considered.

The first is:

The grantees will not directly or indirectly conceal from the scaler, or *dispose of*, any of the timber, logs, or lumber of any kind until all dues, stumpage, and damages are *paid* or *secured*, without the consent of the said company in writing. Otherwise they shall forfeit the whole lumber cut under this contract.

The second is:

It is hereby agreed that the said grantees shall pay to the said company at the time of executing this license, a mileage rate of ten dollars per square mile of the entire area of the land hereby licensed. It is also further agreed that the said grantees shall pay the said company as stumpage, one dollar per thousand superficial feet for all the spruce logs, and two dollars per thousand superficial feet for the pine logs, and at the company's scale of rates of stumpage for the present season for all such other lumber as they may cut on the said lands, hereby licensed or permitted, said stumpage to be *paid* in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes or other sufficient security to be approved of by the said company and payable on the 15th of July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid.

Had these been the only provisions for a lien, the grantees' logs would have been relieved from it, on one or other of the two things being done by the grantees—the one, making payment—the other, by securing the payment. On the 29th of April a draft was given by the grantees to the respondents through their agent, upon *Jewett & Co.* for the amount due, and accepted by the latter. Was this a payment or merely security? As to the clauses of the agreement under consideration, I consider it unimportant to decide that question, as, in either case, the lien was removed permanently. The grantees by the first clause were not (amongst other things) "to dispose of" the logs until the amount was paid or *secured*. If the respondents did not receive the draft in payment, they at least took it as security and

1880
McLeod
v.
The New
Brunswick
Railway
Co.
Henry, J.

abandoned their lien by giving up possession of the property. The result necessarily was that the grantees became the owners of the logs unencumbered, and might, in the terms of the clause, dispose of them. To be in a position to "dispose" of them they must have had the whole unencumbered property in them. The logs were taken possession of by the grantees on the acceptance of the draft, with the assent of the respondents, and a large sum, no doubt, expended in taking them to the boom, where they were subsequently sold and delivered to *Jewett & Co.*, and held by *Estey* for them. The rights of third parties here come up, and one of the learned judges in *New Brunswick* would have felt disposed, I think, from what he says, to have validated the transfer to *Jewett & Co.* as such third parties, but for the fact, that they must be presumed to have known the agreement under which the logs were obtained and the nature of the subsequent dealings as to the draft, &c. With every deference to the opinion of the learned judge I cannot see where the evidence is that would produce the conclusion that *Jewett & Co.* knew anything more than that the draft was given and accepted, and the logs delivered up to the grantees. They may or may not have known the peculiar terms of the agreement. I can see nothing according to the evidence to have prevented them from purchasing, any more than any other third party who would purchase in ignorance of the source from which the logs were obtained, and of the whole transaction. I take, however, the ground that a lien cannot exist contemporaneously with a security payable at a future day, whether such lien be implied or one created by express agreement, unless such continuing lien be expressly agreed for. If, when the draft was accepted, and before the logs were delivered or permitted to be taken from the "brows," a

further agreement was entered into, that in consideration of the respondents giving up the logs the lien should continue until payment of the draft, or if that result is plainly provided for in the agreement, and that the draft is not to be considered a payment, I will not say that such lien would not continue to attach to the logs in the meantime. I will hereafter consider both of these propositions.

It is elementary in the doctrine of liens, that the continuance of possession is indispensable to the exercise of the right of lien.

An abandonment of the custody of matters over which the right extends, necessarily frustrates any power to retain them and operates as an absolute waiver of the lien. The holder is in such case deemed to yield up the security he has upon the goods and trust to the responsibility of the owner (1).

At page 43, the same author says:

It has been well established by numerous authorities, that if security be taken for a debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone (2).

He proceeds:

This principle as to waiver of lien is not regulated by the usage of trade, nor consists in a mere rule of law that the special contract determines the implied one, but in the inconveniences which would result (the necessities of mankind requiring that the goods should be delivered for consumption) from the extension of the lien for the whole period which the security has to run, for it must be presumed, either that the lien is to continue with, and accompany, the security until payment, or that it is relinquished by the substitution of the security (3).

Reference to that case will show that the security was a note of hand of the party on whose goods the lien rested for a part of his debt and a judgment against him for the balance. The subject matter of the lien still

(1) Cross on the Law of Liens, p. 38.

(2) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755.

(3) Per Lord *Eldon* in *Cowell* v. *Simpson*, 16 Ves. Jun. 279.

1880

McLEOD v. THE NEW BRUNSWICK RAILWAY CO.

Henry, J.

remained with the party who held it, but it was held that by taking the note and judgment the lien was removed. His lordship said:—

The proposition that the lien can exist after such a special contract (referring to the note,) necessarily involves a contradiction to that contract. My opinion, therefore, is that where these special agreements are taken, the lien does not remain. And whether the securities are due or not, makes no difference.

This case is much stronger. There the subject matter of the lien was not given up, and still it was held the taking of the securities destroyed the lien. Here the subject matter was given up to the grantees, and they, as I think they had a right to do, disposed of it as their own property. In this case there was a special reason why the grantees should get, not only the possession, but the exclusive right to the logs, so that they might make sale of them, and I have no doubt that was what the respondents fully intended and expected when they, on the acceptance of the draft, gave up the possession of the logs to the grantees. It was stated without contradiction at the argument that, at the time they did so, *Jewett & Co.* were generally considered a wealthy firm and their paper considered equal to that of a bank. Theirs was not considered a doubtful security, and the feeling of confidence in them may possibly account for the unconditional surrender of the logs to the grantees. Whether that was, or was not, the reason, all that is necessary for us to consider is that there was no agreement for a continuing lien. The lien created by those clauses, (and so far they are only what I am dealing with,) was to be operative up to a certain point. That is the respondents were to retain possession of and control over the logs until the balance of the stumpage, &c., was secured to their approval. That being done, by the acceptance of the draft, their right of stoppage ceased and the grantees became entitled to the possession. If, after they received the acceptance of the draft

they had refused to permit the grantees to take the logs, it would have raised the question of the right of the grantees to compel them to do so, or to submit to the legal consequences of their refusal, and, in that case, according to the ruling of Lord *Eldon*, in the case before mentioned, and since confirmed by numerous decisions, they would have had the law against them. But they themselves have by their own act of surrendering the logs settled the point, and virtually and effectually construed their own agreement and abandoned any lien they held.

It is, however, contended that by the provisions contained in subsequent clauses of the agreement, the delivery of the logs by the respondents was only to enable the grantees to remove them to a point where a market could be obtained for them, and not with the intention of cancelling their lien, but the only evidence adduced to establish that position is from those clauses themselves. It is necessary to consider them carefully and ascertain whether that is the result—taking those clauses in connection with those I have before referred to and the acts and dealings of the parties themselves.

Following two other clauses wherein the grantees undertook "to go upon the said premises in due and proper season and cut and *remove* lumber and pay the stumpage as aforesaid;" to faithfully perform the conditions and stipulations expressed in the license; to pay the company damages for violation or neglect of the same; to exercise diligence and precaution to prevent damages by fire, and to pay for any resulting from carelessness,—we find the clauses as follows:

And the company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages

1880

McLEOD v. THE NEW BRUNSWICK RAILWAY Co.

Henry, J.

for non-performance of this agreement or stipulations herein expressed shall be liquidated and paid. And if any sum of money shall have become payable by anyone of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any of the said lumber, wherever or however situated, and to absolutely sell and dispose of the same, &c.

Here, then, are general provisions of the contract, and operating from the time of its execution. That they were intended to operate in connection with the previous clauses for the protection of the company's interest only up to a certain point, I have no doubt. If, indeed, the clause should be construed as giving the company a right to retain any "ownership" or "control" after all things had been "settled and adjusted," and the amount or balance due paid or *secured*, as mentioned in previous clause which provides for the lien, then the two clauses are antagonistic, and, if so, that which is the most favorable to the grantees is the one by which we must be governed. The provisions are those of the respondents, and if, by one of two antagonistic ones, the grantees are justified in doing an act, or entitled to retain the property, the other party cannot be permitted to set up the other. On the principle, too, that they are the words of the respondents, and taking the whole agreement together, if an ambiguity arises they, and not the grantees, are to take the consequences. By the two clauses first cited the grantees were to have possession of the property relieved from any lien on giving the required security, which was given and accepted and the logs given up. The agreement contains no provision that, *under such circumstances*, the lien should continue or remain upon the logs. It is true that in the former of the two last cited clauses we find it provided that the respondents *reserved* and *retained* the *ownership* and *control* until

(amongst other things) all sums due for stumpage, &c., should be fully *paid*. Independently of this antagonistic and, therefore, ambiguous provision, I have no difficulty in concluding that it could only consistently apply to circumstances and transactions up to the time of a settlement and adjustment of all matters and things connected with the license. The last clause cited shows clearly that such was the intention of the parties, for it provides that if any money shall have become payable "*by any of the stipulations* or *agreements herein* expressed" (which covers the whole ground), "and shall not be paid or *secured in some of the modes* herein expressed, the company shall have full power and authority to take all or any of the said lumber, &c." The plain and simple meaning of this latter clause is, that if the grantees either paid or secured the respondents, their power and authority to take or interfere in any way with the logs or timber was at an end. Here, then, we have another provision in opposition to that under which the respondents claim. In the license we have three several provisions against that one. The respondents claim, however they so intended. If so, why was not something said or done in regard to it when they gave up possession of the property. If they really so intended, their failure to communicate it to the grantees when acting in a manner to lead them to assume the opposite, was, under all the circumstances, I take it, a fraud, not only on the grantees, but a still greater one upon a third party who might purchase and pay for the logs. The property was given up in April, and the respondents did nothing to assert any claim to it until October. During the intervening seven months the logs might have been sold, changed owners several times and been converted into lumber or other manufactured articles. It might in the ordinary course of business in the hands of innocent purchasers have been shipped and sold in a

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Henry, J.

foreign or domestic market, and we are asked to put a construction on that one antagonistic clause which would result in giving a right to the respondents to follow the property, it might be to *England*, or the *United States*, and take it from the innocent purchasers there. It is possible an agreement to produce such a result might have been secretly entered into between, and bind the immediate parties, but to have any effect, it should be in language the most plain and unmistakable and essentially different from that under consideration. Besides, had such an agreement been entered into privately, the fact that it is of that private and unusual character throws upon the party for whose security the provision was made the responsibility of acting consistently with the fact of his holding such a right. He must not act in a way to induce outsiders to believe he has no such secret claim. The respondents, by giving up the property unreservedly and enabling the grantees to act with the logs as if under no lien, put them in a position to hold themselves out as the unencumbered owners. I have no doubt that *Jewett & Co.*, when purchasing, and the grantees, when selling to them, considered the latter had full authority to sell and convey. It would be, I think, a serious question in such a case to say, whether or not the respondents would in the case of a third party not be estopped from setting up such a secret claim, when their overt acts and dealings were so inconsistent with it. What are the facts in the knowledge of *Jewett & Co.*? Why, that the grantees had settled with and secured the respondents, and thereupon that the latter gave up the possession to the former, who brought the logs at much expense to the boom where they were when purchased. They had, then, every right to assume, as they did, that the grantees had the property and the right to dispose of it. How could they be presumed to know of this ambi-

guous clause, and be expected to construe it as it has been since then, I think, erroneously done? Suppose another person had bought, knowing what *Jewett & Co* knew, or are presumed to have known, would it be right to permit the respondents to say: "True, we held on to the property till we got satisfactory security, upon which we surrendered it unconditionally at the time; true, we allowed the grantees to take possession and put them in a position to hold themselves out as the owners of the property, but still we had a clause in the private agreement with them which perhaps no one could have expected, but there it is; and although you have been induced in a great measure by our mode of dealing to feel yourself perfectly safe we will nevertheless take the property from you and hold it?" I think there would be neither law or equity in permitting them to do so.

Although not necessary I may refer to the question of the draft as *payment*. I am free to admit that if a debt existed, the mere taking of a bill or note, even of a third party, would not necessarily amount to a payment, if nothing more was done, and that the result of taking such would but postpone the payment. If, however, it was taken as payment, it is otherwise. Here something more was done. The possession and control of the property was given up, and the legal conclusion, I think, is that in the absence of any special agreement to the contrary, the acceptance was received as payment. A mere *security* could have been given in a variety of ways by bond or otherwise, amounting to a guarantee. The words *paid* or *secured* are those used in the first clause. Those in the second are "*secured* by good endorsed notes or other sufficient security to be approved of by the said company." The latter clause, it is true, refers only to *security*, but the first and one of the two latter clauses uses the word "paid."

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Henry, J.

The rule of law applicable to such cases was laid down by Lord *Langdale* in *Sayer* v. *Wagstaff* (1), and cited with approval *in re The London, Birmingham and South Stafford Bank* (2). His lordship said:—

> The debt may be considered as actually paid if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied.

The point would, therefore, be one to be submitted to a jury under the evidence of the conduct of the respondents at the time, and the special circumstances of the case. As we are now dealing with a case prepared by the parties themselves, and in which we are not aided by the finding of a jury, we must necessarily place ourselves in the same position a jury would have occupied. Assuming that duty, I have no difficulty, from the whole evidence, in arriving at the conclusion that in taking the acceptance and handing over the property, the respondents received that acceptance as payment and relinquished all the lien they held upon the property in question.

For the reasons given (which on account of a difference of views entertained by my learned brethren, I have elaborated more than I would have otherwise considered necessary,) I think the appeal should be allowed and judgment given for the appellant with costs.

TASCHEREAU, J.:—

I am of opinion to dismiss this appeal.

It seems to me clear that by the license under which *Cunliffe & Co.* cut this lumber, they never thought for a moment, and it never came to the mind of any of the parties thereto, that they could pay the company the

(1) 5 Beav. 415. (2) 34 L. J. 420.

amount of the stumpage on the 15th of April. Indeed, it appears to me plain by the said license that not one of the contracting parties ever thought it possible that *Cunliffe & Co.* could pay the stumpage before the lumber was taken down to market. But as it was expressly stipulated and agreed, and made obligatory upon *Cunliffe & Co.*, that the lumber should be taken down to market as early as practicable, the first stream driving or rafting season after being cut, that being about the fifteenth of April then next, it was agreed and stipulated that, not later than the said fifteenth of April, *Cunliffe & Co.* were to give sufficient security, by good indorsed notes or otherwise, that the amount due for stumpage would be paid on the 15th of July, the said lumber not to be removed from the brows or landing till the stumpage was so secured. And if the said security was not so given by *Cunliffe & Co.*, then the said company could, ten days after the 15th of April, take possession of the said lumber and absolutely dispose of the same; and if the stumpage was not duly paid on the 15th July, or within ten days after, then also the said company could take the said lumber, *wherever* it was, and dispose of the same. It was also agreed and stipulated as follows:

And the said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, *wherever* and however it may be situated, until all matters or things appertaining to or connected with this license shall be settled and adjusted, and all sums due or *to become due*, for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid.

I am at a loss to know what language could more clearly say that the company retained the ownership of this lumber till the stumpage was actually paid. The security given on the 15th of April was so given for one purpose only, that of allowing the taking down

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Taschereau, J.

of the lumber to market, the ownership remaining in the company till actual payment of the stumpage, and delay being given for such payment till the 15th of July. If, on the 15th of July, stumpage was not paid, or within ten days, the company was authorized to take the lumber and sell it. Surely, all this means that the ownership could never pass to *Cunliffe & Co.* till actual payment of the stumpage.

I think that the judgment entered for the plaintiffs in the court below is right, and that the defendant must fail in his appeal.

GWYNNE, J.:

The sole question, as it appears to me, which is presented to us upon this special case, is one of the construction of the instrument marked A, annexed to the special case, and is, whether, *by force of the terms of that instrument*, the absolute property in the logs in question did or not pass to *Cunliffe & Stephens immediately upon* the acceptance by *Jewett & Co.* of the draft of *Cunliffe & Stephens* of the 29th April, 1875?

We are not placed in the position of a jury, nor are we authorized to draw inferences of fact as they might. No question of fact is raised before us, whether the plaintiffs as against *Jewett & Co.*, and their assignee, by reason of their conduct in suffering the logs to remain in the possession of *Cunliffe & Stephens*, or rather of their assignees, *Jewett & Co.*, after the draft became due; or by the manner in which they dealt with the acceptance; or by any admission or conduct of theirs whatever subsequently to the receipt by them of the acceptance, should be held, as a matter of fact, to have adopted and taken, or to have agreed to adopt and take, the acceptance, notwithstanding the terms of the instrument? and whether they should or not, by reason of such or any circumstances, be estopped *in pais* from

asserting now that the property is theirs, is a question upon which we are not called upon, nor is it proper for us, to express an opinion.

The question before us being, as I have said, in my opinion, limited to the mere legal construction of the terms of the instrument, our judgment must, I think, be to dismiss the appeal, for otherwise we must, as it appears to me, eliminate from the contract of the parties that part wherein it is declared that their intention is that the plaintiffs' full and complete ownership of the timber shall be and is reserved and retained, wherever and however it may be situated, until all matters and things appertaining to or connected with the license shall be settled and adjusted, and all sums due, or to become due, for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or the stipulations therein expressed, shall be liquidated and paid. The clause seems to be inserted for the express purpose of reserving the ownership until *actual* payment. Upon a view of the whole instrument the parties, as it seems to me, have shewn that they understood, when entering into the contract, the difference between security for money to be paid at a future day and actual payment of such money, and that, however unreasonable the terms imposed by the vendor may have been, the parties agreed that the property should remain the property of the vendors until actual payment, notwithstanding that for a limited purpose the vendees might have possession before payment.

If I could see that the doctrine of lien applied to the case I should have no difficulty in holding that the plaintiffs, by parting with the possession, had lost any lien they may have had, but I cannot see that the doctrine of lien at all affects the case. The question is, in

1880
McLEOD
v.
THE NEW BRUNSWICK RAILWAY Co.
Gwynne, J.

my opinion, one of property, not of lien, namely, whether, in virtue of the provisions of the instrument, the property in the timber had passed from the plaintiffs to *Cunliffe & Stephens, eo instanti* of the draft being accepted?

So viewing the case stated and the question submitted, I cannot hold that the property did pass then, without ignoring this clause.

Appeal dismissed with costs.

Solicitor for appellant: *Ezekiel McLeod.*

Solicitors for respondents: *Fraser, Wetmore & Winslow.*

1879
*Nov. 4.
1880
*March 13.

DAME ADELAIDE PILON *et al*..... APPELLANTS;

AND

DAME ALBINA MALETTE ES-QUALITÉ AND EMERY BRUNET ET UX. ES-QUALITÉ..... RESPONDENTS.

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

Assets of first and second community—Transfer of arrears of life rent by wife to the grandson of her second husband, validity of—Edit de secondes noces, 1560—*Arts.* 279, 282 *and* 283, *Custom of Paris, and Arts.* 1760, 1265 *and* 774 *C. C. (P. Q.)—Costs—Error of date in deed of transfer.*

On the 17th February, 1841, *C.* and wife acknowledged by the deed that they were indebted to one *S. N.*, widow of one *P.*, in a sum of $140, due to her late husband. On the same day, *C.* and wife, the son-in-law and daughter of *S. N.* and *P.*, also acknowledged to be indebted to *S. N.* in an annual life-rent, in

Present,—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

consideration of certain real estate given to them previously by the late *P.* and *S. N.*, by deed of gift, 16th February, 1830. On 19th February, 1841, the widow, *S. N.*, married one *J. B. L.* On the 21st January, 1870, *J. B. L.* and his wife, *S. N.*, transferred to *P. L.*, the grandson of *J. B. L.*, all the arrears of life-rent due them by *C.* and his wife as well as the sum of $140, being the amount of the obligation.

On an action brought by *P. L.* against *C.* and wife, to recover £1,325 for 26 years of said life-rent, and £35 for the amount of the obligation of the 17th February, 1841;

Held,—1. Affirming the judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), that the arrears of the life-rent which accrued during the second marriage of *S.N.* belonged to the community which existed between her and her second husband, *J. B. L.*, and that the husband as head of the community could legally dispose of his share in the community, viz: one-half of said arrears, in favor of his grandson *P. L.*, but the transfer as to the other half belonging to his wife, *S. N.*, was null, as by law *S. N.* could not transfer to any of her husband's descendants, who, in such a case are, by law, considered as persons interposed to secure directly to the husband a benefit which cannot be conferred to him directly—Art. 774 C. C. (P. Q.)

2. Reversing the judgment of the Court *a quo*, that although the sum of $140 formed part of the movables belonging to the first community, yet the half of said sum belonging to *S. N.* at the time of her second marriage formed part of the second community, and her husband, *J. B. L.*, could legally dispose of his share in said sum, viz.: $35 in favor of his grandson, the transfer of the balance, viz., $105, being null and void.

In this case both parties appealed to the Supreme Court, the respondent, *A. M. et ux.* having succeeded in getting the judgment of the Court *a quo* reversed on the second point and confirmed on the first point, were allowed costs of a cross appeal.

In plaintiff's declaration it was alleged that the arrears of rent transferred to him and which he claimed from defendants were due in virtue of a life-rent constituted by a deed of cession, dated 16th February, 1828, and in the Superior Court, after argument, a motion was made by plaintiff to discharge the *délibéré* inasmuch as it was discovered at the argument that a clerical error of a serious nature to the interests of the present plaintiff had inadvertently crept into one of the authentic documents invoked by the plaintiff in support of his action, such error being as to the date of a certain donation upon

1879

PILON
v.
BRUNET.

which the action is mainly based; and inasmuch as such clerical error can most easily be remedied by referring to the minute of the notary who passed the deed or otherwise, this motion was granted, and a second motion was made by the plaintiff *en reprise d'instance*, praying to be allowed to amend the declaration by adding under count No. 10 in the declaration the following, to wit: "That the date of the constitution of the rent above mentioned was erroneously mentioned in the deed of transfer above related as being made by and in virtue of the contract of marriage of the said *A. C.*, dated the 7th February, 1828.

"That the said constituted rent is made by a deed of the 16th February, 1830, as it appears from an authentic copy of said deed forming part of exhibit number one of the plaintiff in this cause, and that the intention of the parties to the said deed of transfer at the time of the execution thereof was to transfer the arrears of rent constituted by the said defendant on the 16th February, 1830. The said rent being the only one due by the said *A. C.* to the said *S. N.*"

Held (affirming the judgment of the courts below), that the error in the transfer, as to the date of the deed under which the life-rent was due, was a mere clerical error. There was no other life-rent to which the transfer could apply but the one in question. The claim was sufficiently identified by the description of the deeds and the date of their registration, under the special allegations of the plaintiff and the evidence which he has adduced.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), reversing a judgment of the Superior Court for *Lower Canada*, by which the plaintiff, *Pierre Lalonde*, then represented by his widow Dame *Albina Mallette*, as tutrix to his two minor children, had been condemned to pay to the respondent *es-qualité*, the sum of $5,143.00 with interest and costs, the Court of Queen's Bench reducing the condemnation to $2,101.77 with costs of appeal against the respondent *es-qualité*.

The judgment of the Court of Queen's Bench, (Appeal side) was appealed from to the Supreme Court by the present appellants on the ground that the condemnation was yet excessive. At the same time the respondent

es-qualité, appealed also from the judgment of the Court of Queen's Bench (Appeal side), on the ground that the judgment of the Superior Court ought to have been affirmed. This second appeal was treated by the Court as a cross-appeal under the Supreme Court rules.

The facts of the case as stated by Sir *A. A. Dorion*, C. J. of the Court below, are as follows :—

On the 7th of February, 1828, *Adélaïde Pilon*, then a minor issue of the marriage of *Joseph Pilon* and *Scholastique Neveu*, married one *Antoine Charlebois*.

Joseph Pilon was a party to the contract of marriage and gave to the future consorts certain real estate, of which he reserved for himself as well as for his wife, the enjoyment (*l'usufruit*) as long as they lived.

On the 16th February, 1830, *Pilon* and his wife made a transaction with *Charlebois* and his wife, by which in consideration of an annual life-rent (*rente viagère*) payable in kind, they released the enjoyment (*l'usufruit*) which they had reserved by the first deed.

Pilon died in 1839 and his wife survived him.

On the 17th of February, 1841, his widow, *Scholastique Neveu* gave to *Charlebois* and his wife, a discharge, in full, for all the arrears of this life-rent which were due to her up to the 17th of February, 1841. The arrears have also been paid since for the year 1842, 1843 and 1844, as admitted in the plaintiff's declaration.

On the same day, 17th February, 1841, *Charlebois* and wife acknowledged by a notarial obligation that they were indebted to *Scholastique Neveu*, widow *Pilon*, in a sum of 840 francs ancient currency, equal to $140, due for the amount of an obligation of the 18th of September, 1830, by *Charlebois* to the late *Joseph Pilon*.

Having thus settled her affairs with her daughter and her son-in-law, *Scholastique Neveu* married one *Jean Baptiste Lacombe*, on the 19th day of February following (1841).

1879
PILON
v.
BRUNET.

Lacombe was a widower and had a daughter by his first marriage. Her name was *Marie Virginie Lacombe*. She married *Pierre Moïse Lalonde*, and had by this marriage a son whose name was *Pierre Lalonde*.

On the 21st of January, 1870, *Lacombe* and his wife *Scholastique Neveu*, the mother of the appellant, transferred to this *Pierre Lalonde*, the grandson of *Lacombe*, all the arrears of life-rent which were due by *Charlebois* and his wife to *Scholastique Neveu*, from December, 1844, to December, 1869.

In the deed of transfer it is erroneously stated that the arrears of life-rent so transferred are due by virtue of the contract of marriage of *Charlebois* and his wife of the 7th February, 1828, and also by virtue of deed of transfer of the 16th February, 1828, written at the foot of the said contract of marriage, while this life-rent was created by an act of the 16th of February, 1830, already mentioned, which act is however written at the foot of the original contract of marriage of the 7th of February, 1828.

Lacombe and wife also transferred by the same deed to *Lalonde* the 840 francs or $140 due by *Charlebois* and his wife by their obligation of the 17th of February, 1841.

On the 27th of March following (1870), a little over two months after the date of this transfer, *Scholastique Neveu* died.

Shortly after her death, *Pierre Lalonde* brought the present action against *Charlebois* by which he has claimed:—

1st. For 26 years of life-rent transferred to him by *Scholastique Neveu* under the above transfer.....	£1,325	5	10
2nd. The amount of the obligation of the 17th of February, 1841, 840 francs equal to.....	35	0	0

3rd. For the funeral expenses and expenses of the last sickness of *Scholastique Neveu* paid for by the defendant *Charlebois* and his wife.....	35	11	6
Making a total of.....	£1,394	0	4

Equal to $5,576.06 with interest from the 28th of April, 1871, and costs.

To this demand the defendant *Charlebois* pleaded the facts already stated, and further, that the life-rent transferred by *Scholastique Neveu* to *Lalonde* represented to the extent of one-fifth the individual estate (*les propres*) of the said *Scholastique Neveu* and for four-fifths the properties acquired during the first community; that no part of the four-fifths of his life-rent, which represented the properties acquired during the first community, could form part of the second community; that *Scholastique Neveu* had no right during her marriage to give any of her property to her husband *Lacombe*, nor to his grandson *Lalonde*; that the sum of 840 francs ancient currency was also a *conquet* of the first community and that the transfer made to *Lalonde* was only valid as to one-tenth of the arrears of life-rent, which was the share of *Lacombe* in one-fifth of such arrears which had fallen into the second community, and *Charlebois* offered to confess judgment for $312 as the value of the share of arrears of said life-rent which *Lacombe* was entitled to transfer.

To this plea the plaintiff answered generally; also that *Scholastique Neveu* had made a will by which she had disposed of all her properties in favor of her husband *Lacombe*, and that the defendant had therefore no interest in asking that the transfer of the 21st of February, 1870, be annulled.

On this contestation, the Superior Court holding that the transfer was not affected by the *Edit des secondes*

1879
PILON
v.
BRUNET.

noces and that *Scholastique Neveu* had the right to transfer her claims to *Lalonde*, as she had done, condemned the defendant *Charlebois* to pay to the plaintiff a sum of $5,143.21 with interest from the 29th of April, 1871, and costs. This sum of $5,143.21 is composed of $4,860.30 for the value of 26 years of arrears of life-rent, $140 amount of the obligation of the 17th of February, 1841, and $142.90 paid for the defendant, for the funeral expenses, etc., of *Scholastique Neveu.*

There was no dispute about this last claim of $142.90 which was admitted by the appellants.

The only other facts requiring to be noticed with reference to this appeal are, that *Pierre Lalonde*, the original plaintiff, died before judgment was rendered in the court below and that *Antoine Charlebois*, the original defendant, died since the judgment. They are now respectively represented in the cause, *Charlebois* by the appellants and *Lalonde* by the respondent.

As the pretended will of *Scholastique Neveu* invoked by the plaintiff in his answers to the defendant's plea the date of which is not even indicated, was never fyled, it was found unnecessary to examine whether or not it would have been a good answer to the defendant's pretensions had it been produced.

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

The first question that naturally comes up under the plea of general denial is whether the plaintiff as assignee under the deed of the 21st January, 1870, can claim any of the arrears of pension due by the defendant to *Scholastique Neveu.*

The deed under which the pension was constituted was passed on the 16th Feb., 1830; this is the only deed under which a pension may be claimed from the defendant; but by the transfer of the 21st January, 1870, *Scholastique Neveu* and *J. B. Lacombe* assigned

over to the plaintiff the arrears of a pension which might be due to *S. Neveu* in virtue of the contract of marriage of the 7th February, 1828, between the defendant and *A. Pilon*, and under a deed of cession bearing date the 16th February, 1828, written at the end of the said contract of marriage.

No such pension exists, and plaintiff has failed to prove any title to the pension which he claims in this cause. The plaintiff felt it so much that after the case had been argued and taken en "délibéré," he moved that the "délibéré" be discharged in order that he might be allowed to amend his declaration. This motion was granted and the amendment allowed, but illegally, as the defendant submits: 1st. The motion was not stamped and this is fatal (1). 2nd. The amendment was allowed on payment of $60 costs, which have not been paid. 3rd. No verbal evidence of the transferer's intentions could be adduced. The evidence of the notary, who is about the only witness brought up, and who throws the blame of what he calls an error on his clerk to whom be dictated the deed, is illegal as tending to prove against a written document and to contradict it.

Besides, no proof of the intent of the late donor, but suppositions only could be made, which are destroyed by the following circumstances: (*a*) The old lady never intended to claim this life-rent, which she had not claimed for 25 years; (*b*) it was only on her death bed, aged 78 years, that she was beset by her husband's family to make her husband's grandson this transfer, which meant the total ruin of her only child. This error might have been a very clever mode of evading the obsessions she was beset with, without ruining her

(1) 27 & 28 *Vict.*, ch. 5, s. 4, 12 & 13 (1864), *Canada*; 31 *Vict.*, ch. 2, s. 10 (1868), *Quebec*.

1879
PILON
v.
BRUNET.

child. Suppositions will not be strained to help committing an injustice.

The following are in point to prove that the absence of date or a false date given in the enregistration of deeds is fatal, and carries with it the complete nullity of the enregistration:

Cass. (*Ehrard*) S. V. 12, 1, 132, *id.* Coll. nouv. 3, 1, 421, D. a, 9, 11 Nov. 1811; *Bruxelles* (*Haumont*) S. V. Coll. N. 3, 2, 509 *Cass.* (*Lahaye*) S. V. 7, 1, 234, 22 avril 1807; C. N. 2, 1, 1376; *Cass.* 19 juin 1833 (Barsalon) S. V. 33, 1, 641. *Dalloz*, P. 33, 1; *Cass.* 1 Mai 1860 (*Rocher*) S. V. 61, 1, 267; *Merlin*, Rép. vo. *Insc. hyp.* s. 5, No. 18, et vo. *Hypothéque*, sect. 2, s. 2, Art. 10; *Grenier*, t. 1, No. 97; *Persil*, Rég. hyp. Art. 2148, s. 3, Nos. 1 et 2; *Zacharie*, t. 2, s. 276, No. 7, t. 3, sur No. 276, p. 344 and foll; *Solon*, Des nullités, t. 1, No. 362: "The false enunciation of the date of the instrument creating the debt is sufficient to make the inscription null;" *Cass.* 7 Septembre 1807 (*Lefèvre*) S. V. 8, 1, 92; *Rouen*, 8 février 1806 (*Langlois*) S. V. Coll. N. 2, 2, 113, and others.

According to all these decisions and authorities the enregistration of the present transfer would be a complete nullity because the date of the deed creating the hypothec, to-wit, the deed constituting the pension of date 16th February, 1830, is not given in the transfer and would not appear in the registrar's books. If the date were in the transfer but not in the inscription, the inscription would be null. For the same reason the error being in the transfer itself, such transfer is null and void; no debt is transferred, because the one which is mentioned does not exist, and the one which exists is not mentioned.

How can a debt be sold which is not described? Art. 1576, C. C., says: "The seller of a debt or other right is bound by law to the warranty that the debt

exists and is due to him." * * * How could such a warranty exist when no debt is mentioned? But here the debt mentioned does not exist, and whether so declared on purpose or not matters not.

The plaintiff shows no title to claim from defendant the pension due in virtue of the deed of 16th February, 1830, and if he has any recourse against *J. B. Lacombe* or *Dame S. Neveu*, let him exercise it.

A second preliminary point was invoked by the appellant, under the plea of general denial, viz.: that there is no proof that the transfer in favor of plaintiff has ever been enregistered; no certificate of enregistration has been fyled; a certificate of service of the transfer only has being fyled.

On the merits of the case we submit, first, that the transfer of the wife's share in the arrears of the life rent was void, as made by a wife to her husband through an interposed person, being a benefit between husband and wife conferred during marriage by act *inter vivos*.

Marriage covenants, whether determined by the parties or settled by law, are irrevocable (1).

It is a public law; the nullity is absolute (2).

Therefore a wife cannot give any of her own property to her husband, either directly or indirectly, nor relinquish any of her rights in the community property.

According to the old custom of *Paris*, man and wife could not benefit each other during marriage either by donation or will (3).

A provincial statute passed in 1801 has taken away the prohibition of conferring benefits by will, as it gives

(1) C. C. 1260, 1264, 1265.

(2) Pothier, *Donations entre mari et femme*, No. 23; id. *Introd. à la Comm.*, No. 11, 12, 13; Troplong, *Contrat de mariage*, No. 174; Merlin Rep. Vo., *Avantages entre époux*, p. 414, s. 6; Duplessis, *Communauté*, pp. 527 and 528.

(3) Art. 282, 283.

1879
PILON
v.
BRUNET.

full power to bequeath all or any property in favor of any person whatsoever. The Civil Code of *Quebec* maintains the prohibition as to Acts *inter vivos* only, but the plaintiff wants to have it said that the liberty of conferring benefits by last will implies the liberty of conferring benefits *inter vivos*, and even has abolished all restrictions to marriage covenants, made, of course, before marriage, by persons marrying a second time and having children from a first marriage. But such a pretension is clearly untenable.

Art. 774, C. C., defines who are interposed persons; it is the ascendants, the descendants, the presumptive heir at the time of the gift, and the consort of the person incapable, unless the presumption established by law be rebutted by services rendered, or relations of kindred. There is no such pretension here, and the charge imposed is quite foreign to the wife, and only the discharge of a duty devolving upon the husband, *J. B. Lacombe*, and the donee.

It is objected that the arrears of the pension fell into the community of property existing between *J. B. Lacombe* and *Scholastique Neveu*; that *J. B. Lacombe*, as head and master of the community, could dispose of the same absolutely, even in fraud of his wife's interest in them, saving the wife's recourse for indemnity upon the husband's property after the dissolution of the community; that there was no fraud against the wife, as she was a party to the deed of transfer; and finally, that the defendant cannot oppose fraud as he is not heir to *Scholastique Neveu*.

We answer by saying, first, that the husband, as head of the community, may dispose of its property absolutely, provided it be, 1st, in favor of persons capable of receiving; 2nd, without fraud (1). That supposing the arrear did fall in the community of *J. B. Lacombe* and

(1) C. C. 1292.

Scholastique Neveu, which we do not admit, the donation, by the husband, of his wife's share to one of his descendants is a complete and absolute nullity; is null and void, as contrary to a public law; the donation by the wife, or her joining her husband in the donation to the husband's grand-child, is also void, as an indirect advantage to the husband. She might, after the dissolution of the community, claim indemnity on her husband's property if she chose, but she is at liberty, specially if the husband has divested himself of all his estate, to claim the things given, whether movable or immovable, from whomsoever is in possession of them, and the reimbursement of the sums of money so given and paid (1).

Adélaïde Pilon was the only child and natural heir to her mother *Scholastique Neveu*, and was seized of all her mother's rights and estate by law, without any act of apprehension; it is sufficient if she does not renounce the succession, C. C. 607.

It was, therefore, sufficient to mention that *Adélaïde Pilon* was the daughter of *Scholastique Neveu*, in order to establish that she was seized of the property, rights, and actions of *Scholastique Neveu* against the plaintiff. As she was in community of property with the original defendant, *Antoine Charlebois*, the latter, as head of the community, was also seized by her decease of said rights of *Scholastique Neveu*. Besides, it is not necessary that the child should be heir to his mother, as he takes as child and not as heir the property acquired by his mother during her first community. *Pothier*, *Contrat de mariage*, No. 645.

A fourth question is: What portion of the life-rent

(1) LeBrun, *Communauté*, pp. 214, 215, 210, 211, 25; Troplong, *Contrat de mariage*, t. 2, No. 888, 889; Pothier, *Donations entre mari et femme*, art. 11, Nos. 50, 51, 52, 54, 55, 56, 65, 66, 69, 71, 72; Pothier, *Communauté*, No. 495.

1879
PILON
v.
BRUNET.

fell into the community? We say only one-fifth. The pension represented for four-fifths the joint *acquets* of the first community of property which had existed between *Joseph Pilon* and Dame *S. Neveu*, and *S. Neveu* could not dispose of any portion of the said first community's property in favor of he second husband, neither directly nor indirectly, under Art. 279 of the Custom of *Paris*. Any property coming to her through her first community was substituted to her children, issue of the first and second marriage, by the event of her second marriage. She could not dispose of it in favor of any one else. *Pothier*, *Contrat de mariage*, Nos. 630, 639.

Such property did not fall into her second community, *id*. No. 643.

It is objected that arrears of a life-rent are not a capital sum, but the fruits and revenues of a capital sum, and as such fall into the second community.

They may fall into a first community, but all movables which fall into an ordinary community do not fall into a second community, they do not when they have been acquired during the first community, art. 279 of the *Coutume de Paris*, including movables as well as immovables, in the property of the first community substituted in favor of the children, in the event of their mother marrying again.

Troplong, *contrat de mariage*, t. 1, No. 68, 441; *Pothier*, *communauté*, No. 102; id *contrat de mariage*, C.C. 1272, 382; *Guyot*, *Rep.* v. *Noces*, p. 164, 2nd col. in fine; *Pothier*, *contrat de mariage*, Nos. 631, 632, 643; *Ferrière*, *Coutume de Paris*, t. 3, on art. 279, gloss 2, Nos. 31 and 9.

Then there are three sorts of life-rent; some are given or bequeathed as aliments; some are bought for a capital sum paid-up cash, and some are constituted as the price

of sale of movable or immovable property. The life-rent in question here belongs to the last category.

When the life-rent is bequeathed as aliment or bought for a sum of money, the rent is the capital or thing given or bought; the sum of money paid is the price of it. When it is constituted for the price of an immovable, then the immovable is the thing sold and the life-rent is the price. The arrears of the life-rent are not considered in such a case as fruits or interest, but as a capital sum.

Troplong, contrats alev., Nos. 216, 217, 218; *Dalloz A. Cass.* 36, 1, 409; *Pothier, rente*, Nos. 614, 615.

Four-fifths of the pension represented immovables belonging to the first community of property of *Scholastique Neveu*, and, as such, did not fall into the second community with *J. B. Lacombe* (1).

A fifth question regards the transfer of 840 francs ($140) by *J. B. Lacombe* and *S. Neveu* to the original plaintiff. We submit that the unanimous *arrêt* of our Court of Queen's Bench which held such transfer void is correct, under the second head of the Edict of *Francois II.* on second nuptials (made in 1560) (2). The first head enacts that a widow marrying again cannot settle on her second husband a greater portion of her own property than on her child least taking; the second head forbids her settling on her second husband, or disposing in favor of any other party but the children of her first marriage, any property coming to her from the liberality of her first husband. Then comes art. 279 of the Custom of *Paris*, already cited, substituting in favor of the wife's children any property acquired during the first community as community property (3).

That debt of 840 francs was due under an obligation

(1) C. C. 373, 381, 382, 1278.
(2) Art. 279 of the Custom of Paris.
(3) Pothier, *contrat de mariage*, Nos. 613, 639, 645.

1879
PILON
v.
BRUNET.

passed in 1841 a few days before the second marriage, but was a debt due to the first community, being only a renewal of a former obligation passed in 1830, during the first marriage.

By law, *Adelaïde Pilon* was owner of one-half of it as heir to her father, *Joseph Pilon*, and therefore it was not due to her mother. If the latter did acquire it from her late husband, say under his will (nothing shows how she did, and the obligation of 840 francs seems to have renewed for the whole under a misapprehension,) then it was a liberality of her first husband, and, as such, became her child's property from the moment of her second marriage, under the second head of the Edict. As to the other half belonging to *S. Neveu*, for her share in the community, it was a sum of money acquired during her first community, and also substituted to *Adelaïde Pilon*, her only child, under art. 279 of the Custom of *Paris*.

It is objected that all the restrictions imposed by the Edict and art. 279 of the Custom were abolished, first, by the statute of 1801, granting freedom of making wills; and, in the second place, by art. 764 C. C.

To say that the withdrawal of one prohibition implies the withdrawal of all other restrictions is going too far.

Formerly a testator could make no dispositions in favor of his wife, and many other persons who were incapable of receiving under a will, nor under a donation *inter vivos*; power was given by the statute of 1801 to every person to receive under a will, but the prohibitions as for donations *inter vivos* were not altered (1).

As for art. 764, C. C., it revoked all restrictions imposed on widows contracting marriages, but it stipulated only for future marriages. This is formally

(1) *Keith v. Bigelow*, 2 L. C. R. 175.

mentioned in s. 128, 29 *Vic.*, c. 41 (1865), adopting the draft of the code.

No other interpretation can be given without giving the code a retroactive effect and destroying acquired rights. The only question raised by commentators has been whether we must consider the first or second marriage, and most of them hold for the time of the first marriage, because the law did then settle the rights of the children. But here, both the first and second marriage took place long before the code was enacted.

The codifiers gave as the law in force in 1865 the dispositions of the edict on second nuptials and art. 279 of the custom, which they proposed to abrogate for the future, and for future marriages; this suggestion was adopted by the legislature, and is now art. 764 of our Civil Code.

Mr. *Laflamme*, Q. C., for respondents:

It is unnecessary to dwell at any length on the preliminary points which were urged in the courts below by the defendants, and which have been over-ruled by both Courts. It is sufficient to mention them with a few observations:

The party took advantage in the first court of clerical error which had occurred in the description of the deed constituting the life-rent, which had been mentioned as being due by virtue of the contract of marriage of the 7th February, 1828, instead of the donation of the 16th of February, 1830. This error was rectified by an amendment, of which the defendants acknowledged having received due notice, and conclusive evidence was adduced by the admission of defendant himself, that the transfer was made of the life-rent in question, and both Courts unanimously held that it was a clerical error which could in no manner affect the plaintiff's title.

1879
PILON
v.
BRUNET.

Another objection was also raised, arising from the absence of registration of the transfer. This was not set up in the plea, but set forth only at the argument in appeal. The defendants invoked art. 1570 of the Code, in support of his pretension.

This article says that "the buyer of a right of action has no possession available against third parties, until signification of the act of sale, and a copy delivered to the debtor."

But the Art. 2127 establishes the penalty in consequence of such omission, in these words: "If these formalities be not observed, the conveyance or transfer is without effect against subsequent transferees who have conformed to the above requirements."

This provision of Art. 1570 has consequently no effect, except when there is a subsequent transfer made of the same claim, but cannot be of any avail to the debtor when called upon to pay the amount transferred after due notification of the same, as was made in this cause.

As these points have been formerly adjudicated upon by both Courts against the defendant, and are matters of form, this Court would not for that reason alone reverse the judgment of the lower courts.

The respondent in this case, complaining that the judgment of the Court of Queen's Bench was erroneous, and contending that the judgment of the Superior Court ought to have been confirmed in every particular, also appealed from the judgment now on appeal before this Court, and, as the appeal taken by the respondents is to be treated by the Court as a cross appeal, I will first urge the reasons why I believe the judgment of the Superior Court ought to have been maintained.

To maintain the correctness of the judgment of the Superior Court, and establish the error of the alterations made thereto by the judgment of the Court of Appeals, the plaintiff asserts as undoubted legal propositions;

1st. That the annual profits of a life-rent, created during a previous marriage, but accruing during the second, and a claim for a sum of money which originated during the first, but remained unpaid during the second marriage, appertains to the second community

Under Art. 1272 of our Code there can be no question that the obligation for 840 livres and the rent reserved to the donors *Joseph Pilon* and his wife, *Scholastique Neveu*, became assets of the community, this article stating that all movable property, and rents, revenues, interest and arrears of whatsoever nature they may be, belong to the community.

This article is not new law, but the re-enactment of Art. 220 of *Coutume de Paris*, from which it is derived. See *Pothier*, *Traité de la Communauté* (1); *Denizart*, *Communauté* (2).

These authorities above quoted enunciate the unquestionable principles of our law respecting the property which falls into the community, and over which the husband has an absolute and unlimited control; the arrears of rent accrued during the community, either that existing under the first marriage of *Scholastique Neveu* and *Joseph Pilon*, or under the second community of the said *Scholastique Neveu*, with her second husband, *Jean Baptiste Lacombe*, were chattels belonging, by law, to the community.

The same rules apply to the obligation of the 17th of February, 1811, for 840 livres which was transferred to *Pierre Lalonde*, on the 21st of January, 1870. This obligation was granted by the debtor to the widow after the dissolution of the first community. Whether the cause was a claim of this community or not makes no difference, as *Pothier* says: We consider only the thing due without any regard to its origin or to the cause from which it is derived. It is impossible to

(1) Pp. 520 and seq. (2) No. 84.

1879
PILON
v.
BRUNET.

conceive under what rule of law the defendants, in the Court below, could assert the proposition that the life rent represented the immovable property which was granted to *Adélaïde Pilon* by the deed of donation.

This alienation was unquestionably the free act of the father and mother in favor of their common child.

The usufruct, which was first reserved, may be considered as a joint acquest, immovable or real estate, and, admitting even that it represents in any proportion the value of the property given, the fruits or revenues derived from such usufruct undoubtedly accrued to the community as they became due.

The second conversion took place by the abandonment of the usufruct, on the part of the father and mother to their child, in consideration of which the life-rent was constituted by the donees in favor of the donors; and it cannot be pretended for a moment, that the arrears of the life-rent do not fall into the community.

The defendants alleged that two of the immovables, so given were *propres* (*i. e.*, the separate and absolute property) of the wife, and the other two, joint acquests —What belonged to her absolutely, she had power to dispose of as she thought fit; what belonged to the community the husband had absolute authority to convey.

It matters not whether they were *propres* or *conquets*, or what proportion of value any of these properties bore respectively, we have to deal only with chattels, which are part of the community; which, as such, were under the control, and at the disposal of the husband, and which he validly assigned, with the consent and concurrence of his wife.

The next proposition is that the husband had power to dispose of such property absolutely, and the conveyance of it, made by the husband jointly with his wife,

to his grandson, is not made in fraud to a person interposed, but, if done to the prejudice of the wife, it gives rise only to a claim by her or her heirs for compensation. See Art. 1292 C. C. (P. Q.) ; Arts. 225, 233 *Coutume de Paris* (*Duplessis*), 375 ; *Pothier*, *Traite de la Communauté*, 708, 715, 720.

These authorities leave no room for doubt as to the absolute right of the husband to execute a valid conveyance of any chattel, even to his presumptive heir, issue of a previous marriage. Whether it be acquired during the community or previous, it equally appertains to the community and, as such is at the absolute disposal of the husband, leaving the wife after the dissolution of the commnnity, or her heirs to urge any objection as to the disposal by him made of any effects of the community, and to claim compensation therefor.

My third proposition is : There is no restriction or exception to the right of the community over movable property, or to the authority and control of the husband over it, by reason of the previous marriage of the wife.

There existed under our old laws several prohibitions and restrictions on the property possessed by a widow or widower who contracted a second marriage when there existed any children, issue of the first marriage. The most important of these prohibitions is contained in the edict of *Francis II.*, 1560.

But all these prohibitions have been abrogated by the statute of 1801, which gave unlimited power to parties to dispose of their property in favor of whomsoever they please, without any restriction or limitation (1).

Then we have our own article of the Code 764, C. C., *L. C.*

Now, admitting for a moment that the prohibitions

(1) 41 *George III.*, c. 4th ; Con. Stats. of *Lower Canada*, p. 321, c. 34, s. 2.

1879
PILON
v.
BRUNET.

existing under the edict of *Francis II*, and the article 379 of the *Coutume de Paris*, were still in force, the edict could not be held to apply to the transfer of the 21st of January, 1870.

The prohibitions of the edict affect only what the consorts hold by a donation or liberality of their deceased husband or wife. This cannot be said to comprehend the property which was acquired during the community as his or her share, this not being given by the husband or wife, but acquired by law in virtue of marriage, and the prohibition applies only to direct gifts of property obtained from the liberality of a previous consort made to a consort in second marriage.

The only grounds, therefore, which the defendants could urge to impugn the transfer would be the Art. 279 of the *Coutume de Paris* (if it were still subsisting), which precludes the wife from giving any portion of the joint acquest of her first community to the prejudice of the children issue of the first marriage, and this article would apply solely to the transfer of the 840 livres.

This is no more the law of the Province of *Quebec*, and was not in existence at the date of the transfer in question, and cannot, therefore, be invoked by the defendants as applicable.

The Code was published and came in force on the 1st of August, 1866, and the transfer in question was made on the 21st of January, 1870.

Even under the old law and the prohibition of Art. 279 of the *Coutume de Paris*, it never was pretended that the issues and profits, or the annual income of property of any of the consorts, were subject to the restrictions of the edict or of the *Coutume*.

See *Bourjon Droit Commun* (1); *Lauriére, Coutume de Paris* (2); *Merlin, Répertoire* (3).

(1) 2 vol. p. 236.
(2) 2 vol. p. 346.
(3) Vo. Noces Secondes p. 489, s. 6.

But there is another ground upon which the respondents must succeed in getting the judgment of the Superior Court in their favor affirmed, viz :—

The debtor or the party who consented to the obligation transferred is not competent to raise the question of the validity of the transfer,—such right is exclusively reserved to the wife and to her heirs.

According to the law of the Province of *Quebec*, all rights, obligations, debts and claims, personal and real, special or otherwise, devolve to the heir the nearest of kin in case of intestacy, or to the universal legatee in case of a devise by will. After the death of the defendant and original debtor, *Antoine Charlebois*, pending the suit, his wife continued the proceedings as his representative, but not as heir or representative of her mother, and she, no more than her husband, could urge these grounds, which were reserved to the heirs in such capacity. It is a violation of an elementary principle of our law which precludes anyone from setting up the rights of third parties to avoid their liabilities. Defendant had no title, interest, or capacity to urge. *Merlin*, Rep.(1).

Unless she assumed the quality of heir of her mother, which would make her irrevocably liable for all obligations and debts of the estate, she could not claim any right to the property transferred by her mother, or question the title. If she had assumed her heirship, the plaintiff was entitled to contest it or to show that there existed a will which disposed of this claim. The principle that such claims arising from transfers of movable property, by parties who contracted second marriages, could be made only on assuming the title of heir, and, as such, was so universally acknowledged in *France*, before the cession of *Canada*, that *Bourjon* in his work (2) says: The Courts universally held that it

(1) Vo. Légitime, secs. 2 & 7.

(2) Vol. 2, pp. 212, 214, 220, Tit. 6, s. 5.

1879
PILON
v.
BRUNET.

was only a reservation made by law in favor of the heir, and which he could not urge if he renounced the estate.

This rule should have its application in *Canada* with greater force after the statute of 1801, which removed all restrictions and limitations as to the disposal of property, even between husband and wife, whether *propres*, *acquets* or *conquets*. It cannot be doubted that *Adélaïde Pilon*, the mother, could have disposed *by will* of all her share of the first community in favor of her second husband. If the defendant had claimed as heir of her mother, the plaintiff would have been entitled to set up the will and deny her quality; not doing so, the defendant had no ground to repel the action of the plaintiff.

When we come to consider the reasons given by the Court for the reduction of one-half on the claim, arising from the assignment of the arrears of rent accrued from the 21st January, 1844, it is impossible to escape the conclusion that it is the result of an oversight, on the part of the learned judges, of the true principles which regulate such matters, and to which their attention was not called.

The judgment admits that the arrears of rent are the property of the second community, and are not subject to the reservations and restrictions contained in the Edict, or in the Art. 279 of the *Coutume*. Under these circumstances, it is clear the respondents must succeed on their cross appeal, and the appellants' appeal be dismissed.

The judgment of the Court was delivered by
FOURNIER, J.:

L'action en cette cause a été intentée par Pierre *Lalonde* contre *Antoine Charlebois*. Les demandeurs et défendeurs, décédés tous deux pendant l'instance, sont maintenant représentés, le demandeur *Lalonde*,

par son épouse *Albina Malette* en qualité de tutrice des enfants issus de leur mariage, assistée d'*Emery Brunet* son second mari, en qualité de tuteur conjoint aux enfants du premier mariage de la dite *Albina Malette*. Le défendeur *Charlebois* est représenté par *Adélaide Pilon*, son épouse et les enfants issus de leur mariage, reprenant l'instance.

Par son action, le demandeur originaire *Lalonde* réclamait du défendeur *Charlebois* la somme de $5,576. 06. Le jugement de la Cour Supérieure, à *Montréal*, en date du 9 novembre 1877, lui accorde celle de $5,143 20. Appel du jugement ayant été interjeté par le défendeur *Charlebois*, la Cour du Banc de la Reine réduisit cette condamnation de plus de moitié, savoir, à la somme de $2,101.77.

Trouvant cette condamnation encore trop élevée, les représentants de *Charlebois*, dame *Adélaide Pilon et al*, ont interjeté appel à cette Cour. De leur côté les représentants de *Pierre Lalonde*, se croyant lésés par la réduction que la Cour du Banc de la Reine a faite de la somme qui leur avait été adjugée en premier lieu, se sont aussi portés appelants. Ainsi, nous avons en cette cause deux appels du même jugement, mais en réalité ils n'en forment qu'un seul pour les questions à décider, car les moyens invoqués par l'une des parties au soutien de son appel, sont les mêmes que ceux qu'elle oppose à l'appel de son adversaire, et *vice versâ*

Les faits qui ont donné lieu au présent litige sont en résumé, comme suit :

[The learned judge then stated the facts of the case]

En appel les principales questions décidées par le jugement de la Cour du Banc de la Reine sont :

1o. Si l'erreur commise dans le transport du 21 novembre 1870, en indiquant le 7 novembre 1828, comme étant la date de l'acte créant la rente viagère transportée au lieu de celle du 16 novembre 1830 qui

1880
PILON
v.
BRUNET.
Fournier, J.

est la véritable date, peut être fatale à cette partie de l'action réclamant les arrérages de cette rente.

2o. Si l'obligation du 17 mars 1841 pour 840 frs., ou aucune partie de la rente viagère transportée à *Lalonde*, représentait des biens acquis pendant la première communauté, et si dans ce cas *Scholastique Neveu* pouvaient transporter ces créances à *Lalonde* au préjudice de son enfant.

3. Si dans le cas où la dite obligation et les arrérages de rente ne représentaient pas des biens acquis pendant la première communauté, ils ont pu former partie de la seconde, et s'ils pouvaient comme biens de cette dernière communauté être transportés aux enfants et petits-enfants de *Lacombe* par l'acte du 21 janvier 1870.

Quant à la première de ces questions, la rente dont il s'agit étant la seule due par *Charlebois*, elle se trouve par le transport et par la preuve suffisamment désignée et identifiée pour qu'il ne puisse y avoir aucune méprise à cet égard. L'indication d'une date erronée n'ayant dans le cas actuel causé aucun préjudice à l'intimé, elle ne saurait être admise comme un moyen de faire rejeter cette partie de la demande qui repose sur le transport. Dans tous les cas, c'est une de ces erreurs cléricales auxquelles les cours n'attachent aucune importance lorsqu'elles n'affectent pas la position des parties. Cette Cour étant sur ce point du même avis que la Cour du Banc de la Reine est, comme l'a été cette dernière, unanime à déclarer cette objection non fondée.

Les deux autres questions ont été considérées par la Cour du Banc de la Reine comme si intimement liées qu'elle ne les a pas séparées dans l'examen qu'elle en a fait.

Le jugement a déclaré que le transport des arrérages de la rente viagère en date du 21 juin 1870, était nul pour moitié, et a réduit d'autant cette partie de la réclamation des appelants Il a aussi déclaré nul le trans-

port de la somme de 840 frs., égale à $140, montant de l'obligation de 1841.

Les appelants prétendent qu'ayant réussi quant à cette obligation, sur le principe qu'elle n'avait pu faire partie de la seconde communauté, la Cour aurait dû pour la même raison les renvoyer non seulement d'une partie, mais de la totalité de la demande.

Leurs prétentions peuvent se résumer comme suit :

1. Que par suite des prohibitions de l'édit des secondes noces et de l'article 279 Coutume de Paris, les biens-meubles qui tombent dans une communauté ordinaire, ne peuvent pas entrer dans une seconde, lorsqu'il y a des enfants vivants d'un premier mariage,—et ils en concluent que l'obligation de $140 n'est pas comprise dans la communauté entre *J. B. Lacombe* et *Scholastique Neveu.*

2. Qu'une partie seulement des arrérages de la rente viagère, savoir : ⅕ comme représentant les biens propres de *S. Neveu* avaient pu en faire partie, les autre ⅘ représentant pour autant les conquets de la première communauté n'ayant pu y entrer, le transport qui en avait été fait était nul.

3. Qu'indépendamment des prohibitions ci-dessus mentionnées, le dit transport du 21 novembre 1870, est en outre nul comme contraire aux articles 1260 et 1265 C.C., déclarant irrévocables les conventions matrimoniales, et défendant d'y faire aucun changement après le mariage.

De leur côté, les intimés *Brunet et al*, prétendent au contraire.

1. Qu'il n'y a aucune différence entre une première et une seconde communauté ; qu'il n'y a aucune restriction ni exception aux droits de la communauté sur les biens-meubles, et aucune limite au pouvoir et à l'autorité du mari sur les biens de la communauté, à raison d'un premier mariage.

1880
PILON
v.
BRUNET.
Fournier, J.

2. Que les restrictions et prohibitions de l'édit des secondes noces et de l'article 279 Coutume de Paris, ont été abolies par l'effet du statut de 1801, au sujet de la faculté de tester et par l'article 764 C.C.

Ne différant d'opinion d'avec la Cour du Banc de la Reine que sur un seul point, cette Cour ne croit pas devoir entrer dans la considération détaillée de toutes les questions que présente cette cause. Elle se bornera en conséquence à exprimer son concours dans ceux des motifs du jugement qu'elle approuve, en limitant ses observations à la seule question sur laquelle il y a divergence d'opinion.

En donnant gain de cause aux appelants, *Pilon et al*, quant à la totalité de l'obligation de 840 frs., dont moitié appartenait à *Scholastique Neveu*, comme sa part dans cette somme qui était un conquêt de sa 1ère communauté, la Cour du Banc de la Reine donne par là, sans restriction, son approbation à la première proposition des appelants, savoir, qu'aucune partie des biens-meubles provenant d'une première communauté ne peut tomber dans une seconde. Cette Cour ne saurait admettre cette proposition générale, qui, si elle était fondée, comporterait une prohibition absolue à la femme et au mari qui passent à de secondes noces de faire entrer en communauté aucune partie quelconque des biens de leur première communauté. Il est indubitable que l'édit des secondes noces et l'article 279 Coutume de Paris ont apporté des restrictions importantes aux donations et avantages que peut faire à son conjoint la personne qui passe à de secondes noces. Ces prohibitions sont : 1o. Qu'une veuve ayant enfants d'un premier ou autres subséquents mariages ne peut, en se remariant donner à son mari, directement ou indirectement par personnes interposées, plus que la part de l'un de ses enfants le moins prenant,—2o. Ni donner aucune partie des biens qui lui proviennent des libéra-

lités de ses précédents maris avec lesquels elle a eu des enfants auxquels elle est tenue de réserver ces biens, —3o. Ni aucunement disposer des conquets faits avec ses précédents maris au préjudice des portions dont les enfants des dits précédents mariages pouvaient hériter de leur mère.

La première de ces prohibitions n'a aucune application à cette cause, car il n'a pas été fait donation de part d'enfant par *Scholastique Neveu*, à son second mari, *J. Bte. Lacombe.*

La 2ème interdisant à la femme de ne rien donner de ce qui lui provient des libéralités de ses précédents maris et l'obligeant à les réserver pour ses enfants, s'applique à la moitié des 840 francs dont *S. Neveu* est devenue propriétaire par la libéralité de son premier mari. Le transport étant de la somme de 840 frs. doit en conséquence être déclaré nul pour la moitié, comme étant fait en contravention à cette prohibition. L'autre moitié lui appartenant par son droit de communauté pouvait, sous certaines restrictions expliquées ci-après, tomber dans la seconde communauté.

La 3ème, qui est une extension de l'édit, défend à la femme de rien *donner* de ses conquets à ses seconds et autres subséquents maris au préjudice des enfants des précédents mariages. La jurisprudence, dit *Pothier* à ce sujet (No. 636, Mariage) est conforme à l'esprit de l'art. 279. Il faut cependant remarquer qu'il y a une différence considérable entre cette dernière prohibition et la seconde. Elle restreint, il est vrai, la liberté de la femme à disposer de ses conquets, mais elle ne constitue pas sur cette espèce de biens une substitution légale comme celle établie par le second chef à l'égard des biens dont la femme qui se remarie a été avantagée par ses précédents maris. Mais cette défense de *donner* de ses conquets peut-elle être interprétée comme interdisant à la femme le droit de faire entrer dans une seconde commu-

1880
PILON
v.
BRUNET.
Fournier, J.

nauté aucune partie de ses biens-mobiliers provenant d'une première? La Cour du Banc de la Reine semble avoir admis l'affirmative; car en déclarant que la moitié des 840 frs. appartenant à *S. Neveu* pour sa part dans le conquet de la première communauté, n'avait pu pour aucune partie quelconque être valablement transportée par *Lacombe*, c'était effectivement décider qu'aucune partie de cette somme n'avait pu lui appartenir par son droit de communauté. C'est admettre la première proposition des appelants qu'aucuns biens d'une première communauté ne peuvent tomber dans une seconde. C'est sur ce point seulement que part la divergence d'opinion entre cette cour et celle du Banc de la Reine. Au soutien de cette partie du jugement les appelants citent un arrêt du 4 mars 1694, rendu sur les conclusions du chancelier *Daguesseau* qui l'aurait ainsi décidé. Est-ce bien la question qui a été jugée? La lecture de cet arrêt fait voir que les appelants lui ont donné une plus grande portée que celle qu'il doit avoir. Cet arrêt a jugé que le terme "conquet," dans la dernière partie de l'art. 279, comprend le mobilier comme l'immobilier acquis pendant la durée d'une communauté,lors qu'il s'agit de l'exécution de l'édit des secondes noces, et de l'art. 279 de la Coutume de Paris concernant les donations et avantages prohibés. Cette doctrine est sans doute correcte; mais elle n'a pas l'effet de prohiber la communauté légale dans le cas de secondes noces. ni par conséquent d'empêcher que des biens-meubles provenant d'une première communauté ne puissent entrer dans une seconde. Il ne faut pas non plus perdre de vue que dans le cas de cet arrêt, comme dans les autres que l'on trouve sur le sujet, il s'agissait toujours de donations et de libéralités faites contrairement à l'édit et à l'art. 279 et dont la réduction était demandée. *Merlin* au mot Noces, secondes, le dit positivement: L'interdiction ne s'applique qu'aux actes de donation pure.

Dans le cas actuel les appelants ne demandent pas la réduction d'une libéralité qui leur a causé du préjudice; ce qu'ils demandent c'est la nullité absolue du transport des arrérages de rente et de la somme de 840 frs. sur le principe qu'aucuns biens-mobiliers d'une première communauté ne peuvent, sans violation de l'art. 279, entrer dans une seconde. Mais cet article, en défendant à la femme de disposer de ses conquets au préjudice de ses enfants, la prive-t-elle du droit de contracter une communauté légale et la faculté d'y faire entrer une partie quelconque de ses biens-mobiliers lui est-elle aussi interdite? Certainement non. Les autorités suivantes le prouvent en même temps qu'elles établissent que la seule restriction à cette communauté est que la femme n'y peut pas apporter plus que son mari, sans faire à celui-ci un avantage que la loi ne frappe pas de nullité absolue, mais qu'elle déclare seulement sujet à réduction, s'il en résulte un préjudice pour les enfants.

Pothier—Mariage, No 550:

La communauté de biens qui est établie entre une veuve et son second mari, est une espèce de contrat de société, qui ne renferme aucun avantage au profit du second mari, lorsqu'il a apporté autant que sa femme; mais lorsque l'apport est inégal et que la veuve a apporté plus que n'a apporté le second mari; ainsi, si la femme a apporté 4,000 en communauté, et que le second mari n'en ait apporté que 1,000; cette inégalité forme au profit du second mari un avantage sujet à la réduction de l'édit. Cet avantage est de la moitié de ce que la femme a apporté de plus que lui.

Pothier—Contrat de mariage, No 551:

Dans la communauté légale, qui a lieu lorsque les parties ne se sont pas expliquées sur la communauté, ou lorsqu'il n'y a pas du tout de contrat de mariage, si le mobilier de la femme, qui est entré dans cette communauté légale, était beaucoup plus considérable que celui du second mari, cette inégalité serait-elle censée faire un avantage au profit du second mari, sujet à la réduction de l'Edit, de même que l'inégalité d'apport qui se trouve dans la communauté conventionnelle?..... il est constant dans l'usage qu'il y est sujet, de même que celui qui résulte de l'inégalité des apports dans le cas de la communauté conventionnelle.

1880

BRUNET. v. PILON

Fournier, J.

Rép. Merlin—Vo. Noces (secondes) :

XIV.—La stipulation de communauté de biens, lorsque les apports sont égaux, n'est pas un avantage, elle en est un lorsque les apports sont inégaux de la part du second mari ou de la seconde femme. L'avantage est de la moitié de ce que l'autre époux a apporté de plus. Ainsi, le partage égal de la communauté ne peut se faire qu'après avoir défalqué les apports de part et d'autre.

XV.—La communauté légale qui s'opère en vertu de la Coutume et sans contrat de mariage, devient aussi un objet de reduction ; si le mobilier de la veuve est plus considérable que celui du second époux, l'inégalité fait au profit de celui-ci un avantage comme l'inégalité des apports dans la communauté stipulée. Cet avantage est également sujet au retranchement, car quoique le second mari ne semble le tenir que de la loi qui a déterminé la communauté et les biens qui la composent, cependant comme il dépend des époux d'adopter ou non les dispositions de la Coutume à cet égard, et qu'ils ne peuvent l'adopter sans une convention tacite, c'est de cette convention, de ce consentement tacite de la femme et non de la loi, que le second époux est censé tenir immédiatement ces avantages. La veuve en ne se réservant pas ses propres, comme elle le pouvait, et en laissant tomber à dessein dans la communauté ce qu'elle avait de plus en mobilier que son second mari, est censé lui avoir fait en cela le même avantage que celui qui est fait dans le cas d'une communauté conventionnelle, lorsque la femme y apporte plus que lui ; et il est également sujet à la réduction de l'édit. C'est dans ce sens qu'il faut entendre l'arrêt du 29 janvier 1658 qui a jugé, dit Denizart, " que la communauté établie par la Coutume entre conjoints par mariage, se trouvant excessive de la part de celui des deux conjoints qui s'est remarié, est un avantage indirect au profit de l'autre, sujet à la réduction en faveur des enfants du premier lit, et qu'après la réduction faite, le surplus de la communauté se doit partager entre ces enfants et le survivant des conjoints.

Merlin, p. 556, vol. 8 :

XIV. La stipulation de la communauté de biens, lorsque les apports sont égaux n'est pas un avantage ; elle en est un lorsque les apports sont inégaux de la part du second mari ou de la seconde femme. L'avantage est de la moitié de ce que l'autre époux a apporté de plus.

XV. La communauté qui s'opère en vertu de la Coutume et sans contrat de mariage devient aussi un sujet de réduction ; si le mobilier de la veuve est plus considérable que celui du second époux, l'inégalité fait au profit de celui-ci un avantage, comme l'inégalité des apports dans la communauté stipulée. Cet avantage est également sujet au retranchement.

Arrêts de *Brillon*. V. Avantage, p. 304 :

La communauté établie par la Coutume entre conjoints par mariage, se trouvant excessive de la part de celui qui s'est remarié, est un avantage indirect au profit de l'autre, sujet à réduction en faveur des enfants du premier lit, suivant l'édit des secondes noces. Soefve, T. 2. 1 ch. 86, rapporte l'arrêt du 22 janvier 1658.

D'après les autorités citées, il est évident qu'en l'absence d'un contrat de mariage il y a eu communauté de biens suivant la loi entre *J. B. Lacombe* et *S. Neveu*. Cette dernière était lors de son mariage créancière de l'obligation de 1841, et de la rente viagère. Ces créances, ou partie d'icelles, sont-elles tombées dans cette communauté ?

Quant à l'obligation de 840 francs, il y a une distinction à faire. *S. Neveu* en était propriétaire pour une moitié comme sa part dans cette créance provenant de la première communauté. Cette moitié d'après les autorités citées est entrée dans la seconde communauté, mais sujette à la condition d'être réduite au cas où elle constituerait un avantage au profit de son second mari. Quant à l'autre moitié, comme il faut conclure d'après les faits de la cause, que *S. Neveu* en était devenue propriétaire à titre de libéralité de la part de son premier mari, elle est restée en dehors de la communauté. Non-seulement la loi (le 2nd chef de l'édit,) lui faisait défense absolue d'en avantager son second mari, mais elle établit sur les biens qui lui proviennent de cette manière une substitution en faveur de ses enfants. Ainsi, il y a eu, dans ce cas, substitution en faveur d'*Adélaïde Pilon* de cette moitié des 840 francs qui n'a pu entrer dans la communauté. A la mort de sa mère, donnant ouverture à cette substitution, elle est devenue propriétaire de cette somme que, d'après la loi, elle est censée tenir de son père et non de sa mère.

L'autre moitié des 840 francs, c'est-à-dire 420 francs, étant entrée dans la 2nde communauté, *J.-Bte. Lacombe* en a acquis une moitié par son droit de communauté,

1880
PILON
v.
BRUNET.
Fournier, J.

c'est-à-dire 210 francs, égal à $35. Si l'entrée de cette somme dans la communauté excédait ce que *Lacombe* y avait apporté, *Adélaïde Pilon* aurait pu en demander la réduction. Mais pour cela il aurait fallu plaider et prouver quels avaient été les apports respectifs des conjoints et constater qu'il y avait eu de la part de *S. Neveu* un excédant sujet à réduction.

Rien de cela n'a été fait. Il n'a été ni allégué ni prouvé que *S. Neveu* ait fait des apports plus considérables que son second mari. D'après la preuve tous ses biens n'auraient consisté que dans les deux seuls articles en question en cette cause, la rente viagère et 840 francs. Il n'a été fait aucune preuve des apports du mari, mais il est assez facile de constater par le transport même dont la nullité est demandée que ceux qu'il a faits devaient être au moins égaux à ceux de sa femme. En effet, par cet acte il transporte à *Lalonde* en outre de 840 francs et des arrérages de la rente de diverses autres sommes, savoir : 5,200 francs et tous les intérêts échus ; 300 francs de rente viagère à lui due personnellement en vertu d'un acte antérieur à son mariage avec *S.Neveu*, et tous les arrérages de cette rente. En l'absence d'une preuve positive constatant les apports, on ne peut pas présumer qu'il y ait eu inégalité, seule condition qui aurait pu faire maintenir une demande pour cette moitié des 840 francs. Comme propriétaire par droit de communauté d'un quart des 840 francs, *J.-Bte. Lacombe* pouvait en faire le transport à *Lalonde* sans tomber sous l'effet d'aucunes restrictions, pas plus sous celles de l'édit que sous celles du code. Pour ces motifs le jugement de la cour du Banc de la Reine devrait être reformé et un quart des 840 frs. devrait être ajouté à la somme dont *Lacombe* pouvait disposer.

Quant aux arrérages de la rente viagère, cette cour est d'opinion pour les raisons données par Sir *A. A. Dorion*, qu'ils sont entrés dans la seconde communauté.

Les autorités sont d'accord à considérer que pendant le mariage tous les revenus, de quelques sources qu'ils proviennent, tombent dans la communauté. Le second mari n'est pas considéré avantagé par le surplus de revenus que sa femme apporte à la communauté.

Pothier, au No 552:

Le second mari n'est censé avantagé que de ce que la femme a apporté de plus que lui en principal; ce que la femme apporte de plus en revenus, n'est pas réputé un avantage prohibé et réductible qu'elle fasse à son second mari; c'est pourquoi, si une femme qui a par exemple, dix mille livres de revenus s'est marié à un homme qui n'en a pas la dixième partie, et a contracté avec lui communauté de biens, dans laquelle entreront ses revenus pendant tout le temps qu'elle durera.

Ricard décide qu'en ce cas, quoique le second mari profite des revenus de la femme, néanmoins, cette communauté n'est point réputée un avantage qui puisse être réductible suivant l'édit. *Merlin*, rep. vo., Secondes noces, dit précisément la même chose. On trouve dans les arrêts de *Brillon*, vo. Avantage, p. 305, qu'il a été jugé, au sujet d'une rente viagère remplaçant un conquêt, que cette jouissance, étant un droit qui s'éteint par la mort du mari, ne pouvait former l'objet d'une demande en indemnité. Il est clair d'après les autorités que les prohibitions de l'édit des secondes noces et de l'art. 279 ne s'appliquent pas aux arrérages de la rente en question.

Ainsi d'après les autorités citées le transport est valable pour la part qui appartenait à *Lacombe* dans les créances transportées, savoir : moitié des arrérages de la rente viagère—et moitié de 420 frs, partie de l'obligation de 1841, tombée dans la communauté. Il est nul pour partie comme contraire au second chef de l'édit des secondes noces, pour te moitié de 840 frs, qui était une libéralité de son premier mari que *S. Neveu* était tenue de réserver à son enfant. Mais indépendamment de l'édit, ce transport est encore nul pour toute la part de

1880
PILON
v.
BRUNET.
Fournier, J.

S. Neveu dans les créances en question comme étant en contravention aux articles 1260 et 1265 Code Civil concernant l'irrévocabilité des conventions matrimoniales, et comme constituant un avantage indirect conféré par la dite *S. Neveu*. Sur ce point qui forme le sujet de la troisième proposition des appelants, cette cour partageant l'opinion de Sir *A A. Dorion*, se borne à la citer comme une réponse complète aux arguments contraires de l'Intimé.

There remains, however, the prohibitions of articles 282 and 283 of the Custom of Paris (articles 1260, 1266 and 774 of the Civil Code) that after marriage, the marriage covenants cannot be altered, nor can the consorts confer any benefits by acts *inter vivos* upon each other, except by means of life insurances. In the face of these prohibitions *Scholastique Neveu* could not transfer her share in the second community, nor in the life-rent or arrears thereof, which formed part of the second community, to her husband, for this would have been altering the conditions of their marriage, by conferring upon him a pecuniary advantage. She was equally forbidden from transferring them to any of his descendants, who in that case are, by law, considered as persons interposed to secure indirectly to the husband a benefit which cannot be conferred to him directly. (Civil Code 774).

It has been said that the above rules merely apply to gratuitous contracts and that the transfer to *Lalonde* was made for a valuable consideration, but the consideration mentioned in the deed, that *Lalonde* should take charge of his own father and mother, the latter being the daughter of *Lacombe*, is one which was altogether for the advantage of *Lacombe* and his family; and in which the wife *Scholastique Neveu* had no interest whatsoever, since she was not bound by law to contribute to the maintenance of the children of her husband by a first marriage. (Civil Code, art. 1304).

Pour terminer il ne reste plus que quelques mots à dire sur les propositions des intimés. La première, savoir qu'il n'y a aucune différence entre une communauté ordinaire et une seconde, n'étant que la contre-partie de celle des appelants, la réponse se trouve déjà donnée par les autorités ci-dessus citées établissant quelles sont les restrictions apportées par la loi à une seconde communauté.

Il en est de même de leur prétention que l'autorité du

mari est la même sur les biens d'une seconde communauté que sur ceux d'une première. La réponse se trouve dans la citation de l'opinion de Sir *A. A. Dorion*, démontrant clairement que les articles 1265 et 774, Code Civil, ne reconnaissent pas au mari une autorité aussi étendue sur les biens de la communauté que les intimés le prétendent.

La dernière question d'après l'ordre ci-dessus indiqué et qui aurait dû être la première, si elle devait être résolue en faveur des Intimés, est celle de l'abolition des prohibitions de l'édit des secondes noces et de l'article 279 de la Coutume de Paris. L'Intimé prétend que ces restrictions ont été abolies d'abord par le statut de 1801 qui a introduit la liberté illimitée de tester, puis ensuite par l'acte 764 C.C., auquel il attribue un effet retroactif.

Le statut de 1801 a sans doute proclamé la liberté illimitée de tester, et fait disparaître toutes les incapacités de recueillir des legs à l'exception de celle concernant les mains-mortes. Mais cette règle n'est pas étendue à la faculté de donner entrevifs dans des cas où elle était interdite. La loi est restée ce qu'elle était à cet égard. Après la passation de ce statut, les biens d'une personne décédant *ab intestat* étaient encore sujets aux réserves coutumières et aux autres restrictions introduites par l'édit et l'article 279. Pour exercer la faculté introduite par le statut de 1801 et être affranchi de toutes restrictions existantes auparavant il fallait disposer de ses biens par testament. C'est ce que la cour du Banc de la Reine a décidé dans la cause de *Quintin* vs. *Girard* le premier mars 1858, (1). Ni ce précédent ni le statut ne peuvent avoir d'application au cas actuel, parce que la disposition dont il s'agit en cette cause a été faite par acte entrevifs, savoir par le transport du 21 février 1870.

Quant à l'art. 764, Code Civil, il est bien vrai qu'il

(1) 2. L. C. Jur. 141.

1880
PILON
v.
BRUNET.
Fournier, J.

déclare "que les prohibitions et restrictions des dona-"tions par un *futur* conjoint dans le cas de secondes "noces n'ont plus lieu,"—mais cette déclaration peut-elle avoir un effet rétroactif et affecter des actes qui ont été accomplis avant sa promulgation ? Non, car l'art. 2,613 déclare que la loi en force avant le Code régit les actes faits antérieurement à sa promulgation. Et d'ailleurs, c'est un principe bien reconnu que les droits des époux sont irrévocablement fixés par le mariage; que c'est aux lois alors en force ou aux conventions matrimoniales des parties qu'il faut recourir pour les déterminer en ce qui concerne les droits acquis (1). Nul doute qu'à l'époque de leur mariage, *J.-Bte. Lacombe* et *S. Neveu* étaient soumis à toutes les prohibitions ci-dessus mentionnées de l'édit et de l'art. 279. Les droits alors acquis entre eux doivent être régis par ces lois. Mais en doit-il être de même des réserves faites en faveur des enfants; peut-on les considérer comme des droits acquis avant le décès de leur mère ? Les auteurs déclarent qu'ils n'ont encore qu'une expectative qui ne peut se réaliser que dans le cas où ils lui survivront (2). Lorsque la loi leur accordant conditionnellement ces réserves est ensuite changée, comme elle l'a été dans ce cas par l'art. 764 C.C., le conjoint auquel ces restrictions étaient imposées est-il par là même rendu capable d'en disposer ?

Il est généralement admis que les lois concernant la capacité des personnes prennent leur effet à dater de leur promulgation et n'ont point d'effet rétroactif (3). Mais ce principe ne saurait avoir d'application à cette cause. Que *S. Neveu* ait été ou non, lors du transport du 21 février 1870, rendue, par l'art. 764, capable de disposer de ses biens par acte entrevifs sans égard aux

(1) Meyer. Principes sur les questions transitoires, p. 81. Chabot de l'Allier.

(2) Meyer. Même ouvrage, No. 46, p. 153.

(3) Laurent, vol. 1, No 169.

restrictions de l'édit et de l'art. 279, c'est une question que les faits de cette cause ne permettent pas aux Intimés de soulever ici. En serait-il autrement, s'il s'agissait d'une disposition que *S. Neveu* aurait faite à d'autres qu'à son mari? On pourrait probablement alors se demander si ce n'est pas la loi en force le 21 février 1870 qui devrait être appliquée et non pas celle en force lors de leur mariage. Cette question est toute différente de celle que soulève le transport dont il s'agit en cette cause, et la cour pour cette raison s'abstient d'exprimer aucune opinion à cet égard.

Quant à l'effet du transport sur cette cause on pourrait même admettre avec les Intimés l'abolition des restrictions de l'édit et de l'art. 279, sans que le résultat leur fût plus favorable. En effet, ces restrictions disparues, ne reste-t-il pas celles des art. 1260, 1265 et 774 auxquelles il est manifestement contraire?

L'art. 764 permet bien aux conjoints dans le cas de secondes noces de s'avantager sans égards aux restrictions ci-devant existantes. Mais la faculté qu'il leur donne ne peut être exercée qu'au moment où ils règlent leurs conventions matrimoniales. C'est aux futurs conjoints qu'elle est donnée et non pas aux époux. Une fois le mariage conclu, les conjoints tombent sous l'effet de l'art. 1265 qui leur défend de faire aucun changement aux conventions matrimoniales. Ainsi, le transport doit, indépendamment de l'édit et de l'art. 279, être déclaré nul pour la part de *Scholastique Neveu*, comme étant fait en contravention à l'art. 1265.

Pour toutes ces raisons, cette cour est d'avis que l'appel de *Pilon et al, vs. Brunet et al*, doit être renvoyé avec dépens en faveur des Intimés. Et quant à l'appel de *Brunet et al, vs. Pilon et al*, cette cour étant d'opinion qu'une partie de la somme de 840 francs, savoir un quart, est devenue la propriété de *J. Bte. Lacombe*, par son droit de communauté avec *Scholastique Neveu*, le transport

1880
PILON
v.
BRUNET.
Fournier, J.

qu'il en a fait aurait dû être maintenu pour autant, $35.00.

Le jugement de la cour du Banc de la Reine doit en conséquence être modifié, en ajoutant au montant de la condamnation la somme de $35.00 ce qui porte à la somme de $2136.77 le montant pour lequel il y a jugement, sans modification de la condamnation aux dépens prononcée par la cour du Banc de la Reine.

Appeal dismissed with costs, and on cross-appeal judgment varied with costs of such cross-appeal.

Solicitors for appellants: *Duhamel, Pagnuelo & Rainville.*

Solicitors for respondents: *R. & L. Laflamme.*

1880
*Oct. 27, 28.
1881
*Feb'y. 11.

HENRI JONAS.....APPELLANT;

AND

HUMPHREY T. GILBERT.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

By-law—Power to impose License Tax—Discrimination between residents and non-residents—33 Vic., c. 4 (N. B.).

J. brought an action against *G.*, the Police Magistrate of the city of *St. John*, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for violation of a by-law made by the common council of the city of *St. John*, under an alleged authority conferred on that body by 33 *Vic.*, c. 4, passed by the Legislature of *New Brunswick*. Sec. 3 of the Act author-

*PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

ized the mayor of the city of *St. John* to license persons to use any art, trade, &c., within the city of *St. John*, on payment of such sum or sums as may from time to time be fixed and determined by the common council of *St. John*, &c.; and sec. 4 empowered the mayor, &c., by any *by-law* or *ordinance*, to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c.; and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of $20 on the former and $40 on the latter.

Held,—That assuming the Act 33 *Vic.*, c. 4, to be *intra vires* of the Legislature of *New Brunswick*, the by-law made under it was invalid, because the act in question gave no power to the common council of *St. John*, of discrimination between residents and non-residents, such as they had exercised in this by-law.

APPEAL from a judgment of the Supreme Court of *New Brunswick*, whereby judgment was given for the Defendant (respondent).

William Sandall, as Chamberlain of the City of *Saint John*, *New Brunswick*, made a complaint to *Humphrey T. Gilbert*, the Police Magistrate of the City of *Saint John*, that *Henri Jonas*, who was not a free citizen of the said City or a registered freeman, or paying rates or taxes in the said City, did, at the City of *Saint John*, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, engage in mercantile business by selling or offering for sale goods to persons in the City of *Saint John* without being duly licensed therefor, as provided by the ordinance of the Mayor, Aldermen and Commonalty of the City of *Saint John*.

That the said Police Magistrate, upon such complaint being made, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, issued a summons for the said *Henri Jonas* to appear before him, the said Police Magistrate, at the

1880
JONAS
v.
GILBERT.

Police office in the City of *Saint John*, on the nineteenth day of June then next, to answer the said complaint, and shew cause, if any he had, why a fine of twenty dollars as provided in said by-law or ordinance, should not be imposed upon him for violating the said by-law.

That in pursuance of the said summons the said *Henri Jonas* attended, and on hearing the matter of the said complaint and the evidence adduced, the said *Henri Jonas* was adjudged to be guilty of violating the said by-law, and a fine of twenty dollars was imposed upon him; but the said *Henri Jonas* having no goods and chattels whereon to levy the said fine or penalty thus imposed, a warrant was issued by *Humphrey T. Gilbert*, the Police Magistrate, under which the said *Henri Jonas* was arrested and imprisoned, and he then paid the fine of twenty dollars.

Thereupon *Henri Jonas* brought an action against the said *Humphrey T. Gilbert* for such arrest and imprisonment; and to his declaration the defendant demurred, alleging that from the proceedings set out therein, namely, the complaint, summons, conviction and arrest, and the plaintiff having no goods and chattels whereon to levy the fine or penalty, the defendant was warranted in his proceedings, and the declaration disclosed no cause of action against the defendant as such Police Magistrate.

The plaintiff joined in demurrer, and contended that the Act of Assembly under which said by-law was made was *ultra vires* the Legislature, and also that the by-law or ordinance of the Mayor, &c., was void in law, and therefore the defendant acted without jurisdiction, and the proceedings could not be sustained.

In Trinity Term last, the Second Division of the Supreme Court, consisting of Judges *Weldon*, *Fisher* and

Wetmore, gave judgment for the defendant on the demurrer.

The Acts of the Legislature of *New Brunswick* and the by-law or ordinance in dispute in this case are referred and set out at length in the judgment of Court hereinafter given.

As the Court held that it was not necessary to enter into the question raised whether the Act 33 Vic., ch. 4, *N. B.*, is or not *ultra vires* of the provincial Legislature, nor the question whether or not a commercial traveller is a person within the operation of the Act, the elaborate arguments of counsel on these points are omitted.

Mr. *Bethune*, Q. C., and Mr. *McLaren*, for appellant:

The Common Council have no power in reference to matters of trade to discriminate against non-residents; if such Council has the power to compel persons doing business in the City of *Saint John* to take out a license they must take the same license fee payable by non-residents as by residents.

The charter gave no power to the Common Council to distinguish between residents and non-residents of the City as to the amount of fee to be paid for a license,—it simply restrained all but freemen from trading. And even if the Act 33 Vic. c. 4 gave power to the Common Council to put a license in the place of freedom, it gave the City Council no power to distinguish between residents and non-residents; if the Act gave that power, it is claimed it was *ultra vires* the Local Legislature; if it did not and the by-law of the City so discriminates, then the by-law is *ultra vires* the Common Council. Does this Act authorize the City Council to say, for example, residents can do business here by paying $20 per year, non-residents by paying $500 per year? Is not this discrimination not contemplated by the Legislature?

1880
JONAS
v.
GILBERT.

Yet, this is the principle the City of *St. John* under its by-law seeks to enforce. If the Act 33 Vic. c. 4 had provided that residents and non-residents should be licensed instead of being made freemen, it might be said that to a certain extent it was relaxing the restraint, &c, but it says in effect that the Common Council may make a by-law putting as much heavier a license fee upon non-residents than upon residents as they please, whereby the power is given the Common Council to altogether prohibit non-residents from doing business in the City. A by-law must not go beyond the statute. *Hardcastle*, on Statutes (1), *Cooley* on Taxation (2). *Dillon*, on Municipal Corporations (3).

Dr. *Tuck*, Q. C., for respondent:—

The point is whether 33 Vic., c. 4 is constitutional, and not whether 33 Vic. c. 4 gave power to the Common Council of *St. John* to pass the by-law in question. However I will first answer the argument of my learned friends on this branch of the case. I admit that under the original charter, no power was given to tax wholesale dealers, but the object of 6 Vic., c. 35, was to enlarge the powers of the Council, in order to reach all traders. Then 33 Vic, c. 4, was passed, and under that Act I contend that *any body* doing business within the city of *St. John* may be taxed. Now if the General Assembly had power to pass 33 Vic., c. 4, then this Act gave to the Common Council of *St. John* the power to make this by-law. If the Act gives them power to tax, it gives them power to tax them $20 or $40, there is no restraint.

See *American Express Co.* v. *City of St. Joseph* (4); *Cooley*, on Taxation (5).

(1) P. 151.
(2) P. 14.
(3) S. 593.
(4) 27 American Rep. 383.
(5) Pp. 209, 408.

The judgment of the Court was delivered by

RITCHIE, C. J.:

This was an action against the Police Magistrate of the city of *St. John* for wrongfully, as it is alleged, causing the plaintiff to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for a violation of a by-law made by the mayor, aldermen and commonalty of the city of *St. John*, under an alleged authority conferred on that body by the 33 *Vic.*, c. 4, passed by the Legislature of *New Brunswick*, which Act plaintiff contends was *ultra vires* of the Legislature of *New Brunswick*, or if it had the legislative power to pass it, the by-law or ordinance made by the corporation of *St. John* was not justified or authorized by the said Act.

We do not think it necessary to enter into the question raised as to whether the Act 33 *Vic.*, c. 4, *N. B.*, is or not *ultra vires* of the provincial Legislature, nor the question whether or not a commercial traveller is a person within the operation of the Act, for we are of opinion that the by-law or ordinance made under it is invalid, and therefore conferred no power or jurisdiction on the Police Magistrate of *St. John* to convict and imprison for its violation.

By the charter of the city of *St. John*, dated the 18th May, 1775, confirmed by 24 *Geo. III*, c. 46, it was ordained "that no person whatever not being a free citizen of the said city shall at any time hereafter use any art, trade, mystery or occupation within the said city liberties and precincts thereof, or shall by himself, themselves, or others, sell or expose to sale, any manner of goods, wares, merchandizes, or commodities by retail in any house, shop, place, or standing within the said city, or the liberties, or the precincts thereof (save in the times of public fairs), &c." The charter likewise provided that none shall be made free, but natural-born

1881
JONAS
v.
GILBERT.
Ritchie, C.J.

subjects, or such as are naturalized or made denizens; blacks were excluded from the privilege of becoming free citizens, but it was ordained that the mayor might license them to reside and carry on business in the city. This charter was amended by 6 *Vic.*, c. 35, an Act for the amendment of the charter of the city of *St. John*, whereby it was enacted:—

Section 3. That it shall and may be lawful for the mayor of the said city, and he is hereby authorized to license persons being natural-born British subjects, or such as shall become naturalized or be made denizens, to use any art, trade, mystery or occupation, or carry on any business in merchandize, or otherwise, within the said city, on paying yearly such sum. not exceeding five pounds nor less than five shillings, to be fixed and determined by an ordinance of the corporation for the use of the mayor, aldermen and commonalty of the said city of *Saint John*, together with the fees of office; and be subject also to the payment of all other charges, taxes, rates or assessments as any freeman or other inhabitant of the said city may by law be liable to or chargeable with.

Section 4.—And be it enacted, That aliens, the subjects of any other country at peace with *Great Britain*, may be licensed by the mayor of the said city, to use any art, trade, mystery or occupation, or to carry on any business in merchandize or otherwise, within the said city, on paying annually for the use of the mayor, aldermen and commonalty of the said city, a sum not exceeding twenty five pounds, nor less than five pounds, together with fees of office, to be regulated by ordinance of the corporation, and be subject also to the payment of all other charges, taxes, rates, or assessments as any freeman or other inhabitant of the said city, may by law, be liable to or chargeable with.

By an Act further in amendment of the charter of the city of *Saint John*, it was enacted: (1)

Section 3.—It shall and may be lawful for the mayor of the city of *Saint John* for the time being, or his deputy for the time being, and he is hereby authorized to license persons being natural-born British subjects, and also such persons as shall become naturalized or be made denizens, and also aliens the subjects of any country at peace with *Great Britain*, to use any art, trade, mystery or occupation, or to carry on or engage in any profession or mercantile or other busi-

(1) 33 Vic., c. 4, N. B.

ness or employment within the said city of *Saint John*, on payment of such sum and sums of money as may from time to time be fixed and determined by the common council of the city of *Saint John*; all such persons so licensed to be subject also to the payment of all other charges, taxes, rates or assessments, and be liable to such duties and obligations as freemen and other inhabitants of the said city are by law and the charter of said city liable to and chargeable with.

Section 4.—It shall and may be lawful for the mayor, aldermen and commonalty of the city of *Saint John*, in common council, and they are hereby authorized and empowered, by any by-law or ordinance to be from time to time made and ordained for that purpose, to fix and determine what sum and sums of money shall be from time to time paid to the use of the said mayor, aldermen and commonalty, for license to use any art, trade, mystery or occupation, or carry on or engage in any profession or mercantile, or other business or employment in the said city, and to establish such a scale of fees, and sums of money, and to declare how and to whom the same shall be payable, and how recoverable, and from time to time alter and vary the same, as the common council may determine; and also to impose such penalties and forfeitures for any breach of any such by-laws and ordinances as the common council may deem advisable.

Sec. 5. No person not being a free citizen of the said city, shall use any art, trade, mystery, or occupation in the said city, or carry on or engage in any profession or mercantile or other business or employment of any kind whatsoever in the said city, without being duly licensed thereto, as herein provided, under such penalty as may be prescribed in and by any by-law or ordinance of the said mayor, aldermen and commonalty, in common council to be from time to time made and ordained.

Under authority of this Act the mayor, aldermen and commonalty of the city of *Saint John*, did make and order the following by-law and ordinance, namely:

A law relating to persons not being free citizens doing business in the city of *Saint John*.

Be it ordained by the mayor, aldermen and commonalty of the city of *Saint John*, in common council convened, as follows:—

1. Whenever the mayor of the city of *Saint John*, or his deputy for the time being, acting under the authority of an Act of the General Assembly of the Province of *New Brunswick* passed in the thirty-third year of the Reign of Her Majesty *Queen Victoria*, c. 4, entituled "An Act in further amendment of the charter of the city of *Saint*

1881

JONAS v. GILBERT.

Ritchie, C.J.

John," shall grant a license to any natural-born British subject or person naturalized or made denizen, or to any alien the subject of a country at peace with *Great Britain*, to use any art, trade, mystery or occupation, or to carry on or engage in any profession or mercantile or other business or employment within the said city of *Saint John*; such person not having been assessed in the general assessment of city rates and taxes for the year then next preceding, the mayor or his deputy, as aforesaid, shall demand and receive from any and every such person to whom license shall be granted, as aforesaid, for the use of the mayor, aldermen and commonalty of the said city, the sum of money hereinafter mentioned and specified, according to the following scale, namely:—

Professional men, as barristers, attorneys, notaries, physicians, surgeons, practitioners in medicine or any art of healing, dentists, *if resident, twenty dollars* ($20). *If transient persons, not having taken up a residence, forty dollars* ($40).

Wholesale or retail merchants or dealers or traders, forwarding and commission merchants, lumber merchants or dealers, the agents of merchants or traders, express agents, general brokers, manufacturers, apothecaries, chemists and druggists, if resident, *twenty dollars* ($20). *If transient persons, not having taken up a residence, forty dollars* ($40).

Persons not having their principal place of business in this city, selling or offering for sale, goods, wares and merchandise of any description by sample card, or any other specimen, and the agents of all such persons, *forty dollars* ($40).

Insurance agents, money brokers, money changers, exchange brokers, and the agents of all such persons, *if resident*, $20. If transient persons, not having *taken up a residence*, $40.

Persons engaged in manual labor, or hired or employed as workmen or servants to drive any hackney carriage, omnibus or vehicle used for hire, *if resident*, $7.50. *If transient persons, not having taken up a residence, twenty dollars* ($20).

Persons using any art, trade, mystery or occupation, or engaged in any profession, business or employment within the city, not coming under any of the before mentioned, if resident, twenty dollars. *If transient persons, not having taken up a residence, forty dollars* ($40.)

All such payments to be made at the office of the chamberlain of the said city, and to be over and above all other charges, taxes, rates, or assessments which any inhabitant of the said city may by law be liable to or chargeable with, and also over and above any and all fees and sums of money payable for licenses which, under any statute of the Legislature or by-law of the city corporation, any person may be required to pay for carrying on any special business in the said city.

2. All such licenses granted under this law shall be issued under the common seal of the city, and shall be and continue for a term from the date of such license up to the first day of May next following, and shall expire on such first day of May in each year.

3. Any person, not being a free citizen of the said city of *Saint John*, registered as a freeman thereof, or not having been assessed in the general assessment for the city rates and taxes in and for the year next preceding, who shall at any time use any art, trade, mystery or occupation in the said city, or carry on or engage in any profession or mercantile or other business or employment in the said city of *Saint John* without having been duly licensed therefor, as provided by this law, under license existing and in force, shall forfeit and pay for each and every time he shall so act in contravention of this law, a penalty of twenty dollars, to be sued for, prosecuted and recovered in the name of the chamberlain of the said city for the time being, before the Police Magistrate or sitting Magistrate at the police office, as provided by law, to be paid and applied in manner and to the use directed by the charter of the city of *Saint John* and the laws in force relating to the local government of said city, and in every case on the adjudication of any such penalty and non-payment thereof, the same shall be levied by distress and sale of the goods and chattels of the person upon whom the penalty shall be imposed, and for want of goods and chattels whereon to levy, the person shall be committed to the common gaol of the city and county of *Saint John* for the term of ten days.

This Act, in my opinion, only contemplated and authorized the establishment of a uniform rate to be paid by persons to be licensed under it, to do business in the said city. I think this general power to tax by means of licenses involved the principle of equality and uniformity, and conferred no power to discriminate between residents and non-residents; that this is a principle inherent in a general power to tax; that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination, must, I think, explicitly and distinctly, appear by clear and unambiguous words.

1881
JONAS
v.
GILBERT.
Ritchie, C.J.

Mr. *Cooley*, in his work on Constitutional Limitations (1), says:

> The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. It is presumed the legislature has granted in plain terms all it has intended to grant at all.

The legislature never could, I think, have intended that the corporation of *Saint John* should have the arbitrary power of burthening one man or one class of men in favor of another, whereby the one might possibly be enabled to carry on a prosperous business at the expense of the other, but must have contemplated that the burthen should be fairly and impartially borne, and the legislature must be assumed to have been quite alive to the distinction between a general uniform power and a power to discriminate, for by 6 *Vic.*, c. 38, which they were then altering, authority is given to discriminate between British subjects and aliens, which is entirely ignored in the 33 *Vic.* c. 4.

Unless the legislative authority otherwise ordains, everybody having property or doing business in the country is entitled to assume that taxation shall be fair and equal, and that no one class of individuals, or one species of property, shall be unequally or unduly assessed.

Uniformity and impartiality in the imposition of taxes may in many cases, we all know, be very difficult; still, in construing Acts of Parliament imposing burthens of this description, I think we must assume, in the absence of any provision clearly indicating the contrary, that the legislature intended the Act to be construed on the principle of uniformity and impartiality; and in this case, I think it never could have been the intention of the legislature, not only to discourage the transaction of business in the city of *Saint John*, but to do injustice

(1) P. 387.

to those seeking to do business there, by granting to any one person or class pecuniary advantages over other persons or classes in the same line of business; in other words, to restrain the right of any particular individual or class to do business in the city by enabling the corporation to favor, by the imposition of a license tax, one individual or class, at the expense of other individuals or classes transacting the same business, thereby enabling certain individuals or classes to do business on more favorable terms in the one case than the other.

I therefore think, if the legislature contemplated such a departure from uniformity and impartiality as is established by this by-law, such an intention would have been made apparent on the face of the Act and cannot be inferred, and, in the absence of any such declared intention, I think no power of discrimination such as they have exercised in this by-law has been conferred on the corporation of *Saint John*, and therefore the by-law, supposing the local legislature has the power of enacting the 33 *Vic.*, c. 4, is *ultra vires* of that Act, and therefore the defendant had no jurisdiction to act under it or to give it effect as he did.

Appeal allowed with costs.

Solicitors for appellant:—*W. Watson Allen.*

Solicitors for respondent:—*W. W. Tuck.*

1880
*Oct. 28, 29.
1881
*Feb'y. 11.

CHARLES GALLAGHER.....APPELLANT;

AND

JOHN TAYLOR.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine policy—Total loss—Sale by master—Notice of abandonment.

T., respondent, was the owner of a vessel called the "Susan," insured for $800 under a valued time policy of marine insurance, underwritten by *G.*, the appellant, and others. The vessel was stranded and sold, and *T.* brought an action against *G.* to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near *Port George*, in the County of *Antigonish*, adjoining the County of *Guysboro'*, *N. S.*, where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th July for $105. The captain did not give any notice of abandonment, and did not endeavor to get off the vessel. The purchasers immediately got the vessel off, &c., had her made tight, and taken to *Pictou*, and repaired, and they afterwards used her in trading and carrying passengers.

Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to show any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total.

Per *Gwynne*, J., that it is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts.

THIS was an action brought by the respondent in the Supreme Court of *Nova Scotia*, against the appellant to recover the amount insured by the appellant, as one

*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

of the underwriters upon a policy of Marine Insurance issued by the Ocean Marine Insurance Association of *Halifax*, upon the schooner "*Susan*," belonging to the respondent, alleged to have been totally lost by a peril insured against.

The appellant having appeared and pleaded in said action, the same was tried before the Honorable Mr. Justice *James*, one of the assistant Justices of said Court, at the sittings of said Court, at *Halifax*, in November, 1878, who gave judgment in favour of the Respondent for the amount claimed by him.

A rule *nisi* to set aside the judgment so given was taken out by the appellant, and at the last term of the Supreme Court at *Halifax* was argued before four of the Judges of that Court sitting *in banco*, a majority of whom subsequently gave judgment discharging said rule *nisi* with costs.

The material facts of the case are as follows :—

On the 6th of July, 1876, the vessel in question having been caught in a gale of wind, was driven on shore by the fury of the storm, and stranded at or near *Cape George* in the County of *Antigonish*, *N.S.*, and at low water persons could walk round her.

The Captain immediately went off to *Antigonish* (four hours journey), noted his protest and telegraphed to Messrs. *Harrington & Co.*, of *Halifax*, who had acted as agents for the owners in effecting the insurance—" Schooner *Susan* on shore *Cape George*, likely a total wreck." Messrs. *Harrington* showed this telegram to the agents of the underwriters on the 7th of July.

On the 7th of July the Captain returned to the vessel, and caused her to be surveyed by three persons, who reported that it would be useless attempting to repair her or get her off, and thereupon condemned her as totally unseaworthy, and recommended that she and her

1880
GALLAGHER v. TAYLOR.

hull and materials should be sold for the benefit of all concerned.

The owner of the vessel resided at the time at *Isaac's Harbor*; this is in the County of *Guysborough*, *Nova Scotia*, the county adjoining that within which the vessel was stranded.

The place where the vessel was stranded was within from four to eight hours drive from the town of *Antigonish*, the shire town of the county of that name, which was in telegraphic communication with *Halifax*, and with *Pictou*, the shire town of the adjoining county of that name. There was also a tri-weekly mail to and from the town of *Antigonish*.

The vessel valued at $1200, insured for $800, was advertised on Saturday, July 8, to be sold, and was sold on Tuesday following, July 11th, for about $105.

The weather continued fine from the day after the stranding until the sale; there was no evidence that any effort was made to save or get off the vessel before the sale, but on the other hand, the captain admits that he made no effort to get her off, and one of the surveyors, *Donald McEachren*, stated that "If weather kept fine, he allowed she could be got off."

The evidence as to the actual damage done to the vessel was conflicting; but she undoubtedly continued to exist as a vessel at the time of sale, and on that day a contract was made to take her off for $35. She was got off by the following Saturday, July 15th. She was made tight on the shore and then taken to *Pictou* and there put on the Marine Slip; was repaired, and for over a year was used as a packet between *Antigonish* and *Pictou*, and made one trip to *Halifax*, during which time she carried freight and passengers.

Mr. *Rigby*, Q.C., for appellant:

In view of the uncontradicted facts and under the

authority of *Knight* v. *Faith* (1) and *Kaltenback* v. *McKenzie* (2) I contend there was no total loss of the "Susan," actual or constructive, no notice of abandonment having been given. It was for the plaintiff to make out all the elements, at the time the vessel was sold, of an actual total loss. In this he has entirely failed.

[*Ritchie*, C J.: We will call on the other side to see if they can make out a case.]

Mr. *Gormully* and Mr. *Graham* for respondent:

It is submitted that this case turned, as appears by the opinion of the Court below, on questions of fact, such as, was the loss total or only constructively total; was the sale by the master justifiable under all the circumstances so as to pass the property in the wreck. Unless, therefore, this Court is of opinion that there was no evidence at all to support this verdict, this case is not appealable.

The objection and the only objection to the verdict, urged by the appellant in the Court below, was that the loss was not an actual total loss but a constructive total loss, that consequently to entitle the respondent to recover as for a total loss, it was necessary to prove notice of abandonment to the underwriters.

Now, whether the vessel in this case was an actual total loss or a constructive total loss, whether she was a mere wreck or still a ship, though in a damaged condition, was a question of fact which the tribunal of fact has disposed of in the respondent's favor. Having regard to the injuries the ship had received, her position on the rocks, the imminence of the danger of her complete destruction, there was ample evidence to go to the jury that she was an actual total loss. But if there were only a scintilla of evidence to go to the jury as to

(1) 15 Ad. & E. N.S. 647. (2) 3 C. P. D. 467.

1880
GALLAGHER v. TAYLOR.

this fact then this Court cannot review the finding of the jury.

See *Cobequid Marine Insurance Co.* v. *Barteaux* (1); *Cambridge* v. *Anderdon* (2); *Roux* v. *Salvador* (3); *Farnworth* v. *Hyde* (4); *Kaltenbach* v. *Mackenzie* (5).

By the text writers and authorities there appears to be a sort of middle case between an actual total loss and a constructive total loss. This middle case arises where the ship, though something more than a mere *congeries* of planks is in a position of imminent peril, and where, by the Maritime law, an implied power to sell her for the benefit of all concerned is reposed in her master. *Arnold* treats such a case where a sale takes place, under actual total loss. The facts of the case bring it within this principle.

See *Arnold* (6); *Idle* v. *Royal* (7).

If it be found that the master was justified in selling the ship and the notice of the loss of the ship and the sale reached the owner at the same time, then we contend, on the latest authorities, that no notice of abandonment would be necessary. This also has been found as a fact.

RITCHIE, C. J.:—

The plaintiff seeks to claim in this case as for a total loss. I think the evidence most clearly shows that the sale was wholly unjustifiable. There was no such necessity as justified it. The master could, and clearly should, have communicated with his owners. I do not think it necessary to go through the evidence in this case, as my brother *Gwynne* has reviewed the evidence at length in his judgment, and

(1) L. R. 6 P. C. 327.
(2) 1 C. & P. 213.
(3) 3 Bing. N. C. 266.
(4) L. R. 2 C. P. 204.
(5) 3. C.P.D. 469.
(6) Vol. 2 p. 953,956.
(7) 8 Taunt. 755.

I entirely concur with him. It cannot be denied that there was not an actual total loss, and there being no justification for the sale, no abandonment, in fact nothing to make this a constructive total loss, the plaintiff, claiming a total loss, and declining to claim for a partial loss, should have been non-suited, or a verdict entered against him.

FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:

I concur in the view expressed by the Chief Justice that there is no evidence to show there was a total loss. The vessel was lost in July, the Captain had an opportunity to communicate with the owners, he did not do so, but sold the vessel for a nominal sum. She was immediately got off and repaired, and afterwards carried freight and passengers.

Under such circumstances we must hold that notice of abandonment should have been given. The owner is always in such cases answerable for the neglect of the Captain. If the law left it to the owner to say that he had notice of the loss only after the sale, then all the owner need do, would be to instruct his captain to use his own judgment when a loss took place and never refer to him. Such is not the law. Under the circumstances of the case I am of opinion there is no evidence to justify the sale, in fact there is no evidence that the vessel was ever in actual danger.

Now as the plaintiff insisted on a total loss, he cannot succeed. He declined to recover for a partial loss. We must hold that he is not entitled to recover in this action for a total loss when no notice of abandonment was given, even if otherwise entitled to our judgment.

GWYNNE, J.:—

This case raises no question as to the weight to be

1881
GALLAGHER v. TAYLOR.
Gwynne, J.

attributed to the finding of a Judge, who tries a case without a Jury, upon matters of fact, for here the Judge's finding is the result of inferences drawn by him from evidence as to which there is no dispute, and in that case, inasmuch as the question is whether or not the inferences so drawn are the reasonable and proper inferences to be drawn from the facts proved, the rule is that this raises a point which is fairly open to inquiry in a court of appeal.

Now in this case, as it appears to me, the learned Judge before whom the trial took place and the Supreme Court of *Nova Scotia*, the majority of which Court sustained the verdict which was rendered for the plaintiff as in the case of a total loss, have proceeded upon the basis that the loss of the schooner was a *constructive* and *not* an *actual* total loss. The learned Judge who rendered the verdict says that he considered the vessel as she lay on the beach at *Cape George* before the sale, *taking into consideration the risk to which she was exposed*, to be of no value as a ship, and that therefore he was of opinion there was a total loss, and accordingly he found for the plaintiff for the amount claimed. In the judgment given by him in the court above, upon the rule *nisi* to set aside this verdict, he says :

> Several defences were set out in the pleas, but the only question really at issue was whether the plaintiff was entitled to recover for a total or a partial loss. A partial loss was not denied, but the plaintiff's counsel contended that the circumstances of the case were such as to constitute a *constructive* total loss which was denied by the defendant's counsel.

And after repeating his opinion as above expressed in his verdict he explains his meaning more fully by adding :

> She was a ship, it is true, in outward form after the accident, but never a good one. The purchasers made nothing of their bargain, and when she went on shore some eighteen months after, although she was insured and might have been got off she was not considered worth the expense,

And finally he says :

I think there is sufficient evidence given by the plaintiff that the vessel could not have been got off and repaired so as to be a good vessel except at an expense exceeding her value, if at all, and if not the Plaintiff had a right under the cases to treat her as a total loss.

But for the words "*so as to be a good vessel*" the learned Judge would have in precise terms applied the test which distinguishes a *constructive* from an *actual* total loss, that question being whether the damage sustained can be so far repaired as to keep it a ship, though perhaps not so good a ship as it was before, without expending on it more than it was worth. If she was repairable there was no actual total loss, but if she was repairable only at an expense exceeding her value when repaired, then the loss was a *constructive*, not an actual total loss (1).

In view of the evidence, which excludes in this case all idea of an actual total loss, and of the above observations of the learned Judge in support of the opinion he had formed at the trial, we must fairly conclude that the learned Judge proceeded upon the basis of there having been established to his satisfaction a constructive total loss only. The learned Chief Justice of the Supreme Court of *Nova Scotia*, also plainly treated the case as one of constructive total loss only, and he was of opinion that the circumstances appearing in evidence constituted a waiver of notice of abandonment.

A point was argued before us which does not appear to have been discussed in the court below, namely: that the verdict for the plaintiff as for a total loss is sustainable upon the ground that the sale was justified under the circumstances appearing in evidence, and that the plaintiff did not receive notice of the loss until after the sale when he received notice of both at the same time, and that therefore notice of abandonment

(1) *Farnworth* v. *Hyde*, 13 C.B. N.S. 815; *Rankin* v. *Potter*, L. R. 6 H. L. 83.

1881
GALLAGHER v. TAYLOR.
Gwynne, J.

was useless and unnecessary. The loss, if total, being only *constructively* not *actually* so, it cannot be, and has not been, disputed, that notice of abandonment was necessary to be given, unless the non giving it was excused in law, or was waived in fact, by the defendants, or must in law be treated as having been so waived, under the circumstances appearing in evidence.

That notice of abandonment was not given is admitted.

The questions therefore which we have to determine appear to me to be, 1st. Was there any actual waiver by the defendant of notice of abandonment, or is it a proper inference to draw from the evidence that the defendant did waive such notice? 2nd. Does the evidence establish that the sale by the master was justified in view of the circumstances under which that sale took place?

It is not pretended that there is any evidence of an express waiver by the defendants of notice of abandonment, but, as I understand the judgment of the learned Chief Justice of the Supreme Court of *Nova Scotia*, he rested his judgment that the notice was waived upon the ground that he found from the evidence—

> That the defendants had a competent agent on the spot who was left without instructions though he wrote for them and was cognizant of all that was taking place.

Mr. Justice *James*, who tried the case, says, in his judgment upon this point:

> The captain, after examining the vessel next morning and taking such advice a she could get on the spot, went to *Antigonish* where he noted his protest and telegraphed to the vessel's agents in Halifax who at once informed the defendant's company, *but did not give notice of abandonment.* They telegraphed to their agent, Mr. *Whidden*, who, on 8th July, proceeded to the wreck and examined her. He knew she had been examined by the Surveyors; saw the advertisement of sale; he also conversed with the captain and abstained from cautioning him that the vessel ought not to be sold; he and another witness (*McDonald*) while not differing materially from the five witnesses for plaintiff as to the facts expressed an opinion at the

trial that she could have been got off for a small sum and rendered perfectly tight, but at the time he expressed no such opinion to the Master as I think he as the agent of the underwriters ought to have done if he thought he was about to do wrong.

And again :

He promised Captain *Sullivan* to communicate with the Insurers by letter and by telegram. He telegraphed to them from *Antigonish* and if they had answered by telegraph instead of by letter *Whidden* could have been at the sale with their instructions ; as it was the master expected him and waited for him at the sale.

" Apart from the other evidence," he adds,

I consider that the conduct of the Insurers under the circumstances in neglecting to advise the master when their agent had virtually undertaken that they would do so, and had encouraged him to proceed with the sale by promising to be present, to be a very material circumstance for the consideration of a Jury. It appears to me that he had a right under the circumstances to assume that they agreed with him in his opinion as to the sale of the vessel and were satisfied that the sale should be held, and my opinion at the trial was and still is largely influenced by these facts.

It appeared in evidence that Mr. *Whidden* above referred to was only an agent for the defendants when specially employed *pro re natâ*. No evidence was offered as to what was the nature or extent of his agency in the particular case. It may have been simply to inspect the damage as well as he could, advise his principals and to observe what was passing so as to enable his principals to form an opinion as to whether every thing had been done by the master that should have been done under the circumstances.

In the above observations the learned Judge, as it appears to me, indicates the nature of the enquiry which he considered the circumstances would have rendered proper to be submitted to a Jury by the impression which he says those circumstances had made upon his own mind, namely, that the master had a right to assume that the defendants agreed with him in his opinion as to the sale of the vessel and were satisfied

1881

GALLAGHER v. TAYLOR.

Gwynne, J.

that the sale should be held. If indeed the evidence had shewn that Mr. *Whidden* had been appointed by the defendants as their agent, not only to inspect the vessel, but invested with full power to act for them in accepting, if he should think fit, possession of the vessel as an abandoned wreck, and to do whatever he might think most for their interest, either by sale of the wreck or otherwise, and that under such circumstances he had assented to the sale taking place under the direction of the master, there might have arisen a proper question to be submitted to a Jury—whether the underwriters had not in fact accepted possession of the wreck to deal with it as they thought best for their own interests, and whether the subsequent sale by the master should not in fact be regarded as a sale by the underwriters themselves so as to preclude them from disavowing it in a suit by the owners upon the policy? But the evidence raised no such question; all that the evidence established was that the underwriters, having been notified of the fact that the vessel was aground, but having no intimation from the owner that he elected to abandon, appointed an agent to inspect the condition of the wreck who did not interfere with the master either by assenting or objecting to his proceedings. He seems to have left the master to exercise his own judgment, although informing him that he had written and telegraphed to his principals and would communicate to him any instructions he might receive, if he should receive any, before the sale which upon his own authority the master had advertised. No case has been cited in support of the proposition that under these circumstances there was any legal obligation imposed upon the defendants to notify the master whether they assented or objected to the proceedings taken by him. It was quite competent for them, if so disposed, to watch his proceedings, and the obligation rested upon him, in the event of his

employers setting up a claim for a total loss, to take care to be furnished with evidence that his proceedings were conducted legally and that a sale by him was strictly warranted by the circumstances of the case.

There is nothing in the evidence, in my opinion, from which an inference of fact or of law can be properly drawn that the defendants waived their right to receive from the owners notice of abandonment if the owners intended to claim for a total loss; or to estop the defendants from resisting such a claim upon the ground that they had no such notice; or from insisting that the evidence failed to establish that the sale by the master was justified. And this brings me to the consideration of that question.

Mr. Justice *Blackburn* in *Rankin* vs. *Potter* (1) says:

> As has often been observed, a sale by the Master is not one of the underwriters' perils and is only material as shewing that there is no longer anything which can be done to save the thing sold for whom it may concern.

The effect of a valid sale being conclusively to determine that neither assurers nor assured could do anything, it is of the utmost importance that an imperative necessity for the sale should exist in order to justify it.

Accordingly, in *Robertson* v. *Clarke* (2), cited by Lord *Campbell*, C. J., delivering judgment in *Knight* v. *Faith* (3), it was held that it is not sufficient to shew that the sale was *bonâ fide* and for the benefit of all concerned, unless it also be shewn that there was urgent necessity for its being resorted to; and in *Farnworth* vs. *Hyde* (4) *Byles*, J., says:

> In all cases of alleged constructive loss where the Captain takes upon himself to sell the ship, the necessity of so doing ought to be strictly proved and the jury are not at liberty to act upon conjecture.

Nor will it be enough to shew that to sell the vessel

(1) L. R. 6 H. L. at p. 122.
(2) 1 Bing. 445.
(3) 15 Q. B. 657.
(4) 18 C. B. N. S. 868.

1881
GALLAGHER v. TAYLOR.
Gwynne, J.

was a prudent course for the Master to pursue. In *Kaltenbach* vs. *McKenzie* (1) Lord Justice *Thesiger* says:

> If at any moment an assured who is entitled to treat a loss as a constructive total loss may at the same time absolve himself from giving notice of abandonment by selling the vessel, *which although a prudent course is not a necessary one*, it would lead to the greatest danger of frauds upon underwriters and, at all events, to very considerable inconvenience in reference to policies of marine insurance.

And referring to the particular circumstances of that case, he says:

> Although it is admitted that the vessel was a constructive total loss in the sense that the cost of repairs would be greater than the value of the vessel when repaired, I cannot trace any evidence to the effect that if the sale of the vessel had been postponed for two or three or four months she would have ceased to exist in specie, or that the loss from a *constructive* would have become an *actual* total loss. If that be so, then upon principle and authority it appears to me the plaintiff is not entitled to use the fact of that sale as a reason for excusing himself from giving notice of abandonment.

And in *Lapraik v. Burrows* (2) the law is laid down by the Privy Council thus:

> The law as we conceive it to be settled is this—that there must be a necessity for the sale, that when the master has no authority from his owner to sell he is not at liberty to sell merely because he deems it to be advantageous to his owner, but that there must be a necessity for the sale. The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done, except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity. We should be exceedingly reluctant to relax the law upon this head because it is of great importance that masters of ships should not divest their owners of their interest in those ships without due authority except they are strictly justified by the necessity of the case.

The like law prevails in the Courts of the *United States*, as will appear by reference to *Hall* vs. *Franklin*

(1) 3 C. P. D. at p. 486.

(2) 13 Moore P. C. at p. 144.

Insurance Co. (1) and *Bryant* v. *The Commonwealth Insurance Co* (2) and many other cases cited in *Prince* v. *The Ocean Insurance Co.* (3).

As the authority of the master is not derived from express power to sell given to him by the owner, but from the necessity of the thing when placed in the position of being unable to consult with the owner, it is obviously of the first importance to enquire as to the opportunity the master had of consulting with the owner.

In the *American Insurance Co.* vs. *Center* (4) it is laid down, that the master is not authorized to sell except in a case of absolute necessity, when he is not in a situation to consult with his owner and when it is necessary for him to act as agent for whom it may concern; and in *Parsons* on *Marine Insurance* (5) the rule is laid down thus:

> Nor is the master at liberty to sell without notice to, or the advice of, the owners, provided he be so near them that he can delay the sale for this purpose without endangering greater loss.

The law as laid down by Mr. *Parsons* is approved in the Privy Council in *Cobequid Marine Insurance Co.* vs. *Barteaux* (6) where Sir *Henry Keating*, delivering the judgment of the Privy Council, says:

> With reference to the law upon the subject there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to as they are well summarised in the work of Mr. *Parsons* at page 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and *what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it.* He distin-

(1) 9 Pick. 478.
(2) 13 Pick. 543.
(3) 40 Maine 487.
(4) 4 Wendell 52.
(5) 2nd Vol., p. 142.
(6) L. R. 6 C. P. 327.

1881

GALLAGHER v. TAYLOR.

Gwynne, J.

guishes between them and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In *Arnold* on *Insurance* the circumstances that will justify the master in selling seem to be well and clearly put and to be quite borne out by the authorities that are cited in its support. Mr. *Arnold* says, the exercise however of this power, that is, the power of the master to sell, is most jealously watched by the English Courts and rigorously confined to cases of extreme necessity, such a necesssity, that is, as leaves the master no alternative, as a prudent and skilful man acting *bonâ fide* for the best interest of all concerned and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies. If he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling her, although the danger at the time appear exceedingly imminent. That seems to be the true rule to apply in these cases where it is most important to confine within strict limits the power of a master to sell the ship.

Applying then the principle of these cases to the facts of this, we find that on the 6th July, 1876, the vessel while on her voyage from *Guysboro* to *Pictou* was stranded at *Cape George*, which is distant about 25 miles from *Pictou*, where a tug boat could have been procured if required; about 20 miles from *Antigonish*, where there was telegraphic communication with *Halifax*, and about 50 or 60 miles from *Isaac's Harbour* where the plaintiff resided. On the morning of the 7th July, the master went to *Antigonish* and telegraphed news of the disaster to the Messrs. *Harrington & Co.*, who as the plaintiff's agent had effected for him the insurance upon the vessel. It is not alleged that they had any authority from the plaintiff enabling them to bind him by a notice of abandonment, and if they had, it is plain that they did not exercise it, for no notice was given. On the same day the master placed the

vessel in the hands of one *Cunningham*, an auctioneer at *Antigonish*, as his, the master's agent. *Cunningham* appointed three persons named *Graham*, *McMillan* and *McEachren* to survey her, of these, two were called as witnesses upon the trial, one of whom, namely *McEachren*, although he said that he did not see any chance of getting the vessel off in the condition she was and taking the risk of the weather, admitted that if the weather kept fine she could have been got off. He, however, said that he did not see any broken timber or broken plank except where the hole was; the other, *McMillan*, who described himself as a *farmer*, said that he had had no experience with vessels, and he says that he saw no chance of getting her off. They all three, however, signed a report to the effect that

> There is no prospect of the said schooner ever being floated off where she now lies. That it would be useless to attempt repairing her or getting her off, and we therefore condemn the said schooner as totally unseaworthy and recommend that the said schooner, her hull and materials, be sold for the benefit of all concerned.

Upon this report, *Cunningham*, who describes himself as agent of the captain, whom he understood to be the owner, gave notice of sale of the vessel for the following Tuesday, the 11th July, when she was sold by *Cunningham* (acting as auctioneer) to one *Mullins*. The account given by *Cunningham* of the sale is as follows. He says :—

> *John Graham* (the third surveyor) and I were owners of the vessel afterwards. I obtained an interest in her on the day of sale. The morning of the sale Capt. *Mullins* was lying off thewharf, and I asked him to buy her. He said he had no means. I had asked *Graham* before. My object was to sell to the best advantage. *Graham* did not agree to take an interest before the sale. I told *Mullins* if he bought her I would back him.

That Mr. *Cunningham* did not think he was selling the vessel as a wreck, but as a vessel capable of navig-

1881

GALLAGHER v. TAYLOR.

Gwynne, J.

ating the Ocean appears from his own statement, for he says:

After the sale I induced *Graham* to take an interest, *as he and I had some business requiring a vessel of that class. Mullins* was to have an interest too: this was arranged after the sale on the same day.

She was accordingly sold by *Cunningham* to *Mullins* for $157.50 leaving after the deduction of all charges the sum of $52.53 in the hands of *Cunningham* after the sale, and on the same day *Mullins* gave up to *Cunningham* and *Graham* the interest which he had acquired by the sale to him. He in fact, as shewn by the evidence, purchased for *Cunningham* and at his request. As to the damage which the vessel had in fact sustained *Cunningham* says:

I don't think she was very much logged, can't tell if her timbers were affected. I think 3 or 4 of the butts were started. There was a hole in her forward where she struck a rock, don't know of any other damages.

And he adds:

On the same afternoon as the sale had taken place we employed *McDougall* to take her off for $35 for labor only, we supplying all materials, they gathered some of the stuff that day, Tuesday, and she was got off by Saturday.

It thus appears that with the appliances there at hand she was got off at an expense of $35. What it cost to repair is not stated; but from the above description of the damage, and from what *Cunningham* further says, the expense does not appear to have been great. He says:

Some of the repairs were done before she was got off. She was caulked on the shore, then taken to a wharf and partly repaired, then taken to *Pictou* and put on the slip. Her timbers were not rotten—her bottom was perfectly sound and good when we tried her and bored into her upper timbers the next year.

He adds:

The started butts were spiked down again and a new piece of plank was put where there was found a hole from striking on the rock.

Then it appears that *Cunningham* and *Graham* used her that season and the following one as a packet between *Antigonish* and *Pictou*, and she was lost in October, 1877, and as *Cunningham* did not know the vessel before she was stranded in July, 1876, he cannot say whether after the repairs then done to her she was or not in as good condition as she had been in before she was stranded.

The Master in his evidence admits that he did not make any effort to get her off. Nor did he try to get assistance to get her off, neither did he communicate with his owner, and he does not give any reason in excuse of his not having done so. Thus it appears that although the vessel lay from the 6th to the 11th July on the beach from which she could have been and in fact was removed at an expense of $35, the Master made no attempt whatever to get her off and made no communication to the owner, who was distant only about 50 or 60 miles from the place where the vessel lay.

Now, wholly irrespective of the above evidence as to the circumstances attending the conduct of the sale, which, whatever may have been the motive for such conduct, can only be mentioned to be condemned; but wholly apart from that, it is apparent that the evidence fails to shew any excuse for the master not communicating with his owner, so as to enable him to give notice of abandonment if he intended to rely upon the loss as total; it fails to shew that, having regard to the cost of repairs, the loss could have been converted from a partial into a constructive total loss, or that notice of abandonment would in this case, any more than in *Knight* v. *Faith*, have entitled the plaintiff to recover as for a total loss, or have deprived the defendant of the right to dispute the validity of the sale; it utterly failed in short to shew those attendant circumstances which are absolutely

1881

GALLAGHER v. TAYLOR.

Gwynne, J.

necessary to establish that urgent necessity for the sale which alone can justify a sale by the Master so as to subject the insurers to liability as for a total loss.

The Appeal must therefore be allowed and the rule in the Court below made absolute for a new trial, and as it is not suggested that any better evidence could be given, and as it appears that the insurers have been always willing to deal liberally with the plaintiff upon the basis of a partial loss, which is all that under the evidence he is entitled to, I think that the appellant should have the costs of this his successful appeal and that the rule in the Court below should be for a new trial without costs.

The circumstances of this case differ from those of *Cobequid Marine Insurance Co.* v. *Barteaux* (1) where both sets of costs were ordered to abide the event of the new trial, because the verdict there was deemed to be only against the weight of the evidence. Here the evidence wholly fails to justify the sale.

Appeal allowed with costs.

Solicitor for appellant: *S. G. Rigby.*

Solicitor for respondent: *N. H. Meagher.*

(1) L. R. 6 P. C. 327.

PATRICK RYAN.....APPELLANT; 1880 *Nov. 16.

AND

MICHAEL RYAN.....RESPONDENT. 1881 *Feb'y. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute of Limitations—Possession as Caretaker—Tenancy at will—Finding of the Judge at the trial.

The plaintiff's father, who lived in the Township of *T.*, owned a block of 400 acres of land, consisting respectively of Lots 1 in the 13th and 14th Concessions of the Township of *W.* The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of Lot 1 in the 13th Concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one *M. K.* In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, where upon the plaintiff brought trespass, claiming title thereto by possession. The learned Judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father.

Held,—Reversing the judgment of the Court of Appeal for *Ontario*, that the evidence established the creation of a new tenancy at will within ten years.

---

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and ynne, J. J.

1880
RYAN
v.
RYAN.

Per *Gwynne*, J., that there was also abundant evidence from which the judge at the trial might fairly conclude as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout.

APPEAL from the Court of Appeal of *Ontario*. The action, which was for trespass to realty, was brought by the respondent *Michael Ryan* in the Court of Common Pleas for *Ontario*, and was tried at the Fall Assizes of 1878, at *Berlin*, before the Honorable Chief Justice *Hagarty*, without a jury, when a verdict was entered for the defendant with leave reserved to move to enter a verdict for the plaintiff for such amount of damages as the Court might deem proper. In Michaelmas Term following, a rule *nisi* was granted calling upon the defendant to show cause why the verdict for the defendant obtained at the trial should not be set aside, and a verdict entered for the plaintiff for such amount as the Court might deem the plaintiff entitled to recover pursuant to the Common Law Procedure Act, and to the leave reserved at the trial, on the grounds that the verdict is contrary to law and evidence, and that the plaintiff established a title by the Statute of Limitations under the evidence given at the trial, and that such possessory title to the land in question was made out as against the plaintiff's father, the late *Thomas Ryan*, under whose will the defendant claimed, and that on the evidence the plaintiff was entitled to a verdict.

In the same Term the rule was argued, and judgment, which was reserved, was delivered on the eleventh day of February, 1879, when, the Court being equally divided, the rule dropped.

On the seventh day of March, 1879, the Court again delivered judgment discharging the rule *nisi*, without costs, for the purposes of appeal. The plaintiff appealed to the Court of Appeal, when the appeal was allowed

with costs, and a verdict ordered to be entered for the plaintiff (respondent), for $10.00 damages.

The facts and pleadings will be found in the judgments hereinafter given (1).

Mr. *King* for appellant :—

The only question to be determined is whether the respondent (the plaintiff) has acquired a title to the *locus in quo* by length of possession. The question is one of facts or inferences of fact, and I shall have to refer to the evidence.

I contend that the respondent was the servant, agent, or caretaker of his father, the owner of the land, and that his occupation was in fact the possession of the father, and not adversely to him, or as tenant under him.

[The learned Counsel then reviewed the evidence bearing on this point.]

The learned Chief Justice of the Queen's Bench, before whom this action was tried without a jury, found as a fact that "whatever occupation plaintiff had "of this land was acting as agent and caretaker for his "father, and, as between the father and a stranger, I "think plaintiff's possession would be the father's pos-"session. On the evidence it seems the father used to "send up money to pay the taxes till 7 or 8 years "ago. He then said, knowing plaintiff was using it, "that he must pay the taxes for the use of the land. I "find as a fact that plaintiff, even to his father's death "in 1877, did not occupy or claim it as his own against "his father, but merely as acting for him, living on the "south 50 acres and using this north 50 (now in suit,) "clearing some of it, taking timber off some part and "protecting it."

This finding was approved of by Mr. Justice *Gwynne*,

(1) See also reports of the case, 29 U. C. C. P. 449 and 4 Ont. App. R. 563.

1880
RYAN
v.
RYAN.

then one of the judges of the Court of Common Pleas, and subsequently by Mr. Justice *Patterson* in the Court of Appeal.

In so far as the evidence on this, or in fact any other, branch of the case is conflicting, the appellant would merely refer to the well known rule which is indicated by Mr. Justice *Patterson* where he says : "The solution "of these questions depended upon evidence, which "was conflicting, and the details of which have been "discussed in the judgments. From that discussion it "is obvious that the reliance to be placed on the testi-"mony of one witness or another became a very mate-"rial element in the decision. It was, therefore, a case "in which the opinion of the Judge who heard and "saw the witnesses would have been of great value, "and ought to have been conclusive whenever the "choice lay between conflicting versions of the same "incident."

The following cases all bear on this branch of the argument:—*Perry* v. *Henderson* (1); *Quincey* v. *Caniff* (2); *Silverthorn* v. *Teal* (3); *Heyland* v. *Scott* (4); *Ellis v. Crawford* (5); *Moore* v. *Doherty* (6); *Allen* v. *England* (7), quoted in *Keffer* v. *Keffer* (8).

Then if, on the facts, the proposition already contended for that the respondent was the servant, and not the tenant, of his father the testator, is not the proper conclusion to be drawn from the evidence, it should be assumed that the respondent obtained possession under such circumstances as to create a tenancy between the testator and him, such tenancy would be a tenancy at will; and such tenancy at will was determined, and a new tenancy created, by what took place between the appellant, as the testator's agent, and the respondent in

(1) 3 U. C. Q. B. 486.
(2) 5 U. C. Q. B. 602, 664.
(3) 7 U. C. Q. B. 370.
(4) 19 U. C. C. P. 165.
(5) 5 Ir. L. R. 404.
(6) 5 Ir. L. R. 449, 451.
(7) 3 F. & F. 49.
(8) 27 U. C. C. P. 272.

the year 1872, before the eleven years had expired, and this constitutes a *terminus a quo* since which sufficient time has not elapsed to constitute a statutable bar.

Assuming therefore a tenancy at will, the tenant not having any rent to pay on the original taking of possession, there is clearly evidence of an agreement made between the appellant, acting as his father's agent, and the respondent, that, from the time of their interview, the respondent would pay as rental the taxes on the adjoining property of his father. This was a new tenancy, which, if followed by payment of the taxes, would become a tenancy from year to year,—and there is evidence that subsequently the taxes were paid by the respondent. Mrs. *Ryan*, after speaking to the father of the appellant's business up to the time the new arrangement was made, proceeds: "The old man told me he could not trust *Patrick* (the appellant) to pay taxes and get the receipt for it. He asked me if I would look after 14 and pay the taxes.....I paid the taxes several times."

The cases of *Doe dem. Stanway* v. *Rock* (1); *Locke* v. *Matthews* (2); *Hodgson* v. *Hooper* (3), shew that such an arrangement or agreement would constitute a new tenancy.

Another view of the case presented by the evidence may be more in accord with the reading that some may be inclined to give to it. From the first taking possession of this half lot in the latter part of 1864, until the testator's death, there were, from time to time and from year to year, dealings between the testator and the respondent, which establishes that the original tenancy at will (and for the purposes of this contention a tenancy at will is conceded) continued, the tenant acknowledging as he did from year to year that he was

(1) 4 M. & G. 30. (2) 13 C. B. N. S. 753. (3) 3 E. & E. 149.

1880
RYAN
v.
RYAN.

but a tenant at will, and that he was ready at any moment to give up possession to his landlord. This, it may be said, cannot avail unless under the 13th sec., of the Statute of Limitations, the acknowledgment is in writing. But it is insisted that the distinction is this: If the tenancy at will by force of the statute is terminated, so that the tenant, ceasing to hold as tenant, holds adversely to the true owner, then the acknowledgment, in order to interrupt the statute running, must be in writing. If on the other hand the tenant, by continual dealings or in other ways, acknowledges the title of the owner and his position as tenant at will, so that the statute does not operate to terminate the tenancy, the acknowledgment need not be in writing; the statute has never commenced to run: *Foster* v. *Emerson* (1).

Mr. *Bowlby*, for respondent:—

In 1863, plaintiff leased to one *Richardson* the land in question, and in 1864 plaintiff put *Richardson* off the land at great cost to himself and then took possession of the land not as caretaker, but for his own use. I contend that on the 3rd of December, 1864, most certainly the statute began to run. The actual occupation of this land by the plantiff on the 3rd December, 1864, did not begin with the permission of his father, who (according to the evidence of the defendant and his witnesses) was always opposed to the plaintiff's occupation of this land. The plaintiff was not let into possession as a tenant at will in 1864, but he then entered as a trespasser, holding adversely. If the plaintiff did not then enter as a trespasser, then he must be held to have been in possession as a tenant at will before that date, and in that view, the statute began to run on the 17th September, 1850. The plaintiff's father, after December, 1864, was

(1) 5 Grant 135.

merely passive and simply allowed the plaintiff to remain in possession after he became aware of his actual occupation thereof. There is nothing in the evidence to show that subsequent to *Richardson's* occupation of this land in 1864, the plaintiff was ever bound by any agreement, either by parol or by deed, to hold this land at the will of his father as lessor. A statement to the plaintiff by his father, long after the plaintiff was in adverse possession as a trespasser, to the effect that plaintiff must leave the land whenever any of his brothers wanted it (even if made) without proof of anything having been said in reply by the plaintiff, would not create a tenancy at will, and it is submitted that no tenancy at will existed between the plaintiff and his father after the 3rd December, 1864, and that the statute began to run on that date, and there having been no written acknowledgment of title under C.S.U. C., cap, 88, sec. 15, the statute did not cease to run by reason of the expression first made by the father about Christmas, 1865, of his willingness that the plaintiff might build upon and continue to occupy the lands in question till the plaintiff would get another place, and other similar expressions made by the father at other times, and that such expressions on the father's part would not create a tenancy at will between him and the plaintiff, nor would the conversation between the parties in the presence of *Clark*, in 1871, have that effect, indeed nothing would stop the running of the statute except a written acknowledgment of title, and it is therefore submitted that the plaintiff acquired a title by possession on the 3rd December, 1874, under 28 *Vic.* c. 16, (*Vide* R.S.O. (1); *Coke Litt.* 55 a ; *Banning's* Limitation of Actions (2); *Sugden's* Real Property Statutes (3).

If it should be held that a tenancy at will was created

(1) Cap. 108, secs., 4, 5, and 15.
(2) Ed. 1877, cap. 9, pp. 88, 96; cap. 16, p. 141.
(3) Ed. 1862, p. 16, *et seq.* 23, 57, 59, 77, 78, 80.

1880
RYAN
v.
RYAN.

by the letter of the 14th January, 1865, from the father, in which he was silent as to the fact that plaintiff had gone into possesssion and actual occupation of the land, although knowing this fact from the plaintiff's letter to him and from information received by him from *Kennedy*, or if a tenancy at will should be held to have been created by virtue of the assent given by the father to the plaintiff's occupation of this land, in his conversation with the plaintiff or his wife about Christmas, 1865, then such tenancy at will must have commenced on the 3rd December 1864, or on the 14th January 1865, or else at Christmas, 1865, and for the purposes of this action it is immaterial which of those dates be taken as the date of the commencement of such tenancy at will, if any such tenancy ever existed, and the right of action under the statute (1) must be deemed to have first accrued to the father one year after such dates, being at latest Christmas, 1866, at which time the alleged tenancy at will, under which the plaintiff's actual occupation and dwelling or residing upon this land began, must, for the purposes of the bar of the statute, be deemed to have determined, and the statute then began to run, and the operation of the statute, having so begun to run, can be stopped only by the creation of a fresh tenancy at will after the determination of the original tenancy at will, and within the period of limitation, and so the plaintiff's title became complete at Christmas, 1876, at the latest, unless before that date the original tenancy were determined and a fresh tenancy created, and it is submitted that a conclusion could not be drawn from the evidence that there was legally any determination of the tenancy at will by what took place between the plaintiff and defendant in the presence of *Clark*, some seven years before the trial (in or about 1871), and that no new

(1) R. S. O., cap. 108, sec. 5, sub-sec. 7.

tenancy between the plaintiff and his father was then created, and that the circumstances attending that interview between the parties to this action did not constitute a new *terminus a quo*, *Doe d. Perry* v. *Henderson* (1); *Keffer* v. *Keffer* (2); *Gray* v. *Richford* (3); *Doe d. Baker* v. *Coombes* (4); *Truesdell* v. *Cook* (5); *Williams* v. *McDonald* (6); and especially *Day* v. *Day* (7); *Banning's* Limitation of Actions (8); *Foster* v. *Emerson* (9) relied upon, is overruled by *Truesdell* v. *Cook* (10). As to whether a fresh tenancy at will was created some seven years before the trial, between the plaintiff and the defendant as agent for his father, although the defendant alone said there was a promise then made by the plaintiff that he would pay the taxes in future, if left on the land, yet in this he is contradicted not only by the plaintiff but also by his own witness, *Clark*. In the letter of the 14th January, 1865, written by the father to the plaintiff, after he, the father, knew from the plaintiff's letter to him, and from *Kennedy*, that the plaintiff was then living on this land now in dispute, and that in consequence thereof the plaintiff would always be obliged to pay the taxes to avoid a distress, the father says "*it is the last taxes I will pay on it*," indicating thereby that he threw upon the plaintiff one of the burdens of ownership, that of paying the taxes from that date, and consistently with this letter the land in dispute was ever afterwards assessed in the name of the plaintiff only, who thereafter was alone liable to pay such taxes. It is submitted that the alleged agreement or promise to pay the taxes is clearly disproved by the evidence, and that even if such an agreement had ever really existed it would not

(1) 3 U. C. Q. B. 486.
(2) 27 U. C. C. P. 257.
(3) 1 Ont. App. R. 112.
(4) 9 C. B. 714.
(5) 18 Grant 532.
(6) 33 U. C. Q. B. 423.
(7) L. R. 3 P. C. 751.
(8) Pp. 96, 98, 103, 118, 140 and 141.
(9) 5 Grant 135.
(10) 18 Grant 532.

1880
RYAN.
v.
RYAN

have made any difference, because *primâ facie* the plaintiff, as the occupant of the land, was bound to pay the taxes. See the observations on this head of *Richards*, C. J., in *Williams* v. *McDonald* (1); also, the observations of *Robinson*, C J., in *Doe d. Henderson* (2), which was a case in almost all respects resembling the present case, and in which it was held that the running of the statute was not interrupted by the fact that the father had, during the period of limitation, required the son to pay the taxes for him, which the son had done. If it were agreed (although it was not proved) that the plaintiff should pay the taxes on the 200 acres in the 14th concession as an uncertain yearly rent for the 100 acres in the 13th concession after the 14th January, 1865, (as intimated in the father's letter) then there is no evidence that he paid such taxes during the period of limitation (3).

The view taken of the language of the statute (R S. O. c 108, sec. 5, sub.-sec. 7,) by Mr Justice *Patterson* in the Court of Appeal, is not justified by authority, but on the contrary is in direct antagonism to a long line of authority, both in this country and in *England*. It is difficult to conceive that the legislature intended to make new bargains for parties, and where it is agreed that there shall be a tenancy at will without any fixed period, to say that the parties are not in the relative positions they have agreed they shall be, but are under an entirely different arrangement—the creature of the statute. The correct view appears to be that held by all the other judges of the Court of Appeal, that the tenancy at will determined at the end of the year for the purposes of the bar of the statute only and not for all purposes.

Mr. *King* in reply :—

(1) 33 U. C. Q. B. at p. 43. (2) 3 U. C. Q. B. at p. 492.
(3) R. S. O. cap. 108, sec. 5, sub. sec. 6.

The respondent starts out with the statement that there was some new arrangement in 1864, all I can say this is not borne out by the evidence. As to the case of *Truesdell* v. *Cook* (1), it is not very difficult to distinguish it from this case, for here we say that from the acts and dealings of the parties a new tenancy was created. An arrangment made with the agent of the owner of the property is proved, and there was no such evidence in *Truesdell* v. *Cook*.

RITCHIE, C. J.:—

The declaration sets forth that the defendant broke and entered certain land of the plaintiff, called the northerly half of lot number one, in the thirteenth concession, western section, of the township of *Wellesley*, in the County of *Waterloo*, and Province of *Ontario*, and cut down and removed from off the said lot, and applied to his own use, a large number of timber and other trees standing, growing and being upon the said land.

Pleas—1. Not guilty. 2. Land was not the plaintiff's as alleged. 3. Land was the freehold of the defendant. 4. Did what is complained of by the plaintiff's leave.

The plaintiff joined issue on the defendant's pleas.

The trial took place before the Hon. Mr. Chief Justice *Hagarty*, without a jury, at *Berlin*, on the 24th day of September, 1878.

The dispute was confined to the south 50 acres of the north 100.

Hagarty, C. J., at the trial found as follows:—

For the present I enter verdict for the defendant. * * *

The difficulty arises as to the effect of this occupation for over 10 years before the bringing of this action, and that will require serious consideration. The claim to these 50 acres seems very unjust. The plaintiff never was promised over 100 acres which he got and sold in 1859, and his father, as I understand, devised the south 50 acres of

(1) 18 Grant 532.

1881
RYAN
v.
RYAN.
Ritchie, C.J.

this half lot to him in addition. Whatever occupation plaintiff had of this land was acting as agent and caretaker for his father, and as between the father and a stranger I think plaintiff's possession would be the father's possession. On the evidence it seems the father used to send up money to pay the taxes till 7 or 8 years ago, he then said, knowing plaintiff was using it, that he must pay the taxes for the use of the land. I find as a fact that plaintiff, even to his father's death in 1877, did not occupy or claim it as his own against his father, but merely as acting for him living on the south 50 acres and using this north 50 (now in suit) clearing some of it, taking timber off some part and protecting it. Within the 10 years it is sworn by defendant that he was sent by his father to complain to plaintiff of his cutting timber, &c., and told him so, and plaintiff promised to forbear and to pay the taxes if he was left on this place until the father would want it (see defendant's evidence on this head).

In Michaelmas term following, a rule *nisi* was granted.

On the 11th of February, 1879, the Court delivered judgment, when the court was equally divided in opinion, and the rule *nisi* dropped. And on the seventh day of March, 1879, the court again delivered judgment, discharging the said rule *nisi* without costs, for the purposes of appeal.

Of the judgments delivered on the 11th February, 1879, *Wilson*, C. J., was of opinion that the plaintiff "was not his father's servant or agent as to the land which he held in possession. He was a trespasser, if he were there wrongfully, or a tenant at will, if he were there rightfully, but he was not a caretaker of that land. He and he alone was in the sole and beneficial occupation of it. The first question then is, whether the plaintiff was a trespasser or a tenant at will."

After summing up the evidence on this point the learned Chief Justice says: "It is quite clear to me then, the plaintiff was not a trespasser and wrong-doer from the first. If he were to be considered so, it would not prejudice the plaintiff's claim, but it would seriously endanger the defendant's rights." And he finds that the plaintiff was tenant at will to his father of the north

50 acres, as well as of the south 50 acres of the same north half lot from December, 1864. The next question he says is: "Whether the plaintiff has had possession of the disputed 50 acres for a period of ten years from one year from December, 1864, that is until December, 1875, and his father was dispossessed for the same period."

He says: "I name these dates without continuing the time to a period after December, 1875, because if the plaintiff's possession were broken at all and the father's possession restored these events happened about seven years before the trial, and the plaintiff's possession subsequent to December, 1875, would not affect the case.

"If the plaintiff's possession were put an end to between December, 1865, and December, 1875, by his becoming tenant at will again to his father, and it is not said it was put an end to in any other manner, then the plaintiff as to the disputed fifty acres fails in his action. If it were not, he is entitled to the verdict. That question depends entirely upon the evidence."

After reviewing the defendant's evidence and referring to *Clarke's* evidence, he says: "That is no evidence of a new tenancy at will having been created between the parties; firstly, because the plaintiff refused to leave unless he got the acre of land he asked, and secondly, because he never promised to pay the taxes."

"There is no further point for discussion or argument than the one last mentioned, namely, whether the tenancy at will, which was determined in one year from December, 1864, when the statute began to run, a new tenancy at will was created between the father and the plaintiff at the time mentioned, seven years before the trial, and as a fact I am of opinion, for it is not a matter of law, it was not. It was neither proved nor found as a fact.

1881
RYAN
v.
RYAN.
Ritchie, C.J.

"If I am to pronounce my opinion upon this evidence, which I think the learned Chief Justice ought to have pronounced, that opinion is that the verdict should be entered for the plaintiff."

Mr. Justice *Galt* delivered a judgment prepared by *Gwynne*, J., before leaving the common pleas, thoroughly concurring in it, and reading it and adopting it as his own. After saying that the whole question as it appeared to him was one of facts and of inference from facts to be decided by the court as a jury would, and after carefully considering the evidence, the learned judge says:

The learned Chief Justice of the Queen's Bench, before whom this action was tried, without a jury, found as a fact that the plaintiff, down to his father's death in 1877, did not occupy, or claim to occupy, the land for which this action is brought on the north fifty acres of the north half of the lot, otherwise than as agent of his father, living on the south 50 acres of the north half, and protecting the north half, clearing some of it, taking timber off some of it, but in the character merely of agent of his father. There is much in the above evidence, as it appears to me, in support of this finding. The plaintiff's own account, that he was authorized by his father to take timber for his own use, and to cut down timber to pay the taxes upon the block, and his account of his habit every time he would go down to see his father, that is every year or every second year, of telling him everything he was doing, what he chopped, and what he cleared, and the repeated injunctions he received not to allow any stranger to take off any timber, seems to me to be very consistent with what would be natural and likely to occur in the case of a steward, caretaker, or agent, giving an account of his stewardship, which was compensated by his being allowed to live on the south 50 acres and by using the cleared part of the land for the support of his family. I am not prepared to hold that a son might not occupy land as the steward or agent of his father under an arrangement of that description, and so that the statute of limitations should not begin to run against the father. But I do not think it necessary to hold that, in this case, the occupation of the plaintiff was only as steward or agent of his father; for assuming him to have been tenant at will of his father, even from his entry in December, 1864, if the evidence given upon the part of the defendant be true, and I see no reason to doubt it, there is, as it appears, abundant evidence; the proper inference

from which is that about six or seven years ago that tenancy was determined, and a new tenancy at will created between the plaintiff and his father.

And after referring to the evidence bearing on this point, the learned judge says:

Now it appears to me that there is no reason to doubt the truth of the evidence for the defence, and that there should be no difficulty in arriving at the following conclusions, namely: That about 7 years ago the plaintiff, in violation of the express orders of his father, the owner of the land, was cutting down, or permitting to be cut down, the timber upon the lot, to the injury of the land, and that the father sent up the defendant in consequence, as his agent, with authority to enter upon the land on behalf of the father, and to remove the plaintiff therefrom, unless he should come to terms satisfactorily to the father's agent; that accordingly the defendant did go up and did enter upon the land in assertion of his father's title, and did prevent persons who were cutting and taking away the timber from doing so, and that this entry and assertion of right was done by the authority of the father and enured to his benefit, and determined any tenancy at will then existing in virtue of which the plaintiff had then possession, and that thereupon the defendant saw the plaintiff and communicated to him that he had come up with power and authority to remove him, unless he would cease cutting timber and would pay the taxes, and that thereupon the plaintiff came to an understanding and agreement which was satisfactory to the defendant, as his father's agent, that if he was allowed to remain on the place until such time as his father or any person claiming under him, should want the place, he would cut no more timber and would pay the taxes, and would give up the place whenever required so to do; and so that the proper inference to draw is, that then a new tenancy at will under the father was created, to which new tenancy the plaintiff being permitted to continue thereafter upon the place is to be attributed, and that consequently the father's title was not barred in his lifetime, and, I think, what passed between the brothers after the father's death, the manner in which they dealt with the land and the reference to arbitration is more consistent with this being the true state of the case than with the plaintiff having obtained a title by the statute of limitations, acting as he would now seem to wish to represent under advice throughout with that view.

Again, he says:

For, believing as I do the evidence of the defendant, that in reply

1881
RYAN
v.
RYAN.
Ritchie, C.J.

to his informing the plaintiff that he had authority from his father to remove him because of his wrongful cutting the timber and neglecting to pay the taxes, the plaintiff undertook not to cut any more timber and to pay the taxes, and to give up the possession whenever required to do so by his father, I think no other construction can be put upon this conduct than that then a new tenancy at will was agreed to in order to avert the threatened eviction, and that this did take place I see no reason to doubt.

If plaintiff was in as a mere trespasser, then entering into this agreement made him a tenant at will.

If he was in as a tenant at will, on the terms of not cutting any timber but for his own use, and of not suffering or permitting others to cut timber on the land, and he did cut on his own account, contrary to his agreement, and without the assent or authority of his father, the owner, and did suffer and permit others to cut, did he not by such acts and conduct become a trespasser, and so put an end to the tenancy at will? And the father being cognizant of this, and sending his son with authority to put him off the premises, did not the new agreement by which his father, through his agent, permitted him to remain, constitute a new tenancy? So that in any view of the case, whether originally caretaker, or trespasser, or tenant at will, he was tenant at will from the time of the last agreement.

The defendant, in my opinion, was not in the full possession of his lot nor occupying it as his own. On the contrary, I think that his possession was the possession of the father; he held it subject to the control of his father, and under him, as his agent or caretaker; that as his father's agent, and for his father's benefit, he kept off trespassers; that by the direction and under the authority of his father he sold timber off it to pay the taxes; that the timber he took was, by agreement with his father, confined to timber for his own use only, and was taken under the authority and by the permission of his father; and when the father heard he was cutting more than he ought, *Patrick*, the other

son, was sent by the father to stop him and others, which he did; all of which doings in connection with the property he continuously, from time to time, if not every year, reported to his father and received from him, as owner, directions respecting the management of the property. That about seven years ago, the father hearing that, in opposition to his orders, plaintiff was cutting or permitting timber to be cut and taken off the lot, the father sent his son, the defendant, as his agent, to prevent the plaintiff and others from cutting and taking any timber, and if need be to remove the plaintiff off the land; and he did enter on the land as agent of the father, the owner, and did prevent the plaintiff and others from further cutting and taking away the timber, and did permit the defendant to continue under a new agreement, that he should be allowed to remain on the place till his father or any person claiming under him should want the place, if he would cut no more timber, and would pay the taxes, and would give up the place when required so to do. If he did not from this time continue in possession as agent or caretaker of his father, continuing in under this new agreement, he must be considered holding under the agreement as tenant at will.

Chief Justice *Wilson* in his judgment says:

"I am quite sensible the plaintiff's claim is a most unrighteous one. He is setting it up against his father, who has all along dealt kindly by him, and who has left him a portion of land by his will, because he could not bear so large a family should want if not further helped."

Chief Justice *Moss* says:

"He took posession for his own benefit, and in order to derive his sustenance from the land as long as his father did not interfere. He commenced and continued to use it according to his own pleasure. He communi-

1881
RYAN
v.
RYAN.
Ritchie, C.J.

cated to his father the fact that he had taken possession and impliedly asked his assent to continuing in possession, but he said nothing of being a bailiff or guardian of the property."

If this is so, did not he cease to use it according to his own pleasure, at any rate after defendant was sent to turn him off unless he ceased cutting timber, kept off trespassers and paid the taxes? And when he agreed to do this did he not from that time become a tenant at will? He was permitted to continue the occupancy of the land, limited as to the timber, performing the service of keeping off trespassers and taking in recompense the profits of the land; does not this arrangement create a tenancy at will?

Be this as it may, *Michael Ryan* was on the land as a mere caretaker for his father, and if so the statute did not run, or he was on as tenant at will to his father on the terms as stated by himself: "I was to take care of the other land; to mind it; let no timber be cut off it; see that no timber was taken off it, or harm done to it. He sent me up money to get some chopped on the north half. I was allowed to take timber off any part of it, but not to give it to any one else, or let any one else take it away." He did cut and sell timber off the land and allow others to cut. This, in my opinion, determined the tenancy: and when *Patrick* went up to put him off for so doing, and he agreed to pay the taxes and cut no more, a new tenancy was created.

FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:

The plaintiff in this action took this property admittedly belonging to his father. He first settled on 100 acres, got a deed of the same from his father and then sold them, and he remained caretaker as to the balance

of the property, some 300 acres. After selling his own 100 acres, he settled on another 50 acres, not the portion of the lot in question, but on running his lines it was found that he had cut trees and that a portion of the land in dispute was in his possession. He then applied to his father for permission to remain in possession, which was granted on certain conditions. Subsequently he got by devise from his father, the 50 acres he had gone to settle on, and by the same will the defendant got the 50 acres now in dispute.

I cannot see that there is any evidence that he ever got these 50 acres otherwise than as caretaker for his father, and he therefore could have no title against his father. I consider for this reason the appeal should be allowed.

I consider further that, whether he is regarded as trespasser or tenant at will, he could not set up his possession beyond a certain date, because at that time his brother, by direction of his father, went to him, complained of allowing the trees to be cut and entered with him into a new arrangement and a new contract. Some of the Judges of the Court below seem to have been of opinion that the original tenancy at will could not be set aside unless there was evidence of a demand of possession or notice to quit. I do not think it was necessary and therefore the appellant is entitled to the land and to our judgment in his favour on this appeal.

GWYNNE, J.:—

When the facts of this case are thoroughly understood it appears to be free from difficulty. Both parties relied mainly upon *Day vs. Day* (1) and *Keffer vs. Keffer* (2), but the appellant with greater reason. Both of these cases proceeded upon the admitted basis that

751

(1) L. R. 3 P. C. 781. (2) 27 U. C. C. P. 272.

1880
RYAN
v.
RYAN.
Gwynne, J.

the estate of the party claiming to have acquired a statutory title was at its commencement a tenancy at will, whereas here, as appears very clearly, the possession of the respondent in its commencement was that of servant, agent, or caretaker for his father. The learned Chief Justice of the Court of Queen's Bench, who tried the case without a jury and himself heard all the witnesses give their evidence, found as a matter of fact that, not only was the respondent's possession in its commencement that of a servant, agent, or caretaker for his father, but that this relationship continued throughout until the father's death in 1877, and so that the respondent never had any estate of the nature of a tenancy whether by the year, or at will, or otherwise. Now, this is just one of those cases in which a Court of Appeal should not reverse the finding upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the Judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. So far from that being capable of being said in this case, the finding of the learned Chief Justice appears to be perfectly justified by the evidence. It appears that the respondent's father, who lived with his family, consisting of several children, in the Township of *Tecumseh*, and owned a block of 400 acres in the Township of *Wellesley*, which is very remote from *Tecumseh*, sent the respondent his eldest son in the year 1849, up to *Wellesley*, to take care of the block of land under an arrangement then made of which the respondent himself gives this account :—

When I first went up I got instructions from my father. He told me to go up and take my choice of the 400 acres. I picked out the south half of lot 1 in the 13th concession. I was to take care of the other land—to mind it—to let no timber be cut off it—to see that

no timber was taken off it or harm done to it. I was allowed to take timber off any part of it, but not to give it to any one else or to let any one else take it away. In November 1864 I sold the S½ of the lot 1 in the 13th concession and I moved on to the north half in December 1864. I wrote a letter to my father before I moved on telling him that I was going to move on.

He then, altho' no foundation was made to enable him to give secondary evidence in his own favor of the contents of the letter, proceeds to say :

The substance of my letter that I sent to my father was that I had sold out the place and was going to move on to the next one. I did not say how long I was going to stay, or what I was going to do on it. I wrote to get some money to pay the taxes. I had not asked him for this lot. I had not intimated to him that I would like another hundred acres.

Now, in all this, there is not a suggestion that he contemplated making any, the slightest, difference in respect of the relationship then existing between himself and his father as regards this land, or that he contemplated converting his possession as caretaker for, into a tenancy under his father, if the latter would consent. At the time of his selling the S½ of the lot he was in possession of that piece as his own by deed from his father, given in pursuance of the arrangement whereby he was in possession of the other 300 acres as the agent, servant, or caretaker for his father. This relationship still existed at the time of his writing to his father the letter of November and at the time of his going on to the N½ of this lot 1 to live in December 1864. A letter written by his father in January, 1865, was produced, but there is nothing in it at all inconsistent with the continuance of the relationship of master and servant, or caretaker, as before. In it the father intimates that the respondent must not expect to get a deed of the N½ as he had got of the S½. It was quite consistent with that letter and with everything of which there is any evidence up to its receipt by the respondent, that the

1881
RYAN
v.
RYAN.
Gwynne, J.

relationship of master and servant, or caretaker, was to continue between the father and son as before. The onus therefore lay upon the respondent to show precisely when, if ever, that relationship was changed and that of tenancy was first created. That it continued throughout until the death of the father in 1877, as was found by the learned Chief Justice who tried the cause, there is evidence to justify the conclusion.

The respondent himself says that he thinks he went down to see his father the next winter after he had moved on to the N½. He says :

Either my wife or I went down every second winter. I cannot tell which of us went down first after December 1864. It was not more than two years after that, that I went down myself.

And again :

I told him, [his father] everything I was doing. I would tell him when I had so much chopping or clearing done. *I would tell him every time I went down. He told me to take care of the place and to let no one take lumber off it.* People had gone to him and complained that I was allowing too much timber to be taken off. *He told me I could sell timber to pay the taxes,* but I was not to let others haul it away.

Now, this occurring every time the respondent went down is exactly what would be natural between a steward or caretaker and his master, and is quite consistent therefore with the relationship in virtue of which the respondent first entered still continuing. Then there is the evidence of *Duncan McKenzie*, which is very strong. He says :

Somewhere about 8 or 9 years ago, a man of the name of *West* and I went to buy some timber. *Michael* [that is the respondent] was then living on the south fifty of the north half. *He told us, his father allowed him to sell the timber on the place,*—that referred to the whole bush as I understood it, wherever we could get timber to suit. Then, two years ago, my cattle got into that bush—the bush of the hundred that *Pat* is on, and the bush of the 50 *Michael* disputes about, was all in one,—he said they had got through it a number of times, he told me he would put them in pound. I told him,

it did not belong to him any more than to me. He told me that made no difference, he *was the agent of his father* and if I did not keep them out, he would put them in pound.

Now here is abundant evidence from which a jury might fairly conclude, as the learned Chief Justice who tried the case did, that the relationship of servant, agent or caretaker, in virtue of which the respondent first acquired the possession, continued throughout. The respondent's own evidence of what passed between him and his father from time to time after December 1864 is quite consistent with the continuance of the original relationship of master and servant, and this is confirmed by the evidence of *Duncan McKenzie*, by which it appears that upon two different occasions within the last 8 or 10 years the respondent asserted the right to deal with the land as *the agent of* his father, upon one of which occasions he sold timber to the witness, asserting that his father allowed him to do so, and it is part of his own evidence that by the arrangement in virtue of which he became and was caretaker for his father he was authorized to sell the timber, as well to enable him to pay taxes as for his own use, and this permission was continued apparently upon every occasion that the respondent visited his father after December, 1864, accompanied with the peremptory injunction against the son permitting other persons to cut and haul away the timber except for the purposes aforesaid.

It is contended, however, that the evidence of *Duncan McKenzie* is valueless as relating only to a verbal admission by the son of the father's title which, as is contended, is not admissible under the statute, and *Doe Perry* v. *Henderson* (1) is referred to in support of this view: but the contention involves a manifest *petitio principii*, and indeed a misconception of the provisions of the statute and of the decision in *Doe Perry* v. *Hen-*

(1) 3 U. C. Q. B. 486.

1881
RYAN
v.
RYAN.
Gwynne, J.

derson, for although true it is that the statute enacts that "*where any person is in possession &c., &c., as tenant* " *at will* the right of the person entitled subject thereto, " or of the person through whom he claims to make an " entry, &c., &c.. shall be deemed to have first accrued " either at the termination of such tenancy or at the " expiration of the year next after the commencement " of such tenancy," and that where any acknowledgment of the title of the person entitled to any land is given to him or his agent *in writing* the right to make an entry or to bring an action to recover such land shall be deemed to have first accrued at and not before the time at which *such* acknowledgment, or the last of such acknowledgments, if more than one was given, and although true it is that *Doe Perry* v. *Henderson* determines that when the statute has begun to run a mere verbal acknowledgment while it is running by the person in possession that the land is the property of the true owner will not stop the running of the statute, still where the question is whether or not the relation of tenancy ever existed?—whether the possession to which the provisions of the statute are sought to be applied was that of a servant, agent or caretaker, or on the contrary that of a tenant?—there is no case which excludes evidence of the fact that the person seeking to avail himself of the statute has verbally acknowledged that his possession was not at all that of a tenant, but was that of a servant, agent or caretaker. In *Doe Perry* v. *Henderson* the late learned Chief Justice *Robinson* draws plainly the distinction between the two cases. He there says: " The son was in fact occupying for his own " benefit *and not as the servant or agent of his father.*"

Now, the principle of *Day* v. *Day* and of *Keffer* v. *Keffer* is this: that acts which were quite consistent with the continuance of the original relationship created between the father and son could not be relied upon

as putting an end to that relationship, and in *Day v. Day* it was held to be a proper question of fact to submit to the jury, (and it is therefore a proper one for a judge trying a case without a jury to determine) whether the acts relied upon as terminating the first relationship existing between the father and son as regarded the possession of the land were consistent with the continuance of that relationship; and in *Day* v. *Day*, the jury having decided that they were, it was held that the first relationship was not determined. This decision, when applied to this case, supports the contention of the appellant, and not that of the respondent, and it is quite right that it should be so, for it would certainly tend to render the title to land very insecure if it should be competent for a person who obtains the possession of land in the character of servant, agent or caretaker for another, at his own sole pleasure, without the knowledge and consent of the other, to convert that relationship into one of *tenancy at will* so as to enable the agent, who is confided in as such by his principal, to dispossess his principal, and in process of time to extinguish his title.

Then, we have the evidence of the appellant, who says that he was sent up by his father who had heard that the respondent was cutting more timber than was right, and that he was destroying the land, with instructions to tell him to stop cutting the timber, and that if he would not pay the taxes the father would put somebody else on the land. That accordingly the respondent did go up to the land as his father's agent; that he found a man hauling timber off the place for rafters, and that he interfered and forbid him, and that he promised to desist; that he next saw the respondent and told him the purpose for which he had come up, and the instructions he had from his father, and he forbid the respondent to sell or dispose of any more

1881
RYAN
v.
RYAN.
Gwynne, J.

timber off the place. That in reply the respondent promised that he would cut no more timber, and that he would pay the taxes if he should be left on the place until such time as his father or the boys, his brothers, wanted it. The respondent, having been himself examined in his own interest upon this point, admitted that he may have said that he would give up the place if his father wanted it, but he could not swear whether he did say so or not. The appellant, however, swears that he did say so, and it is plain that the interview resulted in an arrangement whereby the respondent was allowed to remain on the land, for this is the only natural inference to draw under the circumstances, from his being permitted to continue in possession and from the mutual occupation of the land for a short time before and after the father's death. Now, this evidence of the appellant is also quite consistent with the fact that throughout the respondent continued in possession in the same character of caretaker in virtue of which he had originally obtained the possession.

It is however urged, that there is that in the evidence of the respondent's wife which tends to shew that there was at some time a change made in this relationship; if there be, it must be said that her evidence is defective in a most important point, namely, in not shewing *when precisely* that change occurred, for upon that turned the question whether or not the statute had run for a sufficient time from that event occurring to give to the plaintiff in the action a statutory title, the onus of establishing which wholly lay upon the respondent, who was the plaintiff; but further, it is only necessary upon this point to say that the judge who tried the case had the best opportunity of determining from the demeanor and manner of the witnesses in giving their evidence which appeared to be most worthy of credit, and he has adopted the evidence, of which it

must be admitted there is abundance, which supports the continuing existence of the original character of caretaker, and a Court of Appeal cannot in such a case with propriety say, that his finding, which is in such plain accord with justice and the integrity of parties originally placed in a fiduciary relation, is in point of fact plainly erroneous. Nor would it avail the respondent if it should be established beyond all doubt that the relation of landlord and tenant did exist between the father and himself, for, assuming the respondent had been tenant at will to his father and that the statute was running in his favor at the time that the appellant was sent up about six years before the action brought, there is abundant evidence to justify a jury in coming to the conclusion that what occurred then evidenced the creation anew of the relationship of landlord and tenant, and that is the inference which under the circumstances a jury should draw. The fact of the respondent being allowed to continue to remain upon the land at all after the appellant had been sent up for the purpose detailed in the evidence, and the subsequent dealings of the brothers in relation to the land shortly before and after the father's death, and when the respondent was aware that the father had left by his will the south fifty acres of the N½ of the lot in question to the respondent and the residue to the appellant, tend to support the evidence of the latter, and that evidence, if believed by a jury, and I see no reason to disbelieve it, would justify the conclusion, as the proper inference to be drawn, that a new tenancy at will was created and was then acknowledged to be in existence between the father and the respondent so as to create a new point of departure for the running of the statute. The question in such case, as said by Lord *Denman* in *Doe Groves* v. *Groves* (1), is merely one as to which

(1) 10 Q. B. 491.

1881
RYAN
v.
RYAN.
Gwynne, J.

of two suppositions is most consistent with the facts in evidence, and that which appears to be most consistent with those facts is, that if not then in possession as agent or caretaker for his father the respondent by what passed between him and the father's agent acknowledged himself to be and agreed to be a tenant at will to his father. The learned counsel for the respondent seemed to be of opinion that, assuming the statute to have begun to run in favor of the respondent before that interview, a verbal acknowledgment made by the respondent in that interview with the father's agent, though made as detailed in the evidence of the appellant, would not have been sufficient within the authority of *Doe Perry* v. *Henderson*. But what *Doe Perry* v. *Henderson* decided upon this point was, that the mere acknowledgment by the party in possession verbally made that another person was the true owner of the land was not sufficient to stop the running of the statute, such an acknowledgment though made to the true owner would be quite consistent with the fact that the person making it was nevertheless availing, and intending to avail, himself of the *continual* running of the statute in his favor, it would involve no acknowledgment of there existing at the time the relation of landlord and tenant between him and the true owner, it would be no more than if he said to the true owner: "You certainly have the title, but I "am acquiring it under the statute," but *Doe Perry* v. *Henderson* does not, nor does any case, decide that the verbal acknowledgment by a party in possession made to the owner or his agent, that the relation of landlord and tenant is *then existing* between the person in possession and the true owner is not good evidence, as against the person making it, of the fact of the present existence of the relationship so as to give a new departure for the run-

ning of the statute—equally as does the payment of a sum of money by way of rent, it may be for the first time several years after the statute had begun to run, but before its efflux, which is but an *act* in acknowledgment of the existing relationship of landlord and tenant Again, it was urged that in *Day* v. *Day* it is said : " When the statute has once begun to run it " would seem on principle that it could not cease to " run unless the true owner, whom the statute assumes " to be dispossessed of his property, shall have been " restored to the possession," but the judgment goes on to explain that he may be restored to the possession so as to control the continuance of the running of the statute by three different ways--either, 1st, " by enter- " ing into the actual possession of the property, or 2nd. " by receiving rent from the person in occupation," the payment of which is but an act in acknowledgment that the party paying it is then tenant of the party to whom he pays it, or 3rd. " by making a new lease to " such person which is accepted by him, and it is not " material whether it is a lease for a term of years, from " year to year, or at will."

Now, *Hodgson v. Kosper* (1) and *Day v. Day* are authorities that the fact of such new lease having been made and accepted by the person in possession may be implied from acts and conduct, and certainly it appears to me that the acts and conduct, to which I add expressions from which a tenancy at will should be implied to have been then created, unless as I have said the respondent was then still invested with the character of agent and caretaker for his father, are stronger than were the circumstances which were held to be sufficient for that purpose in *Doe Groves v. Groves* (2), *Doe Bennett v. Turner* (3), and *Doe Shepherd* v. *Bayley* (4).

(1) 3 E. & E. 149.
(2) 10 Q. B. 486.
(3) 9 M. & W. 643.
(4) 10 U. C. Q. B. 310.

1881
RYAN
v.
RYAN.
Gwynne, J.

As to the further point which was urged in favor of the respondent's contention, namely, that he had been assessed and paid the taxes upon the land for several years, it is only necessary to say, that by his own shewing it was provided by the arrangement in virtue of which he originally became agent and caretaker of the land for his father that he should be at liberty to sell timber to pay the taxes, and there is ample evidence to shew that he exercised this privilege to an amount greater, as it would seem, than was necessary to pay taxes.

Upon the whole I am of opinion that the majority of the Court of Appeal for *Ontario* erred in reversing the verdict rendered by the learned Chief Justice who tried the case, and that this appeal should be allowed and the verdict and judgment thereon of the Court below in favor of the appellant, the defendant in the action, should be restored with costs.

Appeal allowed with costs.

Solicitor for appellant: *John King*.

Solicitors for respondent: *Bowlby, Colquhoun & Clement.*

JOHN NASMITH.....APPELLANT; 1880 *Nov. 16.

AND

ALEXANDER MANNING.....RESPONDENT. 1881 *Feb'y. 12.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

R. W. Co.—Action by creditor against a shareholder—Conditional agreement—Allotment, notice of, necessary.

The appellant, a judgment creditor of the *T. G. & B. Railway Co.*, sued the respondent as a shareholder therein, for unpaid stock. From the evidence it appeared that the respondent signed the stock book, which was headed by an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent of the amount of the said shares and all future calls. The company, on the 1st July passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper notifying subscribers to the capital stock of the *T. G. & B. Railway Co.*, that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never called for or received his certificate of allotment, and never paid the ten per cent, and swore that he had never had any notice of the allotment having been made to him.

The case was tried twice and the learned judge, at the second trial, although he found that the respondent had subscribed for fifty shares and had been allotted said fifty shares, was unable to say whether respondent had received actual notice of allotment.

Held, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for

*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

1880

NASMITH v. MANNING.

shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved.

[*Ritchie*, C. J., and *Gwynne*, J., dissenting.]

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing a judgment of the Court of Queen's Bench (2), and directing a verdict to be entered for the defendant.

This was an action or proceeding, in the nature of *scire facias quare executionem non*, instituted by the plaintiff, a judgment creditor of *The Toronto, Grey and Bruce Railway Company* against the defendant, who, as the plaintiff alleges and contends, is a holder of fifty shares in the capital stock of the said company, of which there remains still unpaid an amount more than sufficient to pay and satisfy the plaintiff's judgment.

To the plaintiff's declaration the defendant pleaded:

1. That he was not nor is the holder of the said shares as alleged.

2. That he was induced to become the holder of the said shares by the fraud of the said company, and that within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of said shares or any of them, and before the debt due by the company to the plaintiff was incurred, he repudiated and disclaimed the said shares and all title thereto and all liability in respect thereof, and gave notice thereof to the company, whereof the plaintiff had notice.

3. That he was induced to become the holder of the said shares by the fraud of the said company and the plaintiff, and that he repudiated the stock after notice of the fraud, as in the second plea, and afterwards, in order to defraud the defendant, the plaintiff, colluding

(1) 5 Ont. App. R. 126. (2) 29 U. C. C. P. 34.

with the said company, instituted the action in which the plaintiff obtained judgment against the company.

4. That the company had sufficient goods to satisfy the plaintiff's judgment and from which the amount of the execution could and would have been realised, but for the fraud and collusion of the plaintiff and the said company, whereby the sheriff was induced falsely to return the said execution, as if the said company had no goods and chattels in his bailiwick whereof he could make the amount of the said execution in whole or in part.

5. That it was agreed between the defendant and the said company that if the defendant would sign an agreement to take the shares, the company would give to the defendant and one *John Ginty* a contract for the construction of the company's railway, and that until the said contract should be given the defendant should not be bound by his signing said agreement, that relying upon such agreement of the said company and not otherwise, the defendant did sign the said agreement to take said shares, but that the company have refused to give the said contract to defendant and the said *John Ginty*.

The sixth plea is somewhat similar to the fifth.

Issue being joined the case came down for trial before *Armour*, J., without a jury in the spring of 1878, (the evidence is set out in the report of the case in 29 U. C. C. P. 34 and 5 *Ont.* App. Rep. 127,) when a verdict was rendered in favor of the plaintiff. Upon a motion to set aside that verdict, a rule was made absolute for a new trial in consequence of a then recent decision in *Denison* v. *Lesslie* (1) in the Court of Queen's Bench and in the Court of Appeal of *Ontario*, and in consequence of the construction which the company by a certificate of allotment produced at the trial seemed to

(1) 3 Ont. App. R. 536.

1880
NASMITH
v.
MANNING.

have put upon the document signed by the defendant, namely, that it was only an application for shares, which if a correct construction would, upon the authority of several English cases, have required a response either in writing or verbally, or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder before he could be liable as such, a point as to which there had been no finding at the trial.

The case accordingly went down to trial a second time and was tried by *Cameron*, J., without a jury, who by his verdict found: 1. That the defendant subscribed for fifty shares in the stock book of the company, and that the fifty shares were allotted to him by the company, and that the company sent notice to him of calls, and that his name was published in the *Globe* newspaper as a shareholder, and that he was at the time of such publication a subscriber to the *Globe*, and that all was done by the company to give the defendant a claim against the company for the stock and to have any benefit that might accrue therefrom. He further added that he could not say that the defendant received actual notice of the allotment, but he found that the company by notices sent to his address gave him notice of their considering him a shareholder. Upon this verdict being moved against the Court of Queen's Bench after argument held, that the evidence supported the findings of the learned judge.

Upon appeal by the defendant to the Court of Appeal of *Ontario*, the majority of that court reversed the judgment of the Court of Queen's Bench, and ordered a verdict and judgment to be entered for the defendant. From that judgment the plaintiff has appealed to this court.

The printed documents connected with the case, viz.: the heading of the stock book, extract from the minutes

of a meeting of the directors of the company, the form of certificate of allotment, resolutions and notices, &c., are referred to at length in the judgment of *Ritchie*, C. J., hereinafter given.

Mr. *Blake*, Q C., and Mr. *Proctor*, for appellant:

The appellant is a judgment creditor of the *Toronto, Grey & Bruce Railway Company*, incorporated by 31 *Vic.*, c. 40, *Ontario*. The several clauses of "The Railway Act" (1), relating to calls, shares, and their transfer, are expressly incorporated therewith.

By referring to sections 1, 2, 6, 7, 15, 17, 18, 27 and 28 of this Act it will be seen that in the mind of the legislature the word "subscriber" is equivalent to the word "shareholder."

The paper signed by *Manning* was a paper prepared by the company, and was executed under seal. The Act empowered the provisional directors to open stock books, to make a call upon the shares subscribed therein, and to call a meeting of the subscribers for the organization of the company, and it was in pursuance of this statute that the subscription of the respondent was made in the company's stock book under his hand and seal. It seems fanciful to give decisions in this country based on decisions of another country where an entirely different mode of dealing with subscribers exists. We all know of the mania that prevailed in *England* some years ago, to get stock in a joint stock company. It was sufficient to announce that a company was being organized, the eagerness of the public was such that there were immediately more applications for stock than was wanting, and it was only after allotment that the applicants could be said to be shareholders.

The document signed by respondent being a covenant to pay under seal, the assent of the company thereto is

(1) Con. Stat. Can., c. 66.

1880
NASMITH
v.
MANNING.

sufficient, and such assent might be inferred, if, as in this case, it was not repudiated by the company; but the evidence shows the company did actually assent to the subscription, and sent respondent notices to pay calls.

The earliest decision on this point in our courts was that given by the Court of Common Pleas in the case of *Smith* v. *Spencer* (1); so again in *Lake Superior Navigation Co.* v. *Morrison* (2); so again in *European & North American Railway Co.* v. *McLeod* (3).

Now, what are the admitted facts as to the mode in which Mr. *Manning* became what he did become.

The capital stock of the company was $3,000,000. It was never contemplated to get more than 10 per cent. of that amount subscribed, the intention of the provisional directors being to get a respectable list of *Toronto* shareholders in order to induce the counties to give the company municipal aid. Accordingly, after a deal of manipulation and canvassing, Mr. *Laidlaw*, one of the most active provisional directors, and Mr. *Campbell*, the company's broker, succeeded in getting subscriptions for their stock to the amount of $300,000, the amount required for organization. *Manning* was induced to subscribe stock at the instance of Mr. *Laidlaw*. This subscription was admitted by him, although at first he alleged it was conditional, and his main defence was that he was only to become a shareholder on his getting the contract to build the company's road about to be constructed in connection with one *John Ginty*, who was also a partner of his in building another road. The court held this defence could not avail him, but in the latter stage of the proceedings he thought it better to say he was not a shareholder at all. But how can it be seriously contended that the company who

(1) 12 U. C. C. P. 281. (2) 22 U. C. C. P. 217, 220.
(3) 3 Pugs. N. B. 3, 34, 35, 40.

wanted all the subscribers they could get, who sent out brokers canvassing, intended to take conditional subscriptions? There was no danger of any subscriber not having his stock. It was even deemed necessary to publish the stock sheet, in order to show who were interested in the scheme, and that the company was *bonâ fide* organized. All this was known to Mr. *Manning*, and we are entitled to contend that what took place is real evidence of his becoming a shareholder. Then, also, it is in evidence that he not only consented to sign the list of subscribers which was published, but he aided publicly the directors in getting municipal bonuses and aid. This, it is argued, does not prove he had knowledge of the allotment, but surely he knew he was a shareholder, and if anything more was to be done, it was only some mere formal matter. Under all these circumstances we have very strong evidence to sustain that construction upon which we primarily rely, *i. e.*, that the effect of signing this document was to create that relation between the company and the respondent as to make him a subscriber. Within the four corners of this paper we find a perfect contract, the minds of both parties were brought together.

The second point relied on is, that if it was an imperfect contract, the only condition was the "allotment," and upon allotment, and not upon "notice of allotment," the respondent became a shareholder. What the court of appeal has done is this: that they have interpolated the words "upon notice of" in this document under seal. They have not taken into consideration that acceptance by the subscriber had taken place. Now, there can be no doubt that an allotment was made, and we cannot therefore be hampered with this objection, for the evidence shows that the company sent respondent calls to pay.

If notice of allotment were necessary it may be implied

1880
NASMITH
v.
MANNING.

from the facts of the case, or the conduct of the parties; and the court of first instance having found that respondent was aware of the company's acceptance of his subscription, or was in a position to have known the same and could have taken advantage of any benefit which might have resulted from the acceptance of himself as a shareholder, consequently he is liable. *Levitas' Case* (1); *Wheatcroft Case* (2); *Pritchard* v. *Walker* (3); *Crawley's Case* (4); *Fletcher's Case* (5).

If the respondent expected or required notice of the allotment or call, he should have taken pains to have informed himself when the same was made, for there was a duty upon him to pay the calls made by the directors. Sec. 48, 49 and 50, Con. Stat., c. 66. *Sparks* v. *The Liverpool Water Co.* (6); *Aylesbury Railway Co.* v. *Mount* (7).

The cause having been twice tried, and a verdict on both trials having been for the plaintiff upon evidence deemed sufficient by the learned judges who tried the case, and the same having been expressly approved of by the court below, the Court of Appeal should not have turned the verdict so obtained into a verdict for defendant, but should have ordered a new trial. *Merchants' Bank* v. *Bostwick* (8).

The following authorities were also cited and commented on by counsel: *Denison* v. *Lesslie* (9); *Gun's Case* (10); *Nixon* v. *Hamilton* (11); *Harrison's Case* (12); *Moore* v. *Murphy* (13).

Mr. *Ferguson*, Q. C, for respondent:

If the true construction and meaning of the document

(1) L. R. 3 Ch. 36.
(2) 29 L. T. 324.
(3) 24 U. C. C. P. 434, 472, 477.
(4) L. R. 4 Ch. 322.
(5) 17 L. T. 136.
(6) 13 Ves. 428.
(7) 4 M. & G. 651.
(8) 28 U. C. C. P. 465.
(9) 43 U. C. Q. B. 22.
(10) L. R. 3 Ch. App. 40.
(11) 2 Or. & Wal. 364.
(12) L. R. 3 Ch. 638.
(13) 17 U. C. C. P. 444.

signed by respondent, is, that it was not an application for shares, but a subscription without any condition, I must admit the authorities cited by the learned counsel for appellant have great weight; but if it is only an application for shares, and that on the face of the document itself there was something else to be done, it is clear the company have no right against the respondent until they do that further act—so I say that upon signing this document respondent did not become *eo instanti* a shareholder. By this document the company need not allot unless they choose, and therefore at that time there was no complete contract, the mind of the company and of the subscriber had not yet come to any decision as to the ownership of the $5,000 stock.

In this document which is said to be the stock book, we find the expression "upon allotment," it shows clearly that in the minds of the parties there was to be an allotment. The proposal was to take, if allotment is made and not otherwise, and it is upon these words that the construction of this agreement must turn. The remedy sought is an extraordinary one given by statute, and unless the requisites of that statute were in all matters strictly made out by the appellant, he was not entitled to succeed.

Now, in order to make out that the respondent was a shareholder, and liable as such by reason of his having so signed the same, it was necessary for the appellant to prove that the respondent had received notice of an allotment of the shares, or at least that there had been a response to this application received by, or communicated to, the respondent, stating, or to the effect, that the said company had accepted his application and himself as a shareholder of the said shares, and this within a reasonable time after the making of such application, and in this respect the evidence adduced by the appellant entirely failed, and there was a positive

1880
NASMITH
v.
MANNING.

denial by the respondent of his having received any such notice of allotment or response. It was not proved that there was any verbal response to the said application, even if that were possible and would be sufficient. Nor was it proved that any letter or other document containing any such response was delivered to the respondent or even mailed to him, if this last could have been held sufficient in the face of the respondent's denial of the receipt of it, which it could not. Nor was it proved that the respondent had any knowledge of an allotment of the said or any shares to him, and besides, it appears by the evidence and the circumstances thereby disclosed, that a long series of years passed away after the time of the said application during which neither the said company nor the respondent considered that the respondent was such shareholder, and for these reasons it was not established that the respondent was such shareholder, and the judgment of the court below is correct and should be affirmed. *Denison* v. *Lesslie* (1); *Redpath's* case (2); *Wall's* case (3); *Pellatt's* case (4); *Gunn's* case (5); *British American Tel. Co.* v. *Colson* (6); *Kipling* v. *Todd* (7); *Ness* v. *Angus* (8).

The newspaper publication and the publication of list of shareholders relied upon by the appellant as being some evidence that the respondent had notice or knowledge that the company had accepted the said application and the respondent as a shareholder, were not evidence against the respondent, and besides, knowledge of them was not brought home to the respondent by the evidence.

The findings of the learned judge who tried the cause were not sufficient to warrant the entry of a verdict for

(1) 3 Ont. App. R. 536.
(2) L. R. 11 Eq. 86.
(3) L. R. 15 Eq. 18.
(4) L. R. 2 Ch. 527.
(5) L. R. 3 Ch. 40, 55.
(6) L. R. 6 Ex. 108.
(7) 3 C. P. D. 350.
(8) 3 Ex. 805.

the plaintiff (the appellant), nor were the said findings supported by the evidence, and it was competent to the court below, if necessary, to reverse these findings, they being based, at least in part, upon inferences of fact drawn by the learned judge, from facts stated in the evidence and not resting upon different degrees of credibility considered to be due to the witnesses from their demeanor before the court, and, moreover, I submit there was no finding on the point for which the case was sent back The *Glannibanta* (1); *in re Randolph* (2).

The learned counsel also referred to and relied upon the authorities following: *Household Fire Insurance Company* v. *Grant* (3); *Reed* v. *Harvey* (4); *Byrne* v. *Van Tienhoven* (5); *Jones* v. *Hough* (6); *McCraken* v. *McIntyre* (7); *Nasmith* v. *Manning* (8).

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

RITCHIE, C. J.:—

The *Toronto, Grey & Bruce Railway Co.* was incorporated by 31 *Vic.*, c. 40 of the *Ontario* Legislature, by the second section of which act certain clauses of the Railway Act of the Consolidated Statutes of *Canada* are incorporated with and to be deemed a part of this act, viz:—

The several clauses of the Railway Act of the Consolidated Statutes of *Canada*, and amendments with respect to the first, second, third, fourth, fifth and sixth clauses thereof, and also the several clauses thereof with respect to "interpretation," "incorporation," "powers," "plans and surveys," "lands and their valuation," "highways and bridges," "fences," "tolls," "general meetings," "president and directors," "their election and duties," "calls," "shares and their transfers," "municipalities," "shareholders," "actions for indemnity and fines and penalties, and their prosecution," "by-laws, notices,

(1) 1 P. D. 283.
(2) 1 Ont. App. R. 315.
(3) 4 Ex. D. 216.
(4) 5 Q. B. D. 184.
(5) 5 C. P. D. 344, 348.
(6) 5 Ex. D. 115. 122.
(7) 1 Can. S. C. R. 479, 526.
(8) 29 U. C. C. P. 52, 53.

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

&c.," "working of the railway," and "general provisions," shall be incorporated with and be deemed to be a part of this act, and shall apply to the said company and to the railway to be constructed by them, except only so far as they may be inconsistent with the express enactments hereof, and the expression, "this act," when used herein, shall be understood to include the clauses of the said Railway Act so incorporated with this act.

Section 14 provides:—

As soon as shares to the amount of three hundred thousand dollars of the capital stock of the said company, other than by municipalities, shall have been subscribed, and ten per cent. thereof paid into some chartered bank, having an office in the city of *Toronto* (which shall on no account be withdrawn therefrom, unless for the service of the company), the directors shall call a general meeting of the subscribers to the said capital stock, who shall have so paid up ten per cent. thereof for the purpose of electing directors of the said company.

Section 17 provides:—

At such general meeting the subscribers for the capital stock assembled who shall have so paid up ten per cent. thereof, with such proxies as may be present, shall choose nine persons to be the directors of the said company, and may also make or pass such rules and regulations and by-laws as may be deemed expedient, provided they be not inconsistent with this act.

Section 27 provides:—

On the subscription for shares of the said capital stock, each subscriber shall pay forthwith to the directors for the purposes set out in this act, ten per cent. of the amount subscribed by him, and the said directors shall deposit the same in some chartered bank to the credit of the said company.

Section 28 provides:—

Thereafter calls may be made by the directors for the time being, as they shall see fit, provided that no calls shall be made at any one time of more than ten per cent. of the amount subscribed by each subscriber.

By the consolidated statutes of *Canada* "shareholder" shall mean any subscriber to or holder of stock in the undertaking, and shall extend to and shall include the personal representatives of the shareholder.

Under heading "shareholder:"

Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock has been paid up, but shall not be liable to an action therefor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder.

This being the state of the law, the company prepared a stock book and solicited subscriptions to stock, and the plaintiff signed the stock-book containing this agreement:

EXHIBITS.

(1)

HEADING OF STOCK-BOOK.

We, the several persons, firms and corporations whose names and seals are hereunto subscribed, severally and respectively agree to and with the *Toronto, Grey* and *Bruce Railway Company*, and bind ourselves, our executors and administrators or successors respectively, to become holders of the capital stock of the *Toronto, Grey & Bruce Railway Company* for the number of shares of one hundred dollars each, and amounts set opposite to our respective names, and upon the allotment by the said company of my or our said respective shares, we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively; provided always, that no calls shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

Toronto, April, 1869.

1869.	Name.	No. of shares.	Amt.	Seal.	Residence.	Amt. Paid.	Witness.
May 14	John Ginty...	40	$4,000	Seal.	Toronto	10p.c.	N. Barnhart.
June 19	Alex. Manning.	50	5,000	Seal.	Toronto		C. J. Campbell.

(2)

EXTRACT FROM THE MINUTES OF A MEETING OF THE DIRECTORS OF THE TORONTO, GREY & BRUCE RAILWAY COMPANY, HELD ON 1ST JULY, 1869.

The president stated that on the previous evening the amount of

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

stock required by the charter for organizing the company, viz., $300,000, had all been subscribed, and that therefore it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible; the brokers, Messrs. *Campbell & Cassels*, were instructed at once to collect the first instalment of ten per cent. on the stock, and to have the amount required by law, viz., $30,000, paid into the bank to the credit of the company before Saturday, the 10th July, so as to enable an advertisement calling the general meeting of the shareholders to appear in the *Ontario Gazette* of that date; the secretary was also instructed to prepare advertisements for the *Ontario* and *Dominion Gazettes*, and such other papers as were necessary, calling the meeting, the date of which was left to be decided by the solicitor; the secretary was also instructed to issue allotment certificates to each shareholder for the amount of shares held by him.

(Signed,) *John Gordon.*

(3)

FORM OF CERTIFICATE OF ALLOTMENT.

Toronto, 1st July, 1869.

To Alexander Manning, Esq., Toronto:

This is to certify that the *Toronto, Grey & Bruce Railway Company*, in accordance with your application for fifty shares of $100 each of their capital stock, have allotted to you fifty shares, amounting to $5,000, the first instalment of ten per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding ten per cent. on the amount of said shares, and at intervals of not less than sixty days.

W. Sutherland Taylor,
Secretary

FORM OF ENDORSEMENT ON NOTICE.

$500. *Toronto*, 3rd July, 1869.

Received from the within-named the sum of five hundred dollars, being amount of first instalment of ten per cent. on the amount of stock allotted by the within certificate.

Campbell & Cassels

(4)

COPY OF A RESOLUTION PASSED AT THE MEETING OF THE SHAREHOLDERS HELD ON 10TH AUGUST, 1869.

It was then moved by Mr. *John L. Blaikie*, seconded by Mr. *Ginty*, and unanimously resolved, That the Directors this day elected be instructed to pay an amount not exceeding four dollars per meeting

to the provisional directors for each meeting which they have severally attended.

Yours truly,

(Signed,) *W. Sutherland Taylor*,
Sec.-Treas.

NOTICE PUBLISHED IN "GLOBE."

TORONTO, GREY & BRUCE RAILWAY NOTICE.

Subscribers to the capital stock of the *Toronto, Grey & Bruce Railway Company* are hereby notified, that the first call of ten per cent. on the stock is required to be paid immediately to the brokers of the company, Messrs. *Campbell & Cassels*, 60 *King Street East*.

By order,

(Signed,) *W. Sutherland Taylor*,
Secretary.

The above notice appeared in the daily *Globe* from the 2nd to the 9th July, 1869.

(5)

TORONTO, GREY & BRUCE RAILWAY.

Take notice, that a further call of ten per cent. on the capital stock of the *Toronto, Grey & Railway Company* has been authorized by the directors, and that the same is payable at the company's offices, corner of *Front* and *Bay Streets*, *Toronto*, on the 16th day of May, 1870.

By order of the Board.

(Signed,) *W. Sutherland Taylor*,
Secretary.

The above is a copy of the notice for calls in *Gazette* on the dates mentioned by the secretary of the company.

I think on allotment by the company, the subscribers became in fact and in law shareholders in the company, liable to pay to the company ten per cent. of the amount of the shares, and to pay all future calls, subject to the proviso in the memo. so signed and sealed; and they became entitled to all privileges, benefits and advantages that might accrue to such shareholders in said company, and became subject to all liabilities and responsibilities attaching to shareholders in the company.

The contract in this case was this: The company applied to the respondent to take shares; the respondent

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

agreed to do so, and bound himself under seal to pay a percentage on allotment, the assent of the respondent to the application of the company, and the binding agreement signed and sealed by him, imposed on the company the binding duty of allotting the specified shares to him, and constituted an agreement completed, binding on both parties, which either could enforce, entirely distinguishable from an agreement merely resting on an application for shares. The applicant was the company, and the sealed undertaking of the respondent was the acceptance of the company's offer, and fixed on the company the obligation to allot them, and when so allotted, they became *eo instanti* vested in the respondent. In other words, the company sent an offer by which they were bound, and under which, on receiving back the offer accepted, signed and sealed by the respondent, a contract complete and binding on both sides was constituted. This conclusive and binding agreement on both parties was, on the respondent's part, that he should become a shareholder of 50 shares and pay; and, on the company's part, that they should grant him the said fifty shares, and the company being under this direct obligation to grant those shares, discharged that obligation by allotting to him the shares in a due and formal manner, and regularly placing him on the register. Surely the contract was then full, perfect and complete; a valid and unimpeachable contract, the effect of which was to make this respondent the holder of 50 shares in the company. I think there was quite enough to satisfy the judge who tried this case, that the respondent knew that the company had acted on the agreement, had treated him as a shareholder, and had placed him on the register, and so had notice that the company had allotted to him the stock; and had the application come from the respondent to the company, that would have been sufficient to show that

he knew that the company had assented to his request, and had completed the contract. In fact, this is to be gathered from defendant himself.

He says:—

I am the defendant. I have not and never had any papers or documents relating to the shares in question in this action. I have no allotment of shares, and never heard of any allotment. Some eight years ago I put my name down for shares conditionally in the *Toronto, Grey & Bruce Railway*, and in the *Toronto & Nipissing Railway*. I cannot swear what amount I took in each; I think it may have been about $5,000 worth in the *Toronto, Grey & Bruce*, and $2,000 or $2,500 in the *Toronto & Nipissing*. This was just before the companies were organized, to the best of my recollection. *George Laidlaw* asked me to take these shares. No call was ever made on me for these. I have never paid any call or anything on the *Toronto, Grey & Bruce* shares. I forget what it was that I signed. I do not know whether it was the stock book that I signed or some other paper. The proposal on the part of *Laidlaw* was made on the corner of *King* and *Church Streets*, I think the south-west corner; we agreed there, but I cannot positively say where I signed. Mr. *C. J. Campbell* came up afterwards, or else *Laidlaw* took *Ginty* and myself round to his office. I do not know who was present when we signed; I think that *Ginty* was there, and signed at the same time that I did. I think that *Campbell* was present when I signed. As far as I recollect, there was nothing appearing in the books in connection with my name, except my signature. I refused to take stock in the first place; then there was a verbal agreement made between *Laidlaw* and myself. I would not have taken the stock except for the inducement that *Laidlaw* offered. He asked *Ginty* and myself to take stock, and I refused. He wanted to raise a large amount of stock here, so as to show to the people outside who were giving bonuses that the people here were contributing largely to the undertaking. He agreed that if we took stock we should get the contract for building the road; that we would not be called on to pay unless we got the contract, and he said that if we got the contract, under any circumstances we should not be called on to pay more than ten per cent. upon the stock. Upon that agreement and conversation we agreed to take the stock. I think that we each took stock separately. We tendered for the *Nipissing* work and got it; we also tendered for the *Grey & Bruce Railway* and did not get it. I supposed that the contracts would be let by tender, but not necessarily to the lowest tender. *Laidlaw* was the only one who had

1881

NASMITH v. MANNING.

Ritchie, C.J.

made the agreement with me. I had been out with him and *Gordon* canvassing for a week in the townships. If I got the contract I understood that my stock would be paid out of my estimates, but not more than ten per cent. I supposed that if I had got the contract I should have been in the same position as any other stockholder. I subscribed to the *Toronto & Nipissing* on the same terms. They were separate transactions, but *Laidlaw* was acting in both as the prime originator. We got the contract for the *Nipissing;* I paid up my stock in full in this. My stock was paid principally out of my estimates. I sold out my stock in this road, and hold no stock in it now. Tenders were called for the *Toronto, Grey & Bruce,* and I put in one; the tender was that of *Manning & Ginty*. I do not know why it was refused. I cannot tell whether it was the lowest. When my tender was rejected, I did not consider that I had any stock. No director ever spoke to me about my stock. I never was asked to pay any calls; I may have been notified when the first call was made. I never wrote to the directors about my stock, nor they to me. I was surprised when I was served with the writ in this action.

By Mr. *Ferguson*—I never at any time paid anything on account of the stock, either when I signed or afterwards. It was distinctly agreed that I was not to pay anything on it unless I got the contract; without this condition, I would not have taken a cent's worth of stock. There was no connection between my subscriptions to the two railways each was a separate transaction. I did not get the contract for the *Toronto, Grey & Bruce* road, and never was asked to pay; I never was a shareholder. I would have been a shareholder if I had got the contract. Mr. *Laidlaw* was the moving spirit in the undertaking; there would have been no *Toronto, Grey & Bruce Railway* without him. I do not recollect whether they had the act at the time that he solicited me to take stock: he was the chief actor in soliciting stock. The *Toronto, Grey & Bruce Railway* is in operation, and there is a large amount of rolling stock in use on it, and the company has other property, such as furniture and safes at all of their stations, and tools on the line of their railway. The road runs through the counties of *York, Peel, South Simcoe, Grey* and *Bruce*. Some of the property I refer to is in each of these counties.

(Signed,) *Alexander Manning.*

Certified a true copy.

(Signed,) *Geo. M. Evans.*

(11)

TORONTO, GREY & BRUCE RAILWAY COMPANY.

List of shareholders at 31st December, 1877.—Revised up to the 30th June, 1877, and 30th Sept., 1877, and 31st Dec., 1877.

NAME.	Address.	No. of Shares.	Calls.	Unpaid.	Amt. paid up.
John Ginty....	*Toronto.*	40	$3,600	00	
Alex. Manning.	*Toronto.*	50	5,000	00	

But apart from this, I think there was a completed contract, and no notice of allotment was necessary to constitute the defendant a subscriber to the stock and a shareholder.

It is clear the company allotted the stock, 50 shares, to the defendant. This is not the ordinary case where a person applies for a maximum number of shares undertaking to accept them or any less number, and the company is under no obligation to give him any, in which case, I take it, a reply to the application is necessary, for the very good reason "that when an individual applies for shares in a company, and there is no obligation to let him have any, there must be a response by the company, otherwise there is no contract (1);" but in this case the application or offer proceeds from the company, and the answer comes from the party applied to, who signs the company's stock book, and who binds himself under seal to become the holder of the number of shares set opposite his name, and on allotment of his shares agrees to pay a certain percentage, &c. The company allotted the shares, and he was placed on the registry, and this constituted a completed transaction, and made him to all intents and purposes, in my opinion, a shareholder in the company.

I think there cannot be the slightest doubt that the defendant did intend and agree to become a member *in praesenti*; there may or may not have been an agreement or understanding—I should rather say simply an expectation—that he should get a contract; but this, whatever it was, was purely collateral, and as was said

(1) Per Lord *Cairns* in *Elkington's* case L. R. 2 Ch. 535.

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

in *Bridge's* case (1), "having agreed to be a shareholder *in praesenti*, he cannot be heard to say that he was not a shareholder because of this collateral matter."

See *Elkington's* case (2), and what was said by Lord *Cairns* cited in this case.

But the contention set up on this point has been abandoned. I think the authorities clearly establish that no notice of allotment in a case of this kind was necessary.

In the last edition of Mr. *Leake's* work, 1878, on Contracts, p. 36, it is said :—

> If a definite offer of the shares proceed in the first instance from the company, or if there be a previous definite agreement respecting them, the application for the shares in pursuance of the offer or agreement may make a complete contract without further notice of allotment.

He cites *Tucker's* case (3); *Adams'* case (4); *Davies'* case (5).

This doctrine was enunciated and acted on by the Supreme Court of *New Brunswick* in *European & North America Ry. Co.* v. *McLeod* (6), and also in *The New Theatre Company (limited)—Bloxam's* case (7).

This latter case is as follows:

> This company established under the 25 and 26 *Vic.*, c. 89, had been ordered to be wound up. This was an application on behalf of the official liquidator to settle Mr. *Bloxam* on the list of contributories in respect of 100 shares.
>
> It appeared that Mr. *Bloxam* had verbally applied for 100 shares, and he was told by the secretary that he could have them on payment of the deposit. He called at the office of the company in *Cornhill* on the 25th of April, 1863, and handed to the secretary his cheque for £100 for the deposit upon the shares; but before handing it over he asked the secretary when he could have the shares, and was told by him that he could have them in a few days, as the company were about to allot them. He then stipulated with the secretary, that if

(1) L. R. 3 Ch. App. 308.
(2) L. R. 2 Ch. 522.
(3) 41 L. J. Ch. 17.
(4) 41 L. J. Ch. 270.
(5) 41 L. J. Ch. 659.
(6) 3 Pugs. N. B. 3.
(7) 33 Beav. 529.

he did not get the shares in a few days, the secretary would return him the cheque. The cheque was duly paid into the bankers of the company.

The shares were actually allotted to Mr. *Bloxam* on the 27th of April at a meeting of the directors, and his name was entered as the allottee for 100 shares in "the Register of allotment of shares." It was not shown that Mr. *Bloxam's* name had been entered in the share registry book (25 and 26 *Vic.*, c. 89, s. 25). Mr. *Bloxam* did not sign any written application for the shares, and no letter of allotment, no scrip certificate of the shares, and no return of the allotment had ever been sent to him.

It did not appear that Mr. *Bloxam* had ever applied for the scrip certificates, but he had called at the office in *Cornhill*, and found it closed, and he was told that the company had gone to pieces, but the office had in fact been removed to *Westminster*. He appeared to have done nothing further, when, on the 27th of July, 1863, the company was ordered to be wound up. Mr. *Selwyn* and Mr. *Beavan*, for the official liquidator, argued that Mr. *Bloxam* ought to be placed on the list of contributories, for the contract for the shares by application and payment of the deposit was complete when the shares had been allotted to the applicant by the company, and that nothing further was wanted to make the allotment effective. They cited *ex parte Yelland* (1); *ex parte Cookney* (2).

Mr. *Roxburgh, contra*, argued that no perfect and complete contract fixing Mr. *Bloxam* with the ownership of any particular shares existed. That an allotment alone, without notice to the allottee was insufficient, for it was not possible to know what number of shares had been allotted, or which they were. That here there had been no notice, no acceptance of the shares, and that no entry on the share registry, as required by the act had been proved.

The *Master of the Rolls*:—

I must hold Mr. *Bloxam* to be a shareholder. *Cookney's* case and *Yelland's* case determine this: that if a person applies for shares and pays what is necessary and has the shares allotted to him he becomes a shareholder, and that the application need not be in writing.

Here Mr. *Bloxam* applies for 100 shares, and he is told he can have them; he then pays a deposit of £100, the secretary promising him that if they are not allotted the cheque shall be returned. There is a book called a register of allotment of shares which answers all the requirements of a register, and in this the allotment to Mr. *Bloxam* appears. It is true that no further deposit is made, and that no notice of the fact of allotment was given to him. But if the company

(1) 5 DeG. & Sm. 396. (2) 26 Beav. 6 & 3 DeG. & J. 170.

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

had been extremely prosperous, how could the company deny that Mr. *Bloxam* was a shareholder; how could they dispute the fact after this entry in their book? After accepting his money they allot him these shares. The rights and obligations are co-extensive, and I must hold him to be a contributory.

And in *Tucker's* case (1) it was contended that *Tucker* had never received notice of allotment of the shares to him, and *Pellatt's* case (2) and *Bloxam's* case (3) were cited.

In *Tucker's* case *Bacon*, V. C., says:

In order to constitute a man a shareholder, all that was required by the provisions of the Companies Act, 1862, was that he should agree to take shares, and that his name should be duly placed upon the share register. These provisions had been made for the benefit of the creditors of the company; therefore in questions as between shareholders and creditors, persons who had complied with the requirements of the act could not be heard to say that they were not shareholders.

* * * * * *

As regarded Mr. *Tucker*, the evidence was not quite so satisfactory. He had, however, received a letter and form of application similar to those sent to Mr. *Brown*, which form he had filled up and returned to the company, and therefore the company was bound to allot to him, and he was bound to take the shares for which he had so applied. There was therefore a binding contract between Mr. *Tucker* and the company, of which either party might have enforced the specific performance.

Mr. *Tucker's* affidavit, stating that he had no recollection of ever having received, and that he did not believe he ever had received, any notice of allotment, was not sufficient; but it was immaterial whether or not he had received notice of allotment, for the contract with the company was complete immediately on his filling up and returning to the company the form of application for shares. Messrs. *Brown* and *Tucker* must therefore be placed on the lists of contributories.

The marginal note in *Adam's* case (4) is:

B. Company agreed to transfer their business to P. Company. One of the terms of such agreement (which was sanctioned by the court

(1) 41 L. J. N. S. 161.
(2) L. R. 2 Ch. 527.
(3) 33 Beav. 529.
(4) 41 L. J. N. S. Eq. 270.

under the winding-up of B. Company) was that the holders of shares in B. Company should receive an equal number of shares in P. Company. A circular letter was sent by P. Company to the shareholders in B. Company, referring to these terms, and requesting the B. shareholders to fill in a form of application for the shares to which they were entitled under the arrangement. *A.*, a holder of fifty shares in B. Company, filled in and returned this form, applying for fifty shares in P. Company. The directors of P. Company by resolution allotted to him that number of shares. Before receiving notice of allotment, *A.* wrote to withdraw his application. After considerable delay the solicitor of P. Company, to whom the question of *A's* withdrawal had been referred by the directors, wrote to *A.*, stating (erroneously as now appeared) that by a resolution of the board the allotment of shares to him had been cancelled. The company had no share register, but *A's* name was entered in their allotment book for fifty shares, though no particular shares were appropriated to him: Held, that as soon as *A's* application had been accepted by the company, there was a binding contract between them without any notice of allotment being given to *A.*; that even if the resolution cancelling the allotment had been passed the directors had no power, under a general authority to compromise proceedings, &c., contained in the articles of association, to sanction *A's* withdrawal; and that as between *A.* and the company the entry in the allotment book was sufficient.

Lord Justice *Mellish* says in *Davies'* case (1):

The only real question appears to me to be this: First, is there not sufficient evidence on this statement that there was an agreement that Messrs. *Templeman & Co.* should take the 250 shares between them? It appears to me that there is sufficient evidence, because he says so. Then there being that arrangement, I think that the written application having been sent in by Mr. *Templeman* for 200 shares, and by Mr. *Davies* for fifty shares, and the company having made no objection to that, there is sufficient proof that the company assented to this division of the 250 shares, which were to be taken by Messrs. *Templeman & Co.*, in the proportion of 200 shares by Mr. *Templeman* and fifty by Mr. *Davies*. If there had been no such previous arrangement I should certainly not have thought that the mere keeping the deposits would have been sufficient evidence.

But assuming that there was, as there appears to me to have been, a valid binding arrangement previous to the written application being made, that Messrs. *Templeman & Co.* should take between

(1) 41 L. J. N. S. Eq. 659.

1881
NASMITH
v.
MANNING.
Ritchie, C.J.

them 250 shares, and there not being any objection on the part of the directors to taking the deposit, there is sufficient evidence to show that the directors assented to the 250 shares which Messrs. *Templeman & Co.* agreed to take being divided between Mr. *Templeman* and Mr. *Davies* in the proportion contained in their written applications.

I am of opinion, therefore, that the order of the Vice-Chancellor is right, and that this appeal must be dismissed with costs.

I am of opinion that the defendant was liable in this action, and that the judgment of the Court of Queen's Bench should have been affirmed, and that the appeal should therefore be allowed, and that the judgment of the Court of Appeal reversing the judgment of the Court of Queen's Bench should be reversed with costs in all the courts.

FOURNIER, J., concurred in the judgment about to be delivered by *Henry*, J.

HENRY, J.:—

This is an appeal from the Appeal Court of *Ontario*. Three of the four learned judges who heard the appeal gave judgment for the respondent, on the ground that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to him, and that no notice whatever of such allotment had been proved. The late lamented Chief Justice of that court agreed that such proof was necessary, but he was of the opinion that from the facts in evidence such notice might be inferred. On this latter point only did he differ from the majority of the court. I do not consider it necessary to give my views at any great length, but will commence by saying that I entirely adopt the views of the learned judges who decided in favor of the respondent. The document signed by him, as I consider it, formed but an offer on his part to accept fifty shares of the company's stock when allotted to him. It being under seal makes no difference as to the legal

construction to be put on it. It was signed as an original subscription or offer to take stock in a company not then, but subsequently to be, organized. The company did not then exist, but was subsequently to be formed, or not, according to circumstances; and we must look at this document from a stand point very different from that we should occupy in the case of a subscription to the stock book of a company already in existence. A party in the latter case would, after his application for stock had been accepted, be called upon to sign the stock list in the book of the company kept for that purpose. Before a company is formed there is an offer on the part of those wishing to become stockholders to take certain shares. It is only, at the most, a unilateral contract, if one at all; and one which could not be enforced by the party subscribing. He could not by his offer oblige the provisional directors to allot any of the shares to him. A larger amount of stock than required might be subscribed for; and no one will doubt the power of the provisional directors to reject such applications as they pleased. So up to the time, at least, of the allotment, any subscriber could withdraw his offer to take the stock he subscribed for. The agreement in this case was to receive fifty shares when allotted; and that, in my opinion, threw upon the provisional directors the onus of not only allotting the stock within a reasonable time, but of giving him notice that they had done so, also within a reasonable time.

I concur with the three learned judges of the Appeal Court that there is no evidence of any notice of allotment. It is in fact not contended there was any, and there is no evidence of a waiver of it by the respondent. At the first meeting to organize the company, nearly two months after the subscription by the respondent, it was decided to call in ten per cent of the allotted shares, but it does not appear that any notice was given

1881
NASMITH
v.
MANNING.
Henry, J.

to the respondent of that resolution, and no notice given of the allotment. Suppose in the absence of both the respondent had been sued for the recovery of the ten per cent. of the shares, could he not have successfully resisted that claim for the want of such notice of allotment? The stock was subscribed for in April, 1869, and a meeting of the provisional directors held on the 1st of July following. At that meeting the president is reported to have stated "that on the previous evening the amount of stock required by the charter for organizing the company, viz.: $300,000, had all been subscribed, and that, therefore, it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible, &c." The minute goes on to state that "the brokers, Messrs. *Campbell & Cassels*, were instructed at once to collect the first instalment," and have the amount, $30,000, paid into the bank on the tenth of the same month, "so as to enable an advertisement calling the general meeting of the shareholders to appear in the *Ontario Gazette* of that date." The secretary was also instructed to prepare advertisements to be inserted in other papers calling the meeting—the day to be determined by the company's solicitor. The secretary was "also instructed to issue allotment certificates to each shareholder for the amount of shares held by him."

By this extract from the company's minutes it is clearly shown that when the respondent signed the document in question the company existed only by the charter. There were no stockholders or members. Even the provisional directors were not actually such, and could only become so by subscribing and paying for stock. There could be no regular stock-book until the shares had been allotted, which is generally prepared after the

company is organized, and therefore the document signed by the respondent could not be tortured into one so as to bind the respondent; but let me pursue the inquiry a little further. Suppose on the day of the meeting to organize the company and appoint directors &c., the respondent attended, but had not paid, and declined to pay the ten per cent., would he or any other similarly situated be allowed to vote or take part in the organization of the company? Sections 14, 18 and others of the act of incorporation require the 10 per cent. to be paid before any subscriber could vote or be elected a director or even called to attend the first meeting to organize the company. He would have been very delicately informed that he was not a stockholder, and denied the privileges of one. Any other course would be a violation of the statute. If the mere signing the document in April previous made him a stockholder he could have insisted upon his right to participate in the proceedings, and if the amount of stock subscribed for by him was sufficient he might have been elected a director. That would be the necessary legal result of the position he would so claim, but who would venture to assert that by his mere signature to the document in question he could acquire such a position, and yet to bind him as a shareholder it becomes necessary to admit the position I have stated.

The appellant claims that the respondent was a shareholder in the company from the time of the allotment of shares, but if the signature of the respondent to the agreement was sufficient to bind him, then no allotment was necessary to be shown. If the agreement, however, is not sufficient alone, and that the allotment was necessary, does it not legitimately follow that a notice of it became necessary? If the signature of the respondent was to the regular stock book of the company after being organized, no allotment would require to be

1881
NASMITH
v.
MANNING.
Henry, J.

shown, and does not the acknowledged necessity for showing the allotment at the same time characterize the document signed as an incomplete contract? If so incomplete, does it not necessarily require, to complete it, that notice should have been proved of the allotment within a reasonable time. I cannot see how the company at the time of the judgment at the suit of the appellant against the company could have enforced the contract as one fully completed against the respondent. He, in fact, never was a shareholder in the company, and the company never during the seven or eight years after he signed the document treated him as such. He never was called upon to pay any call on his shares, never had any notice to attend a meeting of the company, nor did he attend any. I am free to admit that if he at any time became a shareholder, the company could not by laches or otherwise release him from his liability to its creditors, and that nothing but the payment in full of his stock would release him; but I have been unable to realise his position as being at any period a stockholder. Once a stockholder, a subscriber to the regular stock book, which latter itself would show him to be one, I am free to admit that if he became a delinquent in the payment of subsequent calls, he might by the by-laws be incapacitated from voting at or taking part in any meeting of the company, but still be liable to the company or its judgment creditors for any balance due on his stock; but that I hold is not the case here.

The statutes make the shareholders answerable to creditors for the amount due on their stock to the company, but do not include those who merely signed a conditional agreement to take stock when allotted, and whose contract is left open for want of notice of such allotment. Sec. 80 of chapter 66 of the Consolidated Statutes, referred to in the Act of Incorporation, provides

for the liability of its shareholders thus: "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid of the stock held by him," &c. It will be observed that the only term used is 'shareholder,' and he is to be held liable "to an amount equal to the stock held by him." In either case, in order to make him liable he must be a shareholder holding stock in the company, or the right to do so. Sub-sec. 19, sec. 2 of the same act, defines the term "shareholder." "The word shareholder shall mean every subscriber to or holder of stock in the undertaking, &c." But the term subscriber to stock is one who by his own act and that of the company becomes a subscriber. No one can be a subscriber to stock so as to make him a shareholder without the concurrence of the company through its officers. I must say I think the evidence of his ever having been a shareholder is wholly insufficient.

By the charter the provisional directors were authorized to open stock books, but they could be only provisional, and it would be as monstrous in my opinion to bind the subscribers thereby absolutely as it would be to bind the provisional directors to allot shares to every one who subscribed for them. The provisional directors guarded themselves, for what reason we need not inquire, by inserting the words "when allotted," but as I look at the document, I am of opinion they had also the inherent right to reject the application of any subscriber they pleased. The true legal meaning in my opinion, of the document signed by the respondent, amounts to this and to nothing more: "I hereby undertake to take and pay for fifty shares in your company if allotted to me. I will wait a reasonable time for your aceeptance of my offer, and if in the meantime I hear nothing from you I shall conclude you have not

1881
NASMITH
v.
MANNING.
Henry, J.

accepted my offer, and shall otherwise dispose of the funds I shall keep for that reasonable time uninvested and unemployed." What the provisional directors did after the respondent subscribed was known to them, but not to him. The charter authorized the issue of stock to the extent of a million dollars, and when he received no notice of allotment to him he might very well have presumed they had got other subscribers that they preferred to him. The fact of their raising and paying into the bank $30,000, being ten per cent. of $300,000 required by the charter to be paid before organizing, shows there must have been sufficient s ock without his to organize the company, and that being the case the directors might have considered it unnecessary, and, in view of the bad feeling existing between *Laidlaw*, the most active promoter and him, failed to notify him of the allotment. Whatever the reason, they certainly gave none, and I have no doubt that in law they were bound to have done so.

Reference has been made to the fact that the respondent went into several counties to forward the interests of the company, but that took place before he subscribed for the stock, and his doing so could not in the least affect the transaction. It is also suggested that after he subscribed as he alleges, conditionally upon his getting the contract for building the road, it was an improper act to allow his subscribed stock to form a portion of the published list of stock absolutely to be taken, which was dependent on the contingency. With that I do not think we have anything to do. If he *bonâ fide* expected to retain his subscription by obtaining the contract, I can see nothing to reprehend, or fraudulent, in his permitting his subscription to appear before the public. If he had got the contract which he says was promised him, I have no doubt he would have waived the want of notice of allotment,

but in my view of the law he would not be bound, under the document he subscribed, even in that event, to have accepted it in the absence of notice of allotment. Before closing my remarks I think it not out of place to state that I have carefully read the judgments of the seven learned judges before whom this case was argued, and no one of them suggested that the subscription of the list was binding as a complete contract, but held the opposite view, which seems not to have been contested. The judgments of four of them were based on the assumption that there was evidence to show an allotment and knowledge of it by the respondent, while three judges of the Appeal Court considered the evidence of notice of the allotment insufficient.

Chief Justice *Hagarty*, in his judgment, says :—

After the first trial, this case with that of *Newman* v. *Ginty* was argued in the Common Pleas and was sent down for another trial. The general principle was settled, that after proof of defendants subscription there should, in the language of Mr. Justice *Gwynne* (1) "be shown to be some response, either in writing or verbally, or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder."

My own language there was : I concur in thinking that our best course is to direct a new trial, so as to have it expressly found as a fact, whether tl e defendant was notified or received notice in any shape, or was made aware of the company having accepted him as a stockholder according to his sub-scription—notice in substance that the directors, or the company assented to or accepted him as a holder of the subscribed shares.

The same doctrine was held by all the other judges. The only differences between them was as to the sufficiency of the proof of notice of allotment.

Before arriving at the conclusion I have stated, I considered fully the law as applicable to the question of notice of allotment. Some would appear to think that if the respondent found out through other means than from the directors that they had accepted his application or

(1) 29 U. C. C. P. 52.

1881
NASMITH
v.
MANNING.
Henry, J.

agreement to take shares, it would bind him. I differ with those who say so. If a notice of allotment be necessary in any case it is necessary to come directly from the one party to the other. Whatever the directors did amongst themselves could not bind the respondent, unless by some binding act of theirs, on which he could rely, they communicated their acceptance to him of his offer to take the shares. If a party to whom an offer is made accepts it by words or in writing to the party making it, the contract is completed, but if after resolving to accept the offer a communication by words or in writing is made to other parties without any authority or request to inform the other party of the acceptance of his offer, and the party who made the offer accidentally hears from third parties that the offer was accepted, he would not be bound by such information. Nor would the other party be bound. The one party may contend that he is not bound by what he hears from third parties whose communication would bind none of the parties, and the other may as properly say: "I resolved to accept your offer, but as I did not communicate that resolution to you the bargain never was closed, because I did not communicate any acceptance to you." At the most a jury in this case might possibly find in the evidence sufficient to infer that the respondent had outside knowledge of the intention to accept, but as I view the law a judge would not be justified on the evidence in submitting such an issue to them.

I think the appeal should be dismissed, and the judgment below confirmed with costs.

TASCHEREAU, J.:—

I am also of opinion that the appeal should be dismissed. I cannot see that, by subscribing for shares as he did, *Manning* became a shareholder *in præsenti*; no company existed then as a matter of fact. The receiv-

ing of subscriptions were provisional acts towards the organization of the company. It might have been that not a sufficient number of shares would have been subscribed for, and so there would have been then no company. Then, if *Manning's* subscription was only an offer to take shares, that offer, to bind him, must have been accepted by the company and notice of such acceptance given to him within a reasonable time. Such an acceptance did take place, but no notice thereof was ever given to him. Without this notice there was nothing to bind him. I need not say that, though the principles which govern this case are the same in the province where I come from as in *Ontario*, and consequently there are no new questions for me in the case, yet I have felt great embarrassment in coming to a conclusion, and have vaccillated a good deal about it. The diversity of opinions in this court and in the *Ontario* courts demonstrates that the case is far from being free of difficulties. After the fullest consideration I have come to the conclusion to dismiss the appeal.

GWYNNE, J. :—

This appeal opens a point which, by reason of the judgment of the Court of Appeal in *Denison* v. *Lesslie* (1), was not available to the plaintiff in the courts below, namely, whether the instrument signed by the defendant constituted a completed contract, or is to be regarded as an application only for shares, requiring a response from the company signifying to the defendant the fact of his application having been acceded to and of his having been himself accepted as a shareholder.

The difficulty upon this point has arisen from the form of the certificates of allotment adopted by the provisional directors, or it may be by their secretary, at a period posterior to the subscription by the defendant

(1) 3 Ont. App. R. 536.

1881
NASMITH
v.
MANNING.
Gwynne, J.

of his name in the stock book of the company as a holder of fifty shares in the capital stock of the company, a certificate which, according to the defendant's own showing, could have had no operation upon his mind, for his contention is that he never saw one until at the trial of this action, and the main contention before us was that because he had not received one, he is not a shareholder.

That the defendant, in signing his name in the stock book, did not conceive that he was setting his name to an application merely for shares, calling for a response either of acceptance or of refusal from the company, but that he understood that he was executing a contract made by him, as a shareholder, and completed by his name being subscribed in the stock book for fifty shares, is to my mind abundantly apparent.

By the second section of the special act incorporating the *Toronto, Grey and Bruce Railway Co.* (1), several enumerated clauses of the General Railway Act (2), and, among those, the clauses respecting "Interpretation" and "Shareholders" are incorporated with and made part of the special Act. By the former of these clauses in sec. 7, sub-secs. 5 and 19 of the general Act, it is enacted that in the special act the word "shareholder" shall mean "every subscriber to, and holder of, stock in the undertaking," and the personal representatives of such shareholder, and by sec. 80 of the general Act, it is enacted that each "shareholder" shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock has been paid up. Then by the 8th sec. of the special act the capital stock of the company was declared to be $3,000,000 divided into $30,000 shares of $100 each, and

(1) 31 Vic. c. 40, Ont. (2) 22 Vic. c. 66.

by the 14th section it was enacted that as soon as shares to the amount of $300,000, or one-tenth part of the capital stock, shall have been subscribed other than by municipalities, and ten per cent. thereof paid into some chartered bank having an office in *Toronto* (which on no account shall be withdrawn therefrom except for the service of the company), the directors shall call a general meeting of the subscribers to the said capital stock, who shall have so paid up ten per cent. thereof, for the purpose of electing directors of the said company.

By sec. 15, it is provided that in case the provisional directors neglect to call such meeting for the space of three months after such amount of capital stock shall have been subscribed and ten per cent. thereof so paid up, the same may be called by any five of the subscribers who shall have so paid up ten per cent., and who are subscribers among them for not less than $1,000 of the said capital stock, and who have paid up all calls thereon.

By sec. 17 it is enacted that at such general meeting the "subscribers for the capital stock" assembled who shall have paid up the ten per cent. thereof, with such proxies as may be present, shall elect the regular board of directors. By the 27th sec. it is enacted that on the subscription for shares of the said capital stock each "subscriber" shall pay forthwith to the directors, for the purposes set out in the act, ten per cent. of the amount subscribed by him, and the directors shall deposit the same in some chartered bank to the credit of the company; and by the 7th section, it is enacted that the provisional directors, who are named in the act and empowered to act as directors until the election of directors by the stockholders, shall have power to open stock books, to make a call upon the shares subscribed therein, to call a meeting of the subscribers thereto for the election of other directors.

1881
NASMITH
v.
MANNING.
Gwynne, J.

Now it is apparent that the opening of stock books was for the purpose of obtaining therein subscriptions for shares in the capital stock of the company, and that subscribers for shares therein—"Subscribers to," "for," or "of" the capital stock—and "shareholders" are equivalent expressions to represent what, by sec. 7, sub-secs. 5 and 19 of the general Railway Act, is declared to be the meaning of the term "shareholder," namely, "every subscriber to, and holder of, stock in the undertaking."

It has been held, and I think well held, in *Denison* v. *Lesslie* (1), that the paying of the 10 per cent. at the time of subscribing is not made by the act a condition precedent requisite to make the person subscribing a shareholder. It was competent for the provisional directors to open stock books, to obtain subscriptions for stock *therein*, and to postpone the period for the payment of the 10 per cent. by the subscribers for such stock until the $300,000 of stock necessary to be subscribed to enable the company to organize should be subscribed, when the directors might make a demand or call upon all subscribers for stock in the stock books for payment of the ten per cent.

The payment of the 10 per cent. is made a condition precedent only to the right of voting, that privilege being by the act conferred only upon those subscribers who shall have paid the 10 per cent. It is the subscription for the stock which the act makes a condition precedent to the accruing of the privilege, as well as of the liability to be called upon to pay the 10 per cent. The account given by the defendant himself in a suit similar to this of *Jaffray* v. *Manning*, the evidence in which case is part of the evidence made use of in this case, is this. He says: "*George Laidlaw* asked me to take these shares." It may be here observed that this

(1) 43 U. C. Q. B. 34 and 3 Ont. App. R. 536.

George Laidlaw was one of the provisional directors and the chief promoter of the company and the undertaking; the defendant describes him as the moving spirit in the undertaking, without whom there would have been no *Toronto, Grey & Bruce Railway*. Defendant then says:—

I refused to take stock in the first place, then there was a verbal agreement made between *Laidlaw* and myself. I would not have taken the stock except for the inducement that *Laidlaw* offered. He asked *Ginty* and myself to take stock and I refused. He wanted to raise a large amount of stock here, so as to show to the people outside who were giving bonuses that the people here were contributing largely to the undertaking. He agreed that if we took stock we should get the contract for building the road, that we should not be called upon to pay unless we got the contract, and that if we got the contract under any circumstances we should not be called upon to pay more than ten per cent upon the stock. Upon that agreement and conversation we agreed to take the stock. I think we each took stock *separately*. We tendered for the *Nipissing* work and got it, we also tendered for the *Grey & Bruce Railway* and did not get it. *Laidlaw* was the only one who made the agreement with me. If I had got the contract I understood that my stock would be paid out of my estimates, but not more than ten per cent. I supposed that if I had got the contract I should have been in the same position as any other stockholder. I subscribed to the *Toronto* and *Nipissing* on the same terms, they were separate transactions, but *Laidlaw* was acting in both as the prime originator. We got the contract for the *Nipissing*; I paid up my stock in full in this; my stock was paid principally out of my estimates.

Then, in his evidence in the present case, he repeats:

It was *Mr. Laidlaw* who asked both of us, (that is defendant and *Ginty*,) at the corner of King and Church streets. *Mr. Laidlaw* asked me to take stock. He asked *Ginty* and me together. An agreement was made verbally, that if we did not get the contract we were not to be considered stockholders; we afterwards tendered.

Having said that he had signed the stock book on a verbal agreement between him and *Laidlaw*, that if he did not get the contract the subscription was to go for nothing, he was asked: "Why then did he want you to put your name on at all?" To which he replied:

1881
NASMITH
v.
MANNING.
Gwynne, J.

I supposed that he was making up his stock list to see how much he could get to enable him to comply with the charter.

The stock book was signed by the defendant and his seal set thereto as his act and deed in the presence of a Mr. *C. J. Campbell*, who signed his name thereto as subscribing witness, and who says that he went out as broker of the company, being also a provisional director, to get subscribers to the stock book. He does not appear to have had, nor is it alleged that he had, any knowledge of the verbal agreement spoken to by the defendant as having been made with him by *Laidlaw*. From this evidence it is plain that the defendant never entertained the idea that he was merely making an application for shares, to which he expected a response from the company signifying whether they would allow him to have any shares and accept him as a shareholder. The character of the whole proceeding is totally different, in fact the very reverse of this. The provisional directors, under the provisions of the act, open stock books for the purpose of obtaining therein subscriptions for stock, in order to enable the company to be organized, which could only be done after the subscriptions should be obtained therein for $300,000 stock subscribed. One of these books is placed in the hands of a broker who is himself a provisional director, and who is authorized to get persons willing to take stock to subscribe therein for as many shares as they may please to hold. The defendant, according to his own showing, instead of being an applicant for shares is canvassed and pressed by a provisional director, not to become an applicant for shares but to become a shareholder, and to take as many shares as he wished to take by subscribing therefor in the company's stock book. At length the defendant consents, being moved thereto, as he says, by a verbal agreement made with him by the provisional director who solicited him to become a shareholder.

The defendant thereupon goes and signs his name in the stock book opened by the provisional directors as a subscriber for fifty shares in the capital stock of the company. The book so signed contains a covenant signed by every one subscribing for shares, expressing the terms of their subscription, but the defendant contends that his subscription is to be affected by a collateral verbal agreement made, as he alleges, with him by one of some twenty provisional directors. The provisional director so referred to denies that any such agreement as that spoken of by the defendant ever was made. However, whether it was made or not, matters not. The principle of *Elkington's* case (1) and of *Bridgers'* case (2) is that which must govern upon this point, namely, that if the defendant's agreement was to become a shareholder *in præsenti*, with a collateral agreement as to what should be the effect of his subscription contract if he should not get a contract to build the road, which is, as it appears to me, the true light in which to view his own evidence, then the defendant is a shareholder, and is liable in this action; but if the agreement which the defendant entered into was that, if and when a contract should be given to him for building the road, he would subscribe for and become a shareholder in the undertaking to the extent of fifty shares, then he would not be liable unless nor until he should get the contract to build the road. But it is to the instrument signed in the stock book under the defendant's hand and seal (construed in the light of the surrounding circumstances), that we must look to determine what the defendant's contract was, and that cannot be qualified by any verbal agreement such as that spoken of by the defendant. Now, looking at the stock book, we find that the defendant subscribed an agreement prepared for signature, and signed

(1) L. R. 2 Ch. 511. (2) L. R. 5 Ch. 306.

1881
NASMITH
v.
MANNING.
Gwynne, J.

by all persons taking stock in the undertaking, under the provisions of the Act of Incorporation, which is as follows:

We the several persons, firms and corporations, whose names and seals are hereunto subscribed, severally and respectively agree to and with the *Toronto, Grey and Bruce Railway Co.*, and bind ourselves, our executors and administrators or successors respectively to become holders of the capital stock of the *Toronto, Grey and Bruce Railway Co.* for the number of shares of one hundred dollars each and amounts set opposite to our respective names, and upon the allotment by the said company of my or our said respective shares we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively, provided always that no calls shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

Among several other persons who subscribed this covenant in the stock books was the defendant, who subscribed by himself for "50 shares, amount $5,000." Now if the body of the above agreement had stopped at the words, "for the number of shares of one hundred dollars each and amounts set opposite to our respective names" with the "50 shares," and amount $5,000 opposite the name of the defendant subscribed by himself, it is not disputed that the taking of the shares would have been complete, and the defendant beyond all doubt or question would have been a shareholder *in præsenti*, whatever agreement, if any, had been made as to the mode of payment, or as to any conditions regulating the payment of calls, but it is to be observed that what follows does not qualify what had gone before, which related to the taking and subscribing for stock. The agreement is not that if and when the company shall allot to the several parties named the number of shares set opposite to their respective names, they will accept such shares and subscribe the stock book. If that had been the intention, the agreement would not have been

entered in the stock book, which the provisional directors were by their act of incorporation empowered to open for the purpose of having shares subscribed for therein, but the agreement is that the subscribers in the stock book, of the several shares and amounts set opposite to their respective names, will pay the calls in certain events, namely, upon allotment of the said shares so subscribed for the first call of ten per centum and all future calls that may be made, provided, &c., &c. It is the subscribers for shares, who, under their hands and seals, covenant to pay the calls, and the qualification involved in the expression "and upon allotment by the said company of our said respective shares, &c., &c.," whatever may have been intended by that, is attached only to the payment of the calls upon the stock then subscribed for. The expression, in view of the fact appearing in the defendant's evidence that he was pressed to take the stock, and did so, being moved thereto by the verbal collateral agreement of which he spoke, and that he signed his name in the book for the fifty shares for the purpose of assisting in showing upon the stock book the subscription of the amount necessary to enable the company to organize under their act, is, it must, I think, be confessed, an inappropriate one; for the circumstances show that the defendant was subscribing for shares pressed upon him, and not proposing to take stock which the company might or might not afterwards allot to him. It is sufficient for the purposes of this suit to say that the nature of the transaction was not an application for shares by the defendant requiring a response to be signified to the company before his contract to become a shareholder should be complete, but an actual acceptance by him of stock offered to him and a subscription therefor by him in the stock book of the company, it was a completed contract, and taking of the stock, and a covenant by the defendant as

1881
NASMITH
v.
MANNING.
Gwynne, J.

a subscriber for the stock to pay the calls in certain named contingencies, and thereby the defendant brought himself within the statutory definition of a "shareholder," that is to say, "a subscriber for stock in the undertaking," and this, upon the authority of *Moss* v. *Steam Gondola Co.* (1), *Bailey* v. *The Universal Provident Life Association* (2), and *Ness* v. *Angus* (3), is all that is required to make the defendant liable to the plaintiff in a proceeding of this nature. It might be that the defendant, although a subscriber for stock in the undertaking within the meaning of the statute, might never have become liable to pay to the company any calls thereon, by reason of the contingencies, upon the happening of which the same respectively became payable under the defendant's covenant, never having happened; or it may be that the company might never have made any calls upon the stock, or might never have asked for, or required, any payment from the defendant in respect of his stock, relying, as the defendant says *Laidlaw* informed him he did, upon constructing the railway upon bonuses so as to make the stock almost free; but whether or not the contingencies happened which, in the terms of the defendant's covenant, made the calls or any of them recoverable by the company, or whether or not the company ever asked for or required from the defendant payment of the first call of 10 per cent. upon the amount subscribed for by him, or of any other call, still the defendant would be liable to the plaintiff in this proceeding if he comes, as by signing the stock book as a subscriber for fifty shares I think he does, within the statutory definition of a "shareholder." If calls had not been made, the effect in such case would only be to make the amount to be reached by a process of this

(1) 17 C. B. 180. (2) 1 C. B. N. S. 557.
(3) 3 Exch. 305.

nature at the suit of creditors larger than it would be if some calls had been made and paid. In this case, however, it appears that the provisional directors, with the view, no doubt, of subjecting the defendant to a liability under his covenant to pay the first call of ten per centum, did go through the form of directing the secretary to issue allotment certificates to each shareholder for the amount held by him. It is the form adopted (apparently by the secretary) for this certificate which has given occasion to the discussion upon this point, for, aside from the expression in this form, there is nothing that I can see affording foundation for an argument that the subscription by the defendant in the company's stock book was merely an application for 50 shares. In my judgment the plaintiff was entitled to succeed upon the record in this action upon the ground, notwithstanding the form of the certificate, that the defendant, by subscribing his name in the stock book as a subscriber for 50 shares, amounting to $5,000 in the capital stock of the company, had brought himself within the statutory definition of a "shareholder" without any further assent by the company being necessary to his becoming a subscriber for that amount. I cannot doubt that by his subscription in the stock book the defendant acquired the right to compel the company to receive his 10 per cent. if he had pleased to tender it so as to entitle him to the privilege of voting or of selling his shares if they had risen to a premium. He was by his signature in the stock book a subscriber for the 50 shares, whatever qualification from the form of the defendant's covenant may have been imposed upon the company affecting their right to enforce against the defendant's will payment of calls.

The certificate prepared for the defendant is as follows:—

1881

NASMITH v. MANNING.

Gwynne, J.

Toronto, 1st July, 1869.

To Alexander Manning, Esq., Toronto:—

This is to certify that the *Toronto, Grey & Bruce Railway Company*, in accordance with your application for 50 shares of $100 each of their capital stock, have allotted to you 50 shares amounting to $5,000, the first instalment of 10 per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding 10 per cent. on the amount of said shares and at intervals of not less than sixty days.

W. Sutherland Taylor,
Secretary.

The case in the court below turned upon the question whether or not in writing, verbally, or by conduct, the defendant had had notice or knowledge that the company regarded him to be a shareholder, his subscription in the stock book having, upon the authority of *Denison* v. *Lesslie* (1) been assumed to be a mere application for shares requiring some response from the company. The learned judge before whom the case was tried found as matter of fact, that the defendant subscribed for the 50 shares in the stock book; that the 50 shares were allotted to him by the company; that the company sent notices to him of calls; that his name was published in the *Globe* newspaper as a shareholder, and that during the period of such publication the defendant was a subscriber to the *Globe*; that all was done by the company to give to the defendant a claim against the company for the stock, and to have any benefits that might accrue therefrom. He added that he could not say that the defendant received actual notice of the allotment, but he found as a fact that the company by notices sent to his address gave him notice of their considering him a shareholder.

Now it appears to me that it would be highly improper and indeed mischievous that a court sitting in appeal should reverse these findings of the learned judge, upon whom devolved the special duty of endea-

(1) 43 U. C. Q. B. 34 and 3 Ont. App. Rep. 536.

voring to reconcile conflicting evidence—of observing the manner in which the several witnesses gave their evidence, although the credibility of none of them was attacked—and, with the advantage of that observation, of arriving at a just conclusion upon the question submitted. Starting with the admission by the defendant that he had subscribed for the shares upon a verbal promise that by doing so he should secure a contract to build the road, which, as he says, was promised him, and that relying upon such promise he had tendered for the contract so promised after the company had become so organized as to enable it to give a contract for building the road, to assist in reaching which point his subscription had been asked for and given; contrasting also the defendant's admission in the former case of *Jaffray* v. *Manning*, "that he may have been notified of the first call," with his denial now of having received any notice of call, it is obvious that in order to arrive at a just conclusion one way or the other, upon the question submitted, not only was great care necessary in the endeavor to reconcile conflicting evidence, but in forming his judgment the learned judge would naturally be influenced by the manner in which the respective witnesses gave their evidence, as well as by the way in which the defendant professed to explain how his view could be reconciled with matter testified to, and which appeared to the learned judge to be established by other witnesses. It is obvious that the learned judge, as well from the manner of the defendant giving his evidence as from its matter, would have to estimate the proper degree of weight to be attached to the defendant's memory when he now says that he never received any notice of calls, when the judge was satisfied from independent evidence that such notices were sent to the defendant's address, and when it appeared that in *Jaffray* v. *Manning* the defendant admitted that

1881
NASMITH
v.
MANNING.
Gwynne, J.

he might have been notified of the first call; so likewise, when it appeared that the list of shareholders with the defendant's name on it was published for some time in the *Globe* newspaper, to which paper at the time the defendant was a subscriber, and when it appeared that the defendant tendered for the contract to build the road in pursuance, as he says, of the promise made to him upon the faith of which he had subscribed, and that he took great umbrage at the promise not being kept, I confess it seems to me to be difficult to conceive a case in which the manner in which the several witnesses gave their evidence would form a more essential feature in enabling a jury, or a judge acting as a jury, to determine which was the most proper conclusion of fact to arrive at. A court, not having the opportunities which the judge at the trial had, assumes in such a case a grave responsibility, when it ventures to reverse the conclusions on matters of fact of the judge who had them; a responsibility which, in my judgment, should never be assumed by a Court of Appeal, unless the matter of the evidence conveys to the minds of the judges sitting in appeal a clear conviction that the conclusions of fact arrived at by the learned judge who tried the cause are erroneous. In the case before us, the Court of Queen's Bench, consisting of three judges, one of whom was the judge who tried the cause, and who had, therefore, an opportunity of conveying to his brother judges in consultation the impression made by the respective witnesses upon his mind during the progress of the trial, has concurred in his findings. One of the four judges of the Court of Appeal takes the same view. How is it possible then to say that conclusions of fact so concurred in are so clearly erroneous as to justify a Court of Appeal in reversing them? It is admitted that if a jury had found, as the learned judge who heard the witnesses, and the Court of Queen's

Bench, of which he is a member, have found, it would not have been competent for the Court of Appeal to reverse the findings; but a distinction has been drawn between the effect of matters of fact found by a judge trying a case without a jury, and the effect of the finding of the same matters by a jury, and in support of this distinction the observations of Lord Justice *Bramwell* in *Jones* v. *Hough* (1), have been referred to, but these observations do not appear to me to go further than the rule as I have stated it above. True it is, although by the course of procedure in *Ontario* either party may have issues joined in an action at law tried by a jury, or by a judge without a jury, at their option, it is known that the full court in which the action is pending may be moved to review the judge's findings upon matters of fact upon the evidence as taken before him; but it is discretionary with the court to grant the motion or to refuse it, and if the case be clear it is not unusual to refuse it. Now, what Lord Justice *Bramwell* holds is that, when the decision of a judge of first instance, finding matters of fact without the aid of a jury, is brought before a court by way of appeal, and the judges of the court sitting in appeal see that the conclusions arrived at by the learned judge who tried the case are erroneous upon the materials before him, they should not accept his finding, but should exercise their own independent judgment. These observations do not touch the point as to the weight to be attached to the finding of a judge of first instance upon matters of fact, when such finding from the nature of the case depends upon the credibility of the witnesses examined before him, or upon the manner in which they give their evidence, or upon the balancing conflicting testimony where no imputation may be cast upon the honesty and credibility of any

(1) 5 Ex. D. 122.

1881
NASMITH
v.
MANNING.
Gwynne, J.

of the witnesses. They relate to cases where, from the materials before the judge, and which are brought before the Court of Appeal, the latter can clearly pronounce the finding of the judge at the trial to be erroneous. The particular question which arose in the case in which the observations occur was whether the judge at the trial was correct in finding that the defendant was guilty of conversion of goods put on board his ship, because he had sailed with his vessel without a bill of lading of the goods having been signed. The case was one as to the proper inference to be drawn from facts as to which there was no dispute. In such a case there can be no doubt that it is within the jurisdiction and the power and the duty of a Court of Appeal to interfere and to pronounce the finding of the learned judge to be erroneous, if convinced that it was so; but such language is manifestly inapplicable to a case in which the manner of the witnesses, as well as the matter of their evidence, must, or may, be an essential ingredient to enable a judge to balance conflicting evidence, for this is a species of testimony which cannot be brought before the court sitting in appeal. The same learned Lord Justice had already held in a case from the Court of Chancery tried before a Vice-Chancellor who had seen the witnesses, that a Court of Appeal ought not to reverse the finding of the Vice-Chancellor upon matters of fact, unless *satisfied* that he was wrong, and proceeded to say:—

> I feel satisfied, and I need not say I say it with perfect respect, that I can put my finger upon the error or the mistake which the Vice-Chancellor made, and I am satisfied that if he had had those materials before him which we now have [the court had allowed additional evidence to be given] he would not have made the mistake, if indeed, it can be properly said to have been a mistake of his making (1).

The general rule laid down by the Privy Council, sub-

(1) *Rigsby* v. *Dickinson*, 4 Chy. D. 30.

ject to possible exceptions, is that they will not reverse the concurrent findings of two courts upon a question of fact, and the test to be applied to determine whether there have been the judgments of two courts, is to enquire whether the first judgment, if not appealed or brought in review before the second tribunal adjudicating in the matter, would have been a conclusive judgment, or whether it required confirmation by the tribunal before becoming operative (1). But the rule of universal application in all courts is that enunciated in the House of Lords in *Gray* v. *Turnbull* (2), where Lord *Chelmsford* says :—

Upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. Different minds will, of course, draw different conclusions from the same facts.

And he comes to the conclusion, that upon an appeal from the decision of the judges of the court of first instance, it should be irresistibly established to the satisfaction of the appellate tribunal that the opinion of the judge or judges on the question of fact was not only wrong but entirely erroneous; and Lord *Westbury*, in the same case, said :—

In the English tribunals, when a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the court to grant a new trial. Unquestionably I should have pressed upon your lordships to abide by that rule if it had not been that the case now brought before us has unfortunately been decided, not on evidence taken in the presence of the court, but upon the written depositions of witnesses; and it has been the practice in courts of equity, where that mode of taking evidence prevails, to allow appeals on matters of fact, although the court below has felt no hesitation in the conclusion to be arrived at on the deposition; but if we open a door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever.

(1) *Hay* v. *Gordon*, L. Rep. 4 P. C. 348.

(2) L. Rep. 2 Sc. Ap. 54.

1881
NASMITH v. MANNING.
Gwynne, J.

Now, applying the principle of these cases, it is impossible to say that the findings of the learned judge at the trial are erroneous; for my own part I cannot say that I am at all disposed to differ from them; and adopting them, as consistently with the principle of the above cases, we must, I can see no other conclusion resulting from them than that arrived at by the unanimous judgment of the Court of Queen's Bench concurred in by the Chief Justice of the Court of Appeal, the majority of which court, in my opinion, erred, in reversing that judgment; and this appeal from the judgment of that court should therefore be allowed, and the judgment of the Court of Queen's Bench restored, with costs as well upon this ground as upon the other.

Appeal dismissed with costs (1).

Attorneys for appellant: *Lauder & Proctor.*

Attorneys for respondent: *Ferguson, Bain, Gordon & Shepley.*

1880
*Nov. 19.
1881
*Feb'y. 12.

THE LONDON LIFE INSURANCE CO...APPELLANTS;

AND

JULIA ELIZABETH WRIGHT.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

37 *Vic., ch.* 85, *Ont.—Insurance policy—Want of Seal—Fraud—Pleadings—Power of Courts of Equity.*

The seventh section of the statute incorporating the appellants (37 *Vic.* ch. 85, O.) after specifying the powers of the directors, enacts as follows: "but no contract shall be valid

* PRESENT—Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, J.J.

(1) In this case the Judicial Committee of the Privy Council granted leave to appeal from the judgment of the Supreme Court, but the case was settled before coming on for argument.

unless made under the seal of the company, and signed by the president or vice-president or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board."

J. E. W. brought an action to recover the amount of a policy issued by the appellants in favor of her father. The policy sued on was on a printed form and had the attestation: "In witness whereof, *The London Life Insurance Co., of London, Ont.*, have caused these presents to be signed by its president, and attested by its secretary and delivered at the head office in the city of *London*, &c."

To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it.

Held, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal," as a defence, was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and therefore the respondent was entitled to the relief prayed as founded upon the facts alleged in her equitable replication.

[*Ritchie*, C.J., and *Taschereau*, J., dissenting.]

APPEAL from a judgment of the Court of Appeal for *Ontario*, dismissing appeals from the judgments of the Courts of Queen's Bench and Common Pleas, in this and eight similar cases.

The action was brought to recover the amount of an accident insurance policy upon the life of *John Wright*, the father of the respondent. The policy was issued on 8th September, 1875, and the death of the insured occurred on 7th December of that year.

The facts and pleadings are fully set out in the judgment of Mr. Justice *Gwynne* hereinafter given. See also reports of the case, 5 *Ont.* App. R. 218 and 29 U. C. C. P. 221.

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

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

[The argument of counsel upon the question of fact whether the death had been accidental or not, was not entertained by the Court, and is therefore omitted.]

The alleged policies of the appellants' company do not purport to be under their seal.

The appellants are incorporated by Act of the Legislature of *Ontario* (37 *Vic.*, c. 85).

It is by section 7 of the said Act, amongst other things, enacted as follows: "No contract shall be valid unless made under the seal of the company, &c."

Mr. Justice *Patterson* in the court below gave his judgment upon the ground that this paper could be treated as an interim receipt. The other judges admitted that there was no evidence to go to the jury to show that this was a contract; but the Court of Common Pleas thought that an equitable replication of estoppel should be allowed to be pleaded, and the Court of Appeal were of opinion that a count in the nature of a bill for specific performance should be allowed to be added.

The appellants submit that both views were erroneous.

As to the interim receipt Mr. Justice *Patterson* seems to have been under the impression that no form of "interim receipt" used by the appellants had been used. This was erroneous, as may be seen by the case. Moreover, it was only to be a temporary contract.

The declaration in the case imported that the instrument upon which the plaintiff was suing was a sealed instrument. After trial, and after the verdict had been moved against, the Court of Common Pleas gave leave to the plaintiff to add an equitable replication, and it was only in the Court of Appeal that appellants got leave to plead to this equitable replication. I contend the Court of Common Pleas had no jurisdiction in such

a case, the Court of Chancery being the proper forum. The record in this case presents the anomaly of a plaintiff suing upon a policy of insurance, and the issues arising upon that action being tried, and all of them going to the whole cause of action, determined by a jury against the plaintiff, and then the Court of Appeal taking up a distinct and separate head of relief, upon evidence not taken before it but directed to a different end, usurping the function of a court of original jurisdiction, and decreeing in effect the specific performance of a contract.

The Court of Appeal did not try the other two issues itself apart from the findings of the jury, but while it discarded the findings of the jury upon one issue adopted their findings upon the other two issues.

There being no representation of a seal having been affixed the appellants submit that no estoppel could arise, in respect of which a Court of Equity could estop the appellants from pleading the want of a seal.

The statute is just as binding upon a Court of Equity as a Court of Law, and a Court of Equity could not decree specific performance of a contract against the appellants, unless that contract was entered into in the only way in which the defendants could contract.

The appellants are the creature of the legislature, and the same legislature has determined that the only way in which they can contract is under their seal.

What right has any court to say that they may contract otherwise?

The cases referred to by Mr. Justice *Patterson* in the Court of Appeal, it is submitted, are distinguishable. There was not, in any of these cases, an express prohibition against contracting except under seal. It may be quite true that in cases where the act of incorporation is silent as to the mode of contracting by the corporation, the courts may determine that trading corporations are

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

bound by contracts made otherwise than under their corporate seal, but that must be so determined only because the courts do not assume that in such cases the legislature did not intend to allow contracts to be authenticated in that way solely, but where the legislature has expressly declared, as in this case, that the contract shall not be binding, except when under seal, the appellants submitt hat no Court of Equity can enforce a contract not so authenticated. *Hunt* v. *The Wimbledon Local Board of Health* (1); *Newd* v. *Dunnett* (2); *Brice* on *ultra vires* (3); *Montreal Ass. Co.* v. *McGillivray* (4); *Sumott* v. *London Dock Co.* (5); *Kelly* v. *The Isolated Risk* (6); *Hardcastle* on Statutes (7).

Mr. *Scott* for respondent:

If it was necessary that an amendment should be made in the pleadings by adding the equitable replication, the courts in term had ample power to make such amendment (8), and the Court of Appeal has similar powers (9).

The appellants object that an amendment should not be allowed when it raises a new issue, but every amendment necessarily does this, and courts are always entitled to amend, and then judge as to whether the amendment renders necessary a new trial. In this case no new issue was really raised, all the facts being either admitted or found by the jury, and the sole question was whether on those facts the respondent was entitled—the record being first put into a proper shape —to succeed. Both courts have power to take further evidence (10).

As to the defence for want of a seal, I don't think any

(1) 3 C. P. D. 208.
(2) 27 L. J. C. P. 314.
(3) Ch. 3, s. 2.
(4) 13 Moore P.C. 87, 122, 124.
(5) 8 E. & B. 347.
(6) 26 U. C. C. P. 299.
(7) P. 22.
(8) R. S. O. ch. 49, sec. 8.
(9) R. S. O. ch. 38, sec. 22.
(10) R. S. O. ch. 38, s. 22; 41 Vic. (Ont.) ch. 8, s. 7.

court of justice would sustain it. The instrument was produced at the trial, and the effect of the jury's verdict, I contend, is that the policy was delivered sealed.

The evidence before the jury was that, as a matter of law, the appellants could only issue policies under seal; that they issued and delivered to the assured this paper as a legal policy; that it purported to be an act not of the officers, but of the company; that they admitted, at a previous trial, that this paper was a policy binding on them; but that their inspector says that they did not seal their accident policies, and that his impression is that this particular policy is not sealed. No evidence was given that the appellants had any special common seal. Any seal affixed by the proper authority of a body corporate will suffice, and any impression would be sufficient (1).

And there was ample evidence to go to the jury. *Grellier* v. *Neale* (2); *Talbot* v. *Hodson* (3).

Then the evidence is also such as to amount to an estoppel *in pais* upon the question of sealing, and on that ground the jury were justified in finding a verdict for the respondent. All the requisites of an estoppel exist in this case, and corporations are bound by an estoppel in the same way as individuals, and can waive their rights. *Herman* on Estoppel (4); *Bigelow* on Estoppel (5); *Laird* v. *Birkenhead R. W. Co.* (6); *Steven's Hospital* v. *Dyas*, this was a case of a statute (7); *London & Birmingham R. W. Co.* v. *Winter* (8); *Wilson* v. *West Hartleford R. W. Co.* (9).

The cases relied upon by the appellants as to the

(1) Shep. Touchst. 57; 6 Viner's Abr. 307; *Reg.* v. *St. Paul's*, 7 Q. B. 232.
(2) Pea. 198.
(3) Pp. 509–512.
(4) P. 419.
(5) 29 L. J. N. S. Chy. 221.
(6) 7 Taunt. 250.
(7) 15 Jur. Ch. 405.
(8) 1 Cr. & Ph. 63.
(9) 2 DeG. J. & S. 475.

1880
THE LONDON LIFE INS. CO. v. WRIGHT.

necessity of a contract being under seal, do not apply here, as they all are cases where there never was any intention that a formal contract should be entered into by the corporations, and the contracts were, at the time they were attempted to be enforced, really incomplete. Here both parties intended to complete the contract, and, as a part of such completion, intended to do everything necessary to attain that end, and among these things to affix the seal.

The replication is not equivalent to a bill for specific performance, but is more in the nature of a bill to restrain an inequitable defence, and if such a bill would lie prior to the Administration of Justice Act a replication is now proper. The respondent submits that such a bill clearly would lie, and that a Court of Equity would not allow the appellants to take advantage of their own fraud in neglecting to affix the seal and delivering a worthless piece of paper as a valid and binding policy. *Bond* v. *Hopkins* (1); *Hovinden* v. *Annesley* (2).

Mr. *Bethune*, Q. C., in reply:

The applicant was dealing with a corporation and it was his duty to enquire what the power of the directors of the corporation were, and the moment he did so he would have to enquire what the statute enacted. Then nothing short of a paper signed and *sealed* can be said to be a binding representation.

RITCHIE, C. J.:—

In this case it is beyond dispute that the instrument declared on as a policy of insurance was not under seal and was not declared on as being under seal, nor did it purport to have been sealed, and the simple question, in my opinion, is: Can the plaintiff, not producing a contract under seal, recover in this action?

(1) 1 Sch. & Lef. 413. (2) 2 Sch. & Lef. 607.

The *Ontario* Act incorporating the *London Life Insurance Company*, 37 *Vic.*, c. 85, s. 7, declaring the powers of the directors, after specifying certain particulars, enacts: "And generally to transact all necessary matters and things connected with the business of the company, but *no contract shall be valid unless made under the seal of the company and signed by the President* or one of the directors, and countersigned by the manager, except the *interim receipt* of the company, which shall be binding upon the company on such conditions as may be thereon printed by direction of the Board."

The reason why interim receipts are thus excepted is very obvious, because practically they could not be sealed by the company, inasmuch as these interim receipts are issued by agents at a distance from the domicile of the company and transmitted to the company, and, as the name indicates, are subject to the acceptance or rejection by the company of the risk tendered to the agent, and to be in force for a certain number of days, or until, in the mean time, such acceptance or rejection by the company.

If accepted a policy issues, if rejected the insurance ceases; in either case the insurance, under the interim receipts, is at an end, and, if neither accepted nor rejected, is at an end at the expiration of the days named.

Here is the copy of the interim receipt of this company as in evidence:

LONDON LIFE INSURANCE CO'Y, OF LONDON, ONT.

AMOUNT, $... INTERIM RECEIPT.—ACCIDENT DEPARTMENT. PREMIUM, $...

Received from.....of.....

.....Dollars, for which I agree to furnish him an Accident Insurance Policy in the above-named Company within thirty days from date, provided the Application is accepted and the Policy written by the Company, or to return the same to him, or his order, on demand.

.....187.....*Agent.*

So far then as this company is concerned, it only obtains

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

power to contract by virtue of the statute, and that power is specially conferred, and the statute has in prohibitory language declared that no contract shall be valid unless in the mode pointed out, and the clear declared policy and object of the statute is that this company, the creature of the legislature, so far as language can declare it, shall not be bound, except by contracts under seal. We have no right to inquire into the reason or motive which prompted the legislature to require this formality; it is, I think, our duty to say that all formalities required by the statute must be punctually complied with, and to declare that neither this court nor any other court has any right or power to dispense with a regulation so imperatively prescribed by the statute in such prohibitory language. I do not think it is for me to question the policy or impolicy of this provision, or any hardship which giving effect to this provision would entail in this case. I consider this enactment quite as binding and obligatory on Courts of Equity as Courts of Law. I know of no principle on which courts can set the statute law of the country at defiance and say that an artificial body, owing its existence to a statutory enactment, can contract without seal, when the legislature, which created the body, declares it shall not, or to make a binding contract for such a body corporate that they have not made for themselves. The very exception of interim receipts proves, I think, that the legislature intended that the term contract should apply to every other insurance contract, and to say that the company could make a contract of insurance such as is contained in the policy declared on in this case without its being sealed is, in my opinion, simply to repeal the statute. It is my duty to read the Act as it is written. The language is clear, plain, positive, free from all ambiguity, admitting of no doubt: the words are "no contract shall be valid unless made

under the seal of the company." There must be a binding contract to enable the plaintiff to recover either in law or equity. There has been no contract under seal, how then can I judicially say there has been a binding, legal, valid contract, unless I am prepared to set at naught an express legislative enactment, and so override the law of the land? The legislature has been pleased to say "no contract shall be valid unless under seal." What right have I, sitting here to administer the law as it stands on the statute book, practically to repeal a provision so clear and unequivocal, and say that a contract shall be valid, which the legislature says in unmistakable language shall not be valid? The same difficulty exists as to specific performance or other relief in equity in this case as to a recovery at law.

The first point to be determined is to ascertain whether there is an agreement, for if no agreement the court cannot make one, and any bill filed must be dismissed, and how can there be any agreement when the Act expressly declares that these defendants shall not contract but in a particular manner? In other words, shall not make a contract of insurance, except by interim receipts, in any other manner than under seal. Therefore any contract, in order to lay the foundation of a suit at law or in equity, must be under seal. You cannot raise an equity without a contract, and you cannot get a contract without a seal.

Let us now see what the authorities say as to the contracts of corporations generally not under seal, when there is no prohibitory clause, and then as to the effect of express statutory requirement of a seal.

In relation to trading corporations, modern cases have engrafted numerous exceptions on the old rule, that a corporation cannot contract except under seal, which rule is thus stated by *Tindal*, C. J., in *Gibson* v. *East India Company* (1):

(1) 5 Bing. N. C. 269.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

The general rule of law is not denied on the part of the plaintiffs to be, that no action founded on contract can be maintained against a corporation aggregate, unless where such contract is under the seal of the corporation. Such, indeed, is the language of all the authorities beginning with those collected from *Year Books* in *Bro. Abr, tit. Corporations and Capacities*, down to the latest of the present day; the ground of that rule, as it is to be extracted from such authorities, being that as a corporation is a body politic and invisible, it can only act and speak by its common seal; or as it is said *arguendo*, in *Rex* v. *Briggs* (1), the common seal is the hand and mouth of the corporation.

But though, as said by *Tindal*, C. J., "On this general rule, both in ancient, and still more frequently and largely in modern times, have exceptions been grafted, so that it is now undoubted law, that in very many cases actions are maintainable in our courts upon contracts entered into, by and on behalf of corporations aggregate, though such contracts are not under seal," these exceptions have not abrogated the old rule, and had they done so this Act of incorporation prevents the engrafting of any exceptions with respect to contracts of insurance, except that named in the statute, and peremptorily prevents this company from effecting a valid contract of insurance except by instrument under seal.

The agreement, I think, must be considered as ranging itself, as was said by *Tindal*, C. J., in the same case, under that class of obligations which is described by jurists as imperfect obligations, obligations which want the *vinculum juris*, although binding in morals, equity and conscience, an agreement which the defendants, as was said there, "are bound *in foro conscientiae* to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law," and *Tindal*, C. J., concludes his judgment thus:

It is enough, however, to say, though the company undoubtedly

(1) 3 P. Wms. 423.

might, if they had thought proper, have made a grant under their common seal for the payment of this pension, by which they would have rendered themselves liable to an action in a court of law, yet they have not done so; and it appears to us that this grant, not under seal, does not fall within the reason or principle of the exception which has been above adverted to, and consequently that it must be governed by the general rule of law, that a corporation aggregate cannot be sued upon a contract not being under their common seal.

In *Lamprell* v. *Billericay Union* (1), an action for additional work, to which want of written directions from the architects was a complete answer so far as such claim depended on the deed, *Rolfe*, B., delivering the judgment of the Court, says :—

But it was suggested at the bar, that though for want of written instructions the plaintiff might have no remedy under the deed, yet, as the defendants had accepted the additional works, and so had the full benefit of them, the plaintiff had a right to be paid on a *quantum meruit* independently of the deed. The case of *Lucas* v. *Godwin* (2) was relied upon. But there the defendant was an individual capable of making a new contract by parol, as he might think fit, whereas here the defendants are a corporate body incapable of contracting otherwise than by deed. We adhere on this subject to the doctrine laid down by this court, in *The Mayor of Ludlow* v. *Charlton* (3), and subsequently acted on in the Common Pleas in *Arnold* v. *The Mayor of Poole* (4), and by the Court of Queen's Bench, in *Paine* v. *The Strand Union* (5). The principle of those cases clearly exempts the present defendants from all liability as to the matters in question in this action, except such as arose by instrument under their seal.

In *Diggle* v. *The London & Blackwall Railway Co.* (6), where all the cases were cited on the arguments, the marginal note is :

A railway company, duly incorporated by Act of Parliament, entered into an agreement *not under seal*, with a contractor that he should execute certain works upon their railway, for the purpose of changing the system of locomotion which they had employed, the rope and stationary engine system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement,

(1) 3 Exch. 283.
(2) 3 Bing. N. C. 744.
(3) 6 M. & W. 815.
(4) 8 Q. B. 338.
(5) 4 M. & G. 860.
(6) 5 Exch, 442.

1881
THE LONDON LIFE INS. CO. v. WRIGHT.
Ritchie, C.J.

entered upon the works and performed a portion of them, but before they were completed he was dismissed by the company: *Held*, that he could not recover the value of this work.

In *Homersham* v. *Wolverhampton Waterworks Co.* (1), this Court (Exchequer) again affirmed the principle that a corporation can contract only under seal, or if it is a body established under Act of Parliament, general or special, under the authority of the provision of such Act; and in *The Governor and Company of Copper Mines* v. *Fox and others* (2), the Court of Queen's Bench, per Lord *Campbell*, fully sustained the general principle that a corporation can contract only under seal, and said that "we regret very much that any technicality should interfere with the enforcement of a fair contract," but the law by which a corporation is not bound, unless the contract is under seal, can be altered only by the legislature.

In *Williams* v. *The Chester and Holyhead Railway Company* (3), *Martin*, B., delivering the judgment of the court, says:—

We cannot conclude without calling attention to the extreme imprudence of persons dealing with railway or other companies upon letters or documents signed by the secretaries of such companies. There is no reason to suppose that any fraud was intended in this case, or that the mistake originated otherwise than in an unintentional oversight. But the consequences to him are the same as if the gross fraud had been practised upon him, of the directors authorizing one contract, and their secretary knowingly communicating one varying from it to him, &c., &c.

Persons dealing with these companies should always bear in mind that such companies are a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials, and should insist upon these contracts being by deed under the seal of the company, or signed by directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such a body upon any other footing. The same obser-

(1) 6 Exch. 137. (2) 16 Q. B. 298.
(3) 5 Jur. 828.

vation also applies in respect of any variation or alteration in a contract which has been made.

In *Cope* v. *The Thames Haven Dock and Railway Company* (1), the marginal note is :—

A railway company was incorporated by an Act of Parliament, one section of which enacted that the directors should have power to use the common seal on behalf of the company, and that all contracts relating to the affairs of the company, signed by three directors, in pursuance of a resolution of a court of directors, should be binding on the company. The following section enacted that the directors should have full power to employ all such managers, officers, agents, clerks, workmen and servants, as they should think proper.

By a resolution of the board of directors, signed by their chairman, the plaintiff was appointed agent to negotiate with another railway for the lease of the line.

Assumpsit for work and labour.

Held, that the contract was not binding on the company, it not having been sealed or executed with the required formalities.

Parke, B. :—

The rule must be absolute, on the ground that this is a contract by which the company cannot be bound, unless made in the form required by the 119th section, which gives a power of binding the company by an instrument under seal, or in writing signed by three directors, in pursuance of a resolution of the board. Neither of these requisites has been complied with. There is no doubt about the rule of law. We had occasion to consider it in the cases of *The Mayor of Ludlow* v. *Charlton* (2), and *Cox* v. *The Midland Railway Co.* (3). The reason why a corporation cannot be bound, except by their common seal, is satisfactorily explained by my brother *Rolfe* in the judgment in *The Mayor of Ludlow* v. *Charlton*, where it is shown that the doctrine was not, as suggested, a relic of ignorant times.

This language of *Rolfe*, B., in *Mayor of Ludlow* v. *Charlton*, was adopted by *Pollock*, B., in *Mayor of Kidderminster* v. *Hardwicke* (4).

In the *Mayor of Ludlow* v. *Charlton* (5), where it was held that a municipal corporation was not bound by a contract to pay money, although the consideration

(1) 5 Exch. 841.
(2) 6 M. & W. 815.
(3) 6 M. & W. 268.
(4) L. R. 9 Exch. 24.
(5) 6 M. & W. 815.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

had been executed, such contract not being made under their common seal, *Rolfe*, B., says:

Before dismissing this case, we feel ourselves called upon to say that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the Legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act the body will be bound; but in other cases the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which, by law, shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

In *Frend and another* v. *Dennett* (1), the marginal note is:—

By the 85th section of the Public Health Act, 11 and 12 *Vic.*, c. 63, it is amongst other things enacted that "the local board of health may enter into all such contracts as may be necessary for carrying the Act into execution; and every such contract, whereof the value or amount shall exceed £10, shall be in writing *and sealed with the seal of the local board*," &c., &c.: *Held*, that a contract which did not comply with this condition is not capable of being enforced. *Cockburn*, C. J., in strong terms expressed his reprehension of the turpitude of the defence.

(1) 4 C. B. N. S. 576.

Cockburn, C. J.:—

This rule must be made absolute. I very much regret that we are compelled to come to that conclusion; but I see no alternative. It is sought to make the rates for the district liable upon this contract, by means of an action against the clerk to the local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the Act of Parliament; and that, by the very same clause which gives the board power to enter into contracts, amongst other things, expressly enacts that "every such contract, whereof the value or amount shall exceed £10 shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal." I think the local board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute.

Williams, J.:—

I am of the same opinion. I do not see how we can, consistently with the ordinary rules by which statutes are construed, hold this part of the 85th section to be directory. It is not like the case of a thing which is to be done by the board, where those dealing with them have no means of knowing whether or not it has been done in the manner required by the Act. Here, however, is a public Act which requires that all contracts to be entered into by the local board shall be entered into in a particular way, viz.: "In writing and sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof."

The plaintiff, therefore, must have been well aware that the board had no power to contract so as to bind the rates, except in the manner pointed out by the Act.

Willes, J.:—

I am of the same opinion. This case has been argued as if the 85th section of the Act had been a controlling section, and as if all the terms in which matters therein mentioned are required to be done were directory only. But it is that section which alone confers upon the local board the power of entering into contracts; and they must exercise that power in the terms in which it is by the act conferred upon them. I regret to be obliged to come to this conclusion; the more especially as this is not the first instance of fraud and oppression occasioned by this state of the law, within my own observation.

In Hunt v. *The Wimbledon Local Board* (1), the marginal note is:

(1) 3 C. P. D. 203.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

Section 85 of the Public Health Act, 1848, and section 174 of the Public Health Act, 1875, enact (without any words of prohibition) that "every contract made by a local board," or by an urban authority, whereof the value or amount exceeds [£10] £50, shall be in writing, and sealed with the common seal of such authority.

The defendants, a "local board," and an "urban authority" under the above mentioned Acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to, and approved, and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorizing their preparation :—

Held, that by reason of the non-compliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them.

Lindley, J.:—

In this case, however, I have to construe and apply a special Act of Parliament; and although some of the provisions of the above mentioned sections are not, in my opinion, applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than £10 or £50, as the case may be, is, I think, applicable to it; and, having regard to the objects and terms of those sections, and to the case of *Frend* v. *Dennett* (1), I am unable to hold that the clause requiring a seal is a merely directory clause.

In *Nowell* v. *Mayor of Worcester* (2), other clauses requiring other things to be done by the board were held to be directory only, because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed; and it appears to me that I should be depriving the ratepayers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for work done under a contract required by those Acts to be under seal, and not in that form.

The observations of Baron *Rolfe* in *Mayor of Ludlow* v. *Charlton* (3), are, in my opinion, very pertinent to cases of this description; and

(1) 4 C. B. N. S. 576; 27 L. J. C. P. 314; and in equity, 5 L. T. N. S. 73.

(2) 9 Ex. 457.

(3) 6 M. & W. 815.

thoroughly concurring, as I do, with those decisions which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed.

Bramwell, J.:—

I am of opinion that the judgment of *Lindley*, J., was right, and ought to be affirmed. First, I think that s. 174 is applicable to cases other than those alluded to in it, and that it is not limited to them. The section is general, and refers to every class of contract, and there is no reason for limiting it. In the next place, I think the section is not merely directory but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal, an offence; but it is a mandatory direction that contracts shall be made in a particular way, that is to say, in writing and under seal. The enactment relates to a contract which is the act of both parties, and is applicable not to one of them alone, but to both of them. I do not mean to say that the section makes anything particularly necessary upon the part of the contractee, but it requires that the evidence of the obligation of the two parties must be in writing and sealed with their seals. In this particular case the section is of importance, as drawing a line between cases where the contract shall or shall not be under seal. If it rested at the common law there might be a discretionary power as to what contracts should be entered into by parol, and what contracts should be made under seal, such as contracts of small amount or acts of daily necessity, and some others which are said to be within the exception to the general rule that a corporation must contract under their corporate seal. If it were not for section 174 it might be contended that contracts to the amount of £5 or £20, or even £100, came within the rule. The legislatures, however, have drawn the line, and said that all contracts over £50 must be entered into under seal and contracts for a less amount may be made by parol. That being my opinion as to the effect of the statute, I think it clear that this is a contract, upon which, if after the order had been given it had been countermanded by the defendants, and defendants had said to the plaintiffs: "Do not go on with it, we shall not employ you," no action could have been maintained. Then it is said that this is not an executory contract, but an executed contract, of which the defendants have got the benefit, and for which they must pay. I will deal with that question presently. First, reliance is placed on the doctrine in equity as to contracts relating to land. It is said that a part performance by entering into possession of the land under a verbal contract for its purchase is sufficient to take it out of the statute of

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

frauds. I think that that doctrine has no analogy to the present case, and the ground on which that law rests has been clearly stated by the Master of the Rolls in *Ungley* v. *Ungley* (1). He says: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the statute of frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract, in order that justice may be done between the parties." That reason is not applicable to a case like the present.

Brett, L. J.:

The general rule is, that where the defendants are a corporation and the contract made with them is not under seal, the defendants are not liable. I think this case is within the general rule, and would not be within any of the recognized exceptions. It is not within the exception which is mentioned—if it can be called an exception—or within that doctrine of the Court of Chancery which is applicable to the statute of frauds. That doctrine of equity with regard to the statute of frauds is equally applicable, whether the defendant be a corporation, or whether the defendant be only an individual, and is founded upon the view that the statute of frauds only deals with a matter of evidence upon a suit or trial. In the case of the statute of frauds, the original contract is perfectly valid, and the only effect of the statute is, that in a contested suit no evidence can be given of that contract unless certain formalities have been observed. The Court of Chancery has held that in certain circumstances they will allow evidence to be given of the contract although the formalities of the statute have not been fulfilled. But that decision cannot have any reference or any application to a case where the contract originally, by a rule of law, is invalid. I think, also, that this case is not within any of the common law exceptions which have been suggested.

* * * * * *

Another exception is suggested. It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made, accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

(1) 5 Ch. D. 887.

I doubt very much whether there is any such rule, either in law or equity.

* * * * * *

But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than directory. It is what has been called mandatory. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this: The legislature knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than £50—that is to say, that if they were necessary and under £50, they should be brought within the recognized exception as to small matters; and that if they were over £50, the mere fact of their being over £50 would prevent their coming within the exception.

Cotton, L. J.:

The statute of frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was. But if a Court of equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the court will in consequence of that overt act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the Courts of Equity have given an effect to contracts valid at common law, which could be enforced but for the statute of frauds. That is the ground on which these cases rest, and that it is not on the ground of fraud is shown by this, that the payment of the price to a vendor will not take the case out of the statute. But surely it is as great an injustice for a man to receive the price, and then say: "You cannot enforce the contract," as to repudiate the contract where possession has been given. When there is an overt act, a Court of Equity will receive parol evidence of the contract, but that is in cases of specific performance of contracts relating to land which are valid at common law.

Pollock, C. B.:—

The case, therefore, stands precisely in this position: That there was a contract under seal; that there was more work done than the plaintiff was bound to perform under that contract; but there was no evidence of the extra work having been either ordered by the

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

company, sanctioned by the company, or ratified, or adopted by the company. These clauses of restriction are of the same nature as the old common law distinction between a corporate body and a private individual, according to which the latter can in general be bound only by a contract under seal; and the rule is for the benefit of subscribers to works of this description, for the protection of their interests. We are, therefore, of opinion, that they can only contract either under seal, if they are a corporation; or, if they are a body established under any special or general Act of Parliament, they can only contract according to the terms by which the contract is authorized to be entered into by the clause of the special Act, or of the general Act by which they are controlled. In the present case there was no evidence of any contract which could be brought under either of these classes; and, therefore, we think the manner in which the case was disposed of at the trial was perfectly correct, and that there is no ground for granting a rule to show cause why a different result should not be obtained.

Mr. *Maxwell* in his work on statutes (1) says:—"It has frequently been held that a statute which prescribes the formalities to be observed by a corporate or public body constituted for a special purpose in executing contracts is imperative, and that a contract not executed in conformity with such provisions was of no binding effect on the body."

Citing many cases already referred to.

In the face of these authorities I cannot, by any forced construction or artificial reasoning, permit myself to set at defiance the declared will of the legislature so simply, so plainly, and so positively expressed.

The language of Mr. Justice *Maule* in *Freeman* v. *Tranah* (2) commends itself to my mind as being applicable to this case.

I agree that in this particular case, justice would be better administered by making the rule absolute, than by discharging it. But there is no court in *England* which is intrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times, and although instances are constantly occurring where the courts might profitably be employed in doing

(1) Page 336. (2) 12 C. B. 413.

simply justice between the parties, unrestrained by precedent or by any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. The only court in this country which is not so fettered, is the Supreme Court of the Legislature.

If I have any feeling in this matter I may be permitted to say that I am very glad that the majority of this court have been enabled to see their way clear to a conclusion the opposite of that at which I have felt myself constrained to arrive, for the language of Lord *Cockburn* in the case of *Frend* v. *Dennett* can hardly be held to be too strong to apply to this defence.

FOURNIER, J.:—

I am in favor of dismissing this appeal for the reasons statein the judgments of the Court of Appeal.

HENRY, J.:—

Were this a case at common law, and the action brought before a common law court, I would have no doubt in saying that the plaintiff could not recover. It is not necessary to explain why, but in courts of equity of late years a great number of additions have been grafted upon instruments of insurance. When companies are chartered for certain purposes, and they enter into ordinary dealings necessary to carry out the business for which they are chartered, I cannot admit that every thing should be under seal, in order to make good their contracts; in fact, trade could not be carried on if all their engagements were to be under seal.

Here is a company established for carrying on life insurance business, and doing business for a number of

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Henry, J.

years in a particular manner; and we find by the same Act which empowers them to do business in a certain way they are given power also to engage agents "and to appoint their duties, obligations and securities, and generally to transact all necessary business of the company;" also to appoint "agents in any town"—agents to transact business, "with such duties and powers as they may deem proper." Now, at the same time the legislature said this, they authorized them to make rules and regulations which would be binding in regard to the policies which they might issue; and among other provisions they can issue interim receipts without the necessity of affixing the seal. This policy was applied for at a local office, and an interim receipt was issued. Now, after the issue of this receipt, it was the duty of the company either to issue a proper policy or reject the application. They kept the money, and the party insured was killed by an accident. Then when sued upon the policy, they do not rely on defence that there is no seal, but set up six other issues, and a verdict for plaintiff is given. A new trial is then asked for and granted, and again a verdict is given in favor of the plaintiff, and it is only after this that the objection is raised for the first time. Had they raised this objection on the first trial, I doubt whether a new trial would have been granted otherwise than on the condition that the objection set up as to the seal would not be raised. The question here is whether the courts of equity of *Ontario* had the inherent power to award that the respondent was entitled to a good policy, and if not, to condemn appellants to pay damages, as if a good one had issued. Appellants rely on their act of incorporation to say that they are bound only by a document under seal, but I do not agree with them, for if they receive the premiums they are bound to give a valid policy. The business of the company is to issue

policies, and there is nothing in the Act to prevent local agents from receiving applications and forwarding them and if the company accept an application and keep the premiums, can it be said they are not bound by their contract. In such a case a Court of Equity has a right to interfere and say you have no right to set up a fraud, and more especially, as in this case, when the fraud is committed upon the court. My brother *Gwynne* has more fully gone into this matter, and I will only add that I concur with him.

TASCHEREAU, J. :—

Here also, as in *Nasmith* v. *Manning* (1), I have had some difficulty in forming an opinion. However, here I find myself in the minority, and must say that it is with a sense of relief that I see the judgment in the case not affected by the conclusion I have come to. The recent case of *Hunt* v. *Wimbledon Local Board* (2), cited by the Chief Justice, seems to me conclusive against the plaintiff not only at law, but also in equity, for there can be no doubt that under the Judicature Act in *England*, it was open to the plaintiff in that case to put his claim on equitable grounds, and it appears by the report that the court did not lose sight of this, and that he must be considered as having done so, and the court as having decided against him in equity as well as in law. The case of *Kirk* v. *Bromley* (3) seems to me also conclusive against the plaintiff on the equitable counts. I cannot understand by what sense of reasoning a court can say that there was no contract of insurance for want of the seal, but that in equity the company defendants can be bound to perform such contract. Is not that *petitio principii?* Is it not taking for granted that there was a contract, whilst that is the very question to

(1) 5 Can. S. C. R. 417. (2) 3 C. P. D. 208.
(3) 2 Phil. Ch. R. 640.

1881
THE LONDON LIFE INS. CO. v. WRIGHT.
Taschereau, J.

be decided? How can we say: True, in law, there was no contract of insurance, but in equity the company will be obliged to fulfil the obligation of that contract. Nor can I see how it can be said that the company was guilty of fraud; as a corporation it was not guilty of fraud. Its officers may have committed a fraud, or an act of negligence, but the corporation did not do so. To hold the contrary is, it seems to me, taking away from this corporation the special protection that the *Ontario* legislature granted to it, in enacting that it could not contract except under seal. I cannot see that courts of justice—never mind under which system of jurisprudence—can thus override or set at naught the positive enactments of the legislative authority.

I concur with the Chief Justice that the appeal should be allowed.

GWYNNE, J.—

The plaintiff in her declaration alleged that by a policy of accident insurance made by the defendants, signed by the president and attested by the secretary of the company, defendants, in consideration of the representations made in the application for the said policy, and of the payment of $7.50 it was declared that the defendants insured one *John Wright* in the principal sum of $1,250 for the term of 12 months, ending the 6th of September, 1876, at noon, the said sum, so insured, to be paid to the plaintiff, a daughter of the said insured, or to her legal representatives, within ninety days after sufficient proof that the insured at any time within the continuance of the policy should have sustained bodily injuries effected through external violent and accidental means, within the intent and meaning of the said contract and the conditions thereunto annexed, and such injuries alone should have occasion-

ed death within 90 days from the happening thereof. The declaration then set forth the conditions endorsed on the policy, and averred that while the policy of insurance remained in full force, to wit, on the 7th day of December, 1876, the said insured was killed by external violent and accidental means within the terms and meaning of the said policy, and that all conditions were fulfilled and all things had happened and all times had elapsed necessary to entitle the plaintiff to maintain this action, yet that the defendants had not paid the said sum of $1,250, but that the same is wholly due and unpaid.

The declaration also contained the common money count.

To this declaration the defendants pleaded, firstly to the first count, that they did not insure or promise as alleged, and nine other pleas which all were in confession and avoidance of the policy as set out in the first count.

To the common count they pleaded never indebted. Issue having been joined on these pleas the case went down for trial before a jury, when the defendants rested their defence wholly upon their 3rd, 4th, 5th, 6th, 7th and 8th pleas.

The 3rd plea was that the death of the said *John Wright* was caused by suicide.

The 4th. That the death of the said *John Wright* happened in consequence of the exposure of himself to unnecessary danger or peril.

The 5th. That he was killed by a railway train while he was walking on the track in violation of the by-laws of the company.

The 6th. That he was killed by a railway train while he was walking on the track in violation of the laws of the State of *Michigan* in which the railway was situate, and

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

The 7th. That he was killed by reason of his not using due diligence for his personal safety and protection in the walking on a railway track at night, by means whereof he fell into a cattle guard, and was killed by a passing train.

The 8th. That immediate notice of the injury or accident was not given to the defendants.

These defences were rested upon certain provisions contained in the conditions endorsed on the policy. The jury, when the case was first tried, found a verdict for the plaintiff upon all the issues. On an application for a new trial, the court in the exercise of its discretion granted a new trial, thinking it proper to take the opinion of a second jury upon the special pleas: no suggestion of any defect in the policy from the want of a seal had been made; if it had been, (as observed by the Chief Justice of the Court of Common Pleas, upon a motion to set aside the second verdict at the trial of which the objection was first taken,) the court in granting the new trial would have granted it only upon condition that no such defence should be set up, which it could have done by confining the second trial to all the issues except that which arose upon the first plea to the first count.

The second trial resulted as did the first, in a verdict for the plaintiff upon all the issues. Thereupon the defendants obtained a rule *nisi* to set aside this verdict, and for a new trial on the ground that the paper produced as a policy was not sealed with the seal of the defendants, and that there was no evidence to go to the jury in support of the contention that the policy was sealed, and that upon the issue as to the alleged policy of insurance the defendants were entitled to a verdict; on the ground also that the verdict was against law and evidence, and the weight of evidence; that upon the issue as to exposure to danger

on the part of the assured, the only evidence of how the deceased fell into the cattle-guard showed that he fell into the same while walking along the track of the railway, and that, having regard to the contract, that was such exposure to danger as avoided the policy, and that the learned judge at the trial misdirected the jury, in telling them that there was evidence to go to them of the death having resulted from an accident within the terms of the contract; and on the ground that under the terms of the contract it not being certain as to how the accident happened, the plaintiff cannot recover.

In disposing of this rule the court determined all the grounds of objection except that relating to the first plea against the defendants, thus supporting the finding of the jury upon all the issues to which they related, and as to the issue upon the first plea they gave leave to the plaintiff to file *nunc pro tunc*, such a replication as should justify the court in restraining the defendants from relying upon any such objection to the form of the policy.

That the court had the power to grant leave to file such a replication and to give effect to it when filed does not appear to have been doubted by the court. As I was one of the judges of that court at the time I can say with certainty that it was not, nor indeed, as I think, by the learned counsel for the defendants. In the report of the cases, (for there were others under somewhat similar circumstances argued at the same time) in *Wright* v. *Sun Mutual Life Insurance Co.* (1), we find the Chief Justice, when delivering judgment, saying:

Under the old system a Court of Equity would, we consider, have compelled the defendants to seal the policies. We think this court, in the present state of the law, can effect the same end, and the

(1) 29 U. C. C. P., at p. 299.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

pleadings should be amended to meet the case. Mr. *Bethune*, in his very able defence, urged that this ought not now to be done, as the defendants may have and have an answer to any application to compel them to complete the contract. We do not think we can at this stage listen to this objection to the exercise of our statutory powers. * * * * * In the case of the *London* company, the attestation clause does not profess a sealing, but merely declares that *in witness whereof the company have caused these presents to be signed by their President and attested by their Secretary and delivered at their head office, &c.* Yet they now point to their charter which declares (sec. 7) that no contract shall be valid unless made under the seal of the company, &c., &c., &c. Having obtained this very special clause from the legislature, they adopt a printed form of policy, omitting all reference to a seal and (as it were) expressly directing and adopting an insufficient form of execution.

And at p. 236 I am thus reported :—

Upon the point arising under the plea of *non est factum and the general issue in the cases in which the policy is not declared upon as a deed*, I concur with the Chief Justice in thinking that, under the circumstances referred to by him, we should not permit this objection now made to prevail; and that we have power, under the Acts for the better administration of justice, to allow such an equitable replication to those pleas to be filed, as would justify us in restraining the defendants from relying upon those pleas. Mr. *Bethune* in his able argument for the defendants, admitted, as I understood him, that the court has sufficient power to authorize now such a replication, and that when allowed its undoubted effect would be to deprive the defendants of all benefit from the objection which they now rely upon arising from the want of seals to the policies; but he contends that when the replication should be filed as it raises an equitable consideration as against a legal plea, the case should be tried over again by a judge without a jury, and he says that if the case had been tried before a judge without a jury that objection would not have been raised. I do not think we can yield to this argument, or that allowing the replication, we should now order a new trial before a judge alone without a jury, inasmuch as we feel compelled to concur with the verdict of the jury upon all the other issues.

In pursuance of the leave thus granted, the plaintiff filed a replication on equitable grounds to the first plea, whereby she alleged:

That the policy declared on was delivered by the defendants to

the deceased *John Wright*, after payment of the premium to the defendants in that behalf *as a policy* duly executed binding upon the defendants, and the said policy was and is signed and countersigned by the proper officers of the defendants to make the same a valid policy, and as required by the defendants' act of incorporation, and nothing was omitted or required to be done by the defendants or the deceased to make the said policy valid and binding, except the mere affixing thereto of the defendants' corporate seal, and the deceased acted upon the faith of the said policy having been duly executed and binding on the defendants, and the defendants kept and retained the premium or consideration paid by the deceased for the risk assumed, and intended to be undertaken by the defendants under the said policy, and the plaintiff says that she is now entitled to have the said policy made complete and perfect by the affixing thereto by the defendants of their seal, or to have the defendants estopped and debarred from setting up the said defence, and enjoined against pleading the said first plea as a fraud upon the deceased, and the plaintiff prays that the said defendants may be ordered by the court to affix their corporate seal to the said policy, or that they may be declared to be estopped and debarred from setting up the defence that the said policy was not their deed, and enjoined against pleading the said first plea.

The authority for this pleading is contained in the *Ontario* Administration of Justice Act Revised Statutes ch. 49, by which it is enacted:—

For the more speedy convenient and inexpensive administration of justice in every case, the Courts of Law and Equity shall be as far as possible auxiliary to one another;

That:

Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiffs right to recover may be an equitable one only, and no plea demurrer or other objection on the ground that the plaintiff's proper remedy is in the Court of Chancery shall be allowed in such action;

And

For the purpose of carrying into effect the objects of this Act and for *causing complete and final justice to be done* in all matters in question in any action at law, the court or a judge thereof, *according to the circumstances of the case*, may at the trial *or at any other stage* of an action or other proceeding, pronounce such judgment, *or make such order or decree as the equitable rights of the parties respectively*

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

require, * * * * *and may as fully dispose of the rights and matters in* question as a Court of Equity could. That no proceedings at law or in equity shall be defeated by any formal objection;

And finally that:

At any time during the progress of any action, suit, or other proceeding at law or in equity, the court or a judge may upon application of any of the parties or without any such appliction, *make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud*—the determining of the rights and interests of the respective parties and of the real question in controversy between them, *and best calculated to secure the giving of judgment according to the very right and justice of the case.*

The defendants appealed from the rule of the Court of Common Pleas, which was issued in the terms following:

Upon reading the rule *nisi* made in this cause during the present term, the affidavit of service thereof and hearing counsel for the parties on both sides, it is ordered that the said rule be and the same is hereby discharged, the plaintiff to have leave to reply equitably and to join issue for the defendants.

Upon this appeal coming up in the Court of Appeal that court in its discretion thought fit to give leave to the plaintiff to file a new equitable replication, and to the defendants to rejoin and demur thereto, and the court directed that either party might adduce further evidence upon any issue to be raised upon such equitable replication.

The authority for this course of proceeding is to be found in "The Act respecting the Court of Appeal," Revised Statutes of *Ontario*, ch. 38, sec. 22, whereby it is enacted that:—

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the court or judge from which or whom the appeal is had, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before any person whom the court may nominate.

Sec. 23. The court shall have power to dismiss an appeal, or give any judgment and make any decree or order, which ought to have been made, and to direct the issue of any process or the taking of any proceedings in the court below, or to award restitution and payment of costs, or to make such further or other order that the case may require.

In pursuance of the leave thus given the plaintiff filed a second replication upon equitable grounds to the defendants' first plea, which is as follows :—

And the plaintiff for a second replication on equitable grounds to the defendants first plea says, that the said *John Wright* in the declaration mentioned being desirous of effecting an insurance against his death by accident for the sum of $1,250, to be paid to the plaintiff in case of such death, made an application to the agent of the defendants for the taking by the defendants, then being an insurance company doing business in the Province of *Ontario*, of the said risk and insurance for reward or premium to be paid to them, and the said application was delivered by the said agent to the defendants, and they accepted the said application and risk, and communicated the said acceptance to the said *John Wright*, and thereupon it became and was the intention of the said *John Wright* and the defendants to complete the contract for such insurance by the issue by the defendants of a policy therefor, and the defendants, for the purpose of completing the said contract as aforesaid, prepared the policy mentioned in the said declaration, which policy was prepared in the ordinary course of the business of the said defendants and was attested and signed by the President and Secretary of the defendants, being the officers of the said company duly authorized to execute policies and contracts in the name of the said company, and having the custody of the seal thereof, and by which said policy it was declared that the defendants had caused the same to be so signed and attested and delivered as the said policy, and the plaintiff says that the said officers of the said defendants omitted inadvertently and by mistake to actually affix the corporate seal of the defendants to the said policy, and the defendants delivered the said policy to the said *John Wright* in consideration of the payment of the premium or reward to the defendants for the assuming of the said risk and insurance as a policy duly executed by them and as their deed, and the said *John Wright* with the knowledge of the defendants accepted the said policy, acting on the faith of the said contract and the belief that the said policy was a duly executed policy of the defendants and their deed, and paid the said insurance premium or reward to the

1881.
THE LONDON LIFE INS. CO. v. WRIGHT.
Gwynne, J.

defendants, and relying upon the said insurance *neglected to insure* elsewhere and complied with all the conditions of the said contract and policy, and the defendants accepted and kept and retained the premium or consideration for the risk intended to be assumed by the said defendants by their said contract and by their said policy, and never in any way repudiated the making of the said policy as their deed until after the bringing of this action; and the plaintiff avers that there was and is nothing to be done by the defendants or the said *John Wright* to make the said contract and policy a binding and valid contract and policy, except the affixing of the defendants corporate seal thereto, and the plaintiff avers that in all other respects the said policy was duly signed and executed, and that the plaintiff is now entitled to have the said contract completed, and the said policy made perfect and complete by the affixing of the defendants seal thereto, or to have the defendants estopped and debarred from setting up the said defence that the said policy is not their deed, and enjoined against pleading the said first plea, and the plaintiff prays that the said defendants may be ordered by the court to affix their corporate seal to the said policy, or that the defendants may be declared to be estopped from setting up the said defence and enjoined against pleading the said first plea.

The defendants filed a joinder in issue upon this replication, and they pleaded by way of second rejoinder thereto, that they did not accept the application or risk under their seal nor by their interim receipt; nor did they communicate such acceptance to the said *John Wright* under the seal nor by their interim receipt, nor did they enter into or make any contract with the said *John Wright* under their seal, nor by their interim receipt to execute or issue under their seal any such policy as alleged. They also demurred to this replication, alleging among other grounds that it is a departure from the declaration which alleged that this action was brought upon a valid policy of the defendants, while the replication admits that no valid policy was issued, and that the said replication shows no grounds upon which an injunction should be granted against the defendants as therein prayed, nor any contract binding upon the defendants to issue a policy or affix their seal.

The plaintiff thereupon demurred to the above second rejoinder as insufficient in law, and joined issue on the demurrer to their replication, and the defendants joined in the demurrer to their replication.

No further evidence was offered by either party, each relying upon the evidence already taken as supporting their respective views.

Now, before referring to the judgment of the Court of Appeal upon the record, it will be convenient to draw attention to the substance and effect of the issues joined upon these replications to the defendants first plea.

The first replication upon equitable grounds set up certain conduct of the defendants, which was relied upon as showing that the point urged by the defendants under their first plea would be a fraud upon the plaintiff, and it prayed that the defendants might be restrained by the exercise of the equitable jurisdiction of the court from committing that fraud, or that they should be decreed to make the policy perfect as they had represented it to be, by affixing the seal.

The second equitable replication set out more at large than the previous one had done the several matters of facts relied upon as showing that the non-affixing of the seal was a mere mistake relievable in equity, or that it was a designed fraud, of which the defendants should not under the circumstances be permitted to take advantage, and it prayed that they should be decreed either to affix their seal *nunc pro tunc*, and thus make the policy good, or that they should be restrained from relying upon their own fraud in not affixing the seal, as a defence to the action.

The joinder in issue upon these replications only put in issue the matters of fact alleged in the replications, and I presume there can be no doubt that the evidence taken does establish the matters so alleged to have been as pleaded, therefore upon the joinder in issue

1881
THE LONDON LIFE INS. CO. v. WRIGHT.
Gwynne, J.

upon the replications the plaintiff is clearly entitled to a verdict and judgment. The sufficiency or insufficiency of those facts to entitle the plaintiff to the relief prayed in respect thereof does not come up for judgment upon the joinder in issue; that question arises solely upon the demurrer to the second equitable replication.

Then, as to the special rejoinder to the second equitable replication, this rejoinder does not dispute any matter alleged in the replication; it must be treated as admitting all those allegations to be true, but insisting that certain of them were not under the seal of the defendants; in other words, the defendants admitting the matters and representations, acts and conduct set out in the replication, the existence of which is relied upon as making the objection of the want of a seal to the policy to be a fraud on the part of the defendants, from the commission of which they should be restained, claims exemption from liability as to the fraud so committed upon an allegation that some of the matters, representations, acts and conduct so relied upon by the plaintiff were not made or done under the seal of the company.

The sufficiency of this rejoinder as an answer to the matters alleged in the replication, and not denied by the rejoinder, comes up under the demurrer to the rejoinder.

The whole question, therefore, rests upon the demurrers to these respective pleadings.

Now, as to the objection raised to the second replication, that it is a departure from the declaration, it may be as well to dispose of this objection at once, by saying that in view of the provision in the Administration of Justice Act, that a plaintiff, in an action at law for a purely money demand, may recover, notwithstanding that his right to recover is purely equitable, and that for carrying into effect

the object of the Act, which was to do away with the distinction between legal and equitable claims, and for causing complete and final justice to be done in all matters in question in any action at law, the court or judge thereof, according to the circumstances of the case, may, at the trial, or at any other stage of an action or other proceeding, pronounce such judgment or make such order or decree as the equitable rights of the parties respectively require, and may as fully dispose of the rights and matters in question as a Court of Equity could, the objection of departure has no application to this case. Moreover, to terminate all controversy upon this point, the Court of Appeal in the exercise of the jurisdiction vested in it, has allowed a count to be added to the declaration, which has been accordingly added, asserting the same ground of equity in the declaration as is set up in the equitable replication. The sole question which remains, therefore, is simply are the matters alleged in the second equitable replication (admitted as they are to be true,) sufficient to entitle the plaintiff to relief in equity, either upon the ground of mistake or of fraud relievable against in equity?

The plaintiff, by the unanimous judgment of the Court of Appeal affirming the unanimous judgment of the Court of Common Pleas in *Ontario*, has been held to be entitled to the relief prayed as founded upon the facts alleged in her equitable replication, and which are admitted to be true.

In the argument before us it was contended that the force of the judgment of the Court of Appeal is weakened by what was contended to be the ground upon which Mr. Justice *Patterson* in that court rested *his* judgment, which was said to be that the instrument declared upon can be construed to be an interim receipt. It must be confessed that some of the observations

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

which fell from the Chief Justice and Mr. Justice *Morrison* give some color for this contention, but, with great deference to those learned judges, a careful perusal of Mr. Justice *Patterson's* judgment has satisfied me, not only that it is not fairly open to any such construction, but that so to construe it would be to do great injustice to that judgment.

The learned judge at p. 229 of vol. 5, Appeal Reports, starts with the assumption that the omission to set the seal to the instrument produced was merely a negligent omission and mistake, and not a designed fraud. He then enters upon a review of the state of the law affecting the contracts of trading corporations, and the exceptions which had become engrafted upon the general rule of the common law that corporations could only contract under their corporate seal. Then at p. 237 he shows what the contention of the defendants is (to combat which is the whole and sole object of his judgment). He says:

> The defendants insist that not only are they free from liability on the policy before us because no seal has been affixed to it, contrary to the doctrines now so universally established and settled, but that even the jurisdiction of chancery to compel execution of a policy is excluded unless a contract under the corporate seal can be shown.

And he adds:

> The high ground thus contended for must not be conceded without a careful examination of the basis on which it is claimed, as we cannot assume *a priori* any intention on the part of the legislature to create for this corporation a position so very exceptional and so capable of being used to the injury, in place of the advantage, of the public. The whole passage to be construed is in these words: "But no contract shall be valid unless made under the seal, &c., except the interim receipt of the company which shall be binding upon the company on such conditions as may be thereon printed by the direction of the Board."

And he adds:

> We are asked to give to the word "contract" (in this sentence,) its literal and unrestricted force, which will necessarily cover a policy

or contract of insurance, but will also include every such petty transaction as the hiring of clerks or servants, and not merely petty and every day engagements but everything which can be technically said to "sound in contract."

And he continues:

When we consider that in the practical business of life a formal contract like a policy of insurance, or an agreement to build a house according to plans and specifications, is rather the exception than the rule, and that contracts are more frequently made by an offer on one side and acceptance on the other; and more particularly when we bear in mind the general use in business of the telegraph as well as the post-office, the absolutely impracticable character of what the literal reading requires becomes very apparent; to carry on business under such a constitution would be a simple impossibility; and to hold that such a rule was enacted in the statute, and yet that the violation of it in all the daily concerns of the business was to be winked at would be a suggestion not to be entertained either by a legislative or judicial court.

He then analyses the expression "interim receipt of the company," and shows that it is a contract of insurance. It is true that in this connection, at p. 239, he makes use of the language which is the sole foundation for what appears to me to be a very unjust construction put upon his judgment, viz.:

We should thus have the statute declaring that there was one kind of contract of insurance which would bind the company without the seal, and finding before us a policy issued by the directors with numerous conditions printed upon it but without seal, it would be our duty *ut res magis valeat quam pereat* to treat this as the contract so authorized by the name of the interim receipt of the company.

Perhaps such a construction might be excusable and necessary, if there was no other mode of preventing the fraud attempted to be perpetrated by the defendants, but that the learned judge does not rest his judgment in whole or in part upon this foundation plainly appears from the sequel, whereby he goes on to show his argument to be that by reason of the use of this expression "interim receipt of the company," imbedded in the sentence in which appear the words "no contract shall

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

be valid, &c., &c., &c.," this word "contract," as so used in contrast with the insurance by interim receipt, must be read as referring to a contract of insurance by policy as the only contract of insurance which can be contrasted with insurance by interim receipt, and he continues to say:—

It is impossible to believe that the legislature can have intended or consented to create in the case of this company a state of things so anomalous, so inconvenient, and so fraught with the means of deception and fraud, as that which would result from the literal and unrestricted rendering of the word "contract" on which the defendants rely. It is keeping sufficiently far behind the advance of modern law to require an insurance company to seal its policies, but to make a seal and other formalities essential in all matters which take the technical form of contracts, and as a consequence of the impossibility of so conducting its affairs, to enable a company to repudiate those common and every day engagements on the faith of which the poorer classes of the community depend for their living, would be a feat of legislation *not to be credited while any escape from belief in it is possible.*

He then suggests the way of escape in which he lays down the principle upon which he rests his judgment, and sums up with the conclusion to be deducted from the premises he lays down thus:—

It is evident, therefore, and is shown by this exception in favor of the interim contract of insurance that the "contract" dealt with and understood and intended to be dealt with is contract of insurance only. We may, therefore, read the clause as declaring that *no contract of insurance* shall be valid without seal, except an interim receipt. By the same rule, *contract of insurance* must be taken as synonymous with *policy*, and the whole passage interpreted as enacting that while the company shall be bound *ad interim* by an agent's receipt, its policies must be sealed, signed, and countersigned as directed.

He then proceeds to show that the jurisdiction of a Court of Equity to afford redress in the case of mistake or fraud is not interfered with by the statute, and he illustrates his argument by the case of an instrument which since 8 and 9 *Vic.*, c. 106, s. 3, Imperial Statute,

to operate as a lease must be by deed, will, if not under seal, be construed and be held to be an agreement for a lease.

While I entirely concur in the conclusion arrived at by all the judges of all the courts, namely: that whether the omission of the seal to the instrument produced is to be attributed to mistake or fraud, the jurisdiction of equity is not affected by any thing in this Act, I incline to the opinion that the object and intent of the legislature, in inserting in the Act the clause under consideration, was not so much to impose the condition of the affixing of a seal to a contract of insurance as essential to its validity (for that was already sufficiently provided by the common law) as it was to provide that, although having a seal and so valid by the common law, such contracts should not be valid under the statute, even though sealed, unless they should be also signed by the president or vice-president, or one of the directors, and countersigned by the manager, which were provisions not required by the common law; the design of the company being in this private Act of their own preparation, for which they required the sanction of the legislature, to protect themselves against their own agents to a greater extent than they would be protected by the provisions of the common law. The clause is in the section which defines the powers of the directors, and enacts, among other things—that they shall have power to appoint officers and agents, and to approve their duties, obligations and securities, and generally to transact all necessary matters and things connected with the business of the company, but no contract shall be valid unless made under the seal of the company and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company upon

1881
THE LONDON LIFE INS. CO. v. WRIGHT.
Gwynne, J.

such conditions as may be thereon printed by direction of the board. The directors may also appoint local directors in any city or town in which the company transacts business, with such duties and powers as they may deem proper for the supervision of the business of the company in such places; and by the 8th section the board is empowered to fix the rates at, and the rules and conditions under, which the company's policies shall be issued. It is then competent, under the express provisions of the Act, for the directors to appoint officers and agents, and to prescribe their duties; to appoint local directors in cities and towns remote from the head office where the seal is kept, and to prescribe their powers and duties; to prescribe also the rules and conditions under which policies shall be issued. They may, therefore, authorize their agents and local directors to canvass persons to effect insurances with the company; to deliver to such persons forms of application to be subscribed by them containing warranties of divers matters; to receive such applications to be forwarded to the head office; to negotiate upon the terms of insurance; to receive the premiums to be agreed upon; to convey the applications to the head office and to communicate to the applicants the action of the board thereon, either by letter or orally, notwithstanding anything in the Act. There is nothing in the Act which expresses or implies that the company shall be exempt from liability for frauds committed by their authorized agents unless such frauds should be evidenced under seal; in fine, there is nothing in the Act to justify the contention that any equitable jurisdiction which existed in the Court of Chancery before the Act was passed, and which still exists in it as respects all other similar companies, shall have no existence as regards this company.

The power of the Court of Chancery to prevent

and redress fraud is not a power derived from an Act of Parliament. In the Province of *Ontario*, it is true that the court was constituted by an Act of Parliament, but by that Act it was invested with the like jurisdiction and powers as by the laws of *England* were on the 4th March, 1837, possessed by the Court of Chancery in *England* in all cases of fraud and accident; and by the laws of *England*, without any Act of Parliament, the jurisdiction of the Court of Chancery extends to the prevention and redress of all frauds. This power constitutes the chief vital organ of the court without which a Court of Equity can exist only in name; no Act of Parliament therefore, much less a private Act of this nature, could strip a Court of Equity of this power without divesting it of its vitality and reducing it to the condition of a Court of Equity only in name. It is impossible, therefore, from the terms of this Act, to attribute any such intention to the legislature.

But it is said that no reported case can be found in which the Court of Chancery has interfered in the manner in which the court has interfered here in a case and under circumstances similar to the present. I am not concerned to seek whether this be so or not. It may be so, but it is of little consequence that it should be so. It may, indeed, be that to the appellants is due the unenviable reputation of having been the first to design and contrive the peculiar phase of fraud which they rest upon as their defence to the plaintiff's claim, *crescit in orbe dolus*; but as fraud increases and extends its ramifications the remedial power of the Court of Chancery to prevent its consequences and to give ample and effectual redress extends also. It matters not how gigantic are its proportions or how new and uncommon the shape which it assumes, the remedial power of the court rises with, and becomes equal to, the occasion.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

It is, however, the duty of the court to adopt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men must continually arise, and not, from too strict an adherence to forms and rules established under different circumstances, decline to administer justice and to enforce the rights for which there is no other remedy. The jurisdiction of the court must not be narrowed to cases in which the jurisdiction has been exercised. The cases in which the jurisdiction has been exercised are merely examples, and must not be looked on as the measure of the jurisdiction (1).

Lord *Redesdale*, in his treatise upon the jurisdiction of the court, gives among other heads of jurisdiction the following:

Where the powers of the law are abused and exercised contrary to conscience, and where the law gives no right but the principles of complete justice require the interference of the court to prevent the recurrence of wrong.

And in *High* on Injunctions, an American work, it is said (2):

Courts of Equity in the exercise of their general jurisdiction for the prevention of fraud are often called upon to interfere by injunction where fraud constitutes the gravamen of the bill. The manifestations of fraud are so various that it is impossible to embrace all its varieties of form within the limits of a precise definition. Indeed the courts have generally avoided all attempts in this direction, and have reserved to themselves the liberty to deal with it in whatever aspect it may be presented by human ingenuity.

That the company is responsible for the fraud of its agents there can be no doubt. They are responsible for the tort of their agents, whether of violence or even of slander; and in *Kerr* on Fraud (1) as to the liability of company for fraudulent misrepresentions of the directors, it is said:

The general interests of society demand that as between an innocent company on the one hand, and an innocent individual defrauded by the company on the other, misrepresentations by the directors of a company shall bind the company, although the shareholders may be ignorant of the representations and of their falsehood.

(1) *Kerr*, on Injunctions, p. 4. (2) Ch. 1, sec. 24.
(3) P. 72.

But in the case before us the fraud is in truth committed by the company itself, which must be responsible for everything done in the suit. It is committed and only perfected in the progress of the cause, and in such a manner as to constitute as it appears to me a fraud upon the court itself, which ought not to be overlooked.

The evidence establishes beyond all question that the company by their duly authorized agents received the application of *John Wright* for insurance; that they in like manner negotiated with and agreed upon the terms of the insurance; that they received the premium agreed upon as the consideration for a valid policy; it thereupon became their duty to deliver him a valid policy or to return him his money and enable him to insure elsewhere; that they elected to retain the money paid by him, and as for the consideration which he negotiated for, namely, a good and valid policy for the amount agreed upon, they delivered to him the instrument sued upon and produced with divers conditions thereon endorsed, subject to which the instrument, which was signed by the president and countersigned by the manager, was issued as and for a good valid policy of insurance; that when this instrument was declaed upon as such good policy, although the defendants pleaded a plea denying that they had insured the party named in the instrument as insured, a plea usually pleaded for the mere purpose of compelling the production of the instrument at the trial in order to show the conditions upon which it was granted, they filed therewith seven or eight other pleas, setting up in bar of the action divers matters alleged to avoid the policy in the terms of the conditions thereon endorsed; that when these issues went down to trial they did not dispute the validity of the policy, but relied wholly upon the pleas setting up the matters

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J

relied upon as avoiding the policy by reason of alleged breaches of the conditions, subject to which it was issued; that upon a verdict being rendered for the plaintiff on all these issues they moved the court for a new trial, and (here comes in the point which appears to me to amount to a fraud upon the court) suppressing all intention of opening the verdict upon the first plea for the purpose of setting up the defence subsequently relied upon thereunder, they permitted the court to grant a new trial under the impression that the sole defence relied upon was that appearing upon the special pleas. Now, if the defence subsequently relied upon under the first issue had never been set up, if the appellants had only asked for and had obtained a new trial of the issues joined upon the special pleas, no fraud would have been completed, the fraud which the appellants have committed was not perfected until at the second trial they set up the defence that there was no seal to the instrument so issued as a perfect policy; and that the setting up of that defence under the circumstances above detailed was a gross and flagrant fraud upon the plaintiff, and as it seems to me upon the court which under the above circumstances was induced to grant the new trial, cannot, as it seems to me, admit of a doubt, and that it is one which a Court of Equity could not refuse to interfere to prevent without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears.

It is said, however, that there are two cases which decide that in such a case a Court of Equity has no such jurisdiction as that which has been asserted, viz.: *Hunt* v. *Wimbledon Local Board* (1), in appeal, and *Crampton* v. *Varna Railway Co.* (2), but these cases, when properly understood, have no

(1) 4 C. P. D. 48. (2) L. R. 7 Ch. Ap. 562.

bearing upon the present case, or whatever bearing they may have, if any, is in support of the jurisdiction here asserted. In the former case the point arose out of the doctrine affecting the jurisdiction exercised by the Court of Chancery in decreeing specific performance of contracts relating to land not in writing, upon the ground of part performance, a totally distinct and very different head of jurisdiction from that relied upon here, as is shown by the judgment of Lord Justice *Cotton* in that case. He says there:

> The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was; but if a Court of Equity finds an overt act such as the possession of land, then the presumption of a contract is raised, and the Court will in consequence of that overt act allow parol evidence to be given for the purpose of ascertaining what the actual contract was.

This is the principle, as he explains it, upon which the Court proceeds in cases of specific performance of oral contracts relating to land partly performed and not upon the ground of fraud—that this principle does not affect the doctrine of the Court of Chancery as to giving relief in cases of mistake either is apparent, so that *Hunt* v. *Wimbledon Local Board* is no authority against the exercise of the jurisdiction which has been exercised in the present case. In *Crampton* v. *Varna Railway Co.*, it was merely held that a Court of Chancery has no jurisdiction to entertain a suit for a purely money demand. That is so in *England*, but not so in *Ontario*, where by statute a suit for a purely money demand may be instituted and determined in the Court of Chancery, and a suit may be brought in an action at law and recovery had in that suit upon the case appearing to be one of a purely equitable nature.

In giving judgment in that case, the Lord Chancellor, Lord *Hatherley*, says:

1881
THE LONDON LIFE INS. CO. v. WRIGHT.
Gwynne, J.

The truth is, that every one who deals with corporations like these must be taken to know what are their powers of contracting, and must take a contract accordingly, and when there is only a money demand. and there is no valid contract, then this Court cannot interfere in the matter.

This language is not used with the design of throwing any doubt upon the jurisdiction of the Court to interfere in cases of fraud, or even in cases of mistake, as plainly appears, if proof upon such a point could be required, by the succeeding paragraph in the judgment, wherein he says:

I certainly was impressed with the consideration of the length to which these doctrines might be carried but I think that the arm of the court is always strong enough to deal properly with such cases. There might be a contract without seal under which the whole railway was made and of which the company would reap the profit, and yet it might be said that they were not liable to pay for the making of the line; when any such case comes to be considered, I think there will be two ways of meeting it. It may be, and perhaps is so in this case, that the contractor has his remedy against the individual with whom he entered into the contract although he may have no remedy against the company; or it may be that the Court, acting on well recognized principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment.

Now, it is some of those well recognized principles as precisely applicable to the circumstances of the present case, which are invoked to prevent and redress the fraud which the appellants, after failing upon all the defences upon the merits urged by them, persistently have been endeavouring to procure the sanction of a court of justice to aid them in perpetrating. Certain it is that the courts of the late Province of *Upper Canada*, now *Ontario*, never doubted that the arm of a Court of Equity was long enough and strong enough to prevent the attempt to commit such a fraud being successful. About 30 years ago, an action was brought against an insurance company to recover back the premium paid by an insurer upon the ground that the instrument

issued by the company as a policy was defective; *Perry* v. *Newcastle Mutual Fire Ins. Co.* (1). The defect was precisely similar to that in the present case. The Act of incorporation of the company enacted that any policy signed by the president and countersigned by the secretary, but not otherwise, should be deemed valid and binding on the company. The insertion here of the words "but not otherwise" makes the case identical with the present. The defect was, that although the policy issued was sealed with the company's seal and was signed by the secretary, it was not signed by the president. It was held that the plaintiffs could not recover back the premiums they had paid, although it was admitted that in case of loss they could not have recovered at law upon the policy as it stood, and that it was clearly invalid, but C. J. Sir *John Robinson*, delivering the judgment of the court, said:

> Thirdly, which indeed is of itself conclusive against this action, the plaintiffs cannot be said to have paid their money for nothing since the company were in fact bound to execute a policy having accepted the risk and received the money.

And again:

> I do not consider that the company could in this case have escaped from their liability after what has taken place, for if they were disposed to be dishonest they could surely be compelled to execute a valid policy of the proper date. In effect, therefore, the plaintiffs have been all the time insured, as they probably have considered themselves to be, notwithstanding the accidental omission of the president's name, which they have had no reason as it appears for apprehending would not be made right on their request at any time.

Here is an express assertion of the existence of the jurisdiction to relieve against mistake in a case, the circumstances of which are precisely similar to the present. *A fortiori* does the jurisdiction exist in a case of fraud, when, as here, the company having enjoyed the premium, upon the loss occurring, fraudulently set

(1) 4 U. C. Q. B. 363.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

up their own wrongful neglect as a defence to the plaintiffs' action, after they had failed upon all the grounds of defence which were legitimately open to them to raise. If this court should now hold that a jurisdiction so long and so uniformly claimed and asserted by the courts of *Ontario*, which, until now, does not appear to have been questioned, does not exist, such a decision would, in my opinion, be greatly to be deplored, and would indeed be extremely mischievous as crippling the arm of the courts of that province in the exercise of one of their most wholesome weapons for the prevention of frauds and the due administration of justice.

The appeal in my judgment must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Harris, Magee & Co.*

Solicitor for respondents: *S. S. Macdonnell.*

1881

*Feb'y. 17, 18.
*March 3.

LOUIS J. ALMON *et al*..... .. ..APPELLANTS;

AND

JAMES D. LEWIN *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Will—Annuities, sale of Corpus to pay.

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testa-

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

tor directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A, B, C, D and E, annexed to his will, upon these trusts, viz. :—Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter *M. A. A.*, the rents, etc., apportioned to her in schedule A; to his daughter *E.*, of those mentioned in schedule B; to his daughter *M.* of those mentioned in schedule C; to his daughter *A.* of those mentioned in schedule D; and to his daughter *L.* of those mentioned in schedule E; each of said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words :—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following:" He then gave out of the residue a legacy of $4,000 to his brother *D. R.*, and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned.

The rents and profits of the whole estate left by the testator

1881
ALMON
v.
LEWIN.

proved insufficient, after paying the annuity of $10,000 to the widow and the rent of and taxes upon his house in *L.*, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency.

Held, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

THIS was an appeal from the decision of the Supreme Court of *New Brunswick* in a suit brought by the executors and trustees under the will of the late Hon. *John Robertson*, for the construction of said will.

The parties agreed to the following case.

"1. The respondents, *James D. Lewin*, *Charles Duff*, *Sophia Robertson* and *DeLisle Gracie*, filed a bill in the Supreme Court in Equity, of the province of *New Brunswick*, for the construction of the last will and testament of the late Honorable *John Robertson*, which said last will and a codicil thereto form a part of this case [See head note and judgments for provisions of the will] 2. The several defendants appeared and answered, and the case was heard on bill and answers before the Supreme Court in Equity; 3. Among the facts admitted were the following: (*a*) That the testator's estate consisted, 1st. Of certain lands and tenements, stocks, and other personal property, set forth and described in the several schedules marked A, B, C, D and E, annexed to said will. 2nd. Of a debt due by *David D. Robertson*, the son named in the will, to his father of over fifty-three thousand dollars; and 3rd. Of a large estate, real and personal, exclusive of and in addition to the property mentioned in the schedules in the hands of respondents, *James D. Lewin*, *Charles Duff*, *Sophia Robertson* and *DeLisle Gracie*, as executors and trustees under said will. (*b*) That *Mary*

Allen Almon had received, in the life-time of the testator, the sum of nine thousand five hundred dollars, which sum is charged against her in the testator's books. (*c*) That the whole net income of the testator's estate, including the properties mentioned in the several schedules, was not sufficient to pay the amount of the annuity of $10,000 to the widow *Sophia Robertson*, and also the several annuities of $1,600 each to the five daughters, *Mary Allan Almon*, *Eliza*, *Agnes Lucas*, *Margaret Sophia* and *Laura Campbell*. (*d*) That, in order to pay each of the daughters the yearly annuity of $1,600, the respondents would have to take a large portion thereof out of the *corpus* of the estate. 4. Among the questions submitted by the above named respondents to the Supreme Court in Equity were the following, which they prayed it might be declared and decreed. First—Whether the trustees are or are not bound or authorized to pay the annuities of $1,600 each to the daughters of the testator, during the life of the testator's widow, in full out of the *corpus* of all or any part or parts of the real or personal estate of the testator, if the rents, issues and profits of the whole of the said estate, or the whole of the said estate applicable for that purpose, prove insufficient. Second—Whether, if the trustees are so bound or authorized, they, during the life of the widow, have not power to sell or mortgage any and what part or parts of the *corpus* of the estate to raise funds to pay said annuities of $1,600 to each of said daughters in full, so far as the rents, issues and profits of the said estate prove insufficient for that purpose, or to any and what extent. Third—Whether the trustees, during the life of the widow, before selling the *corpus* of the testator's estate to meet the said annuities of $1,600 to each of said daughters, ought or ought not to reserve so much of any and what part of the said estate as may be necessary to provide for and secure the

1881
ALMON
v.
LEWIN.

widow's annuity, and if so, how is the extent of such reserve to be ascertained and determined, and by whom. 5. The appellants in this case claim that after setting aside so much of the estate outside and exclusive of the property mentioned in the schedules as may, together with the income derived from the scheduled property, be sufficient to provide for and secure the widow's annuity, they are entitled to have the amount of their several annuities of $1,600 a year each paid to them out of the *corpus* of the estate, outside of and beyond the scheduled property, if the income is not sufficient to do so, and that the trustees should sell so much of said estate outside of scheduled property as may be necessary for said purpose. 6. That in the Supreme Court in Equity, His Honor the Chief Justice, delivered judgment, and decreed, among other things, as follows: 'And, as to the *first* and *second* questions, it being admitted that the rents and profits of the whole estate left by the testator are insufficient, after paying the annuity of $10,000 to his widow and the rents and taxes upon his house in *London*, to pay the several sums of $1,600 a year to each of his daughters during the life of their mother, whether under these circumstances the executors and trustees have power to sell or mortgage any part of the *corpus* of the property to make up the deficiency, his honor doth declare that the said executors and trustees have no such power. The answer to the said *first* and *second* questions being thus given renders it unnecessary for his honor to answer the *third*.' 7. The appellants appealed to the Supreme Court of *New Brunswick*, when the appeal was heard before their honors Mr. Justice *Weldon*, Mr. Justice *Fisher*, Mr. Justice *Wetmore* and Mr. Justice *Palmer*, and after consideration their honors gave judgment, and were divided in opinion. Mr. Justice *Weldon* and Mr. Justice *Wetmore* concurring with the Chief Justice, while their honors

Mr. Justice *Fisher* and Mr. Justice *Palmer* were of a different opinion, and the division being equal the decree of the Supreme Court in Equity was affirmed."

Dr. *Barker*, Q. C., representing the administrators who are nominal parties, declared he would take no part in the case.

Mr. *Weldon*, Q.C., for appellants, *E. & M.* and *A. & L. Robertson*:—

The question now is simply whether the annuities to the children are chargeable on the *corpus* of the real and personal estate. It is one of those cases where the testator thought his property worth more than it really was. The manifest intention of the testator is clearly shown that there should be equality amongst his children in the participation of the benefits of his estate, as well during the life-time of their mother as after her death. The testator divided his estate into two divisions. The one which may be called the scheduled estate and the other which he calls the general estate, the former to be held intact during his wife's life, and then to be held in trust and with limitations over for his daughters respectively, the latter consisting of two parts, namely, the rents and profits of the scheduled estate and the residue of his property.

Out of this general estate so made he directs an annuity of $10,000 to be paid to his wife during her life, and also "from and out of the said general estate during the life of my said wife, to pay to each of my daughters, *Mary Allan Almon*, *Eliza*, *Margaret Sophia*, *Agnes Lucas*, and *Laura Campbell*, the clear yearly sum of $1,600, dominion currency, by equal quarterly payments, free from the debts, control or engagements of any husband they may respectively have, the first of such quarterly payments to be made at the expiration of three months from my decease."

By his will he also orders and directs that his said

1881
ALMON
v.
LEWIN.

executors shall reduce the amount of the advances made by him to his son *David Dobie*, and interest thereon, as aforesaid, by crediting him with "the like annual sum of $1,600, by quarterly credits of $400 each."

This deduction or allowance, in effect an annuity, was to be made under any circumstances, whether the income of the estate was sufficient to pay the whole of the annuities or not.

And having estimated the property in each schedule to be worth $50,000, he directs that upon the death of his wife that amount shall be credited to his son.

After payment of certain legacies he directs the residue to be divided equally among his children.

It now appears, that after the payment of the annuity to Mrs. *Robertson*, the residue of the income is not sufficient to pay the daughters their several annuities, and the question is, are they entitled to have the deficiency made up out of the *corpus* of the estate? This question, it is submitted, must be answered in the affirmative.

The law on this subject has been very fully discussed in a late case, *Gee* v. *Mahood* (1), where Vice-Chancellor *Hall* made a decision somewhat similar to that of the Chief Justice in the present case. On appeal the Lords Justices and the late Lord Chancellor, Earl *Cairns*, reversed the Vice-Chancellor's decision (2). The case was then taken to the House of Lords, where the decision of the Court of Appeal was affirmed. The case in the House of Lords is reported as *Carmichael* v. *Gee* (3). We rely on this decision and contend that the annuities are chargeable on the *corpus* of the real and personal estate of the testator.

Mr. *Gilbert* for appellants, *L. J. Almon* and *Mary A. Almon*:—

(1) 9 Ch. D. 151. (2) 11 Ch. D. 891.
(3) 5 App. Cases, 588.

The only question which arises is, what did the testator mean by the term general estate?

The word general is defined as "belonging to or relating to the whole" opposed to "partial or special" on the one side and to "universal" on the other, *i.e.*, being the greater part but not the entirety. Or applying it to a devise or bequest, it would be out of the whole of the estate, except so much thereof as is carved out and separated from the whole, and thereby made *special* in contradistinction to *general*. Then the meaning of the term general estate would be found by ascertaining if there was any portion of his estate which the testator intended to separate and set apart, and this being found, the whole of the residue would constitute the "general estate," unless indeed the context of the will, or some expressions contained in it, would show that the testator had used the word in a more limited sense.

The only expression used by the testator bearing on the meaning of the term is, he directs his executors to collect the income arising from the scheduled properties, "which shall be and be taken to form a portion of my general estate." This income, then, is a *portion*, not the whole of his general estate; only a portion. Where, then, is the balance? for balance there must be, if this is only a portion. It can not be the *corpus* of the scheduled properties, for these are afterwards in the will (not only directed to be held by the trustees after the death of the widow in their entirety for the benefit of his daughters) but the trustees are directed if any portion should have been disposed of by the testator in his life-time, "or if any stocks, mortgages, bonds or debentures therein named shall have depreciated in value, to substitute therefor or add thereto, in money or otherwise, from and out of '*my residuary estate*' some other property or security or its equivalent in money which they or the majority of them may consider of

1881
ALMON
v.
LEWIN.

equal value to the property so disposed of or depreciated." Nor can it, the balance, be the debt due from his son *David*, for this is to remain uncollected during the life of the widow, undergoing a process of reduction by $1,600 a year, and after her death is to be reduced or extinguished to at least the extent of $50,000 by giving or crediting that amount to his said son, and the balance of it treated as an investment of his (the son's) portion of the estate. If so, then the balance or other portion of the general estate, of which the income of the scheduled property is one portion, must be sought for and can only be found in that large amount of real and personal property not included in the schedules, and which, if not then consumed in the payment of the annuities and the other charges laid on it in the will, becomes at the death of the widow, and not until her death, and all other previous bequests paid, *his residuary estate.*

It is true that when the death of the widow occurs that then what is left of the large estate not included in the schedules passes out of the category of general estate and becomes residuary, and as such is to be kept intact. But there can be no residuary estate until all previous bequests are satisfied, annuities as well as other charges, and the testator has well marked this in his will, for he says: "And from and after the death of my said wife the amount of such premiums of life policies and all other monies which my said executors and trustees shall pay, lay out or expend in the execution of the trusts of this my will shall be deducted from the income of the property of my estate." In other words, the testator says, as clear as words can, the scheduled property shall be kept intact.

It will be said, however, that the reduction of debt to his son should also abate *pro tanto* as the daughter's annuities abate. But this cannot be, for the testator has provided a fund from which the son's yearly allow-

ance is to come, *i. e.*, the debt due from him, not the interest of the debt but the debt itself. And the annuity or reduction to him cannot abate until the fund from which it is to be taken is exhausted, which cannot happen because it is perpetually renewed by the accruing interest on it. And this debt or fund and the interest accruing on it can form no part of the general estate available for the purpose of paying either the annuity to the widow or the annuities to the daughters, because it is to remain until the widow's death for the purpose of being then applied or given to him to the reduction of the son's debt, and the balance, after such reduction is made, is specifically appropriated to be held as an investment of his portion. Under no circumstances (at any rate, before the widow's death) is it to be collected and applied or the interest on it collected and applied to the payment of any charges on the general estate, the interest from it, unlike the income of the scheduled properties, not forming a portion of the general estate, but specifically appropriated to the preservation of the fund from which his allowance of $1,600 a year is to be had.

Mr. *Kaye*, Q.C., for respondents:

It is my duty, as representing the trustees and executors, to call the attention of this honourable court to the passages in the will which, in their opinion, shows the testator's intention was that the *corpus* should not be touched. The general estate (which includes all but the *corpus* of the scheduled property), comes to the trustees subject to a charge of an annuity to the widow, and is to be held upon the same trusts for the daughters as the schedule property. Under the trusts, as to the scheduled property, the *corpus* is to remain intact until the daughters' decease, therefore the *corpus* of the general estate, which is to be held upon the same trusts, is also to remain intact in like manner.

1881
ALMON
v.
LEWIN.

The widow has a primary charge on the general estate, therefore, so far as the daughters are concerned, the *corpus* of the general estate is to remain intact for the purpose of securing the widow's annuity as intended and provided by the will.

The provisions of the will in favor of the widow are in lieu of dower, and as the testator left real estate in which her dower right existed at his death, she is a purchaser for value (1), her claim is therefore preferential to that of the daughters, and the fund provided for her security ought not to be taken to pay their annuities.

Now, by referring to the will it will be seen that the testator gives to his wife the annuity which, he says, "shall be a charge upon my general estate;" thus making an independent gift of the annuity to her, and expressly charging it upon his general estate; but it will also be seen that there is no charge of the annuities to the daughters, and no independent gift of the annuities to them; the gift to them consists only in the direction to the executors and trustees to pay them from and out of the general estate.

How could the trustees pay out of the general estate, unless that general estate is first in them from and out of which they can pay? How is the estate in them except by the residuary clause?

If they take nothing as trustees except what is left after deducting the annuities to the daughters, what have they in them from and out of which to pay those annuities? It is a fallacy to assume that there was a charge of those annuities in favor of the daughters, or an independent gift of such annuities to them; they take only through the trustees, who take at the decease of the testator the whole legal estate, both real and pre-

(1) *Burridge* v. *Brady*, 1 P.W. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Heath* v. *Dendy*, 1 Russ. 543.

sonal, in order to fulfil and discharge the trusts thereof. As to so much of the whole estate as is comprehended under the term general estate, the trustees take subject to a charge in favor of the widow, and subject to no other charge.

Can the trustees, by selling to pay the annuities to the daughters, destroy or diminish the estate expressly charged in favor of the widow, and subject to which charge the trustees take the estate? If they can sell to pay the annuities to the daughters, what becomes of the express charge in favor of the widow? So to sell, implies that the daughters, with respect to the annuities, stand on equal terms with the widow.

In the case of *Baker* v. *Baker* (1), the testator gave his estate to trustees in trust to invest a sum, the dividends of which would realize the clear annual sum of two hundred pounds, and to pay such dividends to his wife, and at her death the trustees were to hold the principal money in trust for other parties, and it was there contended, on behalf of the widow, that if the, dividends were insufficient, the *corpus* should be taken to pay her annuity; referring to this contention, the Lord Chancellor observed: "According to the construction which is contended for on behalf of the widow, this strange state of things would arise, that, supposing her life to continue for many years, the provision which was clearly intended for her by the will might, in the course of time, by appropriating annually a portion of the *corpus* of the property, be utterly annihilated, and she would be left without any provision at all, and therefore, as the question is one regarding intention, I apprehend that nobody can suppose that such an intention could have ever existed in the mind of the testator." Now it is the daughters in the present case, and not the widow, who seek to use the *corpus* of the general estate.

(1) 6 H. L. 616.

1881
ALMON
v.
LEWIN.

Can anybody suppose that an intention existed in the mind of the testator that the *corpus* of the estate charged by him with the widow's annuity should be taken to pay the daughters annuities, whereby possibly the *corpus* may be annihilated and his widow left without the provision intended for her, and in return for which he required her to relinquish her right to dower out of his estate?

That it was not the intention of the testator that the *corpus* of the general estate should be taken to pay the annuities to the daughters is further shown by the effect which the taking of such *corpus* would have in possibly destroying the equality of shares amongst his daughters which he plainly desired to preserve; thus Mrs. *Almon*, one of his daughters, received in her father's lifetime advances to over nine thousand dollars, while the other daughters received nothing. Under the provisions of the will, the amount of these advances are to be taken as a part of her share of the residuary estate. Mrs. *Almon* has therefore received upwards of nine thousand dollars on account of her share of the residuary estate, and to make the shares of the other daughters equal, each would have to receive nine thousand dollars; or, the whole of them together, 4×9,000=$36,000; but if the *corpus* of the estate be used, it does or may take away the fund out of which this $36,000 has to be paid to make the shares of the four daughters equal, and the using of the *corpus* does or may defeat the intention of the testator that the shares of the children should be equal.

STRONG, J.:—

The question presented for our decision on this appeal arises on the will of the Hon. *John Robertson*, who died on the 3rd of August, 1876. The provisions of the will material to be considered may be stated as follows:

The testator, in the first place, gave his widow an annuity of $10,000 for her life, which he declared to be in lieu of dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property, particularly described in five schedules marked respectively A, B, C, D and E, annexed to his will, upon the trusts hereafter stated, viz., upon trust during the life of his wife to collect and receive the rents, issues and profits thereof, which should be and be taken to form a portion of his "general estate," and then, from and out of the general estate, during the life of the testator's wife, to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, control, and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provides that from and after the death of his wife the trustees are to collect and receive the rents, issues, dividends and profits of the lands, tenements, hereditaments and premises mentioned in the several schedules, and to pay to his daughter *Mary Allen Almon* the rents, issues, dividends and profits of the lands, tenements and hereditaments apportioned to her and mentioned in the schedule A; to his daughter *Eliza* the income arising from the property comprised in schedule B; to his daughter *Margaret* that of the property comprised in schedule C; to his daughter *Agnes Lucas* that of the property comprised in schedule D, and to his daughter *Laura Campbell* the income arising from the property in schedule E. Such payments to be made to the separate use of his daughters. Then there is a provision that each of the daughters are to be charged with insurance, ground rents, rates and taxes, repairs and other expenses connected with or

1881
ALMON
v.
LEWIN.
Strong, J.

incidental to the management and upholding of the property apportioned to her, the same being from time to time deducted from such quarterly payments. The will then, after directing the executors to keep the properties described in the schedules insured against fire, and giving the devisees an option either to re-build or to lease the ground, in case of loss by fire, proceeds as follows: "And upon trust, on the death of either of my said daughters, to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule to such person or persons, upon the trusts, and for the ends, intents and purposes, or in such manner, as my said daughter may, by any writing under her hand, attested by two or more witnesses, or by her last will and testament, direct and appoint, and in default of such direction and appointment, then and in such case the said two-thirds and one-third shall be held by my said executors and trustees in trust for such child or children, and be equally divided between them and their heirs, share and share alike, on the youngest child living attaining the age of 21 years, and in the mean time and until such child shall attain such age the rents, issues and profits thereof shall be applied by my said executors towards the support, maintenance and education of such child or children; and in the event of my daughter dying leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and the one-third before mentioned (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs *per stirpes* and not *per capita*". The testator then gives a "like" annuity of $1,600 to his son *David Dobie Robertson*, and directs that after the death of the testator's wife his son shall have a legacy of

$50,000, which he estimates to be the equivalent in value of the property contained in the schedules given to each of his daughters; and he directs that as well the annuity as the legacy of the capital sum shall be paid to his son by setting it off against a debt due by his son to himself, on which debt he directs interest to be charged at the rate of 5 per cent. per annum. Subject to these specific devises and bequests, annuities and pecuniary legacies already mentioned, the testator gives the residue of his estate to his executors upon trust by the following words, which are important to be considered: "The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give devise and bequeath the same to my said executors and trustees upon the trusts and for the intents and purposes following." He then gives out of the residue a legacy of $4,000 to his brother *Duncan Robertson*, and the ultimate residue he directs to be equally divided among his children, upon the same trusts with regard to his daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned.

For the purpose of obtaining a declaration as to the proper construction of this will, the executors filed a bill in the Supreme Court in Equity of the Province of *New Brunswick*, and the defendants, the present appellants, having answered, the cause was heard upon bill and answer before his honor the Chief Justice of *New Brunswick*.

Among the questions submitted by the respondents for the decision of the court were the following:

First—Whether the trustees are or are not bound or authorized to pay the annuities of $1,600 each to the daughters of the testator, during the life of the testator's widow, in full out of the *corpus* of all or any part or parts of the real or personal estate of the testator, if

1881
ALMON
v.
LEWIN.
Strong, J.

the rents, issues and profits of the whole of the said estate, or the whole of the said estate applicable for that purpose, prove insufficient. Second—Whether, if the trustees are so bound or authorized, they, during the life of the widow, have not power to sell or mortgage any and what part or parts of the *corpus* of the estate to raise funds to pay said annuities of $1,600 to each of said daughters in full, so far as the rents, issues and profits of the said estate prove insufficient for that purpose, or to any and what extent. Third—Whether the trustees, during the life of the widow, before selling the *corpus* of the testator's estate to meet the said annuities of $1,600 to each of said daughters, ought or ought not to reserve so much of any and what part of the said estate as may be necessary to provide for and secure the widow's annuity, and if so how is the extent of such reserve to be ascertained and determined and by whom.

By the decree pronounced by the Chief Justice, sitting in the Supreme Court in Equity, it was declared as follows: "And as to the first and second questions, it being admitted that the rents and profits of the whole estate left by the testator are insufficient, after paying the annuity of $10,000 to his widow, and the rents and taxes upon his house in *London*, to pay the several sums of $1,600 a year to each of his daughters during the life of their mother, whether under these circumstances the executors and trustees have power to sell or mortgage any part of the *corpus* to make up the deficiency, his honor doth declare that the said executors and trustees have no such power. The answer to the said first and second questions being thus given, renders it unnecessary to answer the third."

The appellants appealed to the Supreme Court of *New Brunswick*, and the appeal was there heard before four judges, two of whom, Mr. Justice *Weldon* and Mr. Justice *Wetmore*, concurred with

the Chief Justice, whilst Mr. Justice *Fisher* and Mr. Justice *Palmer* were of opinion that the part of the decree complained of should be reversed, and the court being thus equally divided the decree of the Supreme Court in Equity was affirmed. From this order of the Supreme Court the appellants have appealed to this court.

The gifts to the testator's daughters of the property, real and personal, included in the schedule, are specific, and are, in the absence of a contrary intention indicated in the will, to be taken free from any charge in respect of the annuity given to the testator's wife, as well as from those given to the daughters themselves.

The learned Chief Justice proceeded upon the assumption that the annuities were not merely charged on the property described in the schedules, but were so charged in exoneration of the general estate of the testator. The testator, after directing that the income of the property specifically devised to the daughters shall, during the life of his wife, be added to and form part of his general estate, expressly directs that "from and out of his general estate during the life of his wife," his executors shall pay to his daughters the annuities in question. And as regards the annuity to the widow the words are equally decisive to show, not merely no intention to charge the specific gifts with the annuities, but to restrict them to the fund out of which they would be *primâ facie* payable, the general personal estate, for, after giving this annuity, he adds the words "which shall be a charge upon my general estate." It seems, therefore, very clear that, as in the simple case of a testator first giving a particular chattel by way of specific bequest and then an annuity to another legatee the whole personal estate other than the subject of the specific legacy is available for the payment of the annuity, so in the present case the whole personal

1881
ALMON
v.
LEWIN.
Strong, J.

estate, other than that specifically given to the testator's wife and comprised in the schedule, is liable for the payment of the annuities.

In so applying the fund to be produced by the conversion of the general personal estate, the income is of course to be first applied to the payment of the annuities, but if this should prove insufficient then recourse may be had to the capital, unless the testator has expressly or by implication demonstrated an intention to restrict the annuitants to the income. Is there, then, to be found in the will anything which will authorize us to say that the persons to whom these annuities are given are to be confined to the income? As regards the annuity to the widow, which, having been given in lieu of dower, is of course entitled to priority, no question arises, since it is admitted that the income is sufficient for its payment. The conclusion at which the learned Chief Justice arrived seems to have been entirely founded on a misapprehension of the terms of the will, for he assumed, as I have already said, that the annuities were charged exclusively on the scheduled properties, but this, as I have already pointed out, was beyond all question not the case; had it been, the construction adopted by the Chief Justice would undoubtedly have been right, for the case of *Baker* v. *Baker* (1), quoted in his judgment, and many other authorities, a collection of which will be found in *Theobald* on Wills, at p. 470, shew that where the *corpus* is dealt with by the will, as by a specific gift over after the termination of the annuity, it is not liable to make good arrears which the income has been insufficient to pay. And if the annuities had been confined to the scheduled properties this principle would have applied in the present case. But the fund out of which the annuities are here payable is, as I have already shewn, the general

(1) 16 H. L. 616.

personal estate, and, as I will shew hereafter, the real estate not specifically devised in addition. Then, does the will contain any expression or implication of an intention to conserve the capital or *corpus* of both or either of these funds until after the death of the testator's wife? The learned counsel who supported the judgment of the court below argued that such an intention was indicated by two distinct considerations,—first, he contended that the testator must be presumed to have intended that the widow should have the security of the whole real and personal estate for the payment of her annuity, and that consequently neither of these funds was to be broken in upon during her life for the payment of arrears of other annuities which the income was inadequate to pay. As the annuities to the testator's children are to cease at the death of the widow, this would of course have been tantamount to saying that the annuities should be payable out of income only. The answer to this contention is, however, very obvious. We nowhere find that the testator has said that his wife should have the security of his whole estate. He has simply given her an annuity, so given, it is true, as to be payable in priority and to the disappointment, if requisite, of all his other beneficiaries, but there is nothing to show that he intended his gift to have any other or greater effect than the ordinary gift of an annuity. The widow is therefore entitled to have a portion of the *corpus* of the estate, real and personal, not specifically devised or bequeathed, sufficient to produce an income equivalent to the amount of her annuity, set apart at once for that purpose (1), and invested for her benefit in such securities as, by the rules of the Supreme Court in Equity in *New Brunswick*, trustees are authorized to invest in. Subject to the investment of such a fund the remainder of the

(1) See form of decrees: Seton on Decrees, 202, 207, Ed. 3.

1881
ALMON
v.
LEWIN.
Strong, J.

estate, real and personal, is available for the payment of other annuitants and legatees. It was further argued that the residue given to the executors and trustees meant the residue after what had previously been given to the same trustees, namely, the scheduled properties, and therefore included the whole estate subject only to the specific bequests, and that, there being then a gift of this residue to the testator's children, with the same limitations as those upon which the scheduled properties had been settled, the whole *corpus* was to be kept intact for the purpose of carrying out the trusts.

The fault of this argument is that it assumes the whole question in dispute. The enquiry is, what is the residue composed of? or, in other words, are the annuities to be paid out of the *corpus* of the estate before the residue is ascertained? and this is not met by assuming that the residue is the whole estate less the fund set aside for the widow. It is clear beyond all question, much too plain to require authority to be cited to sustain the proposition, that where a legacy, annuity, or any other bequest is first given, and is then followed by a gift of residue, the word "residue" *ex vi termini* imports what shall remain after satisfaction of the previous bequests. So in the present case the residue given to the executors means what shall remain after satisfaction of the annuities in question. The will therefore contains nothing which would warrant us in depriving the children of the testator of their *primâ facie* right to have the arrears of their annuities made good out of the *corpus* of the estate, subject only to the prior rights of the widow and other specific legatees and devisees.

The direction to pay the annuities out of the general estate would not warrant us in holding that the annuities are charged on the realty. The terms of the residuary clause are, however, amply sufficient for that

purpose. By it the testator has charged all his pecuniary legacies and annuities on his real estate. The introductory words of that clause are "the rest, residue and remainder of my said estate, both real and personal, I give, devise and bequeath." Now it is a well established principle of construction that if a testator, after giving a pecuniary legacy without any indication of an intention to charge it on the realty so far as the language of the gift itself indicates, subsequently gives the residue of his *real* estate, the use of the word "residue," as applied to the real estate, is sufficient to charge the legacy by implication, and this is so, even though there have been previous specific devises of real estate (1).

From a vast number of authorities, the following have been selected as affording examples of the application of this rule: *Bench* v *Biles* (2); *Francis* v. *Clemow* (3); *Greville* v. *Brown* (4). There can, therefore, be no doubt of the authority of the executors and trustees to raise any arrears of the annuities from time to time by sale or mortgage of the testator's real estate not specifically devised in aid of the *corpus* of the general personalty.

I am, therefore, of opinion that so much of the decree of the court below as is complained of in this appeal must be reversed; and that there must be substituted for it a declaration that the annuities given to the appellants are charged on the *corpus* of the real and personal estate, subject to the right of the widow to have a sufficient sum set apart to provide for her annuity; and I think that the costs of all parties should be paid out of the estate.

FOURNIER and TASCHEREAU, J.J., concurred.

(1) Jarman on wills, Vol. 2, Ed. 3, p. 573.
(2) 4 Madd. 187.
(3) 1 Kay 435:
(4) 7 H. L. 689.

1881

ALMON v. LEWIN.

GWYNNE, J.:—

The plain meaning of the testator's will, as it appears to me, is, that the property in the several schedules mentioned, subject to such alteration as should be made therein under the provisions in the will in that behalf, so as to make the parcels in each, in the opinion of the executors, &c., of the value of $50,000, should be held by the executors and trustees during the life of testator's wife upon trust to receive the rents, issues and profits thereof for the purpose that such rents, &c., should form part and parcel of what the testator calls his general estate. He then gave to his wife and to his five daughters out of this general estate (which term must plainly be construed as meaning the rents, issues and profits of the property in the schedules particularly mentioned, together with the residue of his estate not specifically appropriated), six several annuities, namely $10,000 per annum to his wife during her life and $1,600 per annum to each of his five daughters during the life of his widow; and, being desirous to place all his children on an equality, he directed that a sum of money, amounting to or exceeding $50,000, in the testator's son's hands bearing interest at 5 per cent., should be suffered to remain at interest in his hands, and that out of such interest he should be allowed $1,600 per annum during the life of testator's widow. At the death of the widow the annuities to the children are to cease, and the executors and trustees are directed to hold then the parcels in the schedules mentioned upon certain trusts in favor of the five daughters respectively, and provision is made as to the debt due by the son so as to place him on an equality with the daughters, valuing the parcels in each schedule set apart for the daughters at $50,000. Then as to all the rest, residue and remainder of the testator's estate, both real and personal, after payment thereout, during the widow's lifetime, of certain premiums of

insurance and other charges, he gave, devised and bequeathed the same to his executors and trustees upon trust after paying testator's brother a legacy of $4,000, to sell and dispose of the same, and to apportion the same and the proceeds thereof equally to and among his children, share and share alike, the daughters' share to be held on the same trusts as are declared in respect of the scheduled lands; and he directed that the son's share should by held by the executors, &c, upon certain trusts declared concerning it.

The terms of this will, as it appears to me, plainly constitute the annual payments bequeathed during the life of the testator's widow, both to herself and to the testator's five daughters, to be annuities in the ordinary sense of that term. The annuity to the widow is expressly charged upon the general estate, which estate is constituted as above mentioned, and it is out of the same *general estate* that the gifts to the daughters, during the widow's life, are made payable also. There is nothing in the will expressing or indicating an intention that the gifts to the daughters during the widow's life shall be made good out of the income only of such general estate, they are, on the contrary, expressly made payable out of the general estate itself, which estate is constituted as above stated. The rule therefore is that the daughters are entitled to have their annuities made good, not only out of the income, but out of the capital of such general estate, so only, however, as not to prejudice the right of the widow to receive first her annuity in full

The principle of *Gee* v. *Mahood* (1), reported in appeal as *Carmichael* v. *Gee* (2), is, in my judgment, sufficient for the determination of this case.

Appeal allowed with costs.

Solicitors for appellants: *G. G. Gilbert and C. W. Weldon.*

Solicitors for respondents: *F. E. Barker* and *J. J. Kaye.*

(1) 11 Ch. D. 891. (2) 5 App. Cases 588.

1881
*Mar. 5,7,8.
*Nov. 14.

ANDREW MERCER..... APPELLANT;

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Escheat—Hereditary revenue—The Escheat Act R. S. O., c. 94 ultra vires—B. N. A. Act, secs. 91, 92, 102 *and* 109.

On an information filed by the Attorney General of *Ontario*, for the purpose of obtaining possession of land in the city of *Toronto*, which was the property of one *Andrew Mercer*, who died intestate and without leaving any heirs or next of kin, on the ground that it had escheated to the crown for the benefit of the Province, and to which information *A. M.* the appellant, demurred for want of equity, the Court of Chancery held, overruling the demurrer, that the Escheat Act, c. 94 R. S. O., was not *ultra vires*, and that the escheated property in question accrued to the benefit of the Province of *Ontario*. From this decision *A. F.* appealed to the Court of Appeal for *Ontario*, and that court affirmed the order overruling the said demurrer and dismissed the appeal with costs. On an appeal to the Supreme Court the parties agreed that the appeal should be limited to the broad question, as to whether the government of *Canada* or the Province is entitled to estates escheated to the crown for want of heirs.

Held,—[Sir *W. J. Ritchie*, C. J., and *Strong*, J., dissenting,] that the Province of *Ontario* does not represent her Majesty in matters of escheat in said Province, and therefore the Attorney General for *Ontario* could not appropriate the property escheated to the crown in this case for the purposes of the Province, and that the Escheat Act, c. 94 R. S. O., was *ultra vires*.

Per *Fournier*, *Taschereau* and *Gwynne*, J.J.—That any revenue derived from escheats is by sec. 102 of the B. N. A. Act placed under the control of the Parliament of *Canada* as part of the Consolidated Revenue Fund of *Canada*, and no other part of the act exempts it from that disposition.

---

* PRESENT: Sir W. J. Ritchie, Knight, C. J.; and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

APPEAL from a decision of the Court of Appeal for the Province of *Ontario* affirming the judgment of *Proudfoot*, V. C., on an appeal of the appellant to the said Court of Appeal, from the decision of the said Vice-Chancellor, over-ruling the demurrer of the appellant to the information of the Attorney-General for *Ontario*.

An information was filed in the Court of Chancery on the 28th September, 1878, by the Attorney-General of *Ontario* against *Bridget O'Reilly*, *Andrew F. Mercer* and *Catharine Smith*, stating that *Andrew Mercer*, late of the city of *Toronto*, died on the 13th day or June, 1871, intestate, and without leaving any heir or next of kin, whereby the estate of the said *Andrew Mercer* in *Ontario* became escheated to the Crown for the benefit of the province; that he died seized of certain specified real estate; that immediately upon his death the defendants entered into possession of it without permission or assent of her Majesty, and have continued in possession, and refused to give up possession to her Majesty; that possession was demanded on 21st Sept., 1878, but the defendants refuse to deliver up possession; and praying that the defendants be ordered to deliver, up possession of the said land, &c. The defendant *Andrew F. Mercer*, demurred to the said information for want of equity, and the demurrer was argued before *Proudfoot*, V. C. On the 7th January, 1879, the learned judge made an order overruling the said demurrer.

From this decision, the defendant. *Andrew F. Mercer*, appealed to the Court of Appeal for *Ontario*, and that court held. that the Provincial Governments are entitled, under the *British North America* Act, to recover and appropriate escheats, and affirmed the order overruling the said demurrer and dismissed the appeal with costs.

Against this judgment and order of the Court of

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

Appeal, the defendant appealed to the Supreme Court, and the parties agreed that the appeal should be limited to the broad question as to whether the Government of *Canada* or of the Province is entitled to estates escheated to the crown for want of heirs.

The Minister of Justice for the Dominion of *Canada*, concurring in the view of appellant's counsel, that the hereditary revenues of the crown belong to the Dominion, intervened, and the case was argued before the full court in March, 1881—Mr. *Lash*, Q C., for the Dominion Government, opened the case.

Mr. *Lash*, Q. C.:—

The Dominion Government have intervened in this case in order to have the question determined whether the government of the Dominion of *Canada* or the government of the Province of *Ontario* have the right to deal with the escheated property It is admitted that the land in question here did escheat, and the only question is to which government the land now belongs.

Andrew Mercer died 13th June, 1871; the crown patent for the land in question issued before confederation. It is, I think, necessary to decide what is the reason why land escheats. There are but two reasons given—1st. that the crown is the last heir (*ultimus hæres*) and takes by royal prerogative; 2nd. that in socage tenure of lands an estate remains in the crown, which, when the heirs of the tenant in fee simple fail, draws to it the fee simple, thus making the crown the owner.

Opinions differ as to which is the true reason. The case must therefore be argued in both views. That the crown is the last heir is the opinion of Lord *Mansfield* in *Burgess* v. *Wheate* (1). This view is also supported by the provisions of the act of *Edward* II, concerning

(1) 1 W. Bl. 162.

the prerogatives of the king (1), and also by *Proudfoot*, V. C., in his judgment in this case. That escheat is a consequence of the free and common socage tenure, see *Blackstone* Comm. (2); *Burgess* v. *Wheate* and *Middleton* v. *Spicer* (3), and the judgment of *Patterson* J., in this case. By 31 *Geo.* 3, c. 31, Imp. stat., the lands in the province of *Ontario* are held in free and common socage. Now the effect of this Imperial statute, which is still in force, is that the allodial estate remains in the crown and, in the old province of *Upper Canada*, from 1791 to confederation, neither the provincial executive nor legislature had control over that tenure. Assuming then that escheat took place in either of the ways mentioned it was a royal revenue, and prior to the union act, 3 and 4 *Vic.*, c. 35, sec. 54, belonged to the Crown and did not go to the consolidated revenue of the province. By that statute the territorial and other revenues of the Crown were surrendered to the provinces, not absolutely or unconditionally, but to the account of the consolidated revenue fund of *Canada* during the life of Her Majesty and for five years after the demise of Her Majesty. This section 54 is repealed by Imperial act 10 and 11 *Vic.*, c. 71, and new provision of a similar kind is substituted by the Canadian act, 9 *Vic.*, c. 114. Now if the word "revenue" as used in the Imperial statutes, included revenues from escheats, I contend the word revenue in sec. 102, *B. N. A.* Act, 1867, includes revenues from escheats and that such revenue passed to the control of the Dominion parliament. This section excepts only "such portions thereof as are by *this act* "reserved to the respective legislatures of the province." The question therefore arises whether the power of appropriation over revenues derived from escheats was by the *B. N. A.* Act

(1) 1 vol. Imp. Stats., p. 182.
(2) Leith 2 edtn., p. 279.
(3) Reporter's notes, 1 Brown's Rep. 205.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

"reserved to the respective legislatures of the provinces." Assuming first that *escheat* is a royal prerogative, I contend that the *B. N. A.* Act gives no power over it to the provincial legislatures. In the recital of the act, we do not find a word said about the provinces to be created out of the Dominion and there is not a word about provincial constitutions till sec. 58. Section 5 merely relates to the territorial division of *Canada*. Section 9 continues the executive government of *Canada* in the Queen. I cannot find anywhere in the act provision for the appointment of a Governor General. This power exists in the Queen by common law. The first 57 sections and a few others respecting legislative authority would have been a sufficient constitution for *Canada* and would have entitled the Governor General, as representing the Queen, to do every thing which before the union the other governors could have done.

We now come to the provisions respecting the provincial constitutions. They are specific; the others are general. The effect, therefore, was to create each province a body politic—a *quasi corporation*, as distinct from her Majesty—so that whatever rights she held individually if now vested in the provinces must have been taken away from her Majesty and given to the provinces.

What rights possessed by the Queen have been taken away from her and handed over to the provinces? The Queen can come to *Canada* and rule in person, under the advice of her Canadian Privy Councillors. She can appoint a governor-general, but she cannot rule in the provinces with the advice of the provincial executive council. The lieutenant-governor must do that, and therefore she does not form part of the provincial legislature, as she does of the Dominion Parliament. The Queen, not being allowed to act either in the government or in the legislature of the province, the pro-

vinces must be regarded as having a separate existence from and any rights possessed by them which the Queen previously possessed must have been taken out of the Queen and vested in them by the *B. N. A* Act. If the right of escheat, therefore, be a prerogative right where is it taken out of the Queen and vested in the province? Not by sec. 92, not by secs. 109 or 117, as this prerogative right is not lands or property.

The estate which, is granted, is the freehold and not the allodial estate, which must remain in her Majesty, represented by the Governor-General. There is nothing in sec. 92 of the *B. N. A.* Act taking away this prerogative right. Section 109 did not change the tenure of the lands, for it expressly says: "subject to any interest other than that of the province in the same." This allodial estate certainly did not belong to the province at the union, for the land had been granted and, under the imperial statute, it was in the Queen.

The only other section is sec. 129, which gives the right to alter and change existing laws, but laws existing in virtue of the Imperial statute, 1791, could not be altered by the legislatures in so far as the allodial estate of her Majesty is concerned. What was surrendered was the revenues, when they might arise, but not the prerogative right, which remains in her Majesty.

If this view is correct, then lands in the province of *Ontario* which escheat to the crown in right of the royal prerogative, whether as last heir or by reason of the socage tenure, are within the meaning of section 102 of the *B. N. A.* Act and belong to the Dominion, and the Attorney General of the Dominion, and not the Attorney General of the province, is the proper officer to represent her Majesty and to take proceedings in her name for the collection of these revenues.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

The following statutes and authorities were also cited by counsel in the course of his argument.

Imperial Statutes: 1 *Will. IV.*, c. 25; 1 and 2 *Vic.*, c. 2, sec. 12; 31 *Geo. III*, c. 31; 3 and 4 *Vic.*, c. 35 (union act), sec. 42, 53, 54, 57, 59; 10 and 11 *Vic.*, c. 71; 30 and 31 *Vic.*, c. 3 (*B. N. A.* Act); 15 and 16 *Vic.*, c. 39.

Dominion Statutes: 31 *Vic.*, c. 5, sec. 12, 50; 31 *Vic.*, c. 39, sec. 3.

New Brunswick Civil List Act: Revised statutes, *N. B.*, vol. 1, c. 5, sec. 7. But see copy unrevised appendix journal *U. C.* assembly, 1857-8, p. 391.

Cases as to grants affecting Royal Prerogative: The case of *Mines, Plowden*, 3306; the *King & Capper* (1); *Cruise*, vol. 5, p. 422-423; 17 *Viner's* abg't tit. prerogative, p. 126, 130; *Touchstone*, p. 76, 77, 245; *Lenoir* v. *Ritchie* (2).

Mr. *Macdougall*, Q. C., for appellant:

I appear as counsel for the appellant *Mercer*, the private party in this case. The judgment of the *Ontario* Court of Appeal, from which we have appealed to this court, after expressing doubts as to some of the technical questions relating to procedure which were raised in that appeal, maintained the jurisdiction of the provincial authorities in all cases where lands escheat in this country for want of heirs.

I will first ask your lordships to consider the position of the crown in respect to "waste lands" in *Canada*—and indeed in all the *North American* provinces—prior to the Union Act of 1840. But, before I enter upon that enquiry, I desire to explain my client's position as between the two governments. His interest in this contest, is not, in my view, entirely a question of jurisdiction. It is a direct pecuniary interest, for if the

(1) 4 Price, 217. (2) 3 Can. S. C. R. 57.

local government administers this property he will get very little; if the Dominion government is entitled to represent her Majesty in the matter of escheats, he and his children will fare much better, because it has been the uniform practice in *England*, for a long period, for the crown to quit claim, or transfer escheated property, to the natural relatives of the deceased owner, where such relatives exist (1). This has also been the practice in *Canada* and the other provinces; therefore, I say my client's interest is not only a moral, but a legal interest, for in such matters custom makes the law. Even the *Ontario* Government admits that he is the natural son of the deceased *Mercer*, and if we succeed in proving that the jurisdiction is in the Dominion, I shall expect to receive from her Majesty's representative in this country the same liberal treatment for my client that he would have received before Confederation.

Prior to 1837, the control of the waste lands of the crown, or, as they were called, "the casual and territorial revenues," was a subject of discussion and dispute between the crown officials and the local assemblies in all the provinces. These revenues were not administered or appropriated by the local legislatures, but by the governor and his appointees. As settlement went on these revenues increased, and it was found that the executive government could be maintained at the expense of the crown without assistance from the legislatures, and that the people through their representatives could not obtain those reforms which they desired, nor exercise that influence which is now deemed essential to good government over officials who were practically independent of them.

(1) "Escheat is seldom called into action in modern times, as the crown usually waives its prerogative by making a grant to restore the estate to the family," etc.—WHARTON, 350.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

This was one of the subjects of dispute which culminated in the outbreak of 1837. The result was favorable to the popular demand, for Lord *Sydenham* was authorized to consent on behalf of her Majesty to a transfer or surrender of the casual and territorial revenues of the crown for a time, and on certain specific terms and conditions. In his speech to the *Upper Canada* Legislature, which will be found in the journals of the legislative council for 1839, he said: "I am commanded again to submit to you the surrender of the casual and territorial revenues of the crown in exchange for a civil list, and I shall take an early opportunity of explaining the grounds on which her Majesty's government felt precluded from assenting to the settlement which you lately proposed."

It appears that the *Upper Canada* assembly had proposed a transfer, without conditions which would have secured the salaries of the governor, the judges, and other high officials against the hostile action of a possibly disloyal or domineering majority in the popular branch of the legislature. I find that in the session of 1837-38 the assembly addressed the governor for a copy of an act which had been agreed to between the home authorities and the legislature of *New Brunswick*, regulating the collection and disbursement of the casual and territorial revenues in that province. Your lordships will find this act, or a copy of it, in the appendix to the Assembly journals of *Upper Canada* for 1837-38, p. 391. It is to be found also in the revised statutes of *New Brunswick*, but much abbreviated, though in substance the same. I call your lordships' attention to the preamble, and especially to the 6th section of this act. It is a rule in the construction of statutes that they are to be interpreted by reference to former acts *in pari materiâ*, "for it is presumed," says *Maxwell* (1), "that the

(1) P. 31.

legislature uses the same language in the same sense when dealing at different times with the same subject."

[The learned counsel then read several passages to show: 1. That the waste lands of the crown in *New Brunswick*, and the hereditary revenues, including escheats, were not previously subject to the control of the provincial legislature. 2. That the transfer was conditional and for a limited time. 3. That the prerogative right of the sovereign to deal with escheats, to compromise, grant to relatives, or otherwise dispose of them, was expressly reserved. 4. That by the use of the words "lands, mines, minerals and *royalties*," as distinct from hereditary revenues such as escheats, it is seen that the construction put upon the word "royalties" by the *Quebec* Court of Queen's Bench, in the case of *Fraser* v. *Atty. Gen.* (1), is a mistake, for this *New Brunswick* act was, no doubt, prepared by the law officers of the crown in *England*.

A bill, founded on the *New Brunswick* precedent, was passed, but containing, as I believe it did, stipulations that would have infringed on the prerogative rights of the crown, it was not assented to. I have not been able to find a copy of the bill, but I think I have suggested the true explanation of the language used by Lord *Sydenham*. As regards *Upper Canada*, therefore, it is evident that prior to the Union Act of 1840, both the casual and the territorial revenues of the crown in that province were under the absolute control of the direct representative of her Majesty in *Canada*, and that her title to the waste lands *jure coronæ* and to the hereditary revenues from whatever source had not been, and constitutionally could not be, affected by any act of the provincial legislature without her Majesty's consent, under the authority of an act of the Imperial parliament. We start then with the Union Act of 1840, to

(1) 2 Q. L. R. 236.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

ascertain the nature and extent of local legislative authority over crown lands and crown revenues in *Canada*, before Confederation. The first point to be observed is the extreme care taken by the Imperial parliament to secure a permanent civil list, especially in respect to the salaries of the governor and judges, as fixed by schedule A of the act. The governor (sec. 53) might abolish any of the political offices, and vary the sums payable for their services, mentioned in schedule B, but the permanent offices could only be touched by an act of the legislature, which of course required the assent of the crown. But as regards the waste lands of the crown, we find this significant restraint on the power of legislation in the 42nd section :—

"Whenever any bill or bills shall be passed containing any provisions which shall in any manner relate to or affect her Majesty's prerogative touching the granting of waste lands of the crown within the said Province, every such bill or bills shall, previously to any declaration or signification of her Majesty's assent thereto, be laid before both houses of parliament," for thirty days, and, if either house should think proper to address her Majesty asking her to withhold her assent, it would not thereafter be lawful for her to give it. Other formalities were required to prevent any covert legislation which, if neglected, rendered such legislation *ipso facto* void. It will be seen that under these restrictions, in connection with those of the 57th section, preventing the legislature from passing any vote to appropriate any part of the surplus of the consolidated revenue fund, without "a message" from the governor, and in the 59th section, which requires the governor to exercise *all* his powers and authorities in conformity with instructions from her Majesty, any law *divesting* the crown of any of its prerogative rights, and *vesting* them in the provincial legislature, must emanate from, or be express-

ly confirmed by, the Imperial parliament. Now, it will be for my learned friends to produce such a law prior to July 1867, if they can. I have failed to discover it. By the Imperial Act of 1791 the tenure of free and common socage was declared to be the tenure of lands in *Upper Canada*, when granted by the crown, but the fee, estate, or title of the sovereign in the ungranted lands, has never been divested or transferred to any other power, Imperial or local. I contend that the power of the Canadian Parliament before 1867, and the power of the local legislatures since, in respect to the public lands was and is simply a power of administration. I admit that an act of the old Canadian Parliament, sanctioned and approved by her Majesty, as required by the Union Act of 1840, might have transferred to the Canadian Government the absolute proprietorship, the prerogative right, of her Majesty in the public lands, as well as the power to manage and sell, and collect and account for, the proceeds, but no such act is to be found, and therefore the prerogative right remains as before. Such then is the general conclusion at which we arrive as to the legal and constitutional position and power of the Canadian Government prior to 1867, in respect to the prerogative rights of her Majesty in the casual and territorial revenues and waste lands of the crown. In addition to the sections I have cited from the Union Act of 1840, I refer your lordships to *Forsyth's* cases and opinions (1), for the opinion of the law officers of the crown, that escheats, in the colonies, cannot be granted before they accrue; and the English Civil List Act 1 and 2 *Vic*, c. 2, and the Imperial Act, 15 and 16 *Vic.*, c. 39, were passed to remove doubts as to whether hereditary revenues in the colonies had not been surrendered to the *Imperial* Consolidated Fund. From all these acts and authorities I

(1) Pp. 156 and 157.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

contend it is clear that the jurisdiction of the Canadian Government, even when these lands and revenues were under the control of a governor who was a direct representative of the crown, was limited, conditional, fiduciary, and temporary; and that the power reserved by the 6th section of the *New Brunswick* Civil List Act, and by the 12th section of the Imperial Civil List Act (which are almost identical in terms) was reserved in the case of *Canada*, and that her Majesty has never parted with her right to dispose of escheats by and through her representative, the Governor General. The 1st and 2nd *Vic.*, c. 2, in terms extends to the colonies and foreign possessions of the crown, and the 15th and 16th *Vic.*, c. 39, to remove doubts, confirms my contention, because it leaves the 1st and 2nd *Vic.* to its operation in the colonies, except as "to moneys arising from the sale of crown lands which might have been lawfully disposed of" if the Civil List Acts of *William IV.*, c. 25 and 1st and 2nd *Vic.* c. 2, had not been passed, and expressly provides that the surplus not applied to public purposes in the colonies "shall be carried to, and form part of, the said consolidated fund" (1). The doubt-removing act is limited to the revenue from the sale of crown lands; it leaves the hereditary revenues from other sources, and the prerogative powers of the crown, in the same position as before, in all the colonies. When in 1847 the Canadian Parliament desired to make some changes in the restrictive provisions of the Union Act, and passed an act for the purpose, what happened? It was reserved, and as it was expedient to pass it—the object not being contrary to the spirit of the compact between the Imperial and Colonial Governments—the law officers of the crown found that it would be necessary to repeal certain clauses of the Union Act before the Canadian Act could

(1) Sec. 2.

become law. This was done, and the Canadian Act was appended as a schedule, and became, therefore, an Imperial enactment, unalterable by colonial legislation.

In the case of *William IV*, and in the case of her Majesty (and those acts are still in force in Great Britain, and as far as they apply are in force in the colonies of Great Britain) we find that parliament expressly reserved to the sovereign, or in other words to the crown, the right as against parliament and the government of the day, in respect of these revenues, to grant escheats of this description to relatives of the deceased—to those who were not, under strict construction of law, entitled to enforce their rights as legitimate heirs. That right to evince the benevolent disposition of the crown towards the natural relatives of a deceased person who may have left his property subject to escheat, is reserved in express terms, and, in order to prevent any possibility of misconstruction, it is reiterated *ex majori cautelâ* that the reservation is made to the intent and for the purpose of enabling the crown independently of those acts, and of the disposition that was apparently made of all the hereditary revenues, to deal with this particular class of revenues as it should please the Royal will. The same discretion and power must be held to remain in her Majesty in respect to these revenues in the colonies, for that act, 1st and 2nd *Vic.*, c. 2, relates to the colonies and foreign possessions of the crown, as well as to *Great Britain* and *Ireland.*

I now come to the *British North America* Act of 1867 The relative rights and powers of the Federal and Provincial Governments and Legislatures, and the qualified, conditional and temporary assignment or loan of the hereditary *revenues*—not prerogative rights, or even "lands"—but "revenues," the "net produce" of which was to be "paid over" after all proper deductions (3 and 4 *Vic.* c. 35, sec. 54) to the consolidated

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

fund of old *Canada*, have to be ascertained and considered in construing the Union Act of 1867. We must determine the effect and meaning of the provisions of the act of July, 1867, by ascertaining the legal and constitutional position of the subject-matter immediately before the passing of that act.

It is to be observed, in the first place, that the new legislative authority for the dominion is declared to be a "Parliament"—it was only a "Legislative Council and Assembly" before—and the "Queen" is *eo nomine* declared to be a part of that Parliament. It "consists" of the Queen, the Senate and the House of Commons. But she is not a part of any other corporation or legislative body under that act. The great powers of government are given to the Parliament of *Canada*, and only limited, enumerated, and definite powers of legislation, on local and municipal subjects, are given to the local assemblies.

The Lieutenant Governor is not the representative of the prerogatives of the crown in this country, except in a very limited sense. The Lieutenant Governor is appointed by the Governor General as other officers are appointed by him. He is a high official; he has important functions unquestionably, but among them is not included the power of representing the prerogative rights of her Majesty in respect to her hereditary revenues. As *Lord Carnarvon* stated in his despatch of January 7th, 1875, written under the advice of the law officers of the crown in England, he is a "part of the colonial administrative staff." He is, therefore, subject to the direction of the Governor General, who is advised, in respect of questions of dominion import, by the responsible ministers of the crown in this country. He is appointed by the Governor General, not by the Queen; he is commissioned by the Governor General, not by the Queen; he is instructed by the Governor

General, not by the Queen; he is subject to dismissal, under certain circumstances, by the Governor General; he is not subject to dismissal by the Queen. And, if I am permitted to refer for the purpose of my argument and in illustration of my case to a recent political event, he is subject to dismissal in consequence of a vote of censure by the Parliament of *Canada*, even against the opinion, so far as it could be ascertained, of the Governor General himself. The correspondence in that case and the action that followed clearly prove that my construction of the act in regard to the office of the Lieutenant Governor, is the true one. We have not had a judicial decision upon the point, but, so far as executive action and official opinion are concerned, that case proves that the Lieutenant Governor is regarded as a local officer appointed by the Governor General, and in no manner subject to direction, approval, or disapproval by the Imperial authorities. He is to all intents and purposes a local colonial officer and nothing more. If that be so, it is absurd to suppose that he can, by virtue of his office, in any manner undertake to represent or exercise Imperial functions, or dispose of the revenues resulting from the exercise of the prerogative rights of the crown. If you could find in this act language which showed a clear intention on the part of the Imperial Parliament for convenience, or for any reason of state, to clothe this officer, appointed by the Governor General, with authority to deal with this particular property or revenue, I would in that case admit, as the power of the Imperial Parliament is supreme, that he was properly exercising the functions of his office in collecting and disposing of the revenues resulting from the enforcement of the hereditary right of the crown in the case of escheats. From the evidence of intention which we find in the act itself, from the judicial commentaries and expositions it has received, from

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the action of the Imperial Government through the Secretary of State, from the action of the Governor General in this country, from the action of our own Parliament—from all these, I contend, it is established that the Lieutenant Governor is a local and not an Imperial officer, and can in no way intervene in proceedings for the recovery of escheats.

By sec. 102, "all duties and *revenues*," over which the previous provincial legislatures had power of appropriation (except what is otherwise disposed of by the act) are to constitute a consolidated fund for the public service of *Canada*.

But for the exception in this clause there would be no doubt, I apprehend, as to the present position of the hereditary revenues of the crown in *Canada*. It would be clear—beyond question—that these "revenues" as well as the "duties" arising under existing laws from various sources, were transferred to, and intended to form part of the consolidated fund of the dominion, for the purposes of the dominion, and that conclusion would be all the more evident from a consideration of the special object for which this transferrence was made. It was made in order that the new government should have the means from the same sources as before, and in pursuance of an existing contract, of providing for certain services, for certain salaries, and for certain public establishments. That duty is transferred to the dominion. The Imperial act having cast upon the dominion the *burden* of these services, it would be only reasonable and natural to suppose that the framers of this act would provide the dominion with the *means*, from the same sources as had previously furnished them with funds to meet those charges. But the excepting clause, according to some authorities, raises the question involved in this case: "Except such portions thereof as are by this Act *reserved* to the respective

legislatures of the provinces." I call your lordships' attention to the peculiar language of that clause. The act does not say that any revenues are reserved for appropriation by, or subject to, the control of the provinces or their local governments, but a portion is reserved to the "legislatures" of the provinces. The legislatures are the only power, newly constituted, to which this reservation is made; therefore, it is a legislative power. Their power of disposition or control is derived exclusively from their functions as a legislature. They must pass a law; they must dispose of whatever is under their control by an act of legislation. It is to them in their corporate, legislative capacity, that this power of control is given by the Imperial Act. When we look at the section of the act which assigns to them their legislative powers, we do not find, I contend, any sufficient words to convey to them the power to intermeddle with, or dispose of the hereditary revenues of the crown.

Now, I cannot understand the reasoning of the learned judges who say that by the word "land," in the 109th section, the absolute estate and prerogative right of the crown—always theretofore reserved—in the waste lands of the crown have been granted to and vested in the provincial legislatures. It is clear, from the qualifying expression "belonging" to the provinces "at the Union," that nothing more was intended to be given to the new, than had already been given to the old, provinces. Therefore, we come back to the proposition I have endeavored to establish, viz, that under the Union Act of 1840 the Queen's prerogative right remained intact, and that neither the 109th nor any other section of the act of 1867 has infringed upon or divested it. If we look at the 92nd section, which enumerates and limits the legislative powers of the province, we find these significant words: "The

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

management and *sale* of the public lands *belonging to the province*, and of the *timber* and *wood* thereon." If it had been intended to extinguish the estate or title of the crown, and to vest in the legislature the absolute dominion over, and fee simple in, the public lands, why specify "the timber and wood thereon?" In this grant of legislative power every word suggests agency, trusteeship, and limitation; not absolute ownership or undivided authority.

As this is a question of interpretation and intention, and as we sometimes derive great advantage from the light which is thrown upon doubtful words and phrases in acts of parliament—though I see nothing obscure or doubtful here—by ascertaining the views, opinions, and intentions of the framers of those acts, and as the estate or title which "belonged" to the Province of *Canada* "at the Union" of 1867 is the estate or title which belongs to *Ontario* now with certain qualifications; I direct your lordships' attention on this point to the explanations of Lord *John Russell*, who introduced and carried through parliament the Union Act of 1840. You will find the report in the *Mirror of Parliament* for 1840 (1). Lord *Stanley*, who had previously held the office of Colonial Secretary, though at the time in opposition, approved generally of Lord *John Russell's* Union Bill.

We find there a commentary upon the land and revenue clauses of the act of 1840, by those who framed them, and explained their meaning to parliament. It supports my contention that, as Lord *Stanley* puts it, "it is not the crown lands themselves, but the revenue arising from them" that was transferred to the Canadian Legislature. It results from this view of the reservation of the prerogative right of the crown in the waste lands of the crown, under the Act of 1840, that

(1) Vol. 4, pp. 3722 and 3725.

the same right subsists, and was not intended to be granted to the local legislatures by the act of 1867. The judgment of the Court of Queen's Bench for the province of *Quebec*, in the *Fraser* escheat case (1), to which I have before referred, and on which the respondents also rely as a decision in their favor, is based on the assumption that the word "royalties" in the 109th section of the *British North America* Act transfers to the provinces the hereditary revenues accruing from escheats. I admit that these revenues did belong to the old province of *Canada*, subject to the right of her Majesty to quit claim to or release them in favour of relatives, as I have already pointed out. But the "net produce" of these revenues was all that was granted by the act of 1840, and the 102nd section of the act of 1867, gives these revenues to the consolidated fund of the dominion, in express terms. The word "royalties" has no reference to these casual revenues, but to the rents or dues reserved for mining rights in the Maritime Provinces. "It is usual for the crown to reserve a *royalty* on minerals raised from waste lands in the colonies" (2). Not only is this clear from the associate words, but the next sentence shows that such a construction was never contemplated by the framers of the act, "and all sums then due or payable *for* such lands, mines, minerals or royalties shall belong to" the provinces. What "sums" could possibly be then due or payable "for" the prerogative right to inherit, as *ultimus hæres*, the property of persons dying intestate and without heirs? Are the *jura regalia* of the crown things, commodities, that can be sold in the market place, and for which "sums" of money may be "due or payable" by private persons? Surely not; yet, my lords, the respondents quote the case of *Dyke* vs. *Walford* (3) to support that proposition,

(1) 2 Q. L. R. 236. (2) Forsyth, p. 178.
(3) 5 Moore P. C. 434.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

for they say royalties here means the same thing as *jura regalia* there.

The *Ontario* Court of Appeal, though arriving at the same conclusion as to the jurisdiction, would not base their judgment on the word "royalties," as the *Quebec* Court had done, but discovered an intention to transfer —I will not say, to *sell*—the prerogative to the local legislature, in the words "all lands." But they overlook, or do not attempt to construe, the proviso at the end of section 109. The grant of "all lands," etc., is subject expressly to "any trusts existing in respect thereof, and to any *interest*"—that of the sovereign, by virtue of her prerogative, as well as any—"other than that of the province in the same." This proviso qualifies the whole section. Private as well as public rights had to be considered in handing over the administration of the public lands to local legislatures. Sales had been made and rights acquired, which it became necessary to protect against unjust treatment by an arbitrary majority in legislatures which did not then exist. That proviso was intended to give a legal remedy against these new powers if they attempted to take away, or affect injuriously, the existing rights of any of her Majesty's subjects in the old provinces. I trust this court will not ignore the proviso.

The next point urged by the respondent, and recognized by the *Ontario* Court as a correct inference in law, from the word "lands," is, 1st, that the estate, or interest of the crown in escheats in *Canada*, is a "reversion," and, 2nd, that a grant of lands without more, in an act of parliament, conveys this reversion. I have tried in vain to find any authority for this doctrine as applied to lands in a colony. The respondent, in his reasons against appeal, mentions no cases. Remembering the commendation of my legal preceptor in favor of an old book, which he said was the great storehouse of cases

on the law of real property in England, especially concerning tenures, I resorted to *Touchstone*, and this is what I find there :—

"Grant of an estate in being by the king must recite the previous estate or else the grant of the new estate will be void (1)."

"Misrecital of previous estate in a deed may pass the reversion in the case of a private person, but will be void in case of grant by the king (2)."

"By grant of land in possession reversion may pass, but by grant of reversion land in possession will not pass." But this applies to private persons (3).

In *Cruise's* digest (4) I find it laid down that "where a reversion is vested in the crown it could not be barred by common recovery, which barred reversions and estates tail," and again, "the crown could not be deprived of any part of its property by ordinary conveyances which would divest subjects. An act of parliament expressly declaring that the reversion shall be divested out of the crown is necessary." It is clear from all the authorities that nothing will be inferred or implied against the rights of the crown. The reigning sovereign cannot even abandon a prerogative unless authorized by statute to do so (5). In the case of *Mines* (6) it was laid down, and has been followed as good law ever since, that if the king granted "lands and mines therein contained" it passes only certain mines, and not mines of gold and silver. The grantee will not take anything not expressly mentioned (7). And as it is an equally well established rule that no act of parliament can affect or take away the crown's prerogatives, unless by clear and express words, I do not

(1) Shep. Touchstone, p. 76.
(2) *Ib.* 77 and 245.
(3) *Ib.* 91 and *supra.*
(4) Vol. 5, p. 422, 423.
(5) *Queen* vs. *Alloo Paroo*, 5 Moore P. C. 303.
(6) Plowden 330 b.
(7) See the *King* vs. *Capper*, 5 Price 217.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

see any justification in law or logic for the claim of the respondent in this case that the words "all lands" in the 109th section of the *B. N A.* Act, even if they were not explained and limited by the succeeding words, include and were intended to grant away forever the prerogative right of the crown, whether you call it a royalty, a reversion, or a caducary succession.

The construction that is suggested respecting the Union Act of 1867, would utterly destroy the object and purpose of that reservation of authority in her Majesty with respect to escheats in *Canada.* It would place that kind of property which is expressly reserved by the crown in *England*, under the control absolutely of whom? Of the local assembly, the provincial representatives of the people. And how are they likely to exercise that control? What does this very example show of the disposition of such a body? In this case about $150,000 worth of private property belonging to the deceased, Mr. *Mercer*, accumulated by himself, not resulting from free grants or anything of that kind--which might, perhaps, have justified a feeling in the public mind that his property ought to revert to the public for public purposes—but the private earnings and accumulations of this person, are taken from the possession of his own son by the local government, by the vote of a bare majority of the local legislature, and appropriated to public uses. The local officials, with a voracity that is revolting, seize it for the purpose of gaining credit to themselves with their partizans, and, ignoring the moral, and, as I contend, the rightful claims of the admitted son and four grand-children of this deceased person, appropriate their patrimony to the use of abandoned women, to the erection of an asylum, a reformatory for prostitutes—and, adding insult to injury, with cruel sarcasm, they give this reformatory the name of ANDREW MERCER! Now, my lords, I say

that, looking through these Imperial statutes and the reports of transactions of this kind in *Great Britain*, we find that her Majesty has never acted in that spirit or in that manner in dealing with escheated property. I remember a case, and no doubt some of your lordships have met with it, which happened two or three years ago in *England*, where a person was killed by a railway accident. He happened to be without heirs. His estate consisted of personal property. I think he lived in the city of *Bristol*, and the property was taken possession of as an escheat of the crown. The money was, by order of her Majesty, appropriated for some public purpose in the town in which the man had lived. It was appropriated for the benefit of his neighbors and friends. Under the provisions of the Civil List Act, and under the influence of those moral considerations which have induced the crown to act leniently and unselfishly in matters of this kind, the money was given in that case, not to relatives, because the man had none, but it was devoted to public purposes in the town in which he had accumulated his property. It was not permitted to reach the public treasury. I refer to that case as showing the spirit which prevails, and the policy which directs in the disposition of such properties in *England*, and that the representatives of her Majesty in this country will, presumably, exercise this mild and generous prerogative power in dealing with properties of this kind which legally come to the crown in *Canada*. The argument of convenience and inconvenience is, I perceive, made use of by the respondents in this case, as if some weight ought to be given to it in a court of law. I think, therefore, I am justified in directing your attention to the public policy which is involved in this question, in view of the uniform practice of the Imperial authorities. At all events, it will operate to this extent—that it will cause your lordships to look into

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

the matter with great care to discover the meaning and purpose intended, and the conditions imposed, in the transfer of these revenues to old *Canada* in 1840, and will sustain my contention that they were transferred to the jurisdiction and control of the Dominion Parliament by the act of 1867, under the same conditions. Now, I will call your lordships' attention, at this stage, to a case decided in this court, which involved the question of authority to exercise the prerogative right of the crown under our present constitution: I refer to the case of *Lenoir* vs. *Ritchie* (1), and, although it bears upon another branch of the prerogative, yet the doctrines propounded, and cases cited by some of the learned judges who delivered judgments in that case are, I think, doctrines and authorities which are applicable to the question which is now under your consideration.

See also *Chitty* on prerogatives (2). In looking over the cases bearing upon this question, I have met with a judgment pronounced by the Judicial Committee of the Privy Council in the case of *Theberge* vs. *Landry* (3), in which that doctrine is reaffirmed, although the court in that case distinguished as to the subject-matter, and refused to advise the exercise of her Majesty's prerogative right to hear appeals. As it is the latest decision on the point, by the highest court in the empire, I ask your lordships to make a note of it.

This is a judgment upon the *British North America* Act, and supports my contention that when I have shown that the prerogative as to escheats existed in this country prior to 1867, precise words must be found in the Union Act of 1840 and in the Confederation Act of 1867 to take away that prerogative. Now, my lords, there are no such words in either of these acts. There is another point with reference to the Act of 1867: The 91st section of the *B. N. A.* Act declares that:—

(1) 3 Can. S. C. R. 575. (2) P. 383.
(3) 2 App. Cases 106.

"It shall be lawful for the Queen, by and with the advice of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada* in relation to *all* matters,"—no more comprehensive language could be used than this,but there is one exception—"to all matters not coming within the classes of subjects *by this act* assigned exclusively to the legislatures of the provinces."

Now, my lords, it is the plain meaning of the language used by the Imperial Parliament in this section, that the Dominion Parliament should have, full, complete, and, so far as a subordinate legislature can have, absolute authority to deal with every matter of legislation in *Canada*, except those special matters that are assigned to these local bodies. The whole field of legislation, the whole scope of legislative power, is placed in the hands of the Dominion Parliament, and may be exercised over the lives, liberties and property of the people of this dominion, except in those special cases in which this subordinate sectional legislative power is conceded to the local legislatures. And to impress still more strongly and clearly on those who are to read this act, and the courts which are to interpret it, that they are not to question this general exclusive authority of the Dominion Parliament to legislate upon every matter concerning the people under its jurisdiction, except in those special cases in which certain questions are expressly assigned to provincial authorities, it is provided:—

"And for greater certainty, but *not* so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in this act, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated."

And certain subjects are then enumerated for the pur-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

pose of explanation and suggestion to people about to be placed under a new constitutional system. It might have been inferred from the enumeration of excepted matters, if this first enumeration had been omitted from the act, that the powers of the general parliament would after all be largely limited; but with this enumeration they would see at a glance the great multiplicity of matters upon which the Dominion Parliament have unquestionably a right to legislate. And for fear that the specification of particular powers might, according to a well known rule, operate as a restriction of the Dominion Parliament, the following is added:—

"And any matter coming within any of the classes of subjects"—not the particular subjects, but the "classes" of subjects—"enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces." Although in the enumeration of local powers it might seem that some of those assigned to parliament were included, you are not to include them. The very first subject over which the Dominion Parliament is given exclusive authority is "the public debt, and," as I interpolate, *the public* "property." "The public debt and property" must be read as if the word "public" had been inserted before "property," because no other property can be intended. That is the power with which the Dominion Parliament is endowed. It includes the "public property" of every kind which is not expressly assigned to the provinces. The 102nd section, as I have pointed out, covers everything so far as duties and "revenues" are concerned. The power to manage and sell the waste lands which were under provincial jurisdiction at the union, and collect the moneys or "sums" in respect of previous sales which were then uncollected, were under

the 109th section, given to the provinces. So there is no difficulty about that. Now, that power of legislation conferred upon the Dominion Parliament by the 1st sub-section, taken in connection with the general authorization in the 91st section, and taken in connection with the 102nd section relating to "all duties and revenues" seems to me, my lords, to give to the Dominion Parliament, beyond any question whatever, the right to deal with the subject-matter involved in this case, unless it is found to have been conveyed or transferred to the local legislatures by some other section. With reference to that contention, I shall have to examine with some detail the judgments, in the first place, of the Queen's Bench of *Lower Canada*, where this point was first decided. In the *Fraser* case to which I refer, it appears that in the first instance the question came before the learned judge who now so worthily fills his place upon this Supreme Court Bench Hon Justice *Taschereau*. The judgment given by him in that case affirmed the jurisdiction of the Dominion Parliament and the Dominion Government in matters of escheat. That was appealed against, and the case came before the Court of Appeal of *Lower Canada*. As I pointed out, the learned chief justice of that court admitted that he found nowhere in the *B. N. A.* Act of 1867, any direct and express transfer of lands or revenues escheating to the crown in *Canada* to the local legislatures.

[The learned counsel then reviewed the arguments and positions taken by Chief Justice *Dorion* in the *Fraser* case, and of the judges of the Court of Appeal of *Ontario* in the present case.]

Jurisdiction over every possible subject of legislation is, in general words, assigned to the Dominion Parliament, and the exception, so far as it extends, is something taken or carved out of that power, and is all that

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

is given to the local legislatures. The entire legislative authority, as it existed in the various provinces before confederation, was dealt with by the Imperial Parliament. No one can doubt the power of the Imperial Parliament to have deprived Canada (so far as an Act of Parliament could do it) of representative government altogether. It might have converted, or reconverted, our provinces into crown colonies, with some new experimental system of colonial government. Probably it would not have been well received. They might have found Boers in *Canada*, as well as in *South Africa*; but, as a matter of law—as a matter of argument before a court of law—I contend that the whole subject was completely within the control of the Imperial Parliament. They could assign such powers of legislation for the future as they thought fit without respect to the "rights" of the past. There were no rights in the question which a court of law can recognize. The people of the four provinces, united together in the new form, were endowed with even greater rights and larger powers than before, but the legislative control and direction of affairs were placed under two distinct legislative bodies. The greater power was that of the Dominion. The full and complete exercise of that power was vested in the Parliament of the Dominion, but certain geographical distinctions were retained, and the provinces were allowed, under the machinery provided in the act, to legislate upon certain specified local subjects as a matter of convenience. Now, I cannot understand what the learned judge (*Burton*) means when he speaks of political rights which remained in, or belonged to the Province of *Ontario*. What rights could *Ontario* have had? There was no such political entity or corporation; there was no such province in a legal sense. It was a geographical expression. It is true you will find that our statutes from 1840 down, were applicable,

some to *Lower*, and some to *Upper Canada*. The old distinction was kept up to limit the operation of certain statutes in consequence of local laws that had previously existed in the provinces. So far as the people of *Lower Canada* are concerned, I admit that from the peculiar circumstances under which the French inhabitants of *Quebec* were dealt with after what the English call the "conquest," and they call the "cession," certain privileges and rights were reserved or secured to them by a so-called treaty. But those rights were not secured to *Quebec* according to her present limitary lines. They were conceded to the French population who were scattered at that time over the whole northern part of this continent. The cession was not restricted to the Province of *Quebec* as bounded at present. These boundaries were established under English jurisdiction; the French never bounded their province on the north; therefore, when rights were reserved to the French inhabitants of this colony, they extended to the *people*, and not to any geographical or territorial circumscription or boundary. So, the pretence that there ever was any grant or reservation of particular rights to British immigrants who came to *Canada* since the cession, and are now living within territory formerly part of the Province of *Quebec*, is altogether unwarranted in the history or reason of the case.

Is escheat a reversion? The doctrine that it is a reversion in the ordinary sense, seems to be relied on both by Mr. Justice *Burton* and Mr. Justice *Patterson*, and it is also stated in the reasons against appeal, by the learned gentlemen who prepared the case, that they rely upon that doctrine of reversion. I am not going to occupy the attention of your lordships with a discussion upon tenures, because it seems to me the feudal relation is not involved in

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

the argument here. I did go into that question at some length before the Court of Appeal. I had carefully examined the authorities, because it was a matter of some historical as well as legal interest. The origin of feudal tenure, the mode in which property was transferred under that tenure, the relation of lord and tenant, the rights of tenants, and the successive changes made by parliament as to these rights; first, their right to sell; secondly, their right to devise by will, destroying thereby the right to escheat in the lord to a great extent; and, lastly, the right of the crown in the absence of a mesne lord: all these questions were and are very interesting as a historical study, but it seems to me they have very little weight in this discussion, because in *Canada* we have a tenure, the character, incidents and bearings of which are well understood even by laymen, from the frequent discussions and expositions in the courts—I mean free and common socage. This was established in *Upper Canada* in 1791 —and we have to deal with this question in the light of doctrines applicable to the tenure of free and common socage. I contend, as a matter of plain, elementary law, that it is neither in accordance with modern decisions nor the reason of the thing, to say that when the crown grants waste lands in a colony to private persons, or authorizes a colonial legislature to grant them, the rights of the crown as *ultimus hæres*, or, if you please, the reversionary right of the crown arising from escheats, is granted at the same time. That sovereign right is not granted; that is the "seigniory" which is always reserved. Let us suppose it to have been granted once in a particular case, and that a subsequent owner happen to die intestate and without heirs, what becomes of that seigniory? The crown having granted the reversion cannot resume it. It has ceased to exist. Therefore, the reversion here is not that kind of reversion

which lies in grant. Lord *Mansfield* said, in the case of *Burgess* vs. *Wheate* (1), that it was a caducary succession, a "sort of reversion," that is to say, it reverted, it came back to the lord or king, but in contemplation of law it was not the reversion which is granted, or may be granted by the owner of a prior estate, if he uses language to show that he intends to grant the reversion. It is not a part of the inheritance, it is something which springs into existence by accident, and is no part of the original estate or fee, which is always vested in some person, and may descend successively through unending generations. Therefore, I contend that the judges of the lower courts treating it as a part of the inheritance known as a reversion, have entirely mistaken the fundamental principle on which the doctrine of reversion is based. In the colonies that now form part of the *United States*, as well as these provinces, and also in *India*, the crown has always been treated as the ultimate heir, to whom property descends or passes that is vested in no one else, and it is by virtue of that doctrine that this property fell to, and is now vested in her Majesty. It is not vested under any doctrine of reversion found in the old books with reference to feudal tenure. Perhaps it will be as well at this point to give your lordships the authority on which I rely, and which, in my judgment, is conclusive. See *Cruise's* Digest (2).

That expresses very clearly the doctrine with respect to title by escheat since the abolition of military tenures. In *New Brunswick* it was held, on the authority of the law officers of the crown, that the wild lands of that province belonged to the King, *jure coronæ*, and were disposable by the representative of the crown, and not by the provincial legislature (3). I hold that the waste

(1) 1 W. Bl. 163.

(2) Edition of 1835, vol. 3, in page 397.

(3) Forsyth, 156.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

lands in *Canada* are still crown lands in the same sense, and that only the *revenue* has been granted to the provinces, and only "the management and sale" entrusted to their legislatures. The pretence that this land, which has come to the crown by the accident of escheat, was included or contemplated in the word "lands," as used in the 109th section, cannot be sustained as a matter of law, in my humble opinion, for a single moment. That it was not conveyed or transferred under the word "royalties" I hope I have succeeded in convincing your lordships. The learned judges of the Court of Queen's Bench were misled by *Brown's* Law Dictionary. Their attention was not directed to the use of this word in the provincial statutes. Upon this point I would direct your lordships to an opinion expressed in another place by a distinguished lawyer and politician. I refer to the Premier of this Dominion, who was one of the framers of the *B. N. A.* Act. It will be found in the House of Commons debates for 1880, page 1185.

The opinion of a distinguished statesman, and one who has been conversant with legislation and political affairs in this country for a great many years; who was chairman of the convention which planned, elaborated, and finally succeeded, with the co-operation of the Imperial Government, in carrying through the Imperial Parliament the Confederation Act—that is an opinion which I venture to say is entitled to great weight even in a court of law. My learned friend who, as Minister of Justice, acquiesced in the decision of the Quebec Court, will contend, I presume, that their interpretation of the word "royalty" is according to the intention of this act, or that because the word happens to be found there, your lordships may by a large construction make it cover the royal prerogative of escheats. I submit that even if the word is capable of that meaning it cannot be held to include the hereditary revenue from escheats.

It refers to the rents or charges for mines in *Nova Scotia* and *New Brunswick*. There were none reserved in *Ontario* and *Quebec*. Those who are familiar with the preliminary stages of the bill, are aware that the word "royalties" was inserted after the first draft, at the suggestion of gentlemen from *Nova Scotia* and *New Brunswick*, lest these rents or sums payable to the crown under the name of "royalties" should be held not to be included; and thus the word was added. By the well known maxim *noscitur a sociis*, you are to interpret words of this kind by reference to those with which they are associated; and according to the doctrine also that the prerogative rights of the Crown, cannot be conveyed or granted unless by express words, you must be satisfied that it was undoubtedly the intention of the Imperial Parliament to grant them in this case. Unless that is clear, you must give a limited signification to the word "royalty." The court in *Quebec* based their judgment principally on that word. The court in *Ontario* founded their judgment upon the doctrine of reversion, being of opinion, as we must assume, that it was the intention of the Imperial Parliament to convey to the provinces by the use of the word "land" this so-called reversion. That construction, I submit, is in direct conflict with the old, and heretofore, unquestioned doctrine with respect to the prerogative rights of the crown in *England* and in the colonies. In *Theberge* vs. *Landry*, the doctrine that her Majesty's prerogative in her colonies must not be infringed, must not, in any manner be affected by any Act of Parliament, except by precise words, is reaffirmed by the highest court in the empire. I contend that even her Majesty, without the express sanction of parliament, cannot grant away the hereditary revenues of the crown from her successor. In all the acts relating to that subject since parliament was

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

established, there is evidence of extreme care when dealing with hereditary revenues of the crown, and prerogative rights of the crown, to preserve them intact for the successor; otherwise the crown would not be worth fighting for.

No subordinate power can touch the prerogative. If the Parliament of *Great Britain* should choose to turn the sovereign out and convert the country into a republic, as once happened, I suppose parliament could do it, but not without the consent of the sovereign. With that assent parliament is supreme. But, I apprehend, even my learned friends will agree that such an act must contain words which clearly evidence the intention of transferring her Majesty's prerogative to the legislatures of the provinces. My lords, there is nothing to evidence that intention here. It is only an inference at best, and that inference is contradicted by all the expressed objects of the act.

Surely it is a trifling thing to allow the Queen's representative in this country, as a matter of authority, as a proof of the existence of that authority, to dispose of any properties which may, by the death of the existing owners, be escheated. It is a light burden, and my learned friends wish to deprive us, not only of the fact, but even of the sentiment, which is inspired by the existence of the fact, and to cut the last—almost the last—link which binds *Canada* to the Mother Country. I say it would be a most fatal result if it should turn out that the Imperial Parliament meant to extinguish the sentiment of loyalty, where it has hitherto inspired to noble deeds, by removing forever from the eyes of our youth this sign, this badge of the royal authority. Certainly it is not the expressed meaning of Parliament. I am satisfied it was not the intention. My lords, if such an intention had been avowed, that act would never have passed the Parliament of *Canada*,

much less the Parliament of the Empire. My learned friends must go that far. They must admit that the surrender is for all time; that this act is perpetual; that it has no limitation; that it is a complete and final transfer to the subject, of the power of asserting the prerogative rights of the crown in *Canada*. They must say that the crown of *England* is no longer entitled to claim any rights whatever in the casual or territorial revenues which previously did accrue and belong to that crown, in *Canada*. I deny that there is a word in the act to support that construction. I leave the case there. It is an important one. Its importance is not by any means to be measured by the amount of money involved, or the private interests directly concerned. It is a question whose decision will settle the relative powers and rights of these two legislative systems in this country. It is the first case, so far as I have observed in looking through the judgments of this high court, in which the question of prerogative jurisdiction has been squarely presented. Though I am here representing private parties only, I have felt it my duty to draw your lordship's attention—perhaps to a greater extent than would be warranted in an ordinary case—to the public interests involved in this case.

Mr. *Blake*, Q. C., for respondent:

While entirely agreeing with the learned counsel on the other side that the importance of the case far outweighs the amount involved, I am unable to agree with them when they claim that upon the decision of this case rests the ultimate fate of the scheme of Confederation. I fail to perceive how the connection of this country with the empire could depend upon the question, whether the property of an inhabitant of *Ontario* or *Canada* who died without heirs was to be disposed of by the Dominion Government or by the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Provincial Government. If the connection depended upon that, it is hardly worth retaining.

I will first refer to the position of the provinces before the union. This right of escheat, which is improperly called a prerogative right, is an incident of tenure in socage—a species of reversion. This right of escheat fell to the lord; and not to the crown, unless the crown happened to be also the lord of whom the land was held.

This view is confirmed by 2 *Cruise's* Digest (1).

See also in *Attorney-General* vs. *Sands* (2).

If a lord to whom the land reverted might be himself a subject, an escheat could not be called a prerogative right.

This was the old law.

In 1791, by the Imperial Act, 31 *Geo. III.*, c. 31, the legislature of the province of *Upper Canada* was empowered to make laws for the "peace, welfare and good government" of *Upper Canada*; but there was a limitation as to the general power of making laws in any manner relating to or affecting "his Majesty's prerogative touching the granting of *waste lands*" of the province, with regard to which no laws were to be made except with the sanction of the Imperial parliament. This limitation is to be found in section 42, and it is clear that if this proviso had not been inserted, the legislative body could have made a law affecting the prerogative of the king touching the granting of the waste lands of the province. By the 43rd section, the most pertinent to this question, all lands in *Upper Canada* were to be held in free and common socage, and legislative power was given to make "alterations with respect to the nature and consequences of such tenure of free and common socage." Now, though this tenure

(1) Title escheat, p. 397.

(2) Tudor's leading cases on real property (3rd. ed.), p. 774.

involved the right of the crown as ultimate heir, it is as clear as day that the legislature could have altered that tenure, and such legislation would necessarily have interfered with the crown's right in respect of escheat. Such legislation would, no doubt, have been subject to disallowance by the crown, but in this respect only were provincial rights curtailed. The provincial legislature could not, without the sanction of the Imperial parliament, have interfered with the prerogative with regard to "waste lands," but they could deal with the subject of escheat in regard to all other lands. The act of union, 1840, 3 & 4 *Vic.*, c. 35, gave the same powers and had the same reservations, and re-enacted section 42 of *Geo III.*, c. 31.

By the act of 1854, 17 & 18 *Vic*, c. 118, "An act to empower the legislature of *Canada* to alter the constitution of the legislative council for that province, and for other purposes," section 42 of the act of 1840, 3 & 4 *Vic.*, c 35, was repealed; so that so far back as 1854 the only remaining prerogative of "granting waste lands" was abolished, and full power was given to the provincial legislature to deal with this prerogative of granting waste lands, and with it power over escheat as respects such lands.

If it is found that by the acts of 1791 and 1854 absolute legislative power was given to the local legislature to deal with this subject matter, we approach without difficulty the distribution of legislative powers under the *B. N. A.* Act. But before considering the *B. N. A.* Act it is necessary to refer to the act of 1852, 15 & 16 *Vic.*, c. 39, relied on by the other side. That act was passed "to remove doubts as to the lands and casual revenues of the crown in the colonies and foreign possessions of her Majesty," and allowed those revenues and lands to be lawfully appropriated for the benefit of the colonies in which they existed. By the first section of

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

the act it was declared, that "the provisions of the said recited acts in relation to the hereditary casual revenues of the crown shall not extend or be deemed to have extended to the *moneys arising* from the sale or *other* disposition of the lands of the crown in any of her Majesty's colonies." The phrase "hereditary casual revenues of the crown" is a general expression, used in connection with the words "sale or other disposition of the *lands* of the crown," and would include *all* lands, whether waste lands or lands falling to the crown by escheat.

Then in a distinct phrase the act speaks of *the moneys arising from the sale of the land.* Here again is a clear legislative declaration that the subject-matter of the lands should hereafter be left under the exclusive control of the local power. And surely it was never intended, in the ever widening and deepening current of liberty of the colonies, that the management of these lands should continue to be under the control of the Imperial parliament.

Then again escheat is not a revenue, but a casual profit. What is revenue is the fruits of the escheat. Nor were escheats ever looked upon as revenues in the sense argued, for a custom had grown up to hand over the property to the connections of the person who had died; and the complaint here is that the Local Government have dealt differently with the fund, and that the whole was not given to the natural son of the deceased. If that be so, how much force is there in the argument that this fund was considered as a fund for paying salaries of the judges, or that *Canada* must depend on these revenues to pay the civil list?

It is also contended that these sums fell into the consolidated revenue fund; but on the 1st July, 1867, that fund terminated, for, as the learned counsel for the appellant had to admit, the legislative power over all lands was by the *B. N. A.* Act vested in the local legis-

lature, not conditionally but absolutely, just as legislative powers were given to *Canada* over other subject-matters, not for the life of the sovereign and five years after, but for ever.

The principal point, the proper construction of the *B. N. A.* Act, remains for consideration. There can be no doubt that the act should be construed with due consideration to the condition of the different parties who entered into the compact of confederation.

Here when it is intended to grapple with the conjunction of four provinces and the establishment of separate legislative powers, and when it has been attempted to deal with all these subject-matters in a few printed pages, it would be a fatal error to stick to the letter of the act. It is the duty of this court to look around in order to get at the proper construction to be put on the different paragraphs of the act. The rule of general intent and the rule of public convenience are of vital consequence in dealing with this act.

There are some points which seem tolerably well admitted.

1. We need to know what were the rights of the different provinces before the union, because it is necessary to apprehend where these rights have gone If it is found that a subject-matter was before confederation a proprietary right of the provinces, it must be found existing in one of the identities which were created. There was no intention to surrender what had been granted by *England* to the provinces before confederation, and all proprietary rights existing before confederation must after confederation exist in the government either of *Canada* or the provinces.

2. It was the intention that each of the provinces should stand upon the same footing as to constitutional as well as proprietary rights, and what was done for *Nova Scotia* and *New Brunswick* was to be done for

1881
MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Quebec and *Ontario*. It is only because *Ontario* and *Quebec* had to be born, so to speak, that there are these different sets of powers. If that leading principle of construction is applied, all these sections can be made to harmonize in such a way as to give no more to *Ontario* and *Quebec* than to *Nova Scotia* and *New Brunswick*. Of course, it is not meant that provincial tenures were to be assimilated, but what is meant is that the power to deal with them was intended to be the same in each of the provinces.

If confederation is so regarded, the construction of the *B. N. A.* Act involves the question: What is the real nature of the union? One section cannot be taken by itself, but all must be read together in order that, by a broad, liberal and quasi-political interpretation, the true meaning may be gathered. The preamble recites the desire for federal union, etc. Then there are some curious provisions. By the third section the provinces of *Canada*, *Nova Scotia* and *New Brunswick* are to be one dominion under the name of *Canada*; and then they are divided into four provinces. Then the twelfth section provides that "all powers, authorities and functions which, under any act of the parliament of *Great Britain*, or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada*, *Lower Canada*, *Canada*, *Nova Scotia* or *New Brunswick*, are at the union vested in or exercisable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those governors or lieutenant-governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the government of *Canada*, be vested in and exercisable by the Governor-General, with the advice,

or with the advice and consent of, or in conjunction with, the Queen's Privy Council for *Canada*, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the parliament of *Canada*." The sixty-fifth section vests the same powers in the Lieutenant-Governors of *Ontario* and *Quebec*, as far as the same are capable of being exercised after the union.

It is clear, then, that whatever might have been done by any governor fell to the Governor-General of *Canada* if the subject-matter related to the Dominion of *Canada*, and fell to the lieutenant-governor if the subject-matter related to the province. There is nothing said of *Nova Scotia* and *New Brunswick*, because the 64th section deals with them. The constitution of *Nova Scotia* and the constitution of *New Brunswick* were already created, and were simply continued. Sections 64 and 65 should be read together, for if *Ontario* and *Quebec* had been existing, section 65 would not have been inserted, and we would have found the lieutenant-governors having the right to exercise all the statutory powers they might have had. If the powers of the lieutenant-governors are interpreted by section 65 alone, see how narrow the words are. The constitution of the executive authority of each province is implied from the fact of its existence before the union. All the provinces are placed upon the same footing, and in *Ontario* and *Quebec*, as well as in *Nova Scotia* and *New Brunswick*, the power of dealing with all subjects which *Nova Scotia* and *New Brunswick* had prior to the union was continued, subject to the alterations made by the act. The consequence is that all the powers existing in the old

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

provinces, except such as are taken away, are grafted upon the new-born provinces of *Ontario* and *Quebec*.

Then there is the distribution of the legislative bodies. It is quite true one is called a parliament and the other a legislature, but to both are given legislative powers. There is a general legislative power in the parliament of *Canada*, but the old province of *Canada* had larger powers than the parliament of *Canada* have now, because the power of the Dominion parliament is limited. In section 91 a general phrase is used excluding certain subject-matters: 1st, The public debt and property. The "public debt" is defined shortly afterwards. "Property," also, is sufficiently defined in the act, for all that is given to *Canada* must be found in the act. Thus Indian lands, *Sable Island* and particular properties are the properties over which legislative authority is given to the parliament of *Canada*. True, it is provided that the particulars of 91 shall over-ride the particulars of section 92, but it is nowhere provided that if the two conflict the latter shall be superseded. This section has been wrongly interpreted, for it is not said matters enumerated in section 91 shall exclude matters enumerated in 92.

There is another mode of construing these sections; it is to interpret them as you would an ordinary grant. It is admitted that there is a general provision in favour of *Canada* and in all matters not granted to the province, and relating to the peace, order and good government of *Canada*, the power is there, yet it is not a power more paramount than the local power is over subject-matters granted to it. Within its range each has an exclusive power. Local authority is legislative in its character and exclusive within its bounds. Among the branches of subject-matters granted to the provincial legislatures is the sale and management of public lands. It is said that this is a limited power, but it is to be remembered

that we are dealing with a legislative power, and it does not seem that anything has been left out or excepted. The intention of the legislature clearly was to give the local authority most ample power.

Then there is also the jurisdiction over "property and civil rights," (which give their chief dignity to the functions of the local legislatures), and "all matters of a local or private nature."

In section 95 there is a concurrent power over emigration. This is the only subject-matter over which there is a concurrent power, and therefore it is the only case in which a law within the jurisdiction of the local legislature can be over-ridden by the parliament of *Canada*.

Now, it is clear, looking at the whole act, that there are words large enough to shew what are the legislative powers of the provinces and of *Canada* respectively over lands. To *Canada* belongs property consisting of Indian lands, *Sable Island*, etc., and to the provinces all public lands and the timber and the wood thereon.

Taking up the act in its order we come next to section 102, which declares that "all revenues over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had and have power of appropriation, except such portions thereof as are by this act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund, to be appropriated for the public service of *Canada* in the manner and subject to the charges in this act provided."

Reliance is placed by the other side on this section 102, and it is said here is a revenue over which the local legislature had a right of appropriation, and not being reserved to them in the act, they have now no control over it. If this argument is correct, it would equally embrace the proceeds of sale of all the lands, for they

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

are not reserved—and can it be said they are to go to the consolidated revenue fund of *Canada?* Then, how can it be argued that the subject-matters shall belong to the local legislatures and the proceeds of the same belong to *Canada?* Surely it was not necessary when the subject-matter was appropriated to the province to add "and the proceedst hereof, if disposed of by the local legislatures." Therefore, if it should be held that the land itself is under the control of the local legislature, the revenue derived therefrom cannot be said to come within section 102. If the argument is good, then the court will hold that all revenues of all lands belong to the consolidated revenue fund.

Section 107 assigns particular assets. Section 108 gives *Canada* a proprietary interest in certain properties as well as in the public works. So that time and again, when dealing with lands under control of *Canada.* they are dealt with specifically. Now, section 108 is in itself enough. There the particular properties which go to *Canada* are found, and the court is asked to hold that property not then given to *Canada* remained with the province, for that is the irresistible inference, But the act does not leave the matter to rest on inference, for all lands, mines, minerals, royalties and other public property belonging to each province are, by the 109th and 117th sections of the *B. N. A.* Act, declared to continue to belong to such province, to be used and administered by the provincial authorities for the use and advantages of the provinces.

Therefore, reading these different sections together, it is manifest that *Canada* got such property as was expressly given to her and the provinces kept what was not given to *Canada.* How will the provinces get a revenue from these lands, if not by sale, licenses, etc.? The power to deal with them is full, ample and com-

plete, and the scope, sense and spirit of the confederation act is plain and obvious, viz.: That all lands situate within a province in respect of which her Majesty had any sort of right or interest continued to belong to the province, with the exception of certain lands given to *Canada*.

It would be absurd to suppose that authority over the whole question of granting and transferring property was given to the local legislatures, and yet one of the smallest and least significant matters incident to it, that of escheats, should be withheld. Can it be said such a little, thwarting, vexatious question, serving no high political interest, was not given to the provinces, and that they were not to decide whether there should be an escheat or not? If fit to deal with the land, then they are fit to deal with this matter.

It has already been said that this is not a prerogative right, for it belonged to the lord and had to be dealt with by the lord. If it is a prerogative, there are prerogatives of a higher class which have been handed over to the provincial legislatures and to which this right is but an incident.

Suppose the land had been granted after 1867 and there is an escheat, to whom does it belong? Is it to *Canada?* The right to alter tenure, the power to legislate over the subject-matter, belongs to the provinces, and yet it is contended escheat would belong to *Canada*. This is said to be a *petitio principii;* but if we find in the provinces before confederation power to deal with the subject and this power is continued, there is an end of the matter.

The question is not one of any personal prerogative, but it is simply whether the attorney-general for *Canada*, who is responsible to parliament, shall advise as to the mode in which the escheat shall be applied, or whether the attorney-general for *Ontario*, who is

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

responsible to the people of *Ontario*, shall advise as to what shall be done with the escheat. To hold the former view involves a clashing of functions and of jurisdiction, which is abhorrent to those who desire the welfare and peace of the confederation.

The question to be decided is: What executive authority shall control this subject-matter? Public convenience is in favour of escheated property being dealt with by the province and becoming the property of the province, and the proper way is to leave it to that authority which is responsible to the people who are interested in the proper administration of the lands of the province.

Mr. *Bethune*, Q C., followed on behalf of respondent:

The first question is, What is escheat? In addition to the authorities cited by the other side I refer to *Cruise's* Digest (1), where it is thus defined by Lord *Mansfield*, in his judgment in *Burgess* v. *Wheate*, there cited: "It has been truly said that on the first introduction of the feudal law, this right was a strict reversion—when the grant determined by failure of heirs, the land returned as it did on the expiration of any smaller interest. It was not a trust, but an extinction of a tenure; as Mr. Justice *Wright* said, it was the fee returned." The same learned judge further on, referring to the liberty of alienation, which was given to tenants, says: "As soon as the liberty of alienation was allowed without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres*."

In *Ontario* and in the former province of *Upper Canada*, all lands were holden directly of the crown in free and common socage. It is quite clear that escheat applied to lands held in socage. At page 401 of the same volume of *Cruise*, it is said "All lands and tene-

(1) 4th edition, page 401, title 30, section 23.

ments held in socage, whether of king or subject, are liable to escheat."

There seems no doubt upon all the old authorities that the right of the crown to escheat was strictly a species of reversion. My learned friends upon the other side have spoken of an estate in fee simple in land as if that were the land itself. An estate in fee simple is the largest estate which can be granted, but the lord, who in *Canada* is the crown, notwithstanding a grant in fee simple, still retains a reversion which is called an escheat. Once an escheat took place, it operated to extinguish the title of the grantee, the tenure of the grantee came to an end.

Assuming that so far I am correct as to the nature and effect of an escheat, let me apply it to the matter in question; and first let me apply it to a case of escheat upon lands granted by Letters Patent of the province of *Ontario* since confederation. We assume that on the 1st day of July, 1867, the crown was possessed, for the province of *Ontario* and its use, of a lot of land which had passed to that province under section 109, of the *B. N. A.* Act, which is in the words following: "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." Before confederation that land was vested in her Majesty; she held it for the use of the former province of *Canada*; after confederation she held it, but for the use of the province of *Ontario*. Nothing in the act had divested her Majesty of the title to these lands. The

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

same *B. N. A* Act continued certain laws in force, under which her Majesty, through the instrumentality of the commissioner of crown lands, was enabled to make a grant of this land. The grant is made under the Great Seal of the Province of *Ontario*. We assume a grant in fee simple. After this grant there would remain in her Majesty her reversionary right in this estate. This reversionary right her Majesty would hold for the benefit of the province of *Ontario*. It could not be that, while the land before being granted was held by her Majesty for the use of the province of *Ontario*, yet upon or after the grant in fee simple the reversionary estate would be held by her Majesty for the use of the Dominion of *Canada*; nothing in the act would warrant an inference that that reversionary interest should thus be disposed of. That being so, it would appear that, in the event of the failure of the title of the grantee, in such a case as I have put, and in the event of his dying intestate, her Majesty in behalf of *Ontario*, would become entitled to the land, for the use of *Ontario*.

The next question that arises is, whether there is any difference between a case in which a grant has been made by the crown in the former province of *Canada* before confederation, and a grant made by *Ontario* since confederation, in reference to the right of *Ontario* to the escheat? I submit that there is nothing in the *B. N. A.* Act which indicates the slightest difference between these two cases. Under section 109, all lands, mines, minerals and royalties which belonged to *Canada* passed to the provinces of *Ontario* and *Quebec*. The term land would include, I apprehend, any interest in land which the crown might have had. The reversionary right, called escheat, is certainly an interest in land. It is only a question of degree between that kind of reversionary interest, and the reversionary interest

which the crown possesses expectant upon the determination of a term for years. Where the crown had, as in many instances it had, made grants for terms of years, it might as well be argued that the reversion of the crown would not pass to the province of *Ontario* because it could not be said that that province had the land; it had only the reversionary interest in the land, expectant upon the determination of the term.

Another reason why I submit this escheat passes to the crown is, that it is a matter appertaining to the title. It is quite clear that under the terms "property and civil rights," in section 92 of the *B. N. A.* Act, section 13, a provincial legislature might by an act abolish escheat as an incident of tenure; it might provide that the whole land should be granted, and that the crown should never under any circumstances assert title to the property which it had once granted; and such a law, if not disallowed, would be valid. It is argued on the other side, that under section 102 of the *B. N. A.* Act, this escheat passes as one of the "revenues" over which the legislature of *Canada* had power of appropriation before confederation. I submit, hovever, that the nature of the revenue must be taken into account in determining what is meant by the term "revenue," in section 102. Before confederation the crown lands were sources of revenue; and it is quite clear that under that term, in section 102, the crown lands did not pass.

To remove any doubt upon this point, section 117, says:—"The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of *Canada* to assume any lands or public property required for fortifications or for the defence of the country."

From the two sections 109 and 117, it seems reasonably clear that it ought to be presumed that this prop-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

erty belongs to the province, unless it comes clearly within that assigned to the Dominion.

The true solution of this question is, that there was a division of the assets between the Dominion and the provinces, and (having reference to the general terms employed) your lordships ought to hold that escheated property falls on the provincial side of the division. If you look at the power which was given to deal with "property and civil rights," and to deal with lands, it is more in accordance with the spirit of the act to hold that escheats were intended to pass to the provinces than that they should remain with the Dominion. All the lands and interests in land which are reserved to the Dominion are described in section 108. When you look at the term "revenues," as employed in that act, as descriptive of what should belong to the Dominion, none of the revenues intended seem to include revenues from lands (except those derived from public works.)

The other side argue that this is a prerogative right, and that none of the prerogatives of her Majesty belong to the provinces. I submit that the prerogatives of the crown, so far as necessary to carry out matters to be executed by the provincial authorities, have passed under the *B. N. A.* Act to the province, and are to be executed by the lieutenant-governor as the proper representative of her Majesty.

It has been assumed by the other side that the executive authority of the Queen does not extend to provincial matters, but that a new kind of executive has been created, which is not part of the executive power of her Majesty, but is a statutory right which has been created and vested in the lieutenant-governor. This view, I submit, is erroneous. Turning to the 9th section of the *B. N. A.* Act you will find it declared that "the executive government of and over *Canada* is hereby declared to *continue* and be vested in the Queen." The argu-

ment of the other side must narrow that section to mean over *Canada* as a body politic or as a subject of federal government; so that while the executive authority of the Queen *quâ* Dominion matters extends over the whole of the Canadian territories, as to provincial matters it is not anywhere to be found in any of the provinces. It would certainly require very strong words to abolish the prerogative right of her Majesty as to any matter in respect of which it existed before confederation. I submit that the true construction is that the executive authority of the Queen continues, and was to be carried out, in every part of *Canada* after confederation, by the Governor-General in respect of Dominion matters and by the lieutenant-governors as her representatives in provincial matters, precisely as such executive authority existed before confederation. I call attention to the words "of and over *Canada*." The words "of and over" would be quite unnecessary if the section meant merely that the executive power of *Canada*, as the subject of Dominion government, should continue in the Queen; the words "over *Canada*" would have no meaning if they did not apply to *Canada* territorially, and thus include within *Canada* the provinces and their executive. I think that under the preceding sections this is reasonably plain. Looking at section 3, it is quite clear that one dominion was to be formed under the name of *Canada*; and by section 4, *Canada* shall be taken to mean *Canada* as constituted under this act. unless it is otherwise expressed or implied. By section 5, *Canada* is divided into four provinces; but that division into provinces is quite consistent with the continued existence of the prerogative over these provinces, to be executed in matters as to which the new provincial governments were to be agents.

I suppose we may look to the headings which precede the various sections; and looking at these, it is

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

quite clear that the words "executive power," which precede section 9, are describing the same kind of thing which the words "executive power" that precede section 58 (as to lieutenant-governors) describe. When you come to provincial constitutions, beginning at section 58, you find these words: "Provincial constitutions," "Executive power." Then you find by section 58, that there is to be an officer called a lieutenant-governor appointed by the Governor-General of *Canada*, by instrument under the great seal of *Canada*, and that lieutenant-governor is to hold office during the pleasure of the Governor-General, subject to removal for cause. It is not said whose "officer" he is. The appointment is made by the Governor-General under the great seal of *Canada* and, I assume, in her Majesty's name. This officer is to exercise the executive power necessary to carry out that part of the government committed to the province. It is, I submit, a part of the same executive power which, under section 9, is declared to continue and be vested in the Queen. None of the sections which deal with the executive of the provinces contains a line that shews it was intended to transfer, in provincial matters, that power which had formerly existed in her Majesty as a matter of prerogative, to the Governor-General. It cannot be argued that it was intended to transfer it to the Governor-General, for he has no duties in connection with the provinces, except the consideration of the question of allowance or disallowance of laws. The other side are driven to argue that this part of the prerogative has been extinguished. Why should that be assumed? All these prerogative rights existed for the benefit of government, and because they were thought necessary to such government. If necessary to the proper carrying on of government in the old provinces, why should it now be thought unnecessary?

Under section 65, all the statutory powers and func-

tions which were formerly possessed by the lieutenant-governors of *Upper* and *Lower Canada* under Canadian or Imperial statutes, are declared to be exercisable by the lieutenant-governors of *Ontario* and *Quebec*. I submit that there can be no doubt that under the *Upper Canada* and *Lower Canada* constitutions, which preceded the union of 1840, the lieutenant-governors were the proper depositories of the "prerogative," so far as it appertained to the Government of the two provinces of *Upper* and *Lower Canada;* and these are still to be exercised after confederation by the lieutenant-governors of these two provinces, in the same way as they had been exercised by former lieutenant-governors.

Then under section 64, the constitution of the executive authority in *Nova Scotia* and *New Brunswick* was to continue as it existed at the union, until altered by the authority of the *B. N. A.* Act. It cannot be doubted that before confederation the lieutenant-governors of *Nova Scotia* and *New Brunswick* respectively possessed the right as representatives of her Majesty to execute the prerogatives necessary to colonial government. If this be so, then it would follow, under section 64, that these prerogative rights continued in these two lieutenant-governors; and the whole scope of the *B. N. A.* Act shews that there was not intended to be any difference in the powers of the lieutenant-governors of the various provinces.

The reason why the *B. N. A.* Act is silent about the exercise of these prerogatives by the lieutenant-governors is very obvious. It is quite clear that the Governor-General is under the act made the deputy of the Queen, and that the Governor-General is enabled to appoint a further deputy of the Queen for certain provincial purposes. That deputy is called a lieutenant-governor. He is appointed by an instrument in the name of her Majesty, and, consistently with the law as

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

to the execution of powers, it seems quite plain that if the Governor-General is an officer of her Majesty, his deputy is also an officer of her Majesty as to the prerogative of her Majesty in convoking the House of Assembly and in other matters. By section 82 it is said that the lieutenant-governors of *Ontario* and *Quebec* shall from time to time, in the Queen's name, by instrument under the great seal of the province, summon and call together the legislative assembly of the province. By section 72 the legislative council of *Quebec* is to be constituted of persons to be appointed by the lieutenant-governor, in the Queen's name, by instrument under the great seal of *Quebec*. By section 75, so often as a vacancy shall occur the lieutenant-governor, in the Queen's name, is to fill it.

It is said on the other side that section 82 found its way into the act by inadvertence. This assumption, I apprehend, cannot for a moment be entertained. Those who make it must also account for sections 72 and 75 having found their way into the act in the same way. But it is quite plain why these sections are there. By section 88, the constitution of the legislature of each of the provinces of *Nova Scotia* and *New Brunswick* was declared to be continued as it existed at the time of the union until altered; and the House of Assembly of *New Brunswick* was to continue undissolved. The reason why the House of Assembly and legislative councils of old *Canada* could not be continued was because of the division of *Canada* into the two provinces, *Ontario* and *Quebec*; and it became therefore necessary to provide for the creation of Houses of Assembly for these two provinces; but it is impossible for a moment to contend that the constitutions of the four provinces were intended te be in any respect different. If they were the same, it follows that the prerogatives proper for the execution of provincial

government are to be exercised by the lieutenant-governors.

Take another prerogative, namely, the prerogative of justice. It is quite clear that the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of criminal and civil justice, is committed to the provinces. Courts of criminal as well as civil jurisdiction have been created in *Ontario* by the provincial legislature. Are not these courts her Majesty's courts? Does not the process of these courts run in the name of her Majesty? If the prerogative of justice is not to be invoked in aid of the provincial courts, what authority is there for the administration of justice in her Majesty's name? Was it not intended by the framers of this act that her Majesty's prerogative of justice should continue in the courts established by the provincial legislatures, just as if these courts had been established by the Imperial parliament?

For these reasons I submit that the judgment appealed against should be affirmed.

Hon. Mr. *Loranger*, Q.C., followed on the same side, on behalf of the province of *Quebec*:

The right in question is a common law right which ought to be governed by local laws. This right is called by different names; sometimes it is called an escheat, sometimes a reversion, and sometimes a *droit de déshérence*. It is nothing else than a fiscal right engrafted upon the law of succession. Society being originally proprietor of all lands, they revert to society if the owner dies without heirs. The sovereign chosen by society holds the land in trust for the people, as a *fidei commissum*. The civil law theory of vacant property is this: If a man gave up property with the intention that some one should take, that person was entitled to it, while if he abandoned it for the sake and

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

with the intention of abandoning it, then the first one who took possession would be entitled to retain it; but if the abandonment is without his will, then it goes to his heirs; and if he leaves no heirs, or they are unwilling to accept, then it goes to the people at large, and under the Roman law it went to the Roman Republic. That right was exercised by a public sale of the property.

In *France* as well as in *England*, and in fact throughout all feudal and monarchical *Europe*, the right of escheat or *droit de déshérence* never ceased to be looked upon as a right of descent, whether exercised by a king or a seigneur, and always formed part of the law of succession. Did the king exercise that right in his capacity of sovereign; in other words, as a royal prerogative? No; but as representing the people, and he had to demand it, and certain forms had to be followed. He took as successor: see *Ferrière*, Coutume, Tit. VIII., sur Art. 187.

It was so well considered as an incident of the law of descent that it was legislated upon by the French Parliament. It is a maxim that they could curtail only the civil law, still we find them legislating upon this right. In *Quebec* it will go to the wife in default of heirs, or to the donor, if the property came from an ascendant.

At the time of the French revolution the feudal system was abolished, and with it the *droit de déshérence*. How was it dealt with since? The civil code was prepared, and *Napoleon* did not say it should go to the sovereign or chief magistrate, but by Arts. 768 and 767, he says it shall belong to the state, not as a prerogative right belonging to the head of the nation, but as coming from the law of descent.

How was this right to be exercised after *Canada* was

ceded to *England?* *Chitty* on Prerogatives (1) distinctly says it must be settled by local laws. Then it was, and is, perfectly competent in this country for our local legislatures to deal with this subject-matter. There was the *droit d'aubaine*, which formerly went to the king, but this has been done away with by legislation.

I contend that if the Dominion Parliament have no legislative authority over the subject-matter, it must go to the provinces. It also falls under their control under the words "property and civil rights." And I say, that as a maxim of international law the right of legislation over a subject belongs to the government under whose control the subject-matter happens to be.

Lex rei sitæ must prevail, even if the Confederation Act did not say so in so many words. And this principle, viz., that escheat should be regulated by the laws relating to property, is not peculiar to the law of *Canada*, for both *Blackstone* and *Chitty* treat this subject-matter under the heading of "the laws relating to the transmission of property."

If the local legislature has legislative powers over property, escheated property must belong to the local and not to the federal government. A great part of the argument on the other side was for the purpose of shewing that the crown had not parted with its prerogative, yet it must be admitted that the sovereign is no longer in the personal enjoyment of this right, and that it belongs now either to the federal government or the local government.

I contend that it belongs to the local government, because it is a subject-matter over which the province has legislative powers, otherwise you would have to conclude that the federal government could own property within the provinces which the local legislatures by legislation could take away.

(1) Ch. 3, p. 25.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

It having been established that the right of escheat being governed by the law of property, namely, by the law of succession, must, of necessity, fall under the control of the provinces, vested, by the 13th paragraph of the 92nd section of the *B. N. A.* Act, with the power of legislation over "property and civil rights," it follows that as a consequence all public property, which at the time of confederation belonged to these provinces and which became subject to provincial legislation, must equally belong to them.

If the Confederation Act had been silent upon this power, escheated property would have gone to the local government on the ground, as I contend, that a true interpretation of the federal compact is, that all powers not specially conferred by it have devolved upon the provinces.

In entering into the federal compact, the provinces did not resign any of their respective constitutions, powers, property and revenues to the federal authority in such a way as to vest it with them to their entire exclusion; in a word, they never intended to renounce, and in fact never did renounce, their distinct and separate existence as provinces, when becoming part of the confederation; this separate existence, their autonomy, constitution, revenues, property, rights, powers and prerogatives, they expressly preserved for all that concerns their internal government; and by forming themselves into a federal association under political and legislative aspects, they formed a central government for inter-provincial objects only. Far from the federal authority having created the provincial powers, it is from these provincial powers that has arisen the federal government, to which the provinces ceded a portion of their rights, property and revenues.

At the time of confederation, all legislative and executive power, legal attributes, public property and

revenues that are now the appanage of the central government and of the provinces, belonged incontestably to the latter. The federal compact did not create a single new power. The part now belonging to the federal government was taken from the provinces to be conferred upon this former power.

The powers, in particular, that are granted by section 91 to the Dominion parliament, had theretofore formed part of the powers of the provinces, in common with those mentioned in section 92, which remain within the jurisdiction of the provinces. These powers have been divided. Those conferred upon the federal parliament were given to it, and those left to the provincial legislatures they merely retained. Then, all that has not been vested in the federal government, remains with the provinces; and again, in the distribution of powers made by these two sections, whatever be their wording, the general rule is the provincial jurisdiction, and the exception the federal.

The same rule applies to the distribution of the property; all belonged to the provinces at the time of confederation, and the federal government has no share, except what has been given to it. There again, the general rule is in favour of the provinces, and the exception is in favour of the federal government.

The authority of the lieutenant-governors, within the limits of their jurisdiction, is on an equality with the authority of the Governor-General. Both are, within their respective spheres, representatives of the Queen, the former in the provincial, the latter in the federal sphere. It is true that the lieutenant-governor is appointed by the Governor-General, but it is in the name of the Queen that he is so appointed, and as her agent or representative. In his official acts, it is the Queen whom he represents and in her name that he acts.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

The relations between the provinces and the Imperial Government remain, after the union, what they were before. The Queen forms part of the legislature of each province, by the intermediary of the lieutenant-governor; it is in her name that the houses are called and prorogued and that the laws are assented to. The sole change, in this respect, consists in the disallowance and disapproval of provincial acts, which is made by the Governor-General, but this is not a legislative act.

The executive government resides in the person of the lieutenant-governor, as the first magistrate of the province, and here again he acts as the representative of the Sovereign.

It is the same with the concession of the revenue to the federal government as with legislative jurisdiction and public property; here again, the public treasury belonging to the provinces was divided to make a budget for the federal government, the remainder was left with the provinces.

The consequences to result from the solution of this conflict between the provincial and federal claims are of great importance to the provinces, and particularly to the province of *Quebec*. In fact, if the federal pretensions prevail, and the principle of the inferiority of the provinces and the subordination of their legislatures to the federal power is well founded, less than fifty years will see their absorption in the central government; and, the annihilation of local governments having done away with the necessity of their existence, the federal government will give place to that legislative union which is so justly dreaded by the province of *Quebec*, whom I represent. Although having no material and direct interest in the suit, the consequences of an unfavourable result might so prejudicially affect its political condition th it thought

it proper to join with the province of *Ontario* in asserting their common claim to the present right of escheat or *droit de déshérence*.

To thoroughly understand the nature and extent of the powers and limits of the jurisdiction of the federal parliament and of the local legislatures, a precise knowledge of their political situation at the time of confederation and of the powers of their legislatures, is necessary. Integral portions of the British Empire for upwards of a century, *United Canada*, *Nova Scotia* and *New Brunswick*, to which at first was limited the federal compact, each possessed, under the guarantee of *England*, whose power was felt rather in protecting than in coercing them, an independent and almost sovereign constitution.

This constitution, modelled on the British constitution, left them the absolute government of the internal affairs of the province, the control of their public funds, the enjoyment of their property, and the disposal of their revenues of all kinds; even the territorial revenues which had been exchanged for a civil list. Within the sphere of their powers, their legislatures or provincial parliaments, under the ægis of the principles of responsible government, worked freely; and their internal action was not under the control of any foreign power.

These provinces, each of which was clothed with the totality of the powers now possessed separately by the federal and local government, were therefore in the enjoyment of their complete political and legislative autonomy.

These constitutions, rights, and powers, and this autonomy, were guaranteed to them by treaties, and Imperial laws which, in the relations between the British Government and the colonies, have the force of treaties. The constitution of the united provinces of

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

Upper and *Lower Canada* (to speak only of these two provinces) had been granted to them by the Union Act of 1840; and the constitutions which each had enjoyed for three-quarters of a century (with the suspension of a few years in the case of *Lower Canada*) had come to them by the Constitutional Act of 1791, not repealed by the Union Act of 1840, but simply modified to make it harmonize with the union of the provinces and the new system.

It is therefore to the Constitutional Act of 1791 that we must look for the origin of the powers of the legislatures of the provinces of *Canada*, which were in force at the time of confederation, modified as has just been stated. These powers, with the reserve of Imperial interests, were unlimited, and extended to every species of legislation, whether public or private, necessary for the good government and welfare of the country. Thus, as already stated, it extended to all the objects of legislation now divided between the federal parliament and the local legislatures.

A right or a power is not taken away from a nation or an individual, except by a law which revokes it, or by a voluntary abandonment. Is there, in the resolutions of the conference of the colonial delegates, held in *Quebec*, in October, 1864, or in the federal act itself, one word which repeals their powers or explicitly derogates therefrom? Certainly not. Does any one of these resolutions, or any section of this law, or the whole of either, imply an implicit repeal of such rights? Article 29 of the resolutions says, with respect to the federal parliament: "The general parliament shall have power to make laws for the peace, welfare and good government of the federal provinces (saving the sovereignty of *England*) and specially laws respecting the following subjects." The *B. N. A.* Act, section 91, enacts: "It shall be lawful for the Queen, by and with

the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

Sec. 92.—"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects, next hereinafter enumerated."

Were these powers of the provinces revoked by the federal compact which became the *B. N. A.* Act? On the contrary the old provinces preserved their corporate identity under confederation. A distinction must here be made between the former province of *Canada* and the other provinces, as those of *Nova Scotia* and *New Brunswick*, which entered into the federal compact under their old corporate names. Under the old constitutional act of 1791, *Upper* and *Lower Canada* each formed a province separately constituted, under the names of the provinces of *Upper* and *Lower Canada*. Reunited by the union act of 1840, they formed only one province, under the name of the province of *Canada*. Under the *B. N. A.* Act of Union, they were again disunited and made into two separate provinces, called the provinces of *Ontario* and of *Quebec*; but did they again become in reality as each was under the act of 1791, although having different names? Has this difference in name and in territorial boundaries effected a difference in their identity, and can it be said that they have become new corporations? Have they not rather remained as they were, as well as *Nova Scotia* and *New Brunswick*? The maxim of law *Nil facit error nominis, cum de corpore constat*, a maxim of universal application in all legal matters, and which declares that the name does not affect the thing, so long as its identity is apparent, seems to settle the question. The

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

only difference in the result is, that, in place of entering the confederation under only one name and as a single member of the union, the two provinces entered it under two different names and as two members of the union. They are, moreover, each clothed with the same powers as before, and as the other confederated provinces, each having one and the same constitution. I do not see, either in the resolutions of the conference. or in the federal act, any provision which would give a pretext to the pretension that, in entering confederation, the provinces lost their former identity to acquire a new one.

Any such inference is rejected by the preamble of the act, which states: "Whereas the provinces of *Canada*, *Nova Scotia* and *New Brunswick* have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of *Great Britain* and *Ireland*, with a constitution similar in principle to that of the United Kingdom;" and by section 3, which declares: "It shall be lawful for the Queen, by and with the advice of her Majesty's most honourable Privy Council, to declare by proclamation that, on and after a day therein appointed, not being more than six months after the passing of this act, the provinces of *Canada*, *Nova Scotia* and *New Brunswick* shall form and be one dominion under the name of *Canada*; and on and after that day those three provinces shall form and be one dominion under that name accordingly;" and section 5, which enacts: "*Canada* shall be divided into four provinces, named *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*," makes the contrary decision absolute.

It was the identical old provinces which united to form a new government and to constitute a federal dominion, without losing their identity; and without ceasing to be what they had been, distinct governments. It is not then from the Dominion that the

provinces arose, but it was the provinces that created the Dominion and were transformed into a new political body, without ceasing to exist in their former condition.

Were they endowed under the new system with their former constitution? Is the constitution given to them by the federal compact their old constitution, modified to suit the new order of things, or is it a new constitution?

It is necessary, first, to know what were the organic characteristics of the old constitution. Let us confine ourselves to the constitution of the provinces of *Upper* and *Lower Canada*, and to that of the province of *Canada*. These constitutions were formed upon the model of the British constitution. The executive power resided in the person of the sovereign, represented by the Governor-General or a lieutenant-governor. The legislative power resided in a legislature sometimes known as the provincial parliament, composed of three branches; the governor or lieutenant-governor representing the sovereign, the legislative council, appointed by the governor, and a legislative assembly or house of assembly, elected by the people. The parliament was convened by the governor in the name of the sovereign, it was prorogued in the same manner, and the laws were assented to in the same name by the same officer. Let us see what are, on the same subjects, the provisions of the federal compact in the constitution of the provinces.

The learned counsel referred to secs. 58, 71, 82, 90, 55 of the *B. N. A.* Act.

It is objected to the analogy, which we find between the executive and legislative powers conferred upon lieutenant-governors and the provinces of the confederation, and the same powers conferred upon the former governors and lieutenant-governors and the old

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

provinces, that under the new system the sovereign does not exercise the executive power as under the old, through the governor who represents him, and by whom he was directly appointed; that under the new system the lieutenant-governor is appointed by the Governor-General, of whom, and not of the sovereign, he is the representative. Secondly, that the sovereign is not a branch of the legislature of the provinces, because the lieutenant-governor, clothed with secondary powers as just stated, does not represent the sovereign as the first branch of the legislative authority.

The answer to these objections is based upon the fundamental principles of the British Constitution, upon which depends the Imperial Sovereignty itself, and the constitutional existence of the colonies, which are: That the executive power of the nation resides in the person of the sovereign, as the chief magistrate of the realm, and the legislative power in the parliament, composed of the sovereign himself, and the other two branches of the nation, the House of Lords and the Commons. That it is from the sovereign and the parliament thus composed that is derived the source, principle and end of all power, "*fons principium et finis omnis potestatis.*"

According to the constitutional doctrine, all legislative and executive power granted by *England* to her colonies is a delegated power, the legislative power being delegated by the parliament, of which the sovereign is the first branch, and the executive power by the sovereign alone, of whom the colonial governors are the representatives in the executive government as well as in the legislatures. The authority of the governors appointed by the sovereign is in no sense personal; it is in the name of the sovereign that they exercise it, in virtue of a commission, which might be assimilated to what is, in the civil law, an ordinary mandate.

In political as in civil law, in the absence of any provision specially applicable to the subject, recourse must be had to the common law, to ascertain the relations between the government and the governed. This rule is admitted in *England*, where, for instance, the publicists hold that the hereditary right to the crown is governed by the law of ordinary successions. It was thus that on the death of *Edward VI.* without children, the crown, like the large baronies, devolved, in default of other heirs male of the late king *Henry VIII.*, to his two daughters, *Mary* and *Elizabeth*, but the former excluded the latter, to avoid a plurality of sovereigns.

Applied to the powers of lieutenant-governors, the rules of mandate, which, being drawn from the civil law, and founded upon natural reason, are common to all civilized nations and are the same in *England* as in *Canada*, clearly show how the federalists are in error, when they hold that the lieutenant-governors do not represent the sovereign. One of the fundamental principles in matters of mandate is that the persons commissioned by the mandatary, with the consent or by order of the mandator, to execute the mandate, are responsible to the mandator, and represent him for all the purposes of the mandate. Here, the Governor-General, appointed by the sovereign under the Federal Act, appoints the lieutenant-governors to fulfil certain functions created by the same act. Can it be doubted that the Governor-General having made the appointment in the name of the Queen, and made it for her, the lieutenant-governor is not his servant, but became, as the Governor-General himself, one of her Majesty's officers, and that, in the performance of the duties conferred upon him, he represents the sovereign?

What are his functions? The executive power resides in his person, by section 58, as we have seen. He is assisted by an executive council (sec. 63), and he can exer-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

cise all powers and functions declared to be exercisable by the lieutenant-governors formerly.

Now, by the Union Act of 1840, which in these respects was in force at the time of confederation and which confirmed the provisions of the Constitutional Act of 1791, the governor of the province of *Canada* convened the parliament in the name of her Majesty (sec. 4) as he still does under art. 81 of the Federal Union Act; prorogued it in the same name (sec. 30); in the name of her Majesty, gave assent to or refused to sanction bills (sec. 37); and, a very remarkable fact, by section 59, it was enacted that the exercise of the functions of governor should be subject to her Majesty's orders; a provision which is not repealed by the Confederation Act, but is still in force under section 65 of that act hereinbefore recited. If that law intended to subordinate the exercise of the functions of lieutenant-governor to the control of the Governor-General, as his officer, would it not have modified the provisions of section 59 of the Union Act of 1840 in order to apply it to the Governor-General, instead of simply keeping it in force and leaving the exercise of the functions of lieutenant-governor to be subject to the orders of her Majesty. It is equally to be noticed that the powers of the governor, created by the Constitutional Act of 1791, are not only not repealed, but, on the contrary, are re-enacted in the Union Act of 1840; and for further security, the latter law has a special provision that the powers conferred upon the governors by the old constitution are continued by the new.

Let me, however, continue the enumeration of the powers of a lieutenant-governor under the federal constitution. He forms, as we have already seen, the first branch of the legislature (sec. 71). In *Quebec* he appoints by instrument under the great seal the legislative councillors, *in the name of the Queen*, and not in

that of the Governor-General (a provision re-enacted from the preceding constitutions of 1791 and 1840. If a vacancy in the legislative council of *Quebec* should occur, by resignation or otherwise, the lieutenant-governor, in the name of her Majesty, fills the vacancy, by appointing a new legislative councillor (sec. 75). He appoints the speaker of the legislative council of *Quebec* (sec. 77). It is not here stated that it is in the name of her Majesty, but was not that omitted to avoid a pleonasm? He fixes the time for the elections and causes the writs to be issued (secs. 84 and 89). No appropriation of the public revenues or taxes can be made by the legislature, unless previously recommended by the lieutenant-governor (secs. 54 and 90.)

Are not these functions of the lieutenant-governors royal functions, which the sovereign, as chief executive magistrate of the nation, as the first branch of parliament, exercises in *England*, and which none other than her representative can exercise in a colony? These functions are numerous, as we have just seen, but were they only to include two of the powers explicitly granted by the Federal Union Act, the appointment of legislative councillors in the name of the Queen (sec. 72), and the convening of the legislature in the same name (sec. 82), this double prerogative affords, beyond doubt, the proof that he is the mandatary of the sovereign. In fact, he acts directly in the name of the Queen in the exercise of these two powers, and not in that of the Governor-General: the choice of councillors no more rests with the Governor-General than that of any other provincial appointment, and to the Queen alone belongs the power of convening any legislature in her empire, from the Imperial Parliament to the legislative body of the humblest colony, since this convening is a prerogative of the executive, residing solely in the sovereign and in the colonies exercised through the governors.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

It is evident that, both from the legislative and executive point of view, the royal prerogatives—which in *England* are not the personal appanage of the sovereign, but are the property of the people, and which the sovereign holds in trust to exercise them in the interests of the British nation—are equally exercised in the provinces by the Queen, not more however to her personal profit than in the mother country, but for the people of the provinces, with respect to whom these prerogatives have not lost their character of a trust; and that not being able to exercise them herself she has delegated their exercise to the lieutenant-governors who are her mandataries.

I now come to the objection that the legislatures are not called parliaments.

What is a parliament? A parliament is "a meeting or assembly of persons for conference or deliberation." In its judicial sense the word has only the value given it by the custom of different countries, and it has no accepted determined meaning, to signify the powers belonging to one or more legislative assemblies.

In the old provinces which now form the Canadian confederation, the provincial legislatures were indifferently called parliaments or legislatures. It was held that they were *mutatis mutandis* clothed with the same power as the British parliament, and (until the Union Act of 1840, which conferred upon the legislative assembly the absolute right of electing the speaker) when the latter claimed from the governor or lieutenant-governor the confirmation of his election, he claimed the parliamentary privileges which are recognized in the English parliament.

The name of "parliament" was given to the legislatures of the old provinces in a host of official, parliamentary and legislative documents; even in acts of the British parliament itself. The word "parliament,"

as a synonym of "legislature," was so familiar under the old system, that the resolutions of the *Quebec* conference make use of both terms jointly to signify the legislative body of the confederation. "There shall be a general legislature or parliament for the federated provinces, composed of a legislative council and a house of commons," says the 6th of these resolutions. The 41st says: "The local government and legislature of each province shall be constructed in such manner as the existing legislature of each shall think fit."

The control which *England*, in theory, possesses over the colonies, exercised in legislating for them or in repealing their legislation, is an act of legislative power, that is to say, of parliament, whilst the *veto* or disallowance of the laws is an act of executive power, that is to say, of the soverign acting with the advice of his council; and it is the same with the disallowance by the Governor-General of provincial laws. This disallowance, which is only a prohibition from carrying into execution a colonial law, that might trench upon Imperial prerogatives or give rise to serious conflict between the rights of the empire and those of the colonies, has always been and still is considered in *England*, not as an act of legislation, but of executive authority.

For the same reason, of avoiding encroachment by local legislation upon imperial interests and federal legislation, and conflicts between both legislations, and to facilitate this double supervision, which is better exercised upon the spot than in *England*, the federal Union Act placed this right of *veto* in the hands of the Governor-General; but it is not as a branch of the parliament and as administering legislative authority that he exercises such right, but as representing the executive authority of the confederation; and in the exercise of this authority he acts upon the advice of his council, who are responsible for such, as for all other advice.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Nothing in the federal union act rebuts the assertion that the confederated provinces are identically the old provinces, with the exception, however, of the provinces of *Quebec* and *Ontario*, divided into two as they were before the union act of 1840, under the constitutional act of 1791.

I will now shew that this Union Act itself, in express terms, establishes this proposition. The preamble states: "Whereas the provinces of *Canada*, *Nova Scotia* and *New Brunswick* have expressed their desire to be federally united into one dominion, (section 3) it shall be lawful for the Queen.....to declare.....that.....the provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, shall form and be one dominion under the name of *Canada*. (Section 5.) *Canada* shall be divided into four provinces, named *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*."

And the act continues thus to speak of the provinces, whose existence, as old provinces, it recognizes, without saying a word of the creation of new provinces. We have just seen that the legislatures are composed of the Queen, represented by the lieutenant-governor, and, for *Quebec*, of the legislative council and legislative assembly; that the executive power resides in the person of the lieutenant-governor, as representing the sovereign, and that the organization of powers is the old provincial organization, notwithstanding the disallowance of the bills of the legislature by the Governor-General and the appointment and removal of lieutenant-governors by that officer. This organization of powers would alone be sufficient to shew that the constitution of the provinces remained identically the same, but the constitutional act goes further and completes this proof, by declaring (section 88) that "the constitution of the legislature of each of the provinces of *Nova Scotia* and *New Brunswick* shall continue as it exists at the union."

The Union Act further contains provisions respecting the constitution of *Quebec* and *Ontario*, only because of the dis-union and the inequality of the provincial representation of these provinces.

The third paragraph of the preamble of the union act, which states: "It is expedient, not only that the constitution of the legislative authority in the dominion be provided for, but also that the nature of the executive government therein be declared," and which does not extend this provision to the provinces, corroborates this assertion. It was decided at the *Quebec* conference (Art 41) that: "The local government and legislature of each province shall be constructed in such manner as the existing legislature of each such province shall provide."

I have stated that the powers of the provinces could not be taken from them, except by the constitution or by the abandonment made by them. It is one of the points of the doctrine hostile to local powers, that in entering into confederation, the provinces returned to the Imperial government all the rights theretofore possessed by them, as well as all their property, so that a new distribution thereof might be made between them and the federal government.

This doctrine is contrary to all the political events, which preceded, accompanied and followed confederation; it is altogether improbable and we must say is regugnant to common sense. Why should the province of *Quebec*, for example, have, abandoned its rights, the most sacred, guaranteed by treaties and preserved by secular contests, and sacrificed its language, its institutions and its laws, to enter into an insane union, which, contracted under these conditions, would have been the cause of its national and political annihilation? And why should the other provinces, any more than *Quebec*,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

have consented to lose their national existence and consummate this political suicide?

This principle, that the provinces retained their old powers when they entered confederation, and have, under confederation, continued to be governed by their former constitution, was judicially consecrated by the court of appeal in the Tanneries case. At least the majority of the court decided in that sense, and especially the opinions of Chief Justice *Dorion* and of Judge *Sanborn*.

The general government can have only those powers which are conferred upon it by the confederated provinces. This government is essentially the creation of those provinces, as an ordinary partnership is the work of the partners. In the absence of contrary provisions, the particular governments are managed by the organic rules which constituted them before forming the confederation, and preserve all the powers which belonged to them, if they do not delegate a part to the central government. In the case of the Canadian confederation, the provinces did not attribute to the federal government powers of a different nature from those that each before possessed. They delegated to it a portion only of their local powers to form a central power, that is to say, they allowed it the management of their affairs of a general character, but retained their own government for their local affairs. It was a concession of existing powers that was made to it and not a distribution of new powers. The powers of the central government came from the provinces, as those of an ordinary partnership come from the partners; to invert the order and state that the powers of the provinces come from the central government, would be to reverse the natural order of things, place the effect where the cause should be, and have the cause governed by the effect.

I have said that if there is relative inferiority and

superiority between the federal government and the provincial governments, such inferiority is to be found with the federal government, and the superiority with the governments of the provinces. But it is not necessary to make this comparison in order to establish their respective competence; let us rather say that there is equality between them, or rather a similarity of powers, and that each of the two powers is sovereign within its respective sphere. *Blackstone* says: "by sovereign power is meant the making of laws, for wheresoever that power resides all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on." According to this principle, whatever may be the respective importance of the powers conferred upon each of the governments in the exercise of their powers, each having an independent authority is equal in authority.

In the *United States* the central power is subordinate to the government of the states; it is from the states that congress draws its authority, and all powers not conferred by the constitution upon congress, belong to the states. Canadian federalists wish to lay down this principle of the constitution of the *United States* as special and exceptional, contrary to the principles of all other confederations and notably to that of the Canadian confederation. We maintain, on the contrary, that this superiority of the states over congress is a general principle, and is derived from the nature of confederations themselves; that the same principle prevails in the Helvetian and Germanic confederation, and in all other possible confederations; that it is of the essence of the federal system; that the central government has only those powers which are conferred on it by the states, and the latter retain the remainder, for the very simple reason that the central government is the creation of the several governments that have given it the form and

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the totality of powers which they deemed suitable, and no more.

But, once more, this does not give rise to relative authority, since each of the governments remains absolute master and independent of the other within its sphere of authority. It is legislative equality for the Canadian confederation.

Starting from the preconceived idea that the provinces are subordinate to the federal parliament, an application of this principle has been sought in the distribution of powers, made by sections 91 and 92 of the Confederation Act, in the text of these articles.

The dominant idea of these two sections is to attribute the power of legislating upon matters of general interest to the parliament of *Canada*, and the power over matters of local interest to the provinces. It is only when two countries join together and submit to a general government, while preserving their local government, that the powers attributed to the central government become general, and those reserved to the individual governments remain local.

Outside of this granting or concession, altogether arbitrary or conventional, there cannot be a general rule to establish the line of demarcation between these general and local powers. Thus in stating that all matters of a general character, not reserved for the provinces, belong to parliament, and those of a local nature, not assigned to parliament, should belong to the legislatures, the draft of the Confederation Act stated nothing, or only repeated that which had been declared in the distribution of the special subjects assigned to each of the legislatures by the remainder of article 29 and by article 43. As these articles, dealing with particular powers, might have omitted a large number, and as the working of the governments might be impeded by these omissions, the authors of the federal Union Act, who

gave the finishing touch to the draft in *England*, felt that, to remedy this serious inconvenience, it was necessary to establish another line of demarcation and another rule of competence, by means of which they remedied this omission by having those omitted cases entered in one or the other category of powers; and, to attain this end, they amended the draft in the manner shown by sections 91 and 92.

Let us consider the effect of these amendments. Section 91 of the federal Union Act states: that it shall be lawful for parliament to make laws in relation to all matters not coming within the classes of subjects assigned to the legislatures. These subjects being those specially enumerated in section 92, and followed by a distribution of all matters of a merely local or private nature in the province, it follows that this limitation of their local or private matters, was taken for the general line of demarcation between the powers, that their local or private matters, including those specially enumerated in section 92, remained within the competence of the local powers; and the rest of the powers necessary for the peace, order and good government of *Canada*, with those specially set forth in section 91, were attributed to the powers of parliament, and must have been considered as general powers.

But, as these latter powers specially assigned to parliament by section 91, were powers withdrawn from the provinces, and before confederation were local powers, to remove doubts upon the conventional nature of these powers declared to be general, section 91 adds: "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" [that is to say, to prevent those omitted powers from being considered otherwise than as powers of the federal parliament] "it is hereby declared that (notwithstanding anything in this act) the exclusive authority of the parlia-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

ment of *Canada* extends to all matters coming within the classes of subjects," etc.

The rule of distribution of federal powers then is, that all which is not local and, as such, does not belong to the government of the provinces, belongs (including the powers enumerated in section 91, which will always be considered as general powers) to parliament.

Sections 91 and 92 might, perhaps, as well have been couched in the following terms: "The competence with respect to matters of a local or private nature, including the powers specially enumerated in section 92, which shall always be considered as local powers, shall belong to the legislatures, and the remainder of the legislative powers necessary for the peace, order and good government of *Canada*, including the special powers enumerated in section 91, shall be considered as general powers and shall belong to parliament."

It was also to avoid confusion and doubt as to the concession to parliament of competence in these matters, that section 91 added: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

I cannot overlook the difficulties in interpretation occasioned by a phraseology so intricate and so confused, and in order to understand it better, we might again further alter the wording of these articles, which might be summed up as follows: "With the exception of the matters enumerated in section 92 and of all which are of a local or private nature, which shall be within the competence of the provinces, parliament shall have power to make laws necessary for the good

government of *Canada*, upon all other matters, including those enumerated in section 91."

In taking this rule for a guide, let us see what would be the natural and logical process to practically establish the line of demarcation between the two powers.

If the 16th paragraph of section 92, granting to the provinces legislative power over matters of a local and private nature, had not been joined to the fifteen other paragraphs, a rule of easy application would have presented itself. The competence of the provinces would be limited to particular matters or to a particular class of laws, the remainder would belong to the federal parliament, and it might, in that case, have been truly said, that all powers not delegated to the legislatures belong to parliament. The competence of the provinces would have been special, and that of parliament general. But it was not so, and the law has granted to the provinces power over all local matters, in addition to those specially enumerated in the paragraphs preceding paragraph 16. It follows that the concession to the provinces was general, for the aggregate of local and private laws constitutes a generality.

I have stated that each of the provinces was clothed with all the powers conferred upon the two legislatures, the powers conferred upon parliament were withdrawn from the provinces. All the powers of the provinces, I also stated, were powers of a local order, that which remained retained its nature and that which was withdrawn to be attributed to parliament was only by a fiction called general, being in reality a particular competence. As a general rule, then, all powers belong to the provinces and the powers of parliament belong to it only as an exception; the powers of parliament come from the provinces, which are the source of all legislative authority in the confederation, and the legislative power of parliament is only a residue of the

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

provincial legislative power. In this order of ideas, it should be said that all power which is not federal has remained provincial. To ascertain the nature of any power whatever, it is necessary, then, to examine all classes of local subjects, and it is only when this power does not enter into one of these classes and when it interests all the provinces, that this power is a federal power. If it interests only one or more of the provinces, without interesting all, it remains within the provincial sphere.

Again, the provincial competence constitutes the rule, the federal the exception.

This conclusion is in accordance with the spirit of legislation, and with the practical end which the authors of confederation had in view.

At the outset of confederation no person had any idea of forming a political association; it was rather a commercial league of the nature of the Hanseatic league or the German Zollverein, than a confederation of the nature of the Germanic or Helvetian confederation, which the provinces wished to form between themselves. This view results from historical documents and the debates in the provincial legislatures upon the subject of the resolutions of the conference. It was only gradually and later on that the basis of their association was enlarged and the circle of their common interests extended to form a general government.

Whatever may have originally been the importance more or less great of their general relations, the idea that prevailed was to have the interests common to all the provinces managed by the general government and to leave the provinces in possession of their particular government for the internal management of their private interests.

Starting from this idea, upon any given point, the object of any inquiry as to the competence of either

power must be to ascertain whether the subject upon which legislation is sought affects only one or more of the provinces or all of them. If this object comes directly and specifically within the sphere of one of the two powers, as marked out by sections 91 and 92, there is no doubt that it must be attributed to the power which was specifically clothed with such competence. Thus, for example, if the object has anything to do with the postal service or the defence of the country, it would be federal; if with the civil law or the administration of justice, it would be provincial; but if it does not fall within the special attributes of any of these powers, that is to say, within any of the 29 paragraphs of section 91 and the 15 paragraphs of section 92 or what may be inferred from them, then under the general provisions of paragraph 16, it must first be ascertained whether it is local, and for this the subject matter of the two sections and the general spirit of legislation must be inquired into. If this subject affects only one or more provinces, as has been stated, it must be left to be disposed of by the legislatures; if it affects all the provinces, it is within the competence of parliament, and in doubtful cases, as that only which is federal belongs to parliament, and the rest should belong to the provinces which must have originally controlled and now control all which is not federal, such subject would be treated as local. In a word, in cases of doubt the doubt is decided in favour of the provinces, which are the source of all the powers.

It does not always happen, however, that legislation takes such a decisive character; there are hosts of subjects which affect both general interests and the particular interests of the provinces, and it is upon this frequent division of interests, that the federalists have based their argument in favour of the federal parliament. They say, in cases of doubt, only those matters

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

that are *purely* local, and within the terms of paragraph 16 of section 92 are of provincial competence and the rest is federal. But this reasoning is evidently based upon false conceptions of legislative principles; for, in legislation all the powers are divisible in the same way as the subject upon which they are exercised. If a law, clearly federal, affects a local interest, this interest is withdrawn from the jurisdiction of parliament, however unimportant such interest may be, as compared to the general object of the law, and *vice versa* for the province. For instance, let us suppose a commercial law; if this law affects solely the interprovincial interests of commerce, it belongs to parliament, in the same manner as if it affected only the civil interests arising from commercial relations, it would belong to the provinces, but if it affected both the interprovincial interests and private relations, giving rise to civil interests between traders, it would belong, for its interprovincial portion, to parliament, and for its local portion to the provinces. To ignore this distinction and say, that in cases omitted, or in the cases provided for, only matters of a *purely* local nature are within the competence of the provinces, and that all mixed legislation belongs to parliament, is to set up a principle contrary to daily legislative experience, for there is not in legislation any subject purely general or purely local and private. This would be to invade the rights of the provinces. Paragraph 16, in qualifying as *merely* local the matters reserved to the provinces, made use of a word that was void of meaning and altogether inapplicable. The end of section 91 had first simply called these same subjects local and private; this corroborates the argument that the adverb *merely* which precedes them in paragraph 16 of section 92 has no value.

I have spoken of subjects that might be within the competence of both powers, on account of their double

nature, general and local, in connection with the omitted cases in sections 91 and 92. In addition, there exists, for some of the subjects enumerated in those sections, a concurrent jurisdiction growing out of the very attribution of power which gave rise to them.

Thus, paragraph 3 of section 91 gives as within federal jurisdiction "any mode of taxation," and paragraph 2 of section 92, leaves to the provinces "direct taxation within the province in order to the raising of a revenue for provincial purposes." Respecting direct taxation allowed to both powers, and in all cases in which their competence is manifest by the law, there is no necessity for interpretation and consequently no doubt, the benefit whereof should be accorded to the provinces against the federal power.

Section 95 again gives to the provinces and to the parliament concurrent power to make laws in relation to agriculture and immigration, to the former in each province, and to the latter for all the provinces; but it is enacted that the law of the province shall, in case of repugnance to the federal law, yield to that law and have no effect. Here again it is evident that interpretation is not required, the superiority of the federal law being declared.

Let us pass now to the powers of the provinces respecting public property.

According to the organic principles of confederation, there is a connection between the legislative powers and the right of property. The provinces entered into the federal compact with the entirety of their public property, as they entered into it with the entirety of their political rights and legislative powers. All public property, which was not granted to the federal government, remained with the provinces. In addition to the property, which is disposed of between the federal government and the local government by the act itself,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

section 117 states, "the several provinces shall retain all their respective public property, not otherwise disposed of in this act," a provision that shews, that the provinces, in entering the union, had not abandoned their rights of property any more than they had abandoned their legislative powers; but that they had retained all that they had not resigned to the federal government. They also each have their separate budget, and section 126 enacts that the duties and revenues over which the respective legislatures of Canada "had before the union, power of appropriation, as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province," and section 109 in addition to these provisions adds, "all lands, mines, minerals and royalties, belonging to the several provnces 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."

It is objected, that the provinces have not, as the federal power, a civil list, but this is an error. Out of the consolidated fund, established by section 126, a certain sum is set apart to defray the civil expenditure of the province, and if it is objected that the province has no civil list, as was done by a judge in the question of an escheat mooted between the federal attorney-general and the attorney-general of *Quebec*, that the civil list is granted to the sovereign in *England* for her personal expenses and that ours does not contain a similar grant, inasmuch as the province does not defray the salary of the representative of royalty, we would answer

that if we do not give a grant to the sovereign, we pay the officers of the civil government, and that it is from this application of the public funds that the civil list gets its name. Some French writers even think anomalous the English practice, which calls the civil list the grant to a sovereign who does not pay the civil expenses of his government, expenses that are paid by the state. As with finances so with respect to legislation and government, the provinces then are, with the exception of the cases provided for, and which we have enumerated above, independent of the federal government and in the sphere of their property, rights and powers, they are on an equality with it. If it were not that the Imperial sovereignty over-rides all our public organization we would say that they are sovereign in this sphere, as it is in its sphere.

RITCHIE, C. J.:—

This is an action brought by the Attorney General for the province of *Ontario* to recover from the defendants the possession of a certain parcel or tract of land in the city of *Toronto* and county of *York*, in the province of *Ontario*, being part of the real estate of one *Andrew Mercer*, late of the said city of *Toronto*, issuer of marriage licenses, who died intestate, and without leaving any heirs or next of kin, on the thirteenth June, 1871, and whose real estate, it is alleged, escheated to the Crown for the benefit of the province of *Ontario*. The said *Andrew Mercer*, at the time of his death, was seized in fee simple in possession of the parcel of land in question.

The action was commenced in the Court of Chancery for *Ontario* by the filing of an information on the 28th day of September, A. D. 1878.

The defendant, *Andrew F. Mercer*, demurred to the said information for want of equity.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

On the 7th day of January, 1879, the Vice-Chancellor made an order overruling the said demurrer.

From this decision the said defendant, *Andrew F. Mercer*, appealed to the Court of Appeal and the appeal was argued on the 23rd day of May, A. D. 1879; and on the 27th day of March, 1880, the said Court of Appeal affirmed the order overruling the demurrer and dismissed the appeal with costs.

Against this last mentioned judgment and order of the Court of Appeal the defendant, *Andrew F. Mercer*, now appeals to the Supreme Court of *Canada*. The parties agree that the appeal shall be limited to the broad question as to whether the government of *Canada* or of the province is entitled to estates escheated to the Crown for want of heirs.

We have therefore nothing whatever to do with any other question than simply to determine to which government escheated estates belong.

The determination of this question depends upon the construction of the *B. N. A. Act.*

Before, however, referring to that Act, to enable us the better to understand its provisions and to arrive at a correct conclusion as to the intention of the Parliament of *Great Britain* in reference to this matter, it may be well to see what the state of the law was in regard to escheated estates, and how such estates were dealt with in the provinces at the time this Act passed.

With respect, then, to the law of escheat, the doctrine is unquestionably founded on the principles of the feudal system, and is not to be confounded with forfeitures of land to the Crown, from which it essentially differs. Mr. *Chitty*, in his prerogatives of the Crown (1), observing on this difference, says:

For forfeitures were used and inflicted as punishments by the old Saxon law without the least relation to the feudal system, and they differ in other material respects.

(1) P. 230.

And therefore, he says:

Escheats revert * * * to the lord of the fee who is almost universally the king. In the cases of attainder of high treason, the superior law of forfeiture intervenes and renders the doctrine of escheat irrelevant, for by such attainder lands of inheritance, though holden of another lord, are forfeited to the Crown.

And Chancellor *Kent* says of Title by forfeiture:

The English writers carefully distinguish between escheat to the Chief Lord of the fee and forfeiture to the Crown. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy.

It is clear that the law of escheat is an incident of tenure by which for failure of heirs the feud falls back into the lord's hand by a termination of the tenure, and therefore it is said that all lands and tenements held in socage, whether of the king or of a subject, are liable to the law of escheat, and no species of property which does not lie in tenure is subject to escheat, and so Mr. *Chitty* (1) says:

His Majesty's right of escheat stands on the same ground as every other legal right, it arises out of the seizen, and is, in general, governed by the same rules as govern escheats to the subject.

And Chancellor *Kent* thus speaks of title by escheat (2):

This title, in the English law, was one of the fruits and consequences of feudal tenure. When the blood of the last person seized became extinct and the title of the tenant in fee failed for want of heirs or by some other means, the land resulted back or reverted to the original grantor or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats under the English law are declared to be strictly feudal and to import the extinction of tenure.

And so it is said:

The lord on the escheat takes the estate by a title paramount to the tenant since he is in of an estate out of which the tenant's interest was originally derived or carved, and it is said to be "a mixed title being neither a pure purchase nor a pure descent, but in some measure compounded of both," and that it differs from a forfeiture in that the latter is for a crime personal to the offender of

(1) On Prerogatives, p. 233. (2) Kent's Commentaries, 423.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

which the crown is entitled to take advantage by virtue of its prerogative, while an escheat results from the tenure only, "and arises from an obstruction in the course of descent." It originated in feudalism and respects the intestate's succession.

And Mr. *Adams*, says:

Escheat is merely an incident of tenure arising out of the feudal system whereby the escheated estate on the death without heirs of the person last seized escheats to the lord as reverting to the original grantor, there being no longer a tenant to perform the services incidental to the tenure. It is therefore inapplicable to estates which do not lie in tenure.

And this right of escheat is treated of as a reversion. In *Cruise's* Digest it is said:

Escheat is a casual profit which happens to the lord by chance, and unlooked for; an escheat is therefore in fact a species of reversion, and is so called and treated by *Bracton*; and when a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres*.

And in *Burgess* v. *Wheat* (1), it is said:

An escheat was in its nature feudal, and in default of heirs the land, strictly speaking, revested, and the legal right of escheat with us arises from the law of enfeofment to the tenant and his heirs, and then it returned to the lord if the tenant died without heirs. * * *

And again:

It reverts by operation of law on extinguishment of an estate that was a fee simple incapable of any further limitations. * * * The right comes as a reversion failing heirs.

And in a note to *Middleton* v. *Spencer* (2), by Mr. *Eden*, he says:

In *Burgess* v. *Wheat* it was a question of tenure, the claim of the Crown having been admitted on all sides to be seignorial and not prerogatival.

If, then, this is a reversionary interest, we all know that reversion is defined by Lord *Coke* to be the returning of the land to the grantor or his heirs after the grant is determined.

(1) 1 Wm. Bl. 175. (2) Br. Ch. C. 205.

In another place Lord *Coke* describes a reversion to be :—

Where the residue of the estate always continues in him who made the particular estate.

The idea of a reversion is founded on the principle that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him, and the possession of it reverts or returns to him upon the determination of the preceding estate.

Hence Lord *Coke* says :—

The law termeth a reversion to be expectant on the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate doth expect or look for to enjoy the lands or tenements again.

And Chancellor *Kent* thus defines a reversion :—

A reversion is the return of land to the grantor and his heirs after the grant is over, or according to the formal definition in the *New York* Revised Statutes, it is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. It necessarily assumes that the original owner has not parted with his whole estate or interest in the land. * * * The usual incidents to the reversion under the English law are fealty and rent.

In *Bunter* v. *Coke* (1) before the passing of the statute making wills speak from the death of the party, it was held that "a devise of lands is not good if the testator had nothing in them at the time of the making his will, for a man cannot give that which he has not, and the statute only empowers men *having* lands to devise them, so that if the devisor has not the lands, he is out of the statute"; citing *Co. Lit.* 392. It was admitted "that, if one has a manor and devises it and after a tenancy escheat, that shall pass by the devise as being part of the manor."

(1) 1 Salkeld 237.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

This being the doctrine and law of escheat, the Crown before confederation surrendered to the respective provinces the management, control, and disposal of the Crown estate, and the casual and territorial revenues of the Crown deriveable therefrom; in other words, the Crown surrendered its rights in the public domain and practically placed the provinces in the same position in reference thereto that the Crown itself held.

Our attention has been called, by the learned counsel in his contention for the claims of the Dominion, to the law passed in the province of *New Brunswick*, as illustrative of what the Crown intended to part with in reference to all the provinces. This Act, as I stated on the argument, was prepared in *England*. It was transmitted by Lord *Glenelg*, the then Colonial Secretary, in a despatch dated 31st October, 1836, to the Lieut. Governor Sir *A. Campbell*, in which he says:—

SIR,—In my despatch of the 10th September, I apprised you that I was engaged in correspondence with Messrs. *Crane* and *Wilmot*, [then delegates from the H. of As., of *N.B.*,] on the provisions of the Act for securing the Civil List which it is proposed to grant to His Majesty in *New Brunswick*.

I now enclose for your information, a copy of that bill, which has been prepared in concurrence with the Lords Commissioners of His Majesty's treasury. It is compiled from the corresponding Acts of Parliament which apply to the grant of the Civil List in this country, with no other changes than such as unavoidably grow out of the different circumstances of the two cases.

This Act was subsequently made perpetual, and is to be found in the Consolidated Statutes of *New Brunswick*, 1877, Title 3, ch. 5, and by which it is enacted that—

Section 1. The proceeds of all Her Majesty's hereditary, territorial and casual revenues, and of all sales and leases of Crown lands, woods, mines and royalties, now and hereafter to be collected, having been surrendered by the Crown, shall, with the exceptions hereinafter provided, be payable and paid to the provincial treasurer for the use of the province.

Section 2. Provides for the payment to Her Majesty of the clear yearly sum of £14,500 out of the above and other revenues of the province, with preference to all other charges or payments.

Section 3. All monies paid to the treasurer under this chapter, except the said fourteen thousand five hundred pounds, shall form part of the general revenues, and be appropriated as such.

Section 4. The Governor in Council may expend out of such revenues such sums of money necessary for the collection, &c., thereof.

Section 5. The Governor shall within 14 days from the opening of every session of the legislature lay before the assembly a detailed account for the previous year of the income and expenditure relating to the said revenue, &c.

Section 6. All grants, leases, &c., by this chapter declared to be under the control of the legislature, unless made upon sale or lease to the highest bidder at public auction after due notice in the *Royal Gazette*, and the consideration thereof made payable to Her Majesty.

Section 7. Nothing in this chapter shall impair or affect any powers of control, management or direction, which have been or may be exercised by the crown, or by other lawful warrant, relative to any proceedings for the recovery of any such revenues, or to compensation made or to be made on account of any of the same, or to any remission, mitigation or pardon of any penalties, fines or forfeitures, incurred or to be incurred, or to any other lawful act, matter or thing which has been or may be done touching the said revenues, or to disable Her Majesty from making any grant or restitution of any estate, or of the produce thereof, to which Her Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or of the same having been purchased by or for the use of an alien, or to make any grant or distribution of any personal property devolved on the Crown for the want of next of kin or personal representatives of any deceased person; but such rights and powers shall continue to be exercised and enjoyed in as ample a manner as if this chapter had not been made, and as the same have or might have been heretofore enjoyed by the Crown; but the moneys arising from the full exercise and enjoyment of the rights and powers aforesaid, shall be a part of the joint revenues at the disposal of the General Assembly, subject to the restrictions hereinafter provided.

Section 8. Nothing in this Act shall annul or prejudice any sale, or purchase, so made before the 17th July, 1837, but the same shall remain good and valid.

This Act, cited with so much confidence by Mr. *Me-*

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

Dougall as supporting the claims of the Dominion, very clearly establishes that the lands and casual and territorial revenues surrendered to the province were to be sold by auction, and that escheated lands might be granted or the proceeds distributed by the Crown, that is by the executive government of the province representing the crown without the interference of the local legislature; and in the province of *New Brunswick* anterior to confederation (and I have been at a loss to discover that it was different in the other provinces) the exercise of that right, prerogative, or seignorial, as you may choose to call it, was exercised there up to and at the time of confederation by the provincial executive. I may cite the case of the estate of *John E. Woolford*, who died in 1866 and on whose estate for want of heirs administration was granted to a nominee of the crown, and which estate, real and personal, has been dealt with by the Governor in Council; and prior to 1866 I may mention the case of the estate of one *Nichols*, which was dealt with by order of the Governor in Council in *New Brunswick*; for as Mr. *May*, in his constitutional history of *England* (1), says, in reference to the concession of responsible government to the colonies:—

> At last she (*England*) gave freedom and found national sympathy and contentment. * * * Patronage has been surrendered, *the disposal of public lands waived by the Crown*, and political dominion virtually renounced. In short their dependence has become little more than nominal except for purposes of military defence.

This transfer and surrender, as is well known, was much opposed in *New Brunswick* by the then Lieut. Governor and his Council; and though the House of Assembly and Legislative Council passed the bill when first presented to it, the Lieut. Governor refused his assent, whereupon he was recalled, or resigned, and another Governor was sent with instructions to imme-

(1) 2 Vol. p. 539.

diately call the Assembly together that the bill might be again submitted to the local legislature, which was done and the bill passed. Extracts from Lord *Glenelg's* despatch dated 6th April, 1837, will show how this Act was viewed by the Imperial authorities at the time.

Extract from despatch dated 6th April, 1837, from Lord *Glenelg* to Major Gen. Sir *John Harvey*:—

Fourthly. A further question of great importance having been noticed in Mr. *Street's* (1) letter of the 23rd March must not be passed over in silence. That gentleman suggests that it is not competent to the King, with the advice and consent of the Legislative Council and Assembly of *New Brunswick*, to alienate the hereditary revenues of the Crown in such a manner as to bind His Majesty's royal successors. On this topic I limit myself to a general statement, declining as unnecessary, and therefore as unadvisable, the discussion of the wide constitutional principles involved in this inquiry. On careful reflection I am convinced that Mr. *Street's* opinion is not well founded. I do not think that the cession which during the last century it has been customary to make to Parliament of the hereditary revenue of the Crown for the life of the reigning sovereign only is to be understood as an affirmation of the maxim that the king, lords and commons of *Great Britain* and *Ireland* are incompetent to conclude a permanent settlement of the question. That the existing practice is founded on the highest grounds of expediency is indeed indisputable, but I do not perceive that the motives which so urgently forbid a permanent alienation of the hereditary revenues of the Crown in this kingdom apply to the case of a British province on the *North American* continent. That such a cession may be rendered valid by an Act of the General Assembly, assented to by His Majesty, and that the enactment of such a colonial law may under some circumstances be judicious and expedient might readily be shown from a reference to our colonial history. I allude especially to the case of the Island of *Jamaica*. The objection, if well founded, would of course apply to a settlement for ten years, as distinctly as if it should be made in perpetuity. Understanding that Messrs. *Crane* and *Wilmot* [delegates from the House of Assembly] and Mr. *Street* concur in thinking that it would be expedient that the civil list should be permanently settled, I have His Majesty's commands to acquaint you

(1) Mr. Street was then Solicitor General and was sent home to press the views of the Governor and his Council on the Colonial Secretary, in opposition to the House of Assembly.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

that, if such should be the opinion of the House of Assembly, you are at liberty to assent to the Civil List Bill with that alteration.

The whole history of this bill and the controversies in connection therewith will be found in the despatches, addresses and the proceedings in the journals of the local legislature of *New Brunswick*.

Before this surrender, though the title to the public domain was in the sovereign, and though the revenues derivable therefrom unquestionably formed a part of the territorial revenues of the Crown, there can, I think, be no doubt the practical constitutional principle acted on was, that these lands and the proceeds and revenues thereof, though beyond the control of the local legislature, were held and disposed of by the Crown for the benefit of the provinces in which they were situate; and all grants in connection therewith were issued by the Colonial executive in the name of the Crown, under the great seal of the provinces, and thus in *New Brunswick* at the time of the surrender there was, as will appear from the documents I have referred to, a surplus of £171,224 unexpended which was also surrendered, and in this connection in the same despatch Lord *Glenelg* says:—

Sixthly. Mr. *Street* has objected that any surplus funds which at the expiration of the term of ten years may remain in the public treasury, may at that period be claimed by the Assembly, although they would have placed at their disposal all the surplus which has been at present accumulated. I do not perceive the force of this objection. The existing accumulations are surrendered to the House cheerfully; not merely with contentment but with satisfaction. His Majesty can have no other interest in the matter, than that the funds should be expended in whatever manner may best advance the welfare of the province; and on that question His Majesty conceives that reliance may, with far greater safety, be placed on the judgment of the representatives of the people than on any other advice. The cession of the existing fund is, therefore, not regarded by the king in the light of a sacrifice, but rather in that of a direct advantage. If during the next ten years (supposing the civil list limited

to that time) any new accumulation should take place, it will constitute a saving effected by the frugality of the House of Assembly, to the benefit of which they will have the clearest title.

And to show how absolutely Crown rights were intended to be subjected to provincial control, we need only refer to Lord *Glenelg's* despatch of 29th April, 1837, in which he says "the cession is co-extensive with the powers of the Crown."

As this was the spirit and intention with respect to *New Brunswick*, it is not disputed that the Crown substantially dealt in a like liberal manner with the other provinces.

Thus we see, that at the time of the union the entire control, management, and disposition of the crown lands, and the proceeds of the provincial public domain and casual revenues, were confided to the executive administration of the provincial government as representing the Crown, and to the legislative action of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate, and therefore when property escheated it became re-invested in the Crown for the use and benefit of the province, and was treated and dealt with by the executive government and legislatures of the provinces as part of the public property of the province, and grantable by the Lieutenant Governor under the great seal of the province when the same should be disposed of by the provincial authorities in the interest of the province. Has then the *B. N. A. Act* altered this and deprived the provinces of the right to public property, which since confederation may escheat *propter defectum sanguinis*, and vested the same in the Dominion to form part of the consolidated fund of *Canada?*

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

In considering the bearing of the *B. N. A. Act* on this question, it is, in my opinion, necessary to examine and compare several of the provisions of the Act with a considerable degree of critical minuteness.

By section 9: The executive government and authority of and over *Canada* is declared to continue and be vested in the Queen.

By section 12:

All powers, authorities and functions which under any act of the parliament of *Great Britain*, or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada, Lower Canada, Canada, Nova Scotia* or *New Brunswick*, are at the union vested in or exercisable by the respective Governors or Lieutenant Governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall as far as the same continue in existence and capable of being exercised after the union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the advice, or with the advice and consent of, or in conjunction with, the Queen's Privy Council for *Canada*, or any members thereof, or by the Governor General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the parliament of *Canada*.

Section 63—Provides for the appointment of executive officers for *Ontario* and *Quebec*, necessitated no doubt by reason of the union of *Ontario* and *Quebec*, severed by the *British North America Act*, rendering a section similar to that relating to the executive government of *Nova Scotia* and *New Brunswick* inapplicable, viz.: section 64, which provides that "The constitution of the executive authority in each of the provinces of *Nova Scotia* and *New Brunswick* shall, subject to the provisions of this Act, continue as it exists at the union until altered under the authority of this Act," and this is again repeated in section 88.

And for the same reason it was necessary to declare the powers to be exercised by Lieutenant Governors of *Ontario* and *Quebec*, which is done by section 65, which is as follows:

All powers, authorities and functions which under any Act of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada*, *Lower Canada*, or *Canada*, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those provinces, with the advice or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the union in relation to the Government of *Ontario* and *Quebec* respectively, be vested in, and shall, or may be, exercised by the Lieutenant Governor of *Ontario* and *Quebec* respectively, with the advice, or with the advice and consent of or in conjunction with the respective executive councils or any members thereof, or by the Lieutenant Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*), to be abolished or altered by the respective legislatures of *Ontario* and *Quebec*.

And as to the provisions for the appointment of executive officers for *Ontario* and *Quebec* and declaring the powers and duties of such officers, and as to issuing proclamations before and after the union, we find by sec. 134 until the legislatures of *Ontario* and *Quebec* shall otherwise provide the Lieut. Governor of *Ontario* and *Quebec* may each appoint under the great seal of the province the following officers to hold office during pleasure, *inter alia*: the Attorney General, and in the case of *Quebec* the Attorney and Solicitor General; and by section 135 it is provided that—

Until the legislature of *Ontario* or *Quebec* otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General [and other officers named] by any law, statute, or ordinance of *Upper Canada*, *Lower Canada* or *Canada*, and not

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the discharge of the same, or any of them.

By sec. 136:

Until altered by the Lieutenant Governor in Council, the great seals of *Ontario* and *Quebec* respectively shall be the same, or of the same design, as those used in the provinces of *Upper Canada* and *Lower Canada* respectively, before their union as the province of *Canada*.

By sec. 139:

Any proclamation under the great seal of the province of *Canada* issued before the union to take effect at a time which is subsequent to the union, whether relating to that province or to *Upper Canada* or to *Lower Canada*, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the union had not been made.

And by sec. 140:

Any proclamation which is authorized by any act of the Legislature of the province of *Canada* to be issued under the great seal of the province of *Canada*, whether relating to that province or to *Upper Canada* or to *Lower Canada*, and which is not issued before the union, may be issued by the Lieutenant Governor of *Ontario* or of *Quebec*, as its subject-matter requires, under the great seal thereof; and from and after the issue of such proclamation, the same and the several matters and things therein proclaimed, shall be and continue of the like force and effect in *Ontario* or *Quebec* as if the union had not been made.

As the executive governments of *Nova Scotia* and *New Brunswick* were continued these provisions were not necessary as to those provinces, but these various enactments and the continuance of the executive governments of *Nova Scotia* and *New Brunswick* very clearly show that the provincial executive power and authority was to be precisely the same after as before confederation. That whatever executive powers could be exercised or administrative act done in relation to the Government of the provinces respectively by the Lieutenant Governor of a province before confederation can be

exercised or done by Lieutenant Governors since confederation, subject, of course, to the provisions of the Act, as is said, in reference to *Nova Scotia* and *New Brunswick*, and is expressed in reference to *Ontario* and *Quebec* "as far as the same are capable of being exercised after the Union." That is to say, that the executive government of the provinces, as exercised by the Lieutenant Governors and Executive Councils, until altered by the respective legislatures, continue as before confederation, except so far as the executive powers of the Governor General over the Dominion of *Canada* may interfere.

Therefore, when it is claimed that a Lieutenant Governor and Council are not competent to deal with a matter or do an executive administrative act that was within their competency before confederation, the burthen is cast on those putting forward such a claim to show clearly from the *B. N. A. Act* that by express language or by necessary implication the Local Governments have been denuded of that authority and the power has been placed in the executive authority of the Dominion. Special pains appear to me to have been taken to preserve the autonomy of the provinces, so far as it could be consistently with a federal union.

To say then that the Lieutenant Governors, because appointed by the Governor General, do not in any sense represent the Queen in the government of their provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant Governors did before confederation, in the performance of all executive or administrative acts now left to be performed by Lieutenant Governors in the provinces in the name of the Queen; and this is notably made apparent in section 82, which enacts that "the Lieutenant Governor of *Ontario* and *Quebec* shall from time to time, in the Queen's name, by instrument under the Great Seal of the province,

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

summon and call together the Legislative Assembly of the province,"—and with reference to which matter, nothing is said in respect to *Nova Scotia* and *New Brunswick*, the reason for which is obvious, the executive authority at confederation continuing to exist, the Lieutenant Governors of those provinces were clothed with authority to represent the Queen, and in Her name call together the legislatures—and also in the section retaining the use of the Great Seals, for the Great Seal is never attached to a document except to authenticate an act done in the Queen's name, such as proclamations summoning the legislatures, commissions appointing the high executive officers of the province, grants of the public lands, which grants are always issued in the name of the Queen, under the provincial Great Seals.

These being the direct enactments in the matter of the executive powers of the Dominion and the provinces respectively, it is well to look at the distribution of legislative powers; and as to all matters coming within the classes of subjects enumerated over which the exclusive legislative authority of the parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with provincial executive authority or property or its incidents, whereas, in the enumeration of the matters coming within the classes of subjects in relation to which the provincial legislatures may exclusively make laws, we find No. 1. "The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of Lieutenant Governor,"—and from this, I think a fair inference may be drawn, that as the Lieutenant Governor under certain circumstances and in certain matters having reference to provincial administration represents the Crown, the provincial legislatures are not permitted to interfere with this office,—No. 5. "The

management and sale of public lands belonging to the province, and of the timber and wood thereon,—No. 13. "Property and civil rights in the province," and No. 16. "Generally all matters of a merely local or private nature in the province." When we come to the clauses relating to "Revenue, debts, assets, taxation," we find, sec. 102, creation of a Consolidated Revenue fund :—

All duties and revenues over which the respective legislatures of *Canada, Nova Scotia* and *New Brunswick,* before and at the union, had and have power of appropriation except such portions thereof as are by this act *reserved to the respective legislatures of the provinces* or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund to be appropriated to the public service of *Canada* in the manner and subject to the charges in this act provided.

And as I understand the argument, the words "all duties and revenues" in this section are mainly, if not entirely, relied on as vesting in the Dominion the right to escheated estates.

In reading section 102 one cannot, in view of the argument which has been so strongly pressed upon us, but be struck with the clear indication that the words "all duties and revenues" are to be read in a limited sense and are not to apply to all revenues of every nature and description, because in the first place the words are confined to those "over which the respective legislatures of *Canada, Nova Scotia* and *New Brunswick,* before and at the time of the union had and have power of appropriation" and are expressly restricted by the exception of "such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act." This establishes, to my mind, in the most unequivocal manner, not only that the duties and revenues referred to were to be confined to those over which the legislatures had power of appro-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

priation, but that with equal clearness the parliament thereby recognized the existence of revenues other than those over which the legislature had the power of appropriation to which the words were not to apply, and also that of those revenues over which the provincial legislatures had power of appropriation there were reserved portions thereof to the respective legislatures of the provinces, and which by the express terms of the section are expressly excepted in like manner, as are those to be raised by the local legislature in accordance with the special powers conferred on them by the Act, and all doubt on this point is set at rest by the provision for the Provincial Consolidated Revenue Funds. In that section this excepted portion is thus dealt with:

Section 126. Such portions of the duties and revenues over which the respective legislatures of *Canada, Nova Scotia* and *New Brunswick* had before the union power of appropriation, as are by this Act reserved *to the respective governments* or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one Consolidated Revenue Fund to be appropriated for the public service of the province.

Here we see that while by sec. 102 the duties and revenues are confined to those over which the respective local legislatures had power of appropriation subject to the exception therein contained, this section 126 recognizes as having been reserved, not only duties and revenues *to the legislatures of the provinces*, but expressly speaks of duties and revenues *reserved to the respective governments* as well as *legislatures of the provinces*; and especially in view of the very strongly urged argument by Mr. *McDougall* that the revenues should be at the disposal of the Dominion Executive to be granted by the representative of the Crown to those having moral claims on the intestate, (in this case his illegitimate son) the last words of section 102 would seem to show that the revenues therein referred to are not revenues

that had been or were to be disposed of, because the language is "shall form one Consolidated Revenue Fund, *to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided;*" and as to the appropriation of this Dominion Consolidated Fund, after, by sections 103, 104 and 105, charging the same with the costs, &c., of collection, &c., the interests of the provincial public debts, &c., the salary of the Governor General, the appropriation from time to time is, by section 106, thus provided for, "Subject to the several payments by this Act charged on the Consolidated Revenue Fund of *Canada*, the same *shall be appropriated by the Parliament of Canada for the Public Service*," thereby ignoring any right in the Executive to deal with this fund in the manner the Crown dealt with the hereditary revenues of the Crown, or in any manner other than through the instrumentality of parliament, and therefore the provision would work in a manner the exact opposite of that for which Mr. *McDougall* contends; for if escheated estates are held to continue to form part of the provincial Public Property and to be dealt with after confederation as it was before, as the provincial Executives before confederation granted such estates like all other Public Lands without the intervention of the legislatures, they would still be in a position to do so and so to deal with equitable and moral claims as section 3 of the *New Brunswick* Act contemplates the Crown as represented by the provincial executive should do; but if these estates pass under the words duties and revenues, and are to form part of the Consolidated Revenue Fund of *Canada*, they are withdrawn from executive control and must be appropriated, as it is enacted the Consolidated Fund of *Canada* shall be by the parliament of *Canada*, for the public service of *Canada*. In looking through the Act we look in vain for any provincial revenues granted to the Domi-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

nion but those from which the revenues intended to be reserved to the provinces are expressly exempted, and tho' there are no duties or revenues in express specific terms reserved to the legislatures of the provinces of *Ontario* and *Quebec*, *Nova Scotia* and *New Brunswick*, nor to the provinces individually, if we exempt the lumber dues in *New Brunswick*, as by this Act it is clearly expressed that there were revenues intended to be and that are reserved to the provinces, the irresistible inference is that there must be revenues which arise from or are incident to or growing out of the property reserved to the provinces. If we refer to the provisions with reference to the distribution of provincial property, we find that as to the Dominion, by section 107, "all stocks, cash, banker's balances and securities for money belonging to each province at the time of the Union, except as in this Act mentioned, shall be the property of *Canada*, and shall be taken in reduction of the amount of the respective debts of the provinces at the Union," and by section 108 "The Public works and property of each province enumerated in the third schedule to this Act shall be the property of *Canada*."

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbors.
3. Lighthouses and Piers and *Sable Island*.
4. Steamboats, Dredges and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages and other debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of *Canada* appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing and Munitions of War, and lands set apart for general public purposes.

These are all the provisions to be found in reference to the vesting of provincial property in the Dominion. With respect to the provinces, section 117 provides that "The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of *Canada* to assume any lands or public property required for fortifications or for the defence of the country." Section 109 provides 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 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.

The executive and legislative powers of the Dominion are large, and so of necessity should be, and while it behoves all courts in the Dominion to recognize and give full force and effect to all executive and legislative acts within the scope of such powers, it is at the same time equally the duty of all courts, especially this appellate tribunal, to recognize and preserve to the executive governments and local legislatures of the provinces their just rights, whether political or proprietary, and not to permit the provinces to be deprived of their local and territorial rights on the plea that Lieutenant-Governors in no sense represent the crown, and therefore all seignorial or prerogative rights, or rights enforceable as seignorial or prerogative rights, of necessity belong to the Dominion.

While I do not think it can be for a moment contended that the Lieutenant-Governors under confederation represent the crown as the Lieutenant-Governors before confederation did, I think it must be conceded, that Lieutenant-Governors, since confederation, do

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

represent the crown, though doubtless in a modified manner.

In my opinion it was not intended by the *British North America Act* to deprive the provinces of the executive and legislative control over the public property of the province, or the incidents of such property, or other matters of a purely local nature, except such as are specifically taken from them, and that within the scope of the executive and legislative powers confided to the Dominion and provinces respectively they are separate and independent, neither having any right to interfere with or intrude on those of the other; and while I find a clear expressed intention of parliament to continue to the provinces all proprietary and territorial rights in all "their respective public properties" not specifically disposed of by the act which belonged to them at confederation, and which the term "public property," as used in the 117th section in connection with the other sections of the act to which I have referred; I think may be read as covering all proprietary rights and incidents of property of every nature and description, I can find no such clear indication of the intention of parliament to denude the provinces of those incidents in the nature of reversions pertaining to their proprietary rights in the public property, such as are escheats, and to transfer them to the Dominion government to be disposed of as part of the consolidated revenue of the Dominion by the parliament of the Dominion.

I cannot bring my mind to the conclusion that it was intended that the lands and their accessories or incidents should be separated and the lands should belong to the provinces and the reversionary or accessory interest to the Dominion; that though the Crown has surrendered all its rights in the property and the revenues derivable therefrom to the provinces, when the land es-

cheats for want of heirs, and the property reverts to the original grantor, it is not to revert to be held as it was at the time of the grant made for the benefit of the province, but for the benefit of the Dominion which never had any interest in the lands whatever; that while the provinces are to retain their public property and have the management and sale of the lands and of the timber and wood thereon, the public property and lands, reinvesting by reason of the want of heirs, should become the property of the Dominion, and so there should be, growing out of and resulting from the tenure of the public lands belonging to the provinces, public lands belonging to the Dominion and subject to its legislation.

I do not think, from a most careful consideration of the *British North America Act*, that it could have been the intention of parliament that while the public properties, and the revenues and proceeds from the disposition thereof, should be retained by the province, and they so continue to retain the position occupied by the surrender to them of the Crown rights, that on escheat, the escheated lands should not revert to the province, but instead thereof should belong to the Dominion, and so the management, control and disposition of what are commonly called the Crown Lands or Public Domain in the provinces consequently be divided, by the withdrawal of the escheated lands from the control of the government and legislation of the provinces and vested in the parliament of the Dominion. I find no expressions in the *British North America Act* that the Dominion were to be proprietors by virtue of the Act of any Crown lands in the provinces or any legislative power granted them to deal with any such lands, excepting always the properties specially named, such as beacons, lighthouses and *Sable Island*, lands reserved for the Indians and public works and property specifically enumerated in the third schedule, together

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

with such other provincial lands and public property as the Dominion may require and assume for fortifications or for the defence of the country.

The Crown having surrendered to the provinces the Crown lands and all casual and territorial revenues incident thereto, or growing thereout, the provinces, so far as the original ownership and beneficial interest in the lands and the incidents thereof is concerned, have by such surrender been placed in the position of the Crown, and therefore when lands granted cease to have any owner *propter defectum sanguinis*, or *propter delictum tenentis*, they revert to the Crown, the original grantor, but to be held as the property and for the benefit of the provinces.

This was so at confederation, the *B. N. A. Act* in no way changed the tenure by which these lands were held ; on the contrary, it was enacted the several provinces should retain their public property, and as a necessary consequence their incidents and reversionary interest therein. If the Crown has then surrendered the land and its reversionary interest therein to the provinces, as no interest in the land has been vested in the Dominion, it is difficult to understand how they could have a reversion in such lands ; in fact, it is a contradiction in terms to say that the lands never owned by the Dominion could revert to it by reason of a failure of heirs, or *propter delictum tenentis*, and surely nothing but the most unequivocal words could prevent the land from reverting to the original grantor to be held for the benefit of the province to whom the rights of the Crown, the original grantor, had been surrendered, in other words, to be placed in the same position and held by the Crown for the benefit of the province as if they never had been granted. When then the property reverts to the crown, I can discover nothing in this to change the purposes for which,

under the surrender by the Crown to the provinces, it was to be held by the Crown as represented by the Lieutenant Governor and the executive of the provinces respectively.

I think the terms "all duties and revenues" in the 102 section, under which it is claimed these escheated estates pass to the Dominion, refer to the ordinary duties and revenues such as customs, impost and excise, and the like, which were at the sole disposal of and subject to direct appropriation by the legislature, and not lands, which, by accident, fall to the lord, or those representing the lord, as is said by *Coke* (1), "the word 'escheat' *id est cadere*, *excidere* or *accidere* properly signifieth," in other words, not casual, accidental or extraordinary revenues which come in the shape of land, and which lands are managed and granted and disposed of by the executive without the intervention of the legislature, and under certain circumstances without even the proceeds being subject to legislative action, as in the case of lands donated to those who may by reason of connection with the deceased or other reasons have a special claim on the clemency and favor of the Crown represented by the provincial executive.

Very strong observations were made as to the manner in which the government of *Ontario* had dealt with a portion of this estate and would probably deal with that in controversy, if it was now decided that the disposition of the estate belonged to the provincial government. With considerations of this kind, we have clearly nothing to do. Though very pointedly and earnestly put forward by Mr. *McDougall* in his very able and ingenious address that those connected with the estate and who had therefore a moral or equitable claim to consideration would be seriously aggrieved and injured by holding that the disposition of an escheated

(1) L. 1, c. 1, sec. 4.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Ritchie, C.J.

estate belonged to the provincial and not to the Dominion authorities, this proposition has not commended itself to my mind in the way it appears to have so forcibly impressed Mr. *McDougall*, because I can see no reason whatever why in a case such as this, the provincial executive should be guided or should act on any different principle whatever in regard to the disposal of escheated estates from those that would govern the Dominion executive; on the contrary, it seems to me that precisely the same principles and considerations that should influence and govern the one should guide and determine the action of the other; and it must be borne in mind that there may be many escheats where no circumstances exist calling for any special action, and therefore in the older books we find it stated "that it is the ordinary course for the Crown *upon petition* to give a lease or grant to the party discovering an escheat with a view to encourage discovery" (1).

For these reasons I think the conclusion arrived at by the Court of Appeal of *Ontario* is correct, and this appeal should be dismissed with costs.

FOURNIER, J. :—

La question soulevée en cette cause est de savoir lequel du gouvernement d'*Ontario* ou du gouvernement fédéral a droit sous la constitution actuelle de profiter des biens tombant en déshérence.

Tout le monde est d'accord pour reconnaître que la déshérence est une prérogative royale qui ne peut être exercée que par la Reine elle-même, ou par ceux auxquels elle a spécialement délégué ses pouvoirs à cet effet.

Quelle que soit l'origine et la nature de la déshérence, il faut admettre que dans la province d'*Ontario* où le système féodal n'a jamais existé, elle est moins un inci-

(1) 1 Chitty's Gen. Pr. 280. citing 7 Ves. 71, and 6 Ves. 809.

dent de la tenure des terres qu'une prérogative fiscale accordée au souverain, par la constitution anglaise, comme source de revenus. C'est ainsi que *Blackstone* (1) la qualifie en la classant parmi les diverses sources de revenus du souverain :

The King's *fiscal* prerogatives, or such as regard his revenue; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power.

A la page 302, au No. XVII, il définit comme suit la prérogative de déshérence :

Another branch of the King's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the King, who is esteemed in the eye of the law the original proprietor of all the lands in the kingdom.

Cette autorité établit trois propositions importantes pour la solution de la question soumise—1o la déshérence est une prérogative royale; 2o une source de revenus du souverain; 3o qu'aux yeux de la loi le souverain est considéré comme le propriétaire originaire de toutes les terres du royaume.

Dans la législation antérieure au statut impérial 1 Guil. 4, ch. 25, les dispositions concernant la déshérence ou l'appropriation des biens et revenus en provenant n'ont pas affecté la prérogative de la Couronne. Les statuts 39 et 40 Geo. 3, 59 Geo. 3 et 6 Guil. 4 n'ont pas été passés pour investir la Couronne d'aucun droit nouveau, ni pour diminuer ceux qu'elle avait déjà sur cette espèce de biens, mais bien plutôt pour en faciliter l'exercice. Il n'y est question de ces biens que comme propriétés de la Couronne. La 59me Geo. 3, ch 94, sec. 3 déclare que le surplus de la vente de ces biens, après l'exécution des ordres de Sa Majesté, sera payé aux commissaires du revenu territorial de Sa Majesté, " *shall be paid to the Commissioners of His Majesty's Land*

(1) Ch. 8, p. 281.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Fournier, J.

Revenue." La prérogative est laissée intacte et les biens qui en proviennent conservent leur caractère de revenu.

Ce n'est que par la 1re Guil. 4, ch. 25 que la destination de cette source de revenu, de même que les autres droits héréditaires, casuels, territoriaux et autres particulièrement attachés à la Couronne, a été aliénée en échange de la liste civile. Elle doit pendant la durée de ce règne, former partie du fonds consolidé du Royaume-Uni, aux conditions et réserves spécifiées dans cet acte. Une de ces conditions est ainsi exprimée: "It being the true intent and meaning of this act that the said rights and powers shall not in any degree be abridged, restrained, affected or prejudiced in any manner whatsoever, but only that the money accruing to the Crown, after the full and free exercise of the enjoyments of the said rights and powers, subject as aforesaid, shall, during His Majesty's life time, be carried to and made part of the consolidated fund of the United Kingdom." Telle est encore, en vertu des dispositions de l'acte impérial 1 et 2 Vict., ch. 2, la destination des droits et revenus particulièrement attachés à la Couronne, et entre autres, ceux provenant de la déshérence.

Le premier changement qui ait été fait dans l'appropriation des revenus héréditaires de la Couronne, dans les provinces formant actuellement la Puissance du *Conada*, a été introduit par l'acte du *Nouveau Brunswick* Cons. Stats. N. B. Tit. 3, ch. 5, dont les dispositions sont à peu près celles de la 1re *Guil.* 4, ch. 25. Des dispositions du même genre furent ensuite introduites dans l'acte d'union du *Haut* et du *Bas Canada* en 1840. Elles furent plus tard modifiées par des statuts subséquents cités en détail dans l'argument du savant conseil de l'appelant. Il résulte de l'état de la législation à l'époque de la Confédération que les revenus provenant de la déshérence appartenaient, lors de la passation de l'acte de l'*A B. N.*, au *Canada* Uni. Cette proposition

admise de toute part, même par le savant conseil de l'appelant, il ne reste donc plus qu'à s'assurer si l'acte de l'*A. B. N.* n'en a pas disposé, comme des autres revenus des provinces, en faveur du gouvernement fédéral.

Pour moi la solution de la question qui nous occupe se trouve entièrement dans la sec. 102, ainsi conçue :

Tous les droits et revenus que les législatures respectives du *Canada*, de la *Nouvelle-Ecosse* et du *Nouveau-Brunswick*, avant et à l'époque de l'union, avaient le pouvoir d'approprier, sauf ceux données par le présent acte aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par le présent acte, formeront un fonds consolidé de revenu pour être appropriée au service public du *Canada*, de la manière et soumis aux charges prévues par le présent acte.

D'après cette section, tous les droits et revenus des législatures doivent former le fonds consolidé de revenu du *Canada*, sauf les deux exceptions y mentionnées.

Les biens provenant de la déshérence forment à n'en pas douter une source de revenus publics depuis que la Couronne en a fait l'aliénation en vertu des lois concernant la liste civile ; ce revenu doit être compris dans la cession qui est faite en termes généraux de tous les *droits et revenus* des provinces, à la Puissance. Il n'y a à cette disposition générale que l'exception en faveur des provinces, des revenus qui leur *sont réservés* par l'acte constitutionnel et qu'elles peuvent percevoir en vertu des pouvoirs spéciaux qui leur sont conférés. La section 126 qui crée le fond consolidé des provinces déclare qu'il sera composé des droits et revenus qu'elles avaient, avant l'Union, le pouvoir d'approprier, et qui sont réservés aux gouvernements ou législatures. Ces deux sections s'accordent à déclarer que tous les *revenus* des provinces, excepté ceux qui leur sont spécialement réservés par l'acte constitutionnel, appartiendront au fond consolidé fédéral. Pour main-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fournier, J.

tenir que le revenu provenant de la déshérence appartient aux provinces, il faudrait donc trouver dans l'acte constitutionnel une réserve à cet effet. Il n'y en a certainement pas. Les sources de revenus des provinces sont indiquées dans les sous-sections 2, 3 et 9 de la section 92, et dans la section 118, accordant une subvention à chaque province,—mais aucune de ces sections ne contient de réserve spéciale qui soit susceptible de comprendre le revenu provenant de la déshérence. La seule réserve spéciale que l'on trouve est celle contenue dans la section 124, conservant au *Nouveau-Brunswick* son privilége de prélever sur les bois de construction les droits établis par une de ses lois passées avant l'Union. Cette exception n'a pas d'autre effet que celui de confirmer le principe genéral de la section 102.

Pour appuyer sa réclamation au bénéfice de la déshérence, l'intimé invoque encore un autre moyen tiré de certaines dispositions de l'Acte de l'*Amérique Britannique du Nord.* Il prétend que les sec. 109 et 116 ont opéré en faveur des provinces un transport législatif de cette prérogative.

Par la sec. 109 "toutes les terres, mines, minéraux et réserves royales (*royalties*) appartenant aux différentes provinces du Canada, etc., lors de l'Union, et toutes les sommes d'argent alors dues ou payables pour ces terres, mines, minéraux, et réserves royales (*royalties*), appartiendront aux différentes provinces d'*Ontario*, *Québec*, la *Nouvelle-Ecosse* et le *Nouveau-Brunswick*, dans lesquels ils sont sis et situés, ou exigibles, restant toujours soumis aux charges dont ils sont grevés, ainsi qu'à tous intérêts autres que ceux que peut y avoir la province."

Par la déclaration, contenue dans cette section, que toutes les terres et réserves royales appartenant aux différentes provinces lors de l'Union continueront de leur appartenir, l'Intimé en conclut que le domaine direct de la Couronne sur toutes les terres publiques a été

transporté aux provinces, et qu'une des conséquences résultant de ce transport c'est que les propriétés tombant en déshérence doivent faire retour aux provinces. Mais le transport n'est pas aussi général et aussi absolu que le prétend l'Intimé. Il est restreint et qualifié par les expressions " terres, etc., appartenant, etc., lors de l'Union." Ces termes ne comportent évidemment qu'une confirmation de la propriété limitée des terres publiques, telle qu'elle était alors—le pouvoir des provinces sur ces terres n'est nullement augmenté—aucun pouvoir nouveau n'est ajouté à ceux qu'elles avaient déjà—aucune prérogative nouvelle ne leur est concédée. Il est resté ce qu'il était auparavant, ainsi que le comporte la sous-sec. 5 de la sec. 92, restreint à l'administration et à la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent.

Leur pouvoir sur les terres est donc actuellement ce qu'il était avant la Confédération et rien de plus. Pour savoir quel est à présent ce pouvoir, il faut nécessairement se reporter à la législation antérieure, tant impériale que provinciale, sur ce sujet. D'après l'examen que j'ai fait de cette législation, dont l'honorable juge *Gwynne* a fait un exposé si complet qu'il serait inutile de revenir sur ce sujet, je suis forcé d'en arriver à la conclusion que le pouvoir des provinces sur les terres publiques n'a pas été augmenté par la sec. 109. Il est comme avant la Confédération un pouvoir d'administration, la Couronne ne s'étant jamais départi par aucun acte impérial ou provincial en faveur de qui que ce soit, du domaine direct lui appartenant dans les terres publiques. Dans ce cas, c'est à la Reine comme ayant encore le domaine directe des terres que les biens tombant en déshérence devraient faire retour, si l'on considère cette faculté plus comme un incident de la tenure des terres que comme une prérogative du souverain.

Mais la province d'*Ontario* n'ayant jamais été sou-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Fournier, J.

mise au régime féodal, ce n'est pas au souverain, comme seigneur (Lord of the Manor), mais à titre de souveraineté que le droit de retour doit lui appartenir, en vertu du principe qui le fait présumer comme le dit *Blackstone*, propriétaire de toutes les terres du royaume. C'est sans doute pour cette raison que sous la constitution actuelle, les concessions de terres publiques se font encore au nom de la Reine. Dans tous les cas l'argument de *reversion* fondé sur le système féodal, s'il était susceptible d'être appliqué à la province d'*Ontario*, ne pourrait affecter que les propriétés immobilières. Que deviennent dans ce cas les biens mobiliers de la succession; à qui feront-ils retour ? La prérogative va-t-elle se diviser suivant la nature des biens,—les immeubles appartiendront-ils aux provinces et les biens mobiliers à la Puissance ? Cette question suffit pour faire voir le vice de l'argument uniquement fondé sur le droit de retour comme incident de la tenure féodale. Il est plus logique de reconnaître que c'est en vertu de la prérogative royale que le souverain a droit de bénéficier de toute espèce de biens tombant en déshérence.

Au surplus, lors même que le transport des terres serait absolu, je ne comprends guère comment il pourrait par lui-même comporter une aliénation d'une prérogative attachée à la personne du souverain. Il est de principe que toute législation affectant les prérogatives royales doit être formelle et expresse, ou résulter du moins des dispositions qui impliquent nécessairement que le législateur a voulu les modifier. Ce principe, si souvent proclamé par les décisions des tribunaux en *Angleterre* a été encore assez récemment réaffirmé par le Conseil Privé dans la cause de *Landry* v. *Théberge*.

Il n'y a certainement dans la clause 109 aucune expression concernant la prérogative, et ses dispositions ne sont pas non plus de nature à faire nécessairement présumer qu'elle a été aliénée.

L'argument fondé sur les expressions "réserves royales" dans la même sec. 109 (*royalties*) que l'on a fait valoir dans la cause de *Church* vs. *Blake* (1) semble avoir été abandonné par le savant conseil de l'Intimé. En effet, le terme *royalties* n'est pas employé là pour signifier les pouvoirs ou les attributions de la royauté. L'explication qui en a été donnée par le savant conseil des appelants est la seule correcte. Il est évident que cette expression se rapporte seulement aux droits de percentage ou de commission que la Couronne percevait avant la Confédération dans les provinces de la *Nouvelle-Ecosse* et du *Nouveau-Brunswick* sur les concessions de mines. Pour ces raisons la sec. 109 ne me paraît aucunement affecter la prérogative en question.

Un autre argument que l'on a aussi fait valoir dans cette cause, et qui ne me semble pas plus concluant que celui fondé sur la section 109, est celui tiré du pouvoir des législatures sur la propriété et les droits civils.

La déshérence étant une interruption de la succession, et le souverain ne prenant les biens que comme *ultimus hæres*, les législatures peuvent, dit-on, changer cet ordre de succession. Mais la déshérence est une matière de prérogative et non pas une question de propriété ou de droit civil. D'ailleurs l'ordre actuel des successions admettant cette prérogative en faveur de la souveraine, il faudrait démontrer que le pouvoir de législater sur les prérogatives royales appartient aux législatures Ce serait retomber dans la question de savoir à qui appartient l'autorité souveraine sous la constitution actuelle, sur les sujets de législation non spécialement délégués, question sur laquelle j'ai déjà eu occasion de me prononcer. Je ne crois pas devoir y revenir, car je crois que la sec. 102 suffit pour résoudre la question soumise.

Ayant pris communication de l'opinion si savam-

(1) 2 Q. L. R. 236.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.

Fournier, J.

ment élaborée de l'honorable juge *Gwynne*, je me suis contenté d'indiquer brièvement les motifs de mon concours dans les conclusions qu'il a adoptées. En conséquence je suis d'avis que l'appel devrait être alloué.

HENRY, J. :—

Having fully considered the interesting and highly important interests involved in the discussion and decision of this case, I shall now briefly state the conclusions at which I have arrived.

On the part of the respondent it is claimed that on the failure of heirs of *Andrew Mercer*, who died intestate, the province of *Ontario* became entitled to his estate—both real and personal—as legislative assignee of the Crown.

On the part of the appellants it is contended that no such assignment was made, but that by the *British North America Act* the assignment, if any, was to the Dominion.

If therefore the claim of the respondent be not sustained our judgment must be for the appellants, whether or not the Dominion, by the act in question, became entitled to the position claimed for *Ontario*.

If the majority of the court should be of the opinion that the respondent's claim cannot be allowed, it will be unnecessary, in my opinion, to consider the proposition advanced by the appellants, that the assignment was to the Dominion. It has been contended in other cases that plenary legislative powers were given by the act mentioned over all subjects and for all objects, either to the parliament of *Canada* or to the several legislatures. I have, in at least one of my judgments, refused to admit the correctness of that proposition ; and have held that we must look to the act and trace to it the right to legislate in regard to every matter arising

for decision. If we always keep in view the consideration that the whole legislative power is given by it, and by it alone—a position requiring no argument to sustain—and determine from that the existence of any legislative power claimed, the solution will, to that extent, be easier; and the decision more likely to be correct. There are, no doubt, many subjects given fully, either to the Dominion or to the local legislatures, or in part to each, wherein it is manifest the one or the two, each of the part allotted to it, should have legislative power to deal with the whole of such subjects; but although that may be properly said to be the general rule, I maintain the existence of cases that should be declared exceptions.

It is not necessary, as I have before said and for the reasons given, to be shown, that the right claimed by the respondent should appertain to the Dominion. It may be that the latter has no such right; but that conclusion, in my opinion, should have little weight in the present case. To recover in this action, the exclusive right must be shown in *Ontario*. The appellants are entitled to our judgment unless the respondent shows a valid legislative transfer of the prerogative right in question to the province; and such a transfer as would deprive the sovereign of the right to its future exercise. I am induced to make these suggestions as many of the reasons for arriving at the conclusion that there was no such transfer to the several provinces composing the Dominion apply with equal force to show there was none to the Dominion.

I have said that we must seek from the *British North America Act*, and from that alone, for the sustainment of the respondent's claim.

Our attention was directed at the argument to the position of *Canada* immediately preceding the passage of the act as regards Crown or waste lands, and also to

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Henry, J.

that of *Upper Canada* before the union with *Lower Canada*. Holding, however, the views I do as to the result of the union of the four provinces in 1867, I am unable to feel that much, if any, weight should be given to an argument founded on the position, as touching the question under consideration, which the provinces or any of them occupied at any time before confederation, except so far as the act specially refers to such position. The Imperial Act was not one forced upon the provinces by an arbitrary proceeding of an overruling legislative body, depriving them, or any of them, of legislative power. In such a case it might be contended that the extent of the deprivation must be ascertained from the act; and as regards any subject or matter not embraced in it, the power would still remain. Here, however, the case is far different. The act was passed, as it recites, on the application of the provinces to give legislative sanction and authority to an agreement entered into on the part of the provinces for their federal union. The implied, if not expressed, principle acted on was that all rights and privileges, including legislative as well as others, of each of the provinces, should be surrendered; and that each should, if the union were consummated, depend subsequently for the exercise of their rights and privileges upon the Imperial Act to be passed, to give effect to the agreement for union entered into. This is patent in the act itself and in the resolutions of the delegates upon which it was founded and passed. I could give many reasons, and show many facts, to prove the correctness of this proposition; but it appears to me only necessary to suggest that if it were intended to be otherwise, we would reasonably expect to find provision made for intended exceptions. The absence of any such is strong presumptive evidence that none were desired.

Section 102 of the act gives to the Dominion the appropriation of

All duties and revenues over which the respective legislatures of *Canada, Nova Scotia* and *New Brunswick*, before and at the union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act,

to form one consolidated revenue fund to be appropriated for the public service of *Canada*.

By the terms and provisions of that section all the duties and revenues controlled before the union by the legislatures of the provinces, with the exception of the portions reserved by the act to the provinces, were clearly given to the Dominion. If, then, before the union, the right claimed by the respondent was vested in the provinces, it was transferred to the Dominion by this section, unless we find it reserved in the act to the provinces. I think therefore that the decision of this case should not be affected by the position of the provinces, or by their legislation, before the union, with the exception I have before mentioned. If the portions of the revenues reserved to the provinces cannot be construed to include the right in question, it matters not that it can be satisfactorily and undoubtedly shown that *Ontario* possessed it before the union.

The reservation to which I have just referred we find, on reference to the act, to be "lands, mines, minerals and royalties, belonging to the several provinces at the union." "Lands" and "royalties" need only to be referred to in this connection. As to the first it is contended, that by the mere transfer from the Crown to the provinces, the prerogative right to an escheat, on the failure of heirs, is transferred. The first inquiry naturally is had the province of *Canada*, before the union, that right? If it had not, then it could not be a part of the reservation. It was the duty of the respondent to have pointed out some legislation of the Imperial Parliament abolishing or transferring the prerogative right of the Crown by escheat over lands in

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

the provinces held in free and common socage, previous to the accession of his Majesty *William IV.*; or to some such statute repealing the statute passed in the first year of his reign, ch. 25, by which his Majesty surrendered to parliament, to form part of the consolidated fund of the kingdom, his Majesty's interest in the hereditary revenues of the Crown, and in the funds "which might be derived from any *droits* of the Crown or admiralty," from any casual revenues either in his Majesty's foreign possessions or in the United Kingdom; and providing that, after his decease, all the said hereditary revenues should be payable and paid to his heirs and successors; to which was added a proviso, that nothing in the act should extend, or be construed to extend, in any wise to impair, affect or prejudice any rights or powers of control, management or direction which had been or might be exercised by authority of the Crown relative (amongst other things) "to the granting or disposing of any freehold "or copyhold property, or the produce of or any part of "the produce or amount or value of any freehold or copy-"hold to which his Majesty, or any of his royal prede-"cessors, had or hath, or shall be entitled to, either by "escheat for want of heirs, or by reason of any forfeiture, "or to the granting or distributing of any personal pro-"perty to which the Crown would become entitled by "reason of the want of next of kin or personal represen-"tatives, of any deceased person," but that the same should be enjoyed in as full and effectual manner as if that act had not been passed; the act declaring that the said rights and powers should not be abridged, restrained, affected or prejudiced in any manner whatever; but only, that the monies accruing to the Crown, after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, should, during his Majesty's life, be carried to and made part of the consolidated fund of the United Kingdom.

The act of the province of *New Brunswick* for the transfer of the hereditary, casual and territorial revenues, and of the lands, woods, mines and royalties, contains similar provisions as to the reservation of the rights of the Crown, *to make any grant or restitution of any estate, or of the produce thereof, to which it might become entitled by escheat for want of heirs, &c.*, or to make any grant or distribution of any personal property devolved to the Crown for want of next of kin, &c., and declaring *that it was only the monies arising, after the full and free exercise and enjoyment of the rights* reserved, should be carried to and form part of the consolidated revenue of *New Brunswick*. That act has been re-enacted, and is still in force.

It could not therefore be successfully contended that in *New Brunswick* the local legislature could legislate upon the subject, as that province could not claim the right under the provisions of the *British North America Act*; not having enjoyed or exercised any such right previously, but, on the contrary, expressly legislated against it. Having been specially exempted from the operation of the *New Brunswick Act*, it may be contended that, inasmuch as the Confederation Act contains no such reservation, it was intended to pass the right claimed; but it will be seen that the terms of the latter are not general, and do not apply at all to the hereditary Crown revenues as such, but specifically refer to lands, mines, minerals and royalties. The argument might be applicable to the grant to the Dominion in its comprehensive terms, if the provinces had previously such right, but is not applicable to the specific reservation to the provinces.

Up to the time of the union of *Upper* and *Lower Canada* in 1840, it cannot be claimed that either had any claim to control the appropriations of the casual or territorial revenues of the Crown. By the Imperial Act

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Henry, J.

passed to consummate that union, it was provided that before any act of the united provinces relating to, or affecting her Majesty's prerogative touching the granting of waste lands of the Crown, could receive the royal assent, it was required to be laid before both houses of the British Parliament for thirty days; and that if either house, during that period, should pass an address asking her Majesty to withhold her assent, it would not thereafter be lawful for her to give it. And also that any law divesting the Crown of any of its prerogative rights, and vesting them in the provincial legislature, must emanate from, or be expressly confirmed by the Imperial Parliament. The latter provision, I take, governed the province of *Canada* up to the Confederation Act, and when on one occasion a provincial act was assented to—as I presume inadvertently—without the act having been laid before both houses of parliament as required, a ratifying act of the Imperial Parliament was passed as necessary to validate it. I can find no legislation of the Imperial Parliament since to change that position of the matter.

It is contended that, inasmuch as the management and sale of crown lands is vested in the local legislatures, it is more reasonable to assume it to have been intended to include the right to acquire a title again by escheat, rather than that the Dominion should take it. That was however a matter more for those who procured the passage of the act, and for the parliament that passed it, than for us. We are not to say what the provision should have been, but what it is. If I were satisfied that the prerogative right in question was in reality transferred by the confederation act, I should be much more inclined to conclude that it was to the Dominion, by force of the general terms of the grant to it, than to the provinces by the restrictive terms of the grant to them. By section 102 it will how-

ever be seen that the grant to the Dominion is limited to the "duties and revenues over which the respective legislatures of *Canada*, *Nova Scotia*, and *New Brunswick* had and have power of appropriation." If therefore the legislatures of those provinces had not, before or at the union, the right to deal with the subject-matter now in question, it cannot be contended that it passed to the Dominion by virtue of that section. If such should be found to be the case it will, I have no doubt, be found to make no practical difference, as we have every reason to assume the right will be exercised by the sovereign as recommended and suggested by her representative in the Dominion.

The Imperial Parliament has never, as far as I have been able to discover, attempted to deal with the peculiar prerogatives of the Crown until previously voluntarily surrendered by the sovereign; and with that now under consideration the British parliament has not in any way interfered. If the province of *Ontario* should be found right in dealing with it, a position will be attained by it which, as far as I can discover, has not been reached in any other part of her Majesty's Dominions.

It is admitted that up to 1840 the prerogative right to escheat in cases like the present vested in Her Majesty the Queen. If previous to that an estate was left without heirs, the Queen would take the title. She would not, however, take it merely as a source of revenue, for such was seldom appropriated for that purpose. Up to that time the title and control of all public or waste lands was in the Queen. The province had no title thereto, and the patents were from the Queen. Under what rule or upon what principle could the province claim, through an escheat, an estate it never before owned. Escheat is by law defined to be "an obstruction of the course of descent and a conse-

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Henry, J.

"quent determination of the tenure by some unforeseen "contingency, in which case the land naturally results "back, by a kind of reversion, to the original grantor or "lord of the fee." If that definition be correct, and I cannot think it will be doubted, then in respect of all lands granted, or patented, previous to 1840, the province could, by no possibility that I can discover, claim as the original grantor, or lord of the fee. If, indeed, the patent had been shown to have issued since 1867, when the Confederation Act was passed, it might be more interesting to consider and apply to it the doctrine of escheat than under existing circumstances, and to decide whether or not the act transferred the right claimed. If, however, we were expected to decide that question it should have been submitted to us by evidence showing the patent to have issued since the Confederation Act came into operation. That is not the case before us, and I need not speak positively as to it, but will content myself by saying that for other reasons given, I am of opinion that, even in that case, the respondent would fail in sustaining his claims.

It was contended on the part of the respondent that it could not be, that while the land, before being granted, was held by her Majesty for the use of the province of *Ontario*, yet upon, or after, the grant in fee simple, the reversionary estate would be held by her Majesty for the use of the Dominion of *Canada*. The answer to that proposition is, that after the grant her Majesty had no substantial interest, such as a reversion on the expiration of a lease. The whole estate was transferred without any reserve, or any provision for a reversion. Her Majesty held not the smallest estate known to the law in it. By the unforeseen accident of the failure of heirs, or by a forfeiture, she again becomes entitled; but in the meantime is neither the owner nor the trustee of any other in regard to it. She takes it in her

own right as the original grantor, having had before the forfeiture or failure of heirs no title whatever. By English law and practice she can dispose of that title when accrued as she pleases, independent of parliamentary control. In the large majority of cases, however, as others lose by the accident which gives her title, she refuses the personal benefit caused by it, and restores, or rather grants, the subject-matter to those who, but for the accident, would most probably have succeeded to it. The power to remedy the injurious result of such an accident in many cases that happen, must be highly prized by any right feeling sovereign; and it is one not yet controlled by Imperial legislation. It must, therefore, have been considered wise and proper that such should continue to be exercised.

On the part of the respondent it was presented to us simply as a matter of revenue, as between the Dominion and the provinces. I view it very differently; and think myself bound to uphold a prerogative right, the exercise of which is more likely to be less exacting than if otherwise held—and which has been so long enjoyed with apparent satisfaction in the United Kingdom—until it is made satisfactorily to appear that it no longer exists.

I think such transfer should not be adjudged by a speculative construction of a doubtful statute, but by a most clear and positive enactment. Besides, it is a well known rule that the sovereign is bound by no statute unless specially named therein, and that any statute affecting adversely the prerogative rights of the sovereign does not bind him unless there are express words indicative of that object. If that rule of law be not violated, the grant of the lands, mines, minerals and royalties belonging to the provinces at the Union in 1867 cannot be adjudged to affect in any way the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

royal prerogative through which lands, by escheat for want of heirs, become vested in the sovereign. That doctrine was acted upon and declared in force by the Privy Council in a comparatively late case (1), and cited by the counsel of the appellants at the argument.

Again it is claimed that the right in question is given to the provinces through the transfer by the act of the subject-matter termed "royalties." The objections last urged will apply with equal force to that subject. The term "royalties" is of very general import and very comprehensive; but it cannot be contended in this case that it includes the transfer of all that might come under that designation. "Royalties" as to mines is well understood in *England* to be the sums paid to the sovereign for the right to work the royal mines of gold and silver; and to the owner of private lands, for the right to work mines of the inferior metals, coal, &c. In *Nova Scotia* and *New Brunswick*, if not in the other provinces, mines and minerals were at the time of the Union being worked; and, in *Nova Scotia*, a revenue therefrom was derived by the government and which, in the acts of that province, were called "royalties." That the income thus derived should be continued to that province, it was necessary that provision therefor should be made; and the use of the term was apparently intended for that purpose, and, at the same time, to give to the other provinces the continuance of the same right, where such was previously enjoyed. The provision of the act had therefore sufficient in the fact I have stated to furnish a subject-matter to which it could be referable, and upon which it could operate without giving it any additional or more extended application. The object was to secure to the provinces someting at once available for revenue to be appropriated by them in their legislatures,

(1) See *Théberge* v. *Landry*, 2 App. Cases 106.

and by their several governments, for public purposes. It does not, however, follow that the words used in the provision should be adjudged to include the prerogative right of the sovereign in respect of any title she might obtain by the accident of a person dying intestate without heirs. Such an assumption as the latter is quite unnecessary to give operation to the provision; and for the many reasons I have given, I think it does not include what is claimed; nor can I arrive at the conclusion that such was intended. These views are in accordance in many respects with those I expressed in the case of *Lenoir* v. *Ritchie* (1). I may add, that in that case they were not alone my views, but those of all my learned brethren who heard and decided it; and I have heard nothing since tending to change or weaken them. After giving my views, as I have done, in reference to the right in question, I need hardly say that I consider the act of the province of *Ontario* in relation thereto *ultra vires*. I must, therefore, in accordance with those views decide that the respondent has not established the position upon which his right to recover in the suit is based; that the judgment appealed from should be reversed, and that our judgment should be for the appellant, with costs.

TASCHEREAU, J.:—

Though I have not failed to give the able argumentation of the learned counsel heard before us on the part of the respondent in this cause the consideration it deserved, I have been unable to alter my views on the question submitted as I expressed them in the *Fraser* case (2), where the same question was before me in the Superior Court of *Kamarouska*, and I am still of opinion that under the *British North America Act* the right to escheats *propter*

(1) 3 Can. S. C. R. 575. (2) 1 Q. L. R. 177.

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Taschereau, J.

defectum sanguinis belongs exclusively to the federal power. As this last case is fully reported, I have not written down at full length the reasons upon which I have come to a conclusion in the present case. This however would, under the circumstances, have been useless. I concur entirely with what my brother *Gwynne* says on the construction to be given to the word *royalties*, and to the word *lands* in section 109 of the *British North America Act*, as well as with what he says on the doctrine of reversion relied upon by the respondent. I may remark that this doctrine of reversion and the reasons given in the present case by the *Ontario* Court of Appeal applicable to real estate, do not support the *Quebec* Court of Appeal in the *Fraser* case, where the question as submitted related to personal as well as real estate. To say, as has been said, that as escheats fall within the words "property and civil rights in the province," they belong to the local power, is a *petitio principii*. It is taking for granted that they do not belong to the Crown, to the federal power; for, if they belong to the federal, they, of course, do not fall under the words "property and civil rights in the province," and they cannot in any shape whatsoever be legislated upon by the local power. Section 117 of the *British North America Act*, relied upon by some of the judges in the *Quebec* Court of Appeal, has nothing to do with the question, and was not relied upon by the respondent before this court. As to the word *royalties*, to be found in section 109 of the *British North America Act*, which word, according to some of the judges in the *Quebec* Court of Appeal, in the *Fraser* case, transfers and reserves escheats to the provincial governments, the respondent has, rightly, in my opinion, been unwilling to base his case upon it in his argument before us. To my mind section 102 of the *British North America*

Act is conclusive. The legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had power of appropriation over the revenues arising from escheats. Such revenues have not by the *British North America Act* been reserved to the provincial legislatures. Neither can these revenues be said to be raised by the provincial legislatures, in accordance with the special powers conferred upon them by the said *British North America Act*. Then, they form part of the consolidated revenue fund of the Dominion, according to this section 102. This is so for real as well as for personal property, as I read the Act. The argument of the respondent, based upon the doctrine of reversion, seems to me defective in that it leaves the personal property of a person deceased intestate without heirs to the federal government, whilst it gives his real property to the local government.

Any argument which leaves *Mercer's* personal estate, which is very large, to the federal government, whilst it gives his real estate to the local government must, as I view it, be wrong, and contrary to a sound interpretation of the *British North America Act*. The Imperial authority cannot have intended such a division of the revenues from escheats. I may also remark that in the province of *Quebec* the laws relating to escheats under art. 637 of the Civil Code are not derived from the feudal system, and are anterior to the feudal ages, so that this doctrine of reversion could not apply there. It seems to me that any argument which under the *British North America Act* does not and cannot apply equally to all the provinces must be contrary to the spirit and intent of the *British North America Act*. This doctrine of reversion seems to me also defective in that it cannot apply to lands which did not belong to the provinces at the time of the union. Lands which did not form part of the public domain at the union were not given to the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Taschereau, J.

provinces by section 109 of the Act. Lands of persons dying intestate without heirs in any one of the provinces before confederation did not re-vest in the province, but escheated to the sovereign, and belonged to him. He alone had the title to them. The provinces had been given by the sovereign and possessed at the union power of appropriation over the revenues arising from this right of escheat (the revenues only, not the prerogative right itself, which always remained and remains in the person of the sovereign), and these revenues by section 102 of the Act have been given to the Dominion Government. All duties and revenues over which the provinces had, before confederation, power of appropriation are by said section 102 given to the Dominion Government, save and except only such portions of said duties and revenues which are by the Act reserved to the provinces. Section 126 distinctly enacts that the provinces shall have for the future such portions only of said duties and revenues which are by the Act reserved to them. This is clear. For the Dominion, *all* duties and revenues, except those expressly reserved to the provinces. For the provinces, none of said duties and revenues but such *portions* thereof as are express reserved to them. The provinces have consequently to establish that the Act reserved to them the revenues from escheats. The *onus probandi* is on them. I fail to see that in any part of the Act these revenues have been so reserved to them.

As to the argument, that as section 102 enacts that the duties and revenues therein mentioned shall form part of the consolidated revenue fund of the Dominion, it would be impossible for the Crown to relinquish its rights to revenues from escheats in favor of illegitimate children of the deceased or otherwise, it may be remarked that this argument, if good, would apply equally to the statute ch. 10 C. S. C. sec. 5, in which it was also enacted

that the duties and revenues, including escheats, would form part of the consolidated revenue of the province of *Canada* as constituted before confederation. Yet, under the said Act, it has never been doubted that the Crown could relinquish its rights to escheats when it wished so to do.

The question submitted to us by one of the learned counsel for the respondent as to whether the Queen forms part of the local legislatures seems to me to have no practical bearing on this case. That, when anything which, according to the principles of the British Constitution, must be done in her Majesty's name, has to be done by the Lieutenant Governors of the provinces, under the *British North America Act*, they are authorized to do it in her Majesty's name, and are deemed then to act for her Majesty, has not, that I remember, been denied by the appellant. But they are not her Majesty's direct representatives, as the Governor General is. They have never been considered as such by the Imperial authorities.

"The Lieutenant Governors of the provinces of the Dominion, however important locally their functions may be, are a part of the colonial administrative staff, and are more immediately responsible to the Governor General in Council. They do not hold commissions from the Crown, and neither in power nor privilege resemble those Governors, or even Lieutenant Governors of colonies, to whom, after special consideration of their personal fitness, the Queen, under the great seal and her own hand and signet, delegates portions of her prerogatives and issues her own instructions," says the Earl of *Carnarvon* in a despatch to Lord *Dufferin*, dated January 7th, 1875 (1).

That the Lieutenant Governors are considered by the Imperial authorities as officers of the Dominion Govern-

(1) Vol. 8, No. 7 Sessional Papers, 1875.

1881
MERCIER
v.
ATTORNEY GENERAL FOR ONTARIO.
Taschereau, J.

ment seems also clear by the proceedings in the *Letellier* affair, and the despatch of Sir *Michael Hicks-Beach* to the Marquis of *Lorne* on the subject, dated July 3rd, 1879 (1).

The following despatch of the Duke of *Buckingham* and *Chandos* to Lord *Monck*, is written in the same view of the Lieutenant Governor's position.

DOWNING STREET, 19th October, 1868.

MY LORD,—I have under my consideration your Lordship's despatch, No. 170, of the 9th September, submitting the question whether the Lieutenant Governors of the provinces within the Dominion of *Canada* are entitled to salutes from H. M. ships and fortifications within their respective provinces.

I have the honour to acquaint you that under the circumstances of the case, the Lieutenat Governors of the provinces holding their commissions from the Governor General, will not be entitled to salutes.

I have the honor to be,

&c., &c., &c.,

(Signed,) BUCKINGHAM & CHANDOS.

The Viscount Monck.

Another despatch from the Secretary of State for the Colonies, dated 7th November, 1872, though it recognizes the Lieutenant Governors should be *deemed* to be acting directly on behalf of Her Majesty on certain occasions, treats them on ordinary occasions as representing the Dominion Government.

* * * And with reference to the question asked by Sir *Hastings Doyle*, and submitted by Lord *Lisgar* for my decision, namely, "whether the Lieutenant Governors are supposed to be acting on behalf of the Queen," I have to observe that, while from the nature of their appointment they represent on ordinary occasions the Dominion Government, there are, nevertheless, occasions (such as the opening or closing of a session of the provincial legislature, the celebration of Her Majesty's birthday, the holding of a levee, &c., &c.,) on which they should be deemed to be acting directly on behalf of Her Majesty, and the first part of the National Anthem should be played in their presence. * * *

(Signed,) KIMBERLEY.

(1) Accounts and Papers, Imp. H. C., Vol. 51, p. 127, session 1878, 1879.

A reference to the order of precedence established for *Canada* by Her Majesty shows that the Lieutenant Governors do not take rank and precedence immediately after the Governor General, but only after the general commanding Her Majesty's troops, and after the admiral commanding Her Majesty's naval forces on the *British North America* station.

I do not cite these documents as conclusive evidence for a court of justice, but as worthy of consideration, and to show that the Imperial authorities and her Majesty herself consider the Lieutenant Governors as not generally representing the sovereign.

However, as I have already stated, though the question has been raised and argued at some length before us, I do not think it can, in any manner, affect this case as I view it. As I have said, I fail to see that the *British North America Act* reserved or gave to the provinces the revenues arising from escheats. They consequently must belong to the federal power, and upon this ground, I am of opinion to allow this appeal with costs.

I am glad to understand that it was agreed between the parties that whatever should be the judgment of this court on this question, the case would be carried to the Privy Council. Though these revenues from escheats must amount in fact to a trifle in each of the provinces, I think it but right for obvious reasons that the final and authoritative determination of controversies on the construction of the *British North America Act*, which is an Imperial statute, should emanate from an Imperial judicial authority.

GWYNNE, J.:

This case was argued before us as one raising a question of the respective rights of the dominion and provincial authorities, and as such we have had the advan-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

tage of hearing a learned counsel who appeared before us in the interest of the province of *Quebec*, as well as two learned counsel who appeared in the interest of the province of *Ontario* on the one side, and, upon the other side, learned counsel who appeared before us in the interest of the dominion.

The particular question is, whether lands in the province of *Ontario* escheating to the Crown *propter defectum sanguinis* come under the management, control and enjoyment of the dominion or of the provincial authorities? This question, however, involves the consideration of all property both freehold and personal in the several provinces of the dominion which escheats to the crown, and whether such escheat accrues *propter defectum sanguinis* or *propter delictum tenentis*, and the conclusion in both cases must be the same.

The learned counsel who appeared before us in the interest of the province of *Quebec* addressed to us an argument replete with ability and research for the purpose of establishing a position which he took, namely, that the title which the crown has to property by escheat is not derived from the feudal tenure, but from a much more ancient law, namely, the old Roman law; but from whatever source derived matters not, for, whatever may be its origin, the learned counsel admitted, as indeed he could not do otherwise, that whether escheat in lands be or be not a species of reversion, whether the title accrues as a sort of caducary succession, the Sovereign taking as *ultimus hæres*, whether it is of the nature of a title by purchase, or by descent, or partakes of both, whether it accrues *propter defectum sanguinis* or *propter delictum tenentis*, whether in short the escheated property accrues as an incident to tenure or in virtue of the prerogative royal, and whether it be real or personal property

which escheats, all property escheating to the Sovereign does so *jure coronæ*. The question with which we have to deal is one simply of the construction of the *British North America Act*, namely, what disposition has that Act, (which is the sole charter by which the rights claimed by the dominion and the provinces respectively, can be determined,) made of property escheating to the Crown? and has it made any distinction between property escheating *propter defectum sanguinis* and tha which escheats *propter delictum tenentis*? In construing this Act, however, it will be convenient to consider in what manner, and under what designation or form of expression, property of the description in question had been dealt with in prior Acts of parliament, and what was the precise condition in which that particular species of property was regarded to be, and was, at the time of the passing of the *British North America Act*. By so doing we shall obtain light to assist us in construing the latter Act.

In 1st *Anne*, stat. 1, c. 7, s. 5, property of this description is spoken of as lands, tenements and heredita ments which may hereafter escheat to her Majesty, her heirs and successors, and to the end that the land revenues of the Crown might be preserved, improved and increased for the best advantage thereof, it was enacted that no grant should be made of any manors, lands, tenements, tithes, woods or other hereditaments within the Kingdom of *England*, Dominion of *Wales* or Town of *Berwick-on-Tweed* then belonging or thereafter to belong to her Majesty, her heirs or successors, whether the same should be in right of the Crown of *England* or as part of the Principality of *Wales* or of the Duchy or County Palatine of *Lancaster*, or otherwise howsoever, unless for 31 years or 3 lives, &c., &c., &c

Sec. 6, made special provision as to buildings which,

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

as they might require reparation, were allowed to be granted for 50 years or 3 lives.

Sec. 7, made all other grants which should be made contrary to the provisions of the Act to be void without any inquisition or *scire facias*. Provided always *that* "the Act or any thing therein contained should not "extend to disable her Majesty, her heirs or successors "to make any grant or restitution of any estate or "estates thereafter to be forfeited for any treason or "felony whatsoever."

The 39 and 40 *Geo.* 3, c. 88, was an Act passed to remove doubts whether real estate purchased by his Majesty out of his privy purse was subject to the provisions of the above stat. of 1st *Anne*, and it declared that such lands so purchased, or any other lands which might accrue to his Majesty, his heirs or successors, by gift, or devise, or by descent, or otherwise, from any of his ancestors, or *any other person not being* a King or Queen of *Great Britain*, were not affected by the above Act, and it provided for the free disposition of all such lands by his Majesty, his heirs and successors.

By the 12th sec. of that Act it was enacted as follows:

And whereas divers lands, tenements and hereditaments have become and may hereafter become vested in his Majesty, his heirs and successors *by escheat or otherwise in right of the Crown* which in the hands of his Majesty's subjects would be chargeable with certain trusts or applicable to certain purposes, and his Majesty, his heirs or successors might be desirous that the same should be applied accordingly, notwithstanding any right which he or they may have to hold the same discharged from such trusts, or without applying the same to such purposes, but by reason of the provisions contained in the said Acts of the first year of her said late Majesty Queen *Anne* and the thirty-fourth year of his Majesty's reign, doubts may be raised whether his Majesty, his heirs or successors, can direct such application thereof; and whereas divers lands, tenements and hereditaments as well freehold as copyhold have escheated and may escheat to his Majesty, his heirs or successors, for want of heirs of the persons last seized thereof or entitled thereto, or by

reason of some forfeiture or otherwise, although not forfeited for treason or felony, and it is expedient to enable his Majesty to direct the execution of any such trust or purposes as aforesaid, to make any grants of any such manors, lands, tenements or hereditaments as aforesaid notwithstanding the provisions contained in the said recited Acts—Be it enacted that it shall be lawful for his Majesty, his heirs and successors, by warrant under his or their sign manual to direct the execution of any trusts or purposes to which any manors, messuages, lands, tenements or hereditaments which have escheated or shall escheat to his Majesty, his heirs or successors shall have been liable at the time the same so escheated respectively or would have been liable in the hands of any of his Majesty's subjects, and to make any grants of such manors, lands, tenements and hereditaments respectively to any trustee or trustees or otherwise for the execution of such trusts, and to make any grants of any lands, tenements or hereditaments which have escheated or shall escheat as aforesaid to any person or persons, either for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any persons or person making discovery of any such escheat, as to His Majesty, his heirs or successors respectively shall seem fit; anything in the said Acts or any of them to the contrary notwithstanding.

By 47 *Geo.* 3, c. 24, which was passed to explain and amend 39 and 40 *Geo.* 3, c. 88, and to remove doubts which had been raised whether the 12th section of that Act applied to the Duchy of *Lancaster* (the title of the kings of *England* to which is separate from the Crown of *England* (1), and grants of lands in which were, by a statute of *Henry* 5th, valid only when executed under the Seal of the Duchy (2),) it was enacted that *in all cases* in which his Majesty, his heirs or successors hath or shall *in right of his Crown* or of his Duchy of *Lancaster* become entitled to any freehold or copyhold manors, messuages, lands, tenements or hereditaments, *either* by escheat for want of heirs, or by reason of any forfeiture, *or* by reason that the same had been purchased by or for the use of or in trust for any alien,

(1) See *Dyke* v. *Walford*, 5 Moore P. C. 434.

(2) See 17 Viners abr. p. 73.

1881
MERCER
v.
ATTORNEY GENERAL FOR ONTARIO.
Gwynne, J.

it should be lawful for his Majesty, his heirs and successors, by warrant under his or their sign manual, *or* under the seal of the Duchy or County Palatine of *Lancaster* according to the title of such manors, messuages, lands, &c., &c., to make grants thereof (as in 12th sec. of 39 and 40 *Geo.* 3rd, c. 88), anything in 1st *Anne* and 34 *Geo.* 3, c. 75, or any other Act to the contrary notwithstanding.

By 59 *Geo.* 3, c. 94, which was passed to explain and amend 39 and 40 *Geo.* 3, c. 88, and 47 *Geo.* 3, c. 24, and to remove doubts which had arisen in certain cases of grants by his Majesty under the said recited Acts, it was enacted that in all cases in which his Majesty hath, or shall *in right of his Crown, or* of his Duchy of *Lancaster*, become entitled to any freehold or copyhold, manors, &c., &c., either by escheat for want of heirs, or by reason of any forfeiture or by reason that the same had been or shall be purchased by or for the use of or in trust for any alien, it shall be lawful for his Majesty, his heirs and successors (as in the former acts) to make grants of such manors, &c., &c., or of any rents and profits then due and in arrear to his Majesty in respect thereof respectively, to any trustee, for the execution of any trusts, *or* for the purpose of restoring the same to any of the family of the person whose estate the same had been, or for carrying into effect any intended grant, *or* for rewarding discoverers, *or* to the families of aliens or other persons *unconditionally*, or in consideration of money, *or* to a trustee to sell, and that the rents and purchase monies to arise by any sale should be applied in payment of any costs, charges and expenses incident to any commission for finding the title of his Majesty, and to the making of any such grant, and for carrying the same and the trusts thereof into execution, or in rewarding any person, or the family of any person making discovery of any such escheat,

forfeiture, or purchase by an alien or of his Majesty's right and title thereto, or in discharging the whole or any part of the debts due from an alien or any person whose estate or property, any such manors, messuages, &c., &c., have been; *or* for the use or benefit in whole or in part of any such alien or of his family, or of any person adopted by such alien or considered as part of his family, *or* of any person whose estate or property any such manors, &c., &c., have been, or his family; or of any person adopted or considered by such person as part of his family, *or* for all or any of the purposes aforesaid as to his Majesty, his heirs and successors shall seem fit; and all previous grants which would be good under the provisions of this Act, are made good and effectual to all intents and purposes as if made under this Act, notwithstanding anything to the contrary in any previous Act.

By the 3rd section it was enacted, that in every case where any surplus should remain of any monies which should arise from any such sale or sales, or which should be paid under the authority of the Act by any person, after satisfying all such purposes as shall have been ordered and directed by his Majesty, his heirs or successors, under the provisions of this Act, shall be paid to the commissioners of his Majesty's land revenue for the time being to be applied by them in the same way and manner as the monies arising from the sale of any manors, messuages, lands, tenements or hereditaments of or belonging to his Majesty by the several Acts now in force for the management and improvement of the land revenue of the Crown or any of them, directed to be applied and disposed of.

By the 14th sec. of 1st *Geo.* 4, c. 1, it was enacted, that an annual account of all monies which shall or may hereafter arise and be received for or in respect of any *droits* of Admiralty *or droits of the Crown*, &c., &c., &c.,

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Swynne, J.

and *from all surplus revenues of Gibraltar, or any other possessions of his Majesty out of the United Kingdom, and from all casual revenue or revenues, whether arising in or from any foreign possessions*, or in the United Kingdom, and of the application and disposition of all such monies or revenues, shall be laid before parliament on or before the 26th day of March in each year, if parliament shall be then sitting, or, if parliament shall not be then sitting, then within 30 days after the then next meeting of parliament.

By 6 *Geo.* 4, c. 17, the provisions of 59 *Geo.* 3, c. 94, were extended to Leasehold lands, &c., &c., &c.

In 1829, 10 *Geo.* 4, c. 50, was passed. This was an Act to consolidate and amend the laws relating to the management of the land revenue of the crown within *England* and *Ireland*, and by the 126th sec. of that Act it was enacted that nothing in the Act should extend or be deemed, or construed to extend, to repeal, interfere with or in any manner affect, any of the powers and provisions of 39 and 40 *Geo.* 3, c. 88, or of 47 *Geo.* 3, c. 24, or of 59 *Geo.* 3, c. 94, or of 6 *Geo.* 4, c. 17.

And by the 128th sec. it was enacted, that nothing in the act should extend, or be construed to extend in any wise to impair or affect any rights, or powers of control, management or direction, which have been or may be exercised by authority of the Crown, or other lawful warrant relative to any leases, grants, or assurances *of any of the small branches of his Majesty's hereditary revenue*, or to any suits or proceedings for recovery of the same, or to compositions made or to be made on account of any of the said small branches, or to fines taken, or to be taken, or to rents, boons and services reserved or to be reserved upon such grants, leases and assurances, or to the mitigation or remission of the same, or to any other lawful act, matter or thing which has been or may be done touching the said branches, but that the

said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same had been or might have been enjoyed by his Majesty up to the time of passing of this Act.

From this last section it appears to be clear that lands which should escheat to the crown whether *propter defectum sanguinis* or *propter delictum tenentis*, or which should become forfeited as purchased to the use of or in trust for an alien were not, and were not regarded as being, part of what were known as "the small branches of his Majesty's hereditary revenue" and that in parliamentary, that is to say in statutory phraseology, this latter term did not comprehend revenue derived from such escheated or forfeited lands

The law affecting lands accruing to the Crown by escheat and forfeiture remained as appearing in the above recited acts until the accession of his Majesty King *Wm.* 4th to the throne in 1831. It will be observed that the above Acts do not profess to affect any personal chattel property escheating to the Crown which continued to be at the absolute disposal of the Sovereign. It will be observed also, that the above recited Acts of 39 and 40 *Geo.* 3, 47 *Geo.* 3, 59 *Geo.* 3, and 6 *Geo.* 4, were not passed for the purpose of vesting in the Crown, rights in respect of lands accruing by escheat or forfeiture which the Crown never had before had, but for the purpose of removing the restraint which the provisions of 1st *Anne* had imposed, or might be supposed to have imposed, upon the power of the Crown over such lands which, but for that statute would have been absolute. The effect of the recited Acts was to cause to be paid over to the commissioners of his Majesty's land revenues the surplus only of the revenue which might be derived or arise from the sale of any such escheated

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

or forfeited lands, after the full and free exercise by the Crown of its prerogative right of disposing at pleasure and *ex speciali gratiâ* of the whole of such lands, or of the proceeds of the sale thereof, to all or any of the purposes mentioned in the recited Acts; they were, in fact, Acts passed for the purpose of maintaining the prerogative right of the Crown of graciously restoring such lands to persons who were, or who were considered as being of, or adopted into, the family of the person whose estate the property had been; that gracious exercise of the Sovereign's prerogative right those statutes maintained and preserved.

Whether the language of 30 & 40 *Geo.* 3, and of the subsequent Acts in amendment thereof, extending as it did to "all cases in which his Majesty, his heirs "or successors, hath or shall in right of his Crown "become entitled by escheat, &c.," was sufficient to include lands in the colonies escheating to the Sovereign for the time being in right of the Crown, is of no importance at the present day, nor is it necessary for the purpose of this case to enquire and determine, for, from what I have already said, it follows, that if those Acts did not apply to lands escheating to the Crown in the colonies the prerogative right of the Crown over such lands to dispose of them at pleasure, and consequently to the gracious purposes indicated in the above recited Acts remained absolute and unaffected by any Act of parliament at the time of the accession of his Majesty King *Wm.* 4 to the throne, for the statute 1st *Anne* was confined expressly in terms to *England* and *Wales* and the town of *Berwick-on-Tweed*, and no similar Act affecting the property belonging or accruing in the colonies to the Sovereign *jure coronæ* had been passed.

I have named above the accession of his late Majesty King *Wm.* 4th to the throne as being the period when first any revenue derived from the casual source of

property, whether real or personal, escheating to the Crown either *propter defectum sanguinis* or *propter delictum tenentis*, was surrendered by the Crown and was incorporated into and made part of the consolidated fund of the United Kingdom.

By 1st *Wm.* 4th, c. 25, after reciting among other things that his Majesty had been graciously pleased to signify to his Majesty's faithful Commons in parliament assembled, that his Majesty placed without reserve at their disposal his Majesty's interest in the hereditary revenues of the Crown and *in those funds which may be derived from any droits of the Crown* or admiralty—from the West India duties, or *from any casual revenues either in his Majesty's foreign possessions or in the United Kingdom*, it was enacted that *the produce* of all the said hereditary duties, payments and revenues in *England* and *Ireland* respectively, &c., &c., &c, *and also* the small branches of the hereditary revenue, *and the produce of* the hereditary casual revenues arising from any *droits* of admiralty *or droits of the Crown*, &c, and from all surplus revenues of *Gibraltar*, or *any other possession of His Majesty out of the United Kingdom*, *and from* all other casual revenues arising either in the foreign possessions of his Majesty or in the United Kingdom, which have accrued since the decease of his said late Majesty, and which shall not have been applied and distributed in the payment of any charge thereupon respectively, or which shall accrue during the life of his present Majesty, shall be carried to and made part of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland*, and from and after the decease of his present Majesty, *all* the said hereditary revenues, shall be payable and paid to his heirs and successors; and by the 12th clause it was enacted, that nothing in this Act contained should extend, or be construed to extend, in any wise to impair, affect or prejudice any

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

rights or powers of control, management or direction which have been or may be exercised by authority of the Crown, or other lawful warrant, relative to any leases, grants or assurances of any of the said small branches of his Majesty's revenue, *or* to any suits or proceedings for the recovery of the same, *or* to any other lawful matter or thing which has been, or may be, done touching the said branches, *or* to the granting of any *droits* of admiralty or any *droits* of the Crown or any part or portion of any such *droits* respectively, as reward or remuneration to any officer, or other person, giving any information relating thereto, *or* to the granting or disposing of any freehold or copyhold property, or the produce of, or any part of the produce, or amount or value of, any freehold or copyhold to which his Majesty, or any of his royal predecessors, have, or hath, or shall become entitled, either by escheat for want of heirs, or by reason of any forfeiture, &c., &c., *or* to the granting or distributing of any personal property devolved to the Crown by reason of the want of next of kin or personal representative of any deceased person, but that the same rights and powers shall continue to be used and enjoyed in as full and effectual manner as if this Act had not been made and as the same might have been enjoyed by his late Majesty King *George* the 4th at the time of his decease, subject nevertheless to all such regulations as were in force by virtue of any Act or Acts of parliament in relation thereto at the time of the decease of his said late Majesty, *it being the true intent and meaning of this Act that the said rights and powers shall not in any degree be abridged, restrained, affected, or prejudiced in any manner whatsoever, but only that the monies accruing to the Crown, after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, shall, during his Majesty's life be*

carried to and made part of the consolidated fund of the United Kingdom.

Now it will be observed that from the passing of the above statute of *Anne* until the passing of this Act of 1st *Wm.* 4, that branch of the revenues of the Crown which arose from escheated or forfeited lands is never spoken of in any Act of parliament under any other designation or description than as the proceeds of lands "which may hereafter escheat" or of lands "wherein "his Majesty hath or hereafter shall become entitled "in right of his Crown by escheat or forfeiture." Never in any Act is such property spoken of or dealt with under the bald description of "Lands belonging to his Majesty." A distinction also was in statutory phraseology drawn between property known under the name of "the small branches of his Majesty's revenue" and lands accruing to his Majesty by escheat or forfeiture. In 1st *Wm.* 4, c. 25, the revenues arising from all lands and personal property devolving upon the Sovereign in right of the Crown by escheat or forfeiture, *as well as* all revenues arising from "the small branches of his crown revenue" are dealt with under the name and designation "casual" revenues of the Crown, and henceforth under this term "casual revenue," the proceeds of all property, whether real or personal, devolving upon the Crown by escheat is dealt with by parliament.

The language of this Act 1st *Wm.* 4, appears to be abundantly ample to comprehend under its operation the territorial and casual revenues accruing to the Crown in the colonies, and in the conflict which arose between the colonial and Imperial authorities, for the purposes of obtaining for the colonies control over those revenues, certain of the Imperial authorities from time to time questioned the competency of the Crown to assent to any bill passed by the colonial assemblies

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

affecting to deal with those revenues. In April 1837 as appears by Mr. *Forsyth's* work intituled "Cases and Opinions on Constitutional Law," p. 156, the then law officers of the Crown in *England*, Sir *John Campbell*, afterwards Lord *Campbell*, and Sir *R. M. Rolfe*, afterwards Lord *Cranworth*, in answer to a question submitted to them by Lord *Glenelg*, then Colonial Minister: "Whether it is in point of law competent for his "Majesty, with the advice and consent of the Legisla-"tive Council and Assembly of *New Brunswick*, to "render the tracts of wildland in the colony which "belong to his Majesty *jure coronæ* subject to the "appropriation of the legislature of the province for a "fixed period or in perpetuity in return for a civil list "to be settled on the Crown for a similar term, or in "perpetuity as may be thought best?" gave it as their opinion that it was competent for his Majesty to make such appropriation of his hereditary revenues in the colony of *New Brunswick*.

The colony of *New Brunswick* possessed a constitution, not created by Act of the Imperial Parliament, as that of *Lower* and *Upper Canada* was, but created from time to time by the Kings of *England* in the exercise of their royal prerogative, the legislative authority in which, as in the Imperial Parliament, consisted of the Sovereign, acting with the advice and consent of a Legislative Council and Assembly, the limits of jurisdiction of such legislature not being prescribed by any written charter. Accordingly, in pursuance of this opinion and in the month of July, 1837, an Act framed upon the model of the Imperial Act, 1st *Wm.* 4th and prepared in *England* was passed by the legislature of *New Brunswick*, 8 *Wm.* 4th, c. 1, whereby after reciting that "his most gracious Majesty had been pleased to signify to his faithful Commons of *New Brunswick*, that his Majesty would surrender up to

their control and disposal, the proceeds of all his Majesty's hereditary, territorial and casual revenues, and of all his Majesty's woods, mines and royalties, now in hand, or which may hereafter during the continuance of this Act be collected in this province, on a sufficient sum being secured to his Majesty, his heirs and successors for the support of the Civil Government, in the province,"—it was enacted that the proceeds of all and every the said hereditary, territorial and casual revenues, and the proceeds of all sales and leases of Crown lands, woods, mines and royalties, which have been collected and are now in hand, or which shall be collected hereafter, during the continuance of this Act, except the monies which shall be expended in the collection and protection thereof, as specially provided for by the 4th sec. of this Act, shall immediately be payable and paid to the Provincial Treasurer, who is hereby authorized to receive the same for the use of the province; and from and after the expiration of this Act the proceeds of all the said hereditary, territorial and casual revenues, and of the said lands, woods, mines and royalties, shall revert to and be payable and paid to his said Majesty, his heirs and successors. The Act then granted a civil list of £1,400, per annum, for 10 years, from 31st December 1836, when the Act should expire.

The 4th section above referred to provided for the payment of the expenses of management out of the gross revenues, and by the 6th sec. it was among other things enacted that nothing in the Act contained should extend or be construed to extend in any wise to disable his Majesty, his heirs or successors, to make any grant or restitution of any estate or estates, or of the produce thereof, to which his Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or by reason of the same having been purchased by or for the use of any alien, or to make any grant or

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

distribution of any personal property devolved to the Crown by reason of the want of next of kin or personal representatives of any deceased person, and that the said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same had or might have been heretofore enjoyed by the Crown, it being the true intent and meaning of this Act that the said rights and powers shall not be in any degree abridged, or restrained or affected in any manner whatsoever, but only that the monies arising from the full and free exercise and enjoyment of them shall be carried to and made part of the joint revenues at the disposal of the General Assembly of the province,

The provisions of this Act were re-enacted and made perpetual by Revised Statutes of *N.B.*, title 3, ch. 5, sec. 7.

The connection in which the words "Crown lands, woods, mines and royalties" are used in this Act plainly shews that under these words is meant to be designated wholly different property from any accruing to the Crown by reason of escheat or forfeiture, and that the word "*royalties*" is intended to describe and cover merely monies, or part of the produce of mines, arising from lease or other disposition of mines. Upon the accession of her present Majesty the Act 1 and 2 *Vic.*, c. 7, was passed which is identical in its terms with 1st *Wm.* 4, c. 25.

That the Imperial Parliament at the time of the reunion of the provinces of *Lower* and *Upper Canada* was determined not to vest in the Legislature of United *Canada* the same power and control over the Crown revenues in the province as the law officers of the Crown had in April, 1837, pronounced to be vested in the Legislature of *New Brunswick* appears from the

Constitutional Act 3 & 4 *Vic.*, c. 35. For the Imperial Parliament by that Act itself constituted a consolidated fund and a civil list for the province of United *Canada* and made a special disposition of the revenues at the disposal of the Crown, and restrained the Crown from assenting to any bill passed by the Legislative Council and Assembly, which should in any manner relate to or affect her Majesty's prerogative touching the granting of waste lands of the Crown within the province, until 30 days after the same should have been laid before both Houses of the Imperial Parliament, or in case either of the said Houses of Parliament should within the said 30 days address her Majesty to withhold her assent from any such bill. The clauses providing for a civil list, namely, the 52nd and 54th, enacted that out of the consolidated revenue fund there should be payable permanently to his Majesty, his heirs and successors £45,000 for defraying the salaries of the Governor, Lieut.-Governor, and of the Judges, and Attorney and Solicitor General, and the expense of the administration of justice, and during the life of her Majesty and for 5 years after the demise of her Majesty a further sum of £30,000 for defraying the expenses of the civil government, and that during the time for which the said several sums were payable the same should be accepted and taken by her Majesty by way of civil list *instead of all* territorial and other revenues now at the disposal of the Crown arising in either of the said provinces of *Upper Canada* or *Lower Canada*, or in the province of *Canada*, and that three-fifths of the *net* produce of the said territorial and other revenues now at the disposal of the Crown within the province of *Canada* should be paid over to the account of the said consolidated revenue fund, and also during the life of her Majesty and for five years after the demise of her Majesty the remaining two-fifths of the *net* produce of

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

the said territorial and other revenues should also be paid over in like manner to the account of the same fund.

The Legislative Assembly of the province persisted still in endeavouring to procure the recognition of the principle for which they contended, namely, that the colonial legislature should exercise the like control over the territorial and casual revenues of the Crown arising in the province as was exercised by the Imperial Parliament over the like revenues arising within the United Kingdom. Accordingly, in 1846, a bill passed the Legislative Assembly and Legislative Council of the province which, as coming within the provision of the Act of Union, was transmitted to *England* for the purpose of being laid, and was laid, upon the table of both Houses of the Imperial Parliament.

By this bill it was recited among other things as follows :—

Whereas your Majesty has been most graciously pleased to declare to your faithful Canadian Commons, in provincial parliament assembled, your Majesty's gracious desire to owe to the spontaneous liberality of your Canadian people, such grant by way of civil list as shall be sufficient to give stability and security to the great civil institutions of the province, and to provide for the adequate remuneration of able and efficient officers, in the executive, judicial and other departments of your Majesty's public provincial service, the granting of which civil list constitutionally belongs only to your Majesty's faithful Canadian people in their provincial parliament.

The bill provided for the establishment of a consolidated revenue fund for the province of *Canada*, in the same terms as had been provided by the 50th sec. of 3 & 4 *Vic.*, c. 35. It then charged upon that consolidated fund permanently a sum not exceeding £34,638 15s. 4d. cy, in lieu of the £45,000, by the 52nd sec. of 3 & 4 *Vic.*, provided, and during the life of her Majesty and for 5 years after the demise of her Majesty, a sum, not exceeding £39,245 16s. cy, in lieu of the

£30,000, by the same 54th section provided; and after making provision for alteration in the salaries to be attached to certain offices, it enacted that:—

During the time for which the said several sums mentioned in the said schedules, are severally payable, the same shall be accepted and taken by her Majesty, by way of civil list instead of all territorial and other revenues now at the disposal of the Crown, arising in this province, and that three fifths of the *net* produce of the said territorial and other revenues, now at the disposal of the Crown, within this Province, shall be paid over to the account of the said consolidated revenue fund; and also that during the life of her Majesty, and for five years after the demise of her Majesty, the remaining two fifths of the *net* produce of the said territorial and other revenues now at the disposal of the Crown within this province, shall also be paid over in like manner to account of the said consolidated revenue fund.

By the Imperial Act, 10 and 11 *Vic.*, c. 71, her Majesty was authorized, with the assent of her Privy Council, to assent to the above bill, and it was enacted that if her Majesty, with the advice of her Privy Council, should assent thereto then the clauses numbered respectively from 50 to 57, both inclusive, of 3 and 4 *Vic.*, c. 35, should be repealed upon and from the day on which the said reserved bill (being first so assented to by her Majesty in Council) should take effect in the province. The bill was subsequently assented to and became an Act 9 *Vic.*, c. 114, of the provincial legislature.

The object of the provincial authorities in procuring the passage of this bill and the royal assent thereto as an Act of the provincial legislature, was to obtain the recognition of the principle so long contended for and which is set out in the above extract from the preamble, namely, that the Crown should owe the provincial civil list to the provincial Commons, and that in return therefor the Crown should surrender to the provincial legislature the same control and management of the territorial and casual revenues accruing to the Crown within the province as was exercised and enjoyed by

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

the Imperial Parliament over the like revenues arising within the United Kingdom. To have greater control was never contended for. We can therefore, I think, affirm with great confidence that by the passing of the bill into an act the local legislature never contemplated obtaining, nor, by authorizing the Royal assent to be given to it, did the Imperial Parliament contemplate conferring, on the provincial legislature, any greater control over, or interest in, the revenues arising from property devolving upon the Crown by escheat or forfeiture, than was exercised and enjoyed in *England* by the Imperial Parliament over the like revenues there, under the 12th section of 1st *Wm.* 4, c. 25, and 1 and 2 *Vic.*, c. 2, by which the jurisdiction was limited to the surplus or "net proceeds" as they are called in the Canadian Act, and in 3 & 4 *Vic.*, c. 35, of those revenues, after the full and free exercise by her Majesty of her royal prerogative of grace and bounty, as expressed in those sections; and yet it is certainly true that no section similar to the 12th section of the above Imperial Acts is inserted in 3 & 4 *Vic.*, c. 35, or in the Canadian Act. This latter Act, however (if the question of her Majesty's right to have exercised in *Canada* such her royal prerogative of grace and bounty after the passing of that act and at the time of the passing of the *British North America Act* should be material to the determination of the question now before us) will have to be read in the light of three Imperial statutes subsequently passed, viz.: 15 & 16 *Vic.*, c. 39, 17 & 18 *Vic.*, c. 118 and 28 & 29 *Vic.*, c. 63. The same observation may be applied to the act of the legislature of *Nova Scotia*, passed in the year 1849, by which the territorial and casual revenues of the Crown arising in that province were surrendered to the provincial legislature. That Act, which appears to have been drafted by a draftsman of a peculiarly and indeed of an excessively cautious cast

of mind, after providing for the surrender of all monies arising from the Crown lands, mines, minerals or royalties, of her Majesty within the province, proceeds to enact, so as to make assurance doubly sure, that "so soon as the Act should come into operation all the right and title of her Majesty, whether in reversion or otherwise, of, in, to and out of all and singular the mines of gold, silver, coal, iron, ironstone, limestone, slatestone, slate rock, tin, copper, lead *and all* other mines and minerals and ores within the province, which by Indenture of lease, dated 25th August, 1826, were granted, demised, etc., by his late Majesty King *Geo.* 4 to the Duke of *York* for 60 years, at and under certain rents and renders therein contained, and also all rents and arrears of *rent and returns* due or to become due by virtue of the said lease, with all powers, rights and authorities, whether of entry for forfeitures, or breach of condition, or otherwise, in the said lease reserved or contained, and also all the estate, right and title of her Majesty, reversionary or otherwise of, in and to all such coal mines in the Island of *Cape Breton*, and to all such reserved mines at *Pictou* as were agreed to be demised by his said late Majesty at £3,000 per annum to a company called the General Mining Association; and also the said £3,000 and all other rents and reservations by the said agreement reserved or payable; and also all mines of gold, silver, iron, coal, iron stone, lime stone, slate stone, slate rock, copper, lead and all other mines, minerals and ores within this province, including the Island of *Cape Breton* of which the title is now in his Majesty, shall be, and the said several enumerated premises are hereby respectively assigned, transferred and *surrendered to the disposal of the General Assembly* of this province to and for such public uses and purposes as in and by any Act of the General

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

Assembly for the time being shall be ordered and directed.

For the purpose of giving effect to this Act, two Acts were subsequently passed by the General Assembly of the province, the one to be found in the second series of the Revised Statutes of *Nova Scotia*, chapter 27, intituled "of The Coal Mines," and the other in the third series of the Revised Statutes, chap. 25, intituled "of Mines and Minerals," in both of which the Legislature of *Nova Scotia* shews its understanding of the term "*Royalties*" to be that which is ordinarily attached to it. By the 23rd section of the former Act it is enacted that "the *royalties* reserved under any lease granted in "pursuance of this chapter shall not be less than those "now paid by any party holding a lease under the "Crown of any mines or minerals in this province," and by the 47 section of the latter Act it is enacted that "on all leases of gold mines and prospecting licenses "to search for gold there shall be reserved a *royalty* "of three per cent. upon the gross amount of gold "mined," by the 55 section that "each licensed mill-"owner shall separate from the yield or produce of gold "of each lot or parcel of quartz as crushed, *three* parts out "of every hundred parts of such yield as the portion "thereof belonging and payable to her Majesty *as* "*royalty*."

By sec. 69, "The lessee of each mine shall be liable "for *royalty*, upon all gold obtained from his mine in "any other way than from quartz crushed at licensed "mills, but he shall be exempted from any claim in "respect of gold obtained from quartz so crushed, the "liability of the mill-owner for such *royalty*, being "hereby substituted, instead of that of the lessee," and by sec, 102—"All licenses and leases of mines and "minerals, other than gold mines shall be subject to "the following *royalties* to the Crown, to the use of

" the province on the produce thereof, after it has been " brought into marketable condition, payable yearly " from the period of their respective dates, " that is to say—of five per cent. on all such ores and " minerals except gold, iron and coal—of eight cents " on every ton of iron and of ten cents on every ton of " 2,240 lbs. of coal, which said *royalties* shall be paid " to such person or persons at such times and in such " places, as the licenses or leases shall respectively " stipulate, or as the Governor in Council may from " time to time direct."

By the Imperial Act, 15 and 16 *Vic.*, c. 39, after reciting 1st *Wm.* 4th, c. 25, sec. 2, and 1st *Vic.*, c. 2, sec. 2, and that from the time of the passing of the said Act of 1st *Wm.* 4th, *the lands of the Crown in the colonies* (save where special provision has been made in relation thereto by other Acts of parliament) have been granted and disposed of, and the monies arising from the same whether on sale or otherwise, have been appropriated by or under the authority of the Crown and by and under the authority of the legislatures of the several colonies as if the Acts 1st *Wm.* 4th, and 1st *Vic.*, had not been passed, and whereas doubts have arisen whether the monies arising as aforesaid in the said colonies may not be considered hereditary casual revenues " within " the meaning of the said Acts, and whether all or any " part of other revenues arising within the said colonies " and being hereditary casual revenues within the " meaning of the said Acts may be lawfully appropriated " to public purposes for the benefit of the colonies within " which they may have respectively arisen," and to remove such doubts it was enacted that,—

1st. The provisions of the said recited Acts in relation to the hereditary casual revenues of the Crown shall not extend or be deemed to have extended to the monies arising from the sale or other disposition of the lands of the Crown in any of Her Majesty's colonies or foreign possessions, nor in any wise invalidate or affect

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J

any sale or other disposition already made or hereafter to be made of such lands or any appropriation of the monies arising from any such sale—or other dispositions which might have been lawfully made if such Acts or either of them had not been passed.

2nd. Nothing in the said recited Acts contained shall extend or be deemed to have extended to prevent any appropriation which if the said Acts had not been passed might have been lawfully made by or with the assent of the crown of any casual revenues arising within the colonies or foreign possessions of the Crown (other than *droits* of the Crown and *droits* of Admiralty) for or towards any public purposes within the colonies or possessions in which the same respectively may have arisen, *provided always that the surplus not applied to such public purposes of such hereditary casual revenues shall be carried to and form part of the said consolidated fund.*

From the debate which took place in parliament at the time of the passing of this Act, its object appears to have been to authorize the appropriation to colonial purposes of the Crown revenues in the colonies arising from waste lands or from mineral treasures, which the Acts of 1st *Wm.* 4 and 1st *Vic.* were regarded as appropriating to the consolidated fund of the *United Kingdom*, and to confirm the appropriations which had then already been made of those revenues by Acts of the colonial legislatures, and to make the above named Imperial Acts apply only to directing the appropriation to the consolidated fund of the *United Kingdom* of any surplus remaining after the application of whatever might be necessary for the advantage of the colony. What surplus there was expected to be after the appropriation by the colonial legislatures of what they should by Act of parliament assented to by the Crown declare to be necessary to be expended for the benefit of the colony, it is difficult to understand, but the Act expressly declares that such monies arising from such revenues as shall not be applied to the public purposes of the colony shall be carried to and form part of the consolidated fund of the *United Kingdom*. The Acts of 1st *Wm.* 4 and 1st *Vic.*, being by this Act held

to apply so far to such surplus monies arising from the surrendered Crown revenues within the colonies, it would seem but reasonable to hold that the proviso in the 12th section of those Acts which saves to the Crown the exercise of its prerogative royal of grace and bounty should apply also if the question was whether the Crown did or did not possess that prerogative right in *Canada* immediately before the passing of the *British North America Act*. There are moreover two colonial Acts of those referred to in the preamble of 15 & 16 *Vic.*, c. 39, as disposing of the lands of the Crown in the colonies notwithstanding 1st *Wm.* 4 & 1st *Vic.*, which it will be proper to refer to in this connection, namely, 4 & 5 *Vic.*, c. 100, and 12 *Vic.*, c. 31 of the Acts of the legislature of *Canada*. By the former of these Acts entituled "An Act for the disposal of *Public Lands*," after reciting that it was "expedient to provide by a law applicable to all parts "of this province for the disposal of *public lands* "therein," it was in the 2nd section enacted that except as thereinafter provided "no free grant of public land shall be made to any person or person whomsoever," and by the latter, after reciting that it was expedient to amend and extend the provisions of the former Act as well as to remove certain doubts which had arisen as to the intention and meaning of some of the provisions of the said Act; and whereas by the 2nd section of the said Act it is enacted with certain exceptions hereinafter provided "no free grant of public land shall be made "to any person or persons whomsoever; and whereas "doubts have been entertained whether the same does "not preclude her Majesty from the exercise of her "royal grace in the relinquishment of her rights to "escheats and forfeitures in favor of those near of kin "or otherwise connected with the parties last seized "thereof, and it is expedient to remove all such doubts,"

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

it was "*declared* and *enacted* that the 2nd section "of the said Act extends and shall be deemed to have "at all times extended *to such lands only* as no patent "deed had ever been issued for, and not to such as "having been once granted by letters patent had "subsequently become vested in her Majesty either by "act of the party or by operation of law."

We have here a plain definition of the term "public lands" of the province as understood by the legislature, a term which has ever since been used and understood in the same sense, and from the preamble to this Act we can gather that the same legislature which recited as a reason for passing it, that it was desirable to remove doubts which had been entertained whether the 2nd sec. of 4 & 5 *Vic.* c., 100, did not preclude her Majesty from the exercise of her royal grace in the relinquishment of her rights to escheats and forfeitures in favour of those near of kin or otherwise connected with the parties last seised could never have intended by the Act of 9 Vic. c. 114 to preclude her Majesty from the like exercise of her royal grace; this Act in fact seems to involve a recognition of the right of her Majesty to exercise such right in the case of lands become escheated or forfeited in *Canada*. By the 6th sec. of 17 and 18 *Vic.*, c. 118, which was an Act passed to empower the legislature of *Canada* to alter the constitution of the Legislative Council of that province, the restraint imposed upon the legislature of *Canada* by the 42nd sec. of 34 *Vic.*, c. 35, was removed, that section was repealed, and it was enacted, notwithstanding anything in 3 and 4 *Vic.*, c. 35 or in any other Act of Parliament contained, it should be lawful for the Governor to declare that he assents to any bill of the legislature of *Canada* or for her Majesty to assent to any such bill if reserved for the signification of her Majesty's pleasure thereon, although such

bill shall not have been laid before the said Houses of Parliament, and no Act heretofore passed or to be passed by the legislature of *Canada* shall be held invalid or ineffectual by reason of its not having been laid before the said Houses or by reason of the Legislative Council and Assembly not having presented to the Governor such address as by the said Act of Parliament is required.

By 28 and 29 *Vic.*, c. 63, sec. 2, intituled "An Act to remove doubts as to the validity of Colonial Laws," it was enacted that,—

"Any colonial law which is or shall be in any respect "repugnant to the provisions of any Act of Parliament "extending to the colony to which such law may relate, "or repugnant to any order or regulation made under "authority of such Act of Parliament, or having in the "colony the force and effect of such Act, shall be read "subject to such Act, order or regulation, and shall to "the extent of such repugnancy, but not otherwise, be "and remain absolutely void and inoperative."

We find then, that immediately preceding the passing of the *British North America Act*, all Acts of Parliament dealing with this subject, from 1st *Wm.* 4, dealt with it as forming part of the hereditary casual revenues of the Crown within the colonies which had been surrendered by the Crown provisionally in return for a civil list, in which revenues the Crown retained a reversionary interest, after the times named during which the civil lists contracted for were granted. We find also that the statute of the legislature of *New Brunswick*, which had dealt with the subject, specially reserved to the Crown the prerogative right of exercising the royal grace and bounty by making any grant or restitution of any property, real or personal, or the produce thereof to which the Crown should become entitled by escheat for want of heirs or next of kin, or

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

by reason of any forfeiture as 1st *Wm.* 4 and 1st *Vic.* had done in *England*, and the first position taken by Mr. *McDougall* in his very able argument, as I understood it, was—that the effect of that Act, as well as of several of the Imperial Acts above cited, was to maintain inviolate to the Crown the same exercise of the royal grace and bounty in respect of property devolving upon the Crown by escheat and forfeiture in *Canada* and *Nova Scotia*; the conclusion drawn being that the power of appropriation of the legislatures of the old provinces prior to confederation is to be regarded as affecting only so much, if any, of such revenues as should remain after the full and free exercise by the Crown of its prerogative right of making grant and restitution of all escheated or forfeited property or of the produce thereof (after deducting the expenses attending finding the property of the Crown) to any person having claims upon the person whose estate the escheated or forfeited property was, and that since confederation the exercise of such prerogative right cannot be interfered with by any provincial authority, or by provincial legislation. But the question, as it appears to me, is not whether before the passing of the *B. N. A. Act*, the Crown did or did not retain the royal prerogative right within the provinces of *Canada*, *Nova Scotia* and *New Brunswick*, but had the several legislatures of those provinces power of appropriation over escheated and forfeited property within these respective provinces—that is to say, in other words, could the Queen, by and with the advice and consent of the Legislative Councils and Houses of Assembly of those respective provinces, have made any appropriation of those revenues as should seem fit to them, although different from what appropriation had already been made by legislation over such revenues accruing within those provinces respectively? And I

think that in view of the long contention maintained by the Legislative Assembly of *Canada* upon the subject, which is so emphatically asserted in the preamble of the *Canada* statute 9 *Vic.*, c. 114, which had been assented to by her Majesty upon the authority of the Act of the Imperial Parliament specially passed for that purpose, the position asserted in the preamble of the *Canada* statute must be taken to be admitted by the Imperial Act passed to give it effect, and in view of the provisions of 17 and 18 *Vic.*, c. 118, and in view also of the practice which had become engrafted upon the colonial constitutions with the sanction of the Imperial Parliament, it cannot, I think, now be questioned, that the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, that is to say, her Majesty, by and with the advice and consent of the Legislative Councils and Houses of Assembly of those respective provinces, had before the passing of the *British North America Act* power of appropriation over all the territorial and casual revenues of the Crown accruing within those respective provinces, whatever may have been contemplated by the equivocal reservation of the very contingent surplus which the Imperial statute, 15 and 16 *Vic*, c. 39, intended to appropriate to, and make part of, the consolidated fund of the *United Kingdom*.

Now, that the *British North America Act* places under the absolute sovereign control of the Dominion Parliament all matters of every description not by the Act in precise terms exclusively assigned to the legislatures of the provinces, which by the 5th section of the Act are carved out of and subordinated to the Dominion, cannot, in my judgment, admit of a doubt. It was admitted by the learned counsel who represented the provinces in the argument before us, that this was true with respect to all matters of *legislation*, but it was contended that when the Act deals with "*property*"

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

the rule was inverted and that the provinces take "*all property*" not by the Act in precise terms given to the Dominion.

The sole foundation for this contention appears to me to be based upon an assumption which in my judgment is altogether erroneous, namely, that the *British North America Act*, transfers as it were the legal estate in the Crown property from the Crown and vests it in the Dominion and the provinces respectively as corporations capable of holding property, real and personal, to them, their successors and assigns for ever; but the Act contemplates no such thing; its design as to "properties," as to every thing else which is appropriated to the use of the provinces and therefore placed under the legislative control of the provincial legislatures, is to specify those properties which being still, as before, vested in the Crown shall be under the *exclusive control* of the provincial legislatures. And so likewise with respect to the properties assigned for the purposes of the Dominion — control and management over property vested in the Crown for public purposes is what the Act deals with, not with the legal estate in such properties, divesting the Crown thereof and transferring the legal estate in some to the provinces and in some to the Dominion as corporations, and indeed what we are called upon to adjudicate upon, is a question directly affecting the legislative jurisdiction of the provinces, namely, is or is not the Act of the legislature of *Ontario*, which professes to deal with the property in question which is admitted to have devolved upon her Majesty, *jure coronæ* by escheat, *ultra vires* of the provincial legislature?

Neither can it admit of a doubt, as it appears to me, that the jurisdiction which is expressly given to the provinces by the 12th item of sec. 92 of the Act over "*property and civil rights in the province*," can

have no bearing whatever upon the question before us for, 1st, the property with which we have to deal is, unless the *British North America Act* by clear enactment makes it otherwise, property accruing to her Majesty *jure coronæ*, it therefore cannot be taken from the Crown except by express enactment. These words therefore "property and civil rights in the province" cannot affect the property of her Majesty. We must seek therefore in some other clause of the Act for authority to affect this property; and secondly, these words have no effect whatever to restrain the jurisdiction of the Dominion Parliament over property and civil rights in all the provinces, in so far as any of the matters comprised in the enumeration of subjects in sec. 91 of the Act requires control over "property and civil rights in the provinces." Those words therefore must be construed as conferring upon the provinces jurisdiction only over the *residuum* of property and civil rights in the provinces, not absorbed by the jurisdiction over that matter involved in the complete and supreme control over the matters specially placed under the control of the Dominion Parliament. Now, among the items so placed we find "the public debt and property" specially mentioned in the first item of sec. 91, and for payment of the public debt it is to be observed that the consolidated fund of the respective old provinces of *Canada*, *Nova Scotia* and *New Brunswick* (created by the *British North America Act* the Dominion of *Canada*) had been formed, and in this fund and as part thereof, as the "public property" appropriated to meet the public debt, was comprehended, as we have seen, the casual revenues of the Crown accruing within the respective provinces, in which casual revenues, as we have also seen, was comprised all property real and personal devolving upon her Majesty *jure coronæ* within the

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

provinces, whether *propter defectum sanguinis* or *propter delictum tenentis*. Now, of this property so forming part of the revenues constituting the consolidated fund of the old provinces, which was the fund upon which the debts of those provinces were charged, we find a most plain and unequivocal appropriation made by the 102nd sec. of the Act, namely: "All "duties and revenues over which the respective legis-"latures of *Canada*, *Nova Scotia* and *New Bruns-"wick* before and at the Union had and have power of "appropriation, *except* such portions thereof as are by "this Act reserved to the respective *Legislatures* of the "provinces or are raised by them in accordance with the "special powers conferred on them by this Act shall "form one consolidated revenue fund to be appro-"priated for the public service of *Canada* in the manner "and subject to the charges in this Act provided," and among those charges in section 104 we find the general interest of the public debts of the several provinces of *Canada*, *Nova Scotia* and *New Brunswick* at the Union.

We have here then, expressed in precise and unambiguous language, appropriation made of everything which formed part of the consolidated funds of the several provinces before confederation, (except what by the Acts is particularly and expressly excepted thereout and placed under the control of the legislatures of the provinces created thereby) for the formation of the consolidated fund of the Dominion of *Canada*, in return for the assumption by the Dominion, (which the old provinces were erected into and created) of the public debts of those old provinces. The question is therefore simply reduced to this: does any other, and if any, what other part of the Act which constitutes the sole charter alike of the Dominion and of the provinces, *except* any, and, if any, what part of such consolidated

fund of the Dominion of *Canada* from that fund, and place such excepted part under the control of the legislatures of the provinces. It is worthy of note here, in connection with what I have already said in relation to the argument as to the appropriation of *property* as distinct from "legislative functions," that the excepted part, whatever it be and in whatever clause of the Act it is found, is spoken of as being "reserved to the respective *legislatures* of the provinces" that is as matter placed under the legislative *control of* and not as *estate vested in* the provinces.

Now, the only clause of the Act which can be contended to involve the exception referred to in the 102nd section is the 109th, namely :—

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.

We cannot, as I have already observed, read these words "lands, mines, minerals and royalties *belonging* to the several provinces of &c., &c., at the Union" as meaning that the *estate and property* in those subjects shall be divested out of the Crown and be transferred to and vested in the provinces as corporations, but, inasmuch as this clause is to be read as expressing the *exception out* of the consolidated fund referred to the 102nd section, that these sources of revenue, constituting portions of the territorial and casual revenues of the Crown forming the consolidated fund of the Dominion of *Canada,* shall be excepted from the general appropriation of all revenues in that fund, and shall be regarded as the excepted parts which are by the 102nd section said to be "reserved to the *respective*

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

legislatures of the provinces" and placed under their control.

Now, what lands, mines, minerals and royalties can with propriety, having regard to the manner in which those words have been used in other legislative language above quoted, be said to have *belonged* to the several provinces of *Canada*, *Nova Scotia* and *New Brunswick at the Union* ? None at all, it is plain, in any other sense than that the revenues arising from such properties *belonging* to the Crown had been made part of the consolidated funds of the old provinces now constituting the *Dominion* of *Canada*, for the public uses of these provinces. "Lands" which had been already granted by the Crown and were at the time of the Union vested in the grantees thereof, or in their heirs or assigns, cannot with any degree of propriety be said to have been lands "belonging to the several provinces of, &c., &c., at the Union," and it is only such lands granted which could devolve upon her Majesty *jure coronæ* by escheat and forfeiture, and for this reason it was that the legislature of *Canada*, which was the chief of the parties to the framing of the *British North America Act* and to the petition to the Imperial Parliament to pass it, and within the limits of which province the property now in question is situate, declared by 12 *Vic.*, c.31, that the term "public lands" in the province, which is but an equivalent expression to "lands belonging to the provinces at the Union" did not comprehend lands accruing to the Crown by escheat or forfeiture, and that they did comprehend only the *ungranted lands of the Crown in the province*, in which sense they have ever since been understood.

These waste ungranted lands of the Crown, the revenues derived from which constituted part of the consolidated funds of the provinces before the Union, were, as we know, appropriated to the public uses of

the provinces; but the lands so appropriated did not constitute all the ungranted lands of the Crown in the provinces. There were other lands of the Crown, the monies arising from the sale or other disposition of which did not form part of such consolidated funds; these lands were set apart and appropriated for the actual residence thereon and occupation thereof by certain Indian tribes by whom they were surrendered to and became vested in the Crown, and others were surrendered by the Indians to and vested in the Crown for the purpose of being granted by the Crown and that the monies arising therefrom should be applied for the benefit of the Indians. These lands are by item 24 of sec. 91, placed under the control of the Dominion Parliament. The custom in the grants by the Crown of these lands was the same as in the grants of all other Crown lands, namely, to reserve all mines and minerals, but the reservation thereof would accrue, as was provided with respect to the monies arising from the sale of the lands, to the benefit of the Indians for whose benefit the lands were set apart; such mines and minerals, or the royalties accruing from the disposition thereof, could not have been appropriated to the public uses of the provinces, the "lands" therefore which are referred to in sec. 109 of the *British North America Act* can only be construed to mean those ungranted or public lands belonging to the Crown within the several provinces of *Canada, Nova Scotia* and *New Brunswick*, the revenues derived from which before and at the Union effected by the *British North America Act* had been surrendered by the Crown and made part of the consolidated funds of the provinces; and the words "mines, minerals and royalties" being in the same 109th sec. added to the word "lands," this latter word must there be construed in a limited sense, that is to say, as exclusive of the "mines and minerals"

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

therein, which, if those words had not been added, the word "lands" might have been sufficient to comprehend, but the section "reserves for the legislatures of the provinces," not only the mines and minerals, and royalties *in* or arising out of such lands but also "all mines and minerals, and royalties" belonging to the several provinces of &c., at the Union—that is to say, not only all mines and minerals in the ungranted lands of the Crown in the several provinces the revenue derived from which had been surrendered to and made part of the consolidated funds of the provinces for the respective uses of the provinces, but also all mines and minerals in the granted lands and which by the grants had been reserved by the Crown, the revenues derived from which had been also made part of the said consolidated funds: the intention, however, of the 109th sec., was to "reserve for the legislatures of the provinces," created by the *British North America Act*, not only the "lands, mines and minerals" as above described, but also the monies accruing to the Crown by way of royalties in mines already being worked under leases or licenses from the Crown, (which monies had also been appropriated to and formed part of such consolidated funds,) of which there were many in *Nova Scotia*, to regulate which, as we have seen, Acts had been passed by the legislature of that province: the word "*royalties*," therefore was added—the whole thus comprising all "lands" being the ungranted lands of the Crown as they were accustomed to be granted, the revenue derived from the sale of which had been made part of the said consolidated funds, *and* "all mines and minerals," as well those in such lands as also in all lands already granted, the revenues from which mines and minerals had been appropriated in like manner, *and* "the royalties" derived from such mines and minerals, or (to which may be added) from timber cut upon public lands, under

licenses for that purpose, which had also been in like manner appropriated, and all monies *then*, that is, at the Union, due and payable for any of such lands, mines, minerals and royalties, these words mines, minerals and royalties being used all in their natural and ordinary sense, and in the sense in which they were used in the above quoted statutes of the province of *Nova Scotia* relating to "mines and minerals." We have thus a plain, simple, rational and natural construction put upon the clause in which these words, constituting the exception referred to in sec. 102, are found, and which accords with the provisions of all of the above quoted Acts relating to the same subject, and with the sense in which the same words are used in some of those Acts.

By giving to the words in the 109th section their plain, natural and ordinary construction, we need not resort to the construction pressed upon us by the learned counsel for the provinces, which I must say appears to me to be strained and unnatural and to have been put forward as expressing what, in the opinion of those learned counsel, should have been the disposition made in the *British North America Act* by the framers thereof, rather than what has been made, of property accruing to the Crown by escheat or forfeiture. It is with this latter point alone that we have to deal. In view, however, of the disposition attempted to have been made of the property in question by the legislature of the province of *Ontario*, in derogation of the claims of the woman who had lived for so many years with the deceased as his wife, and of the young man their son who, though illegitimate, had been brought up by the deceased as, and with the expectations of, a son and under the name of the deceased, and in derogation also of the right of her Majesty to exercise her prerogative of grace and bounty to repair the wrong done to those

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

injured persons, who to all seeming, though not in law, filled the places of wife and son of the deceased (a prerogative which in like cases had never been known to fail), we may be permitted to venture the opinion, that those may be excused who doubt whether the placing the claims of such persons under the control of the local legislatures would have been more prudent in any sense, or more calculated to promote the interests of justice and humanity, and to procure redress of the wrongs of the parties already cruelly injured by perhaps the unintentional accident of the deceased having died without a will, or best adapted to advance the real good of the public, than to leave the matter still to be dealt with by her Majesty as it had always hitherto been for the protection of the injured, controlled only by the legislative authority vested in her Majesty by and with the advice and consent of the Parliament of the Dominion. For the reason, however, already given I entertain no doubt that control over all property in the several provinces of the Dominion becoming escheated or forfeited to the Crown is placed under the exclusive control of the Dominion Parliament by the 102nd section of the *British North America Act*, and that no other clause or part of the Act exempts such property from such disposition,—the Act therefore of the province of *Ontario*, 40 *Vic.*, c. 3, which affects to deal with such property is *ultra vires* and void, and the appeal in this case should be allowed with costs.

As it did not appear to me to be necessary for the determination of the question before us, I have not followed the learned counsel in all their adverse criticism of the frame of, and of the expressions used in, the *British North America Act*. I may, however, say that it is not, in my opinion, justly chargeable with the defects imputed to it, or open to the construction put upon it by the learned counsel who represented the provinces.

In my judgment it expresses in sufficiently clear language the plain intent of the framers of that Act to have been, that the plan designed by them of federally uniting the old provinces of *Canada*, *Nova Scotia* and *New Brunswick* into one Dominion under the Crown of the United Kingdom of *Great Britain* and *Ireland* with a constitution similar in principle to that of the United Kingdom, was, to confer upon the Dominion so formed a *quasi* national existence—to sow in *its* constitution the seeds of national power—to give to it a national Parliament constituted after the pattern of the Imperial Parliament, her Majesty herself constituting one of the branches thereof, and to constitute within that national power so constituted and called the "Dominion of *Canada*," certain subordinate bodies called provinces having jurisdiction *exclusive* though not "Sovereign" over matters specially assigned to them of a purely local, municipal and private character, to which provinces, by reason of this juridiction being so limited, were given constitutions of an almost purely democratic character, of whose legislatures her Majesty does not, as she does of the Dominion, and as she did of the old provinces, constitute a component part, and to the validity of whose Acts, the Act which constitutes their charter does not even contemplate the assent of her Majesty as necessary. The jurisdiction conferred on these bodies being purely of a local, municipal, private and domestic character, no such intervention of the Sovereign consent was deemed necessary or appropriate, so likewise the power of disallowing Acts of the provincial legislatures is no longer, as it was under the old constitution of the provinces, vested in her Majesty, but in the Governor General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by her Majesty in right of her

1881
MERCER
v.
ATTORNEY
GENERAL
FOR
ONTARIO.
Gwynne, J.

prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power *by statute* vested in the Dominion authorities (the royal prerogative being for that purpose extinguished) and to enable the Dominion authorities to prevent the legislatures of the provinces, carved out of and subordinated to the Dominion, from encroaching upon the subjects placed under the control of the National Parliament by assuming to legislate upon those subjects which are not within the jurisdiction of the provincial legislatures.

The Appeal must be allowed with costs, the order overruling the appellants demurrer to the information filed by the Attorney General of the province of *Ontario* in the Court of Chancery of that province discharged, the demurrer allowed and the said information dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *McDougalls* and *Gordon.*

Solicitors for respondent: *Edgar*, *Ritchie* and *Malone.*

INDEX.

ABANDONMENT—*Notice of* — — 368
See MARINE POLICY.

ACCORD AND SATISFACTION — — 35
See CONTRACT.

ACTION BY CREDITOR AGAINST A SHAREHOLDER — — — — — 417
See ALLOTMENT.

ACTION—*Premature* — — — 82
See INSURANCE, FIRE.

AGENT—*Fraudulent receipt of* — — 179
See SHIPPING NOTE.

AGREEMENT—*Additional parol term* — 204
See CARRIERS.

2——*Construction of—Property in lumber—Ownership and control of lumber until payment of draft given for stumpage under the agreement.*] The respondents, owners of timber lands in *New Brunswick*, granted *C. & S.* a license to cut on twenty-five square miles. By the license it was agreed *inter alia:* "Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the afore-mentioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become

AGREEMENT.—*Continued.*

due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license *C. & S.* gave to the respondents a draft upon *J. & Co.*, which was accepted by *J. & Co.*, and approved of by the respondents, but which was not paid at maturity. After giving the draft *C. & S.* sold the lumber to *J. & Co.*, who knew the lumber was cut on the plaintiff's land under the said agreement. *J. & Co.* failed, and appellant, their assignee, took possession of the lumber and sold it. *Held:* Per *Strong*, *Taschereau* and *Gwynne*, J. J., (affirming the judgment of the Court below,) *Ritchie*, C. J., and *Fournier* and *Henry*, J. J., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to *C. & S.* immediately upon the receipt by the company of the accepted draft of *C. & S.* on *J. & Co.*, and that appellant was liable for the actual payment of the stumpage. MCLEOD *v.* THE NEW BRUNSWICK RAILWAY CO. — — — 281
3——*Conditional agreement* — — 417
See ALLOTMENT.

ALLOTMENT—*Notice of—R. W. Co.—Action by creditor against a shareholder—Conditional agreement.*] The appellant, a judgment creditor of the *T. G. & B. Railway Co.*, sued the respondent as a shareholder therein, for unpaid stock. From the evidence it appeared that the respondent signed the stock book, which was headed by an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent. of the amount of the said shares and all future calls. The company, on the 1st July, passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper, notifying subscribers to the capital stock of the *T. G. & B. Railway Co.*, that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never

ALLOTMENT.—*Continued.*

called for or received his certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of the allotment having been made to him. The case was tried twice and the learned judge, at the second trial, although he found that the respondent had subscribed for fifty shares and had been allotted said fifty shares, was unable to say whether respondent had received actual notice of allotment. *Held*, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved. (*Ritchie*, C. J., and *Gwynne*, J., dissenting.) NASMITH *v.* MANNING — — 417

ANNUITIES—*Sale of corpus to pay* — 258
See WILL.

APPEAL—*From findings upon matters of fact* 91
See ELECTION, 1.

2——*Cross Appeal.*] An appellant in the Court of Queen's Bench, P.Q., who had partly succeeded, appealed to the Supreme Court on the ground that the judgment was yet excessive. At the same time the respondent appealed on the ground that the judgment of the Superior Court ought to have been affirmed. This second appeal was treated by the Court as a cross-appeal under the Supreme Court rules, and the respondents on the second appeal having succeeded in getting the judgment of the Court *a quo* reversed on the second point and confirmed on the first point, were allowed costs of a cross-appeal. PILON *v.* BRUNET — 319

3——*Finding of the Judge at the trial.*] A Court of Appeal should not reverse the finding upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanor of the witnesses, unless the evidence be of such a character as to convey to the mind of the Judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. RYAN *v.* RYAN — — — — 406

ASSUMPSIT — — — — — — 35
See CONTRACT.

BRIBERY — — — — — — 91
See ELECTION.

BRITISH NORTH AMERICA ACT, 1867, 66
See ESCHEAT,—PARLIAMENT OF CANADA, JURISDICTION OF.

BY-LAW—*Power to impose License Tax*— 356
See LICENSE TAX.

CANDIDATE—*Liability of, for the acts of persons employed by agent* — — — — 133
See ELECTION, 2.

2.——Personal expenses of— — — 91
See ELECTION, 1.

CARRIERS—*Railway Company, Liability of as —Agreement—Additional parol term—Conditions —Carriers—Wilful negligence—"At owner's risk."*] The respondents sued the appellants railway company, for breach of contract to carry petroleum in covered cars from *L.* to *H.*, alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, a verbal contract between plaintiffs and defendants' agent at *L.* was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk." *Held*, per *Ritchie*, C.J., and *Fournier* and *Henry*, J.J., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. Per *Strong*, *Fournier*, *Henry* and *Gwynne*, J. J.:—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at *L.* was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars, prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability. THE GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* FITZGERALD — — — — — — 204

CIVIL CODE—*Arts.* 1760, 1265, 774 — 318
See COMMUNITY.

2.——Art. 2482 — — — — 157
See INSURABLE INTEREST.

COLORABLE EMPLOYMENT — — 313
See ELECTION, 2.

CONTRACT—*Construction of.*]—Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in *England*, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent. On the trial it appeared that *E. V.*, a brother of respondents, had obtained from appellant a fourth share in the

CONTRACT.—*Continued.*

vessel, the purchase being effected by one of the respondents; and it was also shown that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at *Liverpool*, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to *Liverpool*, of which appellant disapproved.—Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied, that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the *Atlantic*. A correspondence ensued, and finally, on the 17th Nov., 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then reasserted his right to control the vessel, stated, in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200 in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant.—*Held*, on appeal, reversing the judgment of the Supreme Court of *New-Brunswick*, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction.—The contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name.—WELDON *vs.* VAUGHAN — — — 35

COSTS—*Tender of.*]—Appellants, not having tendered with their plea costs accrued up to and inclusive of its production, should pay to the respondent the costs incurred in the court of first instance. THE ÆTNA LIFE INSURANCE CO. *vs.* BRODIE — — — — 1

2.——*Of Appeal*—The court being equally divided, the judgment of the court below was affirmed. MCLEOD *vs.* THE NEW BRUNSWICK RAILWAY CO. — — 218

3.——*Of Cross Appeal* — — — 318
See APPEAL 2.

CROSS APPEAL — — — 319
See APPEAL 2.

CUSTOM OF PARIS—*Arts.* 1760 & 1265. — 318
See COMMUNITY.

DISCRIMINATION—*Tax.* — — — 356
See TAX.

EDIT DE SECONDES NOCES, 1560 — 318
See COMMUNITY.

EJECTMENT — — — — — 221
See LETTERS PATENT.

ELECTION PETITION—*Supreme Court Act, Sec. 44—Right to send back record for further adjudication—Bribery—Appeals from findings upon matters of fact—Insufficiency of return of election expenses—Personal expenses of candidate to be included.*] The original petition came before Mr. Justice *McCord* for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned Judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent, under sec. 48 of the *Supreme Court Act*, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice *McCord* had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the said cause proceeded with according to law. The record was accordingly sent to the prothonotary of the Superior Court at *Montmagny*. Mr. Justice *McCord*, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice *McCord* had no jurisdiction to proceed with the case. *Held:* That the Supreme Court on the first appeal could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court *a quo* to be proceeded with according to law, gave jurisdiction to Mr. Justice *McCord* to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48, *Supreme Court Act.* (*Fournier* and *Henry*, J.J., dissenting). The charge upon which this appeal was principally decided was that of the respondent's bribery of one *David Asselin*. The learned Judge who tried the case found, as a matter of fact, that the appellant had underhandedly slipped into *Asselin's* pocket the $5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the *Election Act*, and this payment was bribery. *Held:* That an Appellate Court in election cases ought not to reverse, on mere matters of fact, the findings of the Judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery. Per *Taschereau*, J.:—That the personal expenses of the candidates should be included in the statement of election expenses required to be furnished to the Returning Officer under 37 *Vic.*, c. 9, sec. 123. [*Fournier* and *Henry*, J.J., expressed no opinion on the merits. The judgment

ELECTION.—*Continued.*

of *McCord*, J., (1) on the other charges, was also affirmed.] LARUE *v.* DESLAURIERS — 91

2——*The Dominion Elections Act*, 1874, *secs.* 82, 83 *and* 84—*Public peace—Colorable employment —Liability of candidate for the acts of persons employed by agent—Bribery.*] On a charge of bribery against one *T.* and one *A.*, upon which this appeal was decided, the Judge who tried the petition found as a fact that *A.* had been directed by *T.*, an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of *Bay St. Paul*, on the polling day, and had bribed four voters previously known to be supporters of the appellant, by giving them $2 each, but held that *A.* was not agent of the respondent, and, therefore, his acts could not void the election. *Held:* on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colorable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of *A.*, the sub-agent, as for the acts of *T.*, the agent, and they having been guilty of corrupt practices, the election was void. (*Taschereau* and *Gwynne*, J. J., holding that *A*, the sub-agent alone, had been guilty of bribery.) CIMON *v.* PERRAULT — 133

EQUITABLE DEFENCE — — — — 221
See LETTERS PATENT.

EQUITY—*Powers of* — — — — 446
See INSURANCE, 2.

ESCHEAT—*Hereditary revenue — The Escheat Act R. S. O., c. 94 ultra vires—B. N. A. Act, secs.* 91, 92, 102 *and* 109.] On an information filed by the Attorney General of *Ontario*, for the purpose of obtaining possession of land in the city of *Toronto*, which was the property of one *Andrew Mercer*, who died *intestate* and without leaving any heirs or next of kin, on the ground that it had escheated to the crown for the benefit of the Province, and to which information *A. M.* the appellant, demurred for want of equity, the Court of Chancery held, overruling the demurrer, that the Escheat Act, cap. 94 R. S. O., was not *ultra vires*, and that the escheated property in question accrued to the benefit of the Province of *Ontario*. From this decision *A. F.* appealed to the Court of Appeal for *Ontario*, and that court affirmed the order overruling the said demurrer and dismissed the appeal with costs. On an appeal to the Supreme Court the parties agreed that the appeal should be limited to the broad question, as to whether the government of *Canada* or the Province is entitled to estates escheated to the Crown for want of heirs. *Held:* [*Ritchie*, C. J, and *Strong*, J., dissenting,] that the Province of *Ontario* does not represent Her Majesty in matters of escheat in said Province, and therefore, the Attorney General for *Ontario* could not appropriate the property escheated to the Crown in this case for the purposes of the Province,

ESCHEAT.—*Continued.*

and that the Escheat Act, c. 94, R. S. O., was *ultra vires*. Per *Fournier*, *Taschereau* and *Gwynne*, J. J.—That any revenue derived from escheats is by sec. 102 of the B. N. A. Act placed under the control of the Parliament of *Canada* as part of the Consolidated Revenue Fund of *Canada*, and no other part of the Act exempts it from that disposition. MERCER *v.* THE ATTORNEY GENERAL FOR ONTARIO — 538

FINDING OF THE JUDGE AT THE TRIAL - 387
See TENANCY AT WILL.

FISHERY OFFICER, *Right of, to Seize on view* - 66
See PARLIAMENT.

FRAUDULENT RECEIPT OF AGENT — 179
See SHIPPING NOTE.

HEREDITARY REVENUE — — — 538
See ESCHEAT.

INSURANCE, FIRE—*Mutual Insurance Co.—Uniform Conditions Act, R.S.O., ch* 162, *not applicable to Mutuable Insurance Companies—Action premature.*] Appellants, a mutual insurance company, issued in favor of *J. F.*, a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 *Vic.*, c. 44, sec. 52, O, now R.S.O., c. 161, sec. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning *J. F.* advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to *J. F's.* attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, *J. F.* furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, *J. F.* brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit. *Held:* On appeal, 1st. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S.

INSURANCE, FIRE.—*Continued.*

O., c. 162. 2nd. That the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *Ballagh* v. *The Royal Mutual Fire Insurance Co. approved.* THE MUTUAL FIRE INSURANCE CO. OF THE COUNTY OF WELLINGTON *v.* FREY — — — — — 82

2——*Fire Insurance—Subsequent and further insurance—Substituted Policy.*] The appellant sued upon a policy of insurance made by the respondents on the the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, $8,000," and the policy had endorsed upon it the following condition, being statutory condition No. 8, R.S.O., ch. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances, which formed a portion of the "*further* insurance" for $8,000 mentioned in the policy, was one for $2,000 in the *Western Insurance Company*, which appellant allowed to expire, substituting a policy for the same amount in *The Queen Insurance Company*, without having obtained the consent of or notified the respondents. *Held:* Reversing the judgment of the Court *a.quo*, that the condition as to *subsequent* insurance must be construed to point to *further* insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the $2,000 insurance in *The Queen Insurance Company.* PARSONS *v.* THE STANDARD FIRE INSURANCE COMPANY — — — — — — 233

3——*Transfer of Insurable Interest* — — 157
See INSURABLE INTEREST.

INSURABLE INTEREST—*Insurance—Transfer of Insurable Interest—Art.* 2482 *C. C. L. C.*—The appellants granted a fire policy to one *T.* on divers buildings and their contents for $3,280. In his written application *T.* represented that he was the owner of the premises, while he had previously sold them to *S.*, the respondent, subject to a right of redemption, which right *T.*, at the time of the application, had availed himself of by paying back to *S.* a part of the money advanced, leaving still due to *S.* a sum of $1,510. Subsequent to the application, and after some correspondence, the respective interests of *T.* and *S.* in the property were fully explained to the appellants through their agents Thereupon a transfer for—(the amount being in blank) was made to *S.* by *T.* and accepted by the appellants. The action was for $3,280, the amount of insurance on the building and effects. *Held:* That at the time of the application for insurance *T.* had an insurable interest in the property, and as the appellants had accepted the transfer made by *T.* to *S.*, which was intended by all parties to be for $1,500, the amount then due by *T.* to *S.*, the latter was entitled to recover the said sum of $1,500. 2nd. That *S.* having no insurable interest in the movables, the transfer made to him by *T.* was not sufficient to vest in him *T.'s.* rights under the policy with regard to said movables. Art. 2482. THE OTTAWA AGRICULTURAL INSURANCE COMPANY *v.* SHERIDAN — — 157

INSURANCE, LIFE—*Life Insurance—Mistake as to amount insured—Premium—Parol evidence.*] Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000; that as soon as the mistake had been discovered they had offered a policy for $1,000, and that previous to the institution of the action they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy. *Held:* That the insurance effected was for $1,000 only, and that the policy had by *mistake* been issued for $2,000. THE ÆTNA LIFE INSURANCE COMPANY *v.* WILLIAM BRODIE. — — — 1

2——*Want of seal* — — — — 466
See POLICY OF INSURANCE.

INSURANCE, MARINE—*Warranty—"Vessel to go out in tow"—Construction of.*] The appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1875, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*. The policy contained the following clause: "*J. C.*, as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance. and cause three thousand dollars to be insured, lost or not lost, at and from *Quebec* to *Greenock*, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near *Indian Cove*, which forms part of the harbour of *Quebec*, and was abandoned with

INSURANCE, MARINE.—*Continued.*

cargo by reason of the ice four days after leaving the harbour and before reaching the *Traverse*. On an action upon the policy it was *Held:* (*Fournier* and *Henry*, J.J., dissenting,) that the words "from *Quebec* to *Greenock*, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of *Quebec* on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty. *Per Ritchie*, C.J.: The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto. *Per Gwynne*, J.: The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily at the date of the departure of the plaintiff's vessel, at least as far as the *Traverse*. THE PROVINCIAL INSURANCE COMPANY OF CANADA *v.* CONNOLLY — — — — — — 258

2——*Total loss* — — — — 368
See MARINE POLICY.

LANDS—*Indian* — — — — 239
See TAXES.

LETTERS PATENT—*Crown Lands—Parliamentary title—Equitable defence*—38 *Vic.* c. 12 (*Man*) 35 *Vic.*, *c.* 23 (*D.*)] *L.* in 1875, applied for a homestead entry for the S.W. ¼ of sec. 30, township 6, range 4 west, pre-empted by *F.*, and paid $10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the $10 he had paid. *F.* subsequently paid for the land by a military bounty warrant in pursuance of sec. 23 of 35 *Vic.*, c. 23. *L.* entered upon the land and made improvements. In 1878, after the conflicting claims of *F.* and *L.* had been considered by the officers of the Crown, a patent for this land was granted by the Crown to *F.*, who brought an action of ejectment against *L.* to recover possession of the said land. *F.*, at the trial, put in, as proof of his title, the Letters Patent, and *L.* was allowed, against the objection of *F*'s counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge who tried the case without a jury, rendered a verdict for the defendant. *Held*, on appeal, reversing the judgment of the Court of Queen's Bench (*Man.*), that *L.*, not being in possession under the Statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of *F.* under the Letters Patent. *Per Gwynne*, J.:—That under

LETTERS PATENT.—*Continued.*

the practice which prevailed in *England* in 1870, which practice was in force in *Manitoba* under 38 *Vic.*, c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment. FARMER *v.* LIVINGSTONE — — — — — 221

LICENSE TAX—*By-law—Power to impose License Tax—Discrimination between residents and non-residents*—33 *Vic*, *c* 4 (*N. B.*)] *J.* brought an action against *G.*, the Police Magistrate of the city of *St. John*, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for violation of a by-law made by the common council of the city of *St. John*, under an alleged authority conferred on that body by 33 *Vic.*, c. 4, passed by the Legislature of *New Brunswick*. Sec. 3 of the Act authorized the mayor of the city of *St. John* to license persons to use any art, trade, &c., within the city of *St. John*, on payment of such sum or sums as may from time to time be fixed and determined by the common council of *St. John*, &c.; and sec. 4 empowered the mayor, &c., by any *by-law* or *ordinance*, to fix and determine what sum or sums of money should be from time to time for license to use any art, trade, occupation, &c.; and to declare how fees should be recoverable; and to impose penalties for any breach of the same &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of $20 on the former and $40 on the latter. *Held:* That assuming the Act 33 *Vic.*, c. 4, to be *intra vires* of the Legislature of *New Brunswick*, the by-law made under it was invalid, because the act in question gave no power to the common council of *St. John*, of discrimination between residents and non-residents, such as they had exercised in this by-law. JONAS *v.* GILBERT — — — — 356

LIMITATIONS—*Statute of* — — — — 387
See TENANCY AT WILL.

MARINE POLICY—*Marine policy—Total loss—Sale by master—Notice of abandonment.*] *T.*, respondent, was the owner of a vessel called the "Susan," insured for $800 under a valued time policy of marine insurance, underwritten by *G.*, the appellant, and others. The vessel was stranded and sold, and *T.* brought an action against *G.* to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near *Port George*, in the County of *Antigonish*, adjoining the County of *Guysboro'*, *N.S.*, where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th July for $105. The captain did not give any notice of abandonment, and did not endeavour to get off the vessel. The purchasers immediately got the vessel off, &c., had her made tight, and taken to Pictou, and repaired, and they afterwards used

MARINE POLICY.—*Continued.*

her in trading and carrying passengers. *Held*, on appeal, that the sale by the master was not justifiable, and that the evidence failed to show any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total. *Per Gwynne*, J., that it is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. GALLAGHER *v.* TAYLOR — — 368

MUTUAL INSURANCE COMPANIES—*Uniform Conditions Act, R. S. O., c.* 162, *not applicable to*— — — — — — — 82
See FIRE INSURANCE, 1.

PARLIAMENT OF CANADA—*Jurisdiction of, over Bay of Chaleurs—The Fisheries Act*, 31 *Vic., c.* 60—*Jurisdiction of Dominion Parliament over Bay of Chaleurs*—14 *and* 15 *Vic., c.* 63 (*Imp.*)—*Justification, plea of—Fishery Officer, right of, to seize "on view."*] Under the Imperial Statute, 14 and 15 Vic., c. 63, regulating the boundary line between Old *Canada* and *New Brunswick*, the whole of the *Bay of Chaleurs* is within the present boundaries of the Provinces of *Quebec* and *New Brunswick*, and within the Dominion of *Canada* and the operation of *The Fisheries Act*, 31 Vic., c. 60. Therefore the act of drifting for salmon in the *Bay of Chaleurs*, although that drifting may have been more than three miles from either shore of *New Brunswick* or of *Quebec* abutting on the Bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act and of the regulations made in virtue thereof.

2. The term "on view" in sub-sec. 4 of sec. 16 of *The Fisheries Act* is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. MOWAT *v.* MCFEE 66

2——Jurisdiction over Escheat.
See ESCHEAT.

PARLIAMENTARY TITLE — — — 221
See LETTERS PATENT.

POLICY OF INSURANCE—37 *Vic., c.* 85, *Ont*—*Insurance policy—Want of Seal—Fraud—Pleadings—Power of Courts of Equity.*] The seventh section of the statute incorporating the appellants (37 *Vic.*, c. 85, O.) after specifying the powers of the directors, enacts as follows: "but no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board." *J. E. W.* brought an action to recover the amount of a policy issued by the appellants in favor of

POLICY OF INSURANCE.—*Continued.*

her father. The policy sued on was on a printed form and had the attestation: "In witness whereof, *The London Life Insurance Co., of London, Ont.*, have caused these presents to be signed by its president, and attested by its secretary and delivered at the head office in the city of *London*, &c." To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal, or ordered to affix it. *Held*, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal," as a defence, was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and therefore the respondent was entitled to the relief prayed as founded upon the facts alleged in her equitable replication. [*Ritchie*, C.J., and *Taschereau*, J., dissenting.] LONDON LIFE INSURANCE CO. *v.* WRIGHT — 466

2——*Substituted Policy* — — — 233
See FIRE INSURANCE, 2.

POSSESSION—*as Caretaker* — — 387
See TENANCY AT WILL.

PUBLIC COMPANY—*Liability of* — — 179
See SHIPPING NOTE.

2——*Want of Seal* — — — 466
See POLICY OF INSURANCE.

RAILWAY COMPANY — — — — 437
See ALLOTMENT.

2——*As Carriers* — — — — 204
See CARRIERS.

3——*Liability of, on agent's receipt* — 379
See SHIPPING NOTE.

SEAL—*Want of* — — — — 466
See POLICY.

SHIPPING NOTE—*Fraudulent receipt of agent—Liability of company.*] *C.*, freight agent of respondents at *Chatham*, and a partner in the firm of *B. & Co.*, caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favor of *B. & Co.*, for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from *B. & Co.* the flour addressed to the appellants, and were attached to drafts drawn by *B. & Co.*, and accepted by appellants. *C.* received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts: *Held* (*Fournier* and *Henry*, J.J., dissenting), that the act of *C.* in issuing a false and fraudulent receipt for goods never delivered to the company, was

SHIPPING NOTE.—*Continued.*

not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. ERB *v.* THE GREAT WESTERN RAILWAY COMPANY — — — 179

STATUTES—*Construction of:*

1——31 Vic., c. 60, (D.) and 14 and 15 Vic., c. 63, (Imp.) — — — — 66
See PARLIAMENT OF CANADA.

2——35 Vic., c. 23, (D.) and 38 Vic., c. 12, (Man.) — — — — 223
See LETTERS PATENT.

3——THE DOMINION ELECTIONS ACT, 1874, secs. 82, 83 and 84 — — — 133
See ELECTIONS, 2.

4——SUPREME AND EXCHEQUER COURT ACT, sec. 44 — — — — 91
See ELECTION, 1.

5——32 Vic., c. 36, sec. 128 (O.) and R S.O., c. 180, sec. 156 — — — 219
See TAXES.

6——37 Vic., c. 85, (O.) — — 466
See POLICY OF INSURANCE.

7——33 Vic., c. 4, (N.B.) — — 356
See LICENSE TAX.

8——BRITISH NORTH AMERICA ACT, 1867, sec. 91 — — — — — 66
See PARLIAMENT.

9——BRITISH NORTH AMERICA, 1867, secs. 102, 109, 91 and 92.
See ESCHEAT.

10——THE ESCHEAT ACT, R.S O., c. 94 538
See ESCHEAT.

TAXES—*Sale of Lands for—Indian lands—Liability to taxation—Lists of lands attached to warrant—32 Vic., c. 36, sec. 128 O., and sec. 156, c. 180 R. S. O.*] In September, 1857, a lot in the Township of *Keppel*, in the County of *Grey*, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one *D. K.*, who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land *hereinafter mentioned* for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By sec. 128 of the Assessment Act, 32 *Vic.*, c. 36, *O.*, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c. *Held:* affirming the judgment of the Court below, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands, and upon being granted became liable to assessment.

2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th section, c. 180 R. S. O. (*Fournier* and *Henry*, J.J., dissenting.) CHURCH *v.* FENTON 239

2——*License Tax* — — — — 356
See LICENSE TAX.

TENANCY AT WILL—*Statute of Limitations—Possession as Caretaker—Tenancy at will—Finding of the Judge at the trial.*] The plaintiff's father, who lived in the Township of *T.*, owned a block of 400 acres of land, consisting respectively of Lots 1 in the 13th and 14th Concessions of the Township of *W.* The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of Lot 1 in the 13th Concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one *M. K.* In December following he moved to the north half of this Lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned Judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father. *Held*: Reversing the judgment of the Court of Appeal for *Ontario*, that the evidence established the creation of a new tenancy at will within ten years. Per *Gwynne*, J., that there was also abundant evidence from which the Judge at the trial might fairly conclude as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout. RYAN *v.* RYAN. - 387

USAGE—*Existence of* — — — 258
See INSURANCE, MARINE.

WILL—*Annuities, sale of Corpus to pay.*] *J. R.* died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A, B, C, D and E, annexed to his will, upon these trusts, viz.:—Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter *M. A. A.*, the rents, etc., apportioned to her in schedule A: to his daughter *E.* of those mentioned in schedule B; to his daughter *M.* of those mentioned in Schedule C: to his daughter *A.* of those mentioned in schedule D; and to his daughter *L.* of those mentioned in schedule E; each of the said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the manag-ment and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following:"—He then gave out of the residue a legacy of $4,000 to his brother *D. R.*, and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned. The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of $10,000 to the widow and the rent of and taxes upon his house in *L.*, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency. *Held*, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

WILL.—*Continued*

WORDS—*Construction of:*

1——"At owner's risk" — — 204
See CARRIERS.

2——"Eternal Bickerings" — — 35
See CONTRACT.

3——"Go out in tow" — — — 258
See INSURANCE, MARINE.

4——"On view" — — — 66
See PARLIAMENT.