REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

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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.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

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

" " JOHN S. D. THOMPSON Q.C.

ERRATA.

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

Page 290—line 16.—For the words "but was not executed" read "and was executed."

Line 17.—Strike out word "however."

Line 4 from bottom.—For "company costs" read "company's costs."

" 324—line 15.—For "*officii*" read "*officio*."

" 649—line 3.—For "Herrington's" read "Sherrington's."

" 722—line 6.—For "Gale" read "Yale."

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

ELIZA McALLISTER, CHARLES GRANT BARNSTEAD AND WILLIAM ACKHURST (PLAINTIFFS) APPELLANTS;

AND

GEORGE E. FORSYTH AND GEORGE DAVIDSON (DEFENDANTS.) RESPONDENTS.

1884 *Nov. 11. 1885 *May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Chattel mortgage—Security for after acquired property—Agreement not to register—Assignment in trust by mortgagor—Legal title of trustee in goods mortgaged—Equitable title of mortgagee—Priority.

In May, 1880, the defendant D., being indebted to the plaintiffs in the sum of $8,000, gave them a chattel mortgage on all his stock in trade, chattels and effects then being in the store of the said defendant D. on Granville street, in the City of Halifax; and by the said mortgage the said defendant D. further agreed to convey to the plaintiffs all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of sub-

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

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stitution in place of stock then owned by him in connection with his said business, which goods were never so conveyed to the plaintiffs. By the terms of the mortgage, the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the defendant D. and the plaintiffs, that to save the business credit of D. the said mortgage was not to be filed and was to be kept secret, and it was not filed until the 12th December, 1881. On the 13th of December, 1881, D. made an assignment of all his property, real and personal, to the defendant F., in trust for the benefit of his (D.'s) creditors, and such trust deed was executed by D., F. and one creditor of D., and subsequently by a number of other creditors. F. had no notice of the mortgage to the plaintiffs. F. took possession of the goods in the store on Granville street, and refused to deliver them to the plaintiffs, who demanded them on 14th December, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being commenced the defendant F. delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were all that remained from the stock on the premises in May, 1880.

Held, affirming the judgment of the Court below, Strong J. dissenting, that the legal title to the property vested in the defendant F. must prevail, the plaintiffs' title being merely equitable, and the equities between the parties being equal.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment of the judge in equity dismissing the plaintiffs' bill. The facts of the case are fully set out in the judgment of the court and in the report of the case in the Court below.

Sedgwick Q.C. for appellants.

There was no evidence of fraud in the transaction between Davidson and plaintiffs. There was a good bill of sale registered in good time, and therefore it gives the appellants a good title to the property in question (2). *Ex parte Popplewell In re Storey.* (3).

(1) 5 Russ. & Geld. 151.

(2) Rev. Stats. N.S. 4th ser. ch. 84; 5th Ser. ch. 93.

(3) 21 Ch. D. 73.

As to subsequently acquired property the following cases were cited: *Holyrod* v. *Marshall* (1); *Brown* v. *Bateman* (2); *Clements* v. *Matthews* (3); *Lazarus* v. *Andrade* (4); *Flower* v. *Cornish* (5).

Graham Q.C. followed for the appellants.

The defendant Forsyth, being an assignee without value, cannot set up the fraud of Davidson.

Brownell v. *Curtis* (6); *Browning* v. *Hart* (7); *Leach* v. *Kelsey* (8).

There is no difference between this case and the case of a previous agreement to give a bill of sale which was afterwards carried out. This would be supported in England.

Henry Q.C. for respondents.

The agreement is not sufficiently definite to be susceptible of specific performance in equity.

Harris v. *Commercial Bank of Canada* (9); *Wilson* v. *Kerr* (10); Jones on Chattel Mortgages (11); *Reeve* v. *Whitmore* (12); *Tapfield* v. *Hillman* (13); *Belding* v. *Read* (14).

But my principal point is that this indenture of 8th May, 1880, was and is fraudulent and void against creditors, inasmuch as it was made secretly and was so held for nineteen months, or from 8th May, 1880, to 13th December, 1881, under a verbal agreement, made before or at the time of its execution by Davidson, with the appellants to that effect; which agreement was made for the express and admitted purpose of enabling Davidson

(1) 10 H. L. Cas. 191.
(2) L. R. 2 C. P. 272.
(3) 11 Q. B. D. 808.
(4) 5 C. P. D. 318.
(5) 25 Min. 473.
(6) 10 Paige 210.
(7) 6 Barb. 91.
(8) 7 Barb. 466.
(9) 16 U. C. Q. B., 437.
(10) 17 U. C. Q. B. 168.
(11) Sec. 103.
(12) 33 L. J. Ch. 63.
(13) 6 Scott N. R. 967; 6 M. & G. 245.
(14) 3 H. & C. 955.

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to carry on business—in other words, to obtain credit.

We have here established, by the evidence in the case, the following elements or badges of fraud:—

1. Possession after default, which was inconsistent with the terms of the mortgage.

2. Possession, under a verbal agreement inconsistent with the mortgage, in the nature of a secret trust.

3. Possession with the *jus disponendi*, exercised under the verbal agreement while the mortgage was held secretly; such possession being inconsistent with the mortgage.

The mortgage provided that Davidson "should, until default, have the right to retain possession of the goods and sell the same in the ordinary course of business." Davidson made default on 1st May, 1881, if not before.

The mortgage does not provide for any accounting for the proceeds of such sales; it in effect permitted Davidson to appropriate such proceeds as he pleased. The mortgagees did not exercise, nor had they the power to exercise, any control over Davidson in the disposal of the monies so derived.

It is contented that such a possession, coupled with the unrestrained *jus diponendi*, invalidates the mortgage as against creditors, or the representatives of creditors such as an assignee in trust for the benefit of creditors, in possession.

No case can be found in the English books where a bill of sale or mortgage, in which the power to dispose for the benefit of the grantor or mortgagor is conferred, has been upheld. *Bamford* v. *Baron* (1), is the only apparent exception, and the instrument in that case was an assignment for the benefit of creditors, by the terms of which the debtor was permitted to carry on the trade for a certain period, and account to the trustee for all the profits of the trade from the date of the assignment.

(1) 2 T. R. 594 (note).

There the *jus disponendi* was for the benefit of creditors and not for the benefit of the assignee, while in *Paget* v. *Perchard* (1); *MacDona* v. *Swiney* (2); *Wordall* v. *Smith* (3); *Worseley* v. *DeMattos* (4), where possession and the right of disposal was retained and exercised by the vendor or mortgagor for their own benefit, the instruments were held void and the transactions fraudulent. See Bump on Fraudulent Conveyances (5), where the argument on this branch of the case is clearly put.

My learned friends urged "that Forsyth was a mere volunteer, and as Davidson could not set up fraud as a defence neither could he."

It will be remembered that this is not a suit in equity instituted by the trustee of creditors to set aside the deed; were it so there might be some foundation for the contention that only judgment creditors could avail themselves of the equities. Be that sound or no, it does not affect this suit. Here mortgagees bring suit in equity on an instrument tainted with fraud, and ask that it may be made effective to pass property to them. They invoke equitable principles to aid them in giving effect to the mortgage; and they are met in the inception by the principles: "He who seeks equity must do equity;" and again, "He who comes into a court of equity must come with clean hands." Equity will never permit eqnitable principles to be made instruments of fraud. But it is not so clear that a trustee of creditors may not avail himself of such fraud in an equity suit to set aside a deed fraudulent as against creditors. Under the Bankruptcy laws he clearly could; and, as respects an insolvent assigning for the benefit of creditors where no such laws exist, it is contended the same rule applies. He (the trustee)

(1) 1 Esp. 204.
(2) 8 Ir. L. R. (N.S.) 73.
(3) 1 Camp. 332.
(4) 1 Burr. 467.
(5) 3rd ed. p. 123.

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occupies a double character. 1st. As representing the insolvent party to the deed. 2nd. As standing in the place of, and entitled to exercise all the rights of, creditors. Quâ the representatives of the bankrupt the assignee has no power to set aside the deed; but, quâ the representatives of the creditors, he has that power. *Martin* v. *Pewtress* (1); *Anderson* v. *Maltby* (2); *Doe d. Grimsby* v. *Ball* (3).

Be this as it may, the trustee here is in possession under an assignment valid and effectual to pass the property but for the fraudulent deed; and in such a case, independently of 13 Eliz., he, representing *bona fide* creditors, can successfully resist the enforcement of the fraudulent transfer. *Ackraman* v. *Corbett* (4); *Tarleton* v. *Liddell* (5); *Goodricke* v. *Taylor* (6); *Cutten* v. *Sanger* (7).

Sedgwick Q.C. in reply.

Sir W. J. RITCHIE C.J.—By an indenture made the eighth day of May in the year of Our Lord one thousand eight hundred and eighty, between George Davidson, of Halifax, in the county of Halifax, merchant, of the first part; and Eliza McAllister of the same place, widow, Charles Grant Barnstead, of the same place, gentleman, and William Ackhurst, of the same place, merchant, of the second part, after reciting indebtedness of first party to the second party, the party of the first part agreed to convey and did thereby transfer and convey unto the said parties of the second part, all the stock in trade, chattels and effects then being in the store of the said party of the first part on Granville street, in the city of Halifax, to have and to hold the same to their own use and behoof; and he further agreed to convey

(1) 4 Burr. 2478.
(2) 2 Ves. jr. 244.
(3) 11 M. & W. 531.
(4) 1 J. & H. 410.
(5) 17 Q. B. 390.
(6) 2 DeG. J. & S. 135.
(7) 3 Y. & J. 374.

to the said parties of the second part, all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of substituting in place of stock then owned by him in connection with his business.

Certain goods were subsequently purchased by Davidson and placed in the store on Granville street, but the same never were, in accordance with the terms of the mortgage, conveyed to the parties of the second part, nor was there any appropriation of the said goods ever made, or any possession thereof given to the said parties, but the same remained in the said store subject to the disposal of said Davidson.

On the 13th December, 1881, the said goods, then being in the possession and under the sole control of the said Davidson, he did by deed in trust for his creditors, dated 13th December, 1881, between George Davidson, of the first part, and George E. Forsyth, of second part, and the creditors of the said George Davidson, who should sign and seal the same within 60 days from the date thereof, of the third part; after reciting that he, the said George Davidson, was then unable to pay all his just debts, and had agreed to assign and convey all his estate, both real and personal, unto the said George E. Forsyth in trust for the benefit of all his creditors in manner thereafter provided, in consideration of the premises, and of one dollar paid him by the said George E. Forsyth, the receipt whereof was acknowledged :

Did grant, bargain, sell, assign, convey, transfer and set over unto the said George E. Forsyth, his heirs and assigns, all the said George Davidson's lands, tenements and hereditaments, goods, chattels, merchandise, stock in trade, debts and sum and sums of money, due, owing or belonging unto the said George Davidson, and all securities, had, taken or obtained for the same and all his right, title and interest, in and to the same, to have, and to hold the same unto the said George E. Forsyth, his heirs, executors, administrators and assigns, upon the special trusts nevertheless that said

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George E. Forsyth shall forthwith take possession and seisin of the premises hereby conveyed and within such convenient time as to him the said George E. Forsyth shall seem meet by public or private sale for the best price that can be procured, shall convert all and singular the premises into money and as soon as possible collect all and singular the debts and sum and sums of money aforesaid, and after deducting the cost and charges of the trusts before mentioned, including the costs of these presents and including a commission of five per cent. on the net proceeds of said estate for the remuneration of said Forsyth, shall pay and apply the money arising therefrom in manner following, that is to say; in the first place shall pay and discharge in equal portions the respective debts due from the said Geo. Davidson to Arthur Fordham, John McNab and Isaac H. Mathers, all of Halifax, aforesaid, and secondly, after the payment in full of the debts last above mentioned, shall out of the residue pay and discharge in equal portions the respective debts of all creditors aforesaid, who shall sign and seal these presents within the said period of sixty days, and in the third place, after the full satisfaction and discharge of the debts last above mentioned, shall pay over the surplus (if any) to the said George Davidson, his executors, administrators and assigns.

In witness whereof the parties to the said presents have hereunto their hands and seals set and affixed the day and year first before written.

GEORGE DAVIDSON. [L.S.]
GEORGE E. FORSYTH. [L.S.]
ARTHUR FORDHAM, [L.S.]
A creditor of said George Davidson.

And, subsequently, some twenty other creditors of said Davidson, who, it is admitted, have filed claims against the estate of the said Davidson. Under this deed possession of the goods in question was delivered to the defendant Forsyth who went into possession, not having had any notice of the deed of the 8th of May, 1880, no registration of the same having taken place, by arrangement between the parties thereto, till the 12th day of December, 1881, the said Davidson carrying on his business in the usual manner as if no mortgage existed, by selling and disposing of his goods and obtaining on credit other goods, including the goods in question. After the defendant had entered into pos-

session of these goods under the deed of the 13th of December, 1881, the plaintiffs claimed them as their property under the mortgage of the 8th of May, 1880, and commenced an action in the Supreme Court of Nova Scotia to replevy the same, in which suit, for some reason not stated, they failed, and they then, on the 2nd of February, 1882, commenced this action.

While the arrangement not to register this deed, and keeping the same secret, thereby enabling the said Davidson to obtain credit as the ostensible owner of the stock he was dealing with in the ordinary course of business, and with the stipulation that he should convey all goods subsequently purchased on the strength of such credit to the plaintiffs, was a transaction, to say the least of it, of a most questionable character, it is not, and cannot be, I think, under the evidence, disputed, that the deed of the 13th of December was a *bonâ fide* transaction on the part of Forsyth, Fordham and the other creditors of Davidson, without notice of the existence of the mortgage or any notice whatever of any equitable claim on the part of the plaintiffs thereunder.

The question now raised is not between plaintiffs and Davidson, but between plaintiffs and Forsyth, as trustee, and Fordham and the other creditors of Davidson, and is in fact a simple question as to which shall have priority, the creditors under the mortgage or the creditors under the assignment to Forsyth. By the mere agreement of the deed of the 8th of May, 1880, to convey all stock Davidson might purchase, no property or title in any such goods passed to the plaintiffs. But by the deed of the 13th of December, 1881, the title and property in these goods, then in the possession of Davidson, vested absolutely in Forsyth, and Fordham, a creditor, being a party to the deed, the relation of trustee and *cestui que* trust was established between Forsyth

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and Fordham and the other creditors of Davidson whereby Fordham and the other creditors obtained a beneficial interest under it. The operation of the deed being to transfer the property, and to convey the legal title to Forsyth, and vest the beneficial interest in the creditors, for so soon as Fordham signed the deed, which he did at the same time as Davidson and Forsyth, there was a consideration, Forsyth ceased to be a mere mandatory of Davidson, but an onerous trust was imposed on him, creating a duty to the creditors which he could not cast off. This relation being established, it is, as Lord Campbell says in *Harland* v. *Binks* (1) "consideration for the deed, and it is no longer voluntary." Therefore, the plaintiff, having only an equitable title, and the defendant a legal title without notice, the legal title must prevail. I think this case is governed in principle by the cases of *Joseph* v. *Lyons* (2), where Brett, M.R. says:

It was argued for the plaintiff that the bill of sale gave him the legal property in the after-acquired goods whenever they should come into the possession of Manning on the premises. For the defendant it was argued that the bill of sale only gave the plaintiff an equitable property in the goods. It was ingeniously argued for the plaintiff that the bill of sale was equivalent at law to a contract on the part of Manning that when any goods should come on to his premises for his business they should become the legal property of the plaintiff, and the case was likened to a contract of purchase and sale of unspecific goods, where the property does not pass at the moment of the contract, but when the goods are appropriated. Let us see what the law is. For a long series of years, where a bill of sale has assumed to assign future property to come upon the premises of the grantor, it has been held by the common law courts that that assignment does not pass the legal property in the goods, even when they have come on to the premises. The courts of equity have always held that, in those circumstances, when the goods have come upon the premises, the interest of the assignee under the bill of sale is not a legal, but only an equitable, interest. Therefore the case is decided by authority. The interpretation in equity was that the document

(1) 15 Q. B. 718. (2) 33 W. Rep. p. 146.

was considered as equivalent to a contract that, when the goods should be acquired, then there should be an equitable property in them. It was equivalent to a contract. They said that it was to be supposed that the parties intended that there should be some security, and that the court should say that it was an equitable contract that, when the goods should come into possession, there should be an equitable property in them. It seems to me that the language of Jessel M. R., in *Collyer* v. *Isaacs*, is exceedingly plain, and that, according to ordinary interpretation, it means what I have stated. He says, "The creditor had a mortgage security on existing chattels, and the benefit of what was, in form, an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law," he does not say "make a contract to," but, "assign what has no existence. Any man can contract to assign property which is to come into existence in the future, and, when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The contract is the governing thing there, and the clear meaning is that the contract becomes a complete assignment in equity and not in law.

It follows, therefore, that the interest of the plaintiff in these goods, even after they had come into the possession of Manning, was only an equitable interest. The legal interest, *i.e*, the legal property, was in Manning. Therefore Manning, having the legal property, takes that property which at common law is his, and pledges it for an advance of money. The right of the pledgee in England as to goods which are the legal property of the pledger is not an equitable, but a legal right. It is a legal right, to be enforced by legal remedies. Therefore the title of the defendant is a legal right, that of the plaintiff is only an equitable interest. In those circumstances the plaintiff could not maintain against the defendant the legal remedy of trover and detinue.

LindleyL. J.—I am also of the same opinion. The plaintiff must establish either, first, that the legal title was in himself, or, secondly, that he had an equitable title in the goods, and that the defendant had notice of it when he acquired the goods. As to the first point, I confess that I cannot see how it has been made out consistently with the authorities. The clause at the end of the deed shows that the plaintiff knew that he had not got a legal title. The operation of the deed was to transfer the legal property in the existing stock-in-trade, but an equitable title in that to be acquired afterwards. The plain-

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tiff has an equitable title, and he can only deprive the defendant of his title by showing that the defendant had prior notice of the equitable title. The doctrine of constructive notice has not been carried so far as was suggested. It appears to me that our conclusion must be that the appeal must be allowed, and that judgment must be entered for the defendant with costs.

And in *Hallas* v. *Robinson* (1) Brett M. R. says:

In this case the defendant takes a bill of sale which, to my mind, is sufficiently specific, and gives him a right to take possession of after acquired property which should be brought upon the premises of the grantor. That, as has been decided, only gave the defendant an equitable title in the goods after they were brought on to the premises. It gave him a right to take possession on failure of the condition of the bill of sale, and if nothing else had happened, and he had taken possession rightly, he would have had a legal title in those goods. But something did happen, and in the meantime, whilst he had only that equitable title, and after property had been brought on to the premises, the same grantor gave a bill of sale to the plaintiff on property then upon the premises. I think the contention on that point was right, and that that bill of sale gave the plaintiff at that time a legal title in those goods subject to an equity. That legal title could not be ousted by reason of the defendant taking possession after it had vested in the plaintiff. Therefore, the defendant is in the same position as a person who has bought goods from a man who has already sold the goods to some one else, in which case the person on whom the fraud has been committed must suffer.

Baggally L J.:

I am of the same opinion. I think that the case is governed by *Joseph* v. *Lyons*, for though that is undoubtedly the converse of the case before us, still, for the purpose of decision as to the interests of the parties, the circumstances are the same. So far as by the bill of sale of 1875 the grantor purported to grant chattels which might be brought upon the premises, the bill of sale was null and void at law. But there was an equitable right that when the goods should be brought on to the premises the grantee should have an equitable interest in them, which, by taking possession of the goods, could be ripened into a legal interest if there was no intervention. But there was an intervention, because in 1882 property then in the actual possession of the grantor, and acquired between the dates of the first and of the second bill of sale, was granted to the plaintiff. Therefore that passed the legal title in the property to him. When

(1) 33 W. R. 426.

that bill of sale was executed each party had an equitable interest in the goods, but the plaintiff had acquired a legal interest, and his title must prevail over that of the defendant. Thus far the case is entirely governed by *Joseph* v. *Lyons*. But there is the additional circumstance that when the plaintiff sought to take possession of the property he found that the defendant was in possession under an assignment which passed the equitable interest. By taking that possession, which would have been a perfectly good possession to give a legal interest, he could not deprive a person who had a legal interest of the benefit of that interest. It is not an answer to inquire whether the defendant had notice of the plaintiff's rights. The plaintiff and defendant may be regarded as two innocent persons, each of whom had advanced money, but one only of whom had a good title as against the other, and, therefore, the better title must prevail. The only distinction between this case and *Joseph* v. *Lyons* does not establish any real distinction in the way in which this case should be decided.

The plaintiffs had at most only an equitable interest, the legal title and property was in Davidson, which he transfers to Forsyth in trust, who had no notice of any such equitable interest, whereby the property became absolutely vested in Forsyth for the benefit of the creditors of Davidson. Forsyth enters into possession, and in pursuance of the trust, sells the goods on 30th December, 1881, receives the consideration money, hands the property over to the purchaser, and ceases to have any further control over, or any interest in the same.

I think the plaintiffs must fail, because Forsyth had a legal title to the property which gave him a superior right to any equitable interest the plaintiff may have had, and the equities being equal the legal title must prevail.

STRONG J.—I assume, for the purpose of the present decision, that a bill of sale, such as that which is in question here, is within chap. 84, 4th series of the revised statutes of Nova Scotia, and requires filing with the register of deeds according to the provisions

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of that statute in order that its priority may be conserved; it has been so considered by the court below, and in argument here counsel on both sides have assumed that upon the proper construction of the statute in question, a bill of sale by way of mortgage of after-acquired chattels is within the terms of the Act referred to. I will in the first place dispose very shortly of two points which were made in argument, neither of which seems to me to be entitled to any weight. The first is that by the agreement not to register the bill of sale, the appellants disentitled themselves to any relief in equity, and, therefore, when on the 12th December, 1881, they did register, they did not thereupon become entitled to such rights and priorities as the statute would, from that time, have conferred upon them in case they had never entered into an agreement not to file the mortgage. It is sufficient to say that this objection, which consists in imputing to the appellants what is called a fraud on the statute, is shown by two analogous cases in England to have no foundation. *Ramsden* v. *Lupton* (1); *Smale* v. *Burr* (2). These cases completely answer this argument against the validity of the bill of sale, for they show that an express agreement to evade the English Act by executing renewals of the bill of sale, at such short intervals as to substitute a new security for the preceding one before the statutory term for registration had expired, was no objection to the validity of the security, and that the mortgagee's rights were in no way effected by it. The mortgagees here in like manner are therefore entitled to claim the right secured to them by the statute, that their bill of sale shall take effect and have priority from the time of the filing thereof. (Chap. 84 Rev. Stat. 4th series section 1).

The other point was that the words of description

(1) L. R. 9 Q. B. 17. (2) L. R. 8 C. P. 64.

used in the deed were too vague and uncertain to entitle the mortgagees to an equitable lien upon the portion of the stock in trade which was acquired or purchased by the mortgagor subsequently to the execution of the instrument. The portions of the mortgage deed material to this question are as follows:

And for the purpose of securing the said indebtedness the said party of the first part agrees to convey and does hereby assign, transfer and convey unto the said parties of the second part, all the stock-in-trade, chattels and effects, now being in the store of the said party of the first part, on Granville street, in the city of Halifax, to have and to hold the same to their own use and behoof; and he further agrees to convey to the said parties of the second part, all stock which during the continuance of the said indebtedness he may purchase for the purpose of substituting in place of stock now owned by him in connection with his business.

The bill of sale also contained the following covenant by the mortgagor:

The said party of the first part further covenants that he will at all times hereafter, upon request, give to the said parties of the second part, all such transfers or conveyances as they may reasonably require for the purpose of conveying to them all such stock-in-trade as he at the time of such request may possess, be owner of or have any interest in, in order more effectually to secure the payment of any balance being part of said indebtedness which at any time hereafter may or shall be due as aforesaid.

That there is any uncertainty in this I am unable to see; surely it was a matter susceptible of being rendered certain by proof that stock acquired by Davidson subsequently to the execution of the bill of sale was purchased "for the purpose of being substituted for stock then owned by him in connection with his business," however difficult, in certain far-fetched hypothetical cases, when the stock had not actually been brought on the premises, used by him for his business and added to his other stock, such proof might be. That however, would be an objection, not to the deed itself as void for uncertainty, but to the proof by which it was sought to identify the goods. It would, I think, be unwarranted

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by either legal considerations or by common sense to say that this claim must therefore be held void for the reasons suggested. Then the very fact that the goods claimed here have been substituted for other stock by being added to and incorporated with the general stock-in-trade with which the grantor was carrying on his business brings them within the terms of the deed and constitutes sufficient proof that they were purchased for that purpose. *Res ipsa loquitur.* There might be some difficulty, as a matter of evidence, if the goods had never been added to the old stock or brought to the mortgagee's place of business, but that is a case which does not occur here, and one with which we have nothing to do. It appears to me, therefore, that in this respect the bill of sale was sufficiently certain and definite, and that the goods claimed are shown by the way in which they have been dealt with to come within the most strict and literal construction which can be placed on the language in which this claim is expressed. I entirely agree with what Mr. Justice Weatherbee has said on this head, and I refrain from dwelling longer on it, as I adopt his observations.

Then the deed being thus free from these two preliminary objections to it, that it was void on grounds of public policy, in consequence of the agreement not to register, and that the portion of it relating to after-acquired goods was void for uncertainty, we have next to enquire what effect was given to it by the registration which took place on the 12th December, 1881. The statute says (section 1) that upon registration the deed shall "take effect" against the several classes of persons mentioned in the same clause, amongst others, against "assignees for the general benefit of the "grantor's creditors." I do not understand these words "shall take effect" as conferring upon the deed by reason of its being registered or filed any greater or

more extended operation than it would at common law, and before the statute was passed, have had immediately upon its execution. Registration is only a process or solemnity in addition to the ordinary common law execution by sealing and delivering required to make the instrument effectual against the third persons named. But when the deed is once thus perfected its legal construction, and its operation both at law and in equity, must be exactly the same as they would have been irrespective of the statute.

This brings us to the consideration of the nature of the appellants' title to the goods now claimed being those acquired by the grantor subsequently to the execution of the bill of sale. The title asserted by the plaintiffs is, of course, a purely equitable one. If they had set up a legal title their bill would have been demurrable, as in such case their remedy would have been at law by an action of trover or detinue; and it is equally clear upon the evidence that in this they were perfectly right. In order to enforce a legal title some additional act on the part of the grantor, such as a further assignment, or at least a delivery of possession, of the after-acquired goods would have been requisite, and no such *novus actus* is proved. The law on this subject is so fully and thoroughly considered and explained in the well-known case of *Holroyd* v. *Marshall* (1), particularly in the opinion of Lord Westbury, delivered in that case, that no further reference to authorities on this point is called for. If, therefore, the suit had been instituted against the grantor before any assignment to the respondent was made, the relief prayed would have been granted as a matter of course. Then the appellants must be entitled to the same relief as against the respondent Forsyth, unless he can how that he is a purchaser for valuable consideration

(1) 10 H. L. Cas. 191.

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without notice, who having obtained a legal title, is entitled to priority over the appellants. This defence is so very imperfectly pleaded by the answer that it may well be doubted whether, according to the strict rules of equity pleading, respondent Forsyth is entitled to avail himself of it. But without dealing with the case on so narrow a ground as a point of pleading, and giving the respondent Forsyth the same benefit of this defence as if it had been pleaded in the most formal and technical manner, it seems very clear on the evidence that he does not bring himself within the conditions essential to constitute him a purchaser for value without notice, so as to entitle himself to protection against the plaintiff's demand. The onus of proving this defence is, of course, as in all cases when it is pleaded, in the first instance on the defendant. He must show that he was a purchaser for valuable consideration. It then lies on the plaintiff, if he can, to neutralize this defence by showing that at or before the time the defendant became such purchaser he had notice of the plaintiffs' equity. Now, what is the evidence to show that the defendant was a purchaser for valuable consideration? We have in the first place the deed of assignment, by which Davidson assigned to the respondent Forsyth, and which is dated and was executed on the evening of the 13th of December, 1881. What Mr. Forsyth says in his evidence as to the date of the execution of the deed, and the circumstances which led to it, is as follows:

The transfer was made to me on the evening of the 13th December, 1881; at that time I had no knowledge of the existence of the bill of sale under which the plaintiffs claim; on the following Monday I took possession of everything in the store. I got possession from George Davidson.

And in his cross-examination he says:

George Davidson met me on the street the evening of the 13th December, 1881; he asked me if I would act as his trustee; I did

not then know what he wanted; I do not remember his telling me anything about the bill of sale before the deed was signed; no creditor asked me to accept the trust; I did not employ Mr. Meagher in the matter; his own solicitor drew up the deed of trust; he asked me to go to Mr Meagher's office with him and sign the deed of trust; when he first spoke to me I supposed he wanted to transfer some property to his wife; the deed of trust was read over before we signed it.

Turning to the deed itself we find that it is a general assignment of all the assignor's (Davidson's) estate real and personal, lands, goods, chattels, merchandise, stock-in-trade and debts due to him, and the trust declared of the proceeds when sold are, first to pay the expenses of executing the trust, then to retain a commission of 5 per cent. on the net proceeds of the estate as the remuneration of the trustee, next to pay in full three preferred creditors named in the deed, and lastly to distribute the residue equally amongst such of the assignor's creditors as should sign and seal the deed within sixty days, with an ultimate trust as to any surplus in favor of the assignor himself. It is not alleged or pretended, nor is it recited in the deed, that Forsyth was himself a creditor. It is not shown when the creditors, or when any one of the creditors, had notice of the deed, nor when they assented to or became parties to it. All that appears in the evidence is an admission noted on the face of the depositions as follows:—"It is admitted that the following parties have filed claims against the estate of George Davidson & Co.," and then follows a list of names with the amount of the debt set opposite each; but there is nothing to show when the claims were filed.

What, then, was the effect of this deed before any creditor acceded to it?

Nothing can be better established by authority than the proposition that a trust deed of this kind, whereby a debtor conveys to a trustee for the benefit of creditors,

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does not constitute the trustee a purchaser until some creditor has had notice of the deed, and has either by some positive act or declaration, or by silent acquiescence, acceded to it. Until it is shown that a creditor has such notice the deed is considered by a Court of Equity a mere deed of management revocable by the debtor at will, and the assignee is held to be a trustee for the assignor only. There is scarcely any doctrine in the whole law of trusts in support of which such a long list of authorities can be cited as this. From the case of *Wallwyn* v. *Coutts* (1), *Garrard* v. *Lord Lauderdale* (2) down to *Smith* v. *Hunt* (3) and *Steel* v. *Murphy* (4); decisions are to be found affirming this principle. It makes no difference that the creditors are named in the deed or in a schedule to it; until they or some one of them has notice of the deed, it is revocable, and the assignee held to be a mere trustee for the assignor. So soon, however, as the fact of the execution of the deed has been communicated to a creditor who, though he may not execute it, does not repudiate it—a binding, irrevocable trust is created, which constitutes the trustee a purchaser for value. *Harland* v. *Burton* (5); *Acton* v. *Woodgate* (6). If the trustee is himself a creditor, the deed is binding and irrevocable, and the trustee a purchaser for value, from the time of its execution. *Siggers* v. *Evans* (7). All the cases are collected, and the conclusions to be drawn from them to the effect just laid down, in the notes to the case of *Ellison* v. *Ellison* in White and Tudor's leading cases (8).

Applying the law thus established to the facts in evidence already referred to, without more, it would follow that the respondent Forsyth fails to

(1) 3 Mer. 707.
(2) 3 Sim. 1.
(3) 10 Hare 30.
(4) 3 Moore P. C. 445.
(5) 15 Q. B. 713.
(6) 2 M. & R. 495.
(7) 5 E. & B. 367.
(8) Vol. 1 p. 288 (5th Ed).

establish his defence that he is entitled to priority in respect of his legal title over the equitable title to the appellants, for, as I have before said, there is nothing to show when creditors first had communication of the deed, and the claims filed, the reference to which is the only allusion to the assent of creditors to be found in the depositions may not have been presented until after the suit was instituted, and it was incumbent on the defendant to prove this defence strictly. But the evidence authorises us to put the case much more strongly than this against the respondent. In his cross-examination, part of which has already been extracted, Mr. Forsyth proceeds to say:

The next morning (referring to the morning after the execution of the deed) Mr. Ackhurst and Mr. Barnstead (two of the appellants) came to the store and claimed title to the goods under the bill of sale. I took advice of counsel in the matter, and intimated to them afterwards that they had no right under their bill of sale to the goods acquired subsequent to its date.

It will be remembered that the deed was executed on the night of the 13th of December, 1881, and thus it appears that the next morning the respondent Forsyth, at a time when, so far as we have evidence, no creditor had become privy to the deed, and consequently whilst it was still revocable and the assignee a mere trustee for the debtor, had clear and distinct notice of the appellant's title, and proceeded to take legal advice upon it. The consequence must be that when creditors afterwards became parties to the deed and thus constituted Mr. Forsyth from that time a trustee for them, and a person who thus became entitled to the rights of a purchaser for value, that defence was rendered unavailing to him by the notice he had previously received, since, beyond all doubt or question, the notice so given to the trustee affected creditors subsequently coming in and taking the benefit of the assignment to as great an extent as it would have done if Forsyth had had notice

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when he first accepted the trust and executed the deed. It seems to me therefore an extremely clear case for giving the appellants the relief prayed, just as such relief was given in *Holroyd* v. *Marshall*, for the reason that in that case the defendant execution creditor was held to take subject to the equitable title of the assignee of after-acquired property, because he did not stand in the position of a purchaser for valuable consideration without notice.

It is out of the question to say that the statute before referred to (the Bill of Sale Act) has any bearing on the question of law just considered, or with its application here. All that the statute does is to require the filing of the bill of sale in order to make it a perfect instrument. When the deed is filed it is left to its ordinary legal and equitable operation, which is the same as it would have been before the statute was passed. The requirements of the statute which had been complied with are therefore wholly collateral to this question. It never could have been intended, by requiring registration, to make a deed irrevocable which, before the statute, was a mere revocable deed of management, thus affecting the rights of an assignee in a matter with which the Act was not intended to interfere. But there is even a more conclusive answer to any argument of this kind for, unless I have misstated the law, the effect of the decisions I have referred to is to show that the respondent Forsyth did not become an assignee for the benefit of creditors, but remained a mere assignee or trustee for the benefit of the settlor himself until the assignment was, by being actually communicated to a creditor, converted into a deed of trust for creditors, and therefore on the evidence he was not in a position to plead that defence until a time subsequently to that at which he had notice of the appellants' title.

There remains still another point which may be

noticed, though I do not think it would afford a ground for upholding the title of the appellants. The first section of the statute enacts that the bill of sale shall only "have priority" and, take effect, "from the time of the filing thereof."

There is nothing in the Act making registration notice, and I cannot read the words just quoted as intended to giving any preference or other priority to a registered bill of sale than before the statute it would have had without registration, and that it is plain, as I have already stated, would only have been an equitable priority so far as it created a charge on chattels to be subsequently ascertained. I am of opinion, therefore, that no argument from which the plaintiff can derive any benefit can be founded upon the use of these words.

It can be no objection to the relief prayed that it is in respect of chattels, contracts of sale relating to which are not ordinarily the subject of equitable jurisdiction by way of specific performance. This objection is fully answered by Lord Westbury in the case of *Holroyd* v. *Marshall*, a case like the present, being distinguishable on the ground of trust, for when a fiduciary relationship is once established a court of equity will interpose to enforce the trust whatever may be the nature of the property. In the notes to *Cuddee* v. *Rutter* in White and Tudor's Leading Cases (1), the law is thus stated:

Although courts of equity, as we have seen, will not ordinarily decree specific performance of contracts to purchase chattels if damages at law will be an adequate compensation, nevertheless, if a trust is created, the circumstance that the subject matter to which the trust is attached is a formal chattel will not prevent the court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. See also *Pooley* v. *Budd* (2).

I am of opinion that the appeal should be allowed

(1) Vol. I. Ed. 5 p. 859. (2) 14 Beav. 34.

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with costs, and a decree for an account, as prayed, with costs be entered in the court below.

FOURNIER J.—I am in favor of dismissing the appeal for the reasons given by the learned judge in equity.

HENRY J.—I am strongly of the opinion that had there been but one point in the case I should have come to the conclusion that the arrangement between Davidson and McAllister, by which the creditors were not to be informed of the bill of sale which was executed, and when McAllister became a party to that, by which he was benefitted by the continuance to Davidson of supplies of goods by other parties, he apparently having a large stock and large business going on, and having taken this secret bill of sale which the statute of Nova Scotia was intended to prevent, rendered the agreement on the point of McAllister by which Davidson was to be enabled to impose upon the world outside and obtain credit for the benefit of McAlister, who, through Davidson obtaining stocks of goods from the parties, which were to inure to Davidson under this bill of sale, was, I consider, a fraud, and an attempt made by McAllister to obtain a benefit through Davidson obtaining further supplies of goods for his store for his benefit, and that he, being a party to that, cannot take advantage of that which was intended as a cover and a cloak to enable Davidson to obtain further credit. My judgment is not necessarily founded on that position, but if it were, I think I should have no difficulty in arriving at the conclusion that McAllister ought not to profit by the bill of sale made under the agreement in question, by which the other party, by false pretences, was enabled to obtain further credit from parties outside. I think the law in regard to it has been properly laid down by his Lordship the Chief Justice, supported and sustained by the case to which he has referred, viz: *Hallas* v. *Robert-*

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son (1) which is exactly in point with this case. In that case Brett M.R., says (2): That confirms the judgment in *Joseph* v. *Lyons* (3), and enunciates a legal position applicable to this case. According to that doctrine McAllister had but an equitable title; not having obtained a legal title under that bill of sale the legal title was transferred legally by Davidson to Forsyth, and he is therefore entitled, I think, to the judgment of this court.

TASCHEREAU J.—For the same reasons I am in favor of dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Sedgwick, Stewart & O'Brien.*

Solicitors for respondents: *Weeks, Pearson & Forbes.*

THE BANK OF TORONTO.....APPELLANT;

AND

LE CURÉ ET LES MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE LA NATIVITÉ DE LA SAINTE VIERGE..... RESPONDENTS.

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*May 3.
1886
*Mar. 8.

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

Appeal—42 Vic., ch. 39, sec. 8—Action hypothecary for church rates under $2,000 not appealable.

A church rate payable in two instalments of $165 each was assessed on a certain property in the Parish of the Nativity. The Bank

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

(1) 33 W. R. 426. (2) See p. 12.
(3) 33 W. R. 146.

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of Toronto subsequently became proprietor of this land, and in an hypothecary action brought by respondents against them to enforce the payment of the first instalment of said church rate, the Superior Court at Montreal held the Bank of Toronto were liable; the Court of Queen's Bench (appeal side) confirmed the judgment.

Held, on appeal to the Supreme Court of Canada, that the case did not come within any of the classes of cases mentioned in sec. 8 of 42 Vic., ch. 39, (Supreme Court Amendment Act, 1879), providing for appeals from the province of Quebec, and was not appealable.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side).

The facts of the case are fully set out in the judgment of Fournier J.

The case was heard on the merits, but was decided on the ground that the Supreme Court of Canada had no jurisdiction.

R. Laflamme Q.C., for appellants.

Archambault for respondents.

FOURNIER J.—L'Appelante, défenderesse en Cour Inférieure, a été poursuivie hypothécairement et condamnée par jugement confirmé par la Cour du Banc de la Reine, à payer à l'Intimé, la somme de $165.82½ en vertu d'un acte de cotisation pour la construction d'une église catholique dans la paroisse de la Nativité de la Ste. Vierge, près de Montréal.

La propriété sur laquelle a été imposée cette cotisation en 1877, était alors en la possession du nommé Henri Girard, catholique romain, et comme tel tenu en vertu de la loi à contribuer à la construction de la dite église, comme propriétaire d'immeubles situés dans l'étendue de la dite paroisse. Il était devenu propriétaire de l'immeuble ainsi cotisé, par contrat de vente passé le 27 juin 1874, par Mtre Marler, notaire, et duement enregistré; cette vente lui avait été consentie par Joseph Ross Hutchins, appartenant à la religion protestante, pour la

somme de $24,000, payable en la manière stipulée au dit contrat.

Par un autre acte passé devant Mtre Doucet, le 19 janvier 1876, et duement enregistré, le dit Joseph Ross Hutchins a cédé et transporté la susdite somme de $24,000 à Walter Bonnel, qui, par un acte exécuté le même jour, par-devant le même notaire, transporta à la Banque de Toronto, l'Appelante, la dite somme de $24,000. La somme ainsi transportée et devenue la propriété de l'Appelante était le prix de vente originairement dû à Joseph Ross Hutchins par Henri Girard avec hypothèque et privilège de bailleurs sur l'immeuble vendu par l'acte du 27 juin 1874. Tous ces divers actes ont été duement enrégistrés. Les deux cessions ci-dessus citées de la susdite créance ayant été faites avec l'hypothèque et privilège de bailleur de fonds qui y étaient attachés, l'Appelante se trouve ainsi être dans la même position que le vendeur Joseph Ross Hutchins, et par conséquent substituée à tous ses droits, titres et privilèges.

Henri Girard se trouvant incapable de payer la dite somme et les intérêts échus, fit le 1er juin 1880 un acte par lequel il abandonna à l'Appelante la propriété sur laquelle était hypothéquée avec privilège de bailleurs de fonds, la créance transportée à cette dernière comme susdit. Cet abandon fut fait par Girard à la condition qu'il deviendrait quitte de son obligation personnelle de payer le prix de vente du dit immeuble—et accepté par l'Appelante sans novation de ses droits d'hypothèque et privilège de bailleur de fonds—et avec la réserve ci-après citée du droit de contester la réclamation qui fait l'objet du présent litige.

Hutchins et Bonnel n'étant pas catholiques romains n'étaient sujets à aucune contribution pour la construction d'une église de cette dénomination religieuse. L'Appelante comme étant aux droits de ces derniers et

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comme corporation composée pour la plus grande partie d'actionnaires protestants, réclame le bénéfice de l'exemption de toute contribution de ce genre. Non seulement les immeubles appartenant à des protestants ne sont pas sujets à cette contribution, mais le prix même qui en représente la valeur, comme dans le cas actuel, dû avec privilège de bailleur de fonds, doit être payé en préférence à toute taxe imposée pour cet objet affectant un immeuble acquis d'un protestant. Ce droit est garanti par l'article 2011 C. C., en ces termes :

The assessments and rates which are privileged upon immoveables are : 1. Assessment for building or repairing churches, parsonages or church-yards ; but in cases where an immoveable has been purchased from a person who does not profess the Roman Catholic religion, before it was assessed for such purposes, the privilege for such assessment must rank after the vendor's claim, and all privileges and hypothecs anterior to such purchase."

Aussi toute contestation à ce sujet est-elle abandonnée par l'intimée qui reconnaît positivement dans son factum s'en tenir à l'obligation personnelle que l'Appelante aurait contractée par l'acte d'abandon que lui a consenti Girard, de payer le montant réclamé. Cette admission qui nous exempte de la considération de toutes autres questions soulevées par les plaidoiries, est en ces termes :—

The principal or rather only legal question really before this honorable court, is whether the Appellants contracted, by their deed of cession and transfer of the 1st of June 1880 with Henri Girard, a personal obligation to pay the amount for which the property of their assignor was hypothecated towards the building of a catholic church under the control of the Respondents.

Toutefois, comme l'action est hypothécaire avec la conclusion alternative de payer $165.82, ou de délaisser un immeuble valant beaucoup au-delà de $2,000.00, il n'est pas hors de propos de faire remarquer que la valeur de l'immeuble dans ce cas ne peut pas affecter le droit d'appel—bien que la juridiction soit, d'après la section citée ci-aprés, déterminée par la somme ou la valeur

de la matière en litige. L'alternative donnée fixe à la somme due, $165.82, la valeur de lintérêt de l'intimé dans l'immeuble hypothéqué. Pour l'exercice de ses droits, la valeur de l'immeuble (la matière en litige) ne dépasse pas pour lui la somme qu'il réclame. C'est le principe suivi en France pour décider la question de compétence du tribunal d'appel dans les actions hypothécaires. Il y a lieu d'en faire application au cas actuel. L'autorité suivante est positive à cet égard, Bioche (1).

Quand la demande contient des conclusions alternatives, il suffit que l'une des deux choses réclamées soit d'une valeur inférieure à 1,500 francs pour que le tribunal prononce en dernier ressort. Henrion, chap. 16; Carré, No. 311; Benech, 1, p. 46; Boncenne, 1, 336; Carou, Nos. 114 et 115.

Mais limitée comme elle l'a été par les déclarations des parties, la demande n'a plus pour but que le paiement de la somme de $165.82½, réclamée en vertu d'une obligation personnelle. Avons-nous juridiction pour entretenir un appel dans une action personnelle dont le montant est au-dessous de $2,000.00? Il est évident que non, d'après le proviso de la section 17 de l'acte 35 Vic., ch. 11, qui déclare qu'il n'y a pas d'appel dans la province de Québec, à moins que la somme ou la valeur de l'objet en litige ne se monte à la somme de $2,000. Dans les causes où il s'agit d'une somme ou d'une valeur moindre, il n'y a pas d'appel, à moins que dans ce cas la demande ne soit de la nature de celle mentionnée dans la section 8 de la 42 Vic., ch. 39, amendant la section 17 ci-dessus citée. Mais la cause actuelle ne tombe dans aucune des catégories mentionnées dans cette dernière section.

Il ne s'agit ici que de l'obligation personnelle de l'intimé de payer $165.82½.

La section 8, après avoir déclaré qu'il y aur appel

(1) Vo. Appel, p. 357, No. 221.

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dans les cas où il s'agit de la validité d'actes législatifs, ajoute qu'il y aura aussi appel dans les causes au-dessous de $2,000, lorsque la demande se rapportera à des honoraires d'office, droits, rente, revenu, ou à quelque somme d'argent payable à Sa Majesté, ou à aucun titre à des terres ou tenements, rentes annuelles ou titres semblables ou choses, dans lesquelles les droits à venir peuvent être liés, "*bound.*"

Dans le cas actuel il ne s'agit que du paiement d'une somme de $165.82½ pour taxe d'église, laquelle a été imposée par la répartition d'une somme déterminée dont le paiement devait se faire en deux versements annuels. Cette taxe quoique portant hypothèque et privilège sur les immeubles, n'a aucunement le caractère d'une charge permanente, elle n'est que temporaire et ne peut pas se répéter d'année en année comme des rentes, ou comme des droits et revenus dûs à Sa Majesté qui ont un caractère permanent. Cette taxe n'est pas un droit (*duty*) car cette expression ne peut s'appliquer qu'à des droits dus à Sa Majesté, tandis que le montant de cette taxe est dû et payable à la corporation intimée. La demande de la somme en question n'a, non plus, aucun rapport à des titres concernant des terres et tenements, héritages, et de plus, comme la taxe dont il s'agit était payable en deux ans, il est évident que la condamnation au paiement de cette taxe ne compromet en aucune manière les droits futurs.

La demande en cette cause ne rentre dans aucune des catégories de causes où l'on peut appeler en vertu de la sec. 8, lors même que la demande est moindre que $2,000.

Cette question de juridiction aurait dû être soulevée préliminairement, mais au lieu de cela les deux parties semblent s'être entendues pour la passer sous silence; ou plutôt paraissent avoir été toutes deux sous l'impression avec l'honorable juge qui a permis l'appel, que la

cause était appelable. L'erreur étant commune aux deux parties, il ne peut être accordé de frais.

HENRY J.—I concur in the views taken by my learned brethren. I regret it, however, because I think it but right to express my opinion that the action was not maintainable, but such a judgment the court has no right to give because we have no jurisdiction.

TASCHEREAU J.—This is a case from the province of Quebec, what we call an hypothecary action for church rates for an amount of $165, and I am sorry to say we have to dismiss it for want of jurisdiction. I do not see that we have any jurisdiction to entertain the appeal. From the Province of Quebec, four classes of cases only are appealable under 42 Vic. ch. 29 sec. 8:—1st, any case wherein the matter in controversy amounts to the sum or value of $2,000; 2nd, any case wherein the matter in controversy involves the question of the validity of an act of Parliament, or of any of the local legislatures; 3rd, any case wherein the matter in controversy relates to any fee of office or any duty or rent or revenue payable to Her Majesty, or any sum of money payable to Her Majesty, where the rights in future might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable, but if in an action for a fee of office, the defendant pleads payment, the case is not appealable if under $2,000. 4th, any case wherein the matter in controversy relates to any title to lands or tenements, or title to annual rents or such like matters or things where the rights in future might be bound. It is evident that this case does not fall within any of the first three classes. Though the value of the immovable in question may be over

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$2,000, it is the amount claimed in an hypothecary action which is in controversy, and here it is clearly below the appealable amount. The only class under which it could at all be argued that this case falls would be the fourth one. But it is impossible to bring it within its terms. The title to this land here is not disputed nor in controversy. Nor do the words "such like matters or things where the rights in future might be bound," support the appeal. The right of the plaintiffs to tax this property is not disputed here. Nor is its liability to future taxation in contestation. And the fact that the taxes claimed are payable by instalments, some of which may not yet be due, cannot render the case appealable. The present liability of the bank, or rather the lien on this property is the only matter of controversy. It is *debitum in præsenti solvendum in futuro.* The case of *Sauvageau* v. *Gauthier* (1) in the Privy Council is in that sense.

Sir W. J. RITCHIE C J. and GWYNNE J. concurred.

Appeal quashed without costs.

Solicitors for appellants: *Laflamme, Huntingdon, Laflamme & Richard.*

Solicitors for respondents: *Mousseau, Archambault & Lafontaine.*

(1) L. R. 5 P. C. 494.

THE SOVEREIGN FIRE INSURANCE COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

1885 *Oct. 28.

AND

CHARLES H. PETERS (PLAINTIFF)... RESPONDENT.

1886 *Mar. 8.

ON APPEAL FROM THE JUDGE IN EQUITY OF THE PROVINCE OF NEW BRUNSWICK.

Insurance against loss by fire—Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.

Where a policy of insurance against loss or damage by fire contained the following provision:—

"If the property insured is assigned without the written consent of the company at the Head Office endorsed hereon, signed by the Secretary or Assistant Secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease:"

Held, affirming the judgment of the court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition.

APPEAL, by consent, from the decree of Mr. Justice Palmer, Judge in Equity for the Province of New Brunswick, in favor of the respondent (plaintiff below).

The firm of Peters & Sutherland, of the city of St. John, N. B., effected an insurance for the sum of $2,000 with the Sovereign Fire Insurance Company on their stock of boots and shoes in the premises in which they did business; not long after, the said Peters & Sutherland executed a chattel mortgage on their stock of boots and shoes, being the property covered by the said insurance, in favor of Charles H. Peters, the respondent, who allowed them to remain in possession of, and sell,

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

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the said stock; while the said mortgage was outstanding the said stock was destroyed by fire, and the company refused to pay the insurance thereon on the ground that the chattel mortgage was a breach of a condition in the policy that the property insured should not be assigned without the written consent of the company indorsed on the policy; the mortgagee brought a suit in equity against the company to recover the insurance, and a decree was made in his favour; the company then appealed, by consent between the parties, to the Supreme Court of Canada.

Lash Q.C. for the appellant, referred to Cons. Stats. U. C. cap. 52 sec. 30; *Smith* v. *Niagara District Mutual Ins. Co.* (1).

Hanington, for the respondent, contended that it would require an absolute transfer of all the interest of the insured to make a breach of this condition. If not, a sale of the goods insured in the ordinary course of business might constitute a breach. He referred to *Taylor* v. *Liverpool & Great Western Steam Co.* (2); *Crusoe* v. *Bugby* (3); *Goodbehere* v. *Bevan* (4); *Croft* v. *Lumley* (5); *Hitchcock* v. *North Western Ins. Co.* (6).

Johns v. *James* (7); *Marks* v. *Hamilton* (8); May on Insurance (9); Phillips on Insurance (10); *Sands* v. *Standard Ins. Co.* (11).

Sir W. J. RITCHIE C.J.—The case set forth that it is admitted:—

That a chattel ortgage was given by said defendants, John Peters and Thomas F. Sutherland, to said plaintiff, upon the property and effects mentioned in said policy of insurance, duly executed by said John Peters and Thomas F. Sutherland, on or about

(1) 38 U. C. Q. B. 570.
(2) L. R. 9 Q. B. 546.
(3) 2 Wm. Black. 766.
(4) 3 M. & S. 353.
(5) 6 H. L. Cas. 672.
(6) 26 N. Y. 68.
(7) 8 Ch. D. 744.
(8) 7 Ex. 323.
(9) Sec. 281.
(10) 5th Ed. p. 151 par. 286.
(11) 26 Gr. 113; 27 Gr. 167.

the 17th day of August, A.D. 1883, and duly filed in the office of the Registrar of Deeds in and for the City and County of Saint John on the 29th day of said month of August, a copy of which said chattel mortgage, it is agreed, may be filed and read as part of this case.

It is admitted that the chattel mortgage aforesaid was made and executed by the said defendants, John Peters and Thomas F. Sutherland, to the said plaintiff without procuring the written consent of the said defendants, the Sovereign Fire Insurance Company of Canada, thereto, and that no consent in writing to the said chattel mortgage was ever indorsed by the said defendant, the Sovereign Fire Insurance Company of Canada, on the policy; that, in fact, the said Abraham D. G. Vanwart (the company's agent) had not, nor had the said Sovereign Fire Insurance Company of Canada heard of said chattel mortgage having been made before said fire, nor had any notice been given to them, or either of them, or to their agent.

That the delivery of the shoes mentioned in the attestation clause of said chattel mortgage to the plaintiff was so made as a matter of form, as the parties to said chattel mortgage believed it to be a necessary form in order to make said chattel mortgage legal as a chattel mortgage, and, in fact, the said plaintiff did not, previous to the time of the fire above mentioned, enter into possession of any of the property or effects mentioned in said chattel mortgage, or take any proceedings to foreclose said chattel mortgage, or realize the amount secured thereby.

That the said Peters & Sutherland, after the execution of said chattel mortgage, continued in possession of said property and effects, and paid over to the plaintiff, from time to time, amounts on account of the amount secured by said chattel mortgage, as they had likewise done on account of the amounts due him before its execution, but there is still due to said plaintiff, on account of the amounts secured by said chattel mortgage, a large amount in excess of the amount of $2,000 insured under said policy as aforesaid.

That the said plaintiff and the said John Peters and Thomas F. Sutherland, or William Peters, junior, at the time of making said chattel mortgage or said trust deed, had not, nor had any of them, read over the conditions of said policy, and none of said parties intended to commit a breach of any of the conditions of said policy, and neither of them knew or believed that such chattel mortgage or trust deed would affect said policy in any way.

It is admitted that if the said policy was in force and valid at the time of said fire, the said plaintiff is entitled to maintain this action and to recover against the defendants, the Sovereign Fire Insurance Company of Canada, the sum of $2,000 and interest

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thereon from the 26th day of December, A.D. 1883.

I differ entirely from Mr. Justice Palmer as to the meaning of the words "property insured" in the third condition. That learned judge says they may fairly mean the insurable interest in the subject insured. That, certainly, is what is insured, and such interest is property. With all due deference to that learned judge, I think the property insured was the following property:

Their stock of boots and shoes, findings, and machinery contained in the premises occupied by them, on the second flat of the four-storey brick building with gravel roof, situate on the south-west angle of Carmarthen and Union streets, City of St. John N.B., occupied by insured and other tenants as a steam power boot and shoe factory, furniture and brush and soap factories, and grocery—

as specified in so many words in the policy. Then we have the third condition, in reference to which the policy is made and accepted, and declared to be part of the contract, "that if the property insured is assigned without the written consent of the company." What property? In my opinion, clearly the stock of boots and shoes, &c. But, if anything is wanting to make this more clear, we have the last words of the condition, "but this condition does not apply to change of title by succession, by operation of law, or by reason of death." Change of title? To what, if not to the stock of boots and shoes, does this apply? Then again, if it could possibly be required to be made plainer, we have condition four: "When property insured is only partially damaged no abandonment, &c." What is this property insured but the stock of boots and shoes? So at the end of this condition: "No abandonment of property insured will be allowed," &c. Does this apply to the insurable interest?

So again, in condition twelve, as to the directions to be observed by persons entitled to make a claim under the policy, we have, *inter alia:*

5. He shall also declare what was the whole actual cash value of the property insured, and what interest the assured had therein at the time of the loss.

6. Whether there was any incumbrance thereon, and, if any, giving full particulars thereof.

7. In what general manner the premises insured, or the premises containing the subjects insured, or the several parts thereof, were occupied, &c.

Also by condition 15:

If any difference arise as to the value of the property insured, of the property saved, or amount of the loss, &c.

But it is, in my opinion, idle to pursue the matter further; the case is too clear for argument. There is not a doubt, in my mind, that the assignment of the property insured referred to the insured subject, the thing insured. I have looked at the cases relied on by the learned judge, and cannot discover that they have the slightest bearing on this case; nor can I agree with the learned judge, that "it follows that the only question is what is the meaning of the words "property insured." The question is simply: Was the execution of a chattel mortgage, without the written consent of the company, such an assignment of the property insured as would render the policy void under the third condition?

I think this must be read as an absolute assignment of the property insured, of all the assured's interest therein, and that the condition, as against the assured, should not be read as forbidding a mortgage of or incumbrance on the property, where the assured retains an insurable interest. That condition must be strictly construed, and, as said by Chief Justice Cockburn in *Fowkes* v. *Manchester and London Assurance Ass.* (1):

In construing an instrument prepared by the company and submitted by them to the party, affecting insurance, it ought to be read most strongly *contra preferentes.*

(1) 3 B. & S. 925.

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Forfeitures are certainly not favored by the law. It has been well said that in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture when it will bear another reasonable construction which will not produce such a result.

In the last edition of the Imperial Dictionary assign is, in law, to transfer or make over to another the right one has in any object, as in an estate, chose in action or reversion, and in this sense we may fairly assume that the words were used. A mortgage is one thing, an assignment of the property is quite another; the one being conditional, the other absolute. In order to operate as a forfeiture, I think the assignment must divest the assured of all interest in the property, as he would be by change of title, by succession, by operation of law, or by reason of death, which changes are excepted from the operation of the condition, but so long as an insurable interest remains in the assured the policy is valid to the extent of that interest. Condition number twelve, in its fifth and sixth paragraphs, which provide directions for parties making claims under the policy, seems to indicate that the property may be encumbered without the knowledge or consent of the insurers.

Par. 5.—In such statutory declaration he (the insurer) shall declare what was the whole actual cash value of the property insured, and what interest the assured has therein at the time of the loss.

Par. 6.—Whether there was any incumbrance thereon, and if any, giving full particulars thereof.

But nowhere is it said that where an insurable interest is shown, the policy is avoided by any incumbrance thereon. If it was intended that the policy should be forfeited, notwithstanding the assured retained an insurable interest in it, I think such an intention should be clearly apparent from the language

of the policy or condition. I think the assignment should amount to an absolute transfer of the assured's whole interest; in other words, a transfer of the title and determination of his interest.

The case from Ontario *Sands* v. *Standard Ins. Co.* (1), holds that in a condition "if a property is assigned without the written consent, &c.," the word "assign" did not cover a dealing with the property by way of mortgage, with which decisions the American authorities seem to be entirely in accord.

I think therefore the appeal should be dismissed with costs.

FOURNIER J.—Sutherland et Peters, après avoir effectué une assurance pour un an, le 29 mars 1883, sur leur fonds de commerce, composé de chaussures et d'articles concernant la manufacture de chaussures, consentirent un *chattel mortgage* (hypothèque sur les meubles) en faveur de l'intimé, comme sûreté collatérale d'une dette. Celui-ci ne prit pas possession des articles en question et ne fit aucun procédé pour réaliser sur le *chattel mortgage*. Le 8 d'octobre suivant, les effets couverts par la police d'assurance et par le *chattel mortgage* furent consumés par un incendie. La question résultant de ces faits est de savoir si la création d'un *chattel mortgage* sur les meubles assurés, constitue une violation de la troisième condition de la police d'assurance, conçue en ces termes :

If the property insured is assigned without the written consent of the company at the head office indorsed hereon, signed by the Secretary or Assistant Secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease; but this condition does not apply to change of title by succession, or by operation of law, or by reason of death.

La création du *mortgage* est-elle en réalité une violation de la condition que les meubles assurés ne peuvent

(1) 26 Gr. 113 and 27 Gr. 167.

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être transportés sans le consentement de la compagnie ? et comme le *chattel mortgage* ne laisse plus aux assurés que le droit de racheter leurs propriétés en remboursant le montant de ce *mortgage*, leur reste-il encore, dans ce cas, un intérêt assurable ?

La propriété des assurés ne consistant plus après le *chattel mortgage* que dans un droit de rédemption (*equity of redemption*), ce droit peut-il être considéré comme compris sous les termes *property insured* ? Le terme *property*, en matière d'assurance, a été interprété, comme ayant une signification assez étendue pour comprendre un intérêt assurable. Voir *Holdbrook* v. *Brown* (1) ; *Wiggins* v. *Mercantile Ins. Co.* (2) ; *Locke* v. *North American Ins. Co.* (3). Si les mots *property insured* comprennent un intérêt assurable, il ne reste donc qu'à savoir si après l'exécution du *chattel mortgage*, les assurés possédaient encore un intérêt assurable. Par l'article 15 du cas spécial, il est admis que la livraison mentionnée dans la clause d'attestation n'a été ainsi faite que comme matière de forme et sous l'impression qu'elle était nécessaire à la validité du *chattel mortgage*, mais qu'en réalité cette livraison n'a pas eu lieu, et que de fait, avant l'incendie, l'intimé n'avait pris possession d'aucun des effets mentionnés dans le *chattel mortgage* et n'avait adopté aucun procédé pour réaliser la somme dont le remboursement était garanti de cette manière. Peters et Sutherland étaient donc encore en possession des articles affectés au *chattel mortgage*, et pouvaient, en payant le montant ainsi garanti, rentrer dans leur droit de propriété et alors, dans le cas d'incendie, la perte des effets assurés retombait sur eux. Il résulte de cette position qu'ils avaient conservé dans les effets en question un intérêt assurable suffisant pour leur permettre de recouvrer le montant couvert par la police d'assu-

(1) 2 Mass. 280. (2) 7 Pick. 270.
(3) 13 Mass. 61.

rance. Cette cour ayant déjà exprimé son opinion sur ce qu'elle considère comme un intérêt assurable dans la cause de *Clark* v. *Scotish Imperial Insurance Co.* (1), et dans celle de *Anchor Marine Ins. Co.* v. *Keith* (2), je crois qu'il serait inutile de citer à ce sujet d'autres autorités que celles de ces deux causes et des nombreuses décisions sur lesquelles la cour s'est alors appuyée pour en venir à la conclusion qu'elle a adoptée. Je considère donc ce point comme réglé et, en conséquence, que l'intimé a droit de recouvrer sur la police.

Mais l'appelant ayant aussi invoqué comme défense le fait qu'il y avait eu violation de la troisième condition par la création du *chattel mortgage*, qui dans ses termes contenant un transport de la propriété assurée, il est nécessaire de voir quelle interprétation il faut donner au mot *assigned* dans cette condition. L'intimé a fait à ce sujet une savante dissertation en se basant sur les règles d'interprétation pour en venir à la conclusion que le mot *assigned* n'a rapport dans cette condition qu'à une aliénation complète des articles assurés qui n'aurait laissé aucun intérêt assurable à Peters et Sutherland. Une clause semblable a déjà fait l'objet de discussions importantes dans les cours de la province d'Ontario, dans la cause de *Sands* v. *Standard Ins. Co.* (3). Dans la même cause, entendue de nouveau *in banco*, et rapportée au 27 vol. Grant, p. 167, le jugement de l'honorable juge Proudfoot décidant que la condition dont il s'agit ne s'appliquait pas à une aliénation par hypothèque (*mortgage*), mais à un transport absolu, fut confirmé par tous les juges. La condition dont il s'agit en cette cause est semblable, dans ses parties essentielles, à celle qui faisait le sujet de la discussion dans la cause de *Sands* v. *The Standard Ins. Co*; il n'y a qu'une différence sans importance dans les

(1) 4 Can. S. C. R. 192. (2) 9 Can. S. C. R. 483.
(3) 26 Grant, p. 113.

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termes qui ne sont pas de nature à modifier la question d'interprétation du mot *assigned* dans la troisième condition dont il s'agit ici. L'interprétation admise est évidemment applicable en cette cause. En conséquence, l'appel doit être renvoyé avec dépens.

HENRY J.—This is an action by the respondent as mortgagee of Peters & Sutherland on certain goods and assignee of a policy of fire insurance issued by the appellant company to the said Peters & Sutherland on the same goods previous to the execution of the chattel mortgage. The question as to the validity of the assignment was submitted under a special case in which everything necessary to the recovery of the respondent is admitted except as to the validity of the policy when the loss occurred, which was a few months after the execution of the chattel mortgage and the assignment of the policy. The third condition of the policy is as follows :—

If the property insured is assigned without the written consent of the company, at the head office, indorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall, thereby, become void, and all liability of the company shall thenceforth cease; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.

The 18th and 19th clauses of the special case are as follows :—

It is submitted that the said plaintiff is the lawful assignee for value of said policy of which the said defendants, the Sovereign Fire Insurance Company, had notice immediately after the said fire, but the Sovereign Fire Insurance Company of Canada had not notice of any assignment of the policy to the plaintiff until after the said fire, nor has the Sovereign Fire Insurance Company of Canada done any act showing they accepted the plaintiff as their assured.

It is admitted that if the said policy was in force and valid at the time of said fire, the said plaintiff is entitled to maintain this action and to recover against the defendants, the Sovereign Fire Insurance Company of Canada, the sum of $2,000 and interest thereon from the 26th day of December, A. D. 1883.

The case concludes as follows:—

It is contended on the part of the defendants, the Sovereign Fire Insurance Company of Canada, that the third condition indorsed on the said policy was a proper and reasonable condition, and the execution and delivery of the said chattel mortgage was a breach of the said third condition indorsed on said policy of insurance, and that the said policy therefrom became void and of no effect whatever, and that the plaintiff cannot recover thereunder. It is admitted, however, that if the execution and delivery of said chattel mortgage was not a breach of said third condition, then the said policy of insurance was valid and in force at the time of said fire.

The question for the court is whether the said policy of insurance was valid and in force at the time of said fire. If so, then the plaintiff to have judgment for the amount aforesaid, said sum of $2,000 and interest and costs of this suit, and, if not, the said defendants, the Sovereign Fire Insurance Company of Canada, to have judgment with costs.

Reference is made in the special case to an assignment alleged to have been made subsequent to the mortgage, and before the loss by Peters and Sutherland to Wm. Peters, junior, of all their property for the benefit of their creditors, but it appears that nothing was done under it, and the creditors did not execute it, but at all events, no question was raised on it so as to affect the policy. We have therefore only to decide as regards the mortgage. I have no doubt that Peters and Sutherland, after the mortgage given as security, had an insurable interest in the property covered by the policy. That after the mortgage they might have insured the property covered by it, and that the creation of the security by the mortgage was not such a transfer or assignment of the property as is prohibited by the third condition of the policy. The assignment therein referred to, is one by which the property is absolutely and wholly assigned, so that no interest in it remains in the assignor. Such is not the case where security by mortgage is given on the insured property.

I have no doubt of the correctness and validity of the decision appealed from to this court, and am therefor of

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opinion the appeal should be dismissed with costs.

TASCHEREAU J. concurred in dismissing the appeal.

GWYNNE J.—The case of *Burton* v. *The Gore District Mutual Insurance Company* (1), and cases of that class being cases depending upon the peculiar provisions of the statutes relating to mutual insurance companies, have no bearing upon the present case, but although an absolute assignment of an insurer's whole interest in chattel property avoids the policy, and divests the insured of all right to recover thereunder upon the property being subsequently destroyed by fire without any condition indorsed on the policy to that effect, still, I think that it is an absolute disposition by assignment of all title in the insured property which is pointed at by the condition in question; the context in which the word "assigned" is used in the condition, leads, I think, to this conclusion. The object of the condition is, I think, to provide that although a change of the whole title by assignment without consent of the insurers shall avoid the policy, as indeed it would without any such provision, still that change of title by succession, or by operation of law, or by death, shall not. So that in these latter cases the parties becoming entitled to the property shall have the benefit of the insurance, while the assignee of the title, that is of the whole title, in the case of assignment, as in the other cases, shall not, unless such assignment be consented to by the insurers in the manner provided for in the condition. I agree therefor that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *Silas Alward.*

Solicitors for respondents: *Hanington, Milledge & Wilson.*

(1) 14 U. C. Q. B. 342.

LES COMMISSAIRES D'ÉCOLES POUR LA MUNICIPALITÉ DU VILLAGE DE ST. GABRIEL DANS LE COMTÉ D'HOCHE LAGA (PLAINTIFFS)..... } APPELLANTS;

1885 *Nov. 4. 1886 *March 8.

AND

LES SŒURS DE LA CONGRÉGATION DE NOTRE DAME DE MONTRÉAL (DEFENDANTS)..... } RESPONDENTS.

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

School taxes—32 *Vic. ch.* 16 *sec.* 13 *P. Q.*—*Cons. Stats. L. C. ch.* 15 *sec.* 77—41 *Vic. ch.* 6 *sec.* 26 *P. Q.*—*Construction of.*

In an action brought by appellants against the respondents to recover the sum of $808.50 for three years' school taxes imposed on property occupied by them as a farm, situated in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the Mother House situated in another municipality.

Held, reversing the judgment of the court below, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by sec. 13 of ch. 16 32 Vic. (P. Q.)

Held, also, that said sec. 13 does not extend, as regards exemptions, sec. 77 of ch. 15 of the Cons. Stats. L. C., which has not been repealed, but which has been amended by the addition of sec. 26 ch. 6 41 Vic. (P. Q.)

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court.

This was an action by the school commissioners of the municipality of the village of St. Gabriel against

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

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the congregation of Notre Dame of Montreal for school taxes upon a farm of the defendants, situated within the said municipality. The defence set up is that the farm is used for educational purposes, and, therefore, exempt from such taxation.

There was only one witness for the defendants as to the nature of the property sought to be assessed. According to her evidence, the property consists of a farm managed by two or three of the ladies of the congregation. All the products of the farm are consumed at the Mother House, Villa Maria, in another municipality, except a portion sold to cover the expenses of working and cultivating the farm. Occasionally, some of the nuns who were ill or indisposed, would pass a few days there, but the establishment was not kept as a sanitarium or place of repose for the respondents. The respondents have no school or house of education at the establishment in question, nor even within the municipality.

The question raised on this appeal was whether or not the respondents are exempt from taxation under c. 16 of 32 Vic. (Quebec); the sections bearing upon the case are given at length in the judgments.

Lacoste Q.C. for respondents, claimed that the letters patent granted to them by the King of France recognize them as an educational institution, and that the property in question was given to them for the purposes for which they were instituted, and therefore is within the Act.

Geoffrion Q.C. for appellants, contended that the respondents derive an income from the said property and are therefore liable to be taxed under the Act.

Sir W. J. RITCHIE, C.J.—I think the property assessed was held solely for the purposes of deriving a revenue

therefrom. The object of working the farm was to make a profit to the funds of the institute from the proceeds of the farm, and therefore for the purposes of revenue, whether received in produce or the produce sold and received in money. I entirely agree with the judgment delivered by Chief Justice Dorion in the case of *La Corporation du Village de Verdun* v. *Les Sœurs de la Congrégation de Notre Dame* (1) and have nothing to add to what he there said.

FOURNIER, J.—Les appelants ont poursuivi les intimées pour le recouvrement de $808.50, pour trois années de taxes scolaires imposées par eux sur certains immeubles dont les intimées sont propriétaires dans les limites de la municipalité du village de St. Gabriel.

Les intimées ont plaidé qu'elles sont une institution d'éducation et que comme telles, les terrains mentionnés en la déclaration des demandeurs (appelants) comme leur propriété, sont exemptés du paiement des taxes scolaires et municipales, et que ces biens sont possédés par les intimées pour les fins pour lesquelles leur institution a été établie,

Par une réponse spéciale, les appelants ont nié que les propriétés en question soient exemptées du paiement des taxes réclamées, et allégué qu'elles n'étaient pas possédées par les intimées pour des fins d'éducation, mais seulement pour en retirer un revenu.

Les faits n'offrent aucune difficulté, les intimées admettant la vérité des allégations de la déclaration, et se reposant entièrement, pour le succès de leur cause, sur l'exemption plaidée.

La nature de l'occupation et de l'exploitation de propriétés dont il s'agit a été expliquée par la sœur Ste. Justine, une des religieuses de la congrégation intimée. Elles sont administrées par deux ou trois dames de la

(1) 1 Dor. Q. B. R. 164.

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congrégation, qui les font exploiter comme propriétés agricoles, dont les revenus sont dépensés à Villa Maria, la maison-mère de cette institution, située dans une autre municipalité, à l'exception de ce qui est vendu pour subvenir aux frais de culture. De temps en temps des religieuses malades ou indisposées y passent quelques jours, mais l'établissement n'est pas un hôpital.

Q. L'établissement alors ne consiste qu'en une ferme, surveillée par deux ou trois sœurs et des employés, et d'autres sœurs qui, quelquefois, vont y passer un intervalle de temps pour leur santé? R. Oui, monsieur.

Il est aussi prouvé que les intimées ne tiennent ni école, ni pensionnat pour l'éducation des jeunes filles, et qu'elles n'en ont pas dans les limites de la municipalité en question.

Dans ces circonstances, la nature de l'usage et de l'exploitation des propriétés en question donne-t-elle aux intimées le droit de se prévaloir de l'exemption établie par la sec. 13 du ch. 16, 32ème Victoria (Québec)? Telle est la seule question en contestation en cette cause. La 2ème partie de la 13ème section, concernant cette exemption, est ainsi conçue:

Aucune institution ou congrégation religieuse, charitable ou d'éducation, ne sera taxée pour les frais scolaires, pour les propriétés occupées par elles pour les fins pour lesquelles elles ont été établies, mais les propriétés possédées par elles pour des fins de revenu seront taxées par les commissaires d'école, etc.

Les intimées prétendent que cette disposition est en amendement du ch. 15 Stat. Ref. B. C., qui, par la sec. 76, déclare que les taxes scolaires doivent être imposées également d'après la valeur de chaque propriété sur tous les immeubles sujets aux taxes dans la municipalité scolaire, et par la sec. 77, déclare quelles sont les exceptions à ce principe. Parmi les exceptions sont "toutes "bâtisses pour les fins de l'éducation et le terrain sur le-"quel elles sont érigées." Cette disposition, d'après les intimées, était beaucoup plus restreinte que celle de la

section 13, qui aurait été adoptée dans le but d'en élargir l'effet et de le rendre plus favorable aux institutions d'éducation. L'acte 32me Vict., ch. 16, quoique portant le titre d'acte pour amender les lois d'éducation, introduit plus de dispositions tout-à-fait nouvelles qu'il n'en amende. Lorsqu'il révoque ou amende quelques dispositions des lois existantes il en est généralement fait mention. C'est ainsi que par la sec. 11, il donne une nouvelle définition du mot habitant; par la sec. 21 il révoque la sec. 133 du ch. 15 Statuts Refondus; par la section 26, les sections 61 et 62 du ch. 15, sont déclarées inapplicables aux secrétaires-trésoriers des cités de Québec et de Montréal. Si le législateur a déclaré son intention d'amender dans ces cas, ne l'eût-il pas fait aussi dans la section 13, contenant en termes différents, l'importante disposition concernant les exemptions de paiement de taxe. Son silence à cet égard est une présomption qu'il n'avait pas l'intention de modifier ou amender la loi dans le sens que prétendent les intimées. La raison en est sans doute que, lorsque l'on compare les deux dispositions, il est difficile d'y trouver une différence suffisante pour en conclure qu'il y a eu intention évidente d'amender. Les termes de l'exemption dans le ch. 15, sont:

> Toutes les bâtisses pour les fins d'éducation, et le terrain sur lequel elles sont érigées.

Cette disposition signifie clairement que les propriétés possédées pour autres fins que celles de l'éducation seront taxées. La section 13 dit-elle autre chose, lorsqu'elle déclare que—

> Les institutions d'éducation ne seront pas taxées pour les écoles à raison des propriétés qu'elles occuperont pour les fins pour lesquelles elles ont été instituées, mais elles seront taxées par les commissaires d'école à raison des propriétés qu'elles possèdent pour en retirer un revenu.

Le pouvoir de taxer n'est-il pas aussi, dans ce dernier cas, limité, comme dans le premier, aux propriétés pos-

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sédées pour des fins d'éducation? Les mots "à raison "des propriétés qu'elles occuperont pour les fins pour "lesquelles elles ont été instituées," ne sont là que pour éviter de répéter la mention des institutions mentionnées plus haut et ne signifient clairement pas autre chose que chacune d'elles n'aura le bénéfice de l'exemption qu'à raison des propriétés qu'elle possède pour le but particulier pour lequel elle a été créé; c'est-à-dire pour les intimées le but spécial de l'éducation des jeunes filles, et pour les autres institutions religieuses ou de charité, les terrains qu'elles occupent pour leurs fins, soit religieuse ou de charité. Puisque la loi n'a pas jugé à propos d'accorder une exemption générale, il faut donc nécessairement donner à cette clause un effet limité, et cette limite nous ne pouvons la trouver, dans ce cas-ci, que dans la possession de propriété pour les fins d'éducation. Pour ces fins il n'est pas nécessaire de posséder de grandes étendues de terres, ou d'autres propriétés possédées et exploitées seulement dans le but d'en tirer des revenus. Je ne puis voir entre les deux dispositions une différence qui me permette de conclure que la deuxième est une extension de la première, donnant le droit d'exemption de taxe à d'autres propriétés des intimées que celles qu'elles possèdent pour des fins d'éducation. Si l'on n'adopte pas cette règle d'interprétation que je trouve dans les deux dispositions, il en résulterait une exemption générale, car il suffirait pour éluder la loi d'établir une modeste école sur une propriété de grande valeur pour être exempté de taxe, d'après l'interprétation que les intimées veulent faire prévaloir.

Pour empêcher sans doute l'introduction de semblables abus la sec. 13 que je trouve plus sévère que la sec. 77, qui n'énonçait que l'exemption de taxe, déclare que les institutions d'éducation seront taxées à raison des propriétés qu'elles possèdent pour en retirer des

revenus. Toute la question se résume donc à savoir si une propriété est possédée pour des fins d'éducation ou des fins de revenus. Comme on l'a vu plus haut, la preuve faite par une des religieuses, sœur Ste. Justine, les intimées n'ont aucune institution d'éducation dans les limites de la municipalité du village de St. Gabriel, et les produits des propriétés qu'elles y possèdent sont employés pour partie à payer les dépenses de culture et le surplus est consommé à la maison-mère à Montréal. Il est évident qu'elles n'occupent pas les propriétés en question en cette cause pour les fins de l'éducation et qu'en conséquence ces propriétés sont sujettes aux taxes scolaires—les seules dont il s'agisse en cette cause. Je dois ajouter que je concoure dans les vues exprimées sur cette question par l'honorable juge en chef du Banc de la Reine, Sir Aimé Dorion et son collègue, l'honorable juge Cross, dans la cause de la corporation de Verdun contre les intimées en cette cause. Ces honorables juges diffèrent de la majorité de la cour qui en était venue à une conclusion contraire et avait décidé cette question comme l'a été celle-ci, en faveur des intimées. Dans la présente cause, l'honorable juge Tessier, qui n'avait pas siégé dans le premier, a différé de la majorité et a adopté l'opinion de l'honorable juge en chef et de l'honorable juge Cross, ce qui donne pour résultat une division égale des six juges de la cour du Banc de la Reine.

Pour les raisons exprimées plus haut, je me range à l'opinion qui tend à déclarer que dans le cas actuel les intimées ne sont pas exemptées du paiement des taxes scolaires. En conséquence je suis d'avis d'allouer l'appel avec dépens.

Je dois ajouter que je n'ai pas cru devoir discuter la question de savoir si les produits tirés de la ferme sont un revenu, car cela ne me paraît pas susceptible d'un doute.

Henry and Gwynne JJ. concurred.

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TASCHEREAU, J.—This action was brought to recover the sum of $808.50 for three years' school taxes (1878, 1879, 1880), imposed by the appellants upon certain immovable property owned by the respondents within the limits of the village of St. Gabriel.

The respondents allege by their defence, that they are an educational institution and that the lands mentioned in appellants' declaration as being their property, are exempt from the payment of municipal and school taxes, inasmuch as the said parcels of land are held by the respondents for the objects for which they were established.

By their answer the appellants deny that the property taxed was held by the respondents for educational objects, but contend that the latter work the same for the purposes of deriving an income therefrom.

The respondents have admitted the truth of the declaration, and rely solely upon the exemption pleaded by them.

Only one witness was examined, Sister Ste. Justine. She explains the nature of the respondents' occupation and the use to which the immovables in question were put. They consist of a farm managed by two or three of the ladies of the Congregation. She states that all the products of this farm are consumed at the Mother House, Villa Maria, situated in another municipality, with the exception of a portion sold to cover the expenses of working and cultivating the farm. Occasionally some of the nuns who were ill or indisposed would pass a few days there, but the establishment was not kept as a sanitarium or place of repose for the respondents. The respondents have no school or house of education at the establishment in question, nor even within the municipality of St. Gabriel.

Under these circumstances the respondents invoke in their favor the exemption established by section 13 of

chapter 16 of 32 Victoria (P.Q.)

This is the whole question at issue. The portion of the above mentioned section bearing upon this question reads as follows:—

No religious, charitable or educational institutions or corporations shall be taxed for school purposes on the property occupied by them for the objects for which they were instituted, but on all property held by them or any of them, for the purposes of deriving any income therefrom, they shall be taxed by the school commissioners.

Par. 2 of sec. 77, ch. 15, C. S. L. C. enacts that:—

All buildings set apart for purposes of education, or of religious worship, parsonage houses, and all charitable institutions or hospitals incorporated by Act of Parliament, and the ground or land on which such buildings are erected, and also all burial grounds shall be exempt from all rates imposed for the purposes of this Act.

It was contended at the argument that this last enactment of the Consolidated Statutes was repealed, or should be considered as repealed, by the above subsequent clause of the 32 Vic. (1869). But it is not so, since later on, in 1878, 41 Vic., ch. 6, sec. 26, the legislature amends the said section of the Consolidated Statutes by adding to the said sub-section 2, that:—

Every educational institution, receiving no grant from the corporation or municipality in which they are situated, and the land on which they are erected, and its dependencies, shall be exempt from municipal and school taxes, whatever may be the act or charter under which such are imposed, notwithstanding all provisions to the contrary.

This last enactment was not cited at the argument of the case and is not referred to in the factums. It applies to the respondents' institution, however, as well as to all other educational institutions. The judgment of the Superior Court, as confirmed in the Queen's Bench, is based, in its first *considérant*, on the proposition that, as sec. 77 of ch. 15 of the C. S. L. C., restricted the exemption from school taxes to the buildings set apart for the purposes of education and the ground or land on which such buildings are erected, the legislature by

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the posterior said section of the 32 Vic. must have intended to enlarge the enactment of the Consolidated Statute and extend the exemption to a property, as the one in question, by using the words "property occupied," instead of "all buildings and the ground or land on which such buildings are erected." If these two sections stood alone, that reasoning might help the respondents, but it works entirely against them, under the still later amendment, whereby the legislature reaffirming, as it were, the restriction contained in the Consolidated Statute, limits, in express words, the exemption to every educational institution and the land on which they are erected and its dependencies. I need not say that the words "its dependencies" cannot apply to the property now in question. For they apply to dependencies of the land, not to dependencies of the institution.

If this last enactment is to govern this case, it would be clear that the property of the respondents now in question, is not exempted from the taxation claimed. However, sec. 13, of the 32 Vic., has been expressly repealed, and the respondents rely upon it to claim for that property an exemption from the school taxes. This would leave us almost exclusively with a question of fact. Is this property occupied by the respondents for the objects for which they were instituted, or is it held by them for the purposes of deriving any income therefrom? With the evidence on the record, and bearing in mind that exemptions are to be strictly construed and embrace only what is within their terms, I am of opinion that this property is not held by the respondents for the purposes for which they were instituted, but is held by them as a source of revenue or income. Sister Ste. Justine, the only witness in the case, says that whether in kind or in cash, the returns of that farm are exclusively *employés aux revenus de la maison-*

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mère. They form part of their revenue, just as if the farm was leased for $1,000 per annum, these $1,000 would form part of the revenues of the institution. *Pierce* v. *Cambridge* (1). If the interpretation given by the respondents to that clause was correct, it would have been useless for the legislature to make a distinction between the property of an educational institution actually occupied as a school, and their property held for the purposes of revenue or income. It would have enacted that all property whatsoever belonging to an educational institution was not taxable. It is clearly not what it intended by its last enactment on the subject, 41 Vic., ch. 6, sec. 26, above cited.

I am of opinion that the appeal should be allowed and judgment given for $808.50 with interest from this date and costs, *distraits à* M. M. Geoffrion, Dorion, Lafleur and Rinfret

Appeal allowed with costs.

Solicitors for appellants: *Geoffrion, Dorion, Lafleur & Rinfret.*

Solicitors for respondents: *Lacoste, Globensky, Bissaillon & Brousseau.*

ELIZABETH NEILL (PLAINTIFF).....APPELLANT;

AND

THE TRAVELERS' INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS.

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*May. 21.
*June 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Accident policy—Condition—Voluntary exposure to unnecessary danger—Practice—Extending time for appealing.

The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency

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

(1) 2 Cush. 611.

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of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents amongst other defences, by their fourth plea, invoked a condtion to which the policy sued on was subject, to wit:—"No claim shall be made under this policy when the death or injury may have happened in consequence of unnecessary danger, hazard or perilous adventure." The uncontradicted evidence was that the deceased was killed by a train coming against the vehicle in which he was driving alone on a dark night in what was called a net-work of railway tracks in the company's station yard at Toronto, at a place where there was no road way for carriages.

Held, affirming the judgment of the court below, that the undisputed facts established by the plaintiff showed "that the deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that therefore respondents were entitled to a non-suit.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of the Court of Common Pleas (2).

This action was brought in the Common Pleas Division of the High Court of Justice for Ontario for the recovery of moneys alleged to be due to the plaintiff by the defendants by virtue of an accident insurance policy issued to John Neill, the husband of the plaintiff.

The pleadings and the evidence so far as material are set out in the report of the case in the court below (3) and in the judgment of Mr. Justice Gwynne hereinafter given.

The action came on for trial on the 9th June, 1880, before the Hon. Mr. Justice Armour, and a jury at Toronto.

The learned judge in his charge submitted three questions to the jury:—1st. Did Mr. Neill voluntarily expose himself to unnecessary danger, hazard, or perilous adventure at the time he was killed; was he killed by reason of exposing himself to unnecessary danger,

(1) 7 Ont. App. R. 570. (2) 31 U. C. C. P. 394.
(3) 31 U. C. C. P. 394.

hazard, or perilous adventure? 2nd. Was he killed while engaged in or in consequence of any unlawful act? 3rd. Did he use due diligence for his personal safety and protection at the time he was killed? His lordship directed the jury, if they found any of these issues against the plaintiff, to find a verdict for the defendants; but if they found all these issues in favor of the plaintiff to find a verdict for her. The jury found a verdict for the plaintiff for the full amount claimed. Leave was reserved to the defendants to move for a non-suit if the court should be of opinion on the evidence, that there was nothing to submit to the jury.

On 28th August, 1880, a rule *nisi* was obtained by defendants calling on plaintiff to show cause why a non-suit should not be entered, pursuant to leave reserved, and on 26th November, 1880, the rule was made absolute.

From this judgment of the Common Pleas Division the plaintiff appealed to the Court of Appeal for Ontario, and the Court of Appeal being equally divided the judgment of the Court of Common Pleas was affirmed.

Lash, Q.C., for appellant:

The policy being a contract to pay a certain sum of money in the event of death from injuries effected through external, violent and accidental means, which injuries shall have occasioned death within ninety days from the happening thereof, and the plaintiff having proved the date and cause of death, that it was the result of an accident which left on the body external signs of the injury, nothing further was required of the plaintiff to entitle her to succeed, and the burden of proving that the conditions of the policy had not been complied with was upon the defendants. *Cluff* v. *The Mutual Benefit Insurance Co.* (1); *Dublin & Wicklow Railway Co.* v. *Slattery* (2).

(1) 1 Big. 208. (2) 3 App. Cas. 1155.

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The plaintiff having made out a *primâ facie* case, which, if there had been no other evidence offered would have entitled her to a verdict, the case was properly submitted to the jury to say whether the defendants had established any violation of the conditions of the policy, and the jury having found all the issues of the plaintiff, the court was wrong in view of the evidence and the finding of the jury thereon in directing a non-suit: Wharton on Negligence (1); May on Insurance (2); *Administrators of Stone* v. *U. S. Casualty Co.* (3).

As to the first question submitted by his lordship to the jury at the trial, no evidence was given by the defendants to support the plea that the assured voluntarily exposed himself to unnecessary danger, hazard or perilous adventure. The position was not whether the place where the accident occurred was a dangerous place, but whether the assured was voluntarily there. So long as there was in the opinion of the judge any evidence that the assured was there voluntarily, it was the province of the jury to decide upon it. And the jury having expressly found this issue in favor of the plaintiff, and it being a question of intention, their verdict was conclusive and should not have been disturbed: *Blyth* v. *Bennett* (4).

The word "voluntary" in the condition of the policy means a "doing by design," and the defendants should have proved that the assured designedly exposed himself to danger, that he must have known of the danger and with such knowledge exposed himself to it, and there was no evidence whatever to support such a defence: Wharton's Law Lexicon (5).

As to the defence that the assured was engaged in an

(1) Sec. 420.
(2) P. 667 and cases there cited.
(3) 34 N. J. (5 Vroom) 371.
(4) 22 L. J. C. P. 79.
(5) P. 772.

unlawful act at the time of the accident, viz., driving along the track of the Northern Railway, such an act has not been covered by the defence pleaded and has not been provided against by any statute or otherwise made unlawful under the conditions of the policy herein: *Fawcett* v. *York and North Midland R. W. Co.* (1).

Further, an unlawful act within the proper meaning of the conditions of the policy herein pleaded by the defendants would refer to some criminal act of assured, and none such was established in evidence.

It was established in evidence that he had the right to go there, as he did, on business, and that he was in the habit, as were other people, of going there on business, with the permission of the company, and that he was not violating the rules of the company, and the jury by their verdict so found.

As to the third question, whether the assured used due diligence for his protection and safety in accordance with the conditions of the policy, even if due diligence had not been used, the plaintiff's claim would not not have been defeated, as the policy attaches no penalty to the breach of this requirement, whereas to breaches of other requirements in the same condition, penalties are attached. *Expressio unius est exclusio alterius.* In any case the burden of proof is on the defendants, and no evidence was adduced to establish want of due diligence.

The policy being an accident policy the question of negligence or contributory negligence does not arise apart from the conditions, and the defendants have failed to establish the breach of any of the conditions of the said policy. May on Insurance (2) ; See also Bliss on Life Insurance (3), and cases there cited.

(1) 16 Q. B. 610.
(2) Pp. 601-602.
(3) 2d Ed. pp. 475-476, Sec. 411, and p. 674, note and p. 715.

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Robinson, Q.C., and *McCarthy*, Q.C., for respondents.

There was no dispute as to the facts as proved at the trial. The word "voluntary," in the conditions of the policy relied on by appellant, must be constructed as meaning "by design," that is to say, the deceased, in order to become within the terms of the conditions, must have known the danger and have designedly run the risk of it. If the appellant is right in this contention, the only case covered by the conditions is the case of an exposure to unnecessary danger permitted or brought about by insured for the express purpose of, and with no ulterior object than, trying the chances of escape or death. The respondents, however, submit that such a strained and unnatural construction cannot be put upon the condition or upon the word "voluntary." It is used as opposed to "involuntary," *i.e.*, without guidance by or control from the will. Given the position of exposure to unnecessary danger, the question is, as the respondents submit, was the taking of such position an act of volation or (to put it negatively) an act, the doing of which could have been avoided by the exercise of volition. The evidence in this case shows clearly the position of exposure, and that the taking of such position was an act of volition on the part of the deceased, and the evidence being uncontradicted the non-suit entered was right. *Mair* v. *Railway Passengers' Assurance Co.* (1); *Shilling* v. *Accidental Death Ins. Co.* (2); *Schneider* v. *Provident Life Ins. Co.* (3); *Providence Life Ins., &c., Co. of Chicago* v. *Martin* (4).

With regard to the second defence, that the insured met his death while violating the rules of a corporation or company, it was given in evidence that the act

(1) 38 L. T. N. S. 356.
(2) 1 F. & F. 116.
(3) 1 Big. 731.
(4) 2 Big. 40.

of the deceased was in contravention of a rule of the Northern Railway binding upon all persons being upon the premises of the company; no evidence in contradiction of this was adduced, and the respondents submit the learned judge should properly have withheld the case from the jury.

The third defence was established by the plaintiff's evidence in support of her case, which showed that the action of the deceased in which he was engaged when he met his death was an unlawful act—being a misdemeanor under "The Consolidated Railway Act, 1879," sec. 27, sub-sec. 4, and a violation of sec. 16, sub-sec 5 of the same Act, and therefore on both grounds *contra leges.*

There being no contradiction as to the facts, the question was one for the judge and not for the jury. *Dublin, &c. R. W. Co.* v. *Slattery* (1).

Sir W. J. RITCHIE C.J.—I think this appeal should be dismissed. On the undisputed facts as between the railway company and the deceased, the accident was not caused by the negligence of the railway company, the act of the plaintiff himself being the sole cause of the accident. There is nothing whatever disclosed by the evidence to justify or excuse the deceased being in the position he was on the track of the railway when struck by the shunting car. I think there was nothing to leave to the jury in this case, the undisputed facts established by the plaintiff show that the deceased came to his death in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure by driving into a railway shunting yard, through, over and among the numerous railway tracks, in all some twenty, if not more, and at a place where there was no provision for the passage of a carriage, and in so ex-

(1) 3 App. Cas. 1155, 1166.

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posing himself he acted contrary to the rules of the Northern Railway. There being no contradiction or dispute then as to the facts there was nothing to leave to the jury. These uncontradicted facts on which the plaintiff rested her case clearly, and beyond all doubt, established that the deceased unnecessarily and improperly drove his horse and carriage after dark where he had no right to go, and where no man could drive with propriety or safety, or without exposing himself to almost inevitable accident, and that such most unwarrantable voluntary exposure and want of reasonable caution was the sole cause of the accident. The evidence of the plaintiff in attempting to establish her case having shown that the deceased by his voluntary exposure to unnecessary danger caused the damage, her case entirely fails, and as was said by Denman J. in *Davey* v. *The London & S. W. R. Co.* (1), the undisputed facts of this case show that this accident was unquestionably due to the plaintiff's own folly and recklessness, and nothing else, and it is therefore, in my opinion, a clear case for a non-suit.

The latest case that I am aware of on the question is *Davey* v. *The London & South-Western Railway Company.*

STRONG J.:—The fourth plea sets out the condition to which the policy is subject, one of the provisions of which is, that no claim shall be made under it when the death or injury may have happened in consequence of voluntary exposure to necessary danger—at the close of the plaintiff's case, a non-suit was moved for, on the ground that it appeared that "the deceased met his death by voluntary exposure to unnecessary danger, hazard or perilous adventure," and upon other grounds the learned judge overruled the objection, but reserved leave to the defendants to move to enter a non-suit. It

(1) 11 Q. B. D. 213.

appears to me that there was no room to doubt that the place which the deceased was killed, was a dangerous place for anyone to be driving in a vehicle as the deceased was, that there was really no question to leave to a jury upon that head, as there could be no reasonable doubt about the facts or the proper conclusion from the facts, and that the case is brought within the principle of *Ryder* v. *Wombwell* (1), and is a much stronger instance for the application of the doctrine of that decision than the facts there actually in question presented. I understand *Ryder* v. *Wombwell* to have been decided, that when the plaintiff's case is such, that but one reasonable inference can be drawn from the evidence, and that conclusion is adverse to the plaintiff the judge may non-suit. Then of the two remaining facts making up this issue on the 3rd plea the burden of which was on the plaintiff, there was not even a scintilla of evidence. It being once admitted that the locality at which the accident occurred was a dangerous one, and that being there was an exposure to danger, it was not shewn that the plaintiff was there otherwise than of his own will, and he must therefore be taken to have been there voluntarily, as every act of man must be presumed to be voluntary until the contrary is proved. Again it was also for the plaintiff to have proved that the presence of the deceased at this dangerous spot, was caused by some reasonable necessity if she relied in the fact that the deceased had exposed himself to this danger for some necessary purpose—but of this also there is an entire failure of proof—I am therefore entirely of accord with the Chief Justice of the Queen's Bench, and Mr. Justice Cameron in the reasons which they give for the judgment of the Court of Appeal, which I think ought to be affirmed and this appeal dismissed.

(1) L. R. 4 Ex. 32.

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FOURNIER J. concurred.

HENRY J.—I consider this case so very plain that it requires but few words to express my view. The insured in this case undertook not to violate the rules of the company, and he unnecessarily exposed himself to danger. It was not shown that there was any necessity for his being on this net-work of tracks, and although it is alleged that he might have been under the influence of liquor, no person, I think, can read the evidence without coming to the conclusion that the unfortunate man was not right in his mind. I am of opinion that the appeal should be dismissed.

GWYNNE J.—This is an action brought by the plaintiff, as the widow of one John Neill, deceased, upon an accident policy executed by the defendants in favor of the deceased in his life time, who came to his death by having been run over by a train of the Northern Railway Company while the deceased was driving with a horse and buggy across a net-work of tracks laid in the yard of the Northern Railway at Toronto, at a place where there was no horse road or footpath, and where the rules of the company forbid any person not in the service of the company to be, and where, consequently, the deceased had no right whatever to be, much less to be driving with a horse and buggy. At the trial the case was submitted to the jury who rendered a verdict for the plaintiff; leave, however, was reserved to the defendants to move to enter a new suit. The Common Pleas division of the Supreme Court of Justice for Ontario granted after argument a rule absolute for entering a non-suit. Upon appeal from this rule the Court of Appeal at Toronto was equally divided. The sole question upon this appeal now before is, should the non-suit have been granted, and I am clearly of opinion that it should. By the policy sued upon in this case the

defendants promised and agreed to pay the sum of $5,000 in gold to the plaintiff, who, at the time of the time of the making of the policy was the wife of the said John Neill, or to the legal personal representative of the said John Neill, within ninety days after sufficient proof that the said John Neill should, at any time during the continuance of the policy, have sustained bodily injury effected through external means within the intent and meaning of the contract and the conditions thereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof. The policy then stated, among other conditions upon and subject to which it was issued, the following which are all that for the purposes of this appeal there seems to be any occasion to refer to, namely: "provided always that no claim shall be made under this "policy when the death or injury may have happened "in consequence of voluntary exposure to unnecessary "danger, hazard or perilous adventure, or in consequence "of violating the rules of any company or corporation."

In an action upon a policy of this nature prior to the Common Law Procedure Act the declaration would have been open to objection upon special demurrer if the declaration did not contain an express affirmation of the happening of each and every thing necessary to happen within the terms and conditions of the policy to entitle the plaintiff to recover, and a negation of the happening of anything, the happening of which, by the terms and conditions of the policy, disentitled the plaintiff to recover. The burthen of proving everything, the happening of which was made a condition precedent to the plaintiff's right to recover, and the absence of the occurence of anything, the occurrence of which disentitled the plaintiff to recover, lay upon the plaintiff. For the purpose of dispensing with the necessity of this prolix form of pleading, with-

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out any variation in the substance, the Common Law Procedure Act enacted that a plaintiff or defendant in any action may aver performance of conditions precedent generally, but that the opposite party should not deny such performance generally, but should specify in his pleading the condition or conditions precedent, the performance of which he intends to contend. The effect of this enactment was that a defendant, instead of denying generally the happening of the several conditions entitling the plaintiff to recover, is confined to the denial of the happening of some particular condition or conditions, the occurrence of which is necessary to entitle the plaintiff to recover, each and every of the conditions, which before the Act were necessary to have been alleged in the declaration, being still since the passing of the Act regarded as contained in the declaration under the averment of general performance of conditions authorized by the Act; so that a plea relying upon a condition broken as disentitling a plaintiff to recover, is in substance still a plea in denial, equally as before the passing of the Act, and the burthen of proving everything necessary to establish the liability of the defendants within the precise conditions to which the policy is made subject, lies upon the plaintiff equally as it did before the passing of the Act. Accordingly the plaintiff in the present action in accordance with the form of pleading in use since the passing of the C. L. P. Act declares upon the policy, and the promise therein contained in the words of the policy, and avers that while the policy continued in force and while the plaintiff was the wife of the said John Neill, "he, the said John Neill, sus-"tained 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 occasioned death

"within ninety days from the happening thereof, to wit, "instantaneously, and all conditions were fulfilled and "all things happened, and all times elapsed necessary to "entitle the plaintiff to maintain this action for the "breach hereafter alleged, and nothing happened or was "done to prevent her from maintaining the same; yet "the plaintiff has not been paid the sum of $5,000, and "the same is wholly due and unpaid."

To this declaration the defendants plead several pleas in which they specify the particular conditions subject to which the policy was issued, which they deny the fulfilment of so as to entitle the plaintiff to recover; to two of which pleas only, namely, the 4th and 5th, is it, in my opinion, at all necessary to refer. In the fourth plea after setting out the several conditions, subject to which the policy was issued, including those above stated, they say that the death of the said John Neill happened in consequence of his having, in violation of the said condition, voluntarily exposed himself to unnecessary danger and hazard, in placing himself in the way of a locomotive engine, on one of the railway tracks of the Northern Railway Company of Canada.

And in their 5th plea they allege that the death of the said John Neill, who was not then an employee of the Northern Railway Company of Canada, happened in consequence of his having in further violation of the condition set forth in the last plea violated one of the rules of the Northern Railway Company of Canada, under which all persons not being in the employ of the said company were forbidden to walk or drive on any of the tracks of the said company. Now, upon these pleas it cannot, I think, admit of a doubt that to entitle the plaintiff to recover it was necessary for her to establish that the death of John Neill happened under such circumstances as within the true intent and meaning of the conditions, subject to

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which the policy was issued, entitled her to recover, that is to say, that it happened not only from external violence, but from violence inflicted otherwise than in consequence of voluntary exposure by the deceased to unnecessary danger, hazard, or perilous adventure, and otherwise than in consequence of his having, in violation of one of the rules of the company, been driving at the time of the accident on the railway tracks of the company at a place where he had no right to be; and if in showing, as it was necessary for her to show, the circumstances attending the occurrence of the accident which caused the death, the uncontradicted evidence showed it to have happened in violation of either of the conditions, the breach of which the defendants relied upon, the case should have been withdrawn from the jury and the plaintiff non-suited. It is unnecessary to enter into the evidence further than to say that the deceased was killed by a locomotive engine and train when he was driving his horse and buggy across a network of railway tracks in the yard of the Northern Railway Company, where trains are being constantly shunted backwards and forwards where the deceased was, in violation of the rules of the company, and where he had no right to be, and whither he went in disregard of an express warning given to him by a person on foot, who saw the danger into which he was going, and who told him that if he persisted in going on he would be killed as he, in fact, was within a couple of minutes after receiving the warning.

A suggestion that was made that notwithstanding this evidence and the absence of any evidence to qualify it in the slightest degree, it was, nevertheless, a question open for the jury to say that they were not satisfied that the deceased was there voluntarily, and that in truth he might have been there quite involuntarily, savors of too much subtilty, as it appears to me,

to be seriously entertained.

It has, however, been contended that the judgment of the House of Lords, in *Slattery* v. *The Dublin and Wicklow Railway Co.*, (1) is an express authority to the effect that upon the defendants was cast the burthen of proving that the deceased was voluntarily in the place where he was killed, and that as there was not sufficient in the evidence to show that he was not there involuntarily it was open for the jury to say whether, in their opinion, he was there voluntarily or unvoluntarily, and that therefore the case could not have been withdrawn from them; and that, although their finding him to have been there involuntarily may be against the weight of evidence, that raises a point not open on the question of non-suit. This contention involves in my judgment a misconception of the judgment of the learned law lords who constituted the majority in the case of *Slattery* v. *The Dublin and Wicklow Railway Company*, and a misapplication of that judgment. In that case the question was whether in view of the circumstances appearing in evidence pointing to negligence on the part of the defendants leading to the collision by which the plaintiff's husband lost his life, and the facts also appearing tending to show contributory negligence upon the part of the deceased, the case should or not have been withdrawn from the jury. The learned law lords who constituted the majority which held that, under the circumstances appearing in evidence, the case could not have been withdrawn from the jury, did not dispute the correctness of the rule as stated by Lords Hatherby, Coleridge and Blackburn, who were of opinion that the case should have been withdrawn from the jury. Lord Hatherley, concurring with Chief Baron Palles of the Irish judiciary, states the rule thus:

(1) 3 App. Cas. 1155.

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When there is proved as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which, *per se*, amounts to negligence, and when it appears that such act caused, or directly contributed to, the injury, the defendant is entitled to have the case withdrawn from the jury.

Again he says:

If contributory negligence be proved by the plaintiffs witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide.

He then proceeds to show how in his opinion the evidence showed contributory negligence on the part of the deceased.

Lord Coleridge in his opinion says:

There has been a difference in the form in which the defence arising from the negligence of the plaintiff has been usually pleaded in actions of this sort in Ireland and England; but the difference in form makes no difference in principle, the onus on the plaintiff is the same in both countries, and the plaintiff may fail in Ireland as well as here to prove his cause of action by proving his own negligence, as well as by not proving that of the defendant. It is therefore, I think, the duty of the judge to withdraw the case from the jury, if by the plaintiff's own evidence at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides at the end of the whole case, it is proved, either that there was no negligence of the defendant which caused the injury, or that there was negligence of the plaintiff which did.

Lord Blackburn states the rule thus:

Where there is no dispute between the parties as to the truth of any particular fact, or the accuracy of any particular witness, there is no need to ask the opinion of the jury. If there is some further inference of fact which may be drawn from the undisputed facts, it is still for the jurymen to say whether they will draw that inference; it is for the judge to say whether they can draw it.

The point in which the learned law lords differed was not in the terms or effect of the rule, but in the view which they took of the evidence, which, in the view of the majority, was sufficiently contradictory and conflicting as to lead to the conclusion that it could not have been withdrawn from the jury. Lord Chancellor Cairns, in his judgment, makes this appear very clearly (1). He says:

(1) At p. 1166.

The appellants contend that even assuming that there was negligence on their part in not whistling, still that, on the facts which were not in controversy the judge should have ordered the verdict to be entered for them, because the deceased either did see or might have seen the advancing train, and it was therefore his carelessness, and not that of the appellant's, which caused the accident. I should by no means wish to say that a case in which such a course should be taken might not arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the appellant's argument. If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight and without anything either in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson v. The Metropolitan Ry Co.*, an *incuria* but not an *incuria dans locum injuriae.* The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed with his eyes open to his own destruction.

He then proceeds to show that, in his opinion, the facts were materially different in the case then before their lordships, and that there was such conflict in the evidence that the case could not be withdrawn from the jury, who, and not the judge, should say whether the absence of whistling on the part of the train or the want of reasonable care on the part of the deceased was the *causa causans* of the accident.

Lord Selborne is no less clear. At p. 1187 he says:

It seems to me impossible to deny that the evidence of persons who, standing in a position where whistling must have been audible, say they heard none, was proper to be left to a jury on the issue whether there was whistling or not, however strong the affirmative evidence might be by which it was not. If the deceased had been a mere trespasser on some part of the line where there was no crossing, it would have been entirely his own fault that he was in the way of danger, and as the defendant would have been under no obligation to give any special warning of the approach of their trains to persons whose presence on their line they had no just cause to

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anticipate, the omission to give such notice by whistling under these circumstances would not have been negligence on their part.

Lord Gordon is equally explicit. At p. 1217 he says:

Where there is no evidence to go to the jury it is proper for the judge to direct a non-suit. That is the course which this House considered ought to have been followed in the recent case of *Metropolitan Ry. Co.* v. *Jackson* (1). But in my view this case is very different from the case of Jackson. I think there was evidence in this case upon both the points raised, and that the judge did right in leaving the case to the jury.

Now in the case before us there was no dispute as to the facts. The undisputed evidence showed that the deceased drove himself across the tracks of the Northern Railway, where a person with a horse and buggy had no right whatever to be, into a place of manifest danger from locomotives shunting backwards and forwards, and where the risk was so imminent that death ensued almost instantaneously after a person who was there on foot warned him that it would occur if he should persist in proceeding further. It seems to me to be trifling with common sense to say that upon this evidence there was anything which left it open to a jury to say that the deceased was not voluntarily in this place, or that this was not exposure to unnecessary danger within the terms of the condition to which the policy was subject.

In a recent case decided in the Court of Appeals in England, *Wakelin* v. *The London & S. W. Ry. Co.*, wherein the points in issue were precisely those in issue in *Slattery* v. *The Dublin & Wicklow Ry. Co.*, it was held that in actions of this nature a plaintiff cannot recover at all, but must be non-suited unless some evidence be given by the plaintiff of the circumstances attending the occurrence of the accident which causes death, for in the absence of such evidence *non constet* but that the negligence of the deceased was the *causa*

(1) 3 App. Cas. 193.

causans of the accident. This case seems to me to throw doubt upon much that was said by Lord Penzance in *Slattery* v. *The Dublin & Wicklow Ry. Co.*, which was not, however, essential to the determination of that case.

Wakelin v. *The London and South-Western Railway Co.* (1):

This case raised an important question as to the evidence in actions of negligence. The action was under Lord Campbell's Act, by a widow to recover damages for the death of her husband, alleged to have been caused by the defendants' negligence. It appeared that the man was found dead on a level crossing of the defendants, and it was admitted that he had been run over by a down train at night, but there was no evidence of how the accident occurred. The defendants' watchman at the crossing was withdrawn at 8 p.m., and at the spot in question on a clear night the light of an engine could be seen for nearly half a mile on each side, but there was no evidence of the state of the weather on the particular night. The down train did not whistle or slacken speed on passing the crossing. On these facts, proved at the trial, Mr. Justice Manisty refused to withdraw the case from the jury, and they found a verdict for the plaintiff for £800. His Lordship left the parties to move for judgment. A Divisional Court, consisting of Mr. Justice Grove, Mr. Baron Huddleston, and Mr. Justice Hawkins, found that there was no evidence to go to the jury, and that there was evidence of contributory negligence on the part of the deceased. Judgment was, therefore, entered for the defendants. The plaintiff appealed. The main question was whether, in such an action as the one in question, it is for the plaintiff to negative contributory negligence (which, in the circumstances of the case, it was impossible for her to do,) or whether it is for the defendants to prove such negligence affirmatively. The case was argued yesterday, when their Lordships reserved judgment.

Mr. *Jelf* Q.C., Mr. *T. C. Jarvis* and Mr. *Harmsworth*, were for the plaintiff; Mr. *Murphy* Q.C., and Mr. *Arbuthnot*, for the defendants.

Their Lordships dismissed the appeal.

The Master of the Rolls said that the first question was as to what was the cause of action. According to English law, the cause of action in such a case was not that the accident was caused by the negligence of the defendant, for if the plaintiff was guilty of contributory negligence there was no cause of action. The cause of action was that, as between

(1) Times of 17th May, 1884. Master of the Rolls and Lords Court of Appeal. Before the Justices Bowen and Fry.

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the plaintiff and defendant, the accident was caused solely by the negligence of the defendant, without any contributory negligence of the plaintiff. It was for the plaintiff to give *primâ facie* evidence of his cause of action, and if he omitted to give evidence of any material part of it he must be nonsuited. He must, therefore, negative contributory negligence on his part. But in the present case the plaintiff was unable to give any evidence of the circumstances of the accident, and therefore there was nothing from which any one could say whether there was or was not contributory negligence of the deceased. Upon that ground alone the non-suit must be upheld. In his view there was evidence for the jury of negligence by the defendants, but the plaintiff, having failed to give any evidence of the circumstances of the accident, had failed to give evidence of a necessary part of her *primâ facie* case, and therefore his Lordship was sorry to say that the relatives of the deceased had no remedy.

Lord Justice Bowen said that even if the law were not (though he did not say it was not) completely expressed by the Master of the Rolls, still the plaintiff must fail owing to the absence of evidence.

Lord Justice Fry said he would not express an opinion whether it was for the plaintiff to prove that the defendants' negligence was the sole cause of the accident, for there was no evidence that it was.

In the case before us I entertain no doubt that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Watson, Thorne & Smellie.*

Solicitors for respondents: *McCarthy, Osler, Hoskin & Creelman.*

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*Mar. 11.
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*Jan'y 12.

THE MAYOR *et al.*, OF THE CITY OF MONTREAL (DEFENDANTS) ..... } APPELLANTS;

AND

DAME M. E. HALL *et al.* (PLAINTIFFS PAR REPRISE D'INSTANCE) ..... } RESPONDENTS.

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

Malicious prosecution—Action for libel—Slander—Prescription—Arts. 2262 and 2267 C. C.—Proceedings instituted to remove plaintiff

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

from position of Commissioner of Expropriations—Cross appeal —Application to hear although principal appeal not filed.

On the 14th April, 1868, S. and two others, B. and M., were named joint commissioners to name the amount which should be accorded for expropriation of property required for widening one of the streets in the city of Montreal.

On the 7th August, 1868, the appellants, in consequence of an award made by S. in reference to said property, passed a resolution charging him with fraud and partiality, and an application was made on their behalf to the Superior Court to have him removed from the office of commissioner.

On the 17th September, 1870, the conclusions of the petition were granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for the expropriation. The charges of fraud and partiality were held unfounded.

On the 20th of September, 1873, the Court of Queen's Bench for Lower Canada (appeal side) re-instated the said S. and B. in their position as commissioners.

On the 4th November, 1876, this judgment was confirmed by the Privy Council.

In May, 1871, S. brought an action against the defendants for damages which he alleged he had suffered in consequence of his having been unjustly removed by the appellants from the position of commissioner. The respondents, widow and daughters of the late S., became plaintiffs *par reprise d'instance.*

The appellants pleaded that the action was barred under Arts. 2262 and 2267 C. C. (P.Q.)

The Superior Court dismissed the action on the 31st May, 1880, but the Court of Queen's Bench (appeal side) reversed the judgment and allowed $3,000 damages to the respondents.

Held, on appeal to the Supreme Court of Canada, affirming the judgment of the Court of Queen's Bench, Fournier J. dissenting, that the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution in following up that resolution by proceedings instituted in the courts, maliciously and without any just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought.

Per Strong, J.—Following the practice adopted in the Court of

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Queen's Bench for Lower Canada, where they either increase or lessen the amount of damages according to their appreciation of the facts, the damages in this case should be increased to $10,000.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court which had dismissed the plaintiffs action, and awarding $3,000 damages to the present respondents (1).

From this judgment the appellants appealed and the respondents filed a cross appeal claiming a larger amount.

The facts and pleadings sufficiently appear in the head note and judgments hereinafter given.

Roy Q.C. and *Doutre* Q.C. for appellants, contended:

1st. That the plaintiff's action was barred by the prescription of one year.

2nd. That the expressions used in the resolution and in the petition above mentioned were not in themselves libellous and actionable.

3rd. That no malice could be attributed to the city, whilst there existed a probable and reasonable cause for their proceedings in August, 1868.

4th. That it had not been shown that the original plaintiff was entitled to damages at the hands of the city, and that, in reality, it was not proved that he suffered any.

On the question of prescription the learned counsel cited and relied on Arts. 2262, 2267 C. C.; Dunod, Prescription (2); Mangin, Action Publique (3); Grellet Dumazeau (4); Merlin, Repertoire (5); Laurent (6); Aubry & Rau (7); Troplong (8); Marcadé (9); Demo-

(1) 6 Legal News 155.
(2) P. 114.
(3) 2 Vol. No. 330.
(4) 2 Vol. p. 169, No. 853.
(5) Vo. Prescription, sec. 1, vii. Quest. xv., p. 547.
(6) 32 Vol. No. 16.
(7) 2 Vol. p. 328 No. 213.
(8) Vo. Prescription No. 700.
(9) Prescription p. 236.

lombe (1); Rolland de Villargues (2); Cass. Nau. Sirey (3); Vazelle—Prescription (4); Journal du Palais (5); Code d'Inst. Crim. (French) (6); Case of *Pigeon* v. *Le Maire & Al.* (7).

On the second point they cited:—

Grellet-Dumazeau (8); Broom, Legal Maxims (9); Folkard's Law of Slander and Libel (10); Cooley, Torts (11); Odgers', Libel and Slander (12); Bigelow's leading cases on Torts (13); *Gauthier* v. *St. Pierre* and authorities quoted (14); C. C. P. Art. 426.

On probable cause: *Ravenga* v. *Mackintosh* (15).

The respondent's counsel on the cross appeal contended that the cross appellants were not entitled to an increase of the damages as allowed by the Court of Queen's Bench, appeal side, for the reasons given on the principal appeal.

Barnard Q.C. and *Laflamme* Q.C. for the respondents.

As to prescription:

(*a*) The prescription applicable is not that of article 2262 in case of slander but that of article 2261, par. 2, in cases of *délits* and *quasi-délits* (16).

Cooley on Torts (17). Definition of action for malicious prosecution.

(*b*) Prescription besides is interrupted while the principal suit is pending.

(1) 8 Vol., Contrats, p. 598 & 809.
(2) Dict. Vo. Delit. No. 70, 90.
(3) 1841-1-787.
(4) 2 vol. p. 178. Nos. 583-586.
(5) Vo. Diffamation, p. 395, No. 738.
(6) Art. 2, 3, 637, 640.
(7) 3 L. C. Jur. p. 64, & 9 L. C. R. 334, in Appeal.
(8) 2 Vol., p. 191, Nos. 884, 887 & 900.
(9) 7th Amer. Ed., No. 319.
(10) 4th Ed., pp. 33 in fine, 34, 35, 36, 173, 305.
(11) P. 183-195.
(12) P. 186.
(13) P. 170, note *e*.
(14) 7 Legal news, 44.
(15) 2 B. & C. 693-698.
(16) 1 Am. L. C. (H. & W.) p. 17.
(17) P. 180.

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Dalloz, Jur. Gén. (1); Larombière (2).

The judgment of Judge Berthelot so far as it dismissed the accusations of improper conduct, was treated by both parties as a final judgment and no exception was taken to the present action as being premature. Art. 119 and 120 C. C. P.

As to the liability of appellants under the French law the learned counsel cited and relied on:—

Pacaud v. *Price* (3); Merlin (4); French Code of Procedure, art. 314, and authorities cited by Carré & Chauveau (5); Laurent (6); Sourdat (7); Sourdat (8); Dalloz, Jur. Gén. (9);

As to the Liability of Corporations acting in bad faith (10).

As to their Liability for the Acts of their Officers (11); Dalloz, Jur. Gén. (12); 1 Larombiere (13); Dalloz, Rec. Pér. (14); Demolombe, Contrats (15); C. C. P. art. 9 and corresponding art. 1036 of French Code and Commentators, particularly Carré and Chauveau. Dareau Traité des Injures (16).

As to malice:

Odger on Libel (17); Bigelow Leading Cases on Torts (18); See 4 Legal News, 224 and 1 Legal News 267 as to collateral motive.

As to *quantum* of damages.

Lambkin v. *South Eastern Railway Co.* (19); *Phillips* v. *South Western Railway* (20); Laurent (21); Dalloz, Jur.

(1) Vo. Dénonciation Calomnieuse No. 70; See also same number in fine.
(2) 5 Vol. Art. 1382-1383, No. 45.
(3) 15 L. C. Jur. 286.
(4) Rep. Vo. Réparation Civile, sec. 2, No. 2.
(5) 2nd Vol. Belgian Ed., pp. 619 & 620.
(6) Nos. 412 & 413.
(7) No. 664, also No. 439.
(8) No. 1086.
(9) Vo. Responsabilité No. 112.
(10) Ibidem, Nos. 255 & 261.
(11) Ibidem, No. 607.
(12) Vo. Dénoncation Calomnieuse, Nos. 5, 6 & 14.
(13) Art. 1382-1383, Nos. 15 & 16.
(14) 1858, 1, 106; 1861, 1, 75; 1864, 1, 135.
(15) Vol. 8, Nos. 519 & 557.
(16) 1 Vol. p.p. 15, 20, 23.
(17) Pp. 280, 281 and 185, (Am. Edition).
(18) P. 179.
(19) 5 App. Cases 361.
(20) 2 Legal News 105.
(21) 20 Vol. No. 413, p. 483.

Gen. (1).

The learned counsel also referred to the transcript *re The Mayor et al.* v. *Brown* prepared for the Privy Council.

The appellant's counsel on the cross appeal contended that under the state of things fully argued, both as to the law and the facts, on the principal appeal, the amount of damages awarded by the Court of Queen's Bench to the present appellants on cross appeal was inadequate. That under the general circumstances of the case, and the evidence of special damage, more should have been allowed them than was done.

Sir W. J. RITCHIE C.J.—The action in this case is not an action for libel, but the complaint is that the defendants caused a resolution to be passed, whereby they instructed the attorney of the corporation to apply by summary petition to the Superior Court to stay the proceedings of the defendant and his co-commissioners appointed in the matter of expropriation for the widening of St. Joseph street in front of the property of the Honorable Charles Wilson, and to remove and replace the said two commissioners, who, in their opinion, forfeited their obligations as such commissioners; that the resolution was calumnious, libellous and injurious to the fair name and reputation of the plaintiff, and that they did file and present to Mr. Justice Berthelot, on the 10th August, 1868, a petition reciting the resolution, and averring certain proceedings, intentionally, maliciously ommitting to mention certain subsequent proceedings of defendant and his co-commissioners, and alleging other matters inconsistent with the proper discharge of the duty by the co-commissioners, and that they had not fulfilled the duties in a faithful, diligent and impartial manner, and prayed that the proceedings of the commis-

(1) Vo. Responsabilité, Nos. 236, 7, 8.

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sioners should be stayed, and defendant and J. Brown should be removed from the office of commissioners, as having violated and forfeited their obligations. The declaration then alleged that "the said resolution and the said petition were false, malicious and libellous, and that the allegations therein contained are false, and were made only with a view to injure the character and good name of the plaintiff, and to conceal the negligence of the defendants, throughout the said herein above-recited proceedings before the said commissioners."

And after alleging specifically the falsity of certain statements it alleges :—That all the allegations in the said petition referring to the proceedinge of the sixth day of August, one thousand eight hundred and sixty-eight, were and are injurious, insulting, libellous and calumnious.

And after specifying on their falsities the declaration averred :

"And it is absolutely false that the plaintiff has been at any period of time, or was under pecuniary obligations to the said Charles Wilson, as falsely alleged in the said petition, and it is false that the plaintiff did not fulfil his duties of commissioner, in a faithful and impartial manner, and without fear or favor.

"That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trust-worthy or positive informations of any kind to justify them in so doing.

"That the said defendants did not prove any of the accusations in the said petition or resolution contained, and that they even did not bring a single witness to substantiate the same, and did not and could not make them good, such accusations being utterly false and calumnious as aforesaid.

"That by a judgment rendered on the said petition, by the honorable Judge Berthelot, on the seventeenth day of September last, past (1870), the said accusations and charges so brought by the defendants against the plaintiffs, were in fact declared false without foundation or probable cause, and were rejected in fact as such by the said judge.

"That the plaintiff is an honest and respectable citizen and has always enjoyed a high character of respectability and the confidence of his fellow citizens; that in his capacity of civil engineer and architect he has often been and is yet entrusted with the management of many important affairs; that he has often been invested with the office of trust, honor and profit, both in his capacity of engineer and that of architect aforesaid.

"That the said false and calumnious accusations and charges were of a nature to injure, and did in fact gravely injure the high character, good fame and reputation of the plaintiff, and put in danger the confidence hitherto reposed in the plaintiff by the public and his friends, and have also greatly hurt the feelings of the plaintiff, and during more than two years kept him in suspense and anguish, under the said accusations and charges, pending the said petition; that, moreover, the said plaintiff has lost a great deal of time and expended large sums of money in defending himself against the said accusations and charges, and has suffered damage to the amount of twenty thousand dollars for all the causes and reasons aforesaid, which sum he has right to claim and deserves to have from the defendants.

"Wherefore the said plaintiff prays that the said defendants may be adjudged and condemned to pay to the plaintiff the sum of twenty thousand dollars currency as damages for the reasons above-mentioned with interest and costs, distraits to the undersigned."

This, then, is not an action of libel, but it is an action

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for falsely, maliciously and without any reasonable or probable cause instituting certain proceedings against plaintiff calculated to injure the plaintiff, and which accusations and charges the defendants failed to prove, or even to bring a single witness to substantiate, and which by the judgment of Mr. Justice Berthelot on 17th September, 1870, were declared false and without foundation or probable cause, and were rejected in fact as such by the said judge and subsequently by the Court of Appeal, and finally by the Privy Council.

Judge Berthelot, on 17th September, 1870, held that plaintiff and Brown had committed an error of judgment in adopting a wrong principle as to the damages; but held that there was no proof of fraud or partiality or want of diligence and fidelity, and dismissed the commissioners for want of diligence. The Court of Appeal, 20th February, 1873, negatived fraud and reversed the judgment as to dismissing the commissioners. On the 11th November the Privy Council confirmed the judgment of the Court of Appeal, holding there was no proof of fraud, &c, and that the principle adopted by the two commissioners was not erroneous, and therefore the inference of want of diligence failed.

The complaint is simply that the defendants maliciously and without any reasonable or probable cause instituted legal proceedings with a view to the dismissal of the plaintiff and his co-commissioners from the office of commissioners on false charges of partiality, corruption and improper conduct in the discharge of their duties as such commissioners, by means of which improper proceedings and false charges the plaintiff was damnified.

Until the termination of the legal proceedings how could it be established whether the complaints of the defendants were well or ill-founded, whether the allegations could be proved or not? The defendants had

the right to go on and prove them if they could.

The court of first instance treated this case as an action for libel, and held it prescribed after one year from the day when the knowledge of the alleged libel came to the plaintiff under arts. 2262 and 2267 of the Civil Code.

The Court of Appeal considered that as the matter was still in course of litigation the arts. 2262 and 2267 did not apply, and the action was not prescribed. The matter complained of continuing up to the rendering of the judgment, 17th March, 1870, and, the courts having found that there was no proof of the frauds and misconduct alleged, necessarily found that the proceedings were without reasonable or probable cause, and therefore properly inferred malice, but which until the termination of the suit remained an open question.

No objection has been taken that the present action has been prematurely brought, and as to prescription as regards the charges of fraud they were not disposed of and terminated till the decision of the Court of Appeal of 20th of September, 1873, their appeal to the Privy Council, decided in November, 1876, being only on the ground of the assessment having been made on a wrong principle.

I think the judgment of the court below should be affirmed and the present appeal dismissed with costs.

STRONG J.—Springle, now represented in this case by the respondent, his widow, and the tutrix of his minor children, was a statutory officer, appointed under a statute of the Province of Quebec providing for an expropriation of lands in the city of Montreal for the purpose of widening streets, and he was charged with a judicial duty as a valuator of the lands so required to be expropriated. Whilst in the exercise of this duty he was accused of corruption and venality in

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office, in an application made to a judge of the Superior Court who had, by the statute, power to remove him. Upon investigation, and after hearing evidence and argument, it appeared that the only ground for this charge put forward by the present appellant, was, that there was a general feeling on the part of the public that the award was for too large an amount. The judge before whom the complaint was heard, the late Mr. Justice Berthelot, on the 17th of September, 1870, decided this charge of venality in favor of Springle, holding that the evidence disclosed no ground for the accusation of the city council. This concluded the proceedings so far as it was sought to remove Springle on the ground of corruption and venality. Mr. Justice Berthelot, however, on another ground, did pronounce judgment of amotion; his decision on this other ground was appealed against by Springle, but no appeal was taken by the present appellants from the learned judge's decision, dismissing the charge on the ground of corruption. On the hearing of the appeal it was allowed by the Court of Queen's Bench, and from that decision the city appealed to the Privy Council, without, however, including in their appeal the charge of corruption originally made, but confining it to the same grounds as those which were dealt with in the judgment of the Court of Queen's Bench.

The present action was instituted by Springle on the 4th of May, 1871. I am of opinion that this was in sufficient time, and that no prescription operated to bar the action. No action could have been maintained until after the judgment of Mr. Justice Berthelot dismissing the application to remove so far as it was based on charges of corruption. In saying this I do not consider that I am acting merely on a technical rule of English law, but on one which, for conclusive reasons, must be of universal application. These reasons

are well stated in a recent case (1) in the House of Lords by Lord Selborne L.C., as follows:

An action for a malicious prosecution cannot be maintained until the result of the prosecution has shown there was no ground for it. And it is manifestly a matter of high public policy that it should be so; otherwise, the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind.

The gross nature of these charges, the fact that not the least evidence was advanced in support of them, and the conclusion of the proceedings in Springle's favor, are sufficient to warrant a presumption of malice, and the action being in the nature of an action for malicious prosecution I am of opinion that it was sufficiently proved; and nothing being shown on behalf of the appellants to rebut the inference of malice, and to show that there was any probable cause for the charge made, the plaintiff was entitled to recover. The Court of Appeal were, therefore, quite right in allowing the appeal, and their judgment must be affirmed with costs.

FOURNIER J.—Les Intimés par reprise d'instance représentent James Key Springle qui avait poursuivi la cité de Montréal en dommages pour l'adoption de procédés dans le conseil de la dite cité et dans la cour Supérieure du district de Montréal pour le faire destituer comme commissaire en expropriation, pour cause de fraude et de partialité dans l'exercice des fonctions de sa charge.

La déclaration après avoir allégué la nomination du dit Springle comme commissaire conjointement avec Thomas Storrow Brown, pour déterminer la compensation à accorder à l'honorable Charles Wilson pour certains terrains requis pour l'élargissement de la rue

(1) *Metropolitan Bank* v. *Pooley* 10 App. Cas. 210.

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St. Joseph, expose les procédés qui eurent lieu devant les dits commissaires pour en arriver à une décision. C'est sur ces procédés que le conseil de ville se fonda pour adopter à l'unanimité la résolution suivante :

That their attention had been called to the extraordinary award recently declared by two of the Commissioners, (meaning the Plaintiff in this cause and the said Thomas S. Brown) appointed in the matter of expropriation for the widening of St. Joseph Street, in front of the property of the Honorable Charles Wilson; and that the exorbitant amount, awarded by the majority of the commissioners in that case, was such as to require in their opinion that steps should be adopted immediately to stay the proceedings in the interest of the public, and they therefore instructed the attorney of the Corporation to apply by summary petition to the Superior Court, or to a judge thereof, to stay the proceedings and to remove and replace the two Commissioners whose award is complained of, and who, in their opinion, forfeited their obligations as such commissioners.

Conformément à cette résolution, des procédés furent pris le 10 août 1868 devant l'honorable juge Berthelot au moyen d'une pétition contenant la résolution ci-dessus et d'autres graves accusations pour demander la destitution du dit Springle comme commissaire. Après quelques autres allégations expliquant la conduite des dits commissaires, la déclaration continue comme suit :

That the said resolution and the said petition were false, malicious, and libellous, and that the allegations therein contained are false and were made only with a view to injure the character and good names of the Plaintiff and to conceal the negligence of the Defendants, throughout the said herein above recited proceedings before the said commissioners.

Cette dénégation générale des accusations portées dans la résolution et la pétition est suivie d'une dénégation spéciale de chacune des accusations spécifiées dans la résolution et la pétition, avec l'addition qu'elles sont injurieuses, outrageantes et calomnieuses.

La déclaration contient en outre la dénégation de l'existence de cause raisonnable ou probable pour l'adoption de la dite résolution et la présentation de la dite

pétition :

That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for fyling the said calumnious, wicked and malicious petition against the Plaintiff in this cause, and that they never had any trustworthy or positive informations of any kind to justify them in so doing.

Il est ensuite allégué que, par le jugement rendu le 17 septembre 1870 par l'honorable juge Berthelot, toutes les accusations portées contre les dits commissaires furent déclarées fausses et sans aucune cause raisonnable ou probable.

J'ai cru devoir citer quelques parties de la déclaration, afin de faire voir, d'après la nature de ces allégations, quel doit être le véritable caractère de l'action de l'Intimé. Est-elle, comme le dit l'honorable juge Caron dans ses notes dans la cour du Banc de la Reine : " une demande par Springle pour $20,000 de dommages " soufferts, en conséquence de son injuste destitution " comme commissaire en expropriation " ? Ou bien n'est-ce pas, comme le prétend l'Appelante, une action fondée sur le libelle contenu dans la résolution et la pétition du conseil de ville, pour réparation du dommage causé par les expressions injurieuses de ce libelle.

Il est évident que si les accusations contenues dans la résolution étaient fausses, elles constituaient un libelle ; et que si le conseil de ville n'eut donné aucune suite au projet de demander la destitution des commissaires, l'offense commise par l'adoption de cette résolution aurait été prescrite par le laps d'une année, suivant l'art. 2262. Mais cette résolution étant nécessaire pour autoriser la poursuite, doit, en réalité, être considérée comme la première procédure dans cette action ; les deux doivent être considérées comme un seul et même acte. Bien que la résolution et la pétition contiennent un libelle—ce n'est pas la punition de ce libelle que Springle a demandée par son action—c'est la réparation des dommages pour une poursuite malicieuse deman-

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dant sa destitution en invoquant le libelle comme base de cette demande. Ceci me paraît clairement résulter des parties ci-dessus citées de la déclaration et surtout de la suivante :

That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for fyling the said calumnious, wicked and malicious petition against the Plaintiff in this cause, and that they never had any trustworthy or positive informations of any kind to justify them in so doing.

En conséquence, je considère l'action en cette cause comme ayant pour but d'obtenir le montant des dommages causés à Springle par la poursuite malicieuse en destitution intentée par l'Appelante au moyen de sa pétition à cet effet.

Si cette manière d'apprécier la nature de l'action est correcte, il s'en suit que la prescription à opposer à la présente action n'est pas celle de l'art. 2262, C. C., contre les injures verbales ou écrites, mais bien celle de l'art. 2261 C. C., limitant à deux ans la prescription " pour " dommages résultant de délits et quasi délits, à défaut " d'autres dispositions applicables."

Pour décider la question de prescription il faut d'abord établir à quelle époque remonte le droit d'action, car la prescription a dû commencer avec la naissance de ce droit, à moins que la loi n'ait fait une exception au cas actuel. C'est précisément ce que prétend l'Intimé en alléguant que la litispendence sur la pétition demandant la destitution des commissaires a eu l'effet d'interrompre la prescription. Dans ses notes sur cette cause, l'honorable juge Caron pose ainsi la question :

Quand Springle devait-il poursuivre?

Du moment qu'il pouvait établir qu'ils avaient agi par malice. Il lui fallait donc attendre le résultat du procès engagé sur leur requête.

C'est ce qu'il a fait et je crois qu'il a eu raison.

Avant le jugement en dernier ressort sur cette requête le demandeur Springle aurait été dans l'impossibilité de prouver aucun dommage.

Car ce jugement rendu le 17 septembre 1870, a réellement constaté d'une manière irréfutable que les accusations contenues dans la la requête des Intimés étaient calomnieuses puisque les requérants n'avaient pas réussi à les prouver.

Le droit des demandeurs d'obtenir des dommages a donc été en réalité suspendu, jusqu'à ce jugement qui a établi d'une manière définitive que M. Springle n'avait pas forfait (forfeited) à ses obligations comme commissaire évaluateur et qu'il avait été un employé fidèle des Intimés.

La prescription annale de l'art. 2262 de notre Code Civil ne pouvait donc courir que de ce jour-là contre Springle.

Cette proposition de l'honorable juge que le droit d'action en dommage, pour réparation d'un délit, comme dans le cas actuel, est suspendu jusqu'au jugement définitif et sur la poursuite malicieuse qui donne lieu à l'action en dommage est-elle conforme au droit de la province de Québec? Je ne le pense pas. Les autorités que l'honorable juge a citées à l'appui de cette proposition sont tirées d'auteurs qui traitent de cette action telle qu'elle est réglée par le code d'instruction criminelle français qui n'a ici aucune application.

En France l'action civile en réparation du dommage causé par un délit est unie à l'action publique et se poursuit devant le tribunal lui-même saisi de l'action publique. On ne trouve dans le code Napoléon aucune disposition concernant la prescription de cette action. Cette matière est réglée par le code d'instruction criminelle qui établit la prescription contre les crimes et délits et les actions civiles qui en résultent. Les autorités citées par l'honorable juge Caron sont fondées sur les articles suivants du Code Criminel, art 637:

L'action publique et l'action civile, résultant d'un crime de nature à entraîner la peine de mort, ou des peines afflictives perpétuelles ou de tout autre crime emportant une peine afflictive ou infâmante, se prescriront après dix années révolues, à compter du jour où le crime aura été commis, si, dans cet intervalle, il n'a été fait aucun acte d'instruction ni de poursuite. S'il a été fait dans cet intervalle des actes d'instruction ou de poursuite non suivis du jugement, l'action publique et l'action civile ne se prescriront qu'après dix années révolues, à compter du dernier acte, à l'égard même des personnes

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qui ne seraient pas impliquées dans cet acte d'instruction ou de poursuite.

Art. 638 :

Dans les deux cas exprimés en l'article précé lent et suivant les distinctions d'époque qui y sont établies, la durée de la prescription sera réduite à trois années révolues, s'il s'agit d'un délit de nature à être puni correctionnellement.

L'article 640 réduit à un an ces prescription en matière de contravention

Ainsi, d'après le code d'instruction criminelle, le délai de la prescription est fixé par les articles 637, 638 et 640, à dix ans, trois ans ou un an, suivant la nature du fait incriminé.

Mais lorsqu'il s'agit d'un délit civil ou d'un quasi délit, (dit Laurent) (1) la prescription est de trente ans, d'après le droit commun, auquel il n'est pas dérogé pour les faits dommageables (2). Si le fait constitue un délit criminel, on suit les règles spéciales qui régissent l'action civile.

Sourdat dit la même chose (3) :

Or nous avons vu que l'action civile, qui naît des délits incriminés par la loi pénale, est soumise quant à la prescription, à des règles spéciales. Mais quand l'action naît d'un *délit purement* civil, elle n'est régie par aucune loi particulière, elle tombe sous l'application de l'article 2262—et ne se prescrit, par conséquent, que par trente ans, à dater du jour où le fait dommageable s'est accompli. Tant que le dommage causé peut être constaté, et qu'il n'a pas été mis à couvert de l'action en réparation par ce laps de temps, celui qui l'a souffert peut en poursuivre l'indemnité, quelque long qu'ait été son silence.

Toutefois je dois dire que cette doctrine est contestée et qu'il y a des décisions qui la répudie. Mais, pour les fins de cette cause, il n'est pas nécessaire de faire plus que de mentionner la contrariété d'opinions, et la différence entre le droit français et le nôtre sur cette question. Cette question de prescription en matière de délits et quasi délits se trouve ainsi réglée en France, bien différemment de notre code. Lorsqu'il s'agit d'un fait incriminé, c'est aux articles 637, 638 et 640 du

(1) Vol. 20, n° 544.

(2) Cour de Cassation de Belgique, 12 juin 1845, (Pasicrésie, 1845, 1).

(3) Au n° 636, 1er vol.

code d'instruction criminelle qu'il faut avoir recours, si au contraire c'est un fait dommageable mais non incriminé, c'est alors le cas d'appliquer l'art. 2262.

Peut-on sous le Code Civil de la province de Québec faire application au cas actuel de l'une ou de l'autre de ces prescriptions du code français? Il est clair que non. Aucune disposition du code d'instruction criminelle de France ne peut avoir force de loi chez nous Quant à la prescription de 30 ans on ne peut l'invoquer non plus parce que notre code a, sur ce sujet, une disposition formelle, qui n'existe pas en France. Il y a à ce sujet dans le Code Napoléon une lacune qui n'existe pas dans le nôtre. Elle a été comblée par l'art. 2261 décrétant que " l'action se prescrit par deux ans dans les cas sui- " vants: parag. 2. Pour dommages résultant de délits et " quasi délits, à défaut d'autres dispositions applicables." Il n'y a pas dans le Code Napoléon d'article correspondant à celui-ci qui a introduit un droit nouveau. Cet article ne faisant aucune distinction entre les délits incriminés et ceux qui ne le sont pas doit recevoir son application dans tous les cas où il s'agit de dommages résultant de délits ou quasi délits quelle que soit leur nature.

L'action en dommage naissant du fait de poursuite malicieuse dont se plaint l'Intimé est évidemment comprise dans cet article et soumise à la prescription qu'il introduit, parce que les termes en sont généraux et absolus et qu'il n'existe aucune prescription contre cette action.

Mais on a prétendu en cour inférieure que la prescription dans le cas actuel était suspendue pour deux raisons, la première, parce que la poursuite qualifiée de malicieuse n'étant pas terminée, la prescription se trouvait suspendue; la deuxième, parce que le fait dommageable constituait un délit successif.

Quant au premier de ces motifs, il est évidemment contraire au principe que la prescription commence à

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courir du moment que l'action est née. Laurent dit à ce sujet : (1)

La prescription des actions personnelles commence du moment *où* les actions naissent, parce que c'est à raison de la durée de l'action que la loi la déclare éteinte ; donc, dès qu'il y a action, il y a lieu à prescription, parce que la raison de la prescription existe. L'action c'est le droit exercé en justice ; et le créancier peut agir en justice du moment que l'obligation est formée.

Aubry et Rau, Troplong, Marcadé et tous les autres auteurs cités par l'appelante dans la liste supplémentaire d'autorités qu'elle a fournie soutiennent la même doctrine, sur laquelle on peut dire qu'il n'y a pas de différence d'opinion. De droit commun le point de départ de la prescription étant la naissance du droit d'action, il faut, pour en adopter un autre s'appuyer sur un texte de loi. C'est la disposition de l'art. 2232 C. C., qui décrète comme droit nouveau

La prescription court contre toutes personnes, à moins qu'elles ne soient dans quelque exception établie par ce code, ou dans l'impossibilité absolue en droit ou en fait d'agir par elles-mêmes ou en se faisant représenter par d'autres.

L'Appelante n'a ni allégué ni démontré qu'elle était dans le cas d'une exception.

L'Intimé prétend que pour prouver la malice qui animait l'Appelante dans ses procédés, il était nécessaire d'attendre le résultat du procès engagé sur la requête en destitution. Cet argument peut-il créer une exception au principe général, et est-il vrai que la malice ne pouvait être prouvée qu'après ce jugement ? S'il y a eu malice, elle a existé au moment de l'adoption de la résolution du 27 juillet 1868 et de la présentation de la pétition, et nécessairement avant le jugement du 7 septembre 1870 par lequel Springle, quoique exonéré des imputations calomnieuses, était cependant destitué de ses fonctions comme commissaire. Ce jugement ne retranchait ni n'ajoutait à la nature des faits imputés ; il ne faisait que les constater. Cette constatation pou-

(1) 32 Vol., p. 27, No. 16.

vait être tout aussi bien faite dans l'action en dommage si elle avait été prise aussitôt après la signification de la requête qui constituait le délit de poursuite malicieuse. Aucune circonstance ne pouvait modifier ces deux faits, et ce sont les deux seuls qui forment la base de sa demande Il n'y avait donc aucune impossibilité d'agir, ni en fait, ni en droit La preuve eut été aussi facile à faire dans un cas que dans l'autre. En conséquence, la nécessité d'attendre le résultat du premier procès me paraît, avec raison, insuffisante pour faire admettre une exception que la loi n'a pas établie. Springle devait donc prendre son action en dommage du moment que le délit dont il se plaignait avait été commis, car la prescription courait à dater de ce moment.

Avant le Code Civil, dans la province de Québec, il a toujours été considéré que cette espèce d'action n'était pas suspendue par la litispendence de celle qui y avait donné origine, même en matière criminelle. Il en était de même aussi des poursuites en dommage pour arrestation et saisie-arrêts malicieuses. Les deux poursuites étaient et sont encore indépendantes l'une de l'autre ; elles peuvent se faire en même temps, ou l'une après l'autre, indifféremment.

Cette doctrine de la suspension du droit d'action en pareil cas, me paraît toute nouvelle et n'a pas, que je sache, été sanctionnée par aucune décision—tandis qu'au contraire, depuis un temps considérable, la jurisprudence des tribunaux a reconnu à une partie lésée soit par une arrestation, soit par une saisie malicieuse ou même par les conséquences d'un délit ou quasi délit, le droit de porter son action en réparation civile, sans attendre le résultat des procédés qui ont occasionné l'action en dommage Cette question a été décidée dans la cause de *Lamothe* et *Chevalier* et al., en appel, le 17 janvier 1854, par les honorables juges Rolland, Panet et Ayl-

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win, qui ont maintenu: "1° Que dans l'espèce, les termes énonciatifs d'un assaut grave sur le Demandeur ne comportait pas une accusation de félonie. 2° Que dans le cas même où cet assaut aurait le caractère de félonie, le Demandeur peut réclamer des dommages sans avoir préalablement poursuivi au criminel, pour l'assaut dont il se plaint."

En cour d'Appel l'honorable juge Rolland motiva son jugement dans les termes suivants:

La Cour Inférieure a maintenu que les faits allégués dans la demande de l'appelant constituaient une félonie, et qu'on ne pouvait se pourvoir en dommages en semblable cas, avant qu'au préalable cette félonie n'eut été poursuivie criminellement. La Cour ici confirme cette décision tant en droit qu'en fait. Nous sommes d'avis que les faits allégués ne constituent pas une félonie, et que dans un cas de cette espèce, il n'était pas nécessaire d'un procès criminel avant que l'appelant pût recouvrer des dommages pour les injures corporelles qu'il avait reçues. Le jugement de la Cour Inférieure doit en conséquence être renversé.

Dans ses observations sur cette cause, l'honorable juge Aylwin fait au sujet de la suspension de la poursuite civile, la remarque suivante:

Quant à l'exception aux fins de suspendre l'action civile, elle n'existe pas sous la loi qui nous régit.

A l'époque de cette décision comme aujourd'hui, la règle était différente en Angleterre; la poursuite criminelle doit précéder le recours civil. De même dans les actions pour poursuite, saisies ou arrestations malicieuses, il est nécessaire dans l'action en réparation civile d'alléguer le résultat final de la procédure dont on se plaint. Il n'en a jamais été de même ici, que je sache. Je ne trouve point de décision qui ait fait de cette allégation une condition nécessaire pour porter l'action en dommage. Je trouve des décisions remontant à une époque éloignée qui ont maintenu le contraire. Dans les *Stuarts Reports*, (1) on voit que la question a été décidée dans le cas de saisie-arrêt simple malicieuse, comme suit:

(1) P. 40.

That it is not necessary to set forth on the declaration, that the action in which the arrest was made has been terminated.

Dans le *Robertson's Digest* on trouve qu'il a été décidé dans la cause de *Dagenay* vs *Hunter* (1),

That a plaintiff may, for an assault, proceed against the defendant by action and by indictment.

Dans le même, aux mots *malicious arrest*, dans la cause de *Boyle* vs *Arnold*, (2) il a été décidé :

That, in an action for a malicious arrest upon a *capias ad respondendum*, on the ground that the Defendant was about to leave the province, it is not necessary to allege in the declaration, that the action in which he was so arrested has been decided.

La cause de *Pacaud* vs *Price*, décidée le 18 juin 1870, en appel est parfaitement analogue à la présente. Le Demandeur Pacaud réclamait des dommages résultant des écritures calomnieuses et diffamatoires que l'Intimé Price et son frère avaient faites sur le caractère, la réputation et l'honneur de l'Appelant, dans une cause devant la cour Supérieure, pour le district d'Arthabaska, dans laquelle ils étaient Demandeurs contre Théophile Coté, secrétaire trésorier de la municipalité du comté d'Arthabaska, la corporation du township de Chester-Ouest et l'Appelant,—Défendeurs. Par cette action, les Price demandaient la nullité de l'acte de vente que le dit Théophile Côté avait consenti à l'Appelant, le 3 avril 1860, du lot de terre n° 12, rang Craig-Sud, dans le township de Chester-Ouest.

Pacaud, l'Appelant, intente de suite contre l'Intimé Price une action en dommage dans laquelle il déclarait que toutes les accusations de fraude proférées contre lui étaient mensongères et obtint, le 26 novembre 1867, devant la cour Supérieure une condamnation de $800 de dommages contre Price Le jugement fut renversé en cour de Revision, mais réintégré par la cour d'Appel à l'unanimité. Dans cette cause l'Intimé Price avait soulevé par exception temporaire la question de la sus-

(1) 1 Rev. de Lég. 346, K. B. (1812).

(2) 1 Rev. de Lég. 503, K. B. (1821).

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pension de cette action pour attendre le résultat de l'action dans laquelle il s'était rendu coupable des calomnies reprochées. La cour Supérieure avait rejeté cette prétention par le considérant suivant :

Considérant que du moment que les dites injures et imputation de fraude ont été faites par le défendeur en la présente cause et par le dit Richard Price par leur déclaration et leur factum—le Demandeur en la présente cause, sans être obligé d'attendre qu'il y eut un jugement final sur l'action intentée devant cette cour en ce district, par le Défendeur en la présente cause et le dit Richard Price, contre le Demandeur en la présente cause, le dit Théophile Coté, et la dite corporation du township de Chester-Ouest, et qu'ainsi l'exception plaidée par le Défendeur en la présente cause intitulé exception temporaire péremptoire en droit, est mal fondée.

Ce motif fut adopté par la cour du Banc de la Reine.

L'analogie entre les deux causes est parfaite Les faits reprochés et servant de bâse à ces actions ont été dans les deux cas, commis dans des procédés judiciaires, et sont absolument de même nature. La seule différence qu'il y a et elle n'est guère en faveur de l'Intimée, c'est que dans cette cause, au lieu de prendre une action pour diffamation conforme à la nature des accusations dont on se plaint, on a sans doute, pour éviter la difficulté de la prescription annale, qualifié l'action en cette cause d'action en dommage résultant de poursuite malicieuse. La qualification donnée n'y fait rien, c'est par la nature des faits allégués que l'on doit juger du caractère de l'action.

Au fond ce n'est qu'une action pour libelle, et Springle n'avait pas d'autre sujet de reproche contre l'Appelante. On ne pouvait lui contester son droit de demander la destitution pour cause d'incompétence, par exemple, si la requête n'eût contenue que ce motif, est-ce que Springle aurait eu droit de se plaindre? Il est évident que non ; le seul grief qu'il ait, ce sont les imputations faites contre son caractère. Elles constituent un libelle pour lequel il aurait dû poursuivre. Mais ayant laissé passer les délais de la prescription, il espère en éviter

la conséquence en présentant son action sous un autre aspect. Si on la considère comme une action pour libelle, elle est prescrite par un an en vertu de l'art. 2262 ; si, au contraire, on la considère comme demandant la réparation du dommage causé par une poursuite malicieuse, elle est alors prescrite par l'art 2261 Cette prescription, quoique n'ayant pas été plaidée, est une de celle que le juge doit suppléer en vertu de l'art. 2267. C'est ce qui a été fait par le jugement de la Cour Supérieure qui a renvoyé cette action.

Il reste maintenant à considérer le deuxième moyen invoqué pour empêcher la prescription de courir, savoir, que les faits reprochés constituent un délit successif. Il est reconnu qu'en cas de délit de cette nature, la prescription ne commence à courir que du moment que le délit a cessé. Mais qu'est-ce qu'un délit successif? Masson (1) le définit ainsi :

On appelle délits successifs ceux qui se renouvellent et se perpétuent par une série d'actes ou dans une série d'instants. On les appellent ainsi par opposition aux autres délits qui s'accomplissent par un seul fait et qui se consomment dans un seul instant.

Il ajoute qu'il n'est pas toujours facile dans la pratique de savoir ce qu'il faut considérer comme délit successif. Il en donne pour exemple le fait de ne pas faire la déclaration exigée par la loi pour la publication d'un journal. On a jugé que l'infraction à cette obligation constitue un délit successif, parce que l'infraction existe et se répète tant que la déclaration exigée n'a pas été produite. Sourdat (2) en donne comme exemple la détention arbitraire, le délit dure aussi longtemps que subsiste la détention La Cour du Banc de la Reine a déclaré, dans la cause de *Grenier* vs. *La cité de Montréal* (3), que des travaux qui font affluer l'eau sur le terrain d'un voisin constitue un délit successif.

Il est évident qu'il n'y a aucune analogie entre ces

(1) Vol. 2, p. 83. (2) Vol. 1er, nº 384.
(3) 21 L. C. Jur. 215.

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faits reconnus comme constituant des délits successifs et celui de prendre une action qui s'accomplit à l'instant de l'émanation de l'action. S'il y a délit, il est alors complet et aucune procédure ni aucun fait postérieur n'ajoute à sa gravité ou ne la diminue. On ne peut pas dire que l'Appelante prenait une nouvelle action, ou commettait un nouveau délit chaque fois qu'il était fait un procédé dans son action. Si cet argument avait quelque force, la cour du Banc de la Reine l'aurait admis dans la cause de *Pacaud* vs *Price* en déclarant que le délit dont se plaignait l'Appelant ne pouvait être considéré comme accompli qu'à la fin du procès, et que le Demandeur n'avait aucun droit d'action lorsqu'il a intenté la demande,—mais elle a au contraire déclaré que le délit était complet et que l'exercice du droit d'action ne pouvait être suspendu. La conséquence de cette doctrine est que la prescription avait commencé à courir du moment de la production du document incriminé. Il est assez extraordinaire que l'on ne trouve pas une seule décision dans nos rapports qui soutienne la doctrine de la suspension du droit d'action. Mais on en trouve au contraire un nombre assez considérable, celles entre autres citées plus haut, qui la répudie. Ces décisions admettant que le droit d'action peut être exercé indépendamment du sort de la première action, reconnaissent par là même que le droit d'action est complet, et que partant il est sujet à la prescription.

Pour ces raisons je suis d'opinion que l'appel devrait être accordé— et le jugement de la cour Supérieur réintégré.

HENRY J.—This suit was commenced in May, 1871, by James Key Springle, the original plaintiff herein, who died in January, 1877, and the suit has been continued by the present respondents, Mary E. Hall, his widow, and Anna Augusta Springle, one of his daughters.

It is substantially an action for a false and malicious complaint made by the appellants through which the original plaintiff alleged he had suffered and sustained serious and heavy damages and losses as complained of in his declaration. It was contended on the part of the appellants that it was but an action for libel and that the time limited by the Civil Code for bringing such an action had expired before the commencement of the action. The declaration, no doubt, charges the appellants with having published a libel against the plaintiff, but it also charges them for a malicious prosecution in the shape of a petition addressed to one of the judges of the Superior Court in the Province of Quebec, in 1868, alleging, amongst other things, dereliction of duty and dishonest and improper conduct on the part of the said plaintiff and one Thomas S. Brown, whilst acting as two out of three of a permanent board of commissioners, duly appointed for the appraisement of damages to parties whose lands and premises might be from time to time appropriated for city purposes, and for which services the said commissioners were provided to be paid; and praying that certain proceedings referred to in the petition might be stayed and the said commissioners removed from office and replaced.

After a general and specific denial of the charges contained in the petition, the plaintiff, in his declaration, alleges:

> That the said defendants never had any probable or reasonable cause for adopting the said resolution (meaning a resolution passed by the defendants on the subject referred to in the petition) or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trustworthy or positive information of any kind to justify them in so doing.

I think the foregoing charges the defendants as for a malicious prosecution, and alleges the want of reasonable or probable cause. The matter of the petition came to a hearing before Mr. Justice Berthelot, and in

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September, 1870, he gave his judgment thereon, acquitting the two commissioners complained against of all the charges contained in the petition, but removed them from office for, as he says, error of judgment only resulting from an erroneous impression of the law as to expropriation.

From that decision the plaintiff appealed to the Court of Queen's Bench, and the latter court by its judgment in September, 1873, reversed the judgment of the Superior Court given by Mr. Justice Berthelot as before mentioned.

From the judgment of the Court of Queen's Bench the appellants took the case by appeal to the Privy Council, and by a judgment of the latter in November, 1876, the appeal was dismissed and the judgment appealed from affirmed.

There is abundant evidence, therefore, to establish the allegations in the declaration, and to show that the original plaintiff sustained serious damage by the false charges made against him, which the respondents were unable and did not attempt in the slightest degree to prove.

The suit was brought within the prescribed time after the proceedings under the petition were terminated, and I have no doubt that the plaintiff had a good and available cause of action.

Having considered the amount of damages awarded, I am of opinion that the award of them is not only not excessive, but much less than, under the circumstances, I should have awarded.

I am of opinion the appeal should be dismissed and the judgment of the court below affirmed with costs.

GWYNNE J.—Two points were urged by the learned counsel for the appellants in support of this appeal.

1. That, assuming the action to lie, it was absolutely

barred under the provisions of articles 2262 and 2267 of the civil code of the Province of Quebec, the former of which enacts that actions for slander and libel are prescribed by one year from the day that it came to the knowledge of the party aggrieved, and the latter, that no action can be maintained after the delay for prescription has expired; and

2. That no action at all lies against the defendants, the now appellants, under the circumstances appearing in the case.

If the present action was one for libel merely, and was founded solely upon the matter which is contained in the resolution of the council of the corporation of the 27th July, 1868, assuming an action founded upon that resolution alone to have lain, it must be admitted that it would have been barred by the above articles of the civil code; but this action is not one for libel merely, nor is the resolution of the 27th July the sole foundation upon which it is framed. The action is for following up that resolution by a proceeding instituted in the courts, maliciously, as is alleged, and without any probable cause, wherein the defendants, by certain false and scandalous charges of venality and corruption made by them against the original plaintiff, maliciously and without any probable cause, endeavored to have the said plaintiff removed from a certain office of profit, and employment of a *quasi* judicial nature in the pursuit of his profession, the effect of so falsely and maliciously prosecuting which proceeding, naturally and in fact, was, to deprive the said original plaintiff almost wholly of the benefit of his profession, by branding him as venal and corrupt and unworthy of all trust and confidence, and of being employed in the business of a valuator of real estate which he followed as a profession.

The declaration alleges the appointment, under the

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provisions of the statute 27 and 28 Vic. ch. 60, of the original plaintiff and one Thomas Storrow Brown and one Damase Masson, as commissioners to determine under the statute the price or compensation to be allowed to one Wilson for expropriation of certain property situate in the city of Montreal and required by the corporation for the widening of St. Joseph street, and that after having been duly sworn they proceeded to take the proceedings indicated by the statute for the purpose of valuing the piece of land in question; that the corporation, although applied to by the commissioners, declined to produce any witnesses or evidence to contradict that adduced by Mr. Wilson, until at length, after an adjournment for the express purpose of enabling the corporation to produce evidence, they produced two witnesses who, in so far as they gave any relevant evidence, corroborated the evidence adduced on behalf of Mr. Wilson. The declaration then states the whole of the proceedings of the commissioners, and that the original plaintiff and Mr. Brown arrived at a preliminary appraisement, in which, however, the other commissioner did not concur, and a meeting was called, conformably with the provisions of the statute, of the parties interested, and a notification given to such parties, that the commissioners would hear them, to the end that, after the said parties should be heard, the commissioners should decide whether they should maintain or modify such preliminary appraisement. It then alleges the reception of such evidence as was offered by the parties interested, and the modification of the preliminary appraisement, and a final report of the valuation of the piece of land to be expropriated at the sum of $13,666. It then alleges that, notwithstanding what is before stated, the council of the city passed the resolution of the 27th July, 1868, authorizing and directing proceedings to be instituted for the purpose

of staying all proceedings of the said commissioners, and of having the said original plaintiff and Mr. Brown removed from being commissioners for valuation of the said piece of land as persons who had forfeited their obligations as such commissioners. It then sets out a petition presented to one of the judges of the Superior Court of the Province of Quebec by the corporation of the city of Montreal, wherein after divers charges of venality and corruption culminating in their having, in violation of their duty as commissioners, made what was charged to be an unjust, excessive and exorbitant valuation in favor of Mr. Wilson under the influence of bribery and corruption, the defendants prayed for an order of the said judge adjudging that the proceedings of the said commissioners should be stayed, and that the said original plaintiff in this action and Thomas S. Brown should be removed from the office of commissioners as having violated and forfeited their obligations. The declaration then proceeds to allege that the said petition and the allegations therein contained are false, malicious and libellous, and were made solely with the view to injure the character and good name of the original plaintiff; and the declaration charges that the several allegations in the petition, charging the said original plaintiff and Thomas S. Brown with partiality, venality and corruption, are false, repeating such charges seriatim, and alleges that the defendants never had any reasonable or probable cause for adopting the said resolution or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trustworthy or positive information of any kind to justify them in so doing; that the said defendants did not prove any of the accusations in the said petition or resolution contained, and that they did not even bring a single witness to substantiate the same, and did not

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and could not make them good, such accusations being utterly false and calumnious as aforesaid. That by a judgment rendered on the said petition by the honorable Judge Berthelot, on the 17th day of September, 1870, the said accusations and charges so brought by the defendants against the plaintiffs were in fact declared false, without foundation or probable cause, and were rejected in fact as such by the said judge. That the said false and calumnious accusations and charges were of a nature to injure, and did in fact gravely injure, the high character, good fame and reputation of the plaintiff, and put in danger the confidence hitherto reposed in the plaintiff by the public and his friends, and have also greatly hurt the feelings of the plaintiff and during more than two years kept him in suspense and anguish under the said accusations and charges pending the said petition; that, moreover, the said plaintiff has lost a great deal of time and expended large sums of money in defending himself against the said accusations and charges, and has suffered damage to the amount of twenty thousand dollars for all the causes and reasons aforesaid.

It is apparent that this declaration discloses what in English jurisprudence is known as an action for malicious prosecution, which consists in the prosecution by the defendant of legal proceedings of a civil or criminal nature against the plaintiff, maliciously and without probable cause, the essential ground of the action being that a prosecution authorized by law, if the grounds which justify its being instituted exist, was carried on without any probable cause, from the absence of which malice may be, and, as said in *Johnstone* v. *Sutton* in error (1), most commonly is, implied. The meaning of a malicious prosecution is that a party, from a malicious motive, and without reasonable or probable cause, sets

(1) 1 T. R. 545.

the law in motion against another; and as the want of probable cause for instituting the legal proceeding complained of is the essential foundation for the action, the termination of such proceeding in favor of the plaintiff must be alleged in the declaration.

Barber v. *Lesiter* (1); *Stewart* v. *Gromett* (2); *Basébé* v. *Matthews* (3).

It is obvious, therefore, that the period when prescription of such an action will begin to run cannot be until such termination. In this case that period did not certainly arrive before, and it is alleged in the declaration to have arrived, upon the delivery of the judgment of Judge Berthelot in the Superior Court upon the 17th September, 1870, whereby the original plaintiff and Thomas S. Brown were acquitted of the calumnious charges which were made the foundation of the petition, and which in effect were pronounced to be false and without foundation or probable cause; and these gentlemen were adjudged by the court to have acted in the discharge of their duty as commissioners with diligence, integrity and impartiality, although they were removed from their office of commissioners for another cause which, upon appeal, was pronounced by the Court of Appeal to have been unfounded and insufficient and illegal, and this judgment of the Court of Appeal, upon an appeal therefrom by the present defendants to the Judicial Committee of the Privy Council, has been maintained. As the objection here urged to the maintenance of the present action is that it has been commenced too late, after being, as is contended, prescribed, not that it has been commenced prematurely, it is unnecessary to enquire whether the cause of action as stated in the declaration, was or not made complete by the judgment of the Superior Court, which, while

(1) 7 C. B. N. S. 186, 190. (2) 7 C. B. N. S. 206.
(3) L. R. 2 C. P. 684.

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acquitting the parties accused of the accusations preferred against them as unjust and unfounded, nevertheless removed them from their office of commissioners to adjudicate upon the special matter submitted to them, but for a different cause which was, upon appeal, finally pronounced to have been insufficient, illegal and equally unfounded.

It is not pretended that an action will not lie under the French law, which prevails in the Province of Quebec, under the like circumstances as an action for malicious prosecution will lie by the law of England; indeed it is contended that the French law is more liberal that the English in giving redress to a party injured by calumnious accusations, inasmuch as it is contended that in virtue of an ordinance of Francis the First, made in 1539, for either a plaintiff or defendant to allege anything in any pleading, false and calumnious of the opposite party, is actionable as a libel, and this wholly irrespective of the termination of the action or proceeding in which such calumnious matter is alleged, and even though it be alleged in assertion of a legal right which the party alleging it succeeds in establishing; the sole test of the calumnious matter being or not being actionable, consisting in its being, or not being, proved to be true; and in support of this contention divers passages from the works of Domat, Dumazeau, Dareau, Merlin and others, and a judgment of the Court of Appeals of the Province of Quebec in *Pacaud* v. *Price* (1) are cited.

The authority of this latter case is disputed by the learned counsel for the appellants, who contended that it was not well decided and that it should not be followed, but I do not think we are called upon in this case to determine whether it was well or ill decided, for even if the judgment of the Court of Revision in

(1) 15 L. C. Jur. 281.

that case had prevailed, which held that the action in that case did not lie because, in the opinion of that court, although the defendant therein did not, in the action which had been brought by him, prove the calumnious matter alleged by him, he had probable cause for making the allegations complained of, still the present action would be maintainable, as it cannot be, and indeed, in this action, has not been, contended that the defendants had any probable cause for making the calumnious accusations, which they did make, for the purpose of having the original plaintiff and Mr. Brown removed from their office. Although they repeat in their plea to the present action the substance of the charges, they appear to have offered no evidence in support of them. Despairing it may be of being able to establish the truth of the charges in the face of the judgments of the Superior Court and of the Court of Appeals for the Province and of the Privy Council upon the matter of their petition, they rather rest their defence to the present action upon an allegation that they filed the petition, which contained the charges, in the exercise of what they call their legislative and judicial functions, and in the interest of public justice, having no interest whatever in the matter themselves, and upon the advice of their counsel, and without malice, and the evidence which they have adduced seems to have been confined wholly to the question of damages.

What is meant by the contention that a legal prosecution founded upon calumnious charges made without any probable cause for making them, is a thing done in the exercise of legislative and judicial functions, I find it difficult to understand. Neither can I appreciate the force of the contention that parties having no interest whatever in a matter brought by them before the courts for adjudication, but who intervene as prosecutors in the interest, as they say, of public justice, can have a

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right to demand that the courts wherein justice, whether public or private, should be dispensed with an equal measure, should, in the interest of public justice, pronounce to be justifiable a prosecution against individuals based upon scandalous, false and calumnious charges made without any foundation in fact or any probable cause for believing them to be true. The defendants, if they could shelter themselves under the plea that what they did was done by them under the advice of their counsel, have failed to offer any evidence of such advice. It may be assumed that counsel may have advised, and very probably did advise them, that the charges stated in the petition, if proved, would require the court to grant the prayer of the petition for the stay of all proceedings and the removal of the commissioners who were accused of partiality and corruption, but further than this we cannot go; nor can we read the plea of the defendants as alleging that counsel advised them that they would be justified in making the charges if they knew them to be false or had no reasonable or probable cause for believing them to be true. For the truth or falsity of such very grave accusations, and for their probable and reasonable cause for making them, the defendants must have known, or, at least, must be regarded as having known, that they themselves must be alone responsible.

There remains only to be considered the question of malice, and upon this point it is unnecessary to enquire whether the falsity of the charges in itself alone, or coupled with the absence of probable cause, is sufficient conclusively to establish malice. Malice may be, and frequently is, implied from the absence of probable cause, but there is not wanting in this case, I think, other evidence from which it may be inferred. A plea of justification of the imputation of calumnious matter upon the ground of the truth of the

calumnious matter, may be taken into consideration on the question of malice. *Wilson* v. *Robinson* (1.) Now, the defendants in their plea allege:

That the said plaintiff and the said Thomas Storrow Brown refused to concur in the opinion of the said Damase Masson, or in his valuation, and that in consequence thereof the defendants, well knowing that the proposed award of the said plaintiffs and the said Thomas S. Brown was excessive, exorbitant and unjust, and would entail grievous loss upon the property owners to be assessed for its payment in the event of the said proposed award being homologated, protested against the said proposed award of nineteen thousand five hundred dollars; and although no part of said amount, if made payable, could be exacted from the said defendants (the whole being assessable upon the properties of the persons interested in the said improvements), nevertheless the defendants being by law constituted the civic guardians of the rights of the citizens of Montreal in all such matters, felt constrained to, and did, institute and cause to be instituted, legal proceedings as by their attorney and counsel they were advised would be necessary and proper to prevent the said proposed award from taking effect and from being ratified or homologated by any legal tribunal.

Now, here it is to be observed that the defendants profess to justify their filing the petition for the removal of the commissioners upon the ground of charges of partiality and venality preferred against them as their motive for awarding to Mr. Wilson an amount which the defendants pronounce upon their own knowledge to be unjust, excessive and exorbitant. Yet, despairing, as it would seem, of establishing the truth of the allegation, they offer no evidence in support of it; moreover, it is not unworthy of observation, as pointed out by the learned counsel for the respondents, that the defendants here persist in stating the proposed award to be nineteen thousand five hundred dollars, although it appears that this sum was a preliminary appraisement subject to review upon evidence being adduced by the parties interested, and which was in fact reduced to thirteen thousand six hundred and sixty-six dollars before ever

(1) 7 Q. B. 68.

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the petition was served and presented to the court, and notwithstanding the finding of the court to which the petition was presented, that the accused commissioners were not guilty of the accusations upon which the petition was founded; nor upon the question of malice, do I think that we can overlook the fact that after the Superior Court had acquitted the accused commissioners of the charges of partiality and venality made against them, but had pronounced a judgment removing them from their office for another cause; and after the Court of Appeal had reversed that judgment of removal and had reinstated the commissioners, the defendants persisted in their prosecution by appealing from that judgment to the Privy Council for the express purpose of endeavoring to have the judgment of removal reinstated, although the sole grounds upon which the statute authorized them to interfere had been adjudged against them, from which adjudication no appeal was ever taken.

Under all these circumstances, I think that the Court of Appeal of the Province of Quebec, which is the only court that has adjudicated upon the merits of the case, was justified in concluding that the proceeding against the accused commissioners was instituted maliciously. Upon the question of damages I do not think that a court of appeal should interfere with damages as awarded by a judgment under consideration in appeal, unless they appear to have been calculated upon a wrong principle or arrived at without regard to the considerations which ought to govern a tribunal in awarding damages—neither of which imputations have been or can be suggested here. It is not sufficient that we, if sitting as judges of first instance, might have given, as some of the judges of the court below were disposed to give, much larger damages.

Our judgment, in my opinion, should be to dismiss

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the appeal of the defendants with costs, and the cross appeal as to damages without costs, as the costs which have been incurred in the case do not appear to have been appreciably increased by the cross appeal.

Appeal dismissed with costs and cross-appeal dismissed without costs.

Solicitor for appellants: *Rouer Roy.*

Solicitors for respondents: *Barnard & Beauchamp.*

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* Mar. 3.
" 16.

Habeas Corpus—Conviction before magistrate—Arrest on warrant—Inquiry as to evidence—Certiorari—Jurisdiction of Court—Supreme and Exchequer Court Act sec. 49—*R. S. O. ch.* 70.

Application was made to the Chief Justice of the Supreme Court of Canada in Chambers, on behalf of a person arrested on a warrant issued on a conviction by a magistrate, for a writ of *habeas corpus*, and for a *certiorari* to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed. On appeal to the full court,

Held, Henry J. dissenting, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the Supreme Court could not go behind the conviction and inquire into the merits of the case by the use of a writ of *habeas corpus*, and thus constitute itself a court of appeal from the magistrate's decision.

The only appellate power conferred on the court in criminal cases is by the 49th section of the Supreme & Exchequer Court Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.

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

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Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus* granted by a judge of the Supreme Court in Chambers; and as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in chambers, the said section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court.

Semble, per Ritchie C.J., that ch. 70 of the Revised Statutes of Ontario relating to *habeas corpus* does not apply to the Supreme Court of Canada.

APPEAL from an order in chambers of Sir W. J. RITCHIE C.J. dismissing an application for a writ of *habeas corpus* and a writ of *certiorari* in the matter of Mélina Trepanier, arrested on a warrant issued on a conviction by a police magistrate.

The prisoner was charged with vagrancy, tried summarily and convicted by the police magistrate of the city of Ottawa, and was sentenced to the Mercer Reformatory for fifteen months.

The jurisdiction of the police magistrate and the conviction and warrant of commitment were not objected to, but the prisoner's counsel contended that the magistrate had erred on the facts, and that, under the Supreme and Exchequer Court Act, a judge of the Supreme Court of Canada had power to issue a writ of *certiorari* in order to bring up the proceedings anterior to the warrant, to ascertain whether there was sufficient evidence to convict, and if not, that he, the prisoner, was entitled to be discharged.

Mosgrove for prisoner cited and relied on 32 and 33 Vic. ch. 28 sec. 1; 29 and 30 Vic. ch. 45 sec. 5; 38 Vic. ch. 11 sec. 51; 39 Vic. ch. 26 sec. 34; 29 and 30 Vic. ch. 25 sec. 66, and *in re Mosier* (1).

Lees Q.C. for the respondent cited *Regina* v. *Rus-*

(1) 4 Ont. P. R. 64.

sell (1); 32 and 33 Vic. ch. 32, sec. 28, *Ex parte Yarbrough* (2). R. S. O. ch. 70.

Sir W. J. RITCHIE C. J.—The jurisdiction of the magistrate being unquestionable over the subject-matter of complaint and the person of the prisoner, and there being no ground for alleging that the magistrate acted irregularly or beyond his jurisdiction, and the conviction and warrant being admitted to be regular, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, I have not the slightest hesitation in saying that we cannot go behind the conviction and inquire into the merits of the case by the use of the writ of *habeas corpus.*

The commitment having been made by a court of competent jurisdiction in the exercise of its unquestionable authority, this court, assuming the conclusion arrived at to have been erroneous, has no authority to review the proceedings, or, in other words, to re-try the case. It cannot be disputed that we have no power to quash the conviction. If the conviction shows a want of jurisdiction, or if it was shown that the magistrate had no jurisdiction, it would be a nullity, and we would discharge the prisoner, because, in such a case, he could not be held by process of any legal tribunal; but with a valid conviction standing against him, and a regular warrant issued thereon, upon what principle can he be discharged?

If there is a principle clear beyond all doubt, it is that when a party is in execution under the judgment of a competent court in which the legislature has entrusted the jurisdiction on the merits to a magistrate, whatever his decision on the merits may be, it cannot

(1) 5 Can. L. J. N. S. 159 (2) 110 U. S. Rep. 651.

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be reversed on *habeas corpus*. I will cite a series of decisions establishing this beyond all question.

In *The Queen* v. *The Overseers of Wallsall* (1) Cockburn C. J. says :—

It is true that there is inherent in the jurisdiction of the Court of Queen's Bench authority to bring before it by writ of *certiorari*, save where the writ is taken away by statutory enactment or charter, the proceedings of any court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction or informality or defect apparent on the face of the proceedings. The court cannot—and this must be carefully borne in mind—give itself appellate jurisdiction through the writ of *certiorari*, where it otherwise possesses none.

In *Dime's Case* (2) Patteson J. says:

If we entertain the question whether there was such a valid injunction, we directly review the judicial decision of the Vice Chancellor. We can no more do this than the court in the case of the Sheriff of Middlesex could review the decision of the House of Commons.

The returns show that the Vice-Chancellor heard and determined this, and, as it is a matter within his jurisdiction, his determination is final. The affidavits cannot be received.

In *Carus Wilson's Case* (3) Lord Denman C.J. says:

Without inquiring whether any affidavit is receivable at all in the case of any prisoner under sentence, we may decide the question before us by considering the principle of the exception that runs through the whole law of *habeas corpus*, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent court. If, indeed, it were proposed to show that the prisoner had never been before such court at all, or that no such sentence had been in fact given, there might be a difficulty in saying that a traverse to that effect could not be allowed. But when it appears that the party has been before a court of competent jurisdiction, which court has committed him for a contempt, or any other cause, I think it is no longer open to this court to enter at all into the subject-matter. If we are to do so, we should constitute ourselves a court of error from such other court, and should be constantly examining whether the circumstances, the existence of which was proved, warranted the opinion which such court had formed.

(1) 3 Q. B. D. 471. (2) 14 Q. B. 565.
(3) 7 Q. B. 1008.

In *Brittain* v. *Kinnaird* (1) the marginal note is:

In an action against a magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained in it.

And Dallas C J. says in the same case:

The general principle applicable to cases of this description is perfectly clear; it is established by all the ancient and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it.

Parke J. says:

All the cases from Hardress downward concur in one uniform principle, that where a magistrate has jurisdiction a conviction by him is conclusive evidence of the facts stated in that conviction.

Burrough J.:

Since I have been in Westminster Hall it has never been doubted that where a magistrate has jurisdiction a conviction, having no defects on the face of it, is conclusive evidence of the facts which it alleges.

And Richardson J. says:

Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think the rule must be discharged.

In *The Queen* v. *Bolton* (2) Lord Denman C.J. says:

The first of these is a point of much importance because of very general application; but the principle upon which it turns is very simple; the difficulty is always found in applying it. The case to be supposed is one like the present in which the legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this court has no jurisdiction as to the merits either originally or on appeal. All that we then can do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it.

Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give

(1) 1 Brod. & Bing. 432. (2) 1 Q. B. 72.

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him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and that appearing to have been insufficient we should quash the conviction. In both these cases a charge has been presented to the magistrate over which he had no jurisdiction; he had no right to entertain the question or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But if, as in this latter case, we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable.

But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case, in one sense, was not within his jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment and barred another proceeding for the offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed at what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.

We will cite only two authorities in support of this reasoning. The former, that of *Brittain* v. *Kinnaird* (1), and the admirable judgment of Richardson J., at p. 422, are too well known to make it necessary to state them at length.

The second case is a recent decision in the Common Pleas of *Cave* v. *Mountain* (2), which we cite only for the rule, which seems to us

(1) 1 B. & B. 432. (2) 1 M. & G. 207.

very clearly and satisfactorily laid down by the Lord Chief Justice: "There can be no doubt but that if a magistrate commit a party "charged before him, in a case where he has no jurisdiction, he is "liable to an action of trespass. But if the charge be of an offence "over which, if the offence charged be true in fact, the magistrate "has jurisdiction, the magistrate's jurisdiction cannot be made to "depend upon the truth or falsehood of the facts, or upon the evi-"dence being sufficient or insufficient to establish the *corpus delicti* "brought under investigation."

These cases were both of them actions of trespass against the magistrate convicting; but they are authorities not on that account the less in point on the present occasion.

And this was a proceeding on *certiorari*, *a fortiori* on *habeas corpus*.

Per Coleridge J. in *Dime's case* (1):

Where the judgment complained of is in an inferior court, the case is different. We have before us the judgment in which the vice is alleged to be; and we have power to quash it; but we have not, in the present case, the injunction before us.

Erle J. says:—

I agree that the proposed affidavits cannot be received. The return shows a committal by a court of competent jurisdiction acting within its jurisdiction.

I may observe that an inferior court, such as the Court of Quarter Sessions, is a court over which this court has a controlling power, and whose proceedings are brought here by writ of *certiorari* in order that we may exercise that controlling power. In that respect such a court differs from the Court of Chancery; and in that respect cases before us, which relate to the inferior courts, are distinguishable from this.

In *Thompson* v. *Ingham* (2) Patteson J. says:

The law on this subject, so far as regards the analogous case of magistrate's convictions, was fully discussed in *Regina* v. *Bolton*, (3) and it was there held, that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive; but, where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it.

In *Brenan's case* (4), a case of *habeas corpus*, Lord Denman C. J. says:

(1) 14 Q. B. 566.
(2) 14 Q. B. 718.
(3) 1 Q. B. 66.
(4) 10 Q. B. 502.

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We are bound to assume, *primâ facie*, that the unreversed sentence of a court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a court of appeal without power to reverse the judgment.

In *ex parte Partington* (1) Lord Denman C. J. says:

There still remains the question whether the commissioner has rightly decided that the prisoner's case was not within the act; but this was a question which he had jurisdiction to inquire into and decide; he has done so, and we are not authorized to review his decision. We by no means intimate a doubt of the propriety of that decision; we simply express no opinion upon it. It may be that there may be no court competent to review it; or it may be that by the Chief Judge or the Lord Chancellor the merits of the decision may be reviewed. It is clear only that we have not that power.

In *ex parte Newton* (2) the marginal note is:

This court has no power to grant a *habeas corpus* to bring up a prisoner who has been convicted at the central criminal court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court. The proper course is to apply to the Attorney General for his fiat for the allowance of a writ of error *coram nobis*, the granting or withholding of which is matter for his discretion.

In *re Bailey* (3) shows that it may be shown by affidavit that the magistrate had no jurisdiction, but not that the finding of a magistrate within his jurisdiction was wrong.

In *Regina* v. *Russell* (4) Cockburn L. J. says:

On this state of facts, and without expressing as yet any opinion as to whether the evidence warranted the court in coming to the decision at which they arrived, there arises this question, whether it is open to the court to inquire whether the Court of Quarter Sessions were warranted in coming to the conclusion at which they arrived. I am of opinion that it is not so open to us. The rule is well established in cases of summary convictions. As to everything which relates to jurisdiction this court will interfere to regulate and set right inferior tribunals, but when once we find that there is jurisdiction this court will not take upon themselves to say whether the decision actually arrived at is that which this court would have come to. It may be that something may happen in the course of a case which is inconsistent with what has been called natural, but what I

(1) 6 Q. B. 656.
(2) 10 C. B. 97.
(3) 3 E. & B. 607.
(4) 5 L. J. N. S. 132.

prefer to call rational, justice—such as the refusal to hear a party—and then this court will interfere; but unless something of this sort appears we should not enter into the merits of the case.

But it is said the Ontario Act gives this court power to review, by way of appeal on the merits, the determination of magistrates on summary conviction in criminal cases under Dominion Acts, and this power it is said the court gets by virtue of the section authorizing the issue of a *certiorari* to bring up the proceedings. I do not think, as at present advised, that the Ontario statute applies in any way to this court. With reference to the jurisdiction thereby conferred, it relates to imprisonments not for crimes, and is based on 56 Geo. 3 cap. 100, and, as its recital shows, was passed for the same reason, namely, that as 31 Car. 2 cap. 2 relates only to criminal charges, the 56 Geo. 3 cap. 100 extends the right to issue writs of *habeas corpus* to cases of imprisonment not for crimes, and the Ontario statute has the like object in view, namely, like 56 Geo. 3, to extend the remedy to imprisonments other than for criminal or supposed criminal matters. Therefore, as the jurisdiction of the judges of this court is confined to inquiring into the commitment in any criminal case under the Dominion statutes, the Ontario Act is inapplicable and unnecessary, because the judges of Ontario have the power in criminal cases independent of it. But assuming the jurisdiction to issue writs of *habeas corpus* under it to apply, as at present advised I am by no means prepared to say that any such jurisdiction necessarily carried with it the power to issue a *certiorari*, no such power being given by the Supreme Court Act.

The only authority to issue the writ of *certiorari* is by section 34 of the Amendment Act, which provides that:

A writ of *certiorari* may, by order of the Supreme Court or a judge thereof, issue out of the said court to bring up any papers or other

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proceedings had or taken before any court, judge or justice of the peace, and which may be considered necessary with a view to any inquiry, appeal or other proceeding had, or to be had, before the Supreme Court.

Thus, while no authority is given to the court to issue the writ of *habeas corpus*, and an appeal is only given in case of refusal of writ or remand by a judge, so no authority is given to issue the writ of *certiorari* to bring up the proceedings but such as may be considered necessary with a view to proceedings had, or to be had, before the court.

But assuming the Act and section relating to *certiorari* to apply, how can it be said to give an appeal to this court? We are to have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada; so soon as we have issued the writ and inquired into the cause of the conviction, and the proceedings show that the prisoner is held on a regular warrant, issued on a regular conviction by a court of competent judicial authority having jurisdiction over the offence alleged against the prisoner and over the person of the prisoner, and no want of jurisdiction is shown or alleged, we have discharged our duty, and we are bound to refuse the writ, or remand the prisoner if the writ has been issued.

Assuming that we may issue a writ of *certiorari* under the authority of the Ontario statute, which I am by no means, as at present advised, prepared to admit, we are not bound to do so, but it is a matter discretionary with the judge, as where he has reasonable grounds for thinking the magistrate or court has acted without jurisdiction; or, by way of illustration, where there has been no conviction, as where a magistrate has committed a party for trial and it is alleged there is no

evidence of a criminal offence sufficient to warrant the committing or detaining the prisoner, in such a case, there being no conviction, the judge would look at the depositions, and under the 29th section bail or otherwise deal with the prisoner, a jurisdiction not conferred by the original Act. So also in cases of extradition, over which this court has now no jurisdiction, but had at the time of the passing of the Act, there being likewise no conviction, the judge, in his discretion, might deem it desirable to see the evidence on which the magistrate held the prisoner for extradition.

This court has no inherent or statutory jurisdiction over the summary proceedings of inferior courts of either civil or criminal jurisdiction. To the Court of Queen's Bench, under powers of the common law, belongs the right to regulate and set right inferior tribunals, and to quash or confirm their proceedings.

The *certiorari* is the medium through which the Court of Queen's Bench exercises its jurisdiction over the summary proceedings of inferior courts, and always was unless expressly taken away; no writ of error lies upon a conviction, so that a *certiorari* is the only mode of bringing it into the Queen's Bench in order to revise it. See the remarks of Cockburn C. J. in *The Queen* v. *Overseers of Walsall* above quoted.

But still it is urged that there is an inference to be drawn from the power to bring up the depositions and evidence, and therefore there must necessarily be a power to review by way of appeal; but is it not too clear to be doubted that an appeal cannot be so given. An appeal, like a conviction, is the creature of statute law, and never lies unless where it is given by express terms. *Queen* v. *Recorder of Ipswich* (1); *Queen* v. *Justices of Warwickshire* (2); *Queen* v. *Justices of Worces-*

(1) 8 Dowl. 103. (2) 6 E. & B. 837.

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tershire (1); *Queen* v. *Inhabitants of Sandon* (2); *Attorney General* v. *Sillem* (3).

But apart from this the only appellate power conferred on the court in criminal cases is by virtue of the 49th section of the Supreme and Exchequer Court Act, which provides that:—

Any person convicted of treason, felony or misdemeanor, before any court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's Bench in the Province of Quebec, on its Crown side, or before any other superior court of criminal jurisdiction whose conviction has been affirmed by any court of last resort, or, in the Province of Quebec, by the court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmation of such conviction; provided that no such appeal shall be allowed where the court affirming the conviction is unanimous, nor unless notice of appeal has been served on the Attorney General for the proper province within fifteen days after such affirmance or refusal.

Having so carefully limited the appeal in criminal cases of the highest importance, can any one suppose that the Parliament ever intended (if it would be done by such a far-fetched inference) to impose on this court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout this Dominion, that is to say, that it was the intention of Parliament in creating this court, a court of last appeal for the determination of questions of the highest importance, to transfer to it by way of appeal the jurisdiction of the police and other magistrates of the Dominion in criminal matters in cases tried summarily before such officers?

As Judge Story in the Supreme Court of the United States (4) says:

If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose, that Congress intended to vest it with the authority to do it indirectly?

And as was said in *ex parte Kearney* (5):

(1) 3 E. & B. 486.
(2) 3 E. & B. 547.
(3) 10 H. L. Cas. 704.
(4) 18 Wall. 188.
(5) 7 Wheaton 42.

If every party had a right to bring before this court every case in which judgment had passed against him for a crime of misdemeanor or felony, the course of justice might be materially delayed and obstructed. and in some cases totally frustrated. If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly?

Can it be supposed the Dominion Parliament could have intended that this appellate court, established for the whole Dominion, with its limited and guarded appeal in both civil and criminal cases, should, indirectly, in addition, be clothed with authority, and bound, to revise the proceedings under any conviction of police or other magistrates having jurisdiction over the person and subject-matter adjudicated on, and the unseemly spectacle of this, the highest tribunal of the Dominion, turned practically into a police court, to retry the case of every vagrant or keeper of a disreputable house, who may be dissatisfied with the judgment of the police magistrate, for they are those who have sought the interposition of this court, and who, of all others, should be dealt with summarily and promptly, and in the interest of decency and morality, and with whom no tribunal in the country is more competent to deal than the police authorities? The police magistrate summarily disposes of the vagrant, and other simple offenders; if the present contention is maintained all any of these gentry, if convicted, would have to do, would be to apply to a judge of this court, and have, as of right, his case reheard, and on being remanded, have then, as of right, an appeal to this court if in session, and no matter what the business may be before the court, a right to a re-hearing at an early date, or if the court is not in session, a right to require the court to be called together to hear his appeal; for if he has a right to come here, and the appeal exists as is claimed, the Supreme Court Act provides that appeals in *habeas*

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corpus shall be heard at an early date, whether in or out of the prescribed sessions of this court. There is something so unreasonable, I may say utterly absurd in this, that I can hardly deal seriously with the case.

The United States Congress has described affirmatively the appellate jurisdiction of the Supreme Court, and that affirmative description has always been held to imply a negative of the exercise of such appellate power as is not comprehended within it.

STRONG J.*—I have had occasion, upon applications in chambers for writs of *habeas corpus* and *certiorari*, to consider the question raised by this appeal, and the conclusion to which I have invariably come is the same as that which the Chief Justice has stated in the judgment just delivered. The considerations which have led me to that conclusion are as follows:

A very slight consideration of the statutory enactments, under which alone this court has any jurisdiction to issue the writ of *habeas corpus*, will be sufficient to demonstrate that there exists upon the return to a writ of *habeas corpus*, no jurisdiction except to consider merely whether a sufficient ground is shewn for detaining the prisoner or not. Throughout it must be borne in mind that the whole jurisdiction of this court is statutory, and that its powers as originally conferred by the first Act were direct, and not by reference to the powers possessed by other courts in England or in the provinces. The Supreme Court has no common law jurisdiction. It has not, as many of the provincial courts have, as, for instance, the High Court of Justice in Ontario has, and as the former Courts of Common Law in Ontario had, the same jurisdiction as the Court of Queen's Bench at Westminster. In Upper Canada, by the statute of 31 Geo. III., the jurisdiction exercised by the Court of Queen's Bench at Westminster was

* Oral judgment reported from short hand writer's notes.

conferred upon the Court of King's Bench in that province, and is now exercised by courts which have succeeded to the jurisdiction of the King's Bench. Such courts, therefore, possess by virtue of this referential legislation that extensive common law jurisdiction which enabled the Court of Queen's Bench at Westminster to protect the liberty of the subject by writ of *habeas corpus*, and also by *certiorari*, to superintend the administration of the law by inferior courts. The first provision in regard to this court, in relation to the writ of *habeas corpus*, is in section 51 of the Supreme Court Act of 1875, as now amended, which enacts:

That any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of inquiring into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

Now, the very name and tenor of the writ of *habeas corpus* indicates what, and what only, can be done under it. The writ is called the writ of *habeas corpus cum causâ;* that is to say, its tenor is to direct the officer to produce before the judge or court the body of the prisoner, together with the cause which he has for detaining him. Therefore, the only consideration which, on the return to the writ of *habeas corpus*, can be entered upon by the court or judge is the sufficiency of the commitment. If the officer returns to the writ a good commitment, whether it is in pursuance of a sentence of a common law court, that is a sentence following a conviction by a jury, or whether it is a commitment following a summary adjudication by a magistrate under a statutory jurisdiction, in either case that is conclusive. In the original Supreme Court Act—the statute I am now considering—no provision whatever was contained as to the writ of *certiorari*, and therefore there is no pretence for saying that, accompanying the writ of *habeas corpus*, either a judge in chambers or the

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court could issue a writ of *certiorari* to bring up something behind the warrant, namely, the conviction. But I have no doubt that, under this section 51, if a prisoner was brought before the court on a writ of *habeas corpus*, and the return to the writ showed he was in custody, not under any conviction by a court or magistrate, but under a commitment for trial, then the judge might, if the materials for the purpose could be got before the judge, consider and determine whether it would or would not be proper to take bail. I do not conceive that it is impossible for the depositions to be produced for that purpose without a writ of *certiorari*. They may be produced by consent of the Crown, or possibly the original depositions may be produced by authority of the committing magistrate. Be that as it may, if, on a return to a writ of *habeas corpus*, it appears that the prisoner is committed for trial on a criminal charge under a Dominion statute, I have no doubt that, under this first enactment relating to *habeas corpus* under section 51, the prisoner could be either bailed or remanded; but if the prisoner was in custody after conviction, the conviction could no more, in the case of a summary conviction by a magistrate, be brought before the judge, than could the record of conviction after a trial by a jury. If the commitment was upon a conviction, and the warrant of commitment was regular upon its face, that was conclusive as a return to the writ of *habeas corpus*.

The next statute we find dealing with this question is the Supreme Court and Exchequer Court Amendment Act of 1876; and under the 29th section of that Act extended powers were given. There was a reason why these extended powers should be given. If I am wrong in what I have just said as to the power under the first Act, in case of a commitment for trial, in regard to the power to bail,

this section gives express power in that respect. I take it that this section was enacted, *ex abundanti cautelâ*, more exactly to define the powers of a judge under the writ of *habeas corpus*. We find no mention whatever of the writ of *certiorari*; and, as I have shown, by the writ of *habeas corpus* alone it is impossible that the judge can get the record before him. There is, however, in section 34 of the same Act of 1876, provision as to the writ of *certiorari*. This section is as follows:

A writ of *certiorari* may, by order of the Supreme Court or a judge thereof, issue out of the said court, to bring up any papers or other proceedings had or taken before any court, judge or justice of the peace, and which may be considered necessary with a view to any inquiry, appeal or other proceeding had, or to be had, before the Supreme Court.

Now, the first observation to be made on this enactment is, that the *certiorari* authorized by it is only for the purpose of bringing up proceedings and papers required before the Supreme Court, and not before a single judge. This had escaped my attention until it was pointed out by my brother Taschereau, and indeed, on one occasion I ordered the writ to issue in what I considered to be a proper case, the representative of the Crown, who appeared before me, not objecting. In that case, the commitment itself showed a clear want of jurisdiction, and I issued the *certiorari* to bring up the conviction, so that I might be able to remand the prisoner if it appeared to be good. I now see I was wrong in doing so, and that the writ of *certiorari* provided for by section 34 is not meant to accompany a writ of *habeas corpus* returnable before a single judge, but was intended to be returnable before the Supreme Court alone. Therefore, a writ of *certiorari* returnable before a judge in chambers is not warranted by the statute at all. This being so, how is it possible that the record of the conviction can be regularly brought before

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the judge at all? The officer who has the prisoner in custody has not the record. He cannot return the record. He can only return the warrant of commitment, and, if that appears to be good, it must be conclusive so far as the writ of *habeas corpus* is concerned. It is said that under the concluding portion of section 29, inferentially, this court, or a judge of this court, possesses the same power as to the writ of *habeas corpus* as a judge in the province of Ontario possesses. I entirely agree to that. But that provision only applies to the jurisdiction in the writ of *habeas corpus* and not to the writ of *certorari*. I think that the object of the statute of the late province of Canada, which gave power to a judge in chambers in Ontario to issue a writ of *certiorari*, was to enable the judge to issue that writ together with the writ of *habeas corpus*, which enabled him, in the case of a commitment for trial or for extradition, to have the depositions brought before him, or in the case of a summary commitment by a magistrate, to have the commitment brought before him, and, if the conviction was erroneous, to release the prisoner as being in illegal custody· not, however, to quash the conviction. The courts in Ontario having, however, the general jurisdiction to quash convictions returned under writs of *certiorari* issued by judges at chambers, have exercised the power, and rightly enough, because they had power to do so without expressly defining where the express statutory power ended and the common law jurisdiction conferred by the 31st Geo. III began. I take it to be quite clear that wherever a conviction by a magistrate is produced, if it appears on its face to be good, it is an estoppel until it is quashed; and no statute gives a judge of this court in chambers the power to quash a conviction. Such power belonged to the Court of Queen's Bench in England, and to such courts here as exercise the powers and jurisdiction formerly belonging

to that court, but to such courts only. In Ontario, in many cases, a single judge, sitting as a court *in banc* and exercising the powers of the court *in banc*, has issued a writ of *habeas corpus*, accompanied by a writ of *certiorari*, and having undoubted power to do so, has quashed convictions. In such cases it is no excess of jurisdiction in the court to look at the depositions regularly before it and see if there is any evidence of the offence charged—not re-hearing the case, as on appeal, for, no matter how strong the evidence may be for the prisoner, no matter what the preponderance of evidence may be against the prosecution, if there is any evidence whatever, the court will refuse to inter, fere with the conviction. In doing all that the courts undoubtedly exercise a well established and regular jurisdiction.

But if a judge in chambers undertakes to go behind the conviction and to consider the merits at large by way of appeal, I should say there was no jurisdiction to do so.

Upon these grounds I have come to the conclusion that all a judge of this court sitting in chambers can do on the return to a writ of *habeas corpus*, is, if a proper commitment is returned, to remand the prisoner; or, if the prisoner appears to be only committed for trial, and if the depositions can be got before him in either of the ways before mentioned, to order the prisoner to be bailed; but that is the limit of the jurisdiction under a writ of *habeas corpus* issued upon the authority of these statutes. I cannot help saying, in conclusion, that the anomaly pointed out already by the Chief Justice must strike anybody at once, for if such a jurisdiction as that now invoked was possessed by the judges of this court, we might in the exercise of it be called upon to review the decisions of police magistrates, recorders

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and justices of the peace sitting throughout the Dominion in all those unimportant cases which they can summarily dispose of, when, if a case should arise in the courts of the highest importance, a state prosecution for treason or sedition, and a point of law should be raised in the highest courts of the provinces, and these courts should come to a decision adverse to the prisoner, though the case were one of the greatest public interest, if that decision should happen to be a unanimous one, we should not have the jurisdiction to review or in any way interfere with it. I cannot believe the legislature ever intended to do anything so anomalous and inconsistent as that, to confer a trifling jurisdiction in regard to prisoners to whom it is reasonable to suppose justice can be done by the provincial courts, and withhold it in the cases to which I refer.

I agree with the Chief Justice that the case should be dismissed.

FOURNIER J.—I have come to the same conclusion. I have had the advantage of reading over the notes of judgment of the learned Chief Justice, and I certainly agree with him.

HENRY J.—I am sorry it is my fortune, or misfortune, to differ in *toto cœlo* with my learned brethren on this most important question, and I shall proceed to state, as briefly as the importance of the case will permit, my views in regard to it. The matter has been considered by me for the last two or three years, having been called upon repeatedly to put in operation the Statute of Canada passed in 1866, previous to Confederation. Having inquired into it, but very willing, as well as my learned colleagues to—I will not say, shirk the duty, but to leave the performance of my duty under it in the hands of the judges of the Superior Courts in Ontario to deal with—I inquired, however,

whether it was a duty on the judges of this court, and, if it were so, I felt it my duty to perform it. I do not consider myself infallible in these cases, nor do I consider the case so clear of doubt on every side as to say I could not reason it patiently, or that I could fail to give it the consideration which a case of such importance demands. I have not come to a conclusion by a process of hop, skip and jump. I have given judgments in cases such as this before, and I did so deliberately; and I may say, with all due deference to my learned colleagues who have expressed an opposite opinion, that I have heard nothing to vary my mind in the slightest degree as to the correctness of the judgments I have given, and I shall proceed to say how. The learned Chief Justice read a very elaborate opinion, principally to prove that in England an appeal would not lie in a case of this kind, and the only course would be by a writ of *certiorari* to remove the conviction, in order to have it quashed I am not saying anything at present as to the power of this court to quash the conviction, but I intend to show that this court has that power under the statutes which I consider govern the matter. How do we possess the jurisdiction? I must turn to the statutes that were in operation when we received our appointment, and, although I might consider it derogatory to my position as a judge of this high court to sit in review of the decision of a stipendiary magistrate, I do not claim to myself the right to judge of that question. I was appointed under statutes of the Dominion, and paid for doing my duty under the statutes and the law, and, although it might be perhaps a little derogatory to the position we hold as judges of this, the highest court, to sit in consideration of the liberty of the subject of a very mean caste and poor character, still it is the pride of every Englishman that the law is open to the poor and wretched and to the unfortunate

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and to the vile just the same as it is to the richest man in the country; and it is the duty of the judges—the duty is imposed upon them—to administer justice to the poor and to the unfortunate and to the criminal just as much as to the most honest man of highest respectability in the community. That, I consider, to be the duty of an English judge. That has been always held by them to be their duty, and I consider I am following no mean example when I do likewise. Now, have we the power? I admit that in England, and in the United States, no such power exists as this. I am perfectly free to admit it. I am free to admit, that it is objectionable that this power should be exercised by the members of this court, or that the judges should be called upon to perform this duty; but, at the same time, I consider that I am not the judge of that, and that the legislature is the only judge, and that, being appointed under the legislature, I had to take my duties as the legislature provided them, and not say that it is derogatory to my position to enter into an investigation of this case or of that other.

We are told that this involves an appeal. I do not know that it necessarily does so. In the administration of this matter, and after the proceedings are brought up from a conviction upon the evidence—I would not undertake to set aside the judgment of the magistrate before whom the witnesses were examined, or say he drew a wrong conclusion from such evidence, nor do I think it necessary, to do justice, that I should have that power; but, if a man is imprisoned and tried for one offence, and convicted for another, or is convicted of that offence without the slightest particle of evidence, I would consider I was doing a service to the country by giving him his liberty, and showing to the police magistrate that there was a control, and that he was bound by the law to convict a party according to the

allegations, and the proofs against him. We are told there is no appeal. Formerly there was an appeal always from the decision of the stipendiary magistrate to the Quarter Sessions, and the statute does not provide for an appeal from the Court of Sessions by issuing a writ of *habeas corpus*, but it does from the stipendiary magistrate. Then, that appeal being abolished, a statute was passed that is the subject of consideration now, and, in lieu of an appeal to the Quarter Sessions, the Legislature of Canada passed the statute, 29 and 30 Vic. ch. 45 section 1, in these terms:

1. When any person shall be confined or restrained of his or her liberty (except persons imprisoned for debt, or by process in any civil suit, or by the judgment, conviction or decree of any Court of Record, Court of Oyer and Terminer or General Gaol Delivery, or Court of General Quarter Sessions of the Peace, or Recorder's Court, not being a court wherein the recorder shall sit alone without a jury) within Upper Canada, it shall and may be lawful for any of the judges of either of the Superior Courts of Law or Equity in Upper Canada, and they are hereby required upon complaint made to them by or on behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award in vacation time a writ of *habeas corpus ad subjiciendum* under the seal of the court wherein the application shall be made, directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any judge in chambers for the time being.

These are the exceptions. That, then, excludes the writ of *habeas corpus*, in certain cases, and very properly, because before a court of record the parties are tried by a jury, and, in an appeal to this court, the parties are convicted not only by a jury but by five or six judges. The law says there shall be no appeal in a case of that kind, but it is very different from a conviction by a stipendiary magistrate sitting alone in his office; and, therefore, the same legislature which said there should be no appeal by means of a *habeas corpus* from the judg-

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ment of six judges and the verdict of a jury, said in effect that there may be still an appeal in that way from the decision of a stipendiary magistrate. Section 5 provides :

5. In all cases, in which a writ of *habeas corpus* shall be issued under the authority of this Act or of the said Act of the thirty-first year of the reign of King Charles the Second, or otherwise, it shall and may be lawful for the judge or court ordering the issue of such writ, or for the judge before whom such writ shall be returnable, either in term time or vacation, to direct the issuing of a writ of *certiorari* out of the court from which such writ of *habeas corpus* shall have issued, directed to the person or persons by whom or by whose authority any such person shall be confined or restrained of his or her liberty, or other person having the custody or control thereof, requiring him to certify and return to any judge in chambers, or to the court, as by the said writ shall be provided, all and singular the evidence, depositions, convictions, and all proceedings had or taken, touching or concerning such confinement or restraint of liberty, to the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such judge or court.

The word "shall" makes it imperative. If the matter comes before the judge by a writ of *habeas corpus*, and he deems it right, this enjoins him to issue it. What are the documents to be ordered? The return of the evidence, the examinations. We all know what is the difference between evidence and examinations. If it was not intended that the evidence on a conviction was to be returned and dealt with, why do we find it mentioned here? If it was merely for bailing a party, or looking at the conviction to see if it is good or bad on the face of it, what would a judge want with the evidence, and how can we say that evidence is sought to be got for any other purpose? But the legislature says what it shall be got for—"to the end that the same may be viewed and considered by the judge"—that is, the evidence and conviction, "and to the end," &c., &c.

Now, we are told that this court cannot have an appeal indirectly, that is, inferentially. Whether this provision includes an appeal cannot admit of a doubt. It is an appeal, not indirectly or inferentially, but directly made to us. The law provides for it. It provides for the trying of the case, and for the appeal by ordering the evidence to be returned with the conviction. The preamble clearly shows the intention of the legislature so to extend the remedy of *habeas corpus:*

Whereas the writ of *habeas corpus* hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof; and whereas extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public; an Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas, only extend to cases of commitment or detainer for criminal or supposed criminal matter; therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I have but little to consider in regard to the policy of the enactment, but, in view of the absolute power of a police magistrate to try, without the consent of the accused before him, not only misdemeanors but felonies without any appeal, it may have been properly considered that some review of his finding was desirable. That was not originally provided for this court, but, when the appeal was taken away, it was provided that the judge of a court in Upper Canada should review the finding of the stipendiary magistrate. Then, intentionally or unintentionally, that authority is thrown upon us. We are empowered to the same extent as the judges of the Superior Courts in Ontario, and the same obligation is thrown upon us to exercise that power as is thrown upon them. Under these circumstances let us look at the law. This is the law, and this is how it stood. Judges in the Ontario courts fully considered this matter after this statute, and

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adopted it in the light I am now expressing, and I would like to hear some person reason out the effect of the statute, and show that the judges in Ontario and I are wrong. I have not heard yet what the evidence would be required for if not to be acted upon by the judge; and if, when it is returned, he is to say, I won't look at it, is that what the legislature meant? I cannot come to such a conclusion. But we are told that the *certiorari* is only to return papers to this court. What does the Ontario statute provide? It provides for the return before the court or any judge in chambers. That power is transferred to us. The statute says—section 51, 38 Vic.—

Any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, or in any case of demand for extradition, and if the judge shall refuse the writ or remand the prisoner, an appeal shall lie to the court.

The party whose case is before us was convicted under an Act of Parliament of Canada. We are called upon to issue a writ to enquire into the cause of the commitment, and then the statute I have read enjoins the judges of the courts in Ontario to issue the writ of *certiorari*—either the judge who issues the *habeas* or the judge before whom the party is brought subsequently, to get up all these papers. This section before mentioned then puts us in the same position as the judges in Ontario, and can we say we will assume one portion of the duty and not another? If it is derogatory to us to hear these cases, we may consider it derogatory to hear any case. We may consider it derogatory to hear an appeal in a case that involves unpleasantness just as much as any one of these cases that have been referred to. Still, it is our duty. Judges in England do not feel it derogatory to have to enquire into any

case that arises. They search the case to the bottom and sift the evidence—some of it most disgusting—but they think it their duty to do so. We are told the writ of *certiorari* does not lie, but this section in question gives us the right to order it. There is express power given. That refers to the general power to issue a writ of *certiorari*. It may apply to civil proceedings. It applies to everything and to any matter which is before this court, and when the parties can show good and reasonable cause for bringing up certain papers in the custody of parties, and required for the inspection of this court, the judge is authorized to issue a *certiorari* to bring them up. But how do we get clear of this portion of the statute of Canada? For, we must bear in mind, that statute was passed by Canada only the year before Confederation, in 1866, and, when this Act was passed in 1875, that Act had been nine years in operation in the Province of Ontario; and certainly when we are told we have the same jurisdiction as the judges in Ontario, I think we have the right to issue a writ of *certiorari*, because the judges in Ontario are authorized to issue it—not only authorized, but required. But, we are told, we have no power to quash the conviction. In the first place, I do not consider it is necessary that we should have that power. We could order the discharge of the party, if wrongfully confined, leaving it to him to get the conviction quashed or not. The party is clear of the operation of the conviction by getting his liberty, and it is a matter of mere moonshine, I take it, whether the conviction is quashed or not. It has no practical value for or against the prisoner. But I go further and maintain that, under the general powers in regard to the *habeas corpus* and the issue of a writ of *certiorari* to bring up the proceedings, we have the same power as the judges in Ontario, and they have power to quash the conviction I think,

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therefore, we have the power to do so. I do not wish to take up more time than necessary, but, it being significantly suggested that points decided in my judgments before referred to were hardly worth considering, I have defended my position, and in as moderate terms, I think, as the circumstances required. I consider that the evidence that is given of what has been done in England, the practice in England and the practice in the United States, and what would be the practice here but for these statutes, need no quotations to establish. It is well known that without statutory power we could not exercise the appellate jurisdiction by means of a *habeas corpus*, and, if that appellate jurisdiction were not given to us, I would be in perfect harmony with my colleagues in regard to this matter. We are told this would add largely to the amount of duties of this court. I have not ascertained that it would. So far, in the experience of nine or ten years, it has not added very much to its duties. Perhaps I have had as much as my colleagues altogether, and I have not felt it affect my dignity or my time very materially. I say the reasons given here for us to refuse to discharge this duty would be very good if addressed to the legislature. They would be cogent, they would have an application, and, I would consider, ought to have very great weight. Still, I do not know that these reasons were ever offered to the legislature, for this reason: that these acts were passed in reference to the judges of the courts of Ontario, and then the other statute was passed when this court was appointed and the jurisdiction transferred. Possibly, if this matter had been before the legislature, or the Dominion Parliament for the first time, and the question had been mooted, this disagreeable duty would not have been thrown upon us.

Entertaining these views, I am of the opinion that it is

the duty of the judges of this court to issue a writ of *certiorari*. I think it is the duty to go behind the conviction and see whether the party is legally convicted. I consider the party is legally convicted if, on the whole view of the evidence fairly applicable to the case and the charge brought against the prisoner, the stipendiary magistrate gives his decision; but, if a case arises where the law is totally misapprehended, or the party is tried for one offence and no evidence given, and he is convicted of that offence upon evidence that does not touch it, I think the law would not be administered, and it would be the duty of a judge of this court to discharge the prisoner. In one respect, I am not sorry that the majority of this court should be against me. It will relieve me and my colleagues of a great deal of perhaps unpleasant duty. I have felt bound to perform it hitherto, and I shall not regret the decision of the court by which I will hereafter not be bound to perform it.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed for the reasons given by the learned Chief Justice. I may add that I had always a strong doubt as to the constitutionality of the clause in the Supreme and Exchequer Court Act which gives us concurrent jurisdiction with the judges of the Province of Ontario. The point has not been argued, and I only wish to express my present doubt.

Appeal dismissed.

Solicitors for appellant: *Mosgrove & Wylde.*

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Sep. 1, 2, 3 & 4.

Sep. 13.

In re ROBERT EVAN SPROULE.

Habeas Corpus—Granted by Judge in Chambers—Appeal under sec. 51 *Supreme and Exchequer Act—Writ improvidently issued—Jurisdiction of Court to quash—Control of Court over its own process—Criminal case under sec.* 51*—Supreme Court of British Columbia—Constitution of—Commission to Judge presiding over —Trial of prisoner in—Order to change venue—Provision for increased expenses—Practice.*

Section 51 of the Supreme and Exchequer Court Act (1) does not interfere with the inherent right which the Supreme Court of Canada, in common with every superior court, has incident to its jurisdiction to enquire into and judge of the regularity or abuse of its process, and to quash a writ of *habeas corpus* and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court. The said section does not constitute the individual judges of the Supreme Court of Canada separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process. (Fournier and Henry JJ. dissenting.)

Per Strong J.—The words of section 51 expressly giving an appeal when the writ of *habeas corpus* has been refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from and revise, rescind and vary orders made under this section.

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

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(1) Section 51 of the Supreme and Exchequer Courts Act provides that "any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada, * * * and if the judge shall refuse the writ or remand the prisoner an appeal shall lie to the court."

The right to issue a writ of *habeas corpus* being limited by section 51 to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry JJ. dissenting.)

Per Fournier and Henry JJ. dissenting.—The restriction imposed by section 51 to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada" is merely intended to exclude any enquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the *habeas corpus* in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an Act of the Parliament of Canada.

Query—Is section 51 of the Supreme and Exchequer Court *ultra vires?*

Semble, that when a judge in a province has the right to issue a writ of *habeas corpus* returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately. (Fournier and Henry JJ. dissenting.)

An application to the court to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner. (Henry J. dissenting.)

After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.

If the record of a superior court, produced on an application for a writ of *habeas corpus*, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. (Henry J. dissenting.)

A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. (Henry J. dissenting.)

The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England.

The various statutes of British Columbia providing for the holding of Courts of Oyer and Terminer and General Gaol Delivery render unnecessary a commission to the presiding judge.

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Per Strong J.—The power of issuing a commission, if necessary, belonged to the Lieutenant Governor of the province. (Henry J. *contra.*)

An order made pursuant to Dominion Statute 32 and 33 Vic. ch. 29 sec. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order.

Even if the writ of *habeas corpus* in this case had been rightly issued, the prisoner on the materials before the Judge was not entitled to his discharge, but should have been remanded.

MOTION to quash a writ of *habeas corpus* issued by Henry J. in chambers as being improvidently issued.

The material facts presented to the court on the motion are as follows:

In June, 1885, a murder was committed in the District of Kootenay, B.C., and Robert Evan Sproule was charged with the commission of the crime and committed for trial. On the application of the Attorney General of the province, an order was made by the Chief Justice of the Supreme Court of the province to change the venue from Kootenay to the District of Victoria, which order was in the following words:

BRITISH COLUMBIA. }
To wit: }

Whereas it appears to the satisfaction of me, Matthew Baillie Begbie, Chief Justice of the Supreme Court of British Columbia, a judge who might hold or sit in the court at which Robert E. Sproule, a prisoner, now confined in New Westminster gaol, under a warrant of commitment given under the hand and seal of Arthur W. Howell, one of Her Majesty's justices of the peace in and for the Province of British Columbia, is liable to be indicted for that he, the said Robert E. Sproule, did on the first day of June, A. D. 1885, feloniously, wilfully and of his malice aforethought, kill and murder one Thomas Hammill; that it is expedient that the

trial of the said Robert E. Sproule should be held in the city of Victoria (being a place other than that in which the said offence is supposed to have been committed);

I do order that the trial of the said Robert E Sproule shall be proceeded with at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the city of Victoria, and I do order the keeper of the New Westminster gaol to deliver the said Robert E. Sproule to the keeper of the gaol at Victoria city, and I do order and command you the keeper of the said gaol at Victoria city, to receive the said Robert E. Sproule into your custody in the said gaol, and there safely keep him until he shall be thence delivered by due course of the law.

Dated at Victoria, this 13th October, 1885.

(Signed) MATT. B. BEGBIE *C.J.*

The prisoner was then indicted and tried at Victoria, found guilty, and sentenced to death. A writ of error was subsequently granted and a return made to the Supreme Court of British Columbia. In making up the record on the writ of error it appeared that the order to change the venue contained no provision for payment by the Crown of increased expenses to the prisoner in holding the trial at Victoria, and the Chief Justice thereupon signed the following order:

CANADA,
Province of British Columbia.

REGINA V. ROBERT E. SPROULE.

At the City of Victoria, Tuesday the thirteenth day of October, A.D. 1885.

Upon motion of Mr. P. Æ. Irving, of counsel for the Crown, in the presence and hearing of Robert E. Sproule, a person charged with and committed to stand his trial for having on the 1st day of June, A.D. 1885, at Kootenay Lake, in the bailiwick of the sheriff of

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Kootenay, in the Province of British Columbia, feloniously, wilfully, and of his malice aforethought, killed and murdered one Thomas Hammill;

And upon hearing Mr. Theodore Davie, of counsel for the said Robert E. Sproule, and it appearing to my satisfaction that it is expedient to the ends of justice that the trial of the said Robert E. Sproule, for the alleged crime, should be held at the city of Victoria;

And Mr. Irving now undertaking on behalf of the Crown to abide by such order as the judge who may preside at the trial may think just to meet the equity of the eleventh section of 32-33 Vic. cap. 29, intituled: "An Act respecting procedure in criminal cases, and other matters relating to criminal law," such being the conditions which I think proper to prescribe;

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert E. Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the said city, on Monday the 23rd day of November, 1885, next.

And I order that the said Robert E. Sproule be removed hence to the gaol at the City of Victoria, and that the keeper of the said gaol do receive the said Robert E. Sproule into his custody in the said gaol, and him safely keep until he shall thence be delivered by due course of law.

(Signed) MATT. B. BEGBIE C.J.

This order was placed in the record as the order for change of venue. The counsel for the prisoner alleged diminution of the record on the ground that this order was not the true order made for change of venue, and was not in existence at the time of the trial; and, also,

that an application which he had made at the close of the trial for the polling of the jury should appear on the record. Both these points were overruled by the court.

The substantial matters of error assigned upon the record, and argued before the full court, were:

1. That the indictment did not show the alleged offence to have been committed within the jurisdiction of the court, or within the realm at all, the only venue which appeared being "British Columbia, to wit," which, since the province was divided into judicial districts, was no venue.

2. That there was no valid order to change the venue, and the Court of Oyer and Terminer at Victoria had no authority to try the prisoner; and

3. That the court was held under a commission from the Lieutenant Governor of the province, and was not a properly constituted court, as the Governor General only could issue the commission.

These grounds of error were all overruled by the unanimous decision of the court, and the prisoner was remanded to gaol.

The counsel for the prisoner then applied to Mr. Justice Henry, of the Supreme Court of Canada, for a writ of *habeas corpus*, and the learned judge granted the following *rule nisi:*

IN THE SUPREME COURT OF CANADA.

Monday the 3rd day of May, A.D. 1886.

Upon hearing Mr. D'Alton McCarthy Q.C. as of counsel for Robert Evan Sproule, and upon reading the affidavits of Theodore Davie filed respectively on the 3rd May, 1886,

I do order that the sheriff for Vancouver Island, James Eliphlet McMillan, Esquire, do show cause before me, at my chambers, at the Supreme Court house, in the city of Ottawa, on Saturday, the twenty-second day of

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May instant, why a writ of *habeas corpus ad subjiciendum* should not issue to the said sheriff requiring him to bring before the court the body of the said Robert Evan Sproule—together with the day and cause of his detention, and why in the event of this order or rule being made absolute, or the writ being allowed the said Robert Evan Sproule should not be discharged without the writ of *habeas corpus* actually issuing and without the prisoner being personally brought before the court.

(Signed) W. A. HENRY.
A Judge of the Supreme Court of Canada.

On the return of the rule *nisi* McCarthy Q C. and Theodore Davie appeared for the prisoner, and Burbidge Q.C and J. J. Gormully for the Crown, and the same grounds were taken and argued as had previously been urged before the Supreme Court of British Columbia on the writ of error, the counsel for the Crown contending, in addition to the points involved in the case itself, that as there was no appeal from the decision on the writ of error, the court being unanimous, the prisoner should not be allowed to take this proceeding, which was virtually an appeal, and so evade the statute.

His Lordship having heard the argument ordered the issue of the writ of *habeas corpus* delivering the following judgment:

HENRY J —This is an order to show cause why a writ of *habeas corpus ad subjiciendum* should not issue to the sheriff of Vancouver Island, British Columbia, to bring up the body of the above named Robert Evan Sproule, together with the day and cause of his detention in the custody of the said sheriff, and why, in the event of the allowance of the said writ, the said Robert Evan Sproule should not be discharged from the said custody without the actual issue of the said writ or the

attendance of the said Robert Evan Sproule before me.

The order was duly served upon the sheriff of Vancouver Island and upon the Attorney General of British Columbia; and on the argument before me, on the twenty-fifth and twenty-sixth days of May last past, cause was shown on behalf of the Crown against the discharge of the prisoner.

The argument on both sides was able and exhaustive, and my labor and inquiry much less than would otherwise have been necessary.

Having since been occupied, however, in the hearing of arguments in term or session of the court, and in delivering judgment in other cases in court, I have not been able to prepare my judgment at an earlier date.

The case is a novel one, particularly in the Dominion, and required, and has had, my best consideration.

The judges of the Supreme Court of Canada derive their authority in regard to writs of *habeas corpus ad subjiciendum* from the 51st section of the Supreme and Exchequer Court Act of the Dominion, passed in 1875, which is as follows:

Any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada * * *

The Supreme Court of British Columbia has complete cognizance of all pleas whatsoever, "and has "jurisdiction in all cases, civil as well as criminal, aris-"ing within the said colony of British Columbia." That court has, and its judges have, full jurisdiction in respect of the writ of *habeas corpus ad subjiciendum* and the judges of this court have, therefore, under the 51st section I have cited, the same jurisdiction.

Having then such jurisdiction the next inquiry is as to its applicability to the circumstances of this case.

It is not appellate but original, deriving its power

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and authority from the section before-mentioned.

In such a case we cannot, in any way, review the decision of a court of competent jurisdiction, but must confine our consideration to the question of jurisdiction over the subject-matter in question, exercised by a court, and resulting in the conviction and sentence of a person charged with a criminal offence. If the court before whom the prisoner in this case was tried and convicted had the necessary jurisdiction I cannot interfere. This position was taken on the argument and well sustained by binding authorities.

The authorities go, however, as effectually to sustain the proposition that when ascertaining the cause of the commitment of a prisoner it is shown that the court had no jurisdiction to try and convict him he is entitled by law to his discharge. The law has provided the mode and manner for trying parties accused of crimes and the courts before whom they are to be tried; and no one can be legally sentenced unless tried and convicted by competent authority and according to law. If any necessary link in the chain to constitute jurisdiction be wanting no one can be legally punished. If the judge who presides at a criminal trial be without proper authority in regard to such a trial the conviction is a nullity, and so in all other cases where, from any cause, there was not jurisdiction, and when such want of jurisdiction is made to appear, it must necessarily result in the discharge of the convicted party.

Numerous authorities might be cited to sustain that proposition.

I cannot in this connection do better than quote from the judgment of Chief Justice Cockburn in *Martin* v. *Mackonochie* (1).

It seems to me, I must say, a strange argument in a court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by

(1) 3 Q. B. D. at page 775.

dealing summarily with a defendant, the proceedings should be upheld. In a court of law such an argument *a convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended, on the whole, to insure the safe administration of justice and the protection of innocence, and must be observed.

A party accused has the right to insist on them as a matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect it is for the legislature to amend it. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself * * *. The law constitutes a given act an offence. As such it attaches to it a given punshisment. But it prescribes a plenary course of procedure by which, if at all, the offence is to be brought home to a party charged with having committed it. If a court having jurisdiction over the offence takes upon itself to substitute a different and more summary method of proceeding, surely this is to make the court, as it were, supersede the law.

The prisoner was indicted at Victoria and tried there under an indictment which is as follows:

BRITISH COLUMBIA. }
To wit: }

The jurors for our Lady the Queen upon their oath present that Robert E. Sproule, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-five, feloniously, wilfully and of his malice aforethought, did kill and murder one Thomas Hammill, against the peace of our Lady the Queen, her Crown and dignity.

The homicide of Hammill took place at or near to Kootenay, in British Columbia, distant from Victoria about seven hundred miles. The province was, by several Acts of its legislature, the last of which was in 1885,

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divided into judicial districts or circuits; and courts of assize and *nisi prius*, and of oyer and terminer and general gaol delivery, were provided to be held at each of the undermentioned places, at the times mentioned in the Act, that is to say, at the city of Victoria, at the city of Nanaimo, at the city of New Westminster, and at other places, including the bailiwick of Kootenay.

Before the trial it is shown by affidavit that an order for a change of venue to Victoria was made, and signed by the learned Chief Justice of British Columbia. That order was subsequently considered, and no doubt properly, defective, as it made no provision, as required by the statute, for such conditions as to the payment of any additional expenses thereby caused to the accused as the court or judge may think proper to prescribe. The prisoner, previous to the making of that order, was in custody for a crime alleged to have been committed by him within the bailiwick of the sheriff of Kootenay, but was taken by some process, the nature of which does not appear, before the learned Chief Justice; and, by his order before referred to, committed for trial to the custody of the sheriff of Vancouver, where he was during the trial and now is. It has been satisfactorily shown by affidavit that the only order for a change of venue in existence at the time of the trial of the prisoner was the one beforementioned If that order is defective, then the trial of the prisoner was without authority.

By law, the trial should have been had in the bailiwick where the homicide took place, unless the venue for the trial was changed as by law prescribed and required. The right of the court or a judge to order a change of venue in a criminal case is upon the condition following: "But such order shall be made upon such "conditions as to the payment of any additional expense "thereby caused to the accused as the court or judge

"may think proper to prescribe."

When it may be the case that a prisoner charged with an offence is without means to provide for his defence at a place distant from the ordinary place of trial, to change the venue without at the same time making provision for the additional expense would practically prevent him from making any defence, and the order for doing so would be manifestly unjust.

The legislature has therefore properly and humanely provided that the court or a judge, meaning no doubt the court or judge making the order, shall consider all the circumstances in relation to the change of venue, and make the order conditional upon the payment of any additional expense thereby caused. The statute requires the court or a judge to decide in his discretion "as to the payment of any additional expense." The trial in this case took place six or seven hundred miles from Kootenay, and the prisoner before being tried had the right to the opinion and decision of the judge as to the amount to be previously paid to him. I say previously paid, because, for good and palpable reasons, the statute has clearly made the decision of the judge and the payment of the additional expense as settled by him conditions precedent to the operation of the order. Those conditions not having been prescribed a peremptory order was made which I think was wholly unwarranted and void.

I have considered this matter from the position shown in the affidavits read on behalf of the prisoner, made by Theodore Davie, Esquire, counsel of the prisoner, who, in one of them says: "That the order in the above "matter as drawn up and in existence at the time of "the trial of the said Robert Evan Sproule, referred to "in the affidavit of James E. McMillan filed herein on "the 22nd of May instant, was in the words and "figures of the document hereunto annexed and marked

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"A, and not otherwise." Annexed to that affidavit is the copy of the order purporting to have been made on the 13th October, 1885, by the learned Chief Justice of British Columbia; and it contains no reference whatever to the matter of the additional expenses of the prisoner. In another affidavit, which is referred to in the order herein, the same deponent stated that on the 13th day of October, 1885, the said Robert Evan Sproule was brought in custody before His Lordship the Hon. Sir Matthew Baillie Begby, Chief Justice of the Supreme Court of British Columbia, at the Supreme Court house at the city of Victoria aforesaid, whereupon an application was made on behalf of the Crown, the result of which was that an order was made by the said Chief Justice, and drawn up and signed by him, directing the trial to proceed at the city of Victoria, instead of at Kootenay, without imposing any terms or conditions. Accompanying the last-mentioned affidavit a verified copy of the record of the trial was produced, and in that affidavit the said Theodore Davie further says: The order for "change of venue set out in the second and third pages "of the said exhibited copy record, was not in existence "at the time of the trial and sentence, but was drawn up "and signed and issued subsequently. Before proceed-"ing to assign errors upon the record, I alleged a diminu-"tion of the record and applied for a *certiorari* upon my "own affidavit, showing that the order for change of "venue set out in the record was not the true one, or in "existence at the time of the trial and judgment * " * * The court after hearing argument "overruled the same."

Here then the error alleged was brought by affidavit to the notice of the court, but the allegations of error were overruled. Should they have been if the facts are truly stated in the affidavits referred to? The court was asked to correct the record for the reasons alleged,

but declined to do so without showing in its judgment why. I have, however, been furnished with the reasons of the learned judges in a report of the argument, and, strange to say, the allegation that the order for the change of venue as appearing in the record was made up after the trial and sentence of the prisoner is not referred to. The fact is neither admitted nor denied. The order purports to have been made and signed by the learned Chief Justice. If so made he was in a position to affirm or deny the allegation. It purports to have been made on the 13th of October, 1885, the same date with the order shown by the affidavit of Mr. Davie to have been made and signed on that day. If two orders were made on that day the fact could easily and should have been shown. When delivering judgment in the matter the learned Chief Justice said: "We are all of opinion that the order of the 13th October, "1885, for the removal of the trial to Victoria was a "good and proper order under sec. 11 of the Canadian "Procedure Act, 1869, ch. 29, and that the condition as "to costs was an expedient and sufficient condition." The learned Chief Justice then dealt with a contention of Mr. Davie, that the statute only applied to a case of change of venue after an indictment found, but made no reference to the allegation under oath of Mr. Davie, that although it appeared as if made on the 13th October, 1885, it was not in fact made or in existence till after the trial and sentence. I can hardly think any respectable counsel, or any other sane person, would have the temerity to make such a statement to the court, if unfounded, when he knew one of the learned judges must know that it was so, but the allegation having been made, and not in any way contradicted, the truth of it must be assumed. The reference of the Chief Justice is to the order appearing in the record, but he does not say that it was made before the trial, and

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therefore does not contradict the statement otherwise of Mr. Davie in regard to it. Whether the record must be received as conclusive is however, another matter, and one I will hereafter deal with. If, then, the order as shown in the record was not made before the trial, some one is answerable for antedating it or the record assigned a wrong date to it. There can be no reasonable doubt that two orders were in fact made, the one last referred to, as I think, being intended to supply what was considered a fatal defect in the previous one. It would be absurd to say that an order, made after the trial held in a wrong place, could relate back and give jurisdiction where none existed when the trial took place. It would be like the case of an execution for murder without a conviction.

I have already given it as my opinion that the order alleged to have been first made was defective, and, as I find that the other was not made till after the trial and sentence, I think the trial of the prisoner was improperly and illegally removed to Victoria; but should I be wrong in my conclusion that the order set forth in the record was not made till after the trial, I will consider the question of its validity if made, as it purports to have been, on the 13th October, 1885. After setting out that it appeared to the satisfaction of the learned Chief Justice, who made it, that it was expedient to the ends of justice that the trial of the said Robert Evan Sproule for the alleged crime should be held at the city of Victoria, His Lordship ordered as follows:

And Mr. Irving now undertaking on behalf of the crown to abide by such order as the judge who may preside at the trial may think just to meet the equity of the eleventh section of the 32 & 33 Vic. chap. 29, intituled "An Act respecting procedure in criminal cases and other matters relating to Criminal Law": Such being the conditions which I think proper to prescribe, I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert Evan

Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the said city on Monday the 23rd day of November, 1885."

Is that then a valid order within the terms of the statute that requires the court or the judge that makes the order to prescribe, and by which to settle, the conditions as to the payment of the additional expense? The statute gave no power of delegation to the court or a judge. The allowance of additional expenses might be to enable a prisoner to secure the attendance of witnesses for his defence, and a poor man would require provision to be made for their attendance by the judge who makes an order of the kind. To postpone the consideration until the trial would, in some cases, be a virtual denial of that which the statute has provided for. The wrong would be done, and if the prisoner should have been convicted what benefit, as to the trial, would be an order from the presiding judge for additional expenses? The clear intention of the provision, was to put the prisoner in no worse pecuniary position as to his trial, in the case of a change of venue. The court or judge applied to for an order for that purpose should, on proper and necessary inquiry, decide as to the amount, if the inquiry satisfied him additional expense would be incurred, and insert it in the order; and having done so, the payment should be considered a condition precedent to the operation of the order.

In no other way could the interests of a prisoner be sufficiently protected, for if once removed he would have no security that the additional expenses would be furnished to him in sufficient time before his trial, and he should not be left to depend on the undertaking of any irresponsible person. In this case the learned judge seems to have made no inquiry whatever before

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making the order. He decided nothing as to the matter, but made the order upon Mr. Irving's undertaking, on the part of the Crown, to abide by an order to be subsequently made by the judge who might preside at the trial.

A judge's order of such a character is, I consider, void, and must be so considered in all cases where the terms upon which the statute allows it to be made are not fulfilled, and where the judge does not himself first do what the statute enjoins as necessary to give him jurisdiction over the subject-matter. A party accused of the committal of a crime is required, by the law, to be tried in the bailiwick where it is alleged to have been committed. The grand jury there are to find an indictment against him before he can be put on his trial, and twelve good and lawful men of that bailiwick form a necessary part of the tribunal. If the order for the change of venue is defective, as I in this case hold it is, the grand jury of no other place could find a bill of indictment against him, and no other petit jury could legally be empanelled to try him.

Chief Justice Cockburn, in his remarks in the case before-mentioned, and which I repeat, says:

> And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law, and to the end of justice, is as much part of the law as the substantive law itself.

It was when deciding upon a rule, calling on Lord Penzance, the official principal of the Arches Court of Canterbury, and J. Martin, to shew cause why a writ of prohibition should not issue to prohibit the said court from publishing, proceeding with, or enforcing a decree of suspension *ab officio et beneficio* made against the Rev. Alexander H. MacKonochie, clerk, in a suit *Martin* v. *MacKonochie*, such decree being one which was made without jurisdiction. It was contended, and admitted,

that the Arches Court had jurisdiction over cases of the kind in question, but only at the request of the Diocesan Court, and that no such request was shown. The writ of prohibition was granted because of the want of jurisdiction in the Court of Arches.

In this case, I think, for the reasons I have given, there was no jurisdiction to try the prisoner at Victoria.

I will now consider whether or not it is permissible, in a case like the present, to contradict the record.

It is well understood that in a great variety of cases the record of a court of competent jurisdiction is not only conclusive evidence of the facts stated therein but in many cases the only proof; still, where the jurisdiction is impeached it appears to me that the mere statements in a record, by which jurisdiction is shown, should not prevail where evidence by affidavit shows conclusively that the statements are erroneous. The question of jurisdiction in a proceeding like this being raised, I think, for the true and proper determination of that question, evidence should be admitted to show that there was really no jurisdiction. To state perhaps an extreme case; should a man be hanged or punished when it could be shown by extrinsic evidence that the tribunal had no authority to try or convict him? In *Crepps* v. *Durden et alio*. (1) we find it stated:

But a question has occasionally arisen, whether in cases where the justices have proceeded without jurisdiction, and have, nevertheless, stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit.

It certainly appears desirable that the court should have the power to entertain the question of jurisdiction. Some cases might easily be suggested where not only great private but great public inconvenience might arise from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices, out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted to them by law.

(1) See 1 Smith's Leading Cases, p. 740.

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At page 241 of the same book we find it said:

Supposing that the court below cannot be compelled by *mandamus* to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be laid before it by way of affidavit on the record being brought before it by a writ of certiorari?

In *R.* v. *St. James, Westminster* (1) it was remarked by Mr. Justice Taunton (a judge whose *obiter dicta* are always worthy of the greatest attention) that this had been constantly done. In *R.* v. *The Inhabitants of Great Marlow* (2) an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction and was finally quashed.

The court in that case had taken time to consider as to the practice with regard to receiving the affidavit, and Mr. Justice Laurence mentioned several cases in which that course had been pursued. In the case of *R.* v. *Justices of Cheshire* (3) the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. It cannot be disputed "said Mr. Justice Coleridge in the latter case" that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court.

And it seems to be settled by the later cases that a defect of jurisdiction may be shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it.

See the judgments in *Regina* v. *Bolton* (4); *The Westbury Union Case* (5); *in re Penny* (6) and other cases.

At page 743 Mr. Smith says:

It should seem that the Queen's Bench Division will on *certiorari* entertain affidavits where the conviction is good on the face of it, —not only to show that preliminary matters required to give the justice jurisdiction to enter upon an enquiry into the merits of the case were wanting, see *R.* v. *Bolton* (7); *R.* v. *Badger* (8); *R.* v. *Wood* (9); *R.* v. *Justices of Totness* (10); the judgments in *R.* v. *St. Olave's District Board* (11); and *in re Smith* (12)—or that circum-

(1) 2 A. & E. 241.
(2) 2 East 244.
(3) 1 P. & D. 23; 8 A. & E. 400.
(4) 1 Q. B. 66.
(5) 4 E. & B. 314.
(6) 7 E. & B. 660.
(7) 1 Q. B. 66.
(8) 6 E. & B. 17.
(9) 5 E. & B. 49.
(10) 2 L. M. & P. 230.
(11) 8 E. & B. 529.
(12) 3 H. & N. 227.

stances appeared in the course of the inquiry which ousted his jurisdiction, *R.* v. *Nunneley* (1); *R.* v. *Cridland* (2); *R.* v. *Backhouse* (3); *R.* v. *Stimpson* (4), but also that there was no evidence to prove some fact, the existence of which was essential to establish the offence charged.

It seems also to be well settled by judgments in the United States that where it is shown that jurisdiction over the subject-matter did not exist the statements of facts in a record of the highest court might be inquired into by affidavit on the ground that if there was not jurisdiction there was no legal record. I will refer to a few out of a great many authorities that might be cited.

In *Davis* v. *Packard* (5) in the Court of Errors, the Chancellor speaking of domestic judgments, says:

If the jurisdiction of the court is general or unlimited both as to parties and subject-matter it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case.

In *Bloom* v. *Burdick* (6) Bronson J. says:

The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered.

And in *People* v. *Cassels* (7) the same judge says:

That no court or officer can acquire jurisdiction by the mere assertion of it or by falsely alleging the existence of facts upon which jurisdiction depends.

In *Harrington* v. *The People* (8) Paige J. expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in *Noyes* v.

(1) E. B. & E. 853.
(2) 7 E. & B. 352.
(3) 30 L. J. M. C. 118.
(4) 4 B. & S. 30.
(5) 6 Wend. 327-332.
(6) 1 Hill 130.
(7) 5 Hill 164.
(8) 6 Barb. 607.

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Butler (1) and in *Hard* v. *Shipman* (2) where he says of inferior as well as superior courts, that:

> The record is never conclusive as to the recital of a jurisdictional fact and that the defendant is always at liberty to show a want of jurisdiction although the record avers the contrary—and that if the court had no jurisdiction it had no power to make a record.

The English cases which I have cited are those before justices; but on principle I can see no difference between a judgment of an inferior and one of a superior court, when the question of jurisdiction is raised, nor can I see why, if the record of the former can be shown to be erroneous or false as touching the matter of jurisdiction the other cannot be; for without jurisdiction the acts of one must be void as well as those of the other, and therefore the rule in the one case should be the same as in the other; and in the cases I have consulted in the courts in the United States the rule is applied to their highest courts.

I could suggest many cases in which serious wrong and injury might result if the jurisdiction of a court could not be attacked by evidence outside of the record, and in contradiction of it, showing the total want of jurisdiction. Suppose that there was no question that a commission of oyer and terminer and general goal delivery was necessary, and a judge undertook to try an accused person for high crime, and the record showed that he had a legal commission authorizing him in the premises but the fact was that no such commission was ever issued or held by him, and that the accused was convicted, and sentenced possibly (as in this case) to forfeit his life, would it not be a gross prostitution of the principles of common justice to shut out evidence tendered to show that the judge acted without a commission, and therefore without any jurisdiction. On the same principle, evidence to show that for any other reason he had not jurisdiction should not be

(1) 6 Barb. 613. (2) 6 Barb. 621, 623.

rejected. It is proper to explain in this connection, that a copy of the record was submitted, and referred to in the affidavit on behalf of the prisoner, when the order *nisi* was applied for, and another copy was returned by the sheriff of Vancouver, and put in by the Crown when showing cause against the order. It was, therefore, by both parties, made a part of the case submitted for my decision, and although the proceedings were not removed by *certiorari* the consideration of it as to the question of jurisdiction was legitimately submitted.

Other objections to the jurisdiction were raised and debated, to which I need not give the same amount of consideration that I would feel it necessary to do in case my decision depended on the correct solution of them.

I will, however, deal with one of them, and refer to the others. The learned judge before whom the prisoner was tried acted by authority of a commission of oyer and terminer and general gaol delivery, issued by the Lieutenant Governor of British Columbia and the commission is set out in the returns. The latter named high functionary was then acting under a commission from the Governor General, under the Imperial Confederation Act of 1867. That commission "authorizes, "empowers, requires and commands the Lieutenant "Governor in due manner to do and execute all things "that shall belong to his said command, and the trust "reposed in him, according to the several powers and "directions granted, or appointed him, by virtue of the "present commission, and of the British North "America Act, 1867, and according to such instructions "as were therewith given to him, or which might, "from time to time, be given him in respect of "the said province of British Columbia, under the "sign manual of the Governor General of Canada, or by

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"order of the Privy Council of Canada, and according "to such laws as were, or should be, in force within the "province of British Columbia." The Governor General's commission authorizes him "to constitute and appoint "judges, and, in case requisite, commissioners of "oyer and terminer, justices of the peace, and other "necessary officers and ministers in our said colony." It is apparent that since the union of British Columbia with Canada, in 1876, its legislative power was largely restricted, and the powers and duties of the Lieutenant Governor proportionately restricted. In fact, the Lieutenant Governor, after the union, was no longer the Imperial officer a Lieutenant Governer had previously been. Under his commission from the Queen previous to the union, the Lieutenant Governor directly represented her, and only through that representation had he any power to issue commissions; but we are not necessarily to inquire what the power of the Lieutenant Governor was before the union, but simply to ascertain what power, if any, to issue commissions of the kind in question here has been given to a Lieutenant Governor by a commission from the Governer General under the Imperial Conferation Act, within its terms. The party so commissioned has no reserved power; but the office and its powers and duties are limited to the subjects over which a Lieutenant Governor so commissioned and appointed would have jurisdiction. Any question as to a reserved power is not, I think, to be considered in the face of the provision of sec. 12 of the B.N.A. Act, 1867, which provides "that all the powers, "authorities and functions vested in the Governor or "Lieutenant Governor of the several provinces shall be "vested in and exercisable by the Governor General, "subject, nevertheless, to be abolished or altered by the "Parliament of Canada." I cannot imagine how, then, the Lieutenant Governor of a province can be claimed to

have any power whatever except what is given by the Act in question and his commission from the Governor General thereunder. Sec. 129 provides that, except as otherwise provided by that Act, all laws in force in the several provinces mentioned, and subsequently made applicable to British Columbia, all laws in force at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing at the union, shall continue in each of the said provinces respectively as if the union had not been made, subject, nevertheless, to be repealed, abolished or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under that Act.

By sub-section 8 of section 91, the parliament of Canada has the authority and duty of making laws for "the fixing of and providing for the salaries and allow-"ances of civil and other officers of the government of "Canada;" and by sub-section 27: "the criminal law, "except the constitution of courts of criminal jurisdic-"tion, but including procedure in criminal matters," is within the exclusive jurisdiction of that parliament. In another section the salaries of the judges were expressly provided to be paid by the government of Canada.

Sub-section 14 of section 92 gives to the legislature of each province the right to make laws for "the "administration of justice in the province, including "the constitution, maintenance and organization of "provincial courts, both of civil and criminal jurisdic-"tion, and including procedure in civil matters in "those courts."

In regard, then, to jurisprudence in civil matters the legislatures of the provinces have the entire legislative

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authority, except that in relation to the fixing and providing for the salaries and allowance of the judges.

The authority and duty of legislation in regard to the administration of justice in criminal cases, including procedure in criminal matters, is given to the parliament of Canada, except (as provided in sub-sec. 27 of sec. 91 before recited) "the constitution of courts "of criminal jurisdiction."

By a comparison of sub-sec. 27 of sec. 91, and sub-sec. 14 of sec. 92, it will be observed that the latter, in addition to the word "constitution," has the words "maintenance and organization." I do not, however, consider that the difference between the two sub-sections has any material bearing on the case under consideration; but, if it has, I think that in view of the terms of the concluding clause of sec. 91 we should confine the operation of sub-sec. 14 of sec. 92 so as to make it harmonize with sub-sec. 27 of sec. 91.

Reading it in that way the parliament of Canada has the right to legislate in all matters of a criminal nature including procedure, and including the appointment and paying of judges, except the constitution of the courts.

It was clearly not intended that the word "maintenance" should include the payment of the judges' salaries, as they, as I have shown, are otherwise provided for. It may, however. have been intended to include the other expenses of the courts, and in otherwise maintaining them when constituted or organized. The words "constitution" and "organization" in this connection I consider synonymous as applicable to courts. To constitute a court means to form, make or establish it, and, necessarily, to prescribe the powers, jurisdiction and duties of those who are to operate it. It, however, does not, necessarily, in all cases include the power of appointment of the judges to preside in them, if the

local legislatures had been given plenary power to provide for their appointment, but with the limited and prescribed powers of legislation awarded to the provinces by the Imperial Act such power does not exist. There is no award of deputed executive powers by the Act in relation to the exercise of any prerogative right of the sovereign by the Lieutenant Governors of the provinces, and their commissions do not contain any. How then can they have any? The commissions to Lieutenant Governors before confederation included such powers, and it was only from them they derived the authority.

We must construe an Act by taking it altogether

By it (sec. 9) the executive government and authority over Canada is declared to continue and be vested in the Queen. Section 10 provides that "the provisions "of this Act referring to the governor extend and apply "to the Governor General, for the time being, of Canada, "or other the chief executive officer or administrator, "for the time being, carrying on the government of "Canada on behalf and in the name of the Queen, by "whatever title he is designated."

In England the sovereign was and is the source of all judicial appointments to the higher courts of law. It is a prerogative right that, while existing, cannot be usurped, and until removed or cancelled by an Act of parliament, assented to by the sovereign, cannot be controlled or interfered with.

When British Columbia became a part of Canada its courts were already established and constituted, and by the terms of the Confederation Act, sec. 129 before cited, were so continued—and so also was the position of the judges. They then held and derived authority from commissions appointing them as judges of the Supreme Court or Court of Queen's Bench during good behavior, but none as permanent judges of the court of oyer and terminer and general gaol delivery, for which com-

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missions *pro re nata* had been issued by the Lieutenant Governors from time to time. As in England, the judges appointed to this duty were styled and called commissioners, and the Acts in British Columbia, providing for the appointment of such commissioners, limited their selection by the Lieutenant Governors.

The judges of the Supreme Court or Court of Queen's Bench had no authority, without such commission, to hold a court of oyer and terminer and general gaol delivery. In connection with this part of the subject I have considered the effect of the provision contained in sec. 14 of cap. 12 of the Acts of British Columbia, 1879, which is as follows: "Courts of assize and *nisi* "*prius*, or of oyer and terminer and general gaol "delivery, may be held with or without commissions, at "such times and places as the Lieutenant Governor may "direct, and provided, when no commissions are issued "the said courts, or either of them, shall be presided over "by the chief justice or one of the other judges of the "said Supreme Court" It is doubtful if that Act, except sec. 17, ever came into operation, requiring as it does the Lieutenant Governor's proclamation for that purpose, and I understand that no such proclamation was issued. In *Regina* v. *McLean & Hare*, British Columbia, in 1880, reported by one of the judges, the learned Chief Justice alluding to the Supreme Court of that province, says:

Those powers and authorities were and are no other than those possessed by the Queen's Bench in England. It would have been exceedingly important if one English case had been cited in which a judge of the Queen's Bench had sat and tried without commission, and without removal by *certiorari* or otherwise, a criminal committed by a justice of the peace to take his trial at the next Court of Oyer and Terminer. But no such case was produced from the records of several centuries, and it is believed none is producible.

The learned Chief Justice further said:

It is true one case was produced from the Ontario courts (*Whelan*

v. *The Queen*) (1) in which an attempt was made to impeach such a trial unsuccessfully. The trial was actually impeached, although an extant enactment by a competent legislature had expressly declared that a court of oyer and terminer might be presided over by a judge of the Supreme Court without commission. It is impossible to read the arguments and judgments upon this point without perceiving what the result would have been in the absence of such a statute. And there is no statute in force here. It is true the Ontario provision has been copied into a local Act here, but being matter of criminal procedure it is *extra vires* of the local legislature; and moreover it only purports to come into force from a day not yet named. All these Acts of Parliament are in effect statutory declarations that by the law of England and the provinces these commissions are necessary to confer jurisdiction, and that nothing less than an Act of parliament can render them unnecessary. The whole argument upon this point, based upon *Whelan* v. *The Queen*, which was referred to at great length by counsel for the Crown, is almost decisive in favor of the prisoners.

The learned Chief Justice concluded his judgment as follows:—

The gaoler alleges two causes for detention. One the sentence of Mr. Justice Crease, the other a warrant of commitment by Mr. Senator Cornwall J. P. The rule *nisi* was obtained on the sole ground of the invalidity of the sentence and the various informalities at the late alleged trial. With these objections we agree, and we consider that the prisoners have never been tried at all. But as to the second cause of detention, the warrant of commitment, it has not been at all impeached, and we cannot at this stage allow it to be now impeached. I think, therefore, the proper order is to remand the prisoners to be held in custody according to the exigence and tenor of the last mentioned warrant.

The case of the prisoners had been brought before the court by a rule *nisi* for a writ of *habeas corpus ad subjiciendum* for their discharge on account of the invalidity of the conviction, and they were discharged therefrom but remanded under the warrant for their commitment.

The "Ontario" statute referred to was passed before confederation by the legislature of the combined provinces, Upper and Lower Canada, and was therefore

(1) 28 U. C. Q. B. 27.

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intra vires, but that of British Columbia was after its union with Canada, and therefore was, as the learned Chief Justice, I think properly, says, *extra vires*. Such being the case there is no parliamentary dispensation of commissions in criminal cases, and as, in my opinion, the Lieutenant Governor had no power to issue them, the learned judge who tried and sentenced the prisoner had, for these reasons, no jurisdiction.

There was another point of objection raised to the jurisdiction. The venue in the margin of the indictment is "British Columbia to wit." No county, shire, division, district or place is mentioned; and there is no venue stated in the body of it. The whole province was formerly one shrievalty, but for many years past it has been divided into several court districts, and shrievalties—one of which is Kootenay. There is no sheriff of "British Columbia," and the indictment did not indicate in what bailiwick it should be preferred to a grand jury, or from what bailiwick the petit jury should be summoned. The provisions of sections 32 and 33 of the Criminal Procedure Act, 1869, are, however, very comprehensive, and, in my opinion, were intended to provide for such a case if, indeed, it be not covered by the provisions of section 21, in regard to which there might be some doubt.

Section 32 enacts that:

Every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment before the defendant has pleaded, and not afterwards, &c., and power to amend is given to the court.

Whether the power could be exercised to relate back, so as to warrant the finding of the grand jury, is a question that would admit of a discussion which I consider unnecessary here. Section 33 provides that:

If any person being arraigned upon an indictment for any indictable offence pleads thereto a plea of "not guilty," he shall by such plea, without further form, be deemed to have put himself upon the

country for trial, and the court may, in the usual manner, order a jury for the trial of such person accordingly.

The provisions of the three sections would certainly seem to cover every possible objection, and I am inclined to the opinion that the objection being apparent on the face of the indictment the party might, under section 32, have demurred; and if the venue was wrongly stated, the question as to the power of amendment could then have been raised. That course was not taken, and it is not now necessary to consider the matter. And as the result does not depend upon any decision I might arrive at, I think it unnecessary to refer further to that objection.

Another as to the polling of the jury was submitted; but it would be of no practical service were I to consider it, as my doing so will not affect the decision. I may say, however, that I consider such an objection is altogether for a court of error to decide. It does not, in my opinion, affect the jurisdiction, and therefore is not in my province to consider.

For the reasons I have given as to the first point referred to, I think there was no jurisdiction to try the prisoner at Victoria; and that the learned judge who presided had no jurisdiction to try the prisoner in the absence of any legislative authority, or a commission from the Governor General, and, therefore, that the trial was a nullity, and as if the prisoner had never been tried. The prisoner is shown by the return and certificate of the sheriff to be detained solely on the calendar of the Assize Court containing the sentence of death, and the formal sentence, and a remand dated the 27th of February last, the prisoner having been brought before the court sitting in error, and the sentence having been unrevoked. No warrant of commitment or other cause of detention was produced or shown in this case. And, as in my opinion the trial was a nullity,

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and the sentence therefore illegal, no other course is, I think, open to me but to order the discharge of the prisoner, and to adopt the necessary proceedings therefor. It is the bounden duty of a judge to declare the law as he finds it, and believes it to be, regardless of consequences and all other considerations.

Pursuant to the order of the learned judge a writ of *habeas corpus* was issued out and served upon the sheriff. Such writ was in the form following :—

CANADA, }
To wit: }

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of Vancouver Island, in the Province of British Columbia.

GREETING :

We command you that you have the body of Robert Evan Sproule detained in our prison, under your custody (as it is said) under safe and sure conduct, together with the day and cause of his being taken, by whatsoever name he may be called in the same, before the Honorable Mr. Justice Henry, one of the judges of our Supreme Court of Canada, at his chambers at the city of Ottawa immediately after the receipt of this writ, to do and receive those things which our said judge shall then and there consider of him in this behalf; and have you then there this writ.

Witness, the Honorable Sir William Johnstone Ritchie, Knight, Chief Justice of our said Supreme Court of Canada, this twenty-fifth day of June, one thousand eight hundred and eighty-six.

(Signed) ROBERT CASSELS,
Registrar of the Supreme Court of Canada.

Per statutem tricesimo primo Caroli secundi regis ; and under the Supreme and Exchequer Court Act of the

Parliament of Canada, thirty-eight Victoria, chapter eleven ; and the Act of the Parliament of Canada, thirty-nine Victoria, chapter twenty-six.

(Signed) W. A. HENRY,
A Judge of the Supreme Court of Canada.

To this writ the sheriff made the following return:

"The within named Robert Evan Sproule was convicted and sentenced to death at the last Victoria assizes for the crime of wilful murder, and the conviction and sentence was afterwards unanimously affirmed on writ of error by the Supreme Court of British Columbia in full bench.

"I hold the prisoner accordingly, and humbly submit that such affirmed conviction and sentence is paramount to the within writ.

"I have not received or been tendered any expenses of the conveyance of the prisoner.

"For the above reasons I respectfully decline to produce the prisoner.

"The answer of James Eliphalet McMillan, the sheriff for Vancouver Island, to the within writ.

"Victoria B.C., 19th July, 1886."

The prisoner's counsel then applied to His Lordship for an order for the prisoner's discharge, which order, after argument, was granted. His Lordship delivered the following judgment on this application :

HENRY J.—This matter came before me under an order made by me in May last on a petition of Sproule, setting forth that he had been illegally convicted of murder at British Columbia, and was under sentence of execution. The order was returnable on the twenty-fifth day of May last, and was directed to the sheriff of Vancouver Island, in whose custody, under the conviction and sentence, the prisoner then was. It called upon him to show cause why a writ of *habeas corpus*

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should not issue to bring up the body of the prisoner, and why, in the event of the order being made absolute, he should not be discharged without the writ being absolutely issued, and without the prisoner being personally brought before me. The order was duly served on the sheriff of Vancouver Island, and on the attorney-general of British Columbia. The sheriff returned the whole of the proceedings in the prosecution, including a copy of the conviction and sentence. The proceedings having been returned before me, and the Crown having been represented by Messrs. Burbidge and Gormully, and the prisoner by Messrs. McCarthy and Davie, at the hearing objections were raised on the part of the prisoner to the jurisdiction of the tribunal by which he was tried and convicted. The objections were argued, and answered on behalf of the Crown, and upon two of them I decided and gave judgment in favor of the prisoner, holding that the tribunal had not jurisdiction, and that the prisoner was entitled to his discharge. The argument was confined to the objections so raised on the part of the prisoner.

After my decision, I heard counsel on the part of the Crown and the prisoner, as to the proper course to be pursued for giving effect to my judgment, the counsel for the prisoner claiming that as the order to show cause was in the alternative, and as counsel appeared, were heard, and showed cause, and took no exception to the terms of the order on the argument, the prisoner was entitled to an order absolute for his discharge. This course was objected to by the counsel for the Crown, and after deliberation I decided to grant an order for a writ of *habeas corpus* to bring the prisoner before me, so that he could be by me discharged. I gave no opinion or decision as to the right of a judge, under the circumstances, to make an order absolute for

the discharge of the prisoner, but rather yielded to the desire of the counsel for the Crown to have the prisoner brought before me.

An order for the issue of the writ was therefore made by me on the 25th of June last past, and the writ, directed to the sheriff of Vancouver Island, was duly issued on the same day.

The writ was served on the sheriff in the early part of July last past, but not returned until the 19th of that month. In fact, it is not returned at all, for although sent back to the registrar of this court, and purporting to be a return of the sheriff, the endorsement thereon bears no signature. Neither does it appear to be in the handwriting of the sheriff. I have compared the writing with his signature to some of the authenticated documents on file in this case, and I have found little difficulty in concluding the indorsement in ques- not to be of his proper handwriting, and there is no affidavit verifying it to be his return, or that it was made by his authority. The endorsement is dated the 19th of July, 1886. Whoever wrote that endorsement seems to be of opinion that a sheriff—a Queen's officer —can refuse to execute the Queen's writ, and usurp judicial authority to decide as to the validity of the writ. Such an assumption by a sheriff is a contempt of legal authority and cannot be permitted. I am, therefore, strongly inclined to the opinion that the endorsement is not that of the subordinate officer, to whom the writ was directed, and if proceeded against for contempt he would, in all probability, be found to deny that he authorized it. It was his duty, under any circumstances, to execute the writ and make a proper return of and to it. At present I will only add, that hereafter it may be found that subordinate officers, such as sheriffs, cannot treat the writ of *habeas corpus* duly issued with contempt. The writ required the sheriff to produce the body of

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the prisoner and he has failed to obey it and must bear the consequences.

On the second instant, pursuant to notice to the attorney general, an order absolute was again moved for by Mr McIntyre, counsel for the prisoner, and Mr. Burbidge Q. C. and Mr. Sinclair were heard for the Crown in opposition. It was contended by the latter gentlemen that inasmuch as a writ of *habeas corpus* was issued the order could not be made, and that further proceedings can be taken only by means to enforce its execution, and that as that course, that is by the issue of the *habeas corpus*, had been adopted, no other was available.

I have carefully reviewed the authorities furnished by the counsel on each side and shall briefly give my views.

It is said in Addison on Torts (1) that:

The validity of the commitment may be tried on moving for a rule to show cause why a *habeas corpus* should not issue and why, in the event of the rule being made absolute, the prisoner should not be discharged without the writ actually issuing or the prisoner being personally brought before the court.

And the case of *Eggington* (2) is cited.

The counsel who showed cause in that case said: "It "may be questioned whether the rule in this form can "be made *in invitos*—there has been no consent." To which Lord Campbell C.J. replied: "I have repeatedly "granted it in vacation in this form without consent, "in order to avoid the necessity of bringing up the "party." Other authorities sustain the same course.

The constitution of the Supreme Court in British Columbia is founded on a proclamation of the Lieutenant-Governor, under a statute, and his commission. The proclamation provides:

That the Supreme Court of civil justice of British Columbia shall have complete cognizance of all pleas whatsoever, and shall have

(1) At page 625. (2) 2 E. & B. 734.

jurisdiction in all cases, civil as well as criminal, arising within the colony of British Columbia.

The unlimited jurisdiction thus given to the court includes the issuing of writs of *habeas corpus ad subjiciendum* and the discharge of prisoners illegally imprisoned, and in the performance of that part of their official duty the judges of the court have authority to pursue the practice of the courts and judges in England; and if the judges in the latter country have established the practice of ordering the discharge of a prisoner without requiring him to be brought personally before them, the judges of British Columbia are, in my opinion, at liberty to pursue the same course; and the same power is given to a judge of this court.

I have considered the objection, that having ordered the issue of the *habeas corpus* I have no power to adopt the other means now sought for the discharge of the prisoner; but no case has been cited or argument advanced in favor of that proposition; and I can see no reason why, if one alternative course has failed through the negligence or improper conduct of the sheriff, the other should not be adopted.

I have, therefore, decided to make an order for the discharge of the prisoner.

The Attorney General of British Columbia then applied to the Supreme Court of Canada to have the writ of *habeas corpus*, and all proceedings thereunder, quashed as having been issued improvidently.

A special session of the court was called to hear the application.

Robinson Q.C. and the Attorney General of British Columbia (*Gormully* with them) supported the motion, and *McCarthy Q.C.* and *Theodore Davie* (*A. F. McIntyre* with them) appeared for the prisoner.

A preliminary objection was taken by the counsel for the prisoner that the application should not be heard in

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his absence.

Robinson Q.C. on this point.—I always understood the rule to be that the presence of the prisoner was only necessary when the court was about to deal with the conviction or with the record. In cases before the Privy Council the prisoner is never present. See *The Queen* v *Murphy* (1) and *The Queen* v. *Coote* (2).

McCarthy Q.C.—The court is bound to protect the prisoner, and will not hear an adverse motion behind his back. If the court has power to hear the application it must have power to bring the prisoner here. The prisoner has a right to be present in every matter affecting his discharge. See *Re Boucher* (3); *Ex parte Martins* (4); *Eggington's case* (5).

The court having overruled the objection, the counsel for the prisoner asked for an adjournment until the next morning that they might consult as to whether or not they should appear under the circumstances. The argument was, however, allowed to proceed, counsel for the prisoner to be considered as only watching the case for the present.

Robinson Q.C. and the Attorney General of British Columbia for the Crown.—The first question to be argued is: What authority is there for this writ to issue? Section 51 of the Supreme and Exchequer Court Act confers the jurisdiction in *habeas corpus* on the judges of this court, and we contend that that section constitutes a court of criminal jurisdiction, and is, therefore, *ultra vires* of the Dominion. See *The Queen* v. *St. Denis* (6), where this question is incidentally considered by Chief Justice Cameron.

Then, what is the "concurrent" jurisdiction that is conferred by this section? When the act was passed

(1) 2 P. C. 535.
(2) 4 P. C. 599.
(3) Cassel's Dig. 181.
(4) 9 Dowl. 194.
(5) 2 E. & B. 717.
(6) 8 Ont. P. R. 17.

there was, practically, no communication between the capital of the Dominion and the province of British Columbia. Then, was it intended to do more than to give this jurisdiction to the judges of the Exchequer Court, and that only when they were in the province in which the writ was required? "Concurrent" means concurrent in territory. It cannot mean concurrent in jurisdiction because that is different in the different provinces.

Again, we say that there was no jurisdiction to issue the writ in this case, because it can only issue to inquire into the cause of commitment in a criminal case under an act of the Parliament of Canada. In this case the prisoner was convicted of the crime of murder, an offence under the common law, and not an offence under an act of the Parliament of Canada.

If then as we contend, this writ should not have been issued, is there any authority in this court to quash it?

The writ has been issued under the seal of the court and tested in the name of the Chief Justice, and was, therefore, the process of the court, and there is an inherent right in this court, in common with all courts, to exercise control over its own process. See Abbott's National Dig. (1); *Robinson* v. *Burbidge* (2) citing the remarks of Parke B. in *Witham* v. *Lynch* (3).

This explains why no appeal is given when the writ is granted. When the writ is refused the appeal must be expressly given, but when it is granted the power of the court over its own process renders an appeal unnecessary.

The following authorities were cited on this point, *Dawkins* v. *Prince Edward of Saxe Weimar* (4); *Sea-*

(1) Vol. 2 p. 152, and cases there cited.
(2) 1 L. M. & P. 99.
(3) 1 Ex. 399.
(4) 1 Q. B. D. 499.

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ton v. *Grant* (1); *Edmunds* v. *The Atty. Gen.* (2); and 5 Fisher's Dig. (3), where most of the cases are collected.

It is clear that the learned judge had no power to order the prisoner's discharge. If the return to the writ was insufficient, he should have left the prisoner to his remedy by attachment against the sheriff, in which case the matter would have come before the full court.

McCarthy Q.C. and *Theodore Davie* for the prisoner.

This is, in effect, an appeal from the decision of Mr. Justice Henry granting the writ, and the court has no jurisdiction to hear it.

It is argued that section 51 is unconstitutional, but we think it cannot be denied that the Parliament of Canada can create courts for the administration of criminal law. See *The Picton Case* (4).

The jurisdiction in *habeas corpus* matters is this—the power is given to the judge, and he is thereby constituted a court altogether distinct from the Supreme Court of Canada, just as he was under the Election Act. *Valin* v. *Langlois* (5). The effect of this may be that the judge should not have used the writ of the court, but the order of discharge is valid.

The argument that this power is only to be exercised by the judges of the Exchequer Court would support the proposition just advanced, because, if a judge is out of Ottawa, he cannot issue the writ under the seal of the court. But we do not concur in this view. The writ of *habeas corpus* should be open to everybody in Canada, but if it can only be issued when the Exchequer Court is sitting, it will, practically, be open only to the people of Ottawa.

The contention that the jurisdiction can be exercised only in case of an offence created by an act of the Par-

(1) L. R. 2 Ch. 459.
(2) 47 L. J. Ch. 345.
(3) Last ed. p. 1739.
(4) 4 Can. S. C. R. 648.
(5) 3 Can. S. C. R. 1.

liament of Canada is untenable. It is a commitment under an act of the Parliament of Canada that forms the basis of the inquiry, and the case is within it. All the proceedings here were under the "Indictable Offences Act."

Even if we are wrong in this, section 129 of the British North America Act makes all common law offences offences under the laws of Canada.

The judges of this court would have jurisdiction in *habeas corpus* matters without express authority. See *ex parte Bollman* (1).

But no matter how erroneous the action of the learned judge in granting this writ may have been, this court has no power to interfere. No authority can be produced to show that an order to discharge a prisoner on *habeas corpus* can be reversed. On the contrary *The Queen* v. *Weil* (2); *The Mayor, &c.* v. *Brown* (3), and *The Attorney General* v. *Sillem* (4), are all authorities to show that this proceeding is unwarranted. See also, *Carus Wilson's Case* (5); *The Canadian Prisoner's Case* (6), and *In re Padstow Total Loss Association* (7).

Robinson Q. C. in reply cited Bishop on Criminal Procedure (8); *Ex parte Tom Tong* (9); *Re Stretton* (10).

Sir W. J. RITCHIE C. J.—The first question to be determined in this case is as to the right of this court to inquire into the propriety of the issue of the writ of *habeas corpus* and its power to quash the writ if improvidently issued.

This writ having been issued out of this court, under the seal of the court, and tested in the name of the Chief Justice (and I know of no other way in which the writ

(1) 4 Cranch 75.
(2) 9 Q. B. D. 701.
(3) 2 App. Cas. 168.
(4) 10 H. L. Cas. 704.
(5) 7 Q. B. 984.
(6) 9 A. & E. 731.
(7) 20 Ch. D. 137.
(8) Sec. 117.
(9) 108 U. S. R. 556.
(10) 14 M. & W. 801.

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of *habeas corpus* could be issued on the fiat of a judge of this court), was a proceeding in this court, and every superior court, which this court unquestionably is, has incident to its jurisdiction an inherent right to inquire into and judge of the regularity or abuse of its process.

In *Witham* v. *Lynch* (1) Parke B. remarks:

> Whenever a jurisdiction is conferred by statute on a judge of the superior courts it is subject to appeal to the court unless there is something in the context leading to a contrary conclusion.

And in *Robinson* v. *Burbidge* (2) Maule J. cited the above remarks of Parke B. with approval.

That this is a matter pertaining to the court, and one with which it can deal, and not a jurisdiction conferred on a judge of the court outside of and independent of the court, and that the judge has no independent jurisdiction unconnected therewith, is, I think, very obvious from the fact that he can only act as a judge of this court through the instrumentality of the writ of this court, obedience to which could not be enforced by authority of the judge but by the court, which alone could issue an attachment for contempt of the court in not obeying its process, the contempt being contempt of the process of the court, not of the fiat of the judge authorizing its issue, and therefore the impossibility of enforcing obedience to the process of the court without the assistance of the court seems to me to prove, conclusively, that the matter is within the jurisdiction of the court.

The learned judge, by indorsement on this writ, declares that the writ was issued, "*per statutem tricesimo primo Caroli Secundi Regis*," and under the Supreme and Exchequer Court Act of the Parliament of Canada 38 Vic. ch. 11, and the act of the Parliament of Canada, 39 Vic. ch. 26. Now this was certainly wrong, because it is clear beyond question that the

(1) 1 Ex. 399. (2) 1 L. M. & P. 99.

31st of Car. 2 has nothing to do with a case like the present and does not authorize the issue of a *habeas corpus* in such a case as this. The statute of 31 Car. 2 was to provide that persons committed for criminal, or supposed criminal, matters in such cases where by law they were bailable should be left to bail speedily. Abbott C. J., in 6 D. & R. 209, says the object of the *habeas corpus* Act, 31 Car. 2 cap. 2, was to provide against delays in bringing to trial such subjects of the king as were committed to custody for criminal or supposed criminal matters, and therefore if this writ could be issued out at all it must be issued at common law.

Now the sixth question proposed to the judges by the House of Lords, see Bacon's Ab. *habeas corpus*, vol. 4, p. 493, and Wilmot's Opinions and Judgments p. 777, and the answers thereto, show conclusively that a judge in vacation has no power to enforce obedience to writs of *habeas corpus* issued at common law, and I think it may be taken to be equally clear that there is no such power in cases within 31 Car. 2. The writ of *habeas corpus* is not the writ of a judge on whose fiat it issues. It is a high prerogative writ which issues out of the Queen's superior courts, and, in my opinion, is necessarily subject to the control of those courts, not necessarily by way of appeal, but by virtue of the power possessed by the court over the process of the court. The course of proceeding to be observed in obtaining an attachment, shows that it is matter with which the court alone can deal; it is thus laid down. The course of proceeding to obtain an attachment which issues to punish disobedience to the Queen's writ is by motion to the court for a rule for an attachment; on being granted a writ of attachment issues. On the sheriff returning *cepi corpus*, a motion is of course for a *habeas corpus* to produce the defendant in court; it is then moved that the defendant be sworn

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to answer interrogatories; if he does not give bail he is returned to prison; interrogatories which contain the charge against the prisoner are filed, and the defendant is examined on them before a master, and it said in the English books of practice the examination is referred to the Queen's coroner and attorney, on whose report the court sentences the defendant to fine or imprisonment or discharges him.

It has been urged, however, that by section 51 of the Supreme Court Act, the individual judges of this court were thereby created so many separate and independent courts and could, and it was said should, issue writs of *habeas corpus*, not out of the court, but in their individual names, and for disobedience to which the judge issuing the writ had power to issue an attachment in his own name. There is not, in my opinion, the slightest pretence for this contention. There is nothing whatever in the statute to indicate that the legislature contemplated the erection of six additional courts, and the power conferred is entirely inconsistent with any such contention. In such a case the judge of this court would not have equal and concurrent jurisdiction with the judges of British Columbia, but a larger and more extensive jurisdiction, and would be capable of doing, under this equal and concurrent jurisdiction, what no judge in British Columbia could do, namely, issue or direct the issue of a writ uncontrollable by any court, and would have the right to issue an attachment which no single judge could do in British Columbia. The power conferred on the judges of this court in cases where they are entitled to order the issue of a writ of *habeas corpus* is the same, in my opinion, that the judges in British Columbia have, that is to say, as the judges there direct the issue of the writ out of the Supreme Court, tested in the name of the Chief Justice of that court, under the seal of the court and subject to the con-

trol of the court if improvidently issued, and for disobedience to which the remedy would be in the court by reason of the disobedience being a contempt of court out of which the writ issues, so the judge of this court granting his fiat for the issue of a writ out of this court, as was done in this case, such writ is necessarily subject to the like control of this court if improvidently issued.

It was stated on the argument of this case that no case could be found where the writ of *habeas corpus*, issued in vacation, having been improvidently issued, was for that reason quashed, but it will be found in the matter of *John Crawford* (1) that a *habeas corpus* having issued directed to the keeper of Her Majesty's jail at Castle Ruchen, in the Isle of Man, and his deputy, commanding him to have the body of John Crawford before this court, at Westminster, to undergo and receive, &c. Peacock at this term obtained a rule calling upon the prosecutor to show cause why the writ should not be quashed on the ground that the same had issued improvidently. Patteson J. observed, just what is applicable to this case, "then the question here being in effect whether the writ, if it had never issued, ought to go, we must make the rule absolute for setting aside the writ." So in this case, if we think the writ ought never to have been issued, then we should quash it. And I may remark, inasmuch as a judge in British Columbia has no doubt the right to issue a writ returnable in term as well as in vacation, as at present advised, I cannot see any reason whatever why the judges of this court, having concurrent and equal jurisdiction with the judges of British Columbia, might not make the writs they authorize to be issued, returnable in this court in term as well as immediately, but it is not necessary for the purposes of this case to determine that point.

Assuming then that we have the power to entertain

(1) 13 Q. B. 612.

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this application an objection has been taken that we should not do so in the absence of the prisoner. I do not view this as an appeal, in the ordinary sense, from the decision of the judge on the return to the writ of *habeas corpus*, but simply as an application to set aside the writ on the ground that it never should have issued by reason of the want of power or jurisdiction in the learned judge to interfere by *habeas corpus* at all in a case such as this, with the judgment and sentence of a superior court of competent criminal jurisdiction.

We are not called upon to say whether the facts submitted to the learned judge justified the issue of the writ and subsequent proceedings thereon. If they did not then the learned judge should have refused the application for the writ. We are, therefore, now dealing with the question as on the application for the writ as suggested by Patteson J., and are called upon to determine, in effect, if the writ had never issued whether it ought to go, and in this view the question of the right of the prisoner to be present could not arise, for on such application, or until the writ was actually issued and returned, the prisoner could not be present, and he does not appear to have been present in the case of Crawford, nor, so far as I am aware, is he ever present before the Privy Council on appeals.

It has also been contended that the 51st section is *ultra vires*. On this point I express no opinion, as in the view I take of the case it is unnecessary for the determination of this case to do so.

It is also contended that, assuming the judges of this court have power to issue writs of *habeas corpus*, the right to do so is limited to an inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada, and that this being a case of murder it is a case at common law and not a criminal case under any act of the Parliament of Canada. Why

this limitation was imposed, and why the same language was not used as in the 101st section of the British North America Act, which gives power to establish this court of appeal and other courts for the better administration of the laws of Canada, is not very apparent, but the legislature having limited the jurisdiction we are bound to give effect to that limitation, and, as at present advised, I think the objection must prevail and therefore my learned brother had no authority to issue this writ. If so, then most certainly the writ of this court was improvidently issued.

But supposing I should not be right in this view, I am then brought face to face with the real, serious substantial question, and it is a most serious substantial question, namely: Was my learned brother, on the materials before him, justified in issuing the writ and making the order discharging this prisoner, or, on the other hand, did the materials before him clearly show that the writ ought never to have been issued and the order for discharge should not have been made, and therefore that the writ was improvidently issued and, as a consequence, should, with the proceedings thereon, be quashed? The two grounds on which the learned judge granted the writ and subsequently made an order discharging the prisoner were: First, that the order changing the place of trial was void and therefore there was no jurisdiction to try the prisoner at Victoria; and secondly, that the court of oyer and terminer could only sit under and by virtue of a commission which the Lieutenant Governor of British Columbia had no power to issue. Such a commission never having been issued by the Governor General there was no authority for holding the court. The learned judge says:

For the reasons I have given as to the first point (that is the order to change the place of trial) referred to, I think there was no jurisdiction to try the prisoner at Victoria; and that the learned judge

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who presided had no jurisdiction to try the prisoner in the absence of any legislative authority or a commission from the Governor General, and, therefore, that the trial was a nullity and as if the prisoner had never been tried. The prisoner is shown by the return and certificate of the sheriff to be detained solely on the calendar of the assize court containing the sentence of death and the formal sentence and a remand dated the 27th of February last, the prisoner having been brought before the court sitting in error, and the sentence having been unrevoked.

No warrant of commitment or other cause of detention was produced or shown in this case. And, as in my opinion the trial was a nullity and the sentence therefore illegal, no other course is, I think, open to me but to order the discharge of the prisoner and to adopt the necessary proceedings therefor.

In considering this case it must be borne in mind that the writ of *habeas corpus* does not issue as a matter of course upon application in the first instance, but must be founded upon an affidavit upon which the court is to exercise a discretion in issuing it or not, that is, a legal discretion justified by the facts presented.

The first inquiry must be as to the jurisdiction of the Supreme Court of British Columbia and the Court of oyer and terminer and general gaol delivery. The Supreme Court of British Columbia is established under a proclamation having the force of law in Her Majesty's colony of British Columbia, whereby it is declared that "the said court shall be a court of record by the "name or style of the Supreme Court of civil justice in "British Columbia." The proclamation designates the seal the court shall use, and declares that:

The said Supreme Court of civil justice of British Columbia shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said colony of British Columbia.

Here then we have a superior criminal court established, of the highest character, clothed with all the powers and jurisdiction civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, within the colony, without

limitation or stint, powers as full and ample as those known to the common law, and possessed by the superior courts of England, and to which court, as necessary and essential part of the jurisdiction, belongs the right to supervise inferior courts, and entertain writs of error from the courts of oyer and terminer and general goal delivery when duly allowed by Her Majesty's attorney general. As to the courts of assize, *nisi prius*, oyer and terminer and general goal delivery, I am of opinion that these courts are superior courts of record, and, as clearly established by the case of *ex parte Fernandez* (1), courts of very high degree, dignity and importance. By 42 Vic cap. 12, 1879 (B. C.), it is enacted that courts of assize and *nisi prius*, oyer and terminer and general goal delivery, may be held with or without commissions, at such time and place as the Lieutenant Governor may direct, and when no commissions are issued the said courts, or either of them, shall be presided over by the chief justice or one of the judges of the said Supreme Court. This Act was to come into force on any day named in a proclamation named by the Lieutenant Governor to that effect published in the *Royal Gazette*. The act was brought into force by authority of a proclamation in the *British Columbia Gazette* on the 24th July, 1880, and was therefore in force long before the trial in this case. By 46 Vic. cap. 15 (B. C.), the jury district from which jurors are to be selected and summoned for the trial of civil and criminal cases at the towns and places where courts of assize, *nisi prius*, oyer and terminer and general jail delivery may be held, the following sections of the province and electoral districts and polling divisions established at the time of the passing of this act shall be districts, *inter alia*, Victoria district, the limits of which are set out in the Act, and grand and petit jurors

(1) 10 C. B. N. S. 3.

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required for or by the order of any court or judge thereof shall be summoned only from the district as established by this act wherein the said court is to be held. On the 9th March, 1885, an act of British Columbia was passed, which was in force at the time of this trial, to fix the times for holding courts of assize and *nisi prius* and oyer and terminer and general gaol delivery, *inter alia*, at the city of Victoria, on the first Monday in the month of April, and the fourth Monday in the month of November in each year, with a proviso that it should be lawful for the Lieutenant Governor in council to appoint times for holding additional and other courts of assize and *nisi prius*, oyer and terminer and general gaol delivery at any of the places aforesaid, and at other places when and so often as he should deem it expedient to do so; so that it is abundantly clear that a court of oyer and terminer and general gaol delivery could be held without a commission at the time fixed by law for holding the same, and that the fixing of the time by the Lieutenant Governor in council was for the holding only of additional and other courts of assize and *nisi prius*, oyer and terminer and general gaol delivery at any of the places named in the Act, and at other places when and so often as he should deem it expedient so to do. And this court at which the trial took place was held at the time and place fixed by the statute. There being then no necessity for a commission in this case, the issuing of a commission by the Lieutenant Governor, if unnecessary, could not in any way interfere with the right to hold the court at the time and place named in the statute. It might possibly have helped the jurisdiction of the court, it could not possibly have interfered with it. All this, however, as to which I humbly conceive there can be no doubt, renders it wholly unnecessary to discuss or determine whether the power to issue a commission such as that issued by the Lieu-

tenant Governor belongs to the Lieutenant Governor of the province or to the Governor General of the Dominion exclusively. I will not discuss this question as it is wholly unnecessary to the determination of this case, but I wish it to be distinctly understood that my not discussing and determining it is not to be construed as throwing any, even the slightest, doubt on the validity of a commission so issued. I simply express no opinion on the question as not being necessary to the determination of this case.

Here then we have a supreme court and courts of oyer and terminer and general gaol delivery having general, full, and ample power and jurisdiction of the largest character for the administration of the criminal jurisprudence of and in the Province of British Columbia. It is only necessary now to refer to one other statute, namely, the Dominion Act 32 and 33 Vic. cap. 29, by which it is provided:

Sec. II.—Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be, indicted may at any term or sitting thereof, and any judge who might hold or sit in such court may at any other time order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county or place within the same province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused as the court or judge may think proper to prescribe.

The record of the proceedings in the courts of oyer and terminer and general gaol delivery and of the Supreme Court of British Columbia in error was brought before the learned judge both on the part of the prisoner and on the part of the Crown and the sheriff. The learned judge says:

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It is proper to explain that a copy of the record was submitted and referred to in the affidavit on behalf of the prisoner when the order *nisi* was applied for, and another copy was returned by the sheriff of Vancouver and put in by the Crown when showing cause against the order. It was, therefore, by both parties made a part of the case submitted for my decision.

And the cause of the prisoner's detention under the sentence and judgment of those courts was also shown to the learned judge by the affidavit of the sheriff, and also by his return to the writ of *habeas corpus*, and the learned judge, it is true, thinks there was no return, because the document returned with the writ by the sheriff, though purporting to be the sheriff's return, was not signed by him, and, the learned judge thinks, was not in his handwriting, he having compared the writing with the sheriff's writing in another document before him which he thinks it does not resemble. The return does not appear on the proceedings to have been in any way challenged or impugned, or any contention made that it was not transmitted by the sheriff, or by his authority, as and for a regular and proper return, and, in my opinion, it was a good and sufficient return; but whether so or not is wholly immaterial, inasmuch as the learned judge had before him the record of the trial, conviction and sentence of a criminal court of competent jurisdiction, with the record of the Superior Court in error affirming and sustaining such conviction and sentence, and the affidavit of the sheriff which showed that the prisoner was held in custody under and by virtue of such conviction and sentence. With these materials before him should this writ have issued? I think not; when it appeared by the records of courts of competent criminal jurisdiction, courts having jurisdiction over the person and over the offence with which he was charged, that he had been tried, convicted and sentenced, and was held under such sentence, the learned judge should have refused

to grant the writ. But the learned judge has held that the court which tried the prisoner was no court at all. I have shown, I think conclusively, that it was a properly constituted court.

He also held that he could go outside the record to show that the case was not triable in Victoria. I venture to propound without fear of successful contradiction, that by the law of England and of this Dominion, where the principles of the common law prevail, that if the records of a superior court contains the recital of facts requisite to confer jurisdiction, which the records in this case did, it is conclusive and cannot be contradicted by extrinsic evidence; and if the superior courts have jurisdiction over the subject-matter and the person, as the court of oyer and terminer and general gaol delivery and the Supreme Court of British Columbia had in this case, the records of their judgments and sentences are final and conclusive, unerring verity, and the law will not, in such a case, allow the record to be contradicted.

It is said there were two orders for changing the venue; that the first order made no reference to any provision for expenses, and which it was alleged by reason thereof was void; on the other hand, it is said the order originally made, orally, in the presence of the prisoner and his counsel, made such provision, and that this is the order which appears on the face of the record; with this discussion I think the court has nothing to do, as I think we can only look at the record and are bound by what it contains, and this record sets out that on application of the Crown made in the presence and hearing of Sproule charged with and committed to stand his trial for having, on the 1st of June, 1885, at Kootenay Lake, in the bailiwick of the sheriff of Kootenay, in the Province of British Columbia, feloniously, wilfully and of his malice aforethought, killed

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and murdered one Thomas Hammill, the Chief Justice on hearing the counsel for Sproule, and it appearing to his satisfaction that it was expedient to the ends of justice that the trial of the said Sproule for the alleged crime should be held in the city of Victoria, and Mr. Irving undertaking on behalf of the Crown to abide by such order as the judge who may preside at the trial might think just to meet the eleventh section of 32 and 33 Vic. ch. 29, such being the condition which he thought proper to prescribe, ordered in these words:

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert E. Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the court of oyer and terminer and general gaol delivery, to be holden at the said city on Monday, the 23rd day of November, 1885, and I order that the said Robert E. Sproule be removed hence to the gaol at the city of Victoria and that the keeper of the said gaol do receive the said Robert E. Sproule into his custody in the said gaol and him safely keep until he shall thence be delivered by due course of law.

(Signed) MATT. B. BEGBIE C.J.

The record then goes on to show the record of the trial, conviction and sentence, the writ of error and the errors assigned, the hearing of the parties, deliberation and the judgment of the court which was "that "there is no error either on the record or proceedings or "in the giving of the judgment on which the writ of "error was brought, therefore it is considered and "adjudged by the said court here that the judgment "aforesaid be in all things affirmed and stand in full "force and effect."

I may say, however, that the judge having power before indictment to change the place of trial he did so, and the order said to have been signed in the first instance was a good and sufficient order for that purpose, as was the order which appears on the record. The

indictment was found in the place assigned for the trial; no objection was made to the change before or after the finding of the indictment, no application was made to set aside, add to or alter the order or to quash the indictment. The indictment was pleaded to and the trial proceeded without any objection being made to the court or place or manner of the trial; no application to postpone the trial, nor any complaint made at the trial that any wrong was being done the prisoner. The court then had full jurisdiction over the prisoner and the subject-matter tried. After the trial the prisoner obtained a writ of error and assigned the alleged errors which included the very matters now alleged as grounds entitling him to a discharge under this writ of *habeas corpus*. He was heard and the court adjudged that there was no error and affirmed the judgment and sentence of the court of assize and general gaol delivery.

In this case my learned brother has cited numerous authorities to show that he had the right to go behind the record, but he frankly admits that the cases he has relied on all have reference to the records and proceedings of inferior courts. He has not been able to find a case of the record of a superior court contradicted, or its validity impugned, by extrinsic evidence. And I venture humbly, and with all respect, to suggest that the difficulty in this case has arisen from a misapprehension of what can, and what cannot, be done under a writ of *habeas corpus*, but more especially from not duly appreciating the distinction between the validity and force of records of courts of inferior, and of courts of superior, jurisdiction, but treating records of superior and inferior courts as being of the same force and effect. That this was done in this case is very obvious, for the learned judge says:

The English cases which I have cited are those before justices; but on principle I can see no difference between a judgment of an

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inferior and one of a superior court, when the question of jurisdiction is raised; nor can I see why, if the record of the former can be shown to be erroneous or false as touching the matter of jurisdiction, the other cannot be; for without jurisdiction the acts of the one must be void as well as those of the other, and therefore the rule in the one case should be the same as in the other.

From this doctrine I am constrained to dissent. I certainly did not expect to hear it contended that the record of a superior court was not to be treated as absolute verity so long as it stood unreversed. The following from Coke on Littleton, 260, I have always been taught was good law at the time it was written, and ever has been since:

Legally records are restrained to the rolls of such only as are courts of record and not the rolls of inferior, nor of any other courts, which proceed *secundum legem et consuetudinem angliam.* And the rolls being the records and memorials of the judges of the courts of record import in them such uncontrollable credit and verity as they admit no averment, plea or proof to the contrary; and if such record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself. And the reason hereof is apparent, for otherwise (as our old authors say and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record, you may read in my reports, but yet during the term wherein the judicial act is done the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct, but when that term is past then the record is the roll and admitteth no alteration, averment or proof to the contrary.

The cases which establish that in a case like the present the writ of *habeas corpus* is inapplicable are numerous. I will refer to a few only of them.

In the *Queen* v. *Lees* (1) Lord Campbell C.J. says:

A writ of *habeas corpus,* to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge after judgment, on an indictment according to the course of the common law; and even supposing it could run to St. Helena, it could only be useful as ancillary to, or accompanying, a writ of error, as it is only by writ of error that such judgment, according to the course of the common

(1) 27 L. J. N. S. 407.

law, can properly be reversed ; until the judgment be reversed the prisoner ought not to be discharged. For these reasons we think that we ought not to interfere.

It is alleged, on the part of the prisoner, that the proceedings were upon a repealed statute, and that there were errors in the judgment, and hardships and irregularities in the proceedings. If such allegations are well founded, and obstacles are found to prevent any remedy by appeal to the Privy Council, or by writ of error to this court, we apprehend that the advisers of the Crown will take the matter into their consideration, and form their judgment with respect to any alleged error, wrong or hardship, which may be brought before them ; and if any such should be established to their satisfaction, will advise the Crown to give the relief to which they may think the applicant entitled, by pardon, or mitigation of punishment. We have no authority to interfere.

Application refused.

In *ex parte Fernandez* (1) Erle C.J. says :

Now, the presumption is that all has been rightly done, and that the imprisonment has taken place in due course of law. The commitment being the act of a lawful court acting within its competency, there can be no invasion of the liberty of the subject in the sense in which the phrase is used. To issue a *habeas corpus* for the purpose of reviewing the decision of the judge, would be to my mind a gross abuse of the process. The writ would, I think, be most perniciously applied, if sought for on that ground ; witness the numerous applications, for writs of *habeas corpus* to bring into question the validity of judgments and other proceedings, which have invariably failed. That principle ought to be adhered to, unless there is reasonable ground for thinking that the commitment was void for want of setting forth in the warrant the facts which would show the offence and the jurisdiction of the judge to deal with it. I am clearly of opinion that no foundation is laid for this motion.

Willes J. :

The result is that, historically, the courts of assize, as being courts of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty and his life, do stand in the place of the ancient iters of the judges itinerant, and are a superior court, so to speak, by succession ; whilst, practically, regard being had to the powers which they exercise, they are, as to criminal matters, courts of the most

(1) 10 C. B. N. S. 37.

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extensive jurisdiction, and, as to civil causes, periodical sittings of the judges of the superior courts, or, in their necessary absence, of others thought worthy to be associated with them for trying in the country those issues of fact which can be more conveniently disposed of there than in London or Middlesex.

In *ex parte Partington* (1) Lord Denman C. J. says:

There still remains the question whether the commissioner has rightly decided that the prisoner's case was not within the act; but this was a question which he had jurisdiction to enquire into and decide; he has done so, and we are not authorized to review his decision. We by no means intimate a doubt of the propriety of that decision; we simply express no opinion upon it. It may be that there may be no court competent to review it; or it may be that by the chief judge or the Lord Chancellor the merits of the decision may be reviewed. It is clear only that we have not that power. The prisoner, therefore, must be remanded.

In *Regina* v. *Newton* (2) Lord Denman C.J. says:

The prisoner was convicted at the Central Criminal Court of unlawful wounding at the Beulah Spa, which place was stated in the indictment to be in the Parish of Lambeth, within the jurisdiction of the central criminal court. The Beulah Spa is really out of the jurisdiction of the Central Criminal Court. Affidavit being made, showing this last fact, in support of a motion for a writ of *habeas corpus* to bring up the body of the prisoner, the court, on the motion being made, refused the writ, the affidavit being in contradiction of a record.

Jarvis C.J. says:

It is sought to impeach this record. This is not the remedy to be taken. There is a record which you cannot impeach. The proper application is to the Attorney General for a writ *coram nobis*. The Attorney General has a discretion on that matter, and is not the mere slave of the public. I looked, when Attorney General, with anxiety to this part of my duty. I refused a writ of error in the case of the Mannings. The application here has been made and refused. The record stands, and the prisoner is convicted of an offence committed within this jurisdiction.

Cresswell J.:

I am of the same opinion. A record is of so high a nature that, if error in fact be assigned which contradicts it, it is ill assigned.

Crowder J.:

As long as the record stands it is quite impossible to grant a *habeas corpus* on a motion of this kind.

(1) 6 Q. B. 656. (2) 3 W. R. 419.

Brenan's Case (1) Lord Denman C.J.:

We think, however, that, the court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the court to pass the sentence to be set out, by the gaoler upon the return. We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a court of appeal without power to reverse the judgment.

No words could have more clearly intimated that the fact of a sentence having been passed by such court founds the right to detain, and that the validity or regularity of the sentence is not to be called in question. Even if that sentence is erroneous, this court cannot set it aside or inquire into its propriety or deny the effect which the law assigns to any sentence.

In the matter of *Clarke*, a case of a magistrate's order (2), Lord Denman C.J. says:

The adjudication of any competent authority deciding on facts which are necessary to give it jurisdiction is sufficient. It would be different if the affidavits tended to show that the magistrate's order was obtained by fraud, or that he was not really exercising the functions which he professed to exercise.

Patteson J.:

The only real question now is, whether affidavits are admissible to show that the statements in the order are not true. There is no case in which a party has been allowed in this way directly to contradict facts set forth in an order. All that the courts have permitted has been to allege a collateral extrinsic fact, confessing and avoiding, as it were, the disputed order. Here the object proposed is to contradict it; and there is no instance of such an attempt having been yielded to. *Brittain* v. *Kinnaird* (3) shows that a fact directly stated on a conviction is not to be controverted. Every order must show facts sufficient to give a jurisdiction; but the facts, if so shown, are not to be contested.

Wightman J.:

I think, for the reasons which have been given, that the prisoner must be remanded. No case is cited in which parties have been allowed to controvert a fact directly decided by a court of competent

(1) 10 Q. B. 502. (2) 2 Q. B. 632.
(3) 1 B. & B. 432.

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jurisdiction.

Prisoner remanded.

Dime's Case (1) shows the distinction between proceedings before a superior court and those of an inferior court.

In *Carus Wilson's case* (2) Lord Denman C.J says:

We may decide the question before us by considering the principle of the exception that runs through the whole law of *habeas corpus*, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent court. When it appears that the party has been before a court of competent jurisdiction, which court has committed him for contempt or any other cause, I think it is no longer open to this court to enter at all into the subject-matter.

* * * * * *

Suppose a party were convicted of murder, and ordered to be executed in three weeks, could we, while he was awaiting the execution of his sentence, receive a statement that he was improperly convicted, that evidence was improperly admitted, or that the offence was not murder? The security which the public has against the impunity of offenders is, that the court which tries must be considered competent to convict. We would not interfere in this way without incurring the danger of setting at large persons committed for the worst offences.

In the case of the *Sheriff of Middlesex* (3) Lord Denman C.J. says:

On the motion for a *habeas corpus* there must be an affidavit from the party applying, but the return, if it discloses a sufficient answer, puts an end to the case, and I think the production of a good warrant is a sufficient answer.

On a writ of *habeas corpus* per Littledale J.:

If the warrant returned be good on the face of it we can inquire no further.

I have not deemed it necessary to refer to the American cases cited, which though entitled to every respect are not binding on this court, and should not be followed if at variance with the English authorities by which we are bound when they are consistent, but I find, in a case in Massachusetts decided by an eminent

(1) 14 Q. B. 554. (2) 7 Q. B. 1008.
(3) 11 A. & E. 201.

jurist, formerly chief justice of Massachusetts and now a distinguished judge of the Supreme Court of the United States, a principle propounded as I believe the law to be in these words.

Per Gray J. in *Fleming* v. *Clarke* (1).

The general rule is well established that a person imprisoned under the sentence of a court having general jurisdiction of the case is not to be discharged by *habeas corpus*, but should be left to his remedy by appeal, exceptions or writ of error,

For which he cites a number of authorities.

These authorities are, to my mind, conclusive that if the prisoner has any just cause of complaint against the proceedings in this case his remedy, if any exists, cannot be obtained through the instrumentality of a writ of *habeas corpus*, for I have no hesitation in saying that a judgment of conviction and sentence of the court of oyer and terminer and general gaol delivery of British Columbia on an indictment for murder, confirmed on error by the Supreme Court of British Columbia, and standing unreversed by the Privy Council, is conclusive as to the prisoner being a convicted felon. Such a decision as this on which we are called to pass raises a conflict of authority, between the established superior courts of the country and individual judges, of a most extraordinary character; places the officer in whose custody the prisoner is, in this most anomalous and trying position, compelling him to elect to hold the prisoner under the judgment and sentence of a court of unquestionably competent criminal jurisdiction, confirmed by the unanimous decision of the full bench of the Supreme Court of the province having unrestricted jurisdiction in criminal cases, or to discharge him under the order of a single judge at chambers, it may be even of a single judge of the very court that unanimously affirmed his judgment and sentence, or a single

(1) 11 Allen 195.

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judge of this court, in direct opposition to, and defiance of, such a conviction and sentence.

A good deal has been said as to the sheriff not obeying the writ and not bringing up the prisoner.

In Comyn's Dig. *hab. cor. b.* it is said:

> If a man is in prison for any cause, except upon a conviction for any crime, or in execution, he may have an *habeas corpus cum causâ detentionis.*

But where the commitment is for treason or felony plainly expressed in the warrant the officer is not obliged by stat. 31 Car. 2 cap. 2, to make a return as directed by that statute and, *per* LeBlanc J. (1):

> It is sufficient for the officer having him in his custody to return to a writ of *habeas corpus* that a court having competent jurisdiction had inflicted such a sentence as they had authority to do and that he holds him in his custody under that sentence.

Chief Justice Robinson deals with that phase of the case in *Regina* v. *Crabbe*, (2) where he says, delivering the judgment of the court:

> We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the Quarter Sessions; and if we should grant the writ the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the Quarter Sessions, and not bring up the prisoner. If there has been anything wrong in the proceeding below, still there can be no *certiorari* after judgment; the only course is by writ of error.

From these views of the law I am not prepared to dissent. So soon then as it appeared by the record of a superior court of general criminal jurisdiction that the prisoner had been tried, convicted of a felony and sentenced by such a court, the jurisdiction of the judge, that is to say, the right of the judge to issue the writ, or discharge the prisoner, ceased.

If in the administration of the criminal jurisprudence of the Dominion the judgments of the superior courts of the provinces, and of this the Supreme Court of the

(1) 1 East 317. (2) 11 U. C. Q. B. 448.

Dominion, can be paralysed by a single judge of either of those courts in chambers, the practical effect of what is now contended for, and if, as contended, there is no redress in this or any other court of the Dominion of Canada, is it too much to say that to allow single judges by virtue of the writ of *habeas corpus* so to review, control, and, in effect, nullify the judgments of these high courts of criminal jurisdiction is subversive of all law and order? For if this writ and order could stand, it is clear that every sentence pronounced, not only by the Supreme Court of British Columbia but by all the supreme courts of criminal jurisdiction in the other provinces, would be subject to be, practically, reviewed summarily and their judgments and sentences declared invalid and of no effect, by a judge in chambers not only of this court but by a judge in chambers of the courts of the province in which the proceedings were had and the judgments and sentences pronounced.

As the judges of this court, in matters of *habeas corpus* for the purpose of inquiry into the cause of commitments in criminal cases under any Act of the Parliament of Canada, have only concurrent jurisdiction with the judges of British Columbia, if a judge of this court has jurisdiction in this matter, a single judge in British Columbia can, on *habeas corpus*, not only review the proceedings of the court of oyer and terminer and general gaol delivery and of the Supreme Court of British Columbia, and discharge a prisoner convicted and sentenced by those courts, but, if on error there had been a difference of opinion in the Supreme Court of British Columbia and an appeal had been taken to this court, and this court had affirmed the judgment and sentence of the courts in British Columbia, on the grounds acted on by my learned brother, the dissentient judge in British Columbia could, on *habeas corpus*, have treated the whole proceedings as a nullity, and, notwithstanding

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the unreserved judgments of all these courts, prevented these judgments from having any effect, although they stood on the records of the court unreversed, by simply ordering the prisoner to be discharged out of custody. Nor indeed, if the judgment of this court was carried to the Privy Council and there affirmed, can I see any reason why, on the principles acted on in this case, a single judge in British Columbia or of this court should not go behind the record, and by extrinsic evidence, pronounce the proceedings without jurisdiction. It seems to me only necessary to state the logical result and effect of the exercise of such a jurisdiction, either by the individual judges of British Columbia or of this court, to produce the conviction that the principles of the common law under which this writ issued could never be found to sanction such a proceeding. At any rate, I have an abiding confidence that the laws of this Dominion have not entrusted to any single judge, however high his legal status, a jurisdiction fraught with such dreadful consequences. Much as I appreciate the value of the writ of *habeas corpus*, and no man can do so more than I do, if by its instrumentality such an exercise of jurisdiction can be accomplished, I should feel that instead of its being a blessing, as I verily think it is, it would be the exact opposite. And I can only add in conclusion that if the proceeding of issuing this writ and the order discharging the prisoner from the judgment and sentence of the court of oyer and terminer in British Columbia, affirmed on a writ of error by the Supreme Court of British Columbia, and which writ, if a judge of this court could issue it, might have been issued by a judge of the court of British Columbia (thereby, in effect, reversing the judgment of both those courts and that, too, on the very same point now in controversy) is so final and conclusive that such writ and order cannot be

dealt with by this or any other court in the Dominion of Canada, would it be too much to say that the administration of justice in this Dominion of Canada is in a truly deplorable condition?

The record and materials before the learned judge having not only shown a proper legal trial, conviction, and sentence by a court of general criminal jurisdiction, but disclosed a valid ground of detention, the application for a writ, therefore, should have been refused. As the writ should not have issued, then, as in *Crawford's case*, it was improvidently issued and should be quashed, and it follows as a necessary consequence that if my learned brother ought not to have issued the writ clearly the order for the prisoner's discharge should not have been made.

STRONG J.—The presence in court of the prisoner for the purposes of this motion was, I consider, for the reasons which have been stated, unnecessary. And the other preliminary objection that the court has no jurisdiction to control its own process by quashing a writ of *habeas corpus* issued under section 51 of the Supreme and Exchequer Act of 1875, is, in my opinion for reasons which I will state hereafter, wholly untenable. That the writ was improvidently issued, the matter upon which it was granted having been in law insufficient, is also a conclusion which I have arrived at for reasons and upon authorities which I will now proceed to state.

In the first place there was no jurisdiction to issue the writ under section 51, the prisoner not having been committed in a "criminal case" under any Act of the Parliament of Canada. The offence of murder is not a statutory but a common law crime, in as much as the first section of the statute 32 and 33 Vic. ch. 20, does not apply to the offence but to its punishment.

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In the case of *Potvin* who had been been committed on a charge of murder under a coroner's warrant, and for whose discharge an application for a writ of *habeas corpus*, was made to me, I had to consider this identical question, and I then formed and acted upon the same opinion as that just enunciated.

If any proposition is conclusively established by authorities having the support of the soundest reasons, it is that, after a conviction for felony by a court having general jurisdiction of the offence charged, a *habeas corpus* is an inappropriate remedy, the proper course to be adopted is such a case, being that to which the prisoner in the present case first had recourse, viz.: a writ of error. The anomalous character of such an interference with the due course of justice, in intercepting the execution of the judgment of a court of competent jurisdiction, and by which a single judge in chambers might reduce to a dead letter the considered judgment of the highest court of error, would to my mind be itself sufficient even without authority to induce a strong presumption that such a state of the law could not possibly exist.

The authorities are however abundant, and decisive against such a contention. The strong language used by Williams, J. in *Regina* v. *Newton* (1) seems well warranted, and without attempting any minute examination of the authorities, it is sufficient to say that the case of *Regina* v. *Newton* is entirely in accordance with other well considered cases particularly with those of *Regina* v. *Suddis* (2); *ex parte Lees* (3); *Bethell's Case* (4); *Re Carlile* (5); *Re Crabbe* (6); and *ex parte Watkins* (7), (a case in the Supreme Court of the United States). When there has been a conviction

(1) 16 C. B. 103.
(2) 1 East 306.
(3) E. B. & E. 828.
(4) 1 Salk. 347.
(5) 2 B. & Ad. 362.
(6) 11 U. C. Q. B. 447.
(7) 3 Peters 93.

for a criminal offence by a superior court of record having general jurisdiction over that offence the objection that the court ought not in that particular case to have exercised its jurisdiction or that there was some fatal defect in its proceedings is one conclusively for a court of error, in other words the judgment of the court is *res judicata* as to questions of jurisdiction as well as to all other objections. If a court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding, being one beyond its general jurisdiction, is wholly void and the prisoner so illegally dealt with may be entitled to be discharged on a writ of *habeas corpus*. This distinction, may, I think, be well illustrated by a case which I put during the argument, of a recorder's court or a court of quarter sessions having no jurisdiction either at common law or by statute to try a prisoner for murder, trying and sentencing one on such a charge, for such a proceeding would be beyond the general jurisdiction of the court. Applying this here, there can be no doubt or question that the court of oyer and terminer in British Columbia had jurisdiction to try prisoners for murder, and that being so it is, in my judgment, decisive of the question upon which we are called upon to pronounce.

As to the objection that the court was not properly constituted for want of a commission from the Governor General of the Dominion that was a proper question for the court of error and is concluded by the judgment in error, or if the Supreme Court of British Columbia did not possess the jurisdiction in error which it assumed to exercise (as to which however I have no doubt) then this point was equally concluded by the sentence of the court of oyer and terminer itself, as is shown very clearly by the cases already cited of *re Carlile* and *Regina* v. *Newton* and *re Crabbe*, in all of which cases

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the objections were to the jurisdiction of the convicting court.

Whilst I hold that the record is conclusive here and that that is sufficient to show that the writ was improvidently issued, I am also prepared to agree with the Chief Justice in holding, as he has, that the objections to the conviction of the prisoner were, even viewed as matters of error, all untenable. Without intending to enter upon any consideration in detail of these objections, I may say, that as regards the objection that there was no proper commission of oyer and terminer, it appears to me entirely covered by the statute of 1885, which, as well as that of 1879, was in force when the prisoner was tried and applied to his case. These acts were, under sub-section 14 of section 92 of the British North America Act authorizing the constitution, maintenance and organization of provincial courts of criminal jurisdiction, clearly within the competence of the provincial legislature, and if no regular commission was issued there was jurisdiction to hold the courts of oyer and terminer and general delivery without commission. I am, however, of opinion that under the provisions of sections 64 and 65 of the British North America Act and the provisions of the order in council for the admission of British Columbia into the confederation, the power of issuing such commissions was conserved to the Lieutenant Governor who before the union clearly possessed that power.

As regards the objection to the order changing the venue I also agree that there could be no valid objection to the conviction, which the prisoner could avail himself of upon a writ of *habeas corpus*, so long as the record was regular and sufficient upon its face. We are bound to consider the record as importing absolute verity, and the order must, therefore, be assumed to

have been actually made on the day it bears date. Moreover, the decision of the Court of Error would, as already shewn, be conclusive as to this objection.

Next it is said that the Supreme Court of British Columbia had no jurisdiction to entertain a writ of error. The terms on which that court was originally established giving it a general jurisdiction in criminal cases are said to be insufficient to confer jurisdiction in error. The court was originally established not by legislative enactment, but by the authority of the Crown given to the Lieutenant Governor by his commission, and by a proclamation of the Lieutenant Governor following the terms of the commission. A court to exercise jurisdiction according to the course of the common law, (but common law courts only) can, as is well known, be legally established in this way. The only question therefore which can be raised is as to the extent of the jurisdiction implied in the words used. And this, I think, must be answered by holding that the powers of the court in criminal cases were to be the same as those of the Court of Queen's Bench at Westminster as it existed at the date of the proclamation. That court, being the great criminal court of original jurisdiction known to the common law, is the type which all criminal courts of general jurisdiction established in this way, must, in the absence of some words expressly restricting jurisdiction, be assumed to follow, and on this principle I have no doubt as to the jurisdiction in error in criminal cases of the Supreme Court of British Columbia. It would, however, make no difference if this were not so, for granting that the Supreme Court of British Columbia had no jurisdiction to issue the writ of error and that the judgment in error was wholly void, still we have before us the record of the Court of

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Oyer and Terminer which shows a good conviction and a conclusive sentence, and, in the cases already quoted of *Regina* v. *Newton*, *Regina* v. *Carlile* and *Regina* v. *Lees*, there was no writ of error, but conclusive effect in these cases was attributed to the judgments of courts of first instance.

So far I have refrained from writing fully either for the purposes of discussing arguments or examining authorities, all of which has been done by the chief justice.

There are however two or three points which were raised in the argument by the learned counsel for the Crown on which I desire, speaking only for myself, to say a few additional words. In the first place it was contended that the 51st section of the Supreme and Exchequer Court Act, 1875, was not within the powers of the Parliament of the Dominion. Acting upon the well established and salutary rule that a question of constitutional validity is one which courts never deal with, if the case is susceptible of a decision in favor of the party raising the objection on other grounds, it has been considered advisable not to enter upon any discussion of this point, and I only mention it expressly to reserve the right to consider it fully if it should be raised hereafter.

Next, with reference to the jurisdiction of the court to entertain the present motion, I desire to say that I have formed an opinion on that point even stronger than that already expressed by the Chief Justice. This court has, in my view, in exercise either of an inherent jurisdiction to control its own process and writs, or referentially under the words of the 51st section conferring on the judges of the court a jurisdiction not in terms unlimited but only concurrent and therefore co-extensive, with that of the judges of the Supreme Court of British Columbia who

are subject to the control of their own court, power to set aside this writ as having been issued improvidently. Some of my learned brothers, I believe, hold that the words of the 51st section expressly conferring a right of appeal in case the writ should be refused have the effect, upon the principle of the argument "*e contrario*," of excluding an appeal to or a right of review by the court in all other cases under the clause in question. Differing, I admit, very widely from them, I am of opinion that there is nothing in the words just referred to which ought to have the effect of so excluding the ordinary jurisdiction of this court to review the decision of one of its judges who, sitting in chambers, exercises the power of the court. If the concluding words of the section giving the appeal in case of the refusal of the writ had been omitted and the section had concluded with the words "any Act of the Parliament of Canada" (the provision relating to extradition was repealed in 1876,) there could, I apprehend, be no possible doubt that, on the general principle that when jurisdiction is conferred on a judge in chambers a right to revise his decision is impliedly conferred on the court, there would be in every case, as well in those in which the writ might be granted as in those in which it might be refused, a right in the court to revise the decision and rescind the order of a judge made under this section. The cases of *Robinson* v. *Burbidge* (1), and *Witham* v. *Lynch* (2), are sufficient authorities to establish this proposition, though no doubt other cases to the same effect could easily be produced, but the proposition in this general form is so universally admitted and acted on in practice that a search for additional authorities may have been thought superfluous. The question is then reduced to this: Do the latter words of the section, giving the right of appeal in

(1) 1 L. M. & P. 99. (2) 1 Ex. 391.

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the one particular case of the writ having been refused, take it away in all others, upon the principle of the often quoted maxim, *expressio unius est exclusio alterius*, or are we to consider this provision as introduced either by way of extreme caution in regard of the right of personal liberty, or from a misapprehension of the general law, which without such words would have conferred an appeal or right of review? No reason can be suggested why the right of appeal should be withheld when the writ is granted, and I am of opinion, therefore, that we must attribute these words expressly giving an appeal to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to disarm the court of the almost essential right of controlling writs and process issued under its seal and running in its name. The provision under consideration is therefore to be construed not upon the principle of the maxim referred to, but upon the application of another equally recognized, viz., *expressio eorum quae taciti insunt nihil operatur*, and a right to entertain appeals from, and revise, rescind and vary orders made, under this section must be recognized as existing in the court to the fullest extent or, in the present case at least, to as full an extent as the Supreme Court of British Columbia possesses jurisdiction to revise and rescind the orders of its judges made at chambers in matters connected with the granting of the writ of *habeas corpus* and proceedings incidental to it.

Next, it is to be observed that the notice of motion asks not merely that the writ of *habeas corpus* be set aside, but also that the order for the prisoner's discharge consequent upon the return may be rescinded. That the return was a perfectly good one in form, in my opinion, cannot be doubted. It follows the precedent of a return to such writs given in Archbolds Crown

Practice (1); and I cannot think that there is any ground for the objection that the return should in addition to the form used be signed by the sheriff in his own hand. The sheriff is a ministerial officer and such officers may in law always act by deputy, and we know that in practice the returns to all writs directed to the sheriff are usually signed by the deputy or under sheriff in the name of the sheriff. That the return is good in substance appears not only as a necessary consequence of what has been already said that the sentence of a court of competent jurisdiction is not to be interfered with by a writ of *habeas corpus*, but also by the high authority of a case directly in point. In the *Queen* v. *Crabbe* (1), already referred to, where such a writ was moved for to bring up a prisoner under sentence of a court of quarter sessions on a conviction for larceny, upon the ground that the court which tried him was not properly constituted, Robinson C.J. says:—

> We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the quarter sessions, and if we should grant the writ the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the quarter sessions and not bring up the prisoner.

This is a decision of peculiar weight as being the judgment of a great crown lawyer and of a Chief Justice little disposed to excuse any laxity in obedience to the process of his court. Having thus upon the files of this court a return good in form and in substance, a return which is nothing less than a record of the court, what, I ask, is there in the statute to prevent this court acting on such a return to its own writ? The utmost effect which can be given to the words already referred to, is that they apply in case the writ is granted to exclude an appeal from that decision, but here the writ having been granted and obeyed so far that a

(1) At p. 346. (2) 11 U. C. Q. B. 447.

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good return has been made to it, how can these words, which do not refer to the proceedings ulterior to the granting of the writ, that is, to the return and subsequent proceedings, take away that obvious jurisdiction which this court must, in common with the most humble tribunal of the land, possess over its own records and its own officers? I can see no reason against exercising jurisdiction on this head and even therefore if I was convinced that we had no power to inquire into the circumstances connected with the granting of the writ, I should still be prepared to hold that there was on the files of the court a good return to the writ of the court upon which we are bound to act by relieving the sheriff, an officer at once of this court and of the Supreme Court of British Columbia, from the embarrassing position in which he is placed between the conflicting orders of the two jurisdictions, by rescinding the order for the prisoner's discharge from custody made on the return.

It is laid down in Bacon's Ab. Tit. *Habeas Corpus*, that a writ to bring up a criminal prisoner should be directed to the gaoler and not to the sheriff, as in the case of a civil prisoner, but here it appears from the proceedings before us that the prisoner, although originally in the custody of the gaoler, was remanded by the court of oyer and terminer and also by the Supreme Court in error to the custody of the sheriff in whose custody he must therefore be now considered to be.

Lastly I must observe that had I thought the learned judge right in all other respects I should still have thought he erred in discharging the prisoner instead of remanding him as he had by statute express authority to do. There were, in my opinion, materials before the judge amply sufficient to warrant a remand.

For the foregoing reasons I am of opinion that this motion must be granted to the fullest extent asked for.

FOURNIER J.—Cette cause est soumise à la cour sur une motion de la part de la Couronne demandant l'annulation d'un bref d'*habeas corpus* émis sur l'ordre de l'honorable juge Henry, ordonnant au shérif de l'Ile de Vancouver de produire devant l'honorable juge, à Ottawa, la personne de Robert E. Sproule. L'annulation des procédés subséquents au dit bref, y compris l'ordre de mise en liberté du dit Sproule sont aussi demandés par la même motion. Les raisons données à l'appui de cette demande sont : 1° Que l'honorable juge n'avait pas le pouvoir d'ordonner l'émission du dit bref d'*habeas corpus*. 2° Que son jugement ordonnant la mise en liberté du dit Sproule est erroné parce que le dit Sproule avait légalement subi, devant une cour compétente, son procès pour meurtre, et en avait été trouvé coupable et convaincu, et que la conviction avait ensuite été confirmée sur un bref d'erreur.

Le meurtre pour lequel le prisonnier a subi son procès en décembre 1885, à Victoria, dans la Colombie Britannique, avait été commis le 1er juin, à Kootenay dans la même province. Un verdict de culpabilité fut rendu (avec recommandation à la clémence royale), mais une sentence de mort n'en fût pas moins prononcée contre le prisonnier, le 5 janvier 1886.

Le condamné ayant obtenu un bref d'erreur, la cour Suprême de la Colombie, composée de cinq juges, étant au complet, rejeta, après audition, le bref d'erreur et confirma la sentence prononcée.

Le trois mai suivant une demande d'*habeas corpus* fut présentée à l'honorable juge Henry, lequel, après audition et délibéré, ordonna l'émission du bref d'*habeas corpus* dont l'annulation est demandée. Sur ce bref le shérif de l'Ile de Vancouver ayant fait rapport qu'il détenait Sproule en vertu d'une sentence de mort, prononcée contre lui aux dernières assises de Victoria, pour

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meurtre, sentence qui avait ensuite été confirmée par la décision unanime de la cour Suprême de la Colombie Britannique, sur un bref d'erreur, il soumettait respectueusement qu'en conséquence il n'était pas tenu de se conformer aux injonctions de ce bref. Après la production de ce rapport, une demande de mise en liberté du condamné fut présentée à l'honorable juge qui après audition, accorda cette demande.

Les questions débattues devant l'honorable juge Henry furent les mêmes que celles qui avaient été discutées devant les cinq juges de la cour Suprême de la Colombie, savoir : 1° qu'un changement de *venue* avait été illégalement ordonné ; 2° que la commission du lieutenant-gouverneur de la Colombie-Britannique, en date du 23 novembre 1885, établissant une cour d'Oyer et Terminer et de délivrance générale, en la cité de Victoria, et les assises tenues en vertu de cette commission émise sous le grand sceau de la province de la Colombie, étaient illégales.

L'honorable juge par un jugement dans lequel il a fait un examen approfondi des importantes questions qui lui étaient soumises, a ordonné d'abord l'émission du bref d'*habeas corpus* et plus tard, la mise en liberté du condamné.

Les mêmes questions ont été de nouveau débattues devant cette cour sur la motion demandant l'annulation des ordres rendus par l'honorable juge Henry tant pour l'émission du bref d'*habeas corpus* que pour la mise en liberté du prisonnier.

Ces questions ont été traitées par les habiles conseils entendus tant de la part de la Couronne que de celle du condamné, avec tous les développements dont elles étaient susceptibles. Mais avant de les aborder, les savants conseils du condamné ont tout d'abord soulevé contre la juridiction de cette cour, une objection qui, si elle est maintenue, nous interdit le droit d'entrer dans

'examen des questions décidées par l'honorable juge Henry. Cette question doit en conséquence être décidée avant que l'on puisse procéder ultérieurement.

La cour Suprême, disent les savants conseils du prisonnier, n'a qu'une juridiction limitée en matière d'*habeas corpus*. Elle ne peut ni ordonner l'émission du bref en première instance, ni siéger en appel pour reviser l'ordre rendu par un seul juge, s'il n'a pas refusé le bref demandé.

Bien que la section 15 de l'Acte de la Cour Suprême déclare d'une manière générale que la cour Suprême exercera une juridiction d'appel en matière civile et criminelle, dans tout le Canada, cette juridiction est définie et limitée par les sections qui suivent cette déclaration. L'appel est limité tant au civil qu'au criminel.

En matière d'*habeas corpus ad subjiciendum* dans les affaires criminelles la juridiction est conférée par la section 51 de l'Acte de la Cour Suprême à tout juge de cette cour, mais elle n'est pas étendue à la cour même qui n'a à cet égard aucun pouvoir, comme le font voir clairement les termes de cette section :

" Any Judge of the Supreme Court shall have concurrent jurisdiction with the Courts or Judges of the several Provinces, to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada * * * "

D'après ces termes c'est au juge individuellement de la Cour Suprême que des pouvoirs concurrents avec ceux des cours et des juges des provinces sont donnés au sujet de l'*habeas corpus* et non pas à la cour Suprême ; il n'y a pas entre cette dernière et les cours et les juges des provinces, concurrence à cet égard.

Le pouvoir que pouvait exercer l'honorable juge Henry quant à l'émission du bref d'*habeas corpus* est exactement le même que celui possédé par la cour Suprême de la Colombie et par les juges de cette cour

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individuellement. Or le pouvoir d'ordonner l'émission du bref *habeas corpus* appartient incontestablement à la cour Suprême de la Colombie et à chacun de ses juges individuellement. Cette clause lui donnait clairement le pouvoir qu'il a exercé de s'enquerir des causes du *commitment* du condamné.

On a paru trouver singulier que la section 51 n'ait pas donné à la Cour Suprême, en matière d'*habeas corpus*, comme c'est le cas dans les autres tribunaux supérieurs, les mêmes pouvoirs que la loi donne à ces cours et aux juges individuellement. La raison en est sans doute que la juridiction donnée à chaque juge était considérée suffisante pour l'expédition de ces sortes d'affaires,

Une autre raison bien forte pour faire voir que tous les pouvoirs ont été conférés à un seul juge, c'est qu'il est en réalité établi comme une cour de première instance en matière d'*habeas corpus*. Le parlement du Canada possède incontestablement par la section 101 de l'Acte de confédération le pouvoir de créer des tribunaux additionnels. C'est ce pouvoir qu'il a exercé en concentrant tous les pouvoirs sur un seul juge. Ce pouvoir de créer des tribunaux additionnels a déjà été exercé plusieurs fois, entre autres dans la création d'une cour d'élection et d'une cour maritime, où dans chacun de ces tribunaux un seul juge forme la cour.

Ce qui rend encore plus évident l'intention du législateur qui, par la section 15, créait une cour d'appel en matière civile et criminelle, c'est qu'il accorde le droit d'appeler de la décision d'un seul juge à toute la cour, lorsque le juge a refusé la demande d'*habeas corpus*, ou renvoyé l'accusé en prison.

D'ailleurs, quelles qu'aient été les raisons du législateur pour en agir ainsi, il est évident que son intention n'était pas de donner à la Cour Suprême une juridiction de première instance. Toute la juridiction qu'il lui a

conférée se borne à un appel dans le seul cas où un juge a refusé le bref d'*habeas corpus*. Il n'y a que dans ce cas que la Cour Suprême puisse exercer une juridiction d'appel en matière d'*habeas corpus*. Si ce n'eût pas été l'intention de limiter ainsi l'appel sur l'*habeas corpus* en matière criminelle, le législateur, comme il l'a fait pour l'*habeas corpus* en matière civile, section 23, ne l'aurait-il pas accordé d'une manière générale à chaque partie intéressée. L'intention de limiter les appels en matière criminelle apparaît encore par la section 49, où cet appel est refusé lorsque la cour qui a confirmé la conviction, a été unanime. Ceci doit suffire pour faire voir que l'appel accordé en matière criminelle est limité et qu'il ne peut être exercé que dans le cas où il est spécialement accordé. Il l'est évidemment dénié dans le cas qui nous occupe, par les termes de la section 51—qui ne l'accorde que lorsquele bref a été refusé—dans ce cas, le bref a été accordé par l'honorable juge. Cette cour est donc sans juridiction.

Pour combattre le texte formel de l'acte de la cour Suprême refusant l'appel, on s'est attaché à des subtilités techniques pour en conclure que la cour a tout de même un droit de surveillance et de contrôle sur les brefs d'*habeas corpus* émis par un juge. Tout bref émanant de la cour Suprême, dit-on, doit, en vertu de la sec. 66, être attesté au nom du juge en chef, et de cette attestation, au nom de la cour on en conclut que celle-ci peut s'enquérir de la manière dont le bref a été émis,—et l'annuler si elle trouve qu'il l'a été irrégulièrement. Il est vrai que le bref signé par l'honorable juge Henry est intitulé comme émis de la cour Suprême et porte l'attestation du juge en chef. Il faut remarquer que la sec. 66 ne s'applique qu'aux brefs de la cour Suprême, c'est-à-dire à ceux qu'elle a le pouvoir d'émettre en vertu du statut. Cette formalité de l'attestation doit sans doute être observée pour ces brefs. Mais en est-il de même

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pour un bref qu'elle n'a pas droit de faire émettre ? Je ne le crois pas. Le bref d'*habeas corpus* aurait pu être valablement émis sur l'ordre du juge seul, sans l'attestation de la cour, et il eut été suffisant, car la principale et presque la seule formalité requise par le stat. 31, ch. 2, (1) est la signature du juge, et le bref dont il s'agit porte celle de l'honorable juge Henry. L'officier sur lequel aurait été signifié ce bref, sans la signature d'un juge n'eût pas été obligé de s'y conformer, bien que ce bref fût attesté par le juge en chef et portât le sceau de la cour La formalité indispensable était la signature du juge ordonnant l'émission du bref et non l'attestation. Il serait donc valable sans l'attestation. Mais le fait d'y avoir ajouté cette pure formalité peut-il donner à la cour une juridiction que le statut lui refuse en termes formels. C'est évident que non, car ce serait un moyen indirect de violer la loi en s'attribuant au moyen d'une simple formalité sans valeur, une juridiction importante que la législature a refusée. Si cette formalité, ce dont je doute fort, doit être remplie dans un bref que le juge seul a droit d'émettre, il faut en conclure que le législateur a voulu autoriser le juge, qui seul a le pouvoir de faire émettre le bref, à se servir de l'attestation du juge en chef et du sceau de la cour.

Dans tous les cas le fait d'avoir rempli cette formalité ne peut pas plus vicier le bref, qu'il ne peut donner juridiction à la cour. Il est de principe d'ailleurs que le bref d'*habeas corpus ad subjiciendum* ne peut être déclaré nul pour simple défaut de forme.

On nous a dit aussi pour nous persuader que la cour Suprême doit avoir le droit de contrôler ou de reviser la décision de l'honorable juge Henry, que la cour du Banc de la Reine a un droit de surveillance sur les cours inférieures de record et qu'elle peut au moyen

(1) Vol. 1 Chitty's Crim. Law, p. 125.

soit du bref de prohibition ou d'erreur, ou de *certiorari* reviser leurs jugements ou les contraindre à se renfermer dans les limites de leurs juridictions respectives. Elle a aussi le même pouvoir sur les tribunaux inférieurs qui ne sont pas des cours de record, au moyen d'un bref appelé *writ of false judgment* On peut encore au moyen du bref d'*habeas corpus* émané de l'une ou l'autre des cours de juridiction supérieure mettre en question la validité des jugements des tribunaux inférieurs. Enfin les pouvoirs de surveillance de la cour du Banc de la Reine sur les tribunaux inférieurs sont très étendus et d'un caractère général.

On nous dit en outre que cette cour peut exercer, en certains cas, le pouvoir d'annuler des brefs qui auraient été illégalement ou irrégulièrement émis, et qu'elle tire son autorité pour en agir ainsi d'un pouvoir inhérent à sa constitution.

Tout cela est sans doute vrai de la cour du Banc de la Reine ; mais ne l'est pas de la cour Suprême. Si elle a ces pouvoirs où est le texte de loi qui les lui confère. Il n'y en a certainement pas. Ce n'est pas en supposant une analogie qui n'existe pas entre ces deux cours, que l'on peut en tirer la conclusion, que les pouvoirs de l'une peuvent être exercés par l'autre.

De ce que la cour du Banc de la Reine peut avoir un certain contrôle sur les brefs qui en sont émanés, doit-on en conclure que ce pouvoir existe aussi dans notre cour ? Peut-on dire encore que ce pouvoir résulte de l'ensemble des dispositions de l'acte de la cour Suprême et de la volonté présumée du législateur, de ne pas laisser à un seul juge, sans aucun contrôle de la part de la cour, le pouvoir de décider finalement les questions importantes qui peuvent être soulevées sur *habeas corpus*.

Ce raisonnement ne repose sur aucune base sérieuse. Ce n'est pas par des analogies et des présomptions que

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l'on peut s'attribuer une juridiction—il est de principe qu'elle n'est conférée que par des termes précis et une volonté formellement exprimée par le législateur. Ici le législateur a dit, de la manière la plus précise, tout le contraire de ce que l'on veut lui faire dire. Dans tous les cas ce qui peut être vrai du pouvoir reconnu à la Cour du Banc de la Reine d'annuler (quash) son propre writ, ne s'applique pas au bref d'*habeas corpus* émis par un juge de cette cour dans l'exercice de sa juridiction en cette matière. Sa juridiction à cet égard est concurrente avec celle des cours provinciales et de leurs juges. Il la possède toute entière lorsqu'il l'exerce seul, et elle est aussi étendue et complète dans sa personne que lorsqu'elle est exercée par une de ces cours ou un de leurs juges. Ses décisions ne sont nullement sujettes au contrôle et à la révision de la cour dont il fait partie pas plus que celles des juges des cours provinciales. Bien que la prétention contraire ait été avancée par les savants conseils de la couronne, ils n'ont pu l'établir par aucune décision judiciaire ni par aucun texte de loi. La décision citée *Queen* vs. *Crawford*, (1) sur laquelle ils ont fortement insisté comme établissant leur proposition, prouve précisément tout le contraire de leur avancé. Car dans cette affaire, l'ordre du juge avait fait le bref rapportable devant la cour, de sorte qu'elle exerçait ses pouvoirs en première instance et non comme tribunal de révision. La décision d'un juge ordonnant l'émission du bref et la mise en liberté d'un prisonnier est considérée comme finale, du moins le contraire n'a pu être établi.

Le pouvoir donné au juge de la Cour Suprême au sujet de l'*habeas corpus* est en ces termes :

" For the purpose of an inquiry into the cause of commitment, in any criminal case under any act of Parliament of Canada."

(1) 13 Q. B. 613.

Ces termes ont, dit-on, l'effet de restreindre le pouvoir du juge à la catégorie des cas désignés par ces expressions. En conséquence un *habeas corpus* demandé en vertu de la loi commune ne pourrait pas être accordé, parce que, pour le Canada (Dominion), il n'existe pas de loi commune. Toutefois cette interprétation me paraît fort douteuse, parce que la première partie de la clause assimile le pouvoir des juges de la Cour Suprême à ceux des cours provinciales et de leurs juges. Malgré cela, je ne crois pas que pour la décision de cette cause il soit nécessaire de trancher cette question, car cette cause est évidemment régie par les statuts du Canada. Mais une demande *d'habeas corpus* qui serait fondée sur un *commitment* pour infraction à quelque loi provinciale serait sans donte refusée parce qu'elle ne tomberait pas dans la catégorie désignée. C'est à cela seulement, dans mon opinion, que se borne la restriction imposée par le statut

Les savants conseils de la Couronne ont prétendu que la condamné n'ayant pas été trouvé coupable sur un indictement pour violation d'un statut du Canada, l'honorable juge Henry n'avait en conséquence aucune juridiction ; mais la section 51 ne lui donne-t-elle pas clairement le pouvoir de s'enquérir des causes du *commitment* en vertu des statuts du Canada ?

Les mots " dans une cause criminelle " que l'on trouve dans cette phrase n'y sont sans doute insérés que pour exclure l'*habeas corpus* en matière civile. Le mot *case*, n'est pas mis là pour signifier *offense* ou crime ; cette phrase ne veut pas dire que l'offense ou le crime doit être défini par une loi du Canada, comme on le prétend, pour qu'il y ait juridiction ; elle dit au contraire qu'il suffit que le *commitment* soit en vertu d'un acte du parlement du Canada pour qu'il y ait lieu d'exercer la juridiction ; pourvu que ce soit dans une cause criminelle.

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Cela me paraît d'autant plus certain que le juge n'a que le pouvoir de s'enquérir de la légalité du *commitment* et qu'il n'a pas le droit de faire le procès du pétitionnaire dans un *habeas corpus*, pour le crime ou l'offense qui a amené son incarcération. Evidemment cette cause a été conduite d'après les statuts du Canada.

L'indictement porté contre le condamné est dans les termes du statut 32-33 Vict, ch. 29, ainsi qu'il suit :

British Columbia. }
To wit : }

The Jurors for Our Lady the Queen upon their oath present that Robert E. Sproule on the first day of June in the year of Our Lord one thousand eight hundred and eighty-five feloniously wilfully and of his malice aforethought did kill and murder one Thomas Hammill against the peace of Our Lady the Queen, her Crown and dignity.

Les seules différences entre cette forme et celle donnée par le statut, sont 1° qu'on y a ajouté les mots " contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," qui ne se trouvent pas dans celle du statut ; la deuxième, qui est plus grave, est qu'on a omis d'indiquer le comté, ou le district où l'offense a été commise. Quoiqu'il soit encore d'usage, de conclure les indictements d'après la loi commune par les mots " contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," et de conclure les indictements pour offenses contre les statuts par la formule " contre la forme du statut en tel cas fait et pourvu et contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," cela n'est cependant pas reconnu nécessaire depuis la passation du statut 14 et 15 Vict. ch. 100 sec. 24. L'addition des mots " contre la paix," etc., n'indique pas une intention de procéder conformément à la loi commune puisque la forme de l'indictement est celle donnée par le statut en vertu de la section 27 du ch. 29, 32-33 Vict.

Le changement de *venue*, qui est un des principaux moyens sur lesquels s'est appuyé l'honorable juge pour

accorder l'*habeas corpus*, a eu lieu en vertu du même statut, sec 11, comme le fait voir le record de la cour Suprême de la Colombie. Ce n'est qu'en vertu de cette section que la cour siégeant à Victoria a pu acquérir juridiction pour faire le procès du condamné, qui sans cela eût dû le subir dans le District de Kootenay où l'offense a été commise. C'est uniquement en vertu de ce statut que la cour a pu acquérir la juridiction nécessaire pour faire le procès du condamné.

Le châtiment infligé par les sec. 1 et 2, de la 32-33 Vic. ch. 20, est celui qui a été prononcé contre le condamné. Comment peut-on dire après cela que cette cause n'est pas "*criminal case under an Act of Parliament of Canada*" quand tout le procès a eu lieu en vertu du c. 29, de 32-33 Vic?

L'honorable juge avait certainement le droit de s'enquérir si le condamné était détenu en vertu d'un ordre légal d'une cour compétente. Il n'a en cela assumé aucune juridiction, mais n'a fait qu'exercer celle que lui confère le statut. Je n'examinerai pas le mérite des questions qu'il a décidées par ses deux ordres, car je suis persuadé que je n'ai aucun droit de siéger en révision ou en appel de ces ordres. Il est vrai que par ses jugements, l'honorable juge se trouve avoir pratiquemment renversé la sentence prononcée contre le condamné, ainsi que le jugement de la cour d'erreur confirmant unanimement cette sentence. Cette conséquence, quoi que grave, n'est pas comme on l'a représentée, une anomalie qui renverserait l'ordre judiciaire, si cette cour ne mettait pas à néant les ordres de l'honorable juge. Ce serait suivant moi une bien plus grande anomalie et un danger beaucoup plus grand, si dans une cause où un malheureux lutte pour sauver sa vie on voyait une cour exercer une juridiction qui ne lui appartient pas.

Le jugement de l'honorable juge Henry doit subsister

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tant qu'il n'aura pas été mis de côté par une cour compétente, et celle-ci suivant moi ne l'est pas, comme je crois l'avoir démontré. Si cette cour n'a pas le pouvoir d'intervenir, il y en a une autre qui a une juridiction incontestable dans cette affaire, c'est le Conseil privé de Sa Majesté. C'est là qu'on eut dû s'adresser de suite au lieu de venir devant une cour dont les avocats de la couronne eux-même ont contesté la juridiction. Chose extraordinaire, tout en nous demandant d'annuler les ordres en question, les savants conseils de la couronne ont en même temps essayé de démontrer que la clause 51 était inconstitutionnelle ; mais cette prétention n'a pas été mieux établie que celle du droit de la cour de siéger en appel des ordres en question.

Je ne crois pas devoir entrer dans l'examen de la question de constitutionalité de la section 51 ; car la Cour Suprême a plusieurs fois déjà exprimé l'opinion qu'elle ne déciderait pas des questions de ce genre, si le litige pouvait être jugé sans cela. Comme je suis d'opinion que la cour n'a aucun droit de reviser les jugements de l'honorable juge Henry, je m'abstiendrai pour cette raison de considérer la question de constitutionalité.

J'ai déjà fait remarquer que les savants conseils de la couronne n'ont pu établir la proposition que la mise en liberté ordonnée par un juge sur *habeas corpus* est sujette à un appel à la cour dont ce juge forme partie. Il s'en suit que les ordres en question doivent subsister tant qu'ils n'auront pas été mis de côté par une cour compétente. Il en est de même en matière civile, et le principe doit, je crois, être observé pour les ordres sur *habeas corpus* comme il l'est dans les causes civiles. Je citerai à l'appui de cette proposition une cause civile dans laquelle ce principe a été soutenu par l'opinion de juges éminents.

Ex parte Bryant, in re Padstow, Total Loss and Collision. Ass. Co. (1).

If a court in assumed exercise of a jurisdiction belonging to it makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order, and can only be discharged upon an appeal.

Le juge Brett fait à ce sujet les observations suivantes qui sont parfaitement applicables à cette cause. (2)

"That order was the order of a superior court which superior court has jurisdiction, under a certain given state of fact, to make a winding up order, and if there has been a mistake made in the particular case, and not the assumption of a jurisdiction which the court has not, I should be inclined to say that this order could never have been treated, as long as it existed. either by the court that made it or by any other court, as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore, is one of appeal, rather than of jurisdiction. It is an erroneous judgment if erroneous at all."

D'après cette autorité, si l'honorable juge Henry a fait une erreur en ordonnant la mise en liberté du condamné, en exerçant une juridiction qui lui appartenait clairement—celle de s'enquérir des causes du *commitment*—pourvu qu'il n'ait pas assumé une juridiction qui ne lui appartenait pas, son ordre ne peut être traité comme une nullité absolue, ni par lui-même ni par aucune autre cour L'appel privé est le seul moyen de faire annuler cet ordre. Jessell, M. R, a exprimé la même opinion dans cette cause (3).

Assuming for the present that the association was an unlawful one, and that the court had no jurisdiction to make the order, is the proper mode of getting rid of that order to appeal against it? I think it is. I think an order by a Court of competent jurisdiction, which has authority to decide as to its own competency when that order is made, must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that there is error in the order, the Court having in fact no jurisdiction to make it.

Ces autorités me confirment dans l'opinion que les

(1) 51. L. J. Eq. N. S. p. 344. (2) P. 350.
(3) P. 348.

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ordres de l'honorable juge Henry doivent subsister jusqu'à ce qu'ils aient été annulés sur un appel à une cour compétente Celle qui a ce pouvoir est l'honorable Conseil privé de Sa Majesté et non la cour Suprême qui n'a aucune juridiction dans le cas actuel. La motion devrait être rejetée.

HENRY J.—This matter came before the court in special session convened by our learned Chief Justice on an application made by the attorney general of British Columbia to consider a motion to be made on the part of the Crown to quash a writ of *habeas corpus ad subjiciendum*, directed to the sheriff of Vancouver Island, British Columbia, to bring before me the body of the prisoner with the cause of his detention, and, also, to set aside an order by me for his discharge subsequently made.

I think it very doubtful if the learned Chief Justice had any jurisdiction to convene the court, as the power to call a special session of this court is, I think, only for the purpose of exercising jurisdiction as prescribed by the Act. When the matter came before me under the alternative order *nisi* made by me, I arrived at the conclusion that on two grounds there was an absence of jurisdiction in the tribunal by which the prisoner was tried, and that he was therefore entitled to be discharged. I adopted one of two alternative means that I considered available for that purpose and caused a writ of *habeas corpus* to be issued to bring the prisoner before me. This not having been obeyed for several weeks or, in my opinion, properly returned, I made the order for the discharge of the prisoner which is now sought to be set aside.

A copy of the record was annexed to the affidavits read on behalf of the prisoner when the original order was applied for, and an authenticated copy of it was

returned by the sheriff in whose custody the prisoner then was, and still is. By the record so produced it was shown that the trial of the prisoner was conducted by one of the learned judges of the Court of Queen's Bench of British Columbia, authorized, as it appeared by the record, only by a commission of oyer and terminer and general gaol delivery issued by the Lieutenant Governor of British Columbia, and it appeared also by affidavits, uncontradicted, that the order for the change of venue set out in the record was made after the trial and conviction of the prisoner. In my judgment on the hearing for the reasons given in it, I stated that, in my opinion, there was no jurisdiction to try the prisoner at Victoria, and that the Lieutenant Governor had not the right to issue such a commission.

It is contended that under the circumstances as shown by the record I had no jurisdiction to make the original order or the subsequent one, or to allow the issue of the writ. If I was wrong as to all, another important question necessarily arises: Has this court the power to deal at all with the subject matter? It is not contended that the court has any appellate jurisdiction, but it is contended that inasmuch as the writ was technically that of the court, the court therefore can quash it as improvident on the ground of my want of jurisdiction. On the argument of the first order before me my jurisdiction to deal with the subject-matter was referred to on behalf of the crown, but was not in fact objected to, and no question as to it was taken or argued, but the whole argument took place on the objections raised to the jurisdiction of the court before which the prisoner was tried and convicted. The case then before me was argued for two days and determined upon points which did not involve a question as to my jurisdiction, and is it not now too late to question it? It is, however, now contended on the part of the crown that the court has

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the right to quash the writ as having been improvidently issued because of the want of jurisdiction on my part.

It should not be forgotten that the matter was before me under the first order, and that had I then made an order for the discharge, as by the practice of the Queen's Bench, in England, I might have done, no one has so far said that this court has any jurisdiction to question the validity of it, but it is claimed that as the writ of *habeas corpus* intervened the court has the right not only to deal with that but also the final order for the discharge of the prisoner. I am quite ready to admit that if the last mentioned order was founded on the writ, and that the writ was necessary to sustain the order, the latter must fail if its source fails, but here the order was quite independent of the writ, and if valid, cannot be affected by any jurisdiction this court might undertake to assert as to the writ. To affect the final order for discharge, the mere assumption of power to deal with the writ does not, in my opinion, confer authority to deal with the order. I have searched in vain to find a case or authority that will sustain the proposition that where a judge has a general authority to issue a writ of *habeas corpus*, and having considered and dealt with the question of the commitment and detention of a prisoner, the court has quashed the writ as improvident. *Crawford's Case* (1) has been referred to but in that case the *habeas corpus* required the prisoner to be brought before the court and cause to be shown before it. In that case the prisoner was committed by the Court of Chancery, in the Isle of Mann, for contempt, and the court held the committal valid, and being so the cause shown was therefore sufficient. Erle J. said:

Taking this, then, as an ordinary case of an application for a *habeas corpus*, we are to see whether there has been a lawful order of a competent tribunal.

(1) 13 Q. B. 613.

I may say that when considering the matter of cause shown against my first order, I felt it to be my duty to see whether there has been "a lawful order of a competent tribunal." In *Crawford's Case* the court had in itself original jurisdiction and also by the writ. This court has no original jurisdiction and the writ, if it had commanded the prisoner to be brought before it, would have been void.

The right to legislate in respect of this court is given to the Parliament of Canada by section 101 of the British North America Act, 1867 :—

The Parliament of Canada may, notwithstanding anything in the Act, from time to time provide for the constitution, maintenance and organization of a general court of appeal for Canada and for the establishment of any additional court for the better administration of the laws of Canada.

The Supreme and Exchequer Court Act of Canada, 1875, section 15, provides that :

The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and without the Dominion of Canada.

Sec. 23 provides :

An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge. * * *

Sec. 51 :

Any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada. * * * And if the judge shall refuse the writ or remand the prisoner, an appeal shall lie to the court.

By the latter section the appeal is only given to the prisoner, and by the 23rd section an appeal in a matter arising out of a criminal charge is excepted. Considering together those two sections the conclusion is irresistible that there is no appeal on the part of the crown in a criminal case, and still an opposite opinion has been expressed. It will be seen that the jurisdic-

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tion given by section 51 to the individual judges of this court is concurrent, not only with the jurisdiction of the individual judges of the several provinces, but concurrent with the jurisdiction of the courts. If the judge has the jurisdiction of the courts in the several provinces, why should he not have power to issue an attachment for contempt. I conclude therefore that the jurisdiction of a judge of this court is wholly unconnected with his position as a member of the appeal court of the Dominion. It is a jurisdiction given to the judge to be exercised as in a matter wholly unconnected with the functions of the appeal court. To the judge who acts in a *habeas corpus* case is given a jurisdiction which gives him the power of a court in any of the provinces, and unless an appeal is specially provided for to this court I fail to see how it can interfere with the judicial acts of the judge, any more than it could with the decision of one of the courts in the provinces. Our statutes provide that the cases of contested elections shall be tried by a judge of one of the superior courts in the provinces. The writ under the seal of the court is issued. There is no appeal to the court of which the judge is a member, but to this court. Suppose in a case decided by the judge, the court of which he was a member was moved to quash the writ and reverse the judgment given by him, could it be successfully contended that the court would have power to do so? The judge is authorized to use the process of the court in the exercise of a special jurisdiction. The writ was tested in the usual way and has the seal of the court affixed to it, but it is in connection with a matter beyond the jurisdiction of the court. The court as such has no jurisdiction and none is given by statute. How, then, can the mere use of the writ give any jurisdiction to the court to reverse what the judge may decree? It is a writ giving a jurisdiction to

a judge that the court as such could not exercise. The court has not the power to order the issue of the writ or prevent its issue. The law gives the judge the whole jurisdiction and enables him and him only to deal with it. In *Valin* v. *Langlois* (1) the Privy Council held that:

The Parliament of the Dominion of Canada has power to impose new duties upon existing provincial courts, and give them power as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction.

In addition to the appellate jurisdiction of the court, the statute provides that any one of the judges may use Her Majesty's writ of *habeas corpus* when in his judgment—not that of the court—a proper occasion is presented. It is true, the writ in this case is issued as the writ of the court and bearing its seal, but it was so issued on my part and specially allowed by and signed by me. The statute gave me the right to do that which the court could not do or prevent, and whence then comes the right of the court to say that I exceeded my jurisdiction? It may have been wrong for me to issue the writ, but in doing so I respectfully submit that the court has not the right to say so or to reverse my judgment. It has been excitedly said that it would be monstrous that one judge, by means of a *habeas corpus*, should control the final decision of a capital case by a court. The consequences, we were told, would be most serious. My answer to that is that if the power exists in regard to the jurisdiction to make use of the writ of *habeas corpus*, to inquire into the existence of jurisdiction, to try and convict a prisoner, it has existed for centuries in England and for a great many years in the United States of America, and we have yet to hear a reason to induce the conclusion that the power is a dangerous one. We have to assume that, when Parliament intrusted the exercise of the power of

(1) 5 App. Cas. 115.

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dealing with cases of *habeas corpus* to the judges of the highest court in the Dominion, it was not ignorant of the power of the courts and judges in England and in this country, and fully expected that the judges of this court would deal as properly with such cases as, at all events, the judges of subordinate courts. If, however, I, or any of my learned colleagues, should happen to err in any case we cannot found the jurisdiction of this court upon the regrets or fears of some of its members. In a case of doubtful jurisdiction, in the humanity of the law, it might be by some, and I trust the larger number, considered better that the jurisdiction should be assumed than that a life of a human being should be sacrificed when there was no doubt in the mind of the judge that he had been illegally convicted. Better than, I think, for this court to assume a jurisdiction to prevent that being done. I don't, however, intend to convey the impression that I felt any doubt of my jurisdiction over the subject matter or of the conclusions at which I arrived. It was established satisfactorily before me, and admitted by the counsel for the Crown, that the order for the change of venue set out in the record was not made until after the trial and conviction of the prisoner, and that the learned judge, who presided at the trial, had so presided solely by the authority of a commission from the Lieutenant Governor. Since the argument before me a proclamation to bring into operation a statute of British Columbia dispensing with the necessity for commissions of oyer and terminer and general gaol delivery by which the statute was in force, at and before the trial of the prisoner, has been brought to our notice. Had it been notified to me I would then have had to consider the question of the right of the legislature of British Columbia to pass such an act since the incorporation of that Province as a part of Canada, affecting as it did, a prerogative right of the crown. If

it had not then the case was not altered. The question of jurisdiction to pass that statute would admit of an important and exhaustive argument. That argument must have been had before me and should I have, improperly even, decided that the act was *ultra vires*, and that a majority of this court should think that my decision was wrong, would that be sufficient to authorize the court to assume jurisdiction and to decide that because of an error of judgment on my part I had improperly exercised jurisdiction? In a case of *habeas corpus* before the court in British Columbia, referred to in my first judgment, the Chief Justice of that court decided that the act was *ultra vires*. I must contend that if it was at all a question legitimately before me for decision the writ cannot be dealt with at all, much less quashed by this court. On the face of the return the defect of jurisdiction appeared and how can the question of my jurisdiction be affected when exercised in May last by something now for the first time shown. The court should now say to the crown "according to the showing before the judge he had "jurisdiction when he decided the case and his decision "cannot be affected by new matters shown before this "court." I differ then with the conclusion of one or more of my learned colleagues, when assuming the right of this court to decide as to my jurisdiction to issue the writ, upon evidence for the first time given at the present argument. The question as to my jurisdiction, as far as that question affects our decision, must, I submit, be determined on the facts and evidence before me, and not upon any new facts shown. Were it a case of appeal with permission to adduce further evidence the case would be very different. The affidavit upon which the motion before us was made show the fact of the introduction of the further evidence in question.

It has been asserted that a judge of this court has no

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more power in a *habeas corpus* case than a judge of a provincial court, and that as the last named court has jurisdiction to deal with its own writ, this court has the same power. To that I answer, first, that under the provisions of the statute a judge of this court has the full power of a provincial court, and the two cases are not in that respect parallel; and, secondly, that a provincial court has original jurisdiction over the subject-matter which this court has not. We are told again that the statute is *ultra vires* of the Dominion Parliament—if it be so, it must be so pronounced by a court of competent jurisdiction, and the mere fact of its being so cannot give power to any court otherwise without jurisdiction to so declare it—and how can a mere court of appeal, constituted as this court is, go out of and beyond the jurisdiction prescribed by the statutes creating it.

Again it is said that the power given to a judge of this court being limited to "an inquiry into the cause "of commitment in any criminal case under any act of "the Parliament of Canada," I had no jurisdiction. This provision may read two ways, that is, it may have been meant to apply to the commitment only in a criminal case—the commitment being "under any act of the Parliament of Canada," or it may also be construed to apply only to cases where the offence was created by an act of the Parliament of Canada. The latter construction has been asserted to be the correct one, but I cannot so read the provision. The true grammatical, and, as I think, the sensible and proper construction is, that it applies solely to the commitment under an act—the inquiry is to be in reference to the commitment, and the true construction, I think, may by a slight change in the position of the words be given thus, "for the purpose of an inquiry, in any criminal case, into the cause of commitment under any act of the Parliament

of Canada," or the provision may be construed by reading the words "in any criminal case" as if found at the end of the provision. The inquiry is certainly to be as to the commitment, and I think the words "in any criminal case" were inserted to limit it to criminal cases as distinguished from civil. I am the more ready to adopt that construction, not being able to find or imagine any reason for attributing to Parliament the intention to limit the jurisdiction of a judge of this court, as the construction contended for would do, when the jurisdiction of the judges of the provincial courts is not so limited. No such reason has been advanced and I do not think any can be found, more especially when we reflect that the power otherwise given to a judge of this court transcends that of the judges of the provincial courts. That the commitment of the prisoner was under the acts of the Parliament of Canada will scarcely be denied, and it has not been. The arrest and commitment of persons charged with crime are provided for by statute, as well as the venue and all proceedings on indictments. The form of the indictment is given, and sec. 27 of cap. 27, 32 and 33 Vic. provides for the sufficiency of indictments, when according to the form given in the schedule to the act. Admitting, however, that my construction when dealing with the case was wrong, how can my judgment be reversed by any court not having original or other jurisdiction, or the writ issued by me quashed by any such court? The fearful consequences that we have been told likely to arise from the exercise of the jurisdiction by judges, such as has been done by me in this case, if not prevented, has been alleged as a reason why this court should interpose, and not only should interpose but give it authority to do so, if none previously existed. I cannot subscribe to any such doctrine. If the administration of the law is defective it is for the legislature, who imposed the duties on

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judges of this court and gave them jurisdiction, to interpose. I am of the opinion that it is the duty of the court to declare the law such as it is. If it be defective we may sincerely regret it, but because we do so we cannot alter it whatever the results may be. I know of no jurisdiction that can be assumed under any circumstances from what has been called a necessity arising in the minds of those using it for what they may deem the proper decision of any case civil or criminal. This court is the creature of legislative enactments giving it a limited jurisdiction, and specially providing for the cases over which jurisdiction is given to it, and it cannot go beyond it. We must assume that the parliament when giving power in *habeas corpus* cases to the judges of this court, was of the opinion that they might possibly exercise the jurisdiction properly, and therefore, not only did not provide for an appeal on the part of the Crown, but expressly provided against any. For this court to assume jurisdiction in any way is, in my opinion, going in the face of the statute. Besides, parliament in its wisdom, by an amendment to the act, withdrew from the court the original and appellate jurisdiction conferred upon it and the judges in *habeas corpus* cases in matters arising out of any claim for extradition, but in doing so did not change or limit the powers of the judges in other matters. In reference then to the claim to exercise jurisdiction by this court from necessity, I may remind those who make that claim that the decision of the judge is not final, but may be controlled by Her Majesty the Queen by judgment of Her Privy Council.

As touching the right of this court to interfere in this case by a summary proceeding to set aside my orders I will refer to the case in *re the Padstow Total Loss and Collision Association (Limited) ex parte*

Bryant (1). The court in that case decided on an appeal to discharge an order for winding up the association made by *Malins* V. C., 1880, that:

If a court acting in assumed jurisdiction belonging to it makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order and can only be discharged upon an appeal.

In that case Jessel M.R. said:

Assuming for the present that the association was an unlawful one and that the court has no jurisdiction to make the order, is the proper mode of getting rid of that order to appeal against it? I think it is. I think an order by a court of competent jurisdiction, which has authority to decide as to its own competency when that order was made must be taken to be a decision by the court that it had jurisdiction to make the order and consequently you may appeal from it on the ground that there is error in the order, the court having in fact no jurisdiction to make it.

Brett L.J. said:

That order was the order of a superior court, which superior court has jurisdiction, under a given state of facts, to make a winding up order; and if there has been a mistake made in the particular case and not in the assumption of a jurisdiction which the court had not, I should be inclined to say that the order could never have been treated, as long as it existed either by the court that made it or by any other court, as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore is one of appeal rather than jurisdiction. It is an erroneous judgment, if erroneous at all.

In the case now under consideration, I, as one of the judges of the highest court in the Dominion, was clothed with the jurisdiction in cases of *habeas corpus*, possessed not only by the judges individually, but of the courts in several provinces. I had therefore a general power to deal with all cases in which application was made to me to inquire into the commitment of prisoners and my first inquiry would be as to my jurisdiction. If I found I had none I would refuse the writ or an order to show cause why the prisoner should not be discharged. If, on the contrary, I decided in favor

(1) 51 L. J. Eq. N. S. 344.

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of my jurisdiction the prisoner would obtain by the proper legal means the benefit of that decision. If I improperly refused to issue the writ or to discharge the prisoner the statute provided for an appeal by the prisoner to this court. Was not, therefore, the position I occupied precisely similar to that of the court in the case just referred to, in which it was expressly decided that the order could not be treated as a nullity either by the court that made it or any other court, and that the only way to get rid of it was by appeal? I can discover no distinction between that case and this one, nor do I think that any can be found by any one else who has a sound legal mind and judgment. If such a doctrine be sound as respects a court of unquestioned jurisdiction over the subject-matter, it cannot be unsound as respects a court which has it not. I don't wish it to be thought by any one that I have any objection to a controlling power in this court in cases like the present, but I have felt under the obligation of ascertaining and deciding upon the contention that it has. I have endeavored, and I trust successfully, to consider the matter before us in the same way I would have considered it my duty to do had the circumstances arisen before any other judge of this court, and in that spirit have arrived at the conclusion that this cour thas not, and was not intended by Parliament to have, any such right or power as that contended for, and cannot aid those who are ready to assume a jurisdiction that does not exist, unless, indeed, revealed by some mysterious nebulous agency invisible to the eyes of ordinary mortals.

For my reasons as to other points taken and debated during the argument I must refer to my two previous judgments in this case.

The argument before the court in this case took place in the absence of the prisoner. He was served with a

notice to show cause why the writ should not be quashed and my order for his discharge set aside. He had the decision of a judge of this court that he was entitled to his discharge and an order to give effect to it. The crown seeks, while he is confined in gaol at Victoria, to quash the writ of *habeas corpus* and set aside the order, which if valid, which I claim it to have been till legally set aside, entitled him to his discharge. He is required by the notice to show cause when it is physically impossible for him to do in his own proper person. If a prisoner so confined is in poverty and unable to employ counsel the question of his life or death must be considered and determined *ex parte*. If the same motion was made without notice to the prisoner I should think no court would hear it, and is it not substantially the same thing and the giving of the notice a mere form if the prisoner cannot do what the notice is intended to prepare him for doing? I think every principle of justice that requires that every one shall be heard when his rights civil or criminal are to be effected should govern in such cases. His counsel objected to appear until the court decided upon the objection raised as to the absence of the prisoner It was subsequently arranged that the argument should proceed subject to the objection to be dealt with by the court. In answer to the objection the want of jurisdiction of the court to issue a writ of *habeas corpus* is suggested and the want of that jurisdiction is another reason why the court should not take upon itself the right to entertain the motion made. I think that under no circumstances should such a motion be entertained in the absence of the prisoner, unless by his own consent. For the reasons I have now given and those to be found in my previous judgments, before referred to, I am of opinion the motion should be refused.

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TASCHEREAU J.—On the constitutionality of section 51 of the Supreme Court Act, which confers on the judges of this court the power to issue writs of *habeas corpus*, I have always entertained grave doubts. I will refrain, however, from determining this question in the present case, as, in the view I take of it, the writ now under our consideration cannot be held to have issued under that section of the Act. This said section enacts that any judge of this court has concurrent jurisdiction to issue the writ of *habeas corpus*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any act of the Parliament of Canada. Now, murder is not a crime nor a criminal case, under or in virtue of any act of the Parliament of Canada It is clear that parliament did not intend to confer on the judges of this court power to issue the writ of *habeas corpus* in all criminal cases whatsoever, otherwise they would not have added the words "under any act of the Parliament of Canada." These words constitute a restriction, a limitation of the right to issue the writ, which we cannot overlook without grasping at a jurisdiction not intended to be conferred by the statute. It has been argued that because the proceedings in all criminal cases are taken under the Procedure Act of 1869, this makes any criminal case, according to the terms of this section 51, a criminal case under an Act of the Parliament of Canada, but this contention, it seems to me, is against the very words of the section The procedure in all criminal cases must be under the Procedure Act of 1869, so that the words "under any act of the Parliament of Canada," would be a surplusage and would have no meaning, if they were so interpreted. This interpretation would strike out these words, and this cannot be done. It would be legislation under the guise of interpretation. Then, how can murder be said to be a criminal case under the Procedure Act of 1869?

We say a crime or a criminal case, for instance, under the Forgery Act, or under the Malicious Injuries to Property Act, or the Larceny Act, or a crime or a criminal case under the common law, but how can it be said that murder is a crime, or that the trial for murder is a criminal case under the Procedure Act of 1869? Neither can it be contended, as has been attempted, that if a prisoner is committed by a magistrate, under 32 and 33 Vic. ch. 30 (D.), this constitutes a case which under this section 51 gives us the right to issue a writ of *habeas corpus*. This would be reading the section as saying "into the cause of commitment under any act of the Parliament of Canada," omitting the words "in any criminal case," or it would be contending that murder is a criminal case under the act respecting Justices of the Peace as regards indictable offences.

We must consequently hold that the writ in this case did not issue under this section 51 of the Supreme Court Act. There was then under that Act no power, no jurisdiction whatever, to issue it. The judges of this court, and this court itself, have no other powers than those expressly conferred upon them by the statute. Their powers are exclusively statutory, and that this court is constituted a court of common law and equity must, in conjunction with the British North America Act, be held to apply only to the appellate jurisdiction of the court, not to any original jurisdiction which parliament did not, and could not, confer upon it. It has been contended that this section 51 should be interpreted as constituting each of the judges a separate court, established with original jurisdiction in virtue of section 101 of the British North America Act for the better administration of the laws of Canada, or in other words that six courts have been so established. This contention seems to me untenable. By its very first section only two courts are established by the act,

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"The Supreme Court and the Exchequer Court," not eight as this proposition would assert.

It being clear then that the writ of this court has been issued without authority, it must necessarily follow that we have jurisdiction to quash it. It would be an extraordinary state of things if this court had not the power of supervision over its own writs. It is not a case of appeal. Where, as here, a judge having a limited jurisdiction exercises a jurisdiction which does not belong to him, his decision, or his acts, amount to nothing and do not create any necessity for an appeal. *Attorney General* v. *Hotham* (1). A proceeding so taken is a complete nullity, a nullity of *non esse*. As we say in civil law, *defectus potestatis nullitas nullitatum*, and a writ so issued without jurisdiction should not be obeyed.

On the merits of the case I have very little to add to what has been said by his Lordship the Chief Justice, with whom I entirely concur on all points. First, as to the presence of the prisoner. In the view I take of the case it is evident that we would have no jurisdiction to order the prisoner to be brought here. To do so would be in direct contravention of the principle I hold to rule the case. As to the injustice and hardship that the absence of a prisoner, as it has been argued, might entail in such cases, we must take it for granted that each court, in each particular case, will always see that a prisoner suffers no injustice. Then it must be borne in mind that on criminal appeals to the Privy Council the prisoner is never present. On criminal appeals before the Court of Crown cases reserved, likewise, the prisoner is never present. And the court hears the case whether the prisoner is defended by counsel or not. *Reg.* v. *Child* (2); *Reg.* v. *Daynes* (3); *Reg.* v.

(1) 3 Turn. & Russ. 219. (2) 12 Cox 64.
(3) 12 Cox 514.

Reeve (1); *Reg.* v. *Rendall* (2); *Reg.* v. *Farrell* (3); *Reg.* v. *Greathead* (4); *Reg.* v. *Brown* (5).

In this court also the presence of the prisoner has never been required in criminal appeals. *Laliberte* v. *The Queen* (6); *Reg.* v. *Cunningham* (7).

On the question of the change of venue the record shows a perfectly valid and legal order. That this record could be contradicted by affidavits is to me an untenable proposition. The records of a court are of such high and supereminent authority that, as I read in 4 Stephen's Comm. 260, their truth is not to be called into question. For it is a settled maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. I refer also to Hawkin's Pleas of the Crown (8) and *Rex.* v. *Carlile* (9), and to Chief Justice Wilson's remarks and cases cited in *re McKinnon* (10).

Then if the plea of not guilty puts the order in question for a change of venue in issue, as a matter of fact, the verdict of the jury is conclusive, and the order must be taken as having been duly proved. If not guilty did not put it in issue, the question, in the absence of a plea to the jurisdiction, is at an end. For the jurisdiction in question here, it must not be lost sight of, is a jurisdiction *ratione personae* only, not *ratione materiae.* The court at Victoria had, in law, jurisdiction, not only to try the crimes committed within its district, but also all those the trial of which, under sec. 11 of the Procedure Act, had been transferred to it from any other part of British Columbia. To say that a prisoner cannot confer jurisdiction on a Court is true, when the court is incompetent *ratione materiae*, but is not true

(1) 12 Cox 179.
(2) 12 Cox 598.
(3) 12 Cox 605.
(4) 14 Cox 108.
(5) 15 Cox 199.
(6) 1 Can. S. C. R. 117.
(7) Cassel's Digest 107.
(8) Book 2 ch. 2 sec. 14.
(9) 2 B. & Ad. 362.
(10) 2 U. C. L. J., N. S., 327.

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when the incompetency is *ratione personae*. The prisoner, for instance, can himself ask the change of venue, and then surely he submits to another jurisdiction than his own. In fact, in the present case, all the objections taken here by the prisoner as to the jurisdiction would be open to him, if he is right in his contentions, even if the order changing the venue to Victoria had been made at his own request and upon his own application.

There are, besides, many other cases which the court of Victoria has jurisdiction to try though the offence has been committed outside its territorial jurisdiction. I allude to those crimes which can by statute be tried at any place where the prisoner is apprehended or in custody, as forgery, bigamy, perjury and various others. *Rex* v. *James* (1); *Reg.* v. *Smythies* (2) *Reg.* v. *Whiley* (3).

This section 11 of our Procedure Act is a new enactment, so that no English cases absolutely in point can be found. But its terms are so clear that there can be no difficulty in working it. Paragraph two thereof enacts in so many words that upon the order for the change of venue being made all proceedings in the case shall be had in the district where the venue has been transferred as "if the case had arisen or the offence been committed therein." These words alone settle the question raised by the prisoner.

I observe that, by the Act 37 Vic. ch. 42 sec. 5, it is enacted that the Supreme Court of British Columbia, and any court thereafter to be constituted by the legislature of the said province and having the powers now exercised by the said court, shall have power to hear, try and determine, all treasons, felonies and indictable offences whatsoever mentioned in any of the said acts

(1) 7 C. & P. 553. (2) 1 Den. C. C. 498.
(3) 1 C. & K. 150.

(the Criminal Acts of 1869) which may be committed in any part of the said province.

However, as this clause has not been mentioned before us I refrain from inquiring here how far it affects or applies to this case.

Coming to another point, I hold that it was a sufficient answer to the rule to show cause, and, *a fortiori*, a sufficient return to this writ that the prisoner was in custody under the sentence of the court of oyer and terminer. *Bethel's* case (1); *Gosset* v. *Howard* (2); *re Suddis* (3); Eight Report Criminal Law Commissioners (4). A contrary doctrine would entitle every convict in any of our penitentiaries to be brought to Ottawa on an affidavit that the court which tried him had no jurisdiction (5). The court of oyer and terminer of Victoria was the court competent, in this case, not only to try the prisoner but also to determine its own jurisdiction and power to try him. It determined it by assuming it. If it erred the only remedy the prisoner had, after moving in arrest of judgment if he chose to do so, there being no court of Crown cases reserved, was a writ of error. *Rex* v. *Seton* (6); *Rex* v. *Justices of Yorkshire* (7). Rightly or wrongly, there is no appeal in criminal cases. The conviction before a court of superior jurisdiction and its decision on its own jurisdiction is, unless reversed on a writ of error, or by the court of Crown cases reserved if any exist, *res judicata*, and as such *pro veritate accepitur*, as said by Lord Tenterden in *Rex.* v. *Carlile* (8). The judge presiding at the trial may refuse to reserve a case. The Attorney General may refuse his fiat for a writ of error. But hard as this may seem to be, the law is that in such a case the prisoner

(1) 1 Salk. 348.
(2) 10 Q. B. 411.
(3) 1 East 306.
(4) P. 195.
(5) See E. B. & E. 828.
(6) 7 T. R. 373.
(7) 7 T. R. 467.
(8) 2 B. & Ad. 362.

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has no way of avoiding either the rulings of the court or the verdict of the jury, or the sentence of the court, but by applying to the Crown. And I venture to say that if parliament ever attempts to change the law on this matter and seeks to give a defendant in a criminal case the right to have a conviction against him reviewed, it is not to a judge in chambers that this power will be given.

What would be the consequences if the proposition enunciated in this case on the part of the prisoner were sustained? Purely and simply, it seems to me, that any judge, whether of this court or of the Supreme Court of British Columbia, would have the right to liberate a prisoner on the ground of want of jurisdiction in the court that tried him even after his conviction has been affirmed either in the court of error, or in this court, or in the Privy Council. Or that when, as in *Reg.* v. *Goldsmith* (1) for instance, the prisoner has contended that the indictment disclosed no crime, and consequently gave no jurisdiction to the court, a judge in chambers who would adopt that view might discharge the prisoner even after, not only the judge at the trial but even the court of crown cases reserved, has held the contrary. Or that when, as in *Reg.* v. *Carr* (2), the very question reserved was as to the jurisdiction of the court to try the prisoners, a judge on *habeas corpus* might have liberated the prisoner, if the judge presiding at the trial had not reserved a case, or even after the conviction was affirmed on a case reserved. But I need not go out of the case now under consideration to illustrate how untenable is the position taken here on the part of the prisoner. A writ of error was by him taken, and after argument the conviction was affirmed by the full court of British Columbia, the judges being unanimous. If the judges

(1) 12 Cox 479. (2) 15 Cox 129.

had not been unanimous the prisoner would have had an appeal to this court. But that not being so the judgment of the full court of British Columbia was final. Yet the prisoner would contend that though this court, on this very question of jurisdiction, cannot review the decision of the court of British Columbia, yet a judge, either of this court or of British Columbia, sitting in chambers has the power to reverse that judgment on the very question of jurisdiction and to liberate the prisoner. I say "either of this court or of the British Columbia court" for the powers of the judges of this court under section 51 of this Act, or under the common law, if any exist, under one or the other, are concurrent with the powers of any of the judges of British Columbia. That means, as I read it, that if a judge of this court had the power to issue this writ any judge in British Columbia had the same power.

To these cases already cited may be added one from the Province of Quebec, *ex parte Plante* (1). In that case the prisoner had been sentenced to the penitentiary for life, although fourteen years was the maximum fixed by the statute; he applied for a writ of *habeas corpus* to Chief Justice Bowen, but the learned judge refused to discharge him on the ground that he could not, on a writ of *habeas corpus*, act as a court of error and revise the sentence of the criminal court. I would also add *Reg.* v. *Smith* (2), where Burns J. says: "That after sentence pronounced, no remedy but the writ of error is left to the prisoner;" and also *Reg.* v. *Powell* (3), where it was held that the proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by *habeas corpus;* also to the American case of *Grignon* v. *Astor* (4).

On the question of whether an order to discharge the

(1) 6 L. C. R. 106.
(2) 10 U. C. Q. B. 99.
(3) 21 U. C. Q. B. 215.
(4) 2 How. 319.

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prisoner can issue without a writ being issued, or without the prisoner being brought up, I have only to say that if such a practice has ever existed it is, it seems to me, a loose and illegal one, and one which we should not sanction. Under sections 53, 61 and 62 of 32 and 33 Vic. ch. 30, a prisoner may be admitted to bail without a writ of *habeas corpus*, but that cannot be extended to a discharge *sine die*.

I have only one more remark to make It is as to the well established rule that if a *corpus delicti* appears by the depositions against a prisoner the judge should not set him at liberty, however defective or irregular the commitment might be. In the present case I may take it for granted, after the verdict of the jury, that the depositions against the prisoner charged him with one of the most heinous crimes known to the law. Yet were he to have the benefit of this order given by the learned judge in chambers he would be set at large. This was a necessary consequence of the granting of this writ, as a *certiorari* to return the deposition could not, under our statute, have been issued by the learned judge, according to the decision of this court in the Trepanier case. But this, it is evident, demonstrates what serious consequences would follow the exercise of the power, if it existed, by a single judge sitting in chambers to assume the the functions of a court of error and review the decisions of the superior courts of the country even on a question of jurisdiction. The court of oyer and terminer's judgment in the case on the question of its own jurisdiction, had it been distinctly raised before it, would have been final and conclusive until reversed by the court of error. The fact that the prisoner did not raise any such objection before the court itself at any time during or after the trial can surely not give him the right to raise it afterward before a judge in chambers.

Different other grounds of error have been assigned by the prisoner before the British Columbia court. But we do not sit here in appeal from the decision of that court, and the objections there taken by the prisoner to the proceedings of the court of oyer and terminer were not grounds for a *habeas corpus* and are not now before us. I may, however, notice the objection that no venue whatsoever, as contended by the prisoner, is laid in the indictment. Now, in fact, a venue is laid in the margin thereof, according to section 15 of the Procedure Act. If not a proper one, section 23 of the Procedure Act covers that defect. *Reg.* v. *O'Connor* (1) and that class of cases cannot now be followed. But moreover this is a defect apparent on the face of the indictment, and one which clearly could have been amended *Reg.* v. *Ashburton* (2). So that by section 32 of the same act, the prisoner cannot now avail himself of that defect. The analogous English clause says, "Every formal defect." But ours says "Every defect." The section is as follows:

Section 32. Every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded and not afterwards; and every court before which any such objection is taken may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

See 3 Burns Justices of the Peace 33 (30th ed).

On the question of the proper constitution of the court of oyer and terminer, and of the court of error, I entirely agree with the Chief Justice, and for the reasons by him given, that here also the prisoner's contentions are entirely unfounded.

I am of opinion that this application should be

(1) 5 Q. B. 16. (2) 5 Q. B. 48.

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allowed and that the writ of *habeas corpus* and the order to discharge the prisoner should be quashed and set aside.

I am not sorry (I may say in fine) to have been able to reach this conclusion, perfectly satisfied, as I am, that the prisoner in this case has had a fair and legal trial. I duly appreciate the highly beneficial character of the writ of *habeas corpus* as one of the most effective safeguards of the liberty of the subject, but I cannot forget that society has also its rights, and that the courts of the country are bound to see that the writ is not taken advantage of for the protection of felons and convicts.

Motion allowed. Writ of habeas corpus quashed and the order and proceedings consequent thereon also set aside.

Solicitor for the Crown: *Attorney General of British Columbia.*

Solicitor for the prisoner: *Theodore Davie.*

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RICHARD WEST AND MARY JANE WEST (WIFE OF THE SAID RICHARD WEST) BY EDWARD HENRY BOODY HER NEXT FRIEND (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF PARKDALE AND THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS)..... } RESPONDENTS.

ROBERT CARROLL AND WILLIAM HENRY DUNSPAUGH (PLAINTIFFS) } APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF PARKDALE AND THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

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

NOTE.—The following is an extract from an affidavit made by the Deputy Attorney General of British Columbia, which was filed as a part of the above case submitted for the consideration of the court, and was uncontradicted on the part of the prisoner.

"On the 13th day of October, 1885, I applied to the Chief Justice "for an order fixing Victoria as the place of trial of Robert Evan "Sproule.

"On the hearing of such application the said Robert Evan Sproule "was personally present, and was also represented by his counsel.

"No application for the payment of additional expenses, or any "expenses whatever, was then or at any other time made on behalf "of the prisoner * * * * * * * but the Chief Justice would "not make the order except upon my undertaking, which under-"taking I then gave, that the Crown would abide by such order as "the Judge who should try the case might think just to meet the "equity of the Statutes of Canada, cap. 29 sec. 11, and an entry "of such undertaking was made in writing by the Chief Justice in "his note-book at the time.

"* * * * In drawing up the order fixing the place of trial at "Victoria, I omitted to set out the conditions the Chief Justice had "imposed upon the Crown as a condition precedent to his making "the order. (Then follows an explanation of how such omission "occurred, and the deponent's reasons for believing that no ad-"ditional expense would be incurred by the change of venue)."

The above refers to the order for change of venue set out at page 142 of this volume.—Ed.

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Municipal Corporation—Construction of subway by—Authorized by special statute—46 Vic. ch. 45 (Ont.)—Agreement with Railway Companies—Order in Council under 46 Vic. ch. 24 (D.)—Work done as agent of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.

A special statute in Ontario (46 Vic. ch. 45) authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways; provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of Parkdale and the railway companies to the Privy Council of Canada, purporting to be made under 46 Vic. ch. 24 (D.), an order of the Privy Council was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to, and approved of by, the ratepayers of that municipality. In an action by the owner of property injured by the work:

Held,—Per Ritchie C.J., Fournier and Henry JJ., that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer.

Per Gwynne J.—That the work should be considered as having been done under the special Act, and the plaintiffs were entitled to compensation thereunder.

Per Taschereau J.—That the work was done by the municipality as agent of the railway companies and it was therefore not liable.

APPEAL from a decision of the Court of Appeal for Ontario (1); reversing the judgment of the Divisional Court (2); and of Wilson C.J. (3).

(1) 12 Ont. App. R. 393. (2) 8 O. R. 59.
(3) 7 O. R. 276.

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The material facts of the case are as follows.

By a special statute of the Ontario Legislature, 46 Vic. cap 45, authority was given to the councils of the city of Toronto and the village of Parkdale, jointly or separately, to construct certain railway subways, to enter into agreements with any or all of the railway companies whose tracks crossed the public streets lying within the limits of the said city and village for the construction of such subways, and to pass such by-laws and make all such agreements as might be necessary for the performance of the work; provision was made for compensation to any person whose lands might be injuriously affected by such construction, to be determined by arbitration under the Municipal Act if not mutually agreed upon; and the respective councils were authorized to issue debentures to provide for the cost of the proposed subways and were not required to submit to the rate-payers any by-law ordering said debentures to issue.

The two councils not being able to agree as to the mode of doing the work Parkdale and the said railway companies entered into an agreement for the construction of a subway partly in Parkdale and partly in Toronto, and obtained an order of the Privy Council of Canada, under 46 Vic. cap. 24, based on a report of the railway committee, authorizing the construction of such subway under the said agreement.

The by-law of the council of Parkdale approving of this agreement and providing for the issue of debentures was submitted to, and ratified by, the rate-payers, and a contract was entered into by the council with one G. who proceeded to construct such subway.

Separate actions were brought by West and wife and by Carroll and Dunspaugh against the corporations of Parkdale and Toronto for injury to their respective properties by the lowering of the street

under which such subway was made. The statement of claim in each case alleged that the work was done under the special Act and that the defendants had not passed by-laws as thereby required, in consequence of which the plaintiffs could not obtain compensation under the Municipal Act.

The defence raised by Parkdale was, that the work was not done under the special statute, but was done by the municipality as the agents of the railway companies.

On the trial it was agreed that if the court should find the defendants liable a reference might be had to determine the amount of compensation.

The two suits were carried on and argued together, and on the hearing before Wilson C J., judgment was given for the plaintiffs and an order for reference made. Parkdale being ordered to pay the costs of the defendants, the city of Toronto. This judgment was affirmed by the Divisional Court but reversed by the Court of Appeal. The defendants in both suits then appealed to the Supreme Court of Canada, and an order was made consolidating the two appeals.

S. H. Blake Q C. and *Lash* Q.C. for the appellants the Wests, and *R. Snelling* for the appellants Carroll and Dunspaugh, contended that Parkdale could not be considered agents of the companies ; that they entered into the agreement with the contractor for the construction of the subway ; they agreed to bear an equal share with each company of the cost of the work; and they acted through as principals and not as agents. It was also argued that the Privy Council could not authorize this work, which would be an interference with provincial rights, and that there was no recourse against the railways as no land had been taken.

The following authorities were cited in addition to those mentioned in the previous reports. *Bissell* v. *The*

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Michigan Ry. Co. (1); *Miners' Ditch Co.* v. *Zellerbach* (2); *Clegg* v. *Dearden* (3); *Bank of New South Wales* v. *Owston* (4); *Barwick* v. *English Joint Stock Bank* (5); *Pearsall* v. *Brierley Hill Local Board* (6).

McCarthy Q. C. and *McDonald* Q. C. for the respondents referred to *White* v. *Gosfield* (7); *Richett* v. *The Metropolitan Ry.* (8); Story on Agency (9); Angell & Ames on Corporations (10); *London & Birmingham Ry. Co.* v. *Winter* (11); *Western Bank of Scotland* v. *Addie* (12); *Ex parte Parkes* (13); *Fotherby* v. *The Metropolitan* (14).

Sir W. J. RITCHIE C. J.—On the 2nd day of September, 1884, the Hon. C. J. Wilson delivered his judgment in this case, which is reported at 7 O. R. 270, and the formal judgment entered thereupon is in the words following:—

(1) This action coming on for trial before this court at Toronto, at the special sittings appointed for the trial of actions in the Chancery Division, on the sixth day of May last past, in the presence of counsel for all parties, upon hearing read the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, and upon motion of Mr. Osler Q. C., of counsel for the defendants the corporation of the village of Parkdale, it was ordered that the said trial should stand adjourned until the 12th day of the said month of May, and that the said defendants should be at liberty to deliver an amended statement of defence, and that the plaintiffs should have liberty thereupon to deliver an amended statement of claim; and this action having again come on for trial on the said 12th day of May last past, in presence of counsel for all parties, upon hearing read the said amended pleadings, and upon hearing the further evidence adduced, and what was alleged by counsel aforesaid, this court was pleased to direct that this action should stand over for judgment; and the same coming on this day for judgment:

(1) 22 N. Y. 258.
(2) 37 Cal. 543.
(3) 12 Q. B. 567.
(4) 4 App. Cas. 270.
(5) L. R. 2 Ex. 259.
(6) 11 Q. B. D. 739.
(7) 10 Ont. App. R. 555.
(8) L. R. 2 H. L. 202.
(9) Sec. 16.
(10) Sec. 186, 278.
(11) 1 Cr. & Ph. 57.
(12) L. R. 1 Sc. App. 145.
(13) 9 Dowl. 614.
(14) L. R. 2 C. P. 188.

(2) This court doth declare that the plaintiffs are entitled to recover from the defendants, the corporation of the village of Parkdale, compensation for the damages (if any) sustained by them by reason of the wrongful acts of the said defendants, complained of in the statement of claim herein, and doth order and adjudge the same accordingly.

(3) And this court doth further order and adjudge that it be referred to his honor the junior judge of the county of York, an official referee, to take an account of the damage (if any) sustained by the plaintiffs. or either of them, by reason of said wrongful acts, and to fix the compensation proper to be paid to them, or either of them, in respect thereof.

(4) And this court doth further order and adjudge that the defendants, the corporation of the village of Parkdale, do pay to the plaintiffs and to the defendants, the city of Toronto, their costs of this action up to and inclusive of this judgment, and including the costs of the motion for an injunction herein, forthwith after taxation thereof.

(5) And this court doth further order and adjudge that the defendants, the corporation of the village of Parkdale, do pay to the plaintiffs the amount which the said referee may find proper to be paid to them, or either of them, for compensation for damages as aforesaid, together with their subsequent costs, to be taxed as aforesaid forthwith after the said referee shall have made his report.

The contention of the defendants, as clearly set forth in their factum, is that the Parkdale council had no power under the Ontario act, 46 Vic. cap. 45, to do this work, and that they did not do it under the Act, That they assumed to act only under the agreement with the railway and the order in council of the 27th of March, 1883. In the words of their factum "they wholly deny having acted under the Ontario act," and they further say: "in any view of the effect of the act the fact was, and it was clearly established, that the respondents did not do, or purpose to do, the work under its provisions, but that the work was done under the railway act and the order of the Privy Council made thereunder," and which justified what they did. That if the act was wrongful it was contended that it was *ultra vires* on the

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part of the Parkdale council to construct the subway, and on this ground the corporation of Parkdale is not liable.

All the judges of the courts below have concurred in the opinion that the work was not done under the Ontario act, 46 Vic., and I have been unable to arrive at the conclusion that on this point they were wrong.

It cannot be denied that the plaintiffs have been seriously damnified and ought to recover compensation therefor, and the real question in this case is: Are the defendants, the village of Parkdale, liable to the plaintiffs for such damage?

The village of Parkdale having entered into an agreement with the four railway companies for the performance of this work, and having taken the control of the work, and having contracted with Mr. Godwin for the execution of the work, how can they escape liability to make compensation to the parties who have been injured by such work, either under the statute or as wrongdoers?

Chief Justice Wilson was of opinion that the work was not being done under the special act; that the village had not observed its terms and had not assumed to act under it, but only under the order in council; that they had exceeded their powers as to all the work done in the city of Toronto; and that applied to the action of West and his wife whose property is situate in Toronto; and also that the village is not authorized by the order in council to do the work, and could not be so authorized, as the order could have no binding effect in law. But if the order could confer such a power the village would not be liable, because a liability arises under it only in those cases in which lands have been taken and none have been taken here; and as the village has not proceeded under the special act, it cannot be compelled to go to arbitration; that they

are, in effect, wrongdoers, and answerable as such for the damage they have caused to the plaintiffs and others by reason of these works; and he found that the village of Parkdale is doing the work in question unauthorizedly, and on that ground, wrongfully, and that they are bound to make compensation to the parties injured, and referred the question of compensation to the master.

Had the municipality proceeded to do this work under the provisions of the Ontario statute 46 Vic. cap. 45, as in my opinion it should have done, the compensation now claimed would have been provided for. The corporation did not do this, but, on the contrary, by works carried on under their control, and by their contractor, unquestionably injuriously affected the lands of the plaintiffs; and not having proceeded under the Ontario statute the plaintiffs cannot obtain compensation in the manner provided for by that act. Are they therefore to be remediless? I think not. They are, to the injured parties, in my opinion, immediately primarily liable. In doing this work I think the municipality of Parkdale acted as, and must be treated as, principals and not as agents, the construction of the subway being, as recited in the Parkdale by-law, essential to the interests of the village. The work performed being just what the act authorized to be done, I think they cannot escape liability by alleging that they did not do, or assume to do it, under the act, or that having power to do the work, they did it in a manner not authorized by the act and without complying with the conditions required by the act.

The Ontario act 46 Vic. cap. 45, authorized the councils of Toronto and Parkdale, jointly or separately, to do work of the kind in question, and provided that the councils should make to the owners or occupiers or other persons interested in the real property entered

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upon, taken or used by them or either of them in the exercise of any of the powers conferred upon them or either of them by the act, or injuriously affected by the exercise of such powers, due compensation for any damage resulting from the exercise of such powers beyond any advantage derived from the works. Is it not, then, clear that the doing of this description of work is not a matter *ultra vires* the corporation of Parkdale; in other words, not beyond the scope of their corporate powers? They should have proceeded under the Ontario statute; they did not do so, but undertook to do the same work in a different, and unauthorized, manner, and now seek to escape from making due compensation to parties injuriously affected thereby; in other words, because they did not choose to act strictly in accordance with the law they can, by acting contrary to it, and so making themselves wrongdoers, obtain the same benefit they would have done if their proceedings had been regular and proper and at the same time injuriously affected real property, and through the instrumentality of their irregular and improper proceedings escape the responsibility of making compensation. This, I humbly think, law, reason and common sense alike repudiate. The village is the only contracting party and pays by funds raised from the property holders within the municipality, and I cannot see how the railway companies agreeing with the municipality of Parkdale to pay a part of the expense of the work can relieve Parkdale from making compensation by paying for the damage they have caused the plaintiff and others by reason of these works. The order in council imposed no obligation on the village of Parkdale to execute this work or to do anything whatever in connection therewith. The order in council required the railway companies to do the work and pay the expense and damage resulting therefrom.

I think this appeal should be allowed, and the judgment of Chief Justice Wilson and of the Divisional Court should be restored.

FOURNIER J.—I am in favor of allowing these appeals for the reasons given by the learned Chief Justice, and also for those given by Chief Justice Wilson, whose judgment, I think, should be restored.

HENRY J.—These actions were brought by the respective plaintiffs for an alleged damage to their property by certain public works, and I think the evidence shows very clearly that the plaintiffs have been injured by the work done. The law as to public nuisances is very plain, and where one is committed, and a party has suffered special damage thereby, he can bring an action. Now it is evident that the parties here did sustain serious damages by the work done. The defendants justify under an order in council, and claim that they were merely the servants of a railway company, or certain railway companies, in doing the work. But in order to sustain that position they would require to show that the railway companies were authorized to do this work. In that I think they have wholly failed. The evidence does not show any such agency. They were, in fact, principals, and contributed a portion of the cost of the work.

The evidence is very clear that this corporation authorized the doing of the wrong complained of. By-laws were passed under the seal of the corporation, and the whole of the work which caused the injury complained of was done under the authority of the corporate seal. They are therefore primarily liable to the parties to whom the wrong was done.

In looking over the statutes I have come to the conclusion that there was no justification for this injury. I think the law is very plain and very easy of applica-

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tion to a case of this kind. I agree with the reasons given by His Lordship the Chief Justice and with the conclusion at which he has arrived; and also in the conclusion arrived at by Chief Justice Wilson in the court below.

I think the appeal should be allowed.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. If Parkdale was to be considered as having acted under the Ontario statute no action would lie, but the plaintiffs only remedy would be by arbitration. But Parkdale did not act under the Ontario statute. That is clear, it seems to me, and was so found, as a matter of fact, by Chief Justice Wilson, and, if I mistake not, by all the judges in the courts below who have had the case before them. The debentures issued were certainly not those authorized by that statute, and the submitting of the by-law to the votes of the ratepayers in the face of a clause which says that any by-law under the act need not be so submitted is conclusive evidence that Parkdale did not purpose to build this sub-way under the act. I cannot see that, such being the case, the appellants can say to Parkdale as they do in this case: "You, in fact, did not act under the statute, but you ought to have done so. You have acted so as not to be liable, but you ought to have acted so as to be liable, and, therefore, you are liable." Then, if not acting under the order of the railway committee Parkdale was a wrong-doer, acting clearly without the scope of its powers, and in West's case even outside of its territorial limits, this action consequently does not lie against the corporation (1). But if, as undoubtedly is the case, Parkdale built this sub-way for the railroad companies, it cannot be denied that these companies had the right to build it. Then they were at liberty to build it themselves, or to employ Parkdale to

(1) *Smith* v. *Rochester*, 76 N. Y. 509, and authorities there cited.

do it as their agent. If Parkdale had not the power to so act as agent, their doing so was *ultra vires* of such a character that no action lies against them. And if they had the power to act as agents of the companies, then the order of the Privy Council protects them from the action of the plaintiffs. And could they possibly be held liable for the companies, the only remedy to the plaintiffs under the railway act is again by arbitration.

For the reasons given by Burton, Paterson and Osler JJ., in the Court of Appeal, I would dismiss the plaintiffs' action. Their only recourse is against the companies.

GWYNNE J.—That a most serious injury, indeed one of the very greatest magnitude, has been inflicted on the plaintiffs by the work performed by Godson under a contract executed by the corporation of the village of Parkdale under their corporate seal cannot admit of a doubt, but the corporation contend that they are not responsible to the plaintiffs for this injury, for the reason that, as is alleged, they only entered into that contract as agents of certain railway companies who, as is also alleged, were under a legal obligation to do the work, while on the part of the plaintiffs it is suggested that the corporation having power and authority to do the work, subject to a liability to the plaintiffs to indemnify them, now pretend that in executing the contract with Godson they were acting only as agents of the railway companies, under the impression that the work could thus be performed by them without their being liable to indemnify the plaintiff. If the law not only authorizes but, as is contended, requires the railway companies to do the work and exempts them from all responsibility to the plaintiffs for the injury done to them, and if upon a proper understanding of the facts of the case the cor-

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poration of Parkdale are to be regarded in the transaction merely as the agents of the railway companies in doing an act lawful for them to do. the result will be that the plaintiffs will be deprived of all means of obtaining redress for a most egregious wrong; but before arriving at this conclusion it will be necessary to examine with critical acumen two acts of parliament, the one an act of the Legislature of Ontario and the other of the Dominion Parliament.

On the 1st of February, 1883, an act respecting the city of Toronto and the village of Parkdale was passed by the legislature of the province of Ontario 46th Vic. ch. 45.

The preamble of that act recites as follows:—

(His Lordship here read the preamble and first section of the act.)

It is to be observed that the corporations of the city of Toronto and the village of Parkdale are the promoters of the act; it is passed upon the petitions of those corporations, respectively, as the parties having a peculiar interest in procuring the construction of the works authorized by the act; and by this first clause power is given, first, to the two corporations to enter into an agreement with each other as to the construction and future maintenance of the works; but lest they should be unable to agree provision is made, secondly, that the several railway companies, whose tracks cross any of the public streets within the limits of the city of Toronto and village of Parkdale, may all jointly, or any of them separately, enter into such agreement with the city of Toronto and the village of Parkdale jointly, or with either of those corporations separately, for the construction and future maintenance of the works authorised by the act as they may deem necessary for the safety and protection of the persons and property of all persons concerned.

By the 2nd section it is enacted that:

(His Lordship here read the second section).

The object of this section primarily seems to be to make provision that either of the said municipalities, in case they should not be able to agree upon such a plan of the proposed works as should be undertaken jointly by them, might separately undertake the whole work to be executed within the limits of both municipalities, and might enter into a contract for such work according to a plan to be suggested by their own engineer and approved by themselves, a provision which, under the circumstances appearing in the case, seems to me to have been a very prudent one; for we find that the authorities of the municipality of Parkdale at an early period conceived an idea, to which they appear ever since to have persistently adhered, that in lowering the grades of Queen street so as to carry that street under the railways crossing it the width of that street might be considerably diminished, and as early as 1881 they procured an engineer to make a plan for such a work by which it was proposed that Queen street should be narrowed in the subway and its approaches to less than two-thirds of its original width, while we find that the difficulty which stood in the way of the city of Toronto coming to an agreement with Parkdale, upon the plan of the work, arose from the fact that the city of Toronto insisted that the original width of Queen street, (which was a great thoroughfare, namely, 66 feet,) should be maintained throughout, while the authorities of the village of Parkdale adhered to the plan as prepared by their engineer. This section then appears to me to be so framed as to enable either municipality alone (if mutually they should be unable to agree upon a plan) to construct the whole of the authorized work as of necessity, one undivided work, according to a plan prepared under its own direc-

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tion and approved by itself, and, in so doing, to close, break up and otherwise alter, improve and change the streets, or any of them, within the limits of both municipalities to such extent and in such manner as the engineer of the corporation undertaking the work might think fit and necessary for the purpose of the said work; the legislature, as it appears, not unreasonably thinking, that if the two municipalities could not agree upon a plan for executing the work jointly, and one alone should be willing to undertake the work, the mode in which the streets which were common to both should be interfered with might safely be entrusted to the municipality which should, if either should, alone undertake the work; but this section, as it appears to me, was intended to have operation equally in case the railway companies, or any of them, whose railways cross the streets should unite with the two municipalities, or with either of them, in procuring the authorized works to be constructed; in that case, the municipalities, being the parties interested in the question as to the manner in which their streets were to be interfered with by the construction of the works, were the parties whose assent to the plan of operations, whatever it might be, was absolutely necessary, and for this reason, whether the municipalities were jointly, or one of them alone was, undertaking the work, or both, or either of them, were, or was, acting in concert with the railway companies, or any of them, any contract for the actual work of construction must be entered into and executed by the municipalities, or one of them, if both are acting, or by the one which is, if one only is, acting in concert with the railway companies or any of them; just as if the two municipalities together were, or one of them alone was, undertaking the work, one or other of the two municipalities by reason of their peculiar interest in the streets to be affected by the authorized

works being a necessary party to any contract to be entered into for the actual construction of the works authorized by the act.

By the third section it is enacted that (His lordship read the section.)

The object of this section, or the necessity for it, is not very apparent. If the city of Toronto and the village of Parkdale should agree jointly to execute the works authorized by the act, it would seem to be a necessity, not requiring a special clause like this to secure its fulfilment, that they should in the agreement contemplated by the 1st section for "construction, erection and future maintenance" of the works, agree upon the proportions they should respectively bear in the cost and maintenance of the works and all incidental expenses. Yet it is apparently to the case of their having agreed to execute the work jointly under the authority vested in them by the 1st section that this 3rd section points. It does not provide for the possible case of the municipalities being unable to come to an agreement between themselves and of one of them, in consequence, entering into an agreement with the railway companies, or some or one of them, for the construction, erection and maintenance of such work, as they might deem sufficient and necessary, which is also authorized by the first section. In case the city of Toronto and village of Parkdale should jointly proceed with the construction of the works, or should execute a contract with any person for that purpose without first mutually agreeing upon the proportions they should respectively bear in the cost thereof, including compensation for damages, and future maintenance, this section might, perhaps, in such case, give to any person whose property might be injuriously affected by the proposed work, a right to restrain the municipalties from proceeding with the work as in dis-

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obedience of this section, although how such persons could be affected injuriously in any way by the municipalities proceeding with the work before they should mutually agree among themselves upon their proportionate cost of the work and its maintenance, is not, to my mind, very apparent. I cannot think that the default of the municipalities to comply with the provisions of this section before proceeding with the works would deprive the parties injured of their right to force an arbitration under the provisions of the Municipal Act. The section appears to me to be simply directory, not a condition precedent in the sense of making the work done to be *ultra vires*, if done before such agreement should be entered into. But however this may be, the section does not appear to apply to the case of an agreement for the construction of the authorized work being entered into between one of the municipalities only and the railway companies, or any of them, which is also authorized by the first section By the fourth section it is enacted that:—

His Lordship read the fourth section of the Act:—

The clauses of the municipal acts here referred to are the following sections of 46 Vic. ch. 18 Ont.

Section 387 provides that the appointment of all arbitrators shall be in writing under the hands of the appointers, and in the case of a corporation, under the corporate seal and authenticated in the same manner as a by-law.

Section 388 that the arbitrators on behalf of a municipal corporation shall be appointed by the council thereof or by the head thereof if authorized by a by-law of the council.

Section 389 that in cases where arbitration is directed by the act either party may appoint an arbitrator and give notice thereof in writing to the other party calling upon such party to appoint an abitrator on behalf of

the party to whom such notice is given. A notice to a corporation shall be given to the head of the corporation.

Section 390 that the two arbitrators appointed by or for the parties shall within seven days from the appointment of the lastly named of the two arbitrators appoint in writing a third arbitrator.

By section 393 it is enacted that (His Lordship read the section):

Then by section 396 it is enacted that (His Lordship read this section):—

The other Act which is relied upon as having a bearing upon the matter in question is the Dominion Statute 46 Vic. ch. 24, passed upon the 25th of May, 1883, whereby the 48th section of the Consolidated Railway Act, 1879, is repealed and the following substituted therefor.

(His Lordship reads section four of 46 Vic. ch. 24).

Into the question whether this section provides for compensation being paid by railway companies, acting in obedience to the order of the railway committee made under the authority of this section, to persons whose property is injuriously affected as is that of the plaintiffs here, although no land is taken from them, we need not now enter, as the railway companies are not parties before the court in this suit. What effect the section has upon the question involved in this suit may have to be considered by-and-by when the manner in which it is relied upon by the municipality of Parkdale as a defence to the plaintiffs' claim to make that municipality liable comes under consideration.

The above being the statutes bearing on the case, the facts so far as we can gather them from the evidence furnished to us appear to be that the city of Toronto refused to come to any agreement with the municipality of the village of Parkdale under the provisions of the

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Ontario statute 46 Vic ch. 45, because the city insisted upon the full width of Queen street being maintained throughout, while Parkdale adhered to the plan it had procured to be made by its engineer in 1881, which made a considerable diminution in the width of the street. What step the village first took in consequence of being unable to effect an agreement with the city of Toronto does not appear, nor what was its nature, namely, whether any attempt was made by the village authorities to procure the railway companies to enter into an agreement with Parkdale under the provisions of the Ontario statute before application was made to procure the interference of the railway committee of the Privy Council under the provisions of the Dominion Act, but that Parkdale did make some application to the railway committee to procure its interference appears from a recital contained in an agreement which the railway companies and Parkdale did voluntarily enter into while the matter of such application was under the consideration of the committee, and before they had arrived at any conclusion thereon, which agreement was, in fact, laid before the committee and constituted the basis of their subsequent action in the premises. A report of the committee of works of the city of Toronto of the date of the 27th August, 1883, which was put in evidence with an admission that it also was laid before the railway committee, throws some light on the matter.

(His Lordship here read the report as set out in 7 O. R. 278).

The agreement between the railway companies and the village of Parkdale, which was laid before the committee and formed the basis of their report made in relation to the subject matter thereof, is as follows. It has no date affixed to it but was executed before the 21st of September, 1883, the date of the report of the

committee of council.

Memo. of heads of an agreement respecting the Queen street crossing in Toronto :—

The Northern Railway.
The Grand Trunk Railway.
The Credit Valley Railway.
The Toronto, Grey and Bruce Railway.
The Village of Parkdale.

The above named parties agree as follows :—

The subway shall be made upon plans and specifications which shall be agreed on, and on failing agreement, as shall be fixed by Mr. Schreiber.

The village of Parkdale, at the request of said railroads, but without varying and without prejudice to the legal position of any of the parties under the Consolidated Railway Act, 1879, and the amendments thereto, shall take the control of the said work with power to let contracts and compel the carrying out of the same, but it shall be done under the direction of the engineer, who shall be named by the railway companies, but all to be done to the satisfaction of the inspector or engineer of the Railway Committee of the Privy Council. The work shall be put in hand at once and pushed as quickly as reasonably can be, the railway companies giving every facility for carrying out the same.

The cost is estimated at $35,000. Each of the parties named above will at once put up one-fifth of the said sum and will be liable for one-fifth of any extra cost of constructing the same.

Parkdale not to be liable for any expenditure incurred by any of the said railways in altering grades of tracks or other incidental expenses, but only for one-fifth of the actual cost of constructing subway, including altering grades of Queen and Dufferin streets, building retaining walls and abutments and overhead work, save as hereinafter excepted.

The money which shall be deposited in the Bank of Montreal to the credit of this work to be chequed out by the Reeve of Parkdale on the certificate of the engineer appointed by the Railway Companies as the work progresses, who is to certify monthly according to the value of work done, the said certificate to state the gross amount to be paid in each case, the certificate to be attached to the cheque.

The contract with the contractors to provide for a percentage being held back as security for the due performance of the work. The contract to be approved by John Bell and Mr. White, General Superintendent of the Credit Valley R. R., on behalf of the Com-

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panies, and J. E. Rose on behalf of the village.

Dufferin street to be closed between the points shown on the plan annexed hereto in red.

Any legislation required to be had to legalise this agreement or any thing thereunder the parties hereto agree to use all legal means to obtain.

The parliamentary expenses, exclusive of counsel fees, to be shared equally between the parties, each to pay its own agents and counsel fees.

If deemed necessary the sanction of both the Local and Dominion Parliaments will be asked for.

All the parties will use their best exertions and influence to have the acts passed. The railway committee to be asked to sanction this arrangement and order accordingly, and the said work to be done as in compliance with the order of the said committee, and nothing in said agreement contained shall be taken to limit the power of said committee or to remove the work from their jurisdiction or control, or to prevent the said village of Parkdale from applying to said committee to enforce the performance of said work by said railways, in case of failure on the part of them or any one or more of them, and the fact of the said village having control of said work shall be without prejudice, as above stated, until the work shall be fully completed as hereby agreed.

The width of the opening to be forty feet. The streets to be maintained hereafter by the municipalities in which they are; the wall and crossings of the railway overhead by the railways. The municipal authorities take a l risk of the sufficiency of the drainage of the subway. It is also agreed that the parties hereto will join in asking, in the acts above proposed, power to collect from the corporation of the city of Toronto one-sixth of the cost of doing the above mentioned work.

Each company at its own costs will provide the iron girders for carrying its railway tracks across the opening. The municipality of Parkdale to contribute $1,500 to cost of such girders as its full proportion thereof.

The division of the costs contemplated by this agreement is a division of the cost less the said iron girders as above set out.

All matters in dispute to be settled by the Government Engineer.

In accordance with the provision contained in this memorandum of agreement that "the railway committee "should be asked to sanction this agreement and order "accordingly" the memorandum was laid before the

committee which, upon the basis of it, on the 21st Sept., 1883, made a report addressed to the Minister of Railways and Canals to be submitted to His Excellency the Governor General in Council for his approval, in which the committee states that (His Lordship read the report set out in 7 O. R. 279.) :—

We have it on the evidence of Mr. Stokes, the engineer who prepared the plan for the municipality of Parkdale in 1881, that the plan approved by the Railway Committee was that plan so prepared by him with two trifling alterations only, which had been suggested by the Government Engineer and concurred in by the parties, namely, that the descent in the approaches of the sub-way should be one foot in twenty instead of one in eighteen, and that the total width of the subway should be 42 feet instead of 40 as originally designed.

The above report of the railway committee was submitted to His Excellency for approval by him in council on the 24th day of September, 1883, upon which day, as the sanction of His Excellency the Governor General in Council was by the Statute 46 Vic. ch. 24 made requisite to the recommendation of the railway committee acquiring any validity, the report acquired whatever legal force or effect it had and assumed the character of an order in council. Upon the 18th of October, 1883, the council of the municipality of Parkdale gave a first and second reading to a by-law introduced into that council and framed so as to give effect to the agreement contained in the above memorandum of agreement entered into by and between the railway companies and the village. This by-law as the same appears in the printed case, is as follows (Here His Lordship read the by-law.) :

The by-law having been approved by the ratepayers the agreement which had been entered into between

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the companies and the municipality reduced into perfect form was upon the 24th November, 1883, executed under the corporate seals of the parties and is as follows (See 7 O. R. 280 where the agreement is set out in full);

Now it is to be observed that in this instrument the parties declare that it was while the proceedings instituted by the municipality of Parkdale before the Railway Committee were still pending, and before that committee had arrived at any conclusion upon such proceedings, that the railway companies and the village of Parkdale of their own free will came to an agreement upon the several particulars as they are contained in the above instrument formally executed under seal on the 24th November, 1883

A memorandum of the heads of that agreement had been, in pursuance of a provision to that effect contained therein, submitted to the Railway Committee accompanied with a request made by the parties to the agreement that the committee would sanction the agreement and order accordingly. The alterations suggested by the Government Engineer having been concurred in by the parties, the committee made their report in which the memorandum of agreement is recited and containing a recommendation which conforms with the terms of the agreement previously entered into between the parties; and to verify all this the instrument executed on the 24th November, 1883, declares that it was while the proceedings before the Railway Committee were pending that the agreement as set out in the instrument of the 24th November was concluded between the parties, and in the 14th paragraph of this instrument we find the railway companies declaring that, except for the purposes of this agreement, they do not admit the jurisdiction of the Railway Committee in the premises, and in the 15th paragraph we find that it is only by agreement between the parties that the decision of

the Engineer of the Railway Committee is to be accepted as binding. In short, by the terms of the agreement the railway companies only recognize the Railway Committee's action in the premises as sanctioning the agreement while the municipality of the village reserves to itself the right, in case of failure by the railway companies or any of them to fulfil their part of the agreement, to fall back upon the authority vested in the Railway Committee of the Privy Council by the Dominion Statute, 46 Vic. ch. 24. Whether under the provisions of that act which provides that "the Rail-"way Committee, if it appears to them necessary for "the public safety, may from time to time, with the "sanction of the Governor in Council, authorize and "require the company to whom such railway belongs," (that is a railway crossing a street) "to carry such street "either over or under the said railway by means of a "bridge or arch," the Railway Committee would have had any power to authorize or require such an alteration of Queen and Dufferin streets, wholly closing up part of the latter and narrowing the former to less than two-thirds of its established width in the city of Toronto and the village of Parkdale as is authorized by the agreement between the railway companies and the village of Parkdale, is a point which I do not think at present calls for a judicial opinion, because I think that the true construction of the action of the Railway Committee in the premises is merely that the committee adopted the agreement of the parties, and, so far as they could, gave their sanction to the work thereby agreed to be done by the railway companies and the village of Parkdale acting in concert as sufficient in the opinion of the committee to give that security to the public which by the 46 Vic. ch. 24, the committee was empowered to secure.

If I had not formed this opinion it would be impos-

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sible to avoid determining a very grave point which, as it appears to me, is involved in this question, for if the terms of the Dominion statute do not empower the Railway Committee of the Privy Council to authorize the railway companies whose railways cross Queen street to reduce the width of that great thoroughfare in the city of Toronto and the municipality of Parkdale to less than two-thirds of its original established width, then the work which has been done under the contract entered into by the municipality of Parkdale with Godson is an indictable nuisance unless it can be maintained and justified under the provisions of the Ontario Statute. And if the work can be justified only under the provisions of this latter statute the municipality of Parkdale cannot, in my opinion, be heard to say that the work which they have caused to be done was not caused to be done, or done, under the only statute which authorized it to be done.

The terms of the agreement ignore the idea that the municipality of Parkdale was entering into it, if it was competent for it to do so, merely as agents of the railway companies who were the only principals in the matter and who were acting merely under the authority and control of the Railway Committee. On the contrary, the municipality of Parkdale is in the agreement treated as a principal equally as are the railway companies. The clause that all parties to the agreement shall combine to endeavour to procure legislation to compel the city of Toronto to become a party contributing to the expense of the work, as also the clause whereby the railway companies provide that they will incur no responsibility as to the draining of the subway into the Queen street sewer, and indeed all the clauses of the instrument, are quite inconsistent with the idea of the municipality of Parkdale being in any other position than a principal equally with the railway companies; and, in short, the

agreement in all its substantial parts is, as it seems to me, precisely such an one as the parties thereto might have entered into under the provisions of the Ontario statute 46 Vic. ch 45.

Then we find that on the 26th November, 1883, a contract for construction of the subway in the shape of an indenture between Arthur William Godson, of the city of Toronto, contractor, of the first part, and the corporation of the village of Parkdale of the second part, was laid before the council of the municipality of the village, when the following by-law was passed:

BY-LAW OF PARKDALE.

Be it enacted a by-law of this municipality that the Reeve and Clerk be authorised to execute the agreement between the municipality and A. W. Godson providing for the building of the Queen street subway, and to affix the corporate seal thereto.

Accordingly the contract under which the work has been done was executed as directed by this by-law, and the work commenced by Godson under that contract.

Thereupon the plaintiffs instituted proceedings in the High Court of Justice for Ontario against the city of Toronto and the village of Parkdale. The case made by their statement of claim was that the defendants, acting together under the authority of the Ontario statute, 46 Vic. ch. 45, had entered into a contract with Godson to execute works which injuriously affected the plaintiffs' property, and that by reason of their having, as was alleged, done so without having passed by-laws as required by the statute, it was impossible for the plaintiffs to obtain compensation under the Municipal Acts as provided by the statute; that the plaintiffs had suffered damage to a large amount by Godson's acts under his contract with the defendants, and the plaintiffs claimed an injunction restraining the continuance of such wrongful acts and an order compelling the defendants to place the road in the same state as it was in before the said works were commenced, and for pay-

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ment of said damages and costs.

The defendants severally filed defences to the said claim of the plaintiffs, in which they severally denied that the wrongful acts complained of had been done by them respectively or that they were, severally, in any way liable in respect thereof. On a motion for an interim injunction the consideration of it was deferred to the hearing of issues joined on the above defences. It being apparent at the trial upon the facts appearing as above detailed that the city of Toronto had in fact taken no part in committing or causing to be committed the acts complained of, and that the defence set out in the statement of defence of the village of Parkdale could not be sustained, and that the actual defence which was offered on behalf of that municipality was that in acting as it did it was merely acting as the agent of the railway companies above named who, as was contended, were acting under the control of the Railway Committee of the Privy Council under the authority of the Dominion statute, 46 Vic. chap. 24, and therefore had a right to cause the works which were complained of to be done, could not be entered into on the record as it stood, and the plaintiffs insisting upon their right to recover damages against the municipality of Parkdale upon the record as it stood, and offering evidence to show the extent of such damages, a discussion took place before the court between counsel for both parties in which counsel for the municipality of Parkdale contended that His Lordship before whom the case was being tried should not assess the damages; that if it was found that the plaintiffs were entitled to damages, the principles upon which such damages should be assessed, should be laid down in any judgment His Lordship might deliver, and a reference should be had to ascertain the amount; that the parties were before His Lordship to test the

question, whether the plaintiffs were, or not, entitled to recover any damages, and if they were, the rule under which compensation should be made; and he submitted that what was necessary to get at on the trial was the legal points and the construction of the statutes and the cases, as the facts were few and might be conceded, and he suggested that the reasonable course to pursue would be shortly to get at the facts and that then the question of law should be disposed of, and that the amount of compensation, if the plaintiffs should be held to be entitled to compensation, should be the subject of a reference. This suggestion was concurred in by counsel for the plaintiffs who accordingly requested His Lordship to take a note that in case His Lordship should adjudicate in favor of the plaintiffs upon the right to compensation there should be a reference to the Master as to the amount. This arrangement having been made, both parties amended their pleadings and the cases were proceeded with. The amended statement of claim alleges that the plaintiffs claim no relief as against the city of Toronto, but submit that the other defendants should be ordered to pay their costs. It then alleged that the defendants, the village of Parkdale, allege that the new subway (in the original statement of claim mentioned) is being constructed by certain railway companies under the alleged authority of and pursuant to the requirements of the Railway Committee of the Privy Council in pursuance of the Dominion statute 46 Vic. ch. 24, and that the railway companies and the corporation have entered into an agreement dated 24th November, 1883, which has been confirmed by a by-law of the village, and that the subway is being constructed pursuant to said agreement with the railway companies and under a contract entered into by Parkdale and pursuant to the authority and agreement of the said Railway Committee, and that the said village of Parkdale claim that they

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are not liable for any damages or injury to the plaintiffs by reason thereof, whereas the plaintiffs contend that the true effect of the said agreement between the railway companies and the village of Parkdale and of the contract entered into by them for the construction of the said subway is that the said subway is being constructed by the last named defendants and not by the railway companies, and that the said defendants, the municipality of Parkdale, are liable to the plaintiffs for the injuries and wrongs complained of. And the plaintiffs further allege that even if the said Railway Committee required or authorized the construction of the said subway, which the plaintiffs deny, the said committee had no power to do so ; and that the railway companies did not take the necessary steps under the statute in that behalf prior to the commencement of the work, and did not file in the proper office in that behalf the necessary plans and book of reference, and the plaintiffs submit that the said defendants, the municipality of Parkdale, cannot shield themselves from their responsibility in the premises by any order or requirements of the said Railway Committee or by any rights which may be possessed by said railway companies.

And the plaintiffs submit that the only authority under which the defendants, the municipality of Parkdale, can legally construct said subway is the Statute of Ontario above referred to, 46 Vic. ch. 45, and if it should be held by the court that the defendants, the municipality of Parkdale, are authorized by said statute to construct the subway, and that their action in the premises is legal, and that the plaintiffs are entitled to compensation to be fixed by arbitration pursuant to the provisions of the Municipal acts, then the plaintiffs submit that the defendants, the municipality of Parkdale, should be ordered to pass the necessary by-laws and take the necessary proceedings connected with such

arbitration, the plaintiffs offering on their part to take such proceedings, and the plaintiffs claim a *mandamus* ordering the defendants, the municipality of Parkdale, to proceed to arbitration in the above event, and the plaintiffs claim such further relief as the nature of the case may require. To this amended statement of claim the defendants, the municipality of Parkdale, filed an amended statement of defence wherein they allege that the subway is being constructed by the above named railway companies under the authority and pursuant to the requirements of the railway committee of the Privy Council in pursuance of the provisions of the Dominion statute 46 Vic. ch. 24. That the corporation of the village entered into the agreement of the 24th November, 1883, with the railway companies to which they crave leave to refer; that a by-law of the village confirming the said agreement was passed on the 3rd December, 1883; that the municipality, pursuant to the said agreement and on behalf of the said railways, entered into a contract for the construction of the said works which are being constructed under the said contract and pursuant to the said authority and requirements of the said Railway Committee and under the direction of an engineer appointed by the railway companies. That save as aforesaid the defendants, the corporation of the village of Parkdale, have taken no part in the construction of the said subway, and the same is not being constructed by them, and they claim that they are not liable in respect of any damages or injury which may be sustained by the plaintiffs by reason or on account thereof, and that no action has been taken by the city of Toronto or the village of Parkdale under the statute of Ontario, 46 Vic. ch. 45.

Upon the above amended pleadings and the evidence given in the cause the learned Chief Justice of the

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Queen's Bench Division of the High Court of Justice for Ontario was of opinion that the defendants, the municipality of Parkdale, were not constructing the works under the provisions of the Ontario statute and that they were not acting, and in point of law could not act, as the agents of the railway companies. That in entering into the contract with Godson, under the by-law of the municipality in that behalf, the work was done under the authority of the corporation who, not having proceeded in the manner directed by the statute which authorized them and the city of Toronto to do the work, were liable as wrongdoers to the plaintiffs, and he made a decree accordingly as follows (1): —

The defendants Parkdale appealed from this decree to the Chancery Division of the High Court of Justice, which court affirmed the judgment, whereupon the defendants appealed to the Court of Appeal for Ontario, a majority of which court, the Chief Justice dissenting, allowed the appeal and ordered the actions of the plaintiffs against the defendants to be dismissed with costs. On appeal from this judgment the case comes before us.

It has been well held, in my opinion, by the learned Chief Justice who tried the case and by the divisional court, that the municipality of Parkdale could not in point of law act in the premises, or justify the acts complained of, as agents of the railway companies; but it is, in my opinion, equally clear that in point of fact it was not as agents of the railway companies that the municipality were acting, if in point of law they could have so acted, but as principals jointly with the companies and as the chief and moving principals in whose interest and at whose instance and for whose benefit the work complained of was done. In 1881, as appears by the evidence of their engineer, Mr. Stokes, they devised the plan which was eventually in sub-

(1) See p. 254.

stance carried out. They petitioned for and procured the passing of the Ontario statute which authorized them to enter into an agreement with the railway companies to procure the performance of the work. Before the Railway Committee made the order, now interposed by way of defence, and wholly independently of that committee who had no authority whatever over them, they entered into an agreement with the railway companies in which they mutually undertook to ask, and they accordingly did ask, the Railway Committee to sanction their agreement and to make an order in compliance with its terms. By this agreement, when reduced to perfect form and executed under the corporate seals of the railway companies and the municipality, the former covenant with the latter that they will by all means in their power afford to the municipality every facility for carrying out and completing the work, and except for the purpose of that agreement, that is, as I understand it, except for the purpose of sanctioning that agreement, the companies repudiate all jurisdiction of the railway committee in the premises. The municipality then pass a by-law affirming this agreement and providing means to give effect to it, wherein they recite that the by-law is passed because it was deemed essential to the interests of the village that the subway should be constructed, and that it was upon the strength of the agreement that the railway committee made the report which was subsequently approved by His Excellency the the Governor General in Council. This by-law is submitted to the ratepayers and approved by them who thereby authorise the levying on them a rate sufficient to raise their contribution as provided by the agreement towards the performance of the work. Thereupon a contract between the municipality and Godson, for the actual performance of the work, is prepared which is approved by a by-law of the municipality

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directing its execution, and which is accordingly executed under the corporate seal, and the work carried on to completion thereunder. It is impossible under these circumstances to say that the municipality were not acting as principals throughout in the transaction, or that the agreement with the railway companies or the contract with Godson were not acts of the corporation, and being acts of the corporation it would be a reproach upon the administration of justice if the corporation should not be liable. In *Mill* v. *Hawker* (1) the point did not directly arise, for there the action was against an individual who acted under the authority of a corporation in doing an act *ultra vires* of the corporation, but the language of Kelly C.B. is very strong as to the liability of the corporation, and is appropriate in the present case. He there says, p. 322:—

It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyn's Digest Franchises, F. 19. But besides that many authorities are to be found in the Year Books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority or by its direction, trover or trespass in maintainable.

Among the authorities cited by him is that of *Yarborough* v *The Bank of England* (2), which has much learning on the subject and wherein Lord Ellenborough shows that a corporation may be made liable as disseisors; and many other instances are there cited of corporations being made liable for torts by writing under their seal. The Chief Baron then adds, p. 323:

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution or otherwise, had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across the bill drawn upon them for a debt, this would have been *ultra vires* and no holder of the acceptance could have recovered the amount against them. It

(1) L. R. 9 Ex. 309. (2) 16 East 6.

would have been void on the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and if any, to what, action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it has been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them.

Then referring to *Poulton* v. *London and South Western Railway Company* (1), "that case," he says.

Shows that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of.

Now in the case before us the acts complained of are not *ultra vires* in the sense of being altogether beyond the scope of the power of the corporation, but are only wrongful, if wrongful, in the sense of their not having been done in the manner in which, if done, they were within the corporate powers of the municipality. They were corporate acts. And in the case of *Bissell* v. *The Michigan Southern Ry. Co.* (2) the Court of Appeals of the State of New York, in a very learned judgment, have held that for corporate acts, although they may be *ultra vires*, corporations may be held responsible in tort. If the acts here complained of were not within the powers conferred upon the municipality by the Ontario statute, 46 Vic. ch. 45, and for that reason were wrongful, we must, nevertheless, hold that, as done, they were done by and under the authority of the corporation so as to make the municipality liable to the plaintiffs. But in my opinion, as I have already pointed out, the contract entered into between the municipality and the railway companies, and that between the municipality and Godson, for the actual construction of the works, and the by-laws of the municipality confirming and

(1) L. R. 2 Q. B. 534. (2) 22 N. Y. 258.

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authorising these contracts, were all acts within the power conferred by 46 Vic. ch. 45, and being acts capable of being supported on the authority of that statute, which is the only statute in virtue of which the municipality of Parkdale could have done the acts, they cannot, for the purpose of evading liability to the plaintiffs, be heard to say that they did not intend to act under the authority of the only statute which authorised them to do, and justified them in doing, the acts complained of. Whatever may have been the effect, if any, which the order in council had on the railway companies as enabling them to interfere with, close up, and alter the streets of the municipalities, as to which it is, for the reason I have already given, unnecessary in this action to express any opinion, it had no effect whatever so as in any manner to affect the construction of the agreement entered into between the municipality and the railway companies, which must be construed, according to its terms, as a voluntary agreement entered into between the respective parties thereto. In virtue of the above contracts and by-laws the plaintiffs might, in my opinion, have appointed an arbitrator and have called upon the village municipality to have appointed one on their behalf under the statute. It was competent for either party to initiate proceedings by arbitration. There was no necessity, however, for such arbitration being had before the works should be proceeded with, as no lands of the plaintiffs were taken. Their complaint only being that their property would be injuriously affected by the works it might be that in the exercise of prudence the plaintiffs should prefer postponing the arbitration until the whole of their injury should be made apparent by the completion of the works. We see now that in this case there was no question as to the fact of the injury, and that the sole matter in contestation was the liability of the defendants to indem-

nify the plaintiffs for this injury, whatever its amount might be, so that at some time, and in some shape, the question of liability would have to be raised and determined before the plaintiffs could reap the fruits of any arbitration. It might be, had the plaintiffs proceeded to call on the judge of the county court to appoint an arbitrator for the municipality in default of their appointing one themselves, that the judge would have suggested that it would be more convenient that the question of liability should be first determined. It is quite reasonable, as it appears to me, that it should be; and such question might be raised at the choice of the plaintiffs by a motion for a *mandamus* or by an action for a *mandamus* of which nature the present proceeding is. *The Queen* v. *Wallasey Board of Health* (1); *Fotherby* v. *Metropolitan Ry. Co.* (2); *Jones* v. *Stanstead, Shefford & Chambly Ry. Co.* (3); *Pearsall* v. *Brierley Hill Local Board* (4).

In my opinion the plaintiffs are entitled to a declaration being made in their favor of their right to recover compensation from the defendants, the municipality of Parkdale, under the provisions of the Ontario statute 46 Vic. ch. 45, and that upon the plaintiffs appointing an arbitrator on their behalf a *mandamus* should go commanding the municipality to appoint one on their behalf, but for the arrangement made at the trial upon the municipality being allowed to amend their statement of defence so as to raise upon the record the question of their liability, which arrangement I think dispenses with the necessity for a *mandamus*. By that arrangement it was agreed that in case the court should be of opinion that the defendants, the municipality of Parkdale, were liable to compensate the plaintiffs for the injury sustained by them, a reference to ascertain the

(1) L. R. 4 Q. B. 351.
(2) L. R. 2 C. P. 195.
(3) L. R. 4 P. C. 122.
(4) 11 Q. B. D. 747.

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amount should be directed to a referee by the judgment and decree of the court in this suit. Very slight alterations in the decree made in the cause will, as it appears to me, be sufficient to make it applicable whether the liability of the defendants arises under the provisions of the Ontario Statute or as wrongdoers. Such alterations are:

1. Expunge the word "wrongful" before the word "acts" where it occurs in the second and third paragraphs of the decree as made.

2. In the third paragraph between the first and second words insert the following: "it having been agreed, "upon an order being made at the trial for liberty to "the defendants, the corporation of the village of "Parkdale, to deliver an amended statement of "defence for the purpose of raising on the record "their substantial defence, namely, the question "of their liability in the premises, that in case the "court should be of opinion that the corporation "were liable to make compensation to the plaintiffs "for the injury sustained by them, the question of "the amount of such compensation should be submitted "to a referee under the direction of the judgment and "decree of the court in this suit."

3. Strike out the words "and to the defendants, the city of Toronto" from the 4th paragraph of the said decree.

4. Insert after the 5th paragraph a 6th paragraph, dismissing the plaintiffs claim as against the defendants the city of Toronto with costs.

As so varied the decree as made by Chief Justice Wilson to stand. I cannot see that the plaintiffs are entitled to recover these costs over against the corporation of Parkdale, for, as appears by the evidence and the amended statement of claim, the city of Toronto were not parties to the injury inflicted on the plaintiffs

by the corporation of Parkdale and were not necessary parties to this suit.

The order will be that the appeal be allowed with costs to be paid to the plaintiffs by the corporation of Parkdale in all the courts, and the decree as varied be ordered to be made in the court below.

In West *et al.* v. The Village of Parkdale and The City of Toronto. } The only difference between this case and the last is that the property of the plaintiffs, which is injuriously affected, is situate within the limits of the city of Toronto, but as the work done is one and indivisible, and as all the damage which has been inflicted on property in the city of Toronto, equally as in the village of Parkdale, has been occasioned by the work done under the contract entered into by the corporation of Parkdale for the construction of the work, which contract it was competent for that corporation by the 2nd clause of the Ontario statute to enter into separately from the city of Toronto, the corporation causing the injury must compensate the parties suffering all the injury resulting from their act. The orders on this appeal and the decree in the court below in both cases will be the same.

Whether the compensation to be paid for injuries caused by the work is to be treated as part of the cost of construction of the work, and whether as such the corporation of Parkdale can compel the railway companies to contribute their share of such compensation as part of the cost of construction under their agreement to contribute to such further sum as might be necessary to complete the work, is a question with which the plaintiffs are not concerned.

Appeals allowed with costs.

Solicitors for appellant West: *Blake, Kerr, Lash & Cassels.*

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Solicitors for appellants Carroll & Dunspaugh: *Snelling & Sorley.*

Solicitors for respondents Parkdale: *McLaren, McDonald, Merritt & Shepley.*

Solicitor for respondents City of Toronto: *W. G. McWilliams.*

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*Nov. 17, 18.
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*April 9.

THE ONTARIO AND QUEBEC RAILWAY COMPANY ..... APPELLANTS;

AND

C. J. PHILBRICK ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Lands taken for railway purposes—Arbitration—Award—Matters considered by arbitrators—Costs.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which offer was not accepted and the matter was referred to arbitration under the Consolidated Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

Held, affirming the judgment of the Court of Appeal, Gwynne J. dissenting, that under the circumstances neither party was entitled to costs.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of Galt J. in the Divisional Court (1), refusing a mandamus to compel the County Court Judge to tax appellants' costs.

The respondent's land having been taken for purposes

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

(1) 5 O. R. 674.

of appellants' railway, notice was given with offer of payment as follows :—

NOTICE.

To C. J. Philbrick, M.D., of Toronto.

Take notice that the lands required by and to be taken by the said The Ontario and Quebec Railway Company from you for the purposes of their railway, may be described as follows: All and singular that certain parcel or tract of land and premises being composed of parts of lots Nos 47, 49 and 51, as shown, on lot 17, concession 2, from the bay, township and county of York, and being a strip of land 66 feet wide, lying 33 feet on each side of, and measured at right angles to the centre line located for The Ontario and Quebec Railway Company, which said centre line may be more particularly known and described as follows, that is to say: Commencing at a point on the west limit of lot 47 aforesaid, distant 35 feet 10 inches, measured northerly along said limit, from the south-west angle of the said lot; thence north-easterly along a curve to the left of 2,865 feet radius, 1,021 feet to the intersection of the east limit of lot 51 aforesaid, as shown on the sketch attached hereto, and containing $1\frac{54}{100}$ acres to the same, more or less, and is set out on the plan hereto annexed.

That the powers intended to be exercised by the said The Ontario and Quebec Railway Company with regard to the lands above described are the acquiring of the said lands for the purpose of constructing and thereafter of operating their railway thereon.

That the said The Ontario and Quebec Railway Company are ready and willing and hereby offer to pay the sum of thirty-six hundred and thirty-five dollars as a compensation for the lands above described, and as a compensation for such damages as you may sustain by reason or in consequence of the exercise of the powers above mentioned; and that in event of your not accept-

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ing this offer, His Honor Judge Kingsmill is to be appointed as and will be the arbitrator of the said The Ontario and Quebec Railway Company.

W. H. LOCKHART GORDON,
Solicitor for The Ontario and Quebec Railway Company.

Dated at Toronto, this 23rd day of November, 1883.

The offer of payment contained in the above notice was not accepted, and an arbitration was had, which resulted in a money award $119 less than the sum offered by the company. The respondent, however claimed that he was entitled to a crossing which the company had agreed to make, and that the arbitrators had considered the value of the crossing in making up the award Shortly before the arbitrators met an agreement was drawn up by the company for construction of the crossing, but was not executed; it was claimed, however, that it formed a feature of the evidence before the arbitrators, and was drawn up for that purpose. Under these circumstances the railway company claimed costs which the county court judge refused to allow, and he finally, some time after these proceedings commenced, taxed costs against them. The statute under which the claim for costs is made is sec. 9, sub-sec. 19 of the Consolidated Railway Act. It provides as follows: "If, in any case, when three arbitrators have been "appointed, the sum awarded is not greater than that "offered, the costs of the arbitration shall be borne by "the opposite party, and be deducted from the com-"pensation; but if otherwise they shall be borne by "the company, and, in either case, they may, if not "agreed upon, be taxed by the judge."

Application was made to Mr. Justice Galt for a *mandamus* to compel the judge to tax the company costs, and also for a writ of prohibition to restrain him from taxing costs against them.

The learned judge held that the agreement or offer

for the crossing was made by the company before the arbitration, and was included in the sum awarded for damages, and he refused both applications.

The Court of Appeal sustained this judgment, holding, as to the *mandamus*, that as the notice by the company contained no mention of a crossing, and the award did, the latter was not made upon the basis of the matter contained in the notice; and as to the writ of prohibition, that if the costs against the company were taxed the writ was useless, and if the judge had no power to tax the taxation would be futile.

G T. Blackstock for the appellants.

There is only one case in which the land owner is entitled to costs, namely, where the award exceeds the amount offered. The judge had no authority to decide on crossing, nor to send matter back to arbitrators. The company put in agreement with reference to crossing. Respondent went on himself, claiming that the amount offered was not enough. They may have taken crossing into consideration. He was entitled to crossing without any agreement. Act 1884, ch. 11, sec. 9, provides for a crossing in cases of this kind. *Brown* v. *Nipissing* (1) decides that the word "at" should be read "and" and the railway companies were compellable to provide crossings. The meaning of the legislature there is clearly shown by the statute of 1884, sec. 9. If the land owner did not wish to have the subject taken into consideration he should have objected before the arbitrators. It is not competent for the county court judge to do anything but compare the sum given with the sum agreed and tax or not tax accordingly And if you find that the arbitrators did take the crossing into consideration, then I submit that the respondent was entitled to that any way, and it is no part of this case. To say that the company are not entitled to costs, is a decision that the

(1) 26 U. C. C. P. 206.

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crossing is worth $119. The court say this was not an arbitration under the statute at all. But the award purports to be an award under the Railway Act of 1879. We claim under the express provisions of the statute of 1883, ch. 24 sec. 8. The judges of the Court of Appeal proceed upon sec. 9, act of 1884.

In order to make out a title to costs at all, land owner must show the court that the amount awarded is greater than the sum offered. Here there is no pretence that it is greater. But the court says that this, in effect, is not an award under the statute at all. I say the county court judge had nothing to give him jurisdiction except the statute. There was no consent to arbitration outside of the statute. Cites *Wheeldon* v. *Burrows* (1); *Pinnington* v. *Galland* (2); Gale on Easements (3); *Davies* v. *Sear* (4).

All the judges have decided that the land owner was not entitled to his costs but the county court judge taxed them all the same. We showed in Court of Appeal that he did carry out his threat and tax costs against us, and we wish to prevent him paying money to the party.

Dr. McMichael Q.C. and *Shepley* for the respondent.

First as to the right of the land owner to the crossing. He never had any such right. When the statute empowers a company to take land which they never would have had otherwise,, unless specifically provided in the statute, no one has the right to cross that land. The case was discussed in many Great Western cases, and never was any such right set up. By the original statute the company had to make crossings, but this has been amended by substituting the word "at" for "and." *Brown* v. *Nipissing* (4) decides that they had to make the crossings before they could make the gates. The former statute compelled them to make crossings. The altera-

(1) 12 Ch. D. 31.
(2) 9 Ex. 1.
(3) Pp. 134 to 138.
(4) L. R. 7 Eq. 427.
(5) 26 U. C. C P. 206.

tion is only that if they are bound to furnish crossings they shall make them. The agreement is one by which they agree to make crossing. We never accepted it. The court has held that having made it they are bound.

The question here is not so much on the statute as on the reference to arbitration. They have express powers which they intend to exercise. If the effect of that is that they propose to take the land and effect a complete severance of those lands, the damage that would result to respondent would be very great.

When a company indicate to a man that they will take his land from him it is *primâ facie* that they will take it without putting him to any cost. That is the rule in England unless the party is deprived of costs by express provision of a statute. In this case we should not be visited with costs unless we have violated the law. The statute provides a penalty; that is when the award is not greater than the offer. My learned friend puts great stress upon the word "sum" as if it only meant sum of money, but other matters may come in to make up a sum.

Instead of saying we will take the land and simply assume the value of the land and damages, they have said "we will make a crossing."

That was in consequence of the case *Baby* v. *Great Western Ry. Co.* (1). They only offered a sum of money, and thinking over the circumstances afterwards they gave evidence to show how much the damages were diminished by giving the crossing.

What I contend is, that the state of facts contemplated by the statute in which the land owner should be compelled to pay costs has not arisen.

Cites *Fitzharding* v. *Gloucester and Berkeley Canal Co.* (2); *Pearson* v. *Great Northern Ry. Co.* (3); *Gray* v.

(1) 13 U. C. Q. B. 291. (2) L. R. 7 Q. B. 776.
(3) L. R. 7 Q. B. 785 n.

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North Eastern Ry. Co. (1).

If they had included the crossing in their notice we would have been able to consider whether or not we would accept that offer.

Queen v. *Brown* (2).

The question we had to consider was whether the sum offered was sufficient to compensate for what they contemplated doing under their notice.

Cites *Morse, petitioner*, &c. (3); High on Extraordinary Legal Remedies (4).

G. T. Blackstock was heard in reply.

Sir W. J. RITCHIE C.J.—I think there was no proper arbitration under the statute, the arbitrators not having adjudicated upon the offer made by the company, the only basis upon which they had a right to proceed, but on that offer coupled with a crossing, not contemplated in the offer but matter in addition to it, which, obviously, materially affected the estimate of damages the property would sustain, and consequently the amount to be awarded for compensation, it being abundantly clear that such amount without an open crossing would be much greater than would be awarded for a severance with an open crossing.

Under such circumstances I agree with the court below that the company are not entitled to costs. On the other hand, it is quite clear that the land owner is not entitled to costs, inasmuch as he has not brought himself within the terms of the statute entitling him to costs. If the costs have been taxed to him, as alleged, I can only say, in the language of the court below, that it is a perfectly futile proceeding; he can only recover them by action, and it is clear that if he is not entitled to them the mere taxation cannot establish a liability on the company to pay them.

(1) 1 Q. B. D. 696.
(2) L. R. 2 Q. B. 630.
(3) 18 Pick. 443.
(4) 2 ed. p. 30 par. 24.

FOURNIER J. :—Dans cette cause il s'agit d'une demande de la part de l'Appelante, d'un bref de mandamus pour faire ordonner au juge de comté de taxer les frais faits sur un arbitrage pour expropriation en vertu de la section 9, ss. 19 de l'Acte des Chemins de fer, 1879 ; en même temps que d'une demande d'un bref de prohibition pour faire ordonner au même juge de s'abstenir de taxer les frais faits par l'Intimé sur le même arbitrage.

Une offre de la somme de $3,635.00 comme compensation pour le terrain requis par l'Appelante, ainsi que pour les dommages résultant de l'expropriation et de la mise en opération du chemin de fer fut régulièrement faite à l'Intimé.

Cette offre ayant été refusée, des arbitres furent nommés. Au jour fixé pour leur réunion, le 27 décembre 1883, mais avant de commencer la preuve, le conseil de l'Appelante produisit un acte de déclaration (*deed poll*) par lequel la compagnie s'engageait à donner à l'Intimé un passage sur le chemin de fer dont la construction allait séparer son terrain en deux parties et le laisser sans moyen de communication entre les deux. Le passage ainsi offert n'était pas indiqué dans le plan qui accompagnait les offres. Après une longue enquête, les arbitres en vinrent à la conclusion, que la somme de $3,516 serait une compensation suffisante pour le terrain et les dommages. Ainsi une somme moindre que celle offerte fut accordée. Sans l'offre postérieure d'un passage, la compagnie aurait eu indubitablement droit à ses frais. La règle à ce sujet est établie comme suit par la ss. 19, sec. 9 de l'acte ci-dessus cité :

If in any case when the arbitrators have been appointed, the sum awarded is not greater than that offered, the cost of the arbitration shall be borne by the opposite party, and be deducted from the compensation, but if otherwise they shall be borne by the company, and in either case they may, if not agreed upon, be taxed by the judge.

Mais le fait d'avoir ajouté à ses offres en argent, l'offre d'un passage a changé la position des parties ;

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elles ne se trouvent plus dans les conditions d'un arbitrage d'après le statut qui exige que l'on ne puisse procéder qu'après un avis de dix jours contenant, à part de la description du terrain requis, la description des pouvoirs que la compagnie entend exercer sur le terrain

La ss. 15 de sec. 19 décrète que si dans les dix jours après le service de tel avis, le propriétaire n'a pas fait connaître le nom de son arbitre, alors le juge pourra nommer un arpenteur provincial comme seul arbitre pour faire l'évaluation de la compensation; et la ss. 16 dit que si dans le même délai de dix jours, le propriétaire fait connaître le nom de son arbitre, alors les deux arbitres nommés en choisiront un troisième. Dans les deux cas le propriétaire a droit à un délai de dix jours pour considérer s'il acceptera ou refusera l'offre qui lui a été faite. Dans ce cas la compagnie n'ayant point donné avis à l'Intimé de son intention de lui accorder un passage et ne lui ayant fait cette offre qu'au moment du procès, il a été ainsi privé de l'avantage du délai que lui accordait la loi pour considérer s'il devait accepter ou refuser cette nouvelle offre. En introduisant la question du passage offert, l'arbitrage a donc été fait sur une offre différente de celle que les arbitres étaient appelés à décider. L'offre d'un passage paraît, d'après les termes de la sentence arbitrale, avoir été pris en considération par les arbitres qui déclarent que " even with the open crossing," la propriété a été dépréciée d'un tiers par la construction du chemin et l'obstacle qu'il met à son accès. Bien qu'ils n'aient pas déterminé la valeur de ce passage, on ne peut pas dire qu'ils accordent moins que les offres puisque, par leur sentence, ils accordent à l'Intimé un passage qui ne lui avait pas été offert suivant la loi. Les procédés des arbitres n'étant pas en conformité du statut, il s'ensuit que la règle qu'il établit pour la taxe des frais ne peut être appliquée au cas actuel, et qu'il n'y a pas lieu à

l'émission d'un bref de mandamus pour faire procéder à la taxe des frais.

La demande d'un bref de prohibition est maintenant sans objet, car il paraît par un document au dossier, que le juge, en présence des deux parties intéressées, a procédé à la taxe des frais. Quoi qu'il en soit, cette taxe n'affectant en aucune manière le droit que peuvent avoir les parties de demander ou refuser le paiement des frais de l'arbitrage en question, elles auront à se pourvoir autrement.

En conséquence je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the same opinion. The party here applies to have his costs taxed. When these lands were taken for the purposes of the railway company an offer was made of the amount fixed by the party who valued it, which the owner thought insufficient. After that had been done the company gratuitously made a conveyance of a crossing at a particular place over the railway to the part of the respondent's land which had been cut off. The respondent having rejected the offer made to him, in the first place the matter went to arbitration, as I take it, on the submission which preceded the conveyance of the company. The arbitrators, no doubt considering that the respondent was to have the benefit of the crossing mentioned in the conveyance, reduced the amount to be given for damages, and in consequence the amount awarded by the arbitrators was less, by a small sum, than that tendered. Now the question here is as to costs. Where the amount tendered is found to be insufficient, the railway company is liable to pay the costs of the arbitration, otherwise the costs are to be paid by the owner of the land. The latter has not shown this, but from the evidence it would have been otherwise if the conveyance of the

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crossing had not been considered by the arbitrators and the amount of the damages consequently reduced. The award, for that reason, I think, was not a good one, embracing the subject of the crossing conveyed subsequent to the submission.

Under these circumstances, I take it that the award, being contrary to the submission, is invalid. Where parties disagree the law provides a mode of settling the disagreement, but it must be on the terms of the statutory requirements.

Under these circumstances then, the company is not entitled to the costs in question. I do not think it necessary to decide anything in regard to the costs of the other party. I should think, however, that neither party is entitled to costs. In my opinion, therefore, the appeal should be dismissed.

TASCHEREAU J. concurred.

GWYNNE J.—I am of opinion that, upon the facts appearing in this case, the appellants were entitled to their costs under the peremptory provision of the statute in that behalf, and that the rule *nisi* for a *mandamus* to the county judge of the county of York, commanding him to tax those costs, should have been made absolute, and that therefore this appeal should be allowed with costs and a rule absolute for the *mandamus* be ordered to be issued from the court below.

The appellants, having been unable to agree with the respondent upon the amount of compensation to be paid to him for certain land of the respondent required for the road-bed of the appellants' railway, served upon the respondent a notice, as required by the Consolidated Railway Act, in the following terms:—[See p. 289.]

This notice was accompanied with the certificate of a sworn surveyor for the Province of Ontario to the effect that the lands mentioned in the notice, as intended to

be taken by the railway company, were required for the Ontario and Quebec railway; that he knows the said lands so required and the amount of damage likely to arise from the exercise by the railway company of the powers mentioned in the notice; and that the sum of thirty-six hundred and thirty-five dollars offered by the said the Ontario and Quebec Railway Company in the notice mentioned was, in his opinion, a fair compensation for the lands in the notice described and for the damages that may be sustained by reason, or in consequence, of the exercise of the powers in the notice mentioned. A sketch of the manner in which the railway was intended to pass through the land, along the whole front thereof, but not showing where the appellants contemplated that the respondents should have a crossing, was annexed to the notice. This notice and certificate conformed with the requirements of the statute in that behalf, and accordingly the respondent appointed his arbitrator who, with the company's arbitrator, appointed a third arbitrator to act with them under the provisions of the statute for the purpose of ascertaining and determining, by the award of any two of them, the amount of said compensation to be paid to the respondent by the said railway company, and evidence was duly entered into for that purpose. It is unnecessary to refer to the fact that Judge McDougall, junior judge of the county court of the County of York, was subsequently appointed and substituted as third arbitrator in the place of the person first appointed to that position, for such substitution took place by agreement between the parties for that purpose made. Two of the three arbitrators made their award in writing signed by them and annexed the same to the notice of arbitration, above set out, served upon the respondent, and they did, by such their award, adjudge and award that the said Ontario and Quebec

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Railway Company do pay the sum of three thousand five hundred and sixteen dollars as compensation for the lands thereinafter described; and after giving a description of the land precisely as it is decribed in the notice of arbitration annexed to the award, the award declared that the arbitrators so making the award, awarded:

The said above mentioned sum as compensation for such damages as the said C. J. Philbrick may sustain by reason or in consequence of the exercise of the powers of the said railway company with regard to said lands as set forth in their notice herein.

And they thereby further certified, in accordance with a provision to this effect in the statute, that in deciding on such compensation they had taken into consideration the increased value that would be given to the lands or grounds of the said C. J. Philbrick, through or over which the said railway will pass, by reason of the passage of said railway through or over the same, or by reason of the construction of the said railway, and that they had set off the increased value that would attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the said company taking possession of, or using, the said lands; and by a memorandum at the foot of their award they declare that the above amount of $3,516.00 was made up as follows, namely:

For area of land taken $1\frac{54}{100}$ acres.....	$ 924 00
For depreciation of balance of property by reason of construction of road through property, interfering with access, &c., even with open crossing.....	2,592 00
In all.....	$3,516 00

The amount so awarded is less than the sum which had been tendered by the company to the respondent by the sum of $119.00.

Now by the Consolidated Railway Act it is enacted that:

If by any award of arbitrators made under this act the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company, but if otherwise they shall be borne by the opposite party, and be deducted from the compensation, and in either case the amount of such costs if not agreed upon may be taxed by the judge.

The amount awarded having been less than the sum offered by the company they claimed to be peremptorily entitled to their costs under this clause, and the judge of the county court having refused to tax them, alleging as his reason that, in his opinion, the respondent, and not the appellants, was entitled to the costs of the arbitration, the appellants applied to the Divisional Court of Common Pleas for a *rule nisi* for a *mandamus* addressed to the judge of the county court of the county of York, commanding him to tax to the appellants their costs, and for a prohibition forbidding him to tax any costs to the respondent. Upon argument this *rule nisi* was discharged with costs, and the rule discharging such *rule nisi* has been upheld by the Court of Appeal for Ontario. These judgments proceeded upon the assumption that what the company, by the terms of their notice served on the respondent, offered him $3,635 for was the right of constructing their railway upon the slip of $1\frac{54}{100}$ acres along the whole front of the respondent's land, consisting of 15 acres, in such a manner as to cut off all possible access for the respondent to his land, consisting of 12 acres, lying to the north of the railway which separated such part from the only highway by which the respondent could have any access thereto, without giving to the respondent, or allowing him to have, any means of access whatever across the railway, and so in effect to render wholly valueless all the respondent's land not taken by the company for the road-bed of their railway; and upon the further assumption that the law enabled the company thus, at their arbitrary will and pleasure,

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so to injure the defendant's property not taken, and that upon an arbitration had under the statute upon a notice framed in the terms of the notice in this case the arbitrators would have been bound to estimate the amount of compensation to be paid to the respondent upon the basis that by the terms of their notice and offer of compensation the appellants claimed to have, and had, the right of utterly excluding the respondent from all access from the highway in front of his land across the railway to the 12 acres lying to the north thereof; and that the appellants having, immediately before the opening of the arbitration, left with the arbitrators, for the benefit of the respondent, an obligation duly executed under their seal whereby they bound themselves, their successors and assigns, to make and maintain, at their own costs and charges, an ordinary roadway crossing, with cattle guards on each side thereof, over the railway upon the division between lot 45 and said lot No. 47, which said roadway crossing should be of the width of 66 feet; 33 feet of such roadway being upon lot 45 and 33 feet being on lot 47, this was a wholly new offer from that contained in the notice and was made too late; and that the effect of the appellants lodging such obligation with the arbitrators was to make the award made thereafter to be an award not within the statute so far as the question of costs was concerned, and that to entitle the appellants to costs the arbitration must be one proceeding strictly upon the footing of the terms of the notice, which it was held that the award in this case was not; for that the arbitrators must have attached some value, although how much did not appear, to the railway crossing which the appellants had bound themselves to make and maintain. If this contention be well founded it must rest wholly upon the ground that (as an incontrovertible proposition of law) the terms in which the notice is framed require the con-

struction which has been put upon it, for the evidence, I think, establishes beyond all question that the appellants never entertained the idea of excluding, or thought that by appropriating for the road bed of their railway a strip of $1\frac{54}{100}$ acres extending along the whole front of the respondents land, they had any right to exclude, the respondent from all access across the railway from the highway in front, to that portion of the respondents land on the other side of the railway which was not taken or required by the company for the purposes of their railway. The evidence shows that the invariable practice of the company has been to make crossings in all cases of severance. The gentleman who valued the land and damages for the company, with a view to negotiating with the respondent for the amount of compensation to be paid to him, if possible without going to arbitration, says that he had several interviews with a Mr. Wickson, acting as attorney for the respondent, and with a Mr. Turner, engineer and surveyor, deputed by the respondent to negotiate with him as the company's valuator for a settlement, and that in all these conversations it was agreed by the witness, upon behalf of the company, and was perfectly understood that the respondent was to have a crossing or crossings; that it was known to all interested that a proper crossing would be provided; and he says that it was not supposed to be necessary that it should be mentioned in a notice of arbitration that such was to be provided. Another gentleman, one of the firm of the appellant's solicitors, says that he endeavored to effect a settlement without an arbitration with a Mr. Hoskin, acting as the respondent's solicitor, and that in his negotiations for that purpose he informed Mr. Hoskin that the company would provide a proper crossing, or proper crossings, and that, in fact, if the respondent wished it they would provide three crossings for him, one on each of his lots

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which consisted of five acres each. That the respondent was aware of these offers would appear from the fact that he himself gave evidence that before the arbitration he spoke with this gentleman with reference to crossings, and that he asked him to put into writing what the company would do with reference to crossings; and the gentleman who acted as valuator for the company said that when it was found that no settlement could be made by agreement with the respondent he advised the preparation of the obligation which was subsequently executed under the company's seal to prevent any misunderstanding about the matter, locating the crossing where it is located by that obligation as the place where it would be most beneficial to the respondent.

Now does the notice indicate any intention of the appellants to exclude (assuming them to have the right to exclude) the respondent from all access between the highway and his lands north of the railway, which are severed from the highway by the railway? It certainly does not in express terms, nor can it, in my opinion, be said to do so by implication. The notice expressly says that the sum of $3,615 is offered as compensation for the land described therein as taken, being $1\frac{54}{100}$ acres for the road-bed of the railway, and as compensation for such damages as the respondent might sustain by reason or in consequence of the appellants constructing, and thereafter operating, their railway thereon. If, then, the notice served by the appellants for arbitration with the respondent is susceptible of the construction which has been put upon it, it must be because the law imperatively requires such a construction, notwithstanding that the appellants never intended to exclude, and never supposed they had a right to exclude, the respondent from all access from the highway, across the railway to his land not taken by the company, and in my

judgment the law does not require, or indeed admit of, any such construction. Doubtless in an arbitration of this nature it is a matter of great importance that the parties should before the arbitration, or at least during its continuance, come to an understanding as to the number and the sites and the nature of the crossings to be given by the company to a land owner whose lands are severed by the railway, whether the severance be of one part of his land from other parts or from a highway; for the compensation to be given to the land owner for the inconvenience which the severance may occasion to him may be increased or diminished accordingly as the number and the sites and the nature of the crossings to be given may afford more or less convenience. Thus in the case before us it appears upon the evidence of the respondent's own engineer and surveyor that a crossing at any other place than at the west limit of lot 47 (precisely where the appellants have by their obligation under seal located it), would be utterly useless, and that having it even at this westerly limit of lot No. 47, a road which must needs be made on the respondent's land to reach the table land which rises upwards of 50 feet at a very short distance from the railway will cost $200 more starting from the crossing on the railway than it would cost if made from the highway in front of the land before the railway was located. This was evidence proper to be considered by the arbitrators in determining whether the offer made by the appellants and mentioned in their notice of arbitration was sufficient compensation, but it is one thing to say that in estimating damages sustained by a land owner by reason of severance of his land it is proper that the arbitrators should be shown where and what number and what nature of crossings the railway company propose to give, assuming them to be bound to give all reasonable crossings in the absence of a

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special agreement with the land owner dispensing therewith, and quite a different thing to say that this information must be inserted in the notice of arbitration under the statute, and in default thereof that the notice must be construed as indicating the intention of the company that the land owner shall have no crossings and as an offer of compensation to be paid to him upon the basis that he shall not have any right whatever to cross the railway to or from his land. An award made on such a basis could not, in my opinion, be sustained. In a case like the present a land owner cannot, in my opinion, be deprived of his right to cross the railway somewhere unless by an express agreement voluntarily executed by him divesting himself of such right which for the reasons given by me in *Clouse* v. *The Southern Ry. Co.*, (1) I conceive to be a right vested in him by law as of necessity, of which he is not divested by the Consolidated Railway Act or by any other Act. Now the arbitrators by their award have declared that the sum of $3,516 by them awarded is given as compensation for the land taken by the company and for such damages as the said C. J. Philbrick may sustain by reason, or in consequence of, the exercise of the powers of the said railway company with regard to the said lands as set forth in their notice, which is annexed to the award; in other words, as it appears to me, that for what the company had offered the respondent, $3,635, the arbitrators award $3,516. The recital in the award of the company's execution of the obligation as to the crossing makes no difference in this respect, in my opinion. It is, therefore, in my opinion, quite a mistake to say that the execution by the company of that obligation after the service of the notice of arbitration and its deposit with the arbitrators constituted the arbitration which was had thereafter to be one not

(1) Cassell's Dig. 443.

within the statute, so as to entitle the appellants to their costs under the provisions of the statute in that behalf.

Appeal dismissed with costs.

Solicitors for appellants: *Wells, Gordon & Sampson.*

Solicitors for respondents: *McMichael, Hoskin & Ogden.*

CHARLES H. LÉTOURNEUX (DEFENDANT) ..... APPELLANT;

AND

CLÉMENT DANSEREAU (PLAINTIFF)...RESPONDENT.

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*Mar. 13.
*May 17.

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

Insolvent Act 1875—*Secs.* 28, 29, 30—*Sureties, liability of.*

Held, Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, that the creditors have recourse upon the bond given for the due performance of his duties as official assignee.

APPEAL and cross appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court in favor of the appellant.

This was a proceeding instituted by respondent *es qualité*, 30th September, 1879, under sec. 69, Insolvent Act of 1875, which provides that any one may obtain an order of a judge authorizing him to take proceedings when assignee refuses.

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

(1) 4 Dorion's Q. B. R. 220.

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One Felix Rieutord is the creditor in this case, suing in the name of the present assignee.

In the year 1875 one Olivier Lecours was appointed official assignee under Insolvent Act, 1875.

On 26th August, 1875, the appellant and one Joseph Brunet became sureties to Her Majesty for the benefit of all interested to the extent of $6,000 for due performance of Lecours in the duties of his office as official assignee as required by 28th section of this Act. That section is as follows :—

28. Each person so appointed assignee or joint assignee, shall hold office during pleasure, and before acting as such shall give security for the due fulfilment and discharge of his duties in a sum of two thousand dollars, if the population of the county or district for which he is appointed does not exceed one hundred thousand inhabitants, and in the sum of six thousand dollars if the population exceeds one hundred thousand—such security to be given to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into his possession under this Act; and in case any such assignee fails to pay over the moneys received by him or to account for the estate, or any part thereof, the amount for which such assignee may be in default, may be recovered from his sureties, by Her Majesty or by the creditors or subsequent assignee entitled to the same, by adopting in the several provinces, such proceedings as are required to recover from the sureties of a sheriff or other public officer.

a. The official assignee may also be required to give in any case of insolvency such further security as, on petition of a creditor, the court or judge may order, such additional security being for the special benefit of the creditors of the estate for which the same shall have been given.

b. The official assignee shall be an officer of the court, having jurisdiction in the county or district for which he is appointed; he shall as such be subject to its summary jurisdiction and to the summary jurisdiction of a judge thereof, and be accountable for the moneys, property and estates coming into his possession as such assignee, in the same manner as sheriffs and other officers of the court are.

c. If it appears to the court or judge that an official assignee has been guilty of any fraud, breach of duty, or wilful violation of any of the provisions of the Insolvent Act of 1875 or the amending Acts, or

has inserted any improper charge in any account or claim preferred by him against the estate, the court or judge shall forthwith make a report of the facts to the Secretary of State of Canada, for the information of the Governor.

The bond is as follows :—

EXHIBIT No. 2.

No. 1501.

Know all men by these presents, that we, Olivier Lecours, trader, of the city of Montreal, in the District of Montreal, in the Province of Quebec, in the Dominion of Canada (hereinafter called the principal), Joseph Brunet, trader, of the city of Montreal, in the District of Montreal, in the Province of Quebec, and Charles Henri Létourneux, merchant, of the city of Montreal, in the District of Montreal, in the Province of Quebec, (hereinafter called "the sureties,") are held, and firmly bound unto our Sovereign Lady the Queen, her heirs and successors, in the sum of six thousand dollars of lawful money of Canada, to be paid to our Sovereign Lady the Queen, her heirs and successors, for which payment, well and faithfully to be made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and each of us, jointly and severally, firmly by these presents, sealed with our respective seals.

Dated this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas "the principal" having been appointed to the office or employment of an official assignee in and for the city and district of Montreal, in the Province of Quebec, is required by the law to give security to the Crown for the performance, fulfilment and discharge of the duties appertaining thereto; and "the sureties," Joseph Brunet and Charles Henri Létourneux, have consented to become his sureties for such performance of the said duties, and this bond is given in pursuance of "An Act further to amend an Act respecting the security to be given by the officers of Canada."

And whereas this bond is also given in pursuance of "The Insolvent Act of 1875" to Her Majesty, for her benefit and for the benefit of the creditors of any estate which may come into the possession of the principal under the last mentioned Act.

Now the condition of this obligation is such that if "the principal" faithfully discharges the duties of the said office and duly accounts for all moneys and property which may come into his custody by virtue of the said office, this obligation shall be void.

And also that in case "the principal" as such assignee, fails to pay over the moneys received by him or to account for the estate or any part thereof, the amount for which "the principal" as such

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assignee may be in default may be recovered from the sureties by Her Majesty or by the creditor or subsequent assignee entitled to the same, by adopting in the said province such proceedings as are required to recover from the sureties of a sheriff or other public officer.

(Signed) OLIVIER LECOURS, [L.S.]
" JOSEPH BRUNET, [L.S.]
" CHARLES HENRI LÉTOURNEUX, [L.S.]

Signed, sealed and delivered in presence or

(Signed) H. F. RAINVILLE,
" WILLIAM F. BROWN.

(True copy.) HUBERT, HONEY & GENDRON, P.S.C.

On 26th February, 1876, Lecours as official assignee received from Houle & Co., of Montreal, insolvents, and came into possession of, immovable properties belonging to said firm.

On 22nd March, 1876, at a meeting of creditors of insolvents Lecours was, appellant alleges, appointed by them assignee to the estate under section 29 of Insolvent Act.

29. The creditors at their first meeting or at any subsequent meeting called for that purpose, may appoint an assignee who shall give security to Her Majesty in manner, form and effect, as provided in the next preceeding section, for the due performance of his duties to such an amount as may be fixed by the creditors at such meeting. In default of such appointment the official assignee shall remain the assignee of the estate, and shall have and exercise all the powers vested by this Act in the assignee.

30. As soon as the security required from the assignee appointed by the creditors shall have been furnished by him, it shall be the duty of the official assignee to account to him for all the estate and property of the insolvent which has come into his possession, and to pay over and deliver to him all such estate and property, including all sums of money, books, bills, notes and documents whatsoever, belonging to the estate, and to execute in his favor a deed of assignment in the form H.

Subsequently Lecours sold by adjudication to Augustin Robert a certain real estate part of the insolvent estate.

On 11th June, 1876, by a deed, Lecours to Robert, Lecours acknowledged to have received purchase price, $8,355.

On 29th March, 1879, Rieutord attained from court an order commanding Lecours, the assignee, to deposit with a chartered bank the said purchase price.

Lecours did not obey this order and on 10th April, 1879, respondent Dansereau was appointed assignee to the estate of Houle & Co., in place of Lecours.

On 16th September, 1879, Rieutord obtained from the court permission to institute this action against the appellant for the whole amount of his suretyship, $6,000, which he alleged to be due to the creditors on account of Lecours' embezzlement. Action was taken in name of the newly appointed assignee.

Rieutord became a creditor of the insolvent firm of Houle & Co. in the following manner: Phileas Racette was a creditor of said estate for $4,500 secured by builder's privilege. This claim was first transferred to one Joseph Brunet, and the latter having become insolvent, it was sold by his assignee to L. W. Sicotte, who in his turn transferred it to said Rieutord on the 29th October, 1878, who paid $1,000 for it.

The defendant (now appellant) pleaded by demurrer that the facts alleged in the declaration were insufficient in law to justify his conclusions, inasmuch as it did not appear that the claims against the insolvent's estate amounted to $6,000, nor that Rieutord was a creditor for that sum; and also because it did not appear that Rieutord had the right to make use of the assignee's name to take the action

The defendant also pleaded six exceptions seeking the dismissal of plaintiff's action, and on the present appeal relied on the

1st Exception.—That Lecours, when he made the sale

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to Robert, was not acting in his quality of official assignee, but as an assignee named by the creditors, and that the security was given only for acts done by Lecours in his quality of official assignee;

And 2nd Exception.—That Rieutord is not creditor of the insolvent, his claim being only a pretended right of Brunet's, which had been irregularly sold and transferred by the assignee Lajoie to Sicotte, and by the latter to Rieutord.

The plaintiff replied generally to said pleas, denying all the allegations both of the demurrer and of the exceptions. The demurrer was dismissed and judgment was rendered in the Superior Court maintaining defendant's first exception, and dismissing plaintiff's action.

On appeal, the Court of Queen's Bench reversed the judgment of the Superior Court and condemned the appellant to pay the respondent the sum of $1,000, the amount he had paid for the debt due to Sicotte, Rieutord's claim being for the purchase of a litigious right.

B. Globensky, Q.C., for appellant.

The suretyship upon which this action is based covers only the acts performed by the official assignee, and when Lecours sold the property in question, he was not acting as an official assignee, but as an assignee to the estate appointed by the creditors.

The fact is admitted, but the legal proposition which we uphold is denied by our adversaries.

The jurisprudence upon this point is yet uncertain. In a case of *Delisle et al.* v. *Letourneux* (1) Mr. Justice Johnson has condemned the surety, and in another of *McNichols, es qualité*, v. *The Canada Guarantee Company* (2) Mr. Justice Torrance has rendered a judgment in the same sense, but declaring that if this case had come before him previous to the judgment rendered in the

(1) 3 Legal News, p. 207. (2) 4 Legal News, p. 78.

case of *Delisle et al.* v. *Letourneux*, he might have come to another conclusion. This last judgment was taken to appeal and confirmed by three judges out of five, who were composing the court.

In Ontario, Mr. Justice Haggarty has decided the contrary, in the case of *Miller* v. *The Canada Guarantee Company* (1).

Now, in this case the judge in the Superior Court has maintained our plea, and this judgment has been reversed by four judges of the Court of Appeals, one of whom, Mr. Justice Ramsay, declares that the Chief Justice and himself had dissented from the majority of the court in the case of *The Canada Guarantee Company* v. *McNichols*, and that, although his opinion was unchanged, he thought it right in a matter of this kind, where the interpretation of a statute only is involved, to adopt the jurisprudence established, leaving to a higher tribunal or to the legislature the responsibility of settling the court right, if it is in error.

Everybody is unanimous as to the rules by which suretyships are governed. Whether it be limited or unlimited, it is always *strictissimi juris* and cannot be extended *de persona ad personam*, *de tempore ad tempus*, *de re ad rem*, and its effects must necessarily be restricted to the obligations derived directly therefrom. This is the principle admitted by the honorable judge who rendered judgment in this cause in the Superior Court.

The statute provides for the appointment of provisional assignees who receive the insolvent's properties, who have the safe guard of them and administer them until the creditors have had an opportunity of choosing an administrator themselves. This provisional assignee is called official assignee; that is to say, that he acts of office, by the mere enactment of the law, and by the only duty of his office, but, from the moment that the

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creditors have manifested their will, and have made their choice, if the same person has been selected, he does not act any more of office, nor by the only duty of his office.

In the ordinary sense, it is true that it is the same person, but in the legal sense, we pretend the contrary.

2nd. The transfers by Lajoie to Sicotte, and from the latter to respondent, are null and void, because the sale of the claim therein contained was made by private agreement, while it could only be made by public sale and at auction. Section 67 of the Insolvent Act is perfectly clear upon this point.

The assignee could not dispose of the property of which he was the administrator, in any other manner than by conforming to the conditions exacted by the statute.

The nullity of Lajoie's transfer to Sicotte involves that of the transfer fron Sicotte to Rieutord, and consequently Brunet's estate and not Rieutord, are the owners of the claim.

On the cross appeal I submit the *considérant* given by the Court of Queen's Bench, that the respondent cannot be entitled to more than he had paid is unanswerable. It being evident that Rieutord bought what is known in our law as litigious rights.

Beique for the respondent:

The bond, as its terms state, was "given in pursu-"ance of the Insolvent Act of 1875 to Her Majesty, for "her benefit and for the benefit of the creditors of any "estate which may come into the possession of the prin-"cipal under the last mentioned Act." And the undertaking of the sureties in said bond was that the principal should "account for the estate or any part thereof"

The terms are most general and indicate clearly that the bond given in favor of an official assignee is intended to cover every act of the latter performed at any

state in the insolvency proceedings, whether such act be performed previous or subsequent to his remaining or being continued in office pursuant to section 29 of said act.

The act provides for the nomination of a number of official assignees to whom alone assignments can be made or who alone can take possession of the estate of an insolvent under a writ of attachment. It is to these officers, who are constituted officers of the court, that the whole charge of winding up insolvent estates in the ordinary course of proceedings under the act is confided. Provision is made, it is true, by which creditors may, at a meeting called for the purpose, name another assignee, but there is no obligation upon them to do so, and the act expressly states that "in default "of such appointment, the official assignee shall remain "the assignee of the estate; and shall have and exercise "all the powers vested by this act in the assignee" And the official assignee who thus remains assignee of the estate, unless removed by the creditors, is not required by the Act to give any further security, except when ordered by the court or judge, on petition of a creditor, while it is provided that a new assignee, if appointed by the creditors "shall give security," it being then obligatory for him to give such security without the necessity of any order to that effect from the court or judge.

The respondent further submits that an official assignee remaining or being continued in office, pursuant to section 29, retains his character of official assignee. Otherwise, the power given by paragraph *e* of section 28, cited above, to the court or judge to report an assignee to the Secretary of State for dismissal by the Governor, could not be exercised for acts done after such meeting of creditors, the term used in said paragraph being official assignee.

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The interpretation put upon the law by respondent is in conformity to the practice prevailing throughout the entire country during the whole time the law was in force.

Official assignees have never been required to give security in each estate, except as additional security in few instances, when they had already given security as official assignees. And this because it was well understood that the security provided was sufficient for the exigencies of the law. See Clarke, Insolvent Act of 1875 (1).

As to the second exception filed by defendant, now appellant, that the sale of the claim in question by Lajoie, assignee of Brunet's estate, to Sicotte, was not made in accordance with the law inasmuch as it was a private and not a public sale, the appellant has no quality to raise that question. Such an exception would lie only in favor of non-assenting creditors of Brunet's estate, who themselves would not be allowed to question the validity of the transfer after having received their proportion of the price of sale. Moreover, it is of record that the question was raised between creditors of Brunet's estate and respondent, and that the sale was maintained.

On the cross appeal I submit that if the interpretation given to the law on the main question by the judgment of the Court of Queen's Bench is correct, the defendant should have been condemned to pay at least the full amount of Rieutord's claim, to wit, $4,500 and interest, which together with the $1,033.24 already paid by him to Delisle *et al*, is still within the amount of the bond.

The Court of Queen's Bench has treated Rieutord's claim as a purchase of litigious rights, and have granted him only the amount he paid for the claim.

This might have been set up by the defendant as a

(1) P. 136 on section 29.

ground of defence, but it would then have been incumbent on him, instead of disputing his liability, to offer and pay to Rieutord his purchase price and incidental expense with interest, or made a tender thereof. (See Art. 1582, Civil Code.)

Pothier, Vente, [par. 507].

Sir W. J. RITCHIE C.J.—The Government by virtue of section 27 may appoint one or more persons to be official assignee, or assignees, or joint official assignees, in each of the judicial districts of Quebec, Montreal and St. Francis, respectively, for the whole district, or for one or more electoral districts in the same. By section 28 security is to be given by the official assignee "for the due fulfilment and discharge of his duties." Such security to be given to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into his possession under this act, and in case any such assignee fails to pay over the moneys received by him, or to account for the estate, or any part thereof, the amount for which such assignee may be in default may be recovered from his sureties by Her Majesty, or by the creditors, or the subsequent assignee entitled to the same.

By sub-section *a* the official assignee may be required on petition of a creditor to give further security for the benefit of creditors of the estate as the court or judge may order.

By sub-section *b* official assignee is made an officer of the court having jurisdiction in the district for which he is appointed and subject to the summary jurisdiction of the court and judge thereof, and accountable for moneys, property and estates coming into his possession as sheriff and as other officers of the court are.

Then section 29 provides for the appointment of and security to be given by assignees not official as follows (1):

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Under this section it appears to me clearly contemplated that unless another, other than the official assignee, is appointed, the official assignee should continue assignee, and therefore, by the non-appointment of another, or, in the words of the act, in default of such appointment, the official assignee remains the assignee of the estate clothed with all the powers vested in the assignee, and this is very clearly shown by the 30th section which requires a transfer of the estate from the official assignee to the creditors' assignee. The enactment is as follows (1) :—

And that it was so treated and acted on by the creditors is placed beyond all doubt by the action of the creditors. The following certificate clearly showing that so far from appointing a creditor's assignee they refrained from doing so and simply allowed Lecours the official assignee to continue as assignee.

Exhibit No. 1. du demandeur à l'enquête.

Acte de Faillite de 1875 *et ses amendements.*

Province de Québec }
District de Montréal }

Dans l'affaire de
HOULE & COMPAGNIE, *Faillis.*
OLIVIER LECOURS, *Ex-Syndic.*
ET
J. C. DANSEREAU, *Syndic.*

Je, soussigné, certifie que :

A l'assemblée des créanciers des dits fallis, tenue par les dits créanciers, le vingt-deux de mars mil huit cent soixante-seize, le dit Olivier Lecours a été dûment continué comme syndic à la dite faillite.

Montréal, le seize de décembre mil huit cent soixante et dix-neuf.

J. C. DANSEREAU, *Syndic.*

Now, what does the bond say ? " Lecours having been " appointed to the office or employment of an official as- " signee," and being required by the law to give security to the Crown for the performance, fulfilment and discharge of the duties appertaining thereto and the sure-

(1) *Ubi supra.*

ties, Jos. Brunet and Charles Henry Letourneux, have consented to become his sureties for such performance of the said duties, and that the bond is given in pursuance of an Act further to amend an Act respecting the security to be given by the officers of Canada, and after reciting that the bond is also given in pursuance of the Insolvent Act of 1875 to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into Lecours' possession under the said Act. The condition of the bond is that if Lecours faithfully discharges the duties of the said office, and duly accounts for all money and property which may come into his custody by virtue of the said office, then the obligations shall be void, and in case Lecours, as such assignee, fails to pay over the moneys received by him, or on account, for the estate, or any part thereof, the amount for which he, as such assignee, may be in default, may be recovered from the sureties by Her Majesty or by the creditors or subsequent assignee entitled to the same, by adopting in the said Province such proceedings as are required to recover from the sureties of a sheriff or public officer.

When did Lecours cease to be official assignee? Having received this property as official assignee, when did he cease to hold it as such? By the title by which he received it, by the same title he disposed of it and never having ceased to be the official assignee, no time ever arrived when his sureties ceased to be liable for his acts as assignee, and his duly accounting for the property which came into his possession as such assignee. There was only one way in which the liability of himself and sureties could cease, and he and they, could be relieved from further liability therefor, and that was on the creditors appointing another assignee, and, upon such assignee giving the security required by the statute, Lecours in accordance with the 30th section

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should account to him and deliver over the estate. This was never done, and therefore the defendant cannot escape liability for the acts of Lecours as assignee.

It seems to me somewhat absurd to suppose that with or without giving any security, in this case without giving any security it should be the duty of the official assignee, as provided by the 30th sec., as soon as the security required from the assignee appointed by the creditors shall have been furnished by him, to account to himself for all the estate and property of the insolvent which has come into his possession and to pay over and deliver to himself all such estates and property, including all sums of money, bills, notes and accounts whatsoever, belonging to the estate, and to execute in his own favor a deed of assignment in the form H, all entirely inconsistent with the official assignee becoming the creditors' assignee, but entirely consistent with the creditors neglecting or refusing to appoint a creditor's assignee and with their expressing a willingness that the official assignee should continue and remain official assignee.

We are of opinion that both this appeal and cross-appeal should be dismissed with costs.

Fournier, Taschereau and Gwynne JJ. concurred.

HENRY J.—I was inclined to hold, on the first consideration of this case, that the parties were not liable, but after a more careful consideration I think the appointment was simply a continuous one. The creditors had a right to exact further security; they did not act on that right, and no further security was taken The property came into the hands of the assignee subsequently to the meeting of the creditors, and if he was appointed by the creditors as a new appointment, I would hold at once that he would not be answerable,

but this appointment was a continuous one, and I think the surety is liable.

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Appeal dismissed with costs.

Ritchie C.J.

Solicitors for appellant: *Lacoste, Globensky, Bissaillon & Brosseau.*

Solicitors for respondent: *Beique, McGoun & Emard.*

THE CORPORATION OF THE TOWNSHIP OF CHATHAM AND NORTH GORE (DEFENDANTS)..... APPELLANTS;

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*Nov. 21, 23, 24.
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*April 9.

AND

THE CORPORATION OF THE TOWNSHIP OF DOVER EAST AND WEST (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipality—Drainage in—Petition for—Extending into adjoining municipality—Report of engineer—Not defining proposed termini—Benefit to lands in adjoining municipality—Assessment on adjoining municipality.

Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having been signed by a majority of the rate-payers of the township to be benefited by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under sec. 582 of 46 Vic. ch. 18, on the grounds, *inter alia,* that a majority of the owners of property to be benefited by the proposed drainage works had not petitioned for the construction of such work as

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

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required by the statute; that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law; that the Council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law; and that the report did not specify any facts to show that the Council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work, and that no assessment whatever should be made on the lands or roads in Dover as the work would, in fact, be an injury thereto; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefited.

Three arbitrators were appointed under the provisions of the act, and at their last meeting they all agreed that the township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought $500 should be taken off the town line, and W. D., another of the arbitrators, held that while the bulk sum assessed was not too great, the assessment on the respective lands and roads, and parts thereof, should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award, "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line, made by the surveyor should be sustained and confirmed, and that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained. The Queen's Bench Division set aside this award on the two grounds, namely, of want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work. The judgment of the Queen's Bench Division was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:

Held, Ritchie C.J. dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give to the corpora-

tion of Chatham jurisdiction to enter the township of Dover and do any work therein.

That the arbitrators should have adjudicated, upon the merits of the appeal, against the several assessments on the lots and roads assessed, as their award was, by secs. 400 & 403 of 46 Vic. ch. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with at all as held by one of the arbitrators. That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the Court of Revision.

That the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that their award should also have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute and did not warrant them to be assessed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2), which set aside the award in an arbitration between the municipalities of Dover and Chatham.

The facts of the case are fully set out in the previous reports and in the judgment of Mr. Justice Gwynne in this court.

Pegley for the appellants.

Practically, the question to be decided is, whether the award was valid or not.

The Cons. Mun. Act of 1883 contains the provisions under which the proceedings in this case have been carried on. See sections 570 to 590 inclusive.

There are two species of enactment in regard to the

(1) 11 Ont. App. R. 248. (2) 5 O. R. 325.

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construction of drains. One where a drain goes near an adjoining township but does not enter it, and the other where it does enter the lands of the adjoining township. This case belongs to the second class.

The respondents will contend that in the absence of an express provision Dover could not be assessed for this drain, but it is submitted that sec. 579 applies to this case and is such an express provision

We must read all the sections together to ascertain the mind of the legislature. I would refer to secs. 576, 578, 579, 580, 581 and 582, in which the language used is the same.

Taking the grounds of objection as set out in the notice of the respondents, I would say as to the first, that the arbitrators were not *functus officii*; that what is claimed to be an award first made is merely a memo. of the intention of the arbitrators, and the subsequent finding was the proper award. Two of the arbitrators could sign. Sec 402.

As to the objection of want of concurrence in the minds of the arbitrators, I submit that there was such concurrence. They may have differed as to their powers, but that was all. They had no authority to distribute the assessment which must be done in the Court of Revision subject to an appeal to the County Court Judge. *Grant* v. *Eastwood* (1).

The next objection is, that the award was contrary to law and evidence. I submit that this award must be taken as the finding of a jury and the court will not inquire as to whether the award was too much or too little.

As to the objection that there was not a proper report of the surveyor, I submit that the evidence is clear that the surveyor pursued the usual course and the report is sufficient. It is contended that the

(1) 22 Gr. 563.

full details should have been reported, but that would have been almost impossible to be done, and of very little use if it were done.

Again they say there was no proper by-law, and no proper petition. That objection is not open to them here. They proved the by-law themselves, and the by-law recited the petition. *Montgomery* v. *Raleigh* (1).

It is contended that Chatham had no power to carry their drain into Dover further than sufficient to find fall enough to carry off the water beyond the limits of Chatham, and could not assess Dover therefor.

The act provides how far the engineer can go and he has not gone farther than the law allows. The power to assess I have already pointed out.

In answer to the next two objections, it is submitted that the titles to the lands assessed in Dover are sufficiently set out in the report.

It will be contended that no power is given to the engineer to assess for bridges. But it is clear that where power to do a thing is given by an act there is, by necessary implication, power to do everything requisite to the completion of the work. See sec. 570 of the Act of 1881, and sec. 529 of ch. 24 of the R. S. O.

Robinson Q.C. and *Matthew Wilson* for the respondents.

There are three or four important questions of law to be considered.

We contend, first, that there was no concurrence in the minds of the arbitrators to make the award relied on by the appellants.

One declines to sign the award altogether; another objects to the distribution. Who then is to sign an award confirming that distribution? The only award that could be made was one according to the memo., and we had a right to have the opinion of Douglas

(1) 21 U. C. C. P. 381.

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before the Court of Revision.

Then we submit that the Engineer had no power to assess the lands and roads, or if lands, not roads, in the lower townships.

See the judgments delivered in the court below (1), and see sec. 284 of the Municipal Act of 1883.

The only case where power to assess is expressly given is in that of an upper township. Sec. 580.

Then, if they had power to assess lands, had they power to assess roads also? That will depend upon the question whether or not the arbitrators had anything to do with the distribution of the assessment. That has occasioned great difference of opinion among the judges of the court below. It was supposed to be set at rest by two decisions in our court, *Essex* v. *Rochester* (2), cited in *Thurlow* v. *Sidney* (3) but they were found not to do so.

It is contended that there must be power to assess or else the provision as to giving notice, &c., would be useless. But a section merely pointing out a mode of procedure cannot enlarge power to assess. Wilberforce on Statutes (4).

The report is not sufficient as it does not specify the work to be done. It should be sufficient to entitle us to compel them to perform the work as we would have to pay the money whether it is done or not. *Chatham* v. *Sombra* (5).

The following authorities also were cited:—

Northwood v. *Raleigh* (6); *Rowe* v. *Township of Rochster* (7); Harrison's Municipal Manual (8).

Pegley was heard in reply.

(1) 11 Ont. App. R. 248.
(2) 42 U. C. R. 523.
(3) 1 O. R. 249.
(4) Pp. 151-2.
(5) 44 U. C. Q. B. 305.
(6) 3 O. R. 347.
(7) 29 U. C. Q. B. 590.
(8) P. 469.

Sir W. J. RITCHIE C.J.—This case was very fully discussed by the learned judge before whom it was originally heard, and by the judges of the Court of Appeal for Ontario.

Chief Justice Cameron set the award aside on two grounds; first, the want of concurrent minds on the part of the arbitrators, and secondly, the insufficiency of the original report, in not disclosing the beginning nor the end of the work.

Hagarty C. J. thought the report not open to objection as not showing a fixed point of commencement; with the aid of plans he thought it readily ascertainable, and that it sufficiently fixed the amount to be assessed against Dover as to lots and roads; and did not think the objection fatal that the surveyors could only go into Dover as far as was necessary to get sufficient outfall; he thought, that in view of the opinion of Mr. Douglas, the award should not have formally sanctioned and affirmed the whole of the assessment, but should merely have affirmed the amount of the assessment as a whole, and not the detailed adjustment of the assessment as made on lands and roads. Yet strange to say, as Mr. Justice Burton points out, one of the reasons assigned by Dover against the validity of the award is "that the arbitrators did not confirm, nor intend to confirm, the different particular assessments." Mr. Justice Osler thought that Dover could not be legally assessed for and on account of the roads in Dover or for the town line; he also thought the surveyor's report defective, in not showing one of the termini of the proposed work, the last station being omitted in profile plans; also in not stating, as expressly required by section 578, that the work is to be constructed at the expense of both municipalities, and in what proportion. Mr. Justice Patterson thought that where roads derive a benefit from a work which is continued into

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the municipality, the same liability exists as is clearly imposed where the works do not extend beyond the municipality where they are commenced but greatly improve the roads of another; he did not think the report, plans, &c., open to the objection of want of definiteness, and as to removing obstructions below 240—$350, it can have no force since the passing of 45 Vic. ch. 26, three weeks after the date of the report, and over a year before it was communicated to the head of the Dover Council and which enacts that the R. S. O. ch. 174, sec. 529, should extend to the removal of any obstruction which prevents the free flow of the waters of any stream. This is now in section 570. And as to the objection that the engineers had no right to continue the proposed deepening or drainage farther into Dover than sufficient to find fall enough to carry the water beyond the limits of Chatham, the learned judge says:—

I can find no proof in support of this objection. The evidence of two surveyors seems rather to suggest that the work should be carried farther than proposed, on account of the creek being obstructed.

The learned judge goes on to say that section 570 makes provision for passing by-laws for work which may be desirable, for determining what property will be benefited, &c., the proportion in which assessments should be made on the various portions of lands so benefited, and in every case of complaint by the owner, &c., to proceedings for trial of such complaint, and appeal therefrom, as under the Assessment Act. Reading section 581 with section 578, and with sections 580 and 570, the learned judge says:—

It seems perfectly manifest that the servient municipality is in no way affected by the engineer's detailed assessment of its lots and roads, but is bound only by his apportionment of the aggregate amount between the two municipalities. That amount it distributes, by its own by-law, among its lands and roads in the same manner

and with its same incidents of appeal to its own Court of Revision and to the judge, as the other municipality. Each may avail itself to what extent it pleases, of the engineer's details; those details will, doubtless, as a matter of practice, be, in most cases, adopted and followed in the by-law, but the statute leaves both municipalities alike free to vary them.

The learned judge also thought the appeal from the report simply an appeal against the aggregate charge upon the municipality, and he did not think the award differs from the memorandum; he thought the arbitrators had no jurisdiction to deal with the apportionment, and the award disposes of the matters over which the arbitrators had jurisdiction. Therefore he thought the award good and that the appeal should be allowed.

Burton J. thought the view taken by Douglas was the correct one, namely, that if one of the parties, or the municipality, complained of the assessment *inter se*, the proper course was to appeal to the Court of Review, when the by-law determining the assessment had been introduced, and it was a matter with which the arbitrators had no concern. As to the objection that the award proposes to confirm the assessment made by the surveyors on the roads and lots and parts of lots on the several proportions mentioned by him, and that the findings did not set forth, or show, or assess, or charge every road, lot, &c., in proportion, &c., that the arbitrators did not confirm, or intend to confirm, the different particular assessments, the learned judge thought that to hold the award bad on that ground would be to ignore what took place before the arbitrators, where the council for Dover wished them to consider the propriety of the several assessments, and also would be in the face of the admission by Dover in the objection to the award that it does not set forth or show or assess or charge every road, lot or portion of lot, &c. As to the sufficiency of the surveyor's report the learned judge thought the plans and profile, in connection with the

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report, intelligible enough, and he thought the only question the arbitrators had to deal with was the gross amount charged against the municipality, and that Douglas was correct in his view of the law, and the objection on the ground of want of concurrence between the two arbitrators, fell to the ground.

The main question as to the validity of the award seems to me to be: Were the arbitrators bound to pass on every assessment or charge on every road and lot, or portion of lot, according to the proportion of benefit the same, in the opinion of the arbitrators, derives, or will derive, from the work, or to confirm the different particular assessments? I think it was the duty of the arbitrators to pass only on the validity of the assessment in respect to the gross or bulk sum assessed, and not on the lands and roads, and parts thereof, assessed. It appears to me, that under section 580, and the sections referred to by Mr. Justice Patterson, that the only matter which is subject to appeal on the report, &c., served on the head of the council of the municipality into which the deepening or drainage is to be continued, is the adjustment of the proportion in which each of the two municipalities shall contribute, and no provision having been made for bringing the property owners before the arbitrators a fair inference, and, in fact, a fair construction of the statute, I think, is that they were, if dissatisfied with the individual apportionment, left to appeal from the assessment under the by-law to the Court of Review, or appeal as in ordinary cases, to have the assessment properly apportioned among themselves, without interfering with the gross or aggregate amount placed on the municipality, and this is the view of one of the arbitrators, and if correct his mere statement of it could in no way affect the validity of the award. In my opinion, the award is not bad in not determining

this latter question. If, then, the duty was confined to determining only as to the correctness of the gross or bulk sum I think the award good. The memorandum signed at the meeting at 9.15 a.m. of the 18th of May, 1883, was not the formal award, but simply a memorandum for drawing up the formal award, for the signing of which a time and place were fixed, namely, four o'clock of the same day, at the same place, of which Fleck, the dissenting arbitrator, had full notice, and having declined, under his hand, to sign any award, and having, in like manner, also declined to be present at the adjourned meeting to sign the award it in accordance with the memorandum of the morning, and the formal award of the majority, as contained in such award, being in accordance with the memorandum of the morning as to the bulk or gross sum and costs, there was, on all matter so awarded, a consensus of opinion by the majority; the absence of Fleck, when the formal award was signed, did not, in any way, vitiate the award so made, the arbitrators not being *functus officii* as alleged.

I cannot say the surveyor's report, with the plan and profile, does not disclose the beginning or end of the work; the starting point seems plain enough, and, although the right of the surveyor is limited to the point where he finds fall sufficient to carry the water beyond the limits of such (dominant) municipality, in this case he did so to remove obstructions from the stream, and the charges for work as to be done were $350. It is said this does not come within the terms of the statute, but if there is no sufficient fall without removing these obstructions, can it be said that until he removed them, he had found a sufficient fall, the intention, in my opinion, being, as Mr. Justice Cameron expresses it, to make it running, and not stagnant, water at that point?

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I think that Dover was assessable for and on account of the roads in Dover, and for the town line.

I think there is a sufficient statement that the work is to be constructed at the expense of both municipalities, and that the proportions are made sufficiently apparent. It is suggested that, in point of fact, Dover was not benefited by the work. Chief Justice Cameron thus disposes of this question.

> A knowledge possessed by the arbitrators of the locality may enable them to see benefits that I do not, and I would therefore, on the mere question of amount of benefit, defer to them.

And Hagarty C. J. O., in the Court of Appeal, says :—

> I share his (Chief Justice Cameron's) reluctance to interfere on that ground alone with the decision of the arbitrators, the more particularly as the dissenting arbitrator was willing to hold Dover benefited in a lesser sum than they awarded.

The strongest evidence, I think, is to be found in the fact that the arbitrator for Dover appears to have been unable to arrive at the conclusion that Dover derived no benefit, but, on the contrary, was of an opposite opinion, and differred from his co-arbitrators only as to the *quantum* of benefit, the majority of the arbitrators thinking the benefit was to the extent of $1,000, and the arbitrator for Dover putting the amount of the benefit at $500.

Before I should be presumptuous enough to interfere in a case, and on a point, such as this, and say the award was wrong, and that the court below were wrong in upholding it on this ground, in a matter on which the arbitrators and the judges of the court below, from local knowledge, are so much more capable of forming an opinion than I can presume to be, I should require that the case should be beyond all reasonable doubt, which, in my opinion, is by no means the case here.

I entirely agree with the judgments of Patterson, and Burton JJ., and think this appeal should be allowed.

FOURNIER J.—I have not been able to come to that conclusion. I think the appeal should be dismissed.

Each portion of the lots or roads should be assessed for its portion of benefit to be derived from the work done. This has not been done here.

I doubt very much if any appeal would lie in this case, because these proceedings seem to me to be regulated by special acts, unless giving an appeal in matters of award would be applicable here.

I have read the very full and exhaustive judgment prepared by Mr. Justice Gwynne, and concur in all that he says.

HENRY J.—After considering this case with a great deal of attention, I have satisfied my mind that the whole of the proceedings were unauthorized by any law. I will deal with it as presented by the argument, by the evidence, and by the opinion of the learned judges in Ontario, and then I will turn to the question of the legality of the proceedings.

The application for the work to be done to be presented to the town council as required by sec. 570 of the act, that is taking the act of 1883, is to be signed by a majority of the parties to be benefited. In this case a number of the parties interested in the township of Dover are reported by the surveyor as the parties who are to be benefited. No application was made to them to sign a petition; they were not called upon in any way to take part in this transaction. Now let us look at the statute, which I will read. (His Lordship read sec. 570 of the Municipal Act of 1883.)

Under that statute the council would have authority only in case a majority of the parties who are to be benefited by the improvement in the township should sign the petition.

But there is no provision made in this proceeding

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for obtaining the signatures of parties in that township to the petition, although alleged to be benefited. It would appear, if the provision of section 570 is to be studied, and for the purpose of carrying out what is intended, that the parties who are to be benefited should be all considered, and in that case, where the law provides that a majority of the parties to be benefited by the improvements must sign the petition, if they are resident out of the township they are not here as petitioners. The policy of that provision of the law is simply to enable a majority to force the minority to make the improvements. But if the township of Chatham is to be benefited and not Dover, and the majority in Chatham were to sign a petition and the council of that township could act on that petition and tax the people of Dover, the principle would not apply.

I cannot think that a bare majority in the township of Chatham should originate procedings where the contemplated works would extend into Dover, and that the legislature could be said to have endowed them with the power of making improvements that in the township of Chatham may cost $1,000, and in the township of Dover may cost four times as much, and the people in the latter taxed without having any voice or say in the matter. It seems to me that where the property is situated in two townships it would be necessary to show that the petition was signed by a majority of the persons to be benefited in both.

I have already said that if the act authorised the proceedings, section 570 is the only provision in the law by which this right could be exercised in Dover, and I am of opinion that that section requires the petition to be signed by a majority of the persons to be benefited in both townships. The law making provision for an appeal from the decision of the surveyor allows such appeal to arbitrators whose decision shall be final

on the whole question of benefit. It is in evidence that objections were taken and fyled with the arbitrators, who declined to consider them. I think it was the duty of the arbitrators to consider these objections. I do not think the award made was a good or binding one. It is a well known principle that if certain matters are left to arbitrators, who fail to consider them, the award is not good. The minutes in evidence show that several matters were not considered.

Another objection that I take is that the weight of evidence shows that Dover was not to be benefited by the change. Then, if this benefit is altogether for the township of Chatham, what right had that township to tax Dover?

If the improvement is made it leaves Dover according to the evidence just about where it is at present. But we have, I think, only to look at the evidence of the surveyor himself. He says:

> In making the assessment in Dover I took into consideration that Chatham had made all these taps mentioned, and if Chatham had not done so, perhaps I would not have assessed Dover at all for this work. * * * I would not have assessed either lands or roads in Dover so high for this work if the cut off had not been made by Chatham.

The meaning of that is, that because Chatham had previously made a drain at its own expense, years afterwards it would have a right to tax Dover.

And when we have, in addition to that, the almost certain evidence that Dover was not to be benefited in any way, I think the whole proceedings are inequitable.

But I have still another objection to the whole of the proceedings in this case. I am of opinion that they were all bad from beginning to end. Section 577 provides for the taxation of an adjoining township where the work to be done extends beyond the limits of the municipality where it is commenced. If the work of

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drainage in this case is commenced in Chatham and being a benefit to Dover, is brought up to the limits between the two townships, then this section applies.

Section 577 is as follows: (His Lordship read the section.)

Now how does the case stand? This act is not intended to allow one township to go into another, make a drain, and alter their bridges and roads and affect and tax the property owners. It is simply to come up to the limits, and the law provides that if the operation is beneficial to the adjoining township the latter may be called upon to contribute. But here Dover is sought to be taxed for a portion of the work to be done in Dover beyond the limits of Chatham. Now where is the law to be found to sustain such a claim? Surely if the legislature had intended that one township could go in and dig drains in and tax another it would have said so.

Then I turn to section 578 and that section provides: (His Lordship read this section.)

That does not alter the other clauses. Then section 580 says: (This section was then read by His Lordship.)

That does not allow one township to go into another. The law protects civil rights and we are to construe the public statutes so as to prevent any interference with these rights.

Then how are we to construe these sections? Plainly it must be that a township is not to operate outside of its own limits. How can we say that the statute intended one township to operate in another unless it so prescribes and enacts?

Then section 582 provides: (His Lordship read this section.)

"If the work being continued in its limits," that is, where it is brought up to the line and the other township benefited, the work being continued within the

limits where it was commenced.

But if I had any difficulty in the construction to be put on these sections I think section 598 would settle it beyond all question or manner of doubt. That section says:

Where any works proposed to be constructed in any locality under section 570 affect more than one municipality, either on account of such works passing, or partly passing, through two or more municipalities, or on account of the lowering or raising of the waters of any stream or lake, which is contemplated in the proposed scheme of drainage, either draining or flooding lands in two or more townships, the county council of the county to which such municipalities belong, upon the application of the council of any of the municipalities affected, and without any preliminary petition from the owners of the property to be benefited, may pass by-laws for the purposes authorized by the said section.

The application for the improvement in question should have been brought before the county council. I think no one township could originate the proceedings, and contract for an expenditure of money, in another. The legislature says, "where the work passes through two or more municipalities," which it did here, and section 598 clearly provides for a case of that kind and no one council is authorized to deal with it, but either may apply to the county council

So I think that our judgment should be to dismiss the appeal and confirm the judgment of the Court of Appeal for Ontario.

TASCHEREAU J.—The appeal, in my opinion, should be dismissed for the reasons given by Mr. Justice Gwynne, in whose judgment I concur.

GWYNNE J.—By the Municipal Institutions Act in force when the proceedings which are the subject of this appeal were instituted by the Township of Chatham, namely, ch. 174 of the Revised Statutes of Ontario, in its 529th section it is enacted that:—

(His Lordship here read the section)

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By the 530th section it is enacted that "such by-law shall, *mutatis mutandis*, be in the form or to the effect following."

Here follows the form of a by-law framed wholly as applicable to the case of a work contemplated to be completed within the limits of the municipality in which it originates, leaving it to the draftsman of a by-law for a case coming within the 2nd sub-section of section 529, namely, to the case of a work extending beyond the limits of the municipality in which it originates, to frame a by-law applicable to such a case upon the model (*mutatis mutandis*) of that given in section 530 for a work completed within the municipality in which it originates. To this model it will, however, in the case before us, be useful to refer for the purpose of seeing what the legislature has enacted should appear in a by-law for executing works of this nature to make it a good by-law. The form is headed:

A by-law to provide for draining parts (*or* for the deepening of , in , *as the case may*,) the township of , and for borrowing, on the credit of the municipality, the sum of for completing the same,

Provisionally adopted the day of A.D.,

Whereas a majority in number of the owners as shown by the last revised assessment roll of the property hereinafter set forth, to be benefited by the drainage (*or* deepening *as the case may be*) have petitioned the council of the said township of praying that (here set out the purport of the petition describing generally the property to be benefited).

Now, from this clause it appears that the preliminary essential condition precedent, necessary to give the council jurisdiction to take any action which could have any binding effect whatever upon any persons sought to be made chargeable with any part of the cost of such a work, is that a petition should be presented to the council praying for the performance of the proposed work, describing its nature, and signed by a majority of the owners of the property to be benefited by the

proposed work, which property should be designated in the by-law. The next clause is:

And whereas thereupon the said council procured an examination to be made by , being a person competent for such purpose, of the said locality proposed to be drained (or the said stream, creek or water course proposed to be deepened, as the case may be) and has also procured plans and estimates of the work to be made by the said , and an assessment to be made by him of the real property to be benefited by such drainage (or deepening as the case may be) stating as nearly as he can the proportion of benefit which, in his opinion, will be derived in consequence of such drainage (or deepening as the case may be) by every road, and lot, or portion of lot, the said assessment so made, and the report of the said in respect thereof and of the said drainage (or deepening as the case may be) being as follows (here set out the report and assessment of the engineer or surveyor employed.)

Now from this clause it appears clearly that the duty of the engineer employed to examine the work was, first, upon a survey to determine the total cost of the proposed work; and then to assess the whole of the property which, in his opinion, would be benefited by the proposed work, whether consisting of roads or lots, with the whole of such cost; the proportion of benefit to be derived by each road, lot, or part of lot, upon completion of the work being specially assessed against each such road, lot or part of lot. The by-law then proceeds:—

And whereas the said council are of opinion that the drainage of the locality described (or the deepening of such stream, creek or water course, *as the case may be*) is desirable: Be it therefore enacted by the said municipal council of the said township of pursuant to the provisions of ch. 174 of the Revised Statutes of Ontario—

1st. That the said report, plans and estimates be adopted, and the said drain, (or deepening as the case may be) and the works connected therewith, be made and constructed in accordance therewith.

2nd. That the Reeve of the said township may borrow on the credit of the corporation of the said township of the sum of , being the funds necessary for the work, and may issue debentures of the corporation to that amount in sums of not

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less than one hundred dollars each, and payable within years, with interest at the rate of per centum per annum, that is to say in (insert the manner of payment whether in annual payments or otherwise) such debentures to be payable at and to have attached to them coupons for the payment of interest.

3rd. That for the purpose of paying the sum of being the amount charged against the said lands so to be benefited as aforesaid other than lands (or roads, or lands and roads,) belonging to the municipality, and to cover interest thereon for years at the rate of per cent. per annum, the following special rates over and above all other rates shall be assessed and levied in the same manner, and at the same time, as taxes are levied upon the under mentioned lots and parts of lots; and the amount of the said special rates and interest assessed as aforesaid against each lot, or part of lot respectively, shall be divided into equal parts, and one such part shall be assessed and levied as aforesaid in each year for years after the final passing of this by-law, during which the said debentures have to run.

Here follows a schedule of the lots assessed as benefited, with the amounts respectively assessed against each, by the engineer appointed to examine and report upon the work as appearing in his report to the council, and the by-law proceeds:

4th. For the purpose of paying the sum of being the total amount assessed as aforesaid, against the said roads (or lands or roads and lands) of the said municipality and to cover interest thereon for years, at the rate of per cent. per annum, a special rate of in the dollar, shall, over and above all other rates, be levied, in the same manner and at the same time as taxes are levied upon the whole rateable property in the said township of in each year for the period of years after the final passing of this by-law, during which the said debentures have to run.

The statute then provides by a second sub-section to the said 530th section that:

In the event of the assessment being altered by the Court of Revision or judge, the by-law shall, before being finally passed, be amended so as to correspond with such alteration by the Court of Revision or judge (as the case may be).

Now, it is to be observed that the form of by-law above given in sec. 530, and the whole of that section

with its sub-section and of sec. 529 with all of its sub-sections except the second, relate exclusively to a work to be completed in the municipality in which it originates, and that this 2nd sub-section of sec. 529, which is the only one which relates to a work originated in one municipality and continued into another, provides that the originating municipality shall raise the funds necessary to defray the cost of the entire work, subject to be re-imbursed (to use the language of the sub-section) "as hereinafter mentioned." Upon the municipality in which the work originates the burthen of providing all the funds necessary for the completion of the entire work seems to be imposed, subject, however, to a right to be re-imbursed by the municipality into which the work is continued for such special benefit as the work shall confer on the lots and roads in the latter municipality.

The only provision made which authorizes a municipality in which a work originates to continue it into an adjoining municipality, or for reimbursing the former in such a case for any part of the cost of such continuance, is contained in the following sections: (His Lordship then read secs. 534, 536 and 537.)

Now from these sections it is apparent that the only purpose for which the legislature has given to one municipality the extraordinary exceptional power of sending its officers into an adjoining municipality and of constructing any work of drainage therein, is to carry off the water brought down by the work commenced in an upper municipality, and the only case in which power is given to charge the municipality into which the work is continued, or the lands situate within the limits of such municipality, with any part of the cost of such work is in the event that the lands of the municipality (in which term I include its roads), or the lands of individual owners situate within the limits of the

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municipality, derive a special benefit from the work, and such power is limited to the extent of such benefit, by which term, as applied to such a case, I understand that the roads and lands so charged should derive such a substantial benefit from the work, beyond that which they respectively enjoyed independently of such work, as to make it plainly just and proper that they should be made to contribute to the cost of a work undertaken for the sole benefit of lands situate in another municipality, and actually necessary for effecting that object. As it is not competent for the engineer or surveyor of the municipality in which the work originates to do anything whatever, within the limits of the municipality into which the work is continued, beyond what is necessary to carry off the water brought down by the work done in the upper municipality, all the work done in the lower municipality must be regarded as being essential and necessary for the accomplishment of the purpose of the upper municipality, and the owners of property therein which is benefited thereby, the incidental benefit therefore, if any there be, to the roads and lots in the lower municipality should be very clearly established beyond all manner of doubt, to warrant the lands in the lower municipality being subjected, against the will of the owners, to contribute to the cost of a work wholly necessary for the benefit of the owners of the upper municipality. The assessment in such a case imposed by an officer of the upper municipality upon property situate in the lower municipality should be scrutinized with the utmost care and jealousy; and it is for this reason, I apprehend, that section 538 of ch. 174 R.S.O. has been amended by sec. 580 of 46th Vic. ch. 18, which came into force before the arbitration had in this case and applies to it, and enacts that :

The council of the municipality in which the deepening or drain-

age is to be commenced shall serve the head of the municipality into which the same is to be continued (or whose lands or roads are benefited without the deepening or drainage being continued), with a copy of the report, plans, specifications, assessment and estimates of the engineer or surveyor aforesaid, and unless the same is appealed from as hereinafter provided it shall be binding on the council of such municipality.

For the purpose stated in the above section, and for all proceedings in this case subsequent thereto, this act, 46 Vic. ch. 18, which is an act in consolidation and amendment of the acts respecting municipal institutions, is the one which applies to this case before us, and I shall, therefore, henceforth refer to the sections of this act. The 581st section enacts that: (His Lordship read the section.)

This section, 570, is identical with section 529 of ch. 174 of the Revised Statutes of Ontario, already set out in full.

The 582nd section enacts that: (His Lordship read secs. 582 and 583.)

The only sections necessary to be referred to in this connection are sections 400 and 403 by the former of which it is enacted that: (The said sections were read by His Lordship.)

Now from these sections it is apparent that what were the matters referred to the arbitrators is to be determined by reference to the report, plans, specifications, assessment and estimates of the engineer, mentioned in the 580th section, and to the grounds of appeal stated in the notice of appeal mentioned in the 582nd section, all which documents taken together constitute the submission to arbitration; and the object of the arbitration, as appears by the 580th sec., is to determine whether or not the said report, plans, specifications, assessment and estimates of the engineer are to have binding effect to any, and if any to what, extent upon the council of the municipality into which the

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work is proposed to be continued, which, in the case before us, is the municipality of the township of Dover East. It becomes therefore necessary to refer to the said report and other documents mentioned in the 580th sec., and to the notice of appeal served on the township of Chatham, to determine what were the matters in difference between these two municipalities which were referred to the arbitrators in this case; but before doing so it will be necessary to draw attention to the condition of things as they existed before the making of the report, plans, &c., prepared by authority of the council of Chatham and served upon the council of Dover for the purpose of charging the latter township with a portion of the cost of a work deemed necessary to be constructed for the benefit of the owners of property in the township of Chatham.

The Little Bear Creek drain, the deepening of which is the work under consideration, was constructed several years ago along the marshes and low wet lands in Chatham, across the greater part of that township, until it reached Little Bear Creek where it flows close to the town line between Chatham and Dover East. The drain crossed the Prince Albert road, in the heart of the township, where the lands are very low and wet. This drain would have been quite ineffective for the purpose for which it was constructed without what is called the Prangley Tap, which was constructed by the county of Kent in the east end of the township of Chatham, and by which waters collecting in Camden and the eastern part of Chatham are drawn off to the river Sydenham. The township of Dover, as one of the townships of the county of Kent, contributed its share to the construction of this drain. Notwithstanding that the Prangley Tap carried off a quantity of water in the township of Chatham, which otherwise would have had no means of escape beyond the limits of the township except

such as was afforded by Little Bear Creek drain and creek, the waters of the creek below the outlet of the drain overflowed its banks and damaged the lands in Dover. In order to drain the lands along the town line, between Chatham and Dover, and to relieve Bear Creek of a portion of the water so brought into it by Little Bear Creek drain, a drain, called the town line tap, was constructed within the limits of the township of Chatham close to the town line from Little Bear Creek drain, along the town line northerly. To the cost of this work the township of Dover contributed between $8,000 and $9,000; subsequently what is called the town line extension drain was constructed, in and by the township of Chatham, for the purpose of giving better outlet for Chatham waters and lessening the flow of water into Bear Creek, to which drain Dover contributed upwards of $1,000.

It was found, however, that the town line drain so constructed, with its extension, and Little Bear Creek drain and creek, were wholly insufficient to give effective drainage of the great mass of water collecting and lying in the heart of the Township of Chatham, and therefore that township, at its own expense, constructed a drain, called the Prince Albert Road Tap, along the Prince Albert road, to carry off a portion of the waters collected there and which the Little Bear Creek drain and creek, and the town line tap and extension, were incapable of carrying off. So many small drains, however, have been constructed by individuals to drain their lots, and by the public to drain roads, which small drains are conducted into the Prince Albert Road Tap, and so low is the land at the Prince Albert road, and so great is the quantity of water which collects there, that the drain was quite unable, even with the assistance of Little Bear Creek drain, to carry it all off, and the Prince Albert road is much overflowed and dam-

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aged thereby. Besides the above drains, the township of Chatham has constructed other drains to carry off water collecting in Chatham, and which had no natural outlet except such as Bear Creek afforded, which creek was utterly incapable of carrying off all of such water. The municipality of the township of Dover, also at its sole expense, constructed in the westerly part of that township a drain called the Baldoon street drain, at the lower extremity of the work now proposed to be done, which falls into Bear Creek near its outlet.

Such was the state of things when Mr. W. G. McGeorge, an engineer and surveyor employed by the council of the municipality of the township of Chatham, made the following report, which is addressed to the reeve, deputy reeve and municipal council of Chatham township. (His Lordship read the report, which is set out in full in 5 O.R. 326.)

Subjoined are two schedules, the one for the township of Chatham the other for that of Dover; to the former it is unnecessary to refer, as it is with the schedule of the township of Dover that we are concerned, which, as it is not long, it will be convenient to set out in full, for the purpose of showing precisely what it is that Mr. McGeorge did, and what it is that his report purports to adjudicate upon; for it is in the nature of an adjudication binding upon the municipality unless appealed from, and in case of appeal the award made by the arbitrators to whom the appeal is referred is absolutely conclusive and binding upon all parties, subject always to the jurisdiction of the High Court of Justice, as we have seen by reference to the sections of the act above extracted.

The schedule in respect of the township of Dover is headed and is as follows:

Little Bear Creek drain west of Prince Albert road. Schedule of assessments on lands and roads in the township of Dover East, for

benefit, for outlet, and for constructing a drain to carry off water brought down on lands to damage them :

Concession 10, Lot 24	$ 10 00
" 11, " 24	20 00
" 12, " 24	20 00
" 13, " 24	5 00
E. Baldoon st., Lot 21	5 00
" " 22	7 00
" " 23	7 00
" " 24	7 00
" " 25	7 00
" " 26	7 00
" " 27	7 00
" " 28	7 00
" " 29	25 00
" " 30	25 00
" " 31	25 00
" " 32	25 00
W. Baldoon st., " 21	5 00
" " 22	5 00
" " 23	5 00
" " 24	5 00
" " 25	5 00
" " 26	5 00
" " 27	5 00
" " 28	5 00
" " 29	5 00
" " 30	5 00
" " 31	5 00
" " 32	15 00
Road between concession 10 and 11 from town line to Baldoon street	50 00
Road between concession 11 and 12 from town line to Baldoon street	50 00
Road between concession 12 and 13 from town line to Baldoon street	50 00
Baldoon street from lot 21 to lot 31, inclusive	50 00
Half assessment on town line of Chatham and Dover from 6th to 15th concessions, inclusive	1,000 00

This schedule being, as it is, made part of the report shows that all that the engineer did, as indeed all that he had to do as far as the township of Dover was con-

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cerned, was to assess the above several lots and roads with the above several sums as for benefit to be conferred upon them respectively by deepening the Little Bear Creek in the township of Dover, which deepening was absolutely necessary to carry down the great flow of additional water brought into it from the township of Chatham, by the deepening of Little Bear Creek drain, in that township. The profile annexed to the report, and also made part of it, shows that this drain was deepened upwards of three feet at the Prince Albert road to carry off water from the Prince Albert road drain and that this depth was continued with a fall of three feet to the town line tap where the bottom of Little Bear Creek drain, when deepened, will be between three and four feet below the bottom of the town line tap; from this point the deepening is to be in Little Bear Creek itself, which, at present, has a fall of about two feet from the town line to Baldoon street drain. The Little Bear Creek, when deepened, is to have its bed lowered to the level of the bottom of the Little Bear Creek drain, at the town line tap, which depth is to be maintained on a dead level to Baldoon street drain, so that instead of the natural fall which the creek now has, from the town line to Baldoon street drain, the current and flow of the waters in the creek, between these points, will be created and maintained solely by the force of the extra water, brought in at Albert road, coming down the Little Bear Creek drain on the fall of three feet given to it, from that point to the town line tap, and this tap will be of no use until the waters in Little Bear Creek drain rise high enough to enter the town line tap. The profile has at its foot, at station 239, the following entry which must also be taken as part of the report:

Continue 300 rods further clearing bars and timber.

Now, against this report and the assessment therein

contained, and against all proceedings of the council of the municipality of the township of Chatham thereupon, the municipality of Dover, in accordance with the above provisions of the statute in that behalf, appeals by a notice of appeal, in which the grounds of appeal are stated as follows:

To James Clancey, Esquire, Reeve of the Township of Chatham and North Gore:—

Take notice that the council of the municipality of the township of Dover East and West do appeal against the pretended report of W. G. McGeorge, provincial land surveyor and engineer for Chatham aforesaid, for the deepening of Little Bear Creek drain, west from Prince Albert road, to the Chatham and Dover town line, and for the extension thereof into the township of Dover East beyond Baldoon street, and against the assessment made by the said McGeorge as mentioned in such report, and against all proceedings taken by the council of Chatham aforesaid thereon.

And the grounds for such appeal are: (His Lordship read the grounds of appeal as set out in 5 O.R. 329.)

The notice then notifies Chatham of the appointment by Dover of an arbitrator to act on behalf of that township and of the name of such arbitrator, and calls upon the council of Chatham to appoint an arbitrator to act upon behalf of that township. An arbitrator having been appointed by Chatham in pursuance of this notice, and a third arbitrator having been also duly appointed, according to law, the matter in difference, as appearing by reference to the reports and other documents appealed against, and to the grounds of appeal as stated in the notice of appeal, whatever those matters were, became referred to the three arbitrators so appointed whose duty it was finally to adjudicate thereon.

The material question therefore is: What were the matters so referred?

Now, it cannot, I think, admit of any doubt or question that the municipality of Chatham had no power whatever, by their engineer or otherwise, to carry any work originating in Chatham, and necessary for the

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drainage of Chatham, into the township of Dover, or to impose any burthen by way of assessment upon any lands or roads in Dover to reimburse Chatham for, or to pay, the cost of any part of such work, unless a petition, signed by a majority of the owners of property in the township of Chatham to be benefited by the proposed work, should be first presented to the council of the municipality praying that the proposed work should be undertaken and executed under the provisions of the statute. The presentation of such a petition so signed is a condition precedent to the acquisition by the municipality of the township of Chatham of any jurisdiction whatever over the township of Dover or over any lands situate therein. That no such petition ever was presented as would give to Chatham the jurisdiction over Dover in this case having been made one of the grounds of appeal against the validity of Mr. McGeorge's report, I cannot see upon what ground it can be held that such a matter was not one which should have been enquired into and adjudicated upon by the arbitrators. If none such had been presented the jurisdiction never attached, and in such case the report of Mr. McGeorge had no validity or binding effect whatever, and the appeal, as it appears to me, must have succeeded upon that ground alone. Now no express decision of the arbitrators has been given upon this point; the objection was taken by the notice of appeal and appears never to have been abandoned; it has been urged before the High Court of Justice for Ontario, on the motion to set aside the award, and has been repeated before us.

The onus of proving that the jurisdiction had attached lies plainly upon the municipality which assumes to exercise the jurisdiction, but no evidence appears to have been offered upon the point. The recital in the by-law of the township of Chatham, which was produced but with which the township of Dover

had nothing to do, of the existence of a fact necessary to exist before the jurisdiction could attach, cannot have the effect of giving the jurisdiction.

The point was made a ground of objection to the award of the arbitrators upon the motion to set it aside made in the High Court of Justice for Ontario, and it is still pressed before us by the respondents as a reason against this appeal, and upon this ground, if on no other, I cannot see why the appeal of the township of Dover against Mr. McGeorge's report should not have prevailed.

But assuming the jurisdiction to have attached, then it became the duty of the engineer employed to report upon the work to set forth in his report a statement of all the several lots and roads in the township of Dover, if any there were, which in his opinion would be benefited by the completion of the proposed work, and to assess and charge each of such lots and roads with the amount of such benefit to be received by each. If the work should be for the benefit of Chatham alone, and should confer no benefit upon lands in Dover, no lands in Dover should be assessed; only such as should be benefited should be assessed, and each lot, separately, only with the amount of the benefit it should receive. If lots should be benefited, but roads not, then the lots only should be assessed, each to the amount of its own benefit, and the roads should not be assessed, or if roads alone should be benefited, then they alone should be assessed to the amount of such benefit, and the lots should not be assessed. Now what Mr. McGeorge by his report did, was to set out in a schedule, which was made part of his report, all the lands and roads in Dover which, in his opinion, would be benefited by the work, and to assess and charge each of such lots and roads with the particular amount of benefit which, in his opinion, each would receive.

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The township of Dover, in their notice of appeal, object to this part of his report upon the ground that the several lots and roads so assessed and charged with such burthen will not derive from the completion of the work a benefit to the amounts respectively assessed upon them, nor in fact any benefit at all, but that, on the contrary, the work will do them injury. This is the substantial ground of appeal upon this point, upon which, in my opinion, it was the duty of the arbitrators to have adjudicated. I cannot, I confess, comprehend how there can be any doubt upon this point. The statute requires the engineer to assess and charge every lot and road, if any there be, which in his opinion is benefited, with the amount of such benefit, and to make the assessment so made by him part of his report. It further makes the report, including his assessments, binding if there be no appeal, but if there be an appeal, then the statute creates a special court of arbitrators to whom the whole report, and the matters in difference in relation thereto, and to its contents, which are stated in the notice of appeal, as grounds of appeal are referred; and it makes the arbitrators' award, on such matters so referred, to be conclusively binding upon all parties, which term "all parties," as here used, in my opinion, comprehends the owners of the lands assessed, as is apparent from section 400 of 46 Vict. ch. 18, which enacts that in cases of this nature one copy of the award shall be registered in the registry office of the county or division in which the lands affected are situate. For what purpose can this be supposed to be done except to perfect most effectually the charge of the several sums assessed upon the lands charged, and to give notice thereof to all purchasers of such lands or any of them. What the foundation is for the idea that, in a case like the present, there is a bulk sum charged by the engineer's report the

propriety of which alone is what is submitted to the arbitrators, and that the manner in which such bulk sum is apportioned, and what are the lots among which it should be apportioned, and in what manner, are matters with which the arbitrators have nothing to do, but are reserved for after consideration by a Court of Revision, I am unable to see. There is nothing in the statute expressed to that effect, and no such thing can be implied from what is expressed. Such a construction would defeat what, in my opinion, appears to be the plain intention of the legislature, namely, that the award of the arbitrators should be conclusive and binding upon all parties affected by the assessment, and that by registering the award the lands so assessed should become irrevocably charged with the amount assessed against each. The by-law thereafter to be passed by the council of the municipality of Dover is merely for the purpose of levying by yearly rates, in the same manner and at the same time as other rates are levied, the amounts already effectually charged upon the lands assessed. Now that there is any bulk sum, in the report appealed from, which is assessed upon the township of Dover as such, that is to say, in any other sense than that the aggregate of the several sums charged upon the several lots and roads mentioned in the report of necessity makes a sum total or, if the term be liked better, a bulk sum is, in my opinion, quite a mistake. By adding up the several sums charged upon the several lots and roads assessed, we find, no doubt, that they amount to $1,479, which sum of necessity does bear a proportion to the amount of the whole cost of the work as estimated at $10,196 which proportion is well expressed, it is true, by the fraction $\frac{1479}{10196}$, and thus the proportion which Mr. McGeorge's report finds that the township of Dover should contribute to the proposed work can be ascer-

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tained, and this, indeed, is the only way in which such proportion can be ascertained consistently with the provisions of the statute, which is to charge severally the lands in Dover with the particular amounts by which they shall be respectively benefited.

If there be error in the items, or any of the items which compose the sum total, that sum total must be erroneous to the extent of such error in the particular items. Whether, therefore, there be any, and if any, what, error in the particular items, or in any and which of them, is the material question, and it requires adjudition upon each particular item.

The sum of $1,479, being arrived at in no other way than by addition of the several items charged upon the several lots and roads, is nothing more than a result of what Mr. McGeorge shows by his report that he did, which was, as he was required to do, to assess the particular lots and roads with the particular sums by which he says that, in his opinion, they will respectively be benefited by the work. That was the only thing done, and which his report represents as having been done, by him, and it is against the things so represented as having been done that the appeal was taken. If it should appear that all, or any, of the lots and roads assessed should not have been assessed for the reason that it does not appear that they would be benefited by the proposed work to the respective sums assessed upon them severally, or to any amount, the assessment would be bad as regards every lot and road so wrongfully or excessively assessed; the correctness of the several assessments was, in my opinion, one of the matters which was submitted to the arbitrators by the express terms of the notice of appeal; that, assuming the jurisdiction to have attached, was the very point upon which the arbitrators were called upon to adjudicate, and upon which they should have made their award so as

to make it, as it is by the statute intended to be, conclusive and binding upon all parties. Whatever might be the difficulties and delay attending the proceedings which might be necessary to be taken for the purpose, that, as it appears to me, was their clear duty. There is no such thing mentioned in the report, nor, indeed, could there be, as a bulk sum, which, having been first ascertained in some unexplained or unsuggested manner, has thereafter to be apportioned among some lots and roads without any diminution of the bulk sum. The only bulk sum being the sum total of the assessments charged on the several lots and roads added together, that sum total must vary accordingly as it should be found that the assessments charged upon the several roads were properly or improperly charged.

If any of those assessments should be removed for the reason that the lots or roads on which they were charged would not be benefited by the proposed work, the sum total must of necessity be diminished accordingly. If the lots would not be benefited, but the roads would be, the assessment charged upon the lots must be removed; so if the roads would not be benefited, but the lots would be, the assessments charged upon the roads must be removed; and in neither case could the amount deducted in respect of the one be charged upon the other, either in justice or common sense or by reason of anything expressed in the act, which, by providing a court of arbitration to adjudicate upon the matters in difference, plainly intended, as I think, that complete justice to all parties concerned should be finally administered by that court.

Now the award, which was signed by two only of the arbitrators, after reciting the engineer's report and the assessments made by him upon the lands and roads in Dover mentioned in his report, and the appeal therefrom, and that the arbitrators had considered all the

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evidence offered before them, adjudicated as follows:—

First—We order, award and determine that the said assessment upon lands and road in the township of Dover East and West, and the town line between the said township of Dover East and West, and the township of Chatham and North Gore, by the said George McGeorge, be sustained and confirmed, as the said lands and roads in the said township of Dover East and West will be greatly benefited and improved by the said work, and also the said town line road between the said municipalities of Dover and Chatham, and that the said appeal be and the said is hereby dismissed, and that the several grounds mentioned in the notice of appeal have not been sustained.

Now that this award purports to be a full, final and complete adjudication upon every ground of appeal stated in the notice of appeal, cannot, I think, admit of a doubt. It determines, in effect, that the event which alone could give any jurisdiction to the township of Chatham to affect the township of Dover had occurred. It determines that every one of the assessments of lots and roads in the township of Dover, made by Mr. McGeorge, was just and proper, and that each one of those lots and roads would be benefited by the proposed work and to the amount charged upon it. In form it is perfect as a conclusive award which is by the act made binding upon all parties, subject only to being interfered with by the High Court of Justice to the jurisdiction of which court it was subjected; and I cannot doubt (if not interfered with by the High Court of Justice) that, if and when registered in the registry office of the county where the lands lie, it would irrevocably charge every one of lots and roads so assessed with the precise amount so assessed upon them respectively. The duty of the municipal council of the township of Dover to pass a by-law for levying these amounts by yearly rates within the period allowed by the statute for that purpose was simply ministerial, and no court of Revision, or other court, could ever review such assess-

ments so confirmed. The registration of the award would irrevocably bind the several lands with the respective amounts so charged upon them respectively, subject always to the jurisdiction of the High Court of Justice over the award. But that the arbitrators who signed the award never intended it to have the effect which, from its terms, in my opinion it clearly has, appears from a minute of proceedings before the arbitrators, which, with the evidence taken before them, has been returned to the High Court of Justice for Ontario for the purpose of being used upon the motion made in that court by the township of Dover that the award should be set aside, for, among other reasons, the same reasons as had been stated in the notice of appeal to the arbitrators, and because the said findings and award of the arbitrators are contrary to law and evidence and the weight of evidence.

From this minute of proceedings it appears that on the 18th May, 1883, all the arbitrators met to decide as to the award, when the following entry is made.

The arbitrators have considered it best to decide against the legal objections, and to decide against Mr. Wilson's contention, (Mr. Wilson was counsel for Dover) leaving him to bring them before the courts if he thinks proper.

The arbitrators all agree that Dover will be benefited by the work, Mr. Fleck holding that, on the evidence offered, five hundred dollars should be taken off the assessment on the town line road, the other arbitrators holding that lands and roads in the township of Dover are benefited to more than the amount of assessment, and that it should be confirmed, but one of the arbitrators, Mr. Douglas, holding that while the bulk sum assessed is not too great the lands and roads and parts thereof so assessed should be varied, which it is competent for the Court of Revision to do. The arbitrators thereupon agree to confirm the assessment as above.

Mr. Fleck declines to sign the award.

Arbitrators now adjourn till 4 p.m. this day to sign the award at same place.

I have already expressed my opinion to be that this view of Mr. Douglas, as to there being a bulk sum

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which could be correct although the items of which it is composed, or some of them, should be removed, is erroneous. The error, I think, consists in the application of sections of the act, which relate solely to a work constructed wholly at the cost of the municipality in which it is both begun and completed, to the case of lands in a township into which a work of an adjoining municipality is continued by and for the benefit of the municipality constructing the work, to which case the sections do not apply, and with respect to which special provision is made by other sections of the act. In the former case there is a bulk sum first ascertained, namely, the cost of the whole work, which afterwards is apportioned (without any diminution of the bulk sum, which of course cannot be diminished being the amount of the cost of the whole work,) in such a manner as may appear most fair and just, among certain lots and roads, even though the proportion of the whole cost which the several lots and roads would have to pay might be greater than any actual benefit that could be said to be conferred upon them respectively by the work. In the present case, where a work begun in and for the benefit of Chatham is continued into Dover, there is no bulk sum in so far as Dover is concerned as to it, the lands therein cannot be subjected to any charge except for the actual benefit each lot and road shall be considered to receive. There is no bulk sum to be apportioned among any lands in Dover. The only bulk sum in the case at all is the cost of the whole work, which must be borne by Chatham, except in so far as particular lots and roads, if any there be in Dover, can be said to derive benefit from the work, and these lots and roads can only be charged with a sum representing the actual benefit which can be fairly attributed to the work irrespective of any bulk sum.

For the reasons already given, I am of opinion that the Court of Revision has not, and cannot have, anything

to do with a case of this kind. The Court of Arbitration is the final court (subject only to the jurisdiction of the High Court of Justice) to adjudicate upon all matters in difference arising in a case of this kind.

The sec. 581 of 46 Vic ch. 18, which provides that the municipality into which a work is continued by an adjoining municipality shall pass a by-law to levy the amounts legally assessed upon lands in the lower township, and which says that such by-law shall be passed in like manner, and with such other provisions, as would have been proper if the majority of the owners of the land to be taxed had petitioned for such work, as provided in sec. 570, does not say that the by-law so passed shall be subject to the provisions contained in sec. 570 and its sub-sections, but that it shall be passed with (that is in my opinion shall contain) such provisions as a by-law petitioned for in the manner provided for in sec. 570; that is to say, provisions for borrowing on debentures the required sum and for levying the sums charged on the several lots by special yearly rates on the respective lots, and for raising the amount charged on roads by a general assessment on the ratepayers of the municipality.

To subject assessments which, on appeal, have been submitted to the decision of arbitrators to be again revised by a court of revision would, in my opinion, be quite inconsistent with the plain intent of the act, that the award should be conclusively binding upon all parties, subject only to revision by the High Court of Justice, and with the provision that the award shall be registered in the registry office of the county in which the lands affected are situate. In my opinion, therefore, the arbitrators erred in not adjudicating in fact upon the merits of the appeal against the several assessments on the lots and roads assessed, as by their award they have in terms done, and that for this error, plainly

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appearing upon their minutes, the award should have been set aside.

There remains to be considered the main point insisted upon, both before the arbitrators and against the award, namely, that the evidence failed to establish that the proposed work would confer any benefit upon the lots and roads assessed, and that on the contrary it established, as well as could be established in advance of the construction of the work, that it would inflict injury upon some of them.

The learned Chief Justice of the Court of Appeal for Ontario, concurring with certain expressions in the judgment of the learned Chief Justice of the Divisional Court before whom the motion to set aside the award as against law and evidence and the weight of evidence was made, says upon this point:

On the general merits of the award I share with the learned Chief Justice his difficulty in seeing, on the evidence, how Dover is to be benefited by the proposed work, but I share also his reluctance to interfere, on that ground alone, with the decision of the arbitrators, the more so as the dissenting arbitrator was willing to hold Dover benefited in a lesser sum than awarded.

If the question was one depending upon the credibility of witnesses, or upon a nice estimate of contradictory evidence, I quite concur that the judgment of arbitrators upon a mere question of fact should not be interfered with. But here no question of the credibility of any of the witnesses arises, and there appears to be very little, if any, contradiction in the evidence, all of which is brought before us. Difference of opinion there may be, but in the facts upon which opinions should be formed there does not appear to be any material difference. Here the great mass of the evidence certainly appears to be against there being any benefit conferred, and if the principle upon which the engineer says that he made the assessments, and formed his opinion that the lots and roads assessed would be benefited, be, as is

insisted by the respondents, erroneous, a court of appeal, on a motion to set aside an award which confirms the assessments, is bound to exercise its independent judgment upon the evidence.

It is not questioned that all the work proposed to be done is absolutely necessary to carry off the extra water brought down from Chatham. This being so, the evidence that benefit will be conferred upon the lots and roads assessed in Dover to justify their being charged with a portion of the cost of a work wholly necessary for the accomplishment of the purposes of Chatham ought, in my mind, to be absolutely free from doubt, for, *prima facie*, in such a case the burthen of the cost of the whole work ought to be borne by the municipality which invades the territory of another in order to accomplish purposes of its own.

It might give rise to a serious question hereafter if lands in Dover should now, before the construction of the work, be assessed as for benefit anticipated to be conferred upon them by the work, and it should after its construction turn out that injury and not benefit, as is most strenuously and for very strong reasons insisted by many of the witnesses, would be the actual result, whether the owners of the land so assessed might not be deprived of their right to compensation, under sec. 591 of 46 Vict. ch. '8, for the injury so done to their property.

Turning then to the engineer's report, we find him there saying that the charges made upon the lots and roads in Dover assessed by him are, "for benefit," "for outlet" and "for constructing a drain to carry off water brought down on lands to damage them."

Now as to this latter item of service done to the lots and roads assessed in Dover, it is to be observed that the only water brought down on lands in Dover, and which certainly will damage some lands in Dover

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unless effectually carried off, will be the water brought down by the deepened drain in Chatham, which water Chatham is bound to carry off effectually so as not to damage any lands in Dover or, in default, to recompense the injured parties under sec. 591 of 46 Vict. ch. 18, as well as at common law, so that this item can form no just ground for charging lands in Dover with any part of the cost of the work. Then as to item "for outlet." What is meant by this item is difficult to understand, for the only outlet which the proposed work will give to any water will be outlet for the extra waters brought into Dover by the deepened drain in Chatham, which waters by the deepening of Bear Creek in Dover will find their outlet through that stream eventually to Lake St. Clair. The deepening Bear Creek in Dover for this purpose gives no outlet to Dover's waters that Dover had not before. There can therefore be no justification for the charge imposed upon the lots and roads assessed in Dover under the item "for outlet."

Then as to the item "for benefit."

The engineer himself, in his evidence before the arbitrators, says :

> The drain is necessary to carry off the water brought down to the Prince Albert road and district. There is very great need to carry off the water from the Prince Albert road (in Chatham). I don't think any smaller drain than I have proposed would be sufficient.

Again :

> It is for outlet that I assess the roads south of the proposed work —the 12th and 13th concession roads. I also assess for outlet, and we have to construct bridges on them, which will cost $200 each. I estimated the buildings in Dover, including Dover's proportion of the town line bridge, at $450. Without the bridges the roads in Dover are benefited by the outlet and are assessed for that, and because they use the drain. I suppose they could use the creek without the drain. I assess them because they will use the outlet, and not because I can see any possible benefit.

Then he speaks of four taps which had in years past been made in Chatham, taking water to the Thames

and thence to the river Sydenham. As to these he says:

Every one of these taps has been of advantage to Dover. and these taps have relieved Dover of more water than will be brought down by the proposed drain. I looked on it that in its natural state Chatham and Dover had a joint interest in Bear Creek, and that if Chatham had made a cut off, to take water off Dover, they would have a right to send as much water down as naturally went there originally, and that Dover would not have a right to make a drain like Baldoon drain, taking water in, which would not naturally come in, to the exclusion of water from Chatham. or without enlarging Bear Creek to carry it off, nor drain their roads to occupy the outlet without giving Chatham the same rights as before. I think that owing to the original conditions of the water and country, Dover should contribute for making the outlet, as it now occupies space in Bear Creek that Chatham formerly occupied. Dover was not assessed for the Prince Albert drain, the Louisville tap or Prangley tap, and contributed nothing unless their share of the county grant.

Now, the meaning of all this seems to be, that in the opinion of the engineer, as Bear Creek was the only natural drain for a large tract of low, wet marshy lands situate in Chatham and Dover, and as such natural drain was wholly inadequate to carry off the great mass of water which collected in Chatham, and as to carry off some of such water, by other outlets through the rivers Thames and Sydenham, Chatham had constructed certain drains to which Dover only contributed its portion of a county grant, although to others Dover had contributed between $9,000 and $10,000, and as Dover also had constructed a drain conducting into Bear Creek, at the western extremity of the proposed works, some water which would not naturally reach that stream, therefore, Dover should now contribute to this proposed work, constructed for the purpose of carrying off water from Chatham, although the engineer who entertains this opinion cannot see any perceptible benefit that the work will confer on Dover, other than giving (as he calls it) an outlet which Dover already has, and is no other than that of the stream called Bear Creek, which by the proposed work Chatham avails itself of, and for

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its own purposes has to enlarge the capacity of the creek.

Again he says:

> In making the assessment in Dover, I took into consideration that Chatham had made all these taps mentioned, and if Chatham had not done so, perhaps I would not have assessed Dover at all for this work. I thought Chatham was not sending more water than she sent there originally, and on this account I assessed Dover.

Another engineer who was called by the township of Chatham, although he also expressed the opinion that Dover was benefited by the work, gives his reason for entertaining that opinion thus: "It will improve the health of the county, if nothing else."

Then, as to the charge on Dover for bridges, it appears by the evidence that they are, as they stand, abundantly sufficient for the water at present passing under them, and that the enlargement is necessitated by the increased flow of water brought down from Chatham by the proposed work.

Upon the evidence before us, all that need be said, as it appears to me, is that if the opinion of Mr. McGeorge, as to the reasons for which he has charged the lots and roads in Dover assessed by him with a part of the cost of this work, be just and sound, legislation is necessary to give effect to it, for, in my opinion, those reasons do not, under the provisions of the statute as it at present stands, warrant any charge being imposed upon them for the purpose.

Upon this main point of the contestation I am unable to come to any other conclusion upon the evidence, than that it fails to establish that the proposed work will confer any benefit upon the lots and roads assessed, or that they should be compelled to contribute to the cost of the proposed work. And for this reason, also, in my opinion, the award should have been set aside and the engineer's report also.

This appeal, therefore, must, in my opinion, be dismissed with costs.

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Appeal dismissed with costs.

Solicitor for appellants: *Charles E. Pegley.*

Solicitors for respondents: *Robinson, Wilson & Bell.*

THE CANADA ATLANTIC RAILWAY COMPANY AND DANIEL C. LINSLEY (PLAINTIFFS) ..... APPELLANTS;

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*Dec. 3, 4.

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*May. 17.

AND

THE CORPORATION OF THE CITY OF OTTAWA AND PIERRE ST. JEAN, MAYOR, AND THOMAS HALDER KIRBY, TREASURER, OF THE CITY OF OTTAWA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—36 Vic. ch. 48 (O.)—Bonus to railway—Vote of ratepayers on by-law for—Premature consideration of by-law—Error in copy submitted to ratepayers—Signing and sealing by-law—To be passed by same council.

A by-law was submitted to the council of the city of O., under 36 Vic. ch. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute such by-law was to be taken into consideration by the council after one month from its first publication on the 24th of September, 1873. The vote of the ratepayers was in favor of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried and the by-law passed. The mayor of the council, however, refused to sign it, on the ground that its consideration was premature, and on 5th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before

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

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the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original.

In 1883 an action was brought against the corporation of the city of O. for the delivery of the debentures provided for by the by-law, in which suit the question of the validity of the whole proceedings was raised.

Held, affirming the judgment of the court below—

1. That the vote of 20th November, 1873, was premature, and not in conformity with the provisions of sec. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under sec. 226.
2. That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of.
3. That the proceedings of 7th April, 1874, were void for two reasons. One, that the by-law was not considered by the council to which it was first submitted as provided by sec. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates.

Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favorable vote.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division (2) in favor of the defendants.

The facts of the case will sufficiently appear from the previous reports and the judgment of this court.

McCarthy Q.C., *O'Gara* Q.C., and *J. J. Gormully* for the appellants.

The by-law was passed on 20th October, 1873, and although it was a few days ahead of time, that was only an irregularity, and the by-law would stand unless

(1) 12 Ont. App. R. 234. (2) 8 O. R. 201.

quashed within a reasonable time. There is a limit of time given to quash a by-law by the Mun. Inst. Act, sec. 241. See *Van Tecar* v. *East Oxford* (1).

The provision that the by-law shall not be taken into consideration before the expiration of one month from publication, is directory only, and not mandatory, and unless damage be shown as a result of non-compliance the court will not invalidate it.

Sealing is not necessary to the validity of a by-law, but is only required for the purposes of indentification: Sec. 226. See *Dunston* v. *Imperial Gas Co.* (2).

The following authorities also were referred to: *Queen* v. *Ingall* (3); *Berks' Turnpike Road* v. *Meyers* (4); Abbott's Dig. of Mun. Cas. (5); Dillon on Mun. Corp. (6); *Brock* v. *Toronto & Nipissing Ry. Co.* (7); *In re Billings* (8); *Moss* v. *Barton* (9); *Buckland* v. *Papillon* (10).

McLennan Q.C. and *McTavish* for the respondents cited *In re Croft and the Township of Brooke* (11); *Mottashed* v. *Prince Edward* (12); *Boulton* v. *Peterborough* (13); *Crossfield* v. *Gould* (14); Fry on Specific Performance (15); *Luther* v. *Wood* (16); *Hammersley* v. *DeBiel* (17); *Jorden* v. *Money* (18); *Maddison* v. *Alderson* (19); *Citizens Bank of Louisiana* v. *First National Bank* (20).

O'Gara Q.C. was heard in reply.

The judgment of the court was delivered by—

GWYNNE J.—I am of opinion that this appeal must be dismissed with costs upon all the grounds urged by

(1) 3 Ont. App. R. 131.
(2) 3 B. & Ad. 125.
(3) 2 Q. B. D. 199.
(4) 6 Serg. & Raw. Penn. 10.
(5) Pp. 725 to 727.
(6) P. 235 sec. 131.
(7) 17 Gr. 425.
(8) 10 U. C. Q. B. 273.
(9) L. R. 1 Eq. 474.
(10) 2 Ch. App. 70.
(11) 17 U. C. Q. B. 269.
(12) 30 U. C. Q. B. 79.
(13) 16 U. C. Q. B. 380.
(14) 9 Ont. App. R. 218.
(15) P. 474 ses. 1070 et seq.
(16) 19 Gr. 348.
(17) 12 C. & F. 45.
(18) 5 H. L. Cas. 185.
(19) 8 App. Cas. 473.
(20) L. R. 6 H. L. 361.

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the respondents against the appellants' demand.

By the 471st section of the Municipal Institutions Act of the province of Ontario of 1873, 36 Vic. ch. 48, the council of every township, county, city, town and incorporated village, were empowered to pass by-laws for granting bonuses to any railway company in aid of such railway, and for issuing debentures for raising money to meet such bonuses, but it was enacted that no municipal corporation should incur a debt or liability for the purposes aforesaid, unless the by-law, before the final passing thereof, should receive the assent of the electors of the municipality in the manner provided by the act. This manner was provided by the 231st section which enacted that in case a by-law requires the assent of the electors of a municipality before the final passing thereof, the council shall by the by-law fix the day, hour, and place for taking the votes of the electors thereon at every place in the municipality at which the elections of the members of the council therein are held, and shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper published within the municipality, or, if there is no such newspaper, in the public newspaper published nearest the municipality, and also, in either case, in a newspaper published in the county town, if there be any such newspaper, the publication to be continued in at least one number of each of such papers for three successive weeks, and shall also put up a copy of the by-law at four or more of the most public places in the municipality, and that appended to each copy so published and posted shall be a notice signed by the clerk of the council stating that such copy is a true copy of a proposed by-law which will be taken into consideration by the council after one month from the first publication in the newspaper, stating the date of the first publication, and that at the hour, day, place, or places

therein fixed for taking the votes of the electors, the polls will be held. And by the 248th section it was enacted that no by-law for contracting a debt by borrowing money or otherwise, or for levying rates for payment of such debts on the ratable property of the municipality for any purpose within the jurisdiction of the council, should be valid unless the by-law should name a day in the financial year in which the same is passed when the by-law shall take effect, and that the whole of the debt and of the obligations to be issued therefor should be made payable in twenty years at furthest from the day on which such by-law takes effect; and that the by-law should settle an equal special rate per annum, in addition to all other rates to be levied in each year, and that such special rate should be sufficient, according to the amount of ratable property appearing by the last revised assessment rolls, to discharge the debt and interest when respectively payable, and that the amount of ratable property shall be ascertained irrespective of any future increase of the ratable property of the municipality, and of any income in the nature of tolls, &c., &c., or of any income from the temporary investment of the sinking fund or of any part thereof.

On the 24th September, 1873, the clerk of the council of the city of Ottawa published in two newspapers published in the city of Ottawa, and also put up at four of the most public places in the city for the length of time required by the 231st section of the above act, what he certified under his hand as city clerk to be true copies of a proposed by-law to authorize the issue of debentures, to the extent of $100,000, to be given as a bonus to the Montreal and City of Ottawa Junction Railway, in which proposed by-law as so published were the clauses following :—

2. "The said debentures" (those authorized by the previous sec-

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tion) shall be payable on the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and ninety-three, at the office of the Quebec Bank in the city of Ottawa, and shall have coupons attached for the payment of the interest as it falls due.

5. This by-law shall take effect and come into operation on the thirteenth day of December in the year of our Lord one thousand eight hundred and seventy-three.

And this final clause:—

And whereas this by-law requires the assent of the electors of the city of Ottawa aforesaid before the final passing thereof, therefore, for the purpose of taking the votes of the said electors thereon the corporation of the city of Ottawa in council assembled do hereby appoint the sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, at the several places hereinafter mentioned.

Here follow the places named for taking the poll of votes and the names of the persons to be returning officers. And at the foot is the notice required by the statute to be signed, and which was signed by the city clerk, as follows:—

TAKE NOTICE

That the above is a true copy of a proposed by-law which will be taken into consideration by the council of the corporation of the city of Ottawa after one month from the first publication thereof in the *Free Press* newspaper, the date of which first publication was the twenty-fourth day of September in the year of our Lord one thousand eight hundred and seventy-three, and the votes of the electors of the said municipality will be taken thereon at the following places within the city of Ottawa, namely, (here follows an enumeration of the places as in the published by-law,) on the sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, at the hour of nine of the clock in the forenoon of the same day.

WM. P. LETT,
City Clerk.

City of Ottawa,
24th September, A.D. 1873.

Between the 16th and 20th October, 1873, the city clerk reported to the council, as required by the act, that the proposed by-law was approved by a majority of the votes polled, and upon the said 20th October a

motion was proposed in council and carried to the effect that the by-law granting a bonus of $100,000 to the Montreal and Ottawa City Junction Company be read a second and third time and passed, suspending all rules of council to the contrary. At the time this motion was put the original of the proposed by-law was not before the council, it having been then lost, as it, in fact, so continued to be until just before the re-hearing of this cause, when a clerk of the plaintiff's made an affidavit, to which was annexed a document which he swore he found on the 11th February, 1884, in the office of the *Free Press*, which, as he said, he was informed by the proprietor of that newspaper was on file in his office since the 23rd or 24th September, 1873, and which had the appearance of being the original of the said proposed by-law as read a first time in council. The motion of the 20th October never was acted upon, the same having been found to be premature, in consequence of which, as appears by the evidence of the city clerk, the mayor declined to act upon the motion by signing the by-law, and as it was then lost he could not have signed it, nor was it, in fact, read a second and third time in council, and under the circumstances the motion although entered in the minutes, was treated, as it, in fact, was, as nugatory, the time when by the notice, as required by the statute attached to the proposed by-law as submitted to the ratepayers they were notified it would be taken into consideration by the council, not having arrived. In consequence of this defect in the proceedings of the 20th October, a motion was made in council on the 5th of November, 1873, as follows:—

Whereas the by-law granting $100,000 to the Montreal and City of Ottawa Junction Railway Company passed by the ratepayers of the city having been passed by this council previous to the time required by law, the same be now read a second and third time and passed, suspending all rules of this council to the contrary, and that the said by-law as so passed be signed and sealed by his worship the mayor

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according to law.

Which motion having been put to the council was lost by a vote of seven against three.

Nothing further was done in the matter until the 7th April, 1874, when in the minutes of council of that year, at a time when, to all appearance, all progress with the work of construction of the railway was abandoned, the following entries appear:—

Alderman McDougall introduced the by-law to grant a bonus of $100,000 to the Montreal and Ottawa Junction Railway Company, read a first time on the 20th day of October, 1873.

Moved by Alderman McDougall, seconded by Alderman Bangs:

That whereas the by-law granting $100,000 to the Montreal and Ottawa City Junction Railway Company passed by the ratepayers of the city having been passed by this council previous to the time required by law, the same be now read a second and third time and passed, suspending all rules of this council to the contrary.—Carried.

Now, it is to be observed here that no by-law of the nature of that recited in the above minutes of council had been read a first time on the 20th of October, 1873, and that on this 7th day of April, 1874, the original of the proposed by-law which had been introduced into the council and read a first time on the 22nd of September, 1873, was not forthcoming; it still remained lost; it was not before the council of 1874; neither was the copy which was submitted to the ratepayers; all that was before the council of 1874 was what the clerk of the council testified to as being a copy of the proposed by-law as originally introduced in 1873, with the exception of the final clause providing for its submission to the ratepayers and which, by the statute, is required to be a part of the by-law, but which was omitted from the document which the council was professing to read a second and third time, and to pass, upon the 7th April, 1874. In effect, then, the document which the council of the year 1874, purported to read

a second and third time, and pass on the 7th April, 1874, had never been read a first time in the council of that year, and, moreover, it was not the proposed by-law which had been originally introduced and read a first time in the council of 1873, if the council of 1874 could read that by-law a second and third time and pass it, nor was it the proposed by-law as submitted to the ratepayers on the 16th of October, 1873, for in the copy before the council on the 7th April, 1874, the clause as to the time when the by-law should take effect was stated to be the thirtieth day of December, 1873, and not the thirteenth day of December of that year, as stated in the proposed by-law submitted to the ratepayers.

It is contended now that the date of the thirteenth day of December, 1873, was a mistake of the printer in the copies as submitted to the ratepayers, those copies having been printed, and that in the original as introduced into the council the date was the thirtieth of December. As an independent matter of fact that may be so, and, if we should look at the paper said by the clerk of the plaintiffs to have been found in February, 1884, in the office of the *Free Press*, would appear to be so, but in an action of this nature, which is not instituted for the purpose of supporting the validity of debentures issued under the provisions of the by-law upon the assumption of its being valid, and disposed of for value, but for the purpose of having the proceedings of the council and the by-law of the date of the 7th April, 1874, declared to be valid after the lapse of twelve years without anything having been done under the by-law, as if it was valid, or any rate collected under it, although, if valid, rates should have been collected every year from the ratepayers on the rolls of those years, who, and not those now on the roll, should have been the persons to pay the moneys leviable dur-

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ing these years, I doubt whether we should or can receive any evidence which would contradict the statutory notice and certificate of the clerk of the council required to be appended to the proposed by-law, as submitted to the ratepayers, to the effect that the copy so submitted which names the thirteenth day of December, 1873, as the day when the proposed by-law shall take effect is a true copy of the proposed by-law, which, after the ratepayers shall have voted thereon, shall be taken into consideration by the council.

The effect of this statutory notice and certificate is, as it appears to me, to provide that the proposed by-law, as submitted to the ratepayers, is to be the one to be taken into consideration by the council after one month from the first publication in the newspapers.

It has been argued that the alteration from the thirteenth of December, as inserted in the proposed by-law as submitted to the ratepayers, to the thirtieth of December, as in the document alleged to have been passed, signed and sealed on the 7th April, 1874, was the mere correction of a mistake of a most formal nature which it was quite within the power of the council to make for the reason that, as is suggested, the mistake cannot be supposed to have influenced the ratepayers in recording their votes; but, with submission, in an action of this nature I do not think we can enquire whether the mistake could or could not have influenced the ratepayers in recording their votes; the question appears to me to be simply has the statute been complied with. If a by-law of this nature, in order to be a valid by-law, must name a day within the financial year in which the same is passed when the by-law shall take effect, and if it must be approved by the ratepayers before the council can pass it, it appears to me that the proposed by-law which is to be

taken into consideration by the council after having been voted upon by the ratepayers, and to be passed as having been approved by them, must be the very one which was submitted to them. The proposed by-law as submitted to the ratepayers and voted upon by them, and the only one of which they approved, and which, as approved by them, the council could pass, was upon the face of it absolutely void, because that proposed by-law being declared to take effect and to come into operation on the thirteenth of December, 1873, and the debentures authorized to be issued thereunder being made payable on the 29th December, 1893, such debentures were not, as the statute required them to be, made payable within twenty years from the day on which such by-law takes effect. Then it was argued that, notwithstanding the proceedings of the 7th April, 1874, the by-law which was introduced into the council of 1873 in September of that year was substantially passed in fact and in law upon and by the vote of the ratepayers of the 16th October, 1873, approving of its being passed by the council, and that all further acts of the council to give validity to the by-law were purely ministerial; but in presence of the provisions of the statute that to the copy of the proposed by-law there shall be appended a notice to the effect that the proposed by-law so submitted will be taken into consideration by the council after one month from the first publication, I cannot think that the council were divested of their legislative deliberative character, and that they had no power to express an opinion upon a matter which the legislature said they should take into their consideration; or that the vote of the ratepayers converted their office from being one of a deliberative and legislative character into one purely ministerial, the execution of which could be enforced by *mandamus* against their deliberate conviction that there were

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abundant reasons why the by-law should not be passed. As for example, suppose that after the vote of the ratepayers in favor of the proposed by-law should be taken the council should discover that the recital of their debts in the proposed by-law already incurred was incorrect, or that they had already exhausted their statutory power of incurring pecuniary obligations; or that there was a verbal agreement with the company which constituted a condition upon which the bonus was proposed to be given, and which the company refused to put into shape of a legal obligation; or that the bonus was proposed to be given upon the faith of the city being the terminus of the railway, and that after the vote of the ratepayers was taken the company had amalgamated with another company, by the terms of amalgamation with which it was provided that the city should not be a terminus, but should be a mere way station, and not receiving the benefit, which, as a terminus, it would have received; or that the company had wholly abandoned their projected railway, or for other like reasons; can it be held that the corporation could be compelled by *mandamus* in such cases to read a second and third time, and to pass, the by-law, and to sign and seal it, and so give it validity contrary to their own judgment as to the propriety of so doing? And at whose suit could the application for a *mandamus* be made? Not, I think, at the suit of the railway company, for the money proposed to be given being by way of a bonus and voluntary grant the company could have no interest, giving them a *locus standi in curia*, until the by-law should be passed by virtue of which alone could they assert any claim. It is contended that the 236th section of the act shows that after a vote by the ratepayers giving the approval of a majority to the proposed by-law being passed, the office of the council is merely ministerial. That section provides that:

Any by-law which shall be carried by a majority of the duly qualified electors voting thereon shall, within six weeks thereafter, be passed by the Council which submitted the same.

This section must be read in connection with section 231, which provides for the notice being given that the proposed by-law will be taken into consideration by the council after one month from the first publication in the newspaper, and construing them together, it appears to me to be more consistent with the constitution and deliberative character of municipal councils to construe section 236 as prescribing the time within which the consideration to be given by the council to the proposed by-law should be perfected, or in default thereof, that it should drop. The case of *Harwich* v. *The Erie Railway Co.*, cited in the judgment of the Court of Appeal for Ontario, proceeded upon a wholly different act; a private act incorporating the Erie and Huron Railway Company, which act contained most extraordinary and exceptional provisions in the interest of that company, which expressly divested the councils of municipalities giving bonuses to that company of their legislative deliberative character, for it was made compulsory on those councils, upon receiving a petition from a prescribed number of qualified voters, to submit to the ratepayers a by-law for granting a bonus to the amount named in such petition, and in case such proposed by-law should be approved by a majority of the votes given thereon it was imperatively enacted that the council should, within one month after such voting has taken place, read the said by-law a third time and pass the same, and should, within one month thereafter, issue the debentures for the bonus thereby granted and deliver the same to trustees to be appointed under the act. The Municipal Institutions Act not having any such imperative enactments does not, I think, require that it should be construed as divesting the council, upon

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these questions of granting bonuses, of all discretion and of their constitutional character as deliberative bodies. But however this may be, this section 236 shows that the proposed by-law does not become a by-law by the vote of the ratepayers approving of it, but that to become a by-law it must be passed by the council of the municipality and by the same council which submitted it to the ratepayers. It has been argued that this expression "shall be passed, &c., by the council which submitted the same," is to be construed as meaning that a proposed by-law introduced into a municipal council, and by them submitted to the ratepayers, must be passed by a council of the same municipality, and not by the council of another and different municipality; but this contention cannot prevail for there would be no sense in enacting that a by-law introduced into the council of (for example) the city of Ottawa, and read a first time there and by them submitted to the ratepayers of the city, should not be passed by the council of another municipality. It could not be passed by the council of any municipality but that of the city of Ottawa. Such a construction as that contended for involves the reading of the word "council" in the section as if it were "corporation." The council is a fluctuating body varying from year to year and having existence only for the year for which the members composing it are elected to serve; and that the word means the council which was the governing body of the municipality in the year in which the proposed by-law was introduced, and by which it was submitted to the ratepayers, there can, I think, be no doubt whatever. The statute provides that the proposed by-law, as submitted to the ratepayers, shall settle an equal special rate per annum in addition to all other rates to be levied in each year, which special rate shall be sufficient, according to the

amount of ratable property appearing in the last revised assessment roll, to discharge the debt and interest, and it shall name a day in the financial year in which it is passed when the by-law shall take effect. It is apparent from these provisions that the last revised assessment rolls which are to regulate the special rate to be named in the by-law when passed are the rolls of the year before the passing of the by-law, and as this provision must be in the proposed by-law when first introduced, the introduction of the proposed by-law, and its submission to the ratepayers, and its final passage, must take place in the same year.

To my mind, I confess, there seems to be strong reason for holding that until the by-law is signed and sealed, as required by the 226th section of the act, it does not become a valid by-law. That section enacts that:

Every by-law shall be under the seal of the corporation, and shall be signed by the head of the corporation or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation.

The word "presiding" here used applies to "the head of the corporation," as well as to any other person presiding at the meeting at which the by-law has been passed, the object to be attained being that it shall be signed by the person presiding at the meeting at which the by-law is passed, whether such person be the head of the corporation at that time or any other person presiding in his place, and I think the signature should take place immediately upon, or shortly after, its being passed while the very by-law, as passed, is in the presence of the meeting by which it is passed. But that this section was not enacted for the mere purpose of affording proof of the by-law in any action arising in respect of it appears from the 227th section, which enacts that:

A copy of any by-law, written or printed, without erasure or inter-

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lineation, and under the seal of the corporation, and certified to be a true copy by the clerk and by any member of the council, shall be deemed authentic, and shall be received in evidence in any court of justice, unless it is specially pleaded or alleged that one or both of the signatures have been forged.

The former of these sections appears to me to point to an act material to be performed for the purpose of the by-law coming into complete existence, the latter to the mode by which the fact of its having acquired existence under the 226th section shall be authenticated. The by-law itself, when signed and sealed as required by the 226th sec., becomes a record to be preserved among the archives of the municipality to be proved, whenever proof of the existence of the by-law should be required in any court, by the copy sealed with the corporate seal and certified to be a true copy by the clerk for the time being and any member of council, and such certified copy should, as it appears to me, show that the original by-law filed among the records of the municipality had the corporate seal annexed to it and was signed, or appeared to be signed, as required by the 226th section. If, ten or fifteen years after a by-law was passed, proof of it was required in a court of justice when the head of the corporation and the clerk and the members of council were wholly different persons from those who filled those respective offices when the by-law was read a third time and passed and if, upon referring to the original by-law filed of record among the archives of the municipality, it should appear that it never had been sealed with the corporate seal, nor signed by the head of the corporation at the time of its having been passed, nor by any person as presiding at the meeting of council at which it was passed, nor by the person who was then clerk of the corporation, the certified copy showing these defects would, as it appears to me, be defective as proof, and I cannot think that such defects

in the original by-law could be cured, and that the provisions of the 226th section would be complied with, by the persons who filled the respective offices of head and of clerk of the corporation when the certified copy was required signing the original by-law on record among the archives of the municipality with their own names, and setting the corporate seal to it, ten or fifteen years after the third reading of the by-law in the council of that time

Now, the only document in the present case which there is any evidence of having been signed and sealed is the document alleged to have been read a second and third time and passed on the 7th April, 1874, and of this document we have no proof under the seal of the corporation. The original apparently no longer exists, and no proof under the 227th section has been, if such could be now, given. But this is of little importance as it manifestly appears, I think, for the reasons already given, that the proceeding of the 7th April, 1874, was wholly void. Admitting, apparently, this difficulty the learned counsel for the appellants endeavored to rest the appellants case, first, upon the contention that upon the vote of the majority of the ratepayers who voted upon the proposed by-law as submitted to them the by-law became passed and a valid by-law, and failing in that contention, that the proceedings in council of the 20th October, 1873, made the by-law valid. But the proposed by-law as submitted to the ratepayers, and as voted on by them, was, as already shown, void upon its face, and even if it had been an exact copy of the proposed by-law as introduced into the council, it did not, as I think I have also shown, become passed and valid in law upon the vote of the ratepayers being taken; and as to the proceedings of the 20th of October, 1873, they, as it appears to me, were null and void and were,

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very properly as I think, so treated to be; for the statutory notice appended to the proposed by-law which was submitted to the ratepayers having declared that the proposed by-law so submitted would be taken into consideration by the council after one month from the first publication of the proposed by-law, amounted to an enactment, by implication, that it should not be taken into consideration before the lapse of that month. The mayor, therefore, of that year acted, as I think, in a very proper manner when he declined to recognize what was done on the 20th October, 1873, as having any validity and refused to sign the by-law as passed; when, then, the motion was made on the 5th November, 1873, in council that the by-law should be read a second and third time and passed, it was competent for the council to take the matter then into their consideration, save in so far as the difference between the proposed by-law as originally introduced and that submitted to the ratepayers may have affected the validity of the proceeding of the council; and we must treat them as having then taken the matter into their consideration, which consideration, whether they had or not power so to exercise it, they did exercise, with what motive is not open to enquiry, by refusing to read the by-law a second and third time and to pass it. So that in point of fact and of law the by-law never was passed by the council which submitted it, and never acquired any force or validity in law.

In the view which I have taken it is unnecessary to dwell upon the point relied upon in the judgments of some of the learned judges in the court below, namely, that the completion of the railway within the eight years from the 14th April, 1871, prescribed by the 18th section of the company's act of incorporation, must be taken to be an implied term or condition of the by-law, assuming it to have ever had any validity; but in that

opinion I entirely concur. The right of the company at this distance of time to compel the delivery to them of debentures under the by-law, and to require a rate to be now levied sufficient to meet them, must, I think, if such right can exist at all, be maintained only upon the ground that it was the duty of the corporation to have levied the rate as specified in the by-law during the last thirteen years since the passing of the by-law, and that the corporation is now just as responsible as if the rate had been duly levied; but in view of the utter abandonment of the work of construction of the railway during all the time that elapsed from the month of January, 1874, before the first year's rate was leviable under the by-law, until the month of February, 1881, all claim of the company, if any they ever had, to any benefit under the by-law was, in my opinion, forfeited before the work was recommenced in 1881, and the corporation was justified in regarding the project, which they proposed aiding, as abandoned, and they were not only justified in not levying any rate under the by-law and in regarding it as having no force, but they would not have been justified in levying the rate under the circumstances. Upon all the grounds of objection, therefore, which have been urged against the claim of the appellants, the respondents must succeed, and the appeal must be dismissed with costs.

Sir W. J. RITCHIE C.J. and FOURNIER, HENRY and TASCHEREAU JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Gormully & Sinclair.*

Solicitors for respondent: *Scott, MacTavish & MacCraken.*

1885
*Nov. 3.
1886
*Mar. 6.

DAME MARY WYLIE & VIR (DEFENDANTS) ..... } APPELLANTS;

AND

THE CITY OF MONTREAL (PLAINTIFF). RESPONDENT.

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

Assessment and Taxes—Cons. Stats. L. C. ch. 15, *and* 41 *Vic. ch.* 6 *sec.* 26 (*P. Q.*)—*Art.* 712 *Mun. Code, P. Q.—Construction of.*

Action by the city of Montreal to recover the sum of $408, for assessment or taxes for the years 1878, 1879 and 1880 on property in said city occupied by the defendant. The property set out in the plaintiff's declaration was during the time mentioned therein occupied and used as a private boarding and day school for girls, kept and maintained by the defendant, who employed divers teachers, and during that time had therein, on an average, for their education, as pupils, eighty-five girls per annum.

The said institution never received any grant from the plaintiff.

Held, Gwynne J. dissenting, that the said institution was an educational establishment within the meaning of 41 Vic. ch. 6 sec. 26 (P. Q.) and exempt from municipal taxation.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side).

This was an action by the city of Montreal for taxes. The defendants pleaded that the property taxed was used as an educational institution and therefore exempt.

The parties agreed to make the following admissions:

First. That the property set out in the said plaintiff's declaration was, during the time mentioned therein, occupied and used as a private boarding and day school for girls kept and maintained by the said defendant who employed divers teachers, and during that time had therein, on an average, for their education, as pupils, eighty-five girls per annum.

Second. That the said institution for the education of girls never received any grant from the plaintiff.

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

Third. That if the said institution be not an educational institution under Sect. 26 of 41 Vic. ch 6 judgment should go for the amount demanded and costs; if, on the contrary, it is such educational institution, within the meaning of the said section, the said plaintiff's action should be dismissed with costs.

Rainville J. in the Superior Court, gave judgment for the city, holding that educational institutions, under the statute, are those of a permanent character, founded in the interest, and under the authority, of the public. The Court of Queen's Bench confirmed this judgment, Hon. Justices Monk and Cross dissenting.

Kerr Q.C. for appellants contended that appellants were entitled to exemption from the payment of municipal school taxes under sec. 26 ch. 6 of 41 Vic., P.Q., the same being an addition to sec. 17 ch. 15, Cons. Stats., L. C., and in addition to the other statutes refered to in the judgments hereinafter given cited the following cases:—

Chegaray v. *Jenkins* (1); *Warde* v. *Manchester* (2); *Lefranc* v. *City of New Orleans* (3); *Colchester* v. *Kewney* (4).

Roy Q. C. for respondents contended that there was no legislative provision conferring immunity from municipal taxes upon a property used as a private boarding school, and cited:

Hilliard on Taxation (5); *State* v. *Ross* (6); *City of Indianapolis* v. *Sturdevant* (7).

Sir W. J. RITCHIE C.J.—The appellant claims exemption under the following statutory provisions:—

Consolidated Statutes of Lower Canada (8).

(1) 3 Sand. (N.Y.) 413.
(2) 22 Am. Rep. 504.
(3) 27 La. An. Rep. 188.
(4) L. R. 1 Ex. 368.
(5) Ch. 31 831.
(6) 4 Zabriskie (N.J.) 497.
(7) 24 Ind. Rep. 391.
(8) 23 Vic. ch. 15 section 77 sub-section 2.

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All buildings set apart for purposes of education or of religious worship, parsonage houses, and all charitable institutions or hospitals incorporated by act of Parliament, and the ground or land on which such buildings are erected, and also all burial grounds shall be exempt from all rates imposed for the purposes of this Act 9 Vic. ch. 27, sec. 37.

Statutes of Quebec (1).

26. Section 77 of chapter 15 of the Consolidated Statutes of Lower Canada, is amended by adding after sub-sec. 2 the following provision:

"3. Every educational institution receiving no grant from the corporation or municipality in which they are situated, and the land on which they are erected, and its dependencies, shall be exempt from municipal and school taxes, whatever may be the act or charter under which such taxes are imposed, notwithstanding all provisions to the contrary."

There can be no doubt that the appellant's school was an educational institution in the primary grammatical signification of that term, and would, *primâ facie*, be exempted, under the authority of these statutory provisions, from payment of the taxes claimed, unless there is to be found some statutory provision depriving such an educational institution as that of the appellants of the exemption, by limiting the words "educational institution" to a public incorporated educational institution. I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed; but in this case the intention to exempt seems to me to be made as clear as plain unequivocal language can very well make it. We have nothing, that I can discover, indicating an intention to limit the exemption to public or incorporated institutions. On the contrary, we find in sec. 77 sub-sec. 2 incorporation made necessary in the case of charitable institutions or hospitals; but not so with reference to all buildings set apart for purposes of education or of religious worship, or to parsonage

(1) 41 Vic. ch. 6 sec. 26 sub-sec. 3, 1878.

houses and all burial grounds. Why should it not with as much force be contended that churches, parsonage houses, and burial grounds, should be incorporated before they are exempt under that section? Surely a school house, seminary or school is an educational institution without reference to incorporation, and may be established by individuals quite as well as by corporations. And again, an incorporated school might be quite as much a private school as this we are now considering. Incorporation gives merely a legal entity; the advancement and interest of education may be quite as much forwarded by private schools of high standing, such as this is admitted to be, under the immediate government of the proprietors as by incorporated schools governed by a board of directors. The mere act of incorporating an existing school, or certain persons to carry it on, does not make it more or less an educational institution, nor more or less a public or private institution, than it was previous to its incorporation. That the legislature fully understood the distinction between private and public, and between incorporated and unincorporated, educational institutions, is to be discovered in numerous acts Thus in 29 Vic. ch. 57 (1865), relating to the corporation of the city of Quebec, in the exemption from taxation we find the limitation clearly expressed:

> The property of any incorporated institution for educational or charitable purposes, occupied and used for educational or charitable purposes, and also all other property by such institutions leased for the aforesaid purposes, or occupied as school houses by the school commissioners of the said city, shall be exempt from taxation, and such houses or properties so occupied are also exempt from tenant's tax.

By 38 Vic. ch. 76 sec. 101 (1875) the city of Three Rivers is authorized to levy on all lands, city lots or parts of lots, excepting churches, bishop's palaces, parsonage houses, charitable and educational establishments

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as also their dependencies, whether there are buildings erected thereon or not, with all buildings and erections thereon fifty cents in each $100, and not a word about incorporation or limiting the exemption to any particular class of charitable or educational establishments. So in 38 Vic. ch. 76 sec. 125 :—

Every place of public worship, and every burying ground; every public school house and the ground on which the same is built; every public educational establishment and the ground on which the same is built; all buildings, lands and property occupied or possessed by hospitals or other charitable institutions.

Then there is 39 Vic. ch. 79 incorporating the city of Hull :—

4. Every public school house and the ground upon which the same is constructed. No. 5. Every educational establishment and the ground upon which the same is constructed.

By 40 Vic. c 29 "The Town Corporation General Clauses Act" which applies to every town corporation or municipality which shall hereafter be established, the following property shall not be taxable :—

3. Property belonging to fabriques or religious, charitable or educational institutions, or corporations;

4. Burial grounds, bishops' palaces, parsonage houses and their dependencies.

The principle of exemption was, no doubt, to encourage education generally, in like manner as religious instruction was encouraged by exempting all buildings set apart for the purposes of religious worship and for the burial of the dead, by whomsoever owned, and without the slightest reference to incorporation. The legislatures have, no doubt, some very good reasons for requiring incorporation only in the case of charitable institutions and hospitals.

The legislation may, very well, be assumed to be based on the idea that certain kinds of property, such as church property, school property, property used for charitable purposes, burial grounds, and the like, are not fit objects for public contributions, inasmuch as

they are supposed to contribute to the general public benefit, and operate in relief of public burdens; and this last is particularly applicable to property devoted to works of education and charity. And the exemptions are, doubtless, granted on consideration of public policy, to be recalled whenever this view of public policy shall have changed.

The American cases from the State of New York, which were much relied on, I have examined, but they do not, in my opinion, assist us, because they appear to have been decided on the peculiar wording of the statute, in the construction of which, the court held that from such peculiar wording the term "incorporated," used in the connexion it was in the statute, showed that the legislature intended to confine the exemption to incorporated institutions. The wording of our statute being entirely different, and no such intention being discoverable from the language used, the cases do not seem to me to apply.

Under these circumstances, I do not think we have any right to confine the exemption to narrower limits than the terms of the statute not only fairly imply, but actually express. Considerations of public policy are, in my opinion, opposed to our doing so, for thereby we may frustrate the object the legislature may have had in view, namely, the encouragement of education. The value of an educational institution such as this is admitted to be, to the city of Montreal in which it is situated, and, in fact, to the Province of Quebec, no one will, I think, venture to deny. To exempt such an institution from local taxation is but a very moderate encouragement to the cause of education, and one to which it is by no means unreasonable to suppose the legislature may have considered it, in the public interests, justly entitled. At any rate, if this is not so, when amending this section had the legislature intended so to limit the application of the term "educa-

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tional institution" as to prevent the exemption applying to private educational institutions they should have made their intention more apparent. And if we have misinterpreted their intention, the remedy is at hand; the legislature can, by the use of unequivocal and explicit language, make their intention clear.

FOURNIER J.—Cet appel est d'un jugement de la Cour du Banc de la Reine de la province de Québec, confirmant un jugement de la Cour Supérieure du District de Montréal, condamnant l'appelante à payer a l'intimée $440.80, pour taxes municipales, sur une propriété occupée par elle comme école et pensionnat de jeunes filles qui y reçoivent l'instruction.

L'appelante a plaidé qu'elle était en vertu de la 41me Vic., ch 6, sec. 26, exemptée du paiement des taxes réclamées. Cette section est ainsi conçue:

26. La section 77 du chap. 15 des Statuts Refondus pour le Bas Canada est amendée en y ajoutant, après la sous section 2, la disposition suivante:

3. Toutes maisons d'éducation qui ne reçoivent aucune subvention de la Corporation ou Municipalité où elles sont situées ainsi que les terrains sur lesquels elles sont érigées et leurs dépendances, seront exemptées des cotisations municipales et scolaires, quel que soit l'acte ou charte en vertu duquel ces cotisations sont imposées, et ce nonobstant toutes dispositions à ce contraires.

Il est admis que pendant les années pour lesquelles les taxes sont demandées l'appelante a occupé la propriété mentionnée dans la déclaration comme école et pensionnat privé de jeunes filles, et qu'elle employait plusieurs instituteurs à donner l'éducation à quatre-vingt-cinq jeunes filles, en moyenne, par année.

Il est aussi admis que l'appelante n'a reçu de l'intimée aucune subvention pour le soutien de son école.

La prétention de l'intimée est que l'exemption invoquée ne s'applique pas aux écoles privées, mais seulement aux institutions d'éducation incorporées. La seule

question à décider est de savoir si l'école tenue par l'appelante est une maison d'éducation, (*educational institution*) suivant l'intention de la clause ci-dessus citée.

L'hon. juge qui a décidé en première instance a donné gain de cause à l'intimé en se fondant sur le motif suivant: "Considérant que les expressions dont s'est servi le statut impliquent l'idée que les maisons d'éducation (*educational institutions*) sont des institutions d'un caractère permanent et fondées dans un intérêt public, et sous le contrôle de l'autorité, et non des institutions privées et qu'en conséquence les lieux occupés par la défenderesse ne sont pas exempts de taxes."

Cette distinction est-elle bien fondée? Le législateur avait-il réellement l'intention de donner à la disposition ci-dessus citée l'effet d'exclure du bénéfice de l'exemption toutes les écoles privées qui ne sont pas sous le contrôle des lois d'éducation? Au contraire les termes généraux de la disposition "toutes maisons d'éducation" doivent nous faire conclure que dans son intention l'exemption est générale, à moins que l'expression "maison d'éducation" n'ait reçue, avant l'adoption de cette disposition une signification précise et limitative. Si tel était le cas, le législateur n'ayant aucunement défini ou qualifié l'expression dont il se sert, est nécessairement présumé l'avoir employée dans le sens que d'autre statut sur le même sujet ont pu lui donner. Bien que la 41me Vic., ch. 6, soit un statut amendant les lois concernant l'éducation, la sec. 26 amende le ch. 15, sec. 77, en ajoutant une disposition nouvelle, et non pas en modifiant ou changeant quelques-unes de ces dispositions. Cependant cette disposition doit-être interprétée en la lisant comme faisant maintenant partie du statut amendé et l'on doit recourir à ce statut pour voir si l'on y trouvera trace de la distinction faite par

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la cour de première instance. Des diverses catégories d'exemption de taxe mentionnées dans la clause 77, la deuxième seulement peut nous servir à l'interprétation de celle dont il s'agit, elle est ainsi conçue :

§ 2. All buildings set apart for purposes of education or of religious worship, parsonage houses, and all charitable institutions or hospitals, incorporated by Act of Parliament, and the ground or land upon which such buildings are erected, and also all burial ground, shall be exempt from all rates imposed for the purposes of this Act.

Ces exemptions sont générales pour chacune des catégories mentionnées,—il n'y a aucune expression qui puisse en limiter l'application, si ce n'est que les bâtisses exemptées doivent avoir été destinées, (*set apart,*) à des fins religieuses ou d'éducation. Mais il n'y est nullement question qu'elles devront être soumises au contrôle d'une autorité publique quelconque. La seule restriction à la généralité de l'exemption n'existe qu'à l'égard des hôpitaux et des institutions de charité qui pour bénéficier de l'exemption, doivent être des institutions incorporées. La conclusion à tirer de là c'est que quant aux institutions d'éducation il suffit pour avoir droit à l'exemption que leurs bâtisses soient destinées à l'éducation. La loi n'exige pas qu'elle soient incorporées comme les hôpitaux ou institutions de charité, ni qu'elles soient sous le contrôle d'une autorité quelconque. Plus tard est venue la sec. 26 citée plus haut, ajoutant une autre classe d'exemption ; comme il a déjà été dit plus haut cette exemption est établie en des termes généraux qui n'impliquent aucune restriction. Il me semble qu'on ne devrait pas introduire une distiction du genre de celle qui a été faite, lorsque le législateur lui-même n'a pas jugé à propos d'en faire dans les dispositions ci-dessus citées.

Une école tenue comme l'est celle dont il s'agit, est-elle moins une institution d'éducation que si elle était sous le contrôle de commissaires d'école ? Fait-on autre

chose dans l'une et l'autre que d'enseigner. Le contrôle auquel peut être soumis une école en change-t-il la nature. Si deux écoles sont tenues exactement de la même manière, ou l'enseignement est de même valeur, —mais l'une est sous le contrôle des commissaires d'école et l'autre en dehors de ce contrôle, et sous la direction seulement d'un professeur particulier, serait-il raisonnable de dire que la première est une institution d'éducation et que la seconde ne l'est pas? Si la loi a considéré les écoles élémentaires comme des institutions d'éducation, évidemment on ne doit pas restreindre les termes "maison d'éducation" à la désignation des institutions d'enseignement supérieure,—ils ont une signification plus ample et pouvent comprendre les écoles élémentaires. Cette interprétation est admise par la sec. 6 du ch. 15, réglant la distribution du fonds destiné à l'encouragement de l'enseignement supérieur entre les Universités, Collège, Séminaires, Académies, etc., et institutions d'éducation, autre que les écoles élémentaires ordinaires, etc. Pourquoi le législateur a-t-il fait cette exception, si ce n'est parce que sans cette déclaration expresse les écoles élémentaires eussent été comprises dans les termes généraux "institutions d'éducation" qui comprennent toutes les écoles, qu'elles soient privées ou publiques. Je ne trouve pas dans nos lois d'éducation d'expressions suffisantes pour justifier la distinction qui a été faite; bien au contraire je trouve que les expressions si générales qu'elle emploie repoussent l'idée d'une telle distinction. Je crois en conséquence devoir donner à la sec. 26 tout l'effet que comporte la généralité de ses termes et je crois que l'école de l'appelante doit être considérée comme une maison d'éducation suivant cette disposition.

Je crois que la cause de *Chegaray* v. *Jenkins* (1), n'a aucune application à la présent cause. Sa décision

(1) 3 Sand. (N.Y.) 413.

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repose sur des statuts différents des nôtres.

Quant à l'abus que l'on pourrait faire de cette exemption de taxes en établissant des écoles plus tôt dans le but de bénéficier de l'exemption que dans celui d'enseigner, il n'en peut être question dans cette cause. Les faits repoussent toute supposition de ce genre. Ce n'est pas un sujet de plainte en cette cause,—mais simplement un argument *ab inconvenienti*. Lorsqu'on se plaindra d'un semblable abus, je crois que les tribunaux n'éprouveront pas de difficulté à faire la distinction entre une école tenue de bonne foi et celle qui ne le serait que comme un prétexte pour éviter le paiement de la taxe.

Pour ces motifs je suis d'avis que l'appel doit être alloué avec dépens.

HENRY J. concurred.

TASCHEREAU J.—The only question in this case is whether the appellant's property in Montreal, occupied, as she claims, as an educational institution, is exempt from municipal taxes. To the respondent's action for such taxes the appellants pleaded that the said immovable property, described in the said plaintiff's declaration, and upon and in respect of which the assessments or taxes sought to be recovered by the present action have been, as the plaintiff alleges, imposed, was, during the whole of the years eighteen hundred and seventy-eight, eighteen hundred and seventy-nine, and eighteen hundred and eighty, and long previous thereto, occupied by the said defendants as an educational institution, with its dependencies, for the education of girls, and that the said educational institution received no grant from the plaintiff within the limits of which it was situated; and that by law the said immovable property on which the said educational institution is erected, and its dependencies, was, at all the times mentioned in the said plaintiff's declaration, exempt from

all municipal and school taxes whatsoever; by reason whereof the said immovable property is exempt from the taxes sought to be recovered in this case, and the said defendants are not bound nor liable, as alleged in the said plaintiff's declaration.

The parties adopted the following admissions:

First. That the property set out in the said plaintiff's declaration was, during the time mentioned therein, occupied and used as a private boarding and day school for girls, kept and maintained by the said defendant, who employed divers teachers, and during that time had therein, on an average, for their education, as pupils, eighty-five girls per annum.

Second. That the said institution for the education of girls never received any grant from the plaintiff.

Third. That if the said institution be not an educational institution under section 26 of 41 Vic. c. 6, judgment should go for the amount demanded and costs; if, on the contrary, it is such educational institution, within the meaning of the said section, the said plaintiff's action should be dismissed with costs.

This is, then, all that we have to determine.

The section of the act referred to reads as follows:—

Every educational institution receiving no grant from the corporation or municipality in which they are situated, and the land on which they are erected, and its dependencies, shall be exempted from municipal and school taxes, whatever may be the act or charter under which such taxes are imposed, notwithstanding all provisions to the contrary.

As a matter of fact, the property in question, it cannot be denied, is an educational institution and nothing else. But, say the respondents, it is not an educational institution within the meaning of the act. In other words, they contend that though the statute says, "every educational establishment" it does not mean "every educational establishment." On them, it must be conceded, rests the onus to establish that

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proposition. Their contention is that this statute applies only to public institutions under the control of the school commissioners, and not to private schools like the one kept by the appellant. After mature consideration, I think it safer not to distinguish when the law does not do so—not to try, as it were, to make the statute say what it does not say—and to hold that the property in question is free from taxation. Under sec. 6 of ch. 15 C. S. L. C. this institution could get a grant from the education funds. The respondents admit that it would then not be taxable. But does the fact that they do not receive any such grant from the public funds render them liable to taxation? I cannot see it. It is just because they are no burthen to the Government, or to the municipal authority, that they should be exempt from these taxes. There are a number of educational institutions in Montreal and other cities—that is colleges, seminaries and convents—which do not fall under said ch. 15 C.S.L.C., and which receive no grant from the government, and yet which pay no municipal taxes. Yet, this must be so under this very clause of this 41 Vic. I do not know of any other statute in the same sense. I asked counsel at the argument if they knew of any other, and they could cite none. For, it must be remembered, sec. 77 of ch. 15 C.S.L.C, and sec. 13 of 32 Vic. ch. 16, apply only to school, and not to municipal, taxes, and sec. 712 of the Municipal Code does not apply to incorporated cities or towns. The fact that such colleges and convents may be incorporated cannot affect the question. This section of the Municipal Code I have just cited exempts from taxation all educational institutions or corporations, showing that, throughout all the rural districts, an educational institution need not necessarily be incorporated to be free from municipal taxes. Has the legislature intended

that what is not taxable in the rural parts of the country should be taxable in Montreal or other incorporated cities? It would require a clear text of law to bring me to such a conclusion.

It has been argued that the consequences of a judgment maintaining the appellants' contention would be to free from taxation a number of small private schools in Montreal. I do not think so. We simply declare that the property here in question is an educational institution within the meaning of the act. I do not say that any petty school in Montreal or elsewhere would come under these terms.

The appeal should be allowed and the plaintiffs' action dismissed with costs in all the courts against them.

GWYNNE J.—The clause relied upon by the appellants as exempting their property from liability to the payment of municipal taxes in the city of Montreal, is found in an act of the legislature of the Province of Quebec, 41 Vic. ch. 6, which is intituled "An act "further to amend the laws respecting public instruc-"tion in this province," and it is enacted in amendment of sec. 77 ch. 15 of the Consolidated Statutes of Lower Canada, which is intituled: "An act respect-"ing provincial aid for superior education and Normal "and Common Schools," and the question before us is whether the property of private persons used as a private school for the education of young ladies, and conducted wholly under the direction, management and control of the private proprietors for their own benefit, as their source of income, is, by the 77th sec. of ch. 15 of the Consolidated Statutes of Lower Canada, as amended by 41 Vic. c. 6, exempted from liability to municipal taxes in the city of Montreal. By the first five sections of this act, which consolidates into one the

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several statutes theretofore passed and then in force for making provision for the support of common schools, and the promotion of elementary education in the rural municipalities and in the cities of Quebec and Montreal, and for the promotion also of superior education and the establishment and support of normal and model schools, a fund called "The Lower Canada superior education investment fund," composed of the proceeds arising from the sale or commutation of the Jesuits estates, was created; and the revenues and interest accruing from such fund, together with a sum of twenty thousand dollars per annum taken from the Consolidated Fund of Canada, and such sum out of the common school fund of Lower Canada as, with the above, might be necessary for the realisation of eighty-eight thousand dollars per annum, were constituted a fund called "The "Lower Canada superior education income fund."

By the 6th section of the act it was enacted that the said income fund, or such part thereof as the Governor in Council should from time to time direct, should be annually apportioned by the superintendent of schools for Lower Canada in such manner, and to and among such "universities," "colleges," "seminaries," "academies," "high or superior schools," "model schools" and "educational institutions other than the ordinary elementary schools," in such sums and proportions, as the Governor in Council should approve.

It was contended strongly by Mr. Kerr, on behalf of the appellants, that their school for young ladies was clearly an "educational institution" within the meaning of that term as used in the above section, and upon this assumption he argued that the same term introduced into the act by 41st Vic. c. 6 should receive a like construction, so as to embrace the appellant's school within the term as it is used in the 77th section as so amended. But that the appellant's school does come

within the term "educational institution" as used in the 6th section, is by no means to be assumed. The better opinion appears to me to be that it does not, whatever may be the construction of the 77th section as amended. The fund is created for the purpose of promoting superior education alone; institutions therefore which impart such education to all or to some of their scholars can only be intended This is indicated by the title at the head of the sections numbering from 6 to 9 of the act, namely: "Aid to superior educational institutions." Now, the term "educational institution" is altogether an unusual and quite inappropriate term to apply to a private person, who conducts a school upon his own property; and that no such person, nor yet the school itself which the private proprietor conducts, is meant, but on the contrary persons united together as religious or secular bodies of a corporate or *quasi* corporate character, is apparent from the 8th and 9th sections. By the eighth it is provided that no grant shall be made "to any institution owning real "estate whose liabilities exceed two-thirds of the value "of such estate." The "institution," therefore, which is entitled to receive a grant must be capable of owning real estate and of incurring debts, and the term must, therefore, have a personal application. The school property where the education is given, and which is used and occupied for educational purposes, cannot come within the term as here used. The personality of the term is further shown in the 9th section, which provides that:—

> Any educational institution desirous of obtaining a grant under this act shall make application to that effect to the superintendent of education, &c., &c.

Every institution, therefore, which is entitled to a grant under the act must be capable of entertaining a desire to obtain it, and of making application for it, that is to

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say, must be possessed of personality. The section then provides that "the superintendent shall not recommend any grant to any educational institution whose application is not accompanied by a report, showing," among other things—"the composition of the governing body." This language points to the institution entitled to receive a grant being of a corporate or quasi-corporate character, having, as such institutions have, a governing body.

"The general course of instruction and the books used."

This is required for the purpose of satisfying the superintendent that the course of instruction comes within what is esteemed superior education.

"The number of persons taught gratuitously or taught and boarded gratuitously."

The requirement is not that the report shall show whether any persons, and if so how many, are taught gratuitously, or taught and boarded gratuitously, but the report must state the number of persons taught gratuitously, &c., &c., seeming thereby to indicate that gratuitous education of some persons is a condition required by the act in order to show that the institution whose application for a grant is to be considered confers some public benefit to justify its receiving aid from public funds. Finally, it appears to me to be a consideration not to be disregarded that as the bodies which are in the 6th section excepted from the term "educational institutions" entitled to receive a grant are themselves institutions of a corporate and public character, the general term from which they are excepted should be regarded as of like character; the expression is "educational institutions other than the ordinary elementary schools."

In view of all of the above considerations I am of opinion that private persons conducting, as do the

appellants, under their own sole direction, management and control, a young ladies' private school for their own sole benefit as a source of income, do not, nor does the school so conducted by them, come within the term "educational institution" as used in the sections of the act numbered from 6 to 9 inclusive; and that, therefore, no argument whatever in support of the appellant's construction of the 77th sec. of the act, as amended by 41 Vic. ch. 6, can be founded upon the assumption that their school is such a one as would qualify and entitle them to receive a grant under these sections. The clauses relating to assessment and rates commence with 73, by which it was enacted that it should be the duty of school commissioners, and of the trustees of dissentient schools in their respective municipalities, to cause to be levied by assessment and rate in each municipality a sum equal to that allowed out of the common school fund for such municipality. This clause has no application to the cities of Montreal or Quebec, special provisions being made for these cities by the sections numbering from 128 to 134, which provided that no rate at all should be levied for school purposes in those cities, but that the aid to be furnished to common schools therein should be by grant from the general city funds; but as these sections have been repealed, and others substituted for them, by 32nd Vic. ch. 16, I shall not further refer to them, nor for the present shall I refer to sec. 77 further than to say that as it relates as it stood prior to the amendment enacted by 41 Vic., only to exemptions from liability to taxes imposed by sec. 73, it had no application to the city of Montreal in which the property of the appellants is situate.

The act 32nd Vic. ch. 16 is intituled: "An act to amend the law respecting education in this Province," and its enactments must needs be considered in connection with those of ch. 15 of the C.S.L.C. whenever

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the construction of the latter becomes now under consideration. By the 13th section of this act it was enacted that the school commissioners of the majority in any school municipality should alone have the power of levying taxes on the lands and real estates of corporations and incorporated companies, but that they should annually pay over to the trustees of the minority a proportion of all the taxes levied by them on such corporations or companies in the same ratio as the government grant for the same year should have been divided between them and the said trustees, and that

"No religious, charitable or educational institutions or corporations should be taxed for school purposes on the property occupied by them for the objects for which they were instituted; but on all property held by them, or any of them, for the purpose of deriving an income therefrom, they shall be taxed by the school commissioners of the religious majority or minority to which such corporations or institutions belong, and to the exclusive benefit of such majority or minority, or in conformity with the declarations which they, or each of them, may make to that effect; but, in the event that the religious body to which such corporations or institutions belong is not apparent, and where no such declaration has been made, then such last mentioned properties shall be dealt with in like manner as the properties of other corporations or incorporated companies in virtue of this section.

By the 21st section, the 133rd sec. of ch. 15 of the C. S. L C. and the three first sections of 31 Vic. ch. 22, are repealed. By the 22nd it was enacted that the annual grant to be paid for the support of schools in the cities of Quebec and of Montreal under the 24th, 88th and 89th sections of the 15th chapter of the Consolidated Statutes of Lower Canada should be in the proportion of the populations of the said cities and should be apportioned by the Minister of Public Instruction, or the Superintendent of Education for the time being, between the Roman Catholic and Protestant Boards of School Commissioners according to the relative proportions of the Roman Catholic and Protestant populations

in the said cities according to the then last census, and by the 23rd section it was enacted that the corporations of the cities of Quebec and Montreal should pay for the support of the schools in the said cities a sum equal to three times the amount of the share of the grant coming to the schools of the said city, and that the sum coming to each of the Roman Catholic and Protestant Boards of School Commissioners under provisions for apportionment contained in the act should be paid by the said corporations by two equal semi-annual payments to the secretary-treasurers of the said boards irrespective of the collection of the tax provided for by sec. 24. By this section (24) it was enacted that the corporations of the cities of Quebec and Montreal should levy annually by assessment on real estate in the said cities a tax sufficient to cover the amount payable by them for the support of schools under the above provisions, and that the said tax should be collected and recovered at the time and in the manner provided for the other city taxes on real estate, and the said tax should be known as the "city school tax." Then follows section 25, which enacts that :

Property belonging to religious, charitable or educational institutions and corporations and occupied by the said institutions or corporations for the purpose for which they were respectively established and not held by them solely for the purpose of deriving an income therefrom, shall be exempted from the said "city school tax."

The object and effect of this last section was simply to exempt property in the cities of Quebec and Montreal from the payment of "the city school tax" under the like circumstances, and only under the like circumstances, as like property in the rural school municipalities was exempted from payment of school tax by section 13.

The exemption there is found in a section relating to the levying of school tax on lands and real estate of corporations and incorporated companies. The religious,

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charitable or educational institutions, or corporations whose property, occupied by them for the purpose for which they were instituted, is exempt from taxation under the section, are the same institutions whose property, held by them for the purpose of deriving income therefrom, is not exempted, but shall be taxed by the school commissioners of the religious body to which such corporations or institutions belong, and to the exclusive benefit of such religious body. The section then provides that "in the event that the religious body to which such corporations or institutions belong is not apparent," then such properties—that is the properties of such corporations or institutions from which they derive income—shall be dealt with as the property of other corporations or incorporated companies. The term "educational institutions and corporations," as used in this section, plainly refers to the owners of the property which is exempted, and it must, in my opinion, be construed as being limited to corporations. It is wholly inapplicable to the case of a private person using his property for the purpose of conducting a private school thereon for his own profit. We do not speak of the proprietor of a private school as being "instituted" for that purpose. He cannot be the "educational institution" referred to in the section. So neither can the school which is kept by him on his own property—for the property exempted by the section is the property of the "educational institutions." The term can be applied solely to the owners of the property exempted, and not to the property itself which is occupied as a school Then again these words "educational institutions or corporations," used as they are in connection with "religious institutions or corporations," and with "charitable institutions or corporations," plainly, I think, show that what was intended

by the term was an aggregation of persons belonging either to the Roman Catholic or Protestant religions united together as a body for the purpose of religion, or of charity, or of education, which aggregation of persons so united together are spoken of as institutions or corporations instituted for one of the above purposes, that is to say, as corporations, and the same construction must be put upon the term wherever it occurs in the ch. 15 of the Consolidated Statutes as amended by 32 Vic. ch. 16. Now, as to the operation of section 77 as it stood prior to the passing of 41 Vic. ch. 6, and I think it better that we should refer to the French copy of the act upon a question of this nature :—

Tous les bâtiments consacrés à l'education ou au culte religieux presbytères, et toutes institutions charitables ou hôpitaux incorporés par acte du parlement et le terrain ou emplacement sur lequel ils sont érigés ainsi que les cimetières seront exempts de la cotisation imposée pour les fins de cet acte.

The word "dedicated," as it seems to me, would be a more exact translation into English of the word "*consacrés*" as here used than "set apart." "*Consacrés à l'education ou au culte religieux.*" These words, so corrected convey to my mind the idea that a destination to a use in which the public, or a considerable portion thereof, were directly interested, as they would be in the case of a building dedicated to religious worship, was intended rather than the use, temporary it might be, by a private person of his own private property to teaching school therein for his own profit; so likewise the other terms used in the same sentence to designate the other descriptions of property intended to be exempted being all of a public nature, seem to me to point in the same direction. "*Presbytères*" represents a building, which being for the sole occupation, as dwelling houses, of ministers of religion engaged in conducting religious worship, and to be enjoyed as part of their stipend, may be said to be so annexed

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buildings dedicated to public worship as to partake of their public nature, so "*toutes institutions charitables ou hôpitaux imcorporés, ainsi que les cimitières,*" are all of a public nature, so that in construing the words "*les bâtiments consacrés à l'education*" in this connection, the maxim *noscitur a sociis* seems to apply. Moreover, as the act is one relating to public grants in aid of superior education and normal and common schools, the natural construction of the words is to regard them as applying to buildings dedicated to the education to aid which the act is passed, and as exempting from liability to a public tax, levied in aid of such education, property which is dedicated to the purpose in aid of which the tax is levied; and the result, in my opinion, is that private property such as that of the appellant's, occupied as a school by private persons engaged in and pursuing the profession of teaching school for their own benefit and profit, as their source of income, was not exempt from liability to rates levied in aid of the public schools either in the rural municipalities or in the city of Montreal.

Then as to exemption from liability to municipal taxation, the municipal code, which applies only to the territory of the province of Quebec not included in cities and towns incorporated by special statutes, exempts only the following property:—

1. Property belonging to Her Majesty or held in trust for her use, and property owned or occupied by municipal corporations.

2. Property owned by or occupied for the use of the federal or the provincial governments.

3. Property belonging to fabriques or to religious, charitable or educational institutions or corporations, or occupied by such fabriques, institutions or corporations for which they were established, and not possessed solely by them to derive a revenue therefrom.

4. Burial grounds, bishops' palaces, parsonage houses, and their dependencies.

5. All property belonging to railway companies, &c.

The property in the third of the above paragraphs, which is the only one to which we have occasion to refer, is wholly framed upon the model of and, with the exception of the addition of the word "fabriques," taken almost verbatim from, the 25th section of 32 Vic. ch 16, which defines the property which alone is exempted from the rate by the 24th section of that act directed to be levied by the corporation of the city of Montreal and called the "city school tax;" and the words "educational institutions," as used in the above paragraph in the Municipal Code Act, which is itself but a consolidation of the previous acts having relation to the same subject, must receive, as indeed from their context they require, a like construction as they would receive in 32 Vic. ch. 16, from which, for the purpose of consolidation into the Municipal Code, they are taken, and as so used in the Code they clearly apply to the owners of the property which is to be exempt, and not to the property itself; moreover, in my opinion, they, by the context in which they appear, apply to an aggregation or association of persons, religious or secular, united together in a corporate capacity to carry out certain purposes of religion or charity or education, for which they were established or founded or united together as an association, and cannot be construed as including a private person, or private persons like the appellants, conducting a private school in order to derive an income therefrom as their means of supporting themselves, and the conclusion is that a person conducting such a school in a rural municipality is not, nor is his property used by him as such school, exempted from taxation by the Municipal Code, and if such property is exempt from taxation, either for school

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or municipal rates, in any rural municipality, it must be by force alone of 41st Vic. ch. 6, and if in any city or town, it must be either by the express terms of the act incorporating such city or town, or in some act amending the same, or by force of 41 Vic. ch. 6.

In acts incorporating cities and towns already incorporated, there does not appear to have been adopted any uniform clause expressing in identical terms in every act the property intended to be exempted, and yet it is, I think, inconceivable that by the difference in the language used in some of these the legislature intended to exempt property of a private person used by him for his own private profit, if used for giving private tuition therein, or as a private school as a source of income, either from contribution to the fund provided for the maintenance of common schools in which the general public are interested, or from municipal taxes, which enhance the value of the premises by the uses of which he obtains his income, and, no doubt, also his profits, in which the public have no interest whatever. If such an intention had been entertained it would have been unequivocally expressed.

In the 29 Vic. ch. 57 (A.D. 1865) which is an act consolidating into one act all acts and ordinances relating to the corporation of the city of Quebec, the exemption from taxation is provided for by the 25th section, in the following terms :—

The property of any incorporated institution for educational or charitable purposes, occupied and used for educational or charitable purposes, and also all other property by such institution leased for the aforesaid purposes, or occupied as school houses by the school commissioners of the said city, shall be exempt from taxation, and such houses or properties so occupied are also exempt from tenants' tax.

In the act incorporating the town of Longueuil, 37 Vic. ch. 49, it is expressed in language identical with that used in the Municipal Code Act. In 37 Vic. ch.

51, which is an act to revise and consolidate the charter of the city of Montreal and the several acts amending the same, there is no clause of exemption of any property, but in 38 Vic. ch. 73 (1875) which was passed in amendment of 37 Vic. ch. 51 there is, and it is as follows:—

Sec. 3. Les églises, presbytères et palais épiscopaux sont exempts de toutes taxes, les établissements occupés pour des fins de charité sont exempts de taxes municipales ordinaires et annuelles.

In this act the intention of the legislature seems to have been that as to the tax called the "city school tax" exemption was provided by 32 Vic. ch. 16, and that as to municipal taxes there should be no exemption other than those specified in the above clause of 38 Vic. ch. 73.

In 38th Vic. ch. 76 (1875), incorporating the city of Three Rivers, the exemption clause is thus expressed:

Tout bien consacré au culte public ainsi que tout cimetière.

Toute maison d'école publique et le terrain sur lequel elle est construite.

Toute maison ou tout établissement public d'éducation ainsi que le terrain sur lequel il est construit.

Tous bâtiments, terrains et propriétés occupés ou possédés par des hôpitaux ou autres établissements de charité.

In the act 39 Vic. chap. 79, incorporating the city of Hull, the exemption is thus expressed;

4. Toute maison d'école publique et le terrain sur lequel elle est construite.

5. Tout établissement ou maison d'éducation ainsi que le terrain sur lequel il est construit.

6. Tous bâtiments, terrains et propriétés occupés ou possédés par des hôpitaux ou autres établissements de charité ou d'éducation, et non possédés pour y faire des profits.

It was argued that the above clause No. 5, *tout établissement au maison d'éducation*, &c., shows an intention to exempt every school house of whatever nature, including private schools conducted for private gain as a source of income to the private owner, but no such construction is, in my judgment, at all necessary, and if

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not necessary the clause should not be so construed. The natural construction, in my opinion, is that in the absence of an express intention to the contrary the properties intended to be exempted are those referred to in the acts relating to public instruction, that is to ch. 15 of C. S. L. C. and the acts in amendment thereof, as 32nd Vic. ch. 16.

The previous clause exempted only the common and elementary schools and the land on which they are built. This left "universities," "colleges," &c, &c., the property of religious communities and incorporated institutions, unprovided for. It is reasonable to construe clause 5 as introduced to cover those, and we are not, in my opinion, justified in construing it to include property of private persons, to exempt which no intention whatever otherwise appears anywhere. To correct in the future the want of unitormity in the clause relating to exemptions in acts of incorporation, provision was made in an act passed in 40 Vic. ch. 29, and intituled: "The Towns' Corporations general clauses Act."

By the 1st section of this act it was enacted that the provisions of the act should apply to every town, corporation or municipality which should thereafter be established by the legislature, and that they should constitute part of the special act relative to such town so as to form with it one and the same act, unless they be expressly modified or excepted; and by sec. 2 it was enacted that for any provisions of the act not to be incorporated in the special act, the special act must expressly declare that such provisions, specifying them by their numbers, should not form part thereof, and that the act should be interpreted accordingly; and the general exemption clause was enacted as follows in sec. 525:—

The following property shall not be taxable:—

1. Property belonging to Her Majesty or held in trust for her use, and property owned or occupied by the corporation of the municipality.

2. Property owned or occupied by the federal or the provincial governments.

3. Property belonging to fabriques or religious, charitable or educational institutions or corporations.

4. Burial grounds, bishops' palaces, parsonage houses and their dependencies.

5. All property belonging to railway companies receiving a grant from the provincial government, for the whole time during which such grant is accorded.

Thus adopting the precise exemptions, and almost in identical language, as those named in the Municipal Code Act. Then by sec. 441 it is enacted that the act might apply to city corporations which should in future be incorporated, and in such case the word town shall be replaced by the word city every time that the meaning of the act thus applied should require it. Provision was thus made for uniformity in so far as to place the rural municipalities and all corporations or municipalities of cities or towns to be created in the future upon the same footing as to exemptions, namely, these enumerated in this act, and these only; thus manifestly, as it appears to me, excluding the idea of any intention that any property of any private persons engaged as the appellants are in keeping school thereon for their own profit, and as their means of deriving income therefrom, should be exempted. But though provision was thus made for uniformity as regards city or town corporations or municipalities to be created in the future, the want of uniformity caused by the difference in the several exemption clauses in the acts or charters relating to cities and towns already incorporated still remained The provisions of 52 Vic. ch. 16 as to common schools in the cities of Montreal and Quebec were expressly incorporated into the act of incorporation of the city of Hull,

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38 Vic. ch. 79 sec. 82, and possibly into the acts incorporating other cities and towns. By 38 Vic. ch. 76, the corporation of the city of Three Rivers were constituted the "School Commissioners of the city of Three Rivers," in which corporate name, and not in that of the city corporation, they were to act when acting as school commissioners; but as regards municipal taxes, which were regulated by the acts of incorporation of cities and towns, there was no uniformity. Now the removal of this want of uniformity was as necessary as regarded cities and towns already incorporated as those to be incorporated under the provisions of 40 Vic. ch. 29; and this seems to me to afford the key to the construction of the 26th sec. of 41 Vic. ch. 6, which was, in my opinion, enacted by way of amendment of sec. 77 of ch. 15 of C. S. L. C. for the purpose, by this short addition imported into the section, of providing that the matter of the amendment thus introduced should be read as part of that act notwithstanding any provision there might be open to a contrary construction in any act or charter of incorporation of any city or town (this being the mode of creating such municipalities) whether such act or charter was passed previously to the passing of ch. 15 C. S. L. C., or in the interval between the passing of that act and of 41 Vic. c. 6; thus by a short method placing the enactments relating to exemption from taxation both as to school and municipal taxes in cities and towns already incorporated upon the same footing as was provided with regard to the future by 40 Vic. ch. 29, and with regard to rural municipalities by ch. 15 as amended by 32 Vic. ch. 16, and by the Municipal Code Act.

The 2nd sub-section of sec. 77 of ch. 15 C. S. L. C., as amended, reads as follows:

Tous les bâtiments consacrés à l'éducation ou au culte religieux, presbytères, et toutes institutions charitables, ou hôpitaux incor-

porés par actes du parlement, et le terrain ou emplacement sur lequel ils sont érigés, ainsi que les cimetières, seront exempts de la cotisation imposée pour les fins de cet acte. Toutes maisons d'éducation qui ne recoivent aucune subvention de la corporation ou municipalité où elles sont situées, ainsi que les terrains sur lesquels elles sont érigées, et leur dépendances, seront exemptes des cotisations municipales et scolaires, quelque soit l'acte ou charte en vertu duquel ces cotisations sont imposées, et ce nonobstant toutes dispositions à ce contraires.

The words *toutes maisons d'éducation qui ne reçoivent aucune subvention de la corporation*, &c., &c., are, in my opinion, not well translated "every educational institution," as they are in the English version, for in every other part of the act in which that term occurs it applies to persons the owners of property *consacrés à l'éducation*, and not to the property itself so dedicated.

What is intended by the words *qui ne reçoivent aucune subvention de la corporation ou municipalité ou elles sont situées* it is difficult to understand; no explanation has been given nor any satisfactory one suggested. The words, according to their ordinary import, convey the idea of a qualification of, or exception from, the generality of the previous words, *toutes maisons d'éducation*, as that it is not actually *toutes maisons d'éducation* which is intended, but only such as do not receive a subvention from the corporations in which they are situate; but this construction would seem to convey an intention, by implication, that only those who do not receive a subvention from the corporation in which they are should be exempt from taxation, and that those who do receive such subvention should not be. The only *maisons d'éducation* which can be said to receive a subvention from the corporation in which they are situate are the common schools in those cities whose acts of incorporation and the acts affecting the corporations are similar to those of the cities of Montreal, Quebec and Hull, whereby the aid given

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to common schools is declared to be by grant out of the general funds of the respective corporations, irrespective wholly of the levy of any tax for the purpose, such grant being subsequently reimbursed to the corporation making it by the levy, together with the ordinary municipal taxes, in each year of what in 32 Vic. ch. 16 is called the "city school tax." If these common schools, which may be said to receive *subvention* from the corporations in which they are situate, are to be construed as the *maisons d'éducation* to be contrasted with those who do not receive any subvention, then the words, *qui ne reçoivent aucune subvention*," &c., &c., might well mean the universities colleges, seminaries, &c., &c, mentioned in the other sections of the act ch. 15; but why refer to them in this manner? For, by so doing, according to ordinary construction, the intention by implication would arise that the common schools should not be exempt, which could not have been the intention.

It was argued that the words were intended to cover private schools like that of the appellant's, for they do not receive aid from the corporations in which they are situate; but this view cannot be adopted, for—

1. No act of incorporation of any municipality, nor any act, authorizes the application of the moneys of the corporation in aid of private persons keeping a private school; and it would be senseless to treat persons who therefore could not receive any such aid to be intended under this form of expression.

2. Applying the words to them or to their schools would still leave unremoved the difficulty of subjecting to taxation by implication these public schools in cities which may, for the reasons aforesaid, be said to receive subvention from the corporations in which they are situate; and—

3. Such a construction would be utterly subversive

of the intent of preserving uniformity in the case of acts of incorporation of cities and towns hereafter to be incorporated appearing in 40 Vic. ch. 29, which excludes all idea that the schools of private persons should be exempt.

Whatever may have been the object of introducing these words, they seem, at any rate, I think, to indicate that the "*maisons d'éducation*" intended were those situated in city or town corporations or municipalities; these words "corporations or municipality" are the precise words used in 40 Vic. ch. 29 to signify a town or city corporation.

By the 1st section it is enacted that the provisions of the act shall apply to "every town, corporation or municipality," and by sec. 441 "every city, corporation or municipality."

These words "*seront exempts de cotisation municipales et scolaires*," &c., &c., confirm me in this view. Those words impart, to my mind, that the *maisons d'éducation* intended to be exempted were these which, by reason of certain provisions to the contrary contained in some act or charter, were, or were deemed to be, not exempted. Now, the only provisions of this nature were contained in some of the acts of incorporation of cities or towns, or in some acts in amendment of such acts of incorporation, which provisions being removed, as in the view which I take of the amendment they are, a uniformity is established between exemptions as to municipal and school taxes in the rural municipalities and in incorporated cities and towns, and the provisions of 40 Vic. ch. 29.

Reading then sub-sec. 2 of sec. 77 of ch. 15, as amended, as one section, it should be construed as applying only to *maisons d'éducation* where education is given by the institutions and corporations mentioned in the act, and as exempting both from municipal and school

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taxes all public schools and all universities, colleges, seminaries, &c, &c., for the purpose of aiding which the act was passed, and whether such *maisons d'éducation* were situated in cities or towns or the rural districts, and this, notwithstanding the provisions to the contrary which do in fact appear in some of the acts incorporating cities and towns.

The appeal, therefore, in my opinion, should be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Kerr, Carter & Goldstein.*

Solicitor for respondents: *Roüer Roy.*

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*Feb'y. 18.

*May 17.

RODERICK McDONALD (DEFENDANT)...APPELLANT;

AND

DAVID McPHERSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bill of lading – Assignment of – Property in goods under—Stoppage in transitu—Replevin.

H., of Souris, P.E.I, carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, &c. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef *viâ* Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent in Halifax to hold them. McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent,—

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

Held, affirming the judgment of the court below, Henry J. dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them.

Held also, that whether or not a legal title to the goods passed to McM. the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them.

APPEAL from a decision of the Supreme Court of Nova Scotia refusing to set aside a verdict for the plaintiff.

The facts of the case may be briefly stated as follows:

Early in 1877 one Haley, of Souris P. E. I., wishing to commence the business of packing lobsters, agreed with Mathers, of Halifax, that the latter should supply him with tin plates, money, &c., and that he should send to Mathers all the lobsters which he should pack in order that the supplies should be paid for out of the proceeds of the sales of the goods, Mathers being paid a commission for selling. That agreement was acted on for six years.

At the end of 1882 Haley was indebted to Mathers from $7,000 to $9,000. On 28th December, 1882, Haley sent from Souris to Halifax, per schr. "Josephine," *viâ* Pictou and Intercolonial Railway, the goods in question in this suit, 180 cases of canned beef, worth about $1,000, and forwarded to Mathers the bill of lading, which, however, made the goods deliverable to the freight agent of the Intercolonial Railway at Pictou Landing, or his assigns.

Mathers about this time getting into difficulties and wishing to secure the plaintiff, respondent, for accommodation endorsements which had previously been made, endorsed to him the bill of lading, which was never endorsed by the freight agent at Pictou Lading.

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After the transfer of the bill of lading the respondent called on the appellant and demanded possession of the goods, and tendered the appellant the amount of freight due upon these goods, and also a balance which the appellant claimed was due by Mathers to the railway in respect of certain goods carried and previously delivered to Mathers. The appellant declined to accept the money tendered, and refused to deliver the goods having been so instructed by Haley.

The assignee of the bill of lading replevied the goods and obtained a verdict which was sustained by the Supreme Court of Nova Scotia. The defendant appealed to the Supreme Court of Canada.

Henry Q.C., for appellants.

The agreement gives Mathers no right to the goods. He obtains an equitable right to have the goods left in his possession. At common law he would have a right to maintain an action for damages for the non-execution of the agreement. He was merely a bailee. Assuming that the bill of lading was effectually indorsed to McPherson, under these circumstances I question whether that would give him any additional rights to those which Mathers had. No new consideration was given.

The most that can be said as to Mather's position is, that he had a right to get the goods as Haley's agent. It will be conceded that in law and equity Haley is the real owner of the goods.

I take the point that this action, having been brought before the Judicature Act, must fail.

McPherson brought this action on the theory that these were his goods. Suppose this case were in equity, the judgment gives plaintiff the goods themselves, not the value of them.

Graham Q C., for the respondent.

The legal title in these goods passed to Mathers.

The only thing urged against this is, that the bill of lading was unindorsed. This having been done in pursuance of the previous agreement, it vested the title to the goods in the plaintiff. See *Allen* v. *Williams* (1); Campbell on Commercial Sales, p. 240 citing the case of *Coxe* v. *Harden* (2); *Dick* v. *Lumsden* (3). The delivery of the bill of lading was the transfer of the goods. *Haile* v. *Smith* (4). It was an indication of the intention.

See Hutchinson on Carriers (5), and see Benjamin on Sales (6), which contains the rest of the cases relied on.

I think that under the Factor's Act McPherson had a right to the goods; at all events he had the bill of lading by which he had a right to receive the goods as a pledge. Story on Agency (7); *Donald* v. *Suckling* (8).

At common law you could not pass the property in the goods, though you could pass it as a pledge; but under an agreement such as this Mathers had a right to the possession of the goods. Jones on Pledges (9); Abbott on Shipping (10); *Halliday* v. *Holgate* (11).

Henry Q.C. in reply.

The relation of a factor, at common law, to his employer is that of a common agent, differing in no way from the position of any other agent. The Factor's Act does not apply to cases of past indebtedness. R. S. 4th ser., p. 63, sec. 3 A factor is but an agent to sell, and has no right to pledge. Further, even if he has a lien, he has no right to sell. The agreement excludes a right to do anything but sell. See Jones on Pledges, sec 338. The goods were not given to the plaintiff as security.

(1) 12 Pick. 302.
(2) 4 East 211.
(3) Peake's Cases p. 252.
(4) 1 B. & P. 563.
(5) Sec. 135.
(6) P. 307.
(7) Sec. 113.
(8) L. R. 1 Q. B. 585.
(9) Secs. 228 and 229.
(10) p. 271.
(11) L. R. 3 Ex. 299.

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Sir W. J. RITCHIE C. J.—The goods in question were originally the property of Haley, who shipped them from Prince Edward Island in a vessel called the "Josephine," the master of which signed the bill of lading to deliver the same at the port of Pictou "unto the freight agent, Intercolonial Railway, or to his assigns, freight payable in Halifax." In the margin "180 cases marked B;" freight "to I. H. Mathers, Esq., Halifax." These goods were unquestionably sent to the agent of the Intercolonial Railway at Pictou, to be forwarded by him, by the I. C. R., to the consignee, I. H. Mathers, at Halifax; and the agent at Pictou had no other interest in the goods, or right or duty connected with them, than to forward them to their destination.

On the arrival of the goods at Pictou, the agent gave to the captain of the "Josephine" the following receipt:—

B. A. W. 2.

INTERCOLONIAL RAILWAY,

PICTOU LANDING STATION,

2nd January, 1883.

Received from "Josephine," Haley, the following goods or merchandize, which are to be transported from this station to Halifax station, and delivered as addressed, agreeably to the "Conditions of Carriage," as set forth in the "General Freight Tariff" of this railway.

Mark—B; Car, 1817; Address in full—I. H. Mathers, Halifax: Quantities and description of goods—180 cases meats canned. Charges—$10.80.

D. BAIN.

And, in accordance with his duty, he forwarded the goods to Halifax with the following way-bill;—

B. A. W. No. 3.

No. 341.

INTERCOLONIAL RAILWAY.

Way Bill of Sundries sent from P. Landing to Halifax per train, the 3rd day of January, 1883.

o'clock

No. of car—1817. Sender—"Josephine." Consignee—I. H. Mathers. Mark—B. Residence—Halifax. Description of Goods—

180 cases Canned Meats. Weight in lbs.—12,600. Rate per 100 lbs. —12. Charge for freight—$15.12. Charge for Expenses—$10.80. Total, to pay—$25.92.

Bain's, the Pictou agent's, testimony is short and very clear on this point. It is as follows :—

DANIEL BAIN.—Live at Pictou Landing; in the Intercolonial Railway employ for 16 years; was so in December, 1882, and January, 1883; was station agent at Pictou Landing; still hold that office, but have been temporarily removed to other side of Pictou harbor; remember consignment of goods came to the railway by schooner "Josephine" from Souris; I saw bill of lading that came with them; this is bill of lading signed by captain; I had no interest in goods. Bill marked B. A. W. No. 1. My duty in connection with these goods was to see that they were shipped and forwarded by rail to Halifax; goods were put into cars by captain of schooner; I signed shipping receipt for goods; I forwarded them to Halifax under way bill; gave two receipts to the captain and held one which I now produce—(B. A. W. 2); I did this on 2nd Jan., 1883; goods came into car that day and think they arrived in schooner same day; I have form of way bill in use and have press copy of way bill given with these goods; original way bill forwarded by me to R. McDonald, station agent of Intercolonial, at Halifax. Copy of way bill marked B. A. W. No. 3 produced. So far as respects these goods it is a correct copy of original way bill; I received goods from vessel and forwarded them to Halifax.

Bain says he received a telegram from Haley in reference to these goods. Haley's telegram was for him to hold 180 cases shipped by "Josephine." He says Haley's telegram was received on the 3rd of January, 1883. "The goods had been forwarded before I received the telegram; I mean forwarded from Pictou Landing," therefore at a time when Bain's duty in reference to, or control over, the goods had ceased

But he says on receipt of the telegram he telegraphed defendant as follows:—

B. A. W. No. 5.

PICTOU LANDING, 3rd January, 1883.

R. McDONALD, Halifax,—

Please hold 180 cases canned goods billed to I. H. Mathers per my bill 341 to-day for instructions; answer if all right.

D. BAIN.

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To this defendant telegraphed in reply:

B. A. W. No. 4.

HALIFAX, 3rd January, 1883.

D. BAIN,

At whose instance are you holding the 180 cases canned goods, per your bill 341, for I. H. Mathers? There is a party here with endorsed bill of lading waiting to receive them Have been sold him by Mathers; reply giving car number.

R. McDONALD.

And on the 4th, the day following, Bain replies by telegram:

B. A. W. No. 6.

PICTOU LANDING, 4th January, 1883.

R. McDONALD, Halifax,—

The 180 cases canned goods, per my bill 341, are held by order of shipper, C. J. Haley, Souris, P.E.I. Car No. 1817.

D. BAIN.

This is all the authority defendant appears to have for holding these goods, and Haley does not seem to have interfered in any other way, or to have intervened or taken part in this trial, or set up any right to the goods as against either Mathers or the plaintiff, or to controvert the statement of Mathers that at the time of the shipment of these goods he, Haley, was largely indebted to Mathers, or that Mathers was entitled, on the sale or other disposal of these goods, to apply the proceeds thereof in liquidation of such indebtedness.

Mathers, on the 1st of January, 1883, disposed of and transferred these goods to the plaintiff for a valuable consideration in excess of the value of the goods, and delivered to him the bill of lading transmitted by Haley to Mathers on 8th Dec., 1882, on which he endorsed the following: "deliver to David McPherson or order. Isaac H. Mathers." Under these circumstances I cannot understand upon what principle Bain interfered with these goods, or upon what principle defendant, when as he himself says there was a party here (at Halifax) with endorsed bill of lading waiting to receive them, they having been, as he says, sold to such party by

Mathers, did not deliver them to such purchaser in obedience to the order endorsed on the bill of lading by Mathers, the consignee at Halifax, on being tendered the freight; and how, without showing any right whatever in Haley to stop the goods, he can keep possession of them against Mathers and his assignee. It is not, in my opinion, necessary to discuss the relations and rights of Haley and Mathers, as between themselves, as to the manner of the disposal of these goods by Mathers. With this, it appears to me, the defendant has nothing whatever to do. Mathers must account to Haley for their proper disposal or full value. Nor whether, as between Mathers and the plaintiff, an absolute legal title passed to the plaintiff. It is sufficient, I think, to say that as against the defendant, whose position, on the evidence, is simply that of a wrongdoer, the plaintiff, if he had not such a strict legal title, had such an equitable interest in the goods, and right to the possession thereof, as would prevent the present defendant from legally withholding them from him. The appeal, therefore, in my opinion, should be dismissed with costs.

STRONG J.—I am of opinion that the judgment of the Supreme Court of Nova Scotia, as delivered by Mr. Justice Thompson, was right, and should be affirmed.

FOURNIER J. concurred.

HENRY J.—This is an action of replevin brought by the respondent to obtain the possession of one hundred and eighty cases of canned beef alleged to be of the value of nine hundred dollars.

The defendant, when the action was brought, was station master of the Intercolonial Railway at Halifax, and as such had the goods in question in his keeping. While the goods were *en route* from Pictou the re-

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spondent obtained an order from Mathers to whom the shipper Haley had written apprising him of the shipment, for the delivery of them, and demanded them, but the appellant refused, at the instance of the shipper, to deliver them to him.

The defendant pleaded as follows to the action :—

1. The said defendant by J. Norman Ritchie, his attorney, for a first plea as to plaintiff's writ or declaration, says, that he did not unjustly detain said goods as alleged.

2. And for a second plea as to said writ or declaration defendant says, that the said goods were not, nor were any of them, the plaintiff's, as alleged.

3. And for a third plea as to said writ or declaration, defendant says, that the said goods were not, nor were any of them, the goods of the plaintiff, but were the goods of one Charles J. Haley, by whose authority he detained the same.

4. And for a fourth plea as to said writ or declaration, defendant says, that the said goods were the property of one Charles J. Haley, and were delivered by his authority to the station master or agent for the Intercolonial Railway at Pictou, to be carried by said railway to Halifax. That the said goods were so carried to Halifax and came into possession of the defendant, who was and is the agent or station master of said railway at Halifax, and were received by him in that capacity, and that while said goods were so in his custody as such station master as aforesaid the said Charles J. Haley, the owner thereof, claimed the same, and forbid the defendant from delivering them to any other person, and said goods were and are lawfully detained by the authority and directions of the said Charles J. Haley, the owner thereof.

5. And for a fifth plea as to said writ or declaration, defendant says that the said goods were the property of

one Charles J. Haley, and were delivered by him to be carried to Halifax and delivered to one Isaac H. Mathers, who was the agent of the said Charles J. Haley for the sale thereof, and then representing himself to be a person of credit in trade and fit to be trusted with the said goods for sale, and who agreed to accept a bill of exchange or draft for one thousand dollars drawn on him by the said Charles J. Haley on account of the proceeds which might be realized by him from the sale of said goods. And the said Charles J. Haley, then believing the said Isaac H. Mathers to be solvent, and a person fit to be trusted with the said goods for sale on the terms above mentioned, delivered the said goods to be carried as hereinbefore mentioned; that after the delivery of the said goods, and before they arrived in Halifax or come into the custody of defendant, the said Isaac H. Mathers became insolvent and refused to accept said bill of exchange, and attempted to make an assignment of said goods to the plaintiff, who accepted the same in fraud of the said Charles J. Haley without giving any legal or valid consideration therefor; the said plaintiff then well knowing the premises, and that the said Isaac H. Mathers was insolvent and unable to meet his liabilities. That the said defendant is and was the station master and agent for the Intercolonial Railway at Halifax, and the said goods afterwards came into his custody as such, and after the said bill had been refused acceptance and protested, and after the said Isaac H. Mathers had become insolvent and unable to pay the same, and before the delivery of the said goods to the said Isaac H. Mathers or to the plaintiff, the said Charles J Haley gave notice to defendant not to deliver the said good to the said Isaac H. Mathers or his assigns, and then stopped the same *in transitu* and required them to be delivered to him, and defendant, at the request of the said Charles J. Haley

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stopped the same, and refused to deliver said goods to plaintiff, the same being then stopped *in transitu* by said Charles J. Haley, as he the said defendant lawfully might.

The respondent's ownership of the goods and his right to the possession of them being denied, strictly legal issues are raised and under them the action was tried. The defendant was lawfully in possession of the goods under Haley, the owner and shipper.

To recover, therefore, it was necessary to show that Haley was divested of his property in them and of the right to retain possession of them, and that such property and right of possession in them had been legally transferred to the respondent. That has been attempted to be shown by a document purporting to be a copy of a bill of lading sent by Haley to Mathers. The bill of lading executed by the master of a schooner who carried the goods from Souris, in Prince Edward Island, where they were put up by Haley, required the master to deliver them at Pictou to the freight agent of the Intercolonial Railway or to his assigns—the goods being stated as being marked and numbered as in the margin. The entries on the margin are: "180 cases marked (B) —freight—To I. H. Mathers, Halifax, N.S." On the copy of the bill of lading Mathers wrote and signed the endorsement: "Deliver to David McPherson" (the respondent) "or order. Isaac H. Mathers," and delivered the copy of the bill of lading so endorsed to the respondent. That was done, as appears by the evidence, before the goods arrived at Halifax, and it is relied on as evidence of a transfer of the property in the goods by Mathers to the respondent. I have no doubt when Haley shipped the goods he intended them to be delivered to Mathers as his agent to sell them on his account, but by doing so conveyed no property in them Mathers was not intended to become the owner of the

goods, but by the authority of Haley he could, by a sale in a legal way have, as authorized by the latter, transferred the property in the goods to a *bonâ fide* purchaser from him within his authority as agent of Haley, but in no other way could he transfer the property in them. If for the purpose of such sale Mathers had got the possession of the goods he would still be but a special bailee of Haley, but only for the sale of them. His possession would be good against all others but Haley would still be the owner, subject to any claim of Mathers' for storage, commission, &c. If then Mathers transferred the possession of the goods or parted with them on any terms outside of his authority both he and his transferree would be liable to Haley for a wrongful conversion. Mathers' authority then was to sell the goods to a real and *bonâ fide* purchaser and account to Haley for the proceeds. Mathers so states it. He however did not so sell, but by the evidence is shown to have given that order for the delivery before mentioned to the respondent to enable him to obtain the possession of the goods to be held by him as security to indemnify him against loss in case certain bills of exchange then current drawn by Mathers and endorsed and negotiated by the respondent should be unpaid and unproductive. Such a transfer, if what was done amounted to a transfer, conveyed the property in the goods to the respondent. They still were the goods of Haley, and the other parties, if the goods were delivered to the respondent, would in law have been wrongdoers. By the compact between Haley and Mathers the former gave the latter no authority to transfer his goods for the payment of, or security for, the debts or liabilities of the latter and without such authority Haley would not be bound. The goods were not and never had been in Mathers' possession and until they came to his possession by the acts and consent of Haley he could not in any way

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deal with them. If the goods had been destroyed or injured the loss would have been Haley's. A good deal was said on the argument, and in the judgment of the court below, that was applicable to cases of transfer and delivery to carriers, but the propositions were applicable only to cases between absolute vendors and purchasers, and wholly inapplicable to the position of parties here. If a man sells goods he intends to part with the property in them, and after delivery to a common carrier the property in them vests in the consignee as purchaser, but, if sold on credit, subject to the seller's right of stoppage *in transitu*. The law regulating such a stoppage is wholly inapplicable here, for as the obtaining of possession of goods sold would bar that right the purchaser's title to the goods would be complete. In a case like this such possession would not divest the shipper and owner, and he would remain owner until the goods were sold by his authority. As that was not done in this case Haley remained the legal owner and the respondent got no property in them, and the possession of the railway officials was that of Haley. If, however, Mathers became, as I have shown he did not, the transferee of the property in the goods, where is there evidence of a transfer by him to the respondent of the property in them? If the endorsement on the copy of the bill of lading had been an endorsement of a bill of lading to which Mathers was a party, as consignee, by which the title appeared to be in him, it would, in ordinary circumstances, operate as an assignment, but the endorsement of the request to deliver the goods to the respondent, written as it was, cannot operate as an assignment, and it amounts to nothing more than a request to deliver to the respondent, it might be as the agent or servant of Mathers. It is not at all events any transfer of the property. A regular

bill of lading is *primâ facie* evidence of property in the consignee, and its assignment is evidence also of property in his assignee, but the words in question endorsed on a bill of lading in favor of another party is of no more value than if written on a blank piece of paper, unless, indeed, to identify the goods to be delivered. It, however, appears that Mathers gave the order for the delivery of the goods to the respondent to receive and retain them as security as I before stated. No delivery of possession was or could be made because Mathers had no possession No delivery, no present consideration given or received. No debt then due by Mathers to the respondent. No possession obtained by the latter. Was not the whole transaction void? It was only in words amounting to this, that, expecting that the respondent would get possession he, as far as Mathers was concerned, was to retain the goods, if he got them as security. Suppose after the respondent's failure to get delivery, Mathers, being more successful, had succeeded in getting them, what property had the respondent in them by what took place to recover them, or the value of them, by an action of replevin or otherwise, from Mathers. There was not, I maintain, any transfer of property legal or equitable. There was no delivery or consideration at the time nor was there any note or memorandum in writing except the request to deliver, and the whole transaction so far as concerns the assignment of the goods was void by the statute of frauds and both parties as to it were afterwards as if such had never taken place.

The learned judge who tried the case reports:—

My judgment was for plaintiff; my view being that Mathers had the equitable right to the goods, that he had made, at least, an equitable transfer of that right to the plaintiff and that the equitable right of the plaintiff was sufficient to entitle him to recover since the Judicature Act. I cited 1 Q. B. D. 709 and L. R. 5 P. C. 253.

If the transaction as an assignment or sale of prop-

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erty was void I am at a loss to know how it could be enforced in equity or by law.

The case, of *Holroyd* v. *Marshall* (1); and the judgment of this court in *Clark* v. *Scottish Imperial Insurance Company* (2); have been referred to, but I fail to recognize anything in them applicable to this case. The question in the latter case was as to the insurable interest in a vessel in course of building. In that case the plaintiff had furnished supplies to the party who built the vessel under the express agreement that he should have a lien on her to the amount of his advances. He insured in an amount sufficient to cover his advances and she was burnt before being finished. On the ground that an equitable lien was sufficient to give an insurable interest this court decided in the plaintiff's favor. That, however, is a very different position from that of Mathers in respect of the preserved or canned beef in reference to which no bargain was made that Mathers was to have any lien or even any right to sell on account of Haley unless specially authorized. It appears from the evidence that about four or five years previous to the shipment of the goods in question, Mathers, who resided at Halifax, entered into an agreement with Haley to advance supplies and money to him to enable him to carry on, at Souris, the business of packing lobsters It was agreed, Mathers says in his evidence, that Haley was to give him all the goods (that is the lobsters) he packed to recoup him; he added: "such goods I was to sell on commission for him." "That was the agreement at the start and was acted on for six years."

At the end of 1882 Mathers says Haley owed him $9,000, but there is no evidence to show that any of it was advances made on account of the packing or preserving of beef, nor is it pretended on the part of

(1) 10 H. L. Cas. 191. (2) 4 Can. S. C. R. 192.

Mathers that as to canned beef there was any agreement that Mathers was to have the sale of it. Mathers made advances to Haley under the agreement as to the packing of lobsters but for nothing else. If then Haley undertook other business and in the course of such business put up pickled fish or purchased grain, hay, vegetables, or other articles, could it be contended that even if Mathers had a lien on canned lobsters the lien could be decreed either by law or equity to extend to those other articles?

Mathers was examined on the trial and did not pretend that he had any special agreement with Haley as to the canned beef. He, on the contrary, pretty clearly shows the contrary. He says:

I do not know when Haley's transactions in canned beef with me commenced, but I believe I sold canned beef for him before '82. The agreement between us related to lobsters, it was not then contemplated that he should can meats. I charged no commission in my books on beef.

From this evidence the conclusion is irresistible that Haley was under no agreement or promise of any kind to give Mathers the sale of canned beef. Mathers does not even say that he so understood. In fact he plainly and clearly discriminates as regards the canned lobsters and the canned beef. There does not appear to have been any previous transaction between them as to canned beef. Mathers says he thinks he sold some for Haley before '82 but on referring to his books he finds no commission charged for selling beef. If he had sold any his books would certainly show it. Where then arises the lien on or any obligation on the part of Haley to employ Mathers to sell the canned beef for him? Suppose in addition to the canned beef Haley had canned indian corn, tomatoes, berries and fruits of different kinds could, it be contended that Mathers' lien on lobsters, made four years before, extended to each and all of the others? If so there must be some-

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thing cabalistic in the term "canned" and if beef is included why not the others and if canned beef why not pickled beef put up in barrels or tierces We are considering alone the question of a lien by Mathers on the identical article of canned beef and to decide in favor of the respondent he must show that lien by evidence. I have fully considered the evidence on the trial and find it impossible to detect any. The issue was on the respondent and in my opinion he most signally failed to prove it.

It has been contended that, as Haley was indebted to Mathers for advances made under the original agreement as to the canned lobsters, he had an equitable claim to the possession of the canned beef. As I before stated no advance was made specially for the canned beef and what better does the fact of the indebtedness of Haley to Mathers make the plaintiff's claim. It was assumed by the learned judge that Mathers' rights as to the corned beef were the same as to the canned lobsters, but I cannot find any evidence to sustain it. If such assumptions are permitted to prevail then the old and recognized rule that parties rights must be adjudged according to their allegations and proofs would be improperly violated and the rights of parties decided upon and affected injuriously, The assumption however in this case, is, in my opinion, not only without any proof to sustain it, but actually in opposition to the evidence on the trial of the principal witness for the respondent.

It is not always that an equitable lien can be set up, and an equitable lien does not always give the party holding it the right of possession, and a legal binding conveyance and transfer of personal property may be made so as to oust the equitable lien. The decision lately of this court in *McAllister* v. *Forsyth* (1), supported

(1) 12 Can. S. C. R. 1.

by and founded on English decisions, establishes that position. If Mathers had even an equitable lien on the goods in question, and Haley did not deliver them as agreed upon, what right would he have by means of an action of replevin to obtain the possession, and if Haley sold and delivered to another for a valuable consideration the property would pass by such sale, but if the property remained in the possession of Haley he might be required to deliver it under the terms of his agreement or Mathers might sustain an action for damages for the loss he sustained by not having the sale of the goods as agreed upon, but not including any amount due by Haley for money or supplies advanced to him. Such should be recovered under the common counts in assumpsit. The aid of equity is invoked to enforce specific performance of contracts but it is no part of its jurisdiction to make them for parties. As there was not shown to have been any equitable lien on the goods in question an equity court would, I think, go beyond its proper functions to assume one, and I am at a loss to conceive upon what principle an equitable lien could be decreed by a court of equity to be a legal title so as to enable the holder of it to recover the possession in replevin, and I am equally at a loss to know how the application of the Judicature Act to the case can affect the legal rights of the parties in this suit.

GWYNNE J.—I concur with the learned judge before whom this case was tried without a jury that the course of dealing between Haley and Mathers with respect to canned beef was conducted on the same understanding and agreement as had governed their dealings with respect to canned lobsters; and that the proper inference to be drawn from the manner in which the particular quantity of beef in question was forwarded by Haley to Mathers and from the circumstance of Haley having

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transmitted to Mathers by post a duplicate of the bill of lading is that Mathers had an interest in the beef and authority to dispose thereof to pay himself a portion of the debt of about $9,000 due to him by Haley. When the goods came into the possession of McDonald, as the servant of the Intercolonial Railway Company, at Halifax, he, as the servant of the company, held them for and on behalf of Mathers subject only to the payment of the freight charges, and when he refused to deliver up the goods to the plaintiff upon Mathers' order he committed a tort of which the plaintiff could sustain an action for the wrongful detention. The question that was raised and tried was as to Mathers having a right to have the goods delivered to him or to his order and not a question as to the sufficiency of the plaintiff's title to the property as between him and Mathers, Haley having already received full value for the goods and having sent forward the goods to Mathers upon a contract enabling him to pay himself out of the proceeds of the goods a portion of the debt due by Haley to him, and having forwarded to Mathers the bill of lading to enable him to receive the goods in fulfilment of such contract, could not, I think, stop the delivery of the goods after their arrival at the place of delivery to Mathers, or justify the carriers and their servant in detaining them.

The appeal therefore, in my opinion, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Drysdale.*

JAMES FLANAGAN AND JOHANNA FLANAGAN HIS WIFE (DEFENDANTS) } APPELLANTS;

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*Feb'y. 20.
*May. 17.

AND

JOHN DOE ON THE DEMISE OF GILBERT R. ELLIOTT AND ISABELLA HIS WIFE, CYRUS LOWELL AND LYDE L. HIS WIFE, JOHN T. GAMBLE, TERESA GAMBLE AND LILLIE GAMBLE (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assessment on real estate—In name of occupier—Description as to persons and property—Cons. Stats. (N.B.) ch. 100 sec. 16—Several assessments in one warrant—One illegal assessment—Warrant vitiated by.

Sec. 16 of ch. 100 Cons. Stats. of New Brunswick relating to rates and taxes, provides that "real estate, where the assessors cannot obtain the names of any of the owners, shall be rated in the name of the occupier or person having ostensible control, but under such description as to persons and property * * * as shall be sufficient to indicate the property assessed, and the character in which the person is assessed."

T. G., owner of real estate in Westmoreland County, N.B., died leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G."

Held, affirming the judgment of the court below, that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed, and the character in which the person was assessed.

Where a warrant for the collection of a single sum for rates for several years, included the amount of an assessment which did not appear to be either against the owner or the occupier of the property.

Held, affirming the judgment of the court below, that the inclusion of such assessment would vitiate the warrant.

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

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FLANAGAN v. ELLIOTT.

APPEAL from a judgment of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a non-suit to be entered.

The following facts appear from the printed case filed on the appeal to this court :—

This is an action of ejectment tried at the Circuit Court for the county of Westmoreland in July, 1883.

The lessors of the plaintiff claim the land as heirs of Thomas Gamble; the defendant Johanna Flanagan claims it under a deed to her from the sheriff of the county as purchaser at a sale under a warrant issued by the chairman of the town council of the town of Moncton, commanding the sheriff to seize and sell the real estate named in said warrant (being the *locus in quo*) or so much thereof as in his judgment may be sufficient to pay the sum of $45.72 and 17 cents for advertising, together with all his charges and expenses, "the said sum of $45.72 being taxes assessed by town of Moncton for the years 1875, 1876, 1877 and 1878, against the estate of Thomas Gamble, deceased, in respect of such real estate."

The sheriff's deed to the female defendant bears date 4th March, 1880.

In 1868, Thomas Gamble conveyed his real estate, of which the *locus in quo* was a part, to three trustees for benefit of his creditors, which deed was duly registered in July, 1868. These trustees, on the 3rd November, 1873, reconveyed the property to Gamble by deed, but the deed was not acknowledged or registered until the 3rd October, 1881.

Gamble died 29th December, 1875, after the assessment for 1875 had been made.

The lands were assessed in '75, '76, '77, in no other way than as "the estate of Thomas Gamble," and in 1878 than as "Widow Gamble."

Gamble was in possession and actual occupation of

the land from the year 1859 to the time of his death in December, 1875, and his widow and family occupied it until the sale by the sheriff, and from his death to the time of the sheriffs' sale it was undivided.

Before the sheriff's sale the plaintiffs' lessors knew in fact that such sale was to be made and they did not forbid it or protest against it, but requested one Martin Dowling to attend at the sale and bid the property in; but there was no evidence that Dowling did attend the sale or bid at it at all.

They did not appeal to the town council of the town of Moncton from any of the assessments at any time.

The plaintiffs obtained a verdict at the trial, the learned judge who presided refusing to non suit, holding that the sheriff's sale was illegal in consequence of the assessment on the property being defective, and that the title was in the lessors of the plaintiffs as heirs of Thomas Gamble. A motion was made before the Supreme Court of New Brunswick to have this verdict set aside, and a non-suit entered, which motion was dismissed. The defendants then appealed to the Supreme Court of Canada.

Borden for the appellants.

The assessments were properly made, and the sale was lawful. The assessors had jurisdiction to make the assessments, and their proceedings must stand until quashed. See 38 Vic. ch. 40 (Moncton Incorporation Act) and Cons. Stats. ch 100 sec. 16.

The action of the chairman of the town council can only be attacked by proceeding against the assessment itself.

The assessment was made against the estate of Thomas Gamble. It was so entered on the roll, and was made before the Incorporation Act came into force.

The respondents have been guilty of negligence in not

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making their claim known and moving to have the assessments quashed. They are estopped as well by their own acts as by the judgment of the assessors.

R. Barry Smith for the respondents.

I contend that the assessments were all bad, because made when Gamble was dead, and the provisions of ch. 100 Cons. Stats. in regard to assessments on estates of deceased persons not being complied with. But, at all events, the assessment for 1878 is invalid and that would vitiate the warrant. The assessment for 1878 is against "Widow Gamble." That certainly does not show on its face the property assessed and the character of the person. Cons. Stats. ch. 100 sec. 16. There is nothing in the term "widow" to show any particular relation to the property.

Then, if this assessment is bad the whole warrant is bad, and the sale under it void. There is no statutory provision authorizing a sale where some of the assessments are good and the others bad.

My learned friend says we are estopped. I submit that we cannot be estopped by silence.

Borden in reply.

As to the assessment of 1878, I submit the widow Gamble was in possession of the property, and administratrix of the estate of the owner, which is sufficient. Where the law has been specifically carried out the technicalities should not be considered.

Sir W. J. RITCHIE C. J.—This was an action of ejectment brought to recover:

All that lot of land situate in the town of Moncton, in the parish of Moncton, in the county of Westmoreland, situate, lying and being in the north-west corner of King and Cross streets, thence running westerly one hundred and thirty feet or to Edward McCarthy's line, thence north along said Edward McCarthy's line sixty-five feet or till it strikes Captain Atkinson's line, thence easterly along said line till it strikes the line of King street, thence southerly along King street to the place of beginning.

The proceedings, and admissions at the trial, were as follows:

Mr. Smith opened the plaintiff's case.

Action of Ejectment.

Mr. Smith offered in evidence a certified copy of a deed from Thomas Gamble to Stephen W. Palmer, Joshua Breau and Edward V. Tait, dated 21st July, 1868, registered 22nd July, 1868. *Locus in quo inter alia.* Read.

Also a certified copy of a deed from Stephen W. Palmer, Joshua Breau and Edward V. Tait to Thomas Gamble, dated 3rd November, 1873, acknowledged 3rd October, 1881, registered 3rd October, 1881.

Re-conveyance of same property. Read.

Agreement of counsel as follows: Read.

SUPREME COURT.

JOHN DOE on the demise of GILBERT R. ELLIOTT, and ISABELLA his wife, CYRUS LOWELL, and LYDE L. his wife, JOHN T. GAMBLE, TERESA GAMBLE and LILLIE GAMBLE, *Plaintiffs.*

AND

JAMES FLANAGAN and JOHANNA FLANAGAN, his wife, *Defendants.*

The plaintiff admits,—

That the assessments for 1875, '76, '77, '78, were on real estate at one time the property of Thomas Gamble, of which the *locus in quo* is a part.

That the existence of the trust deed to Messrs. Breau, Palmer and Tait was in fact unknown to the assessors during said years.

That the widow of Thomas Gamble and family occupied the *locus in quo* from the time of the death of Thomas Gamble up to time of sale.

That the preliminaries set forth in cap. 82, secs. 2, 3 and 4, acts of 1878 (except as to personal property) were performed, and that the assessments were made on a correct valuation.

That the real estate of the said Thomas Gamble was in trustees under deed at the time of assessment, and was undivided and is still undivided.

That the lessors of the plaintiff in fact knew of sale and did not forbid it or protest against it, and that they requested one Martin Dowling to attend at sale and bid it in.

That the plaintiff's lessors did not, nor did the trustees or either of them, appeal to the town council from any assessment on the *locus in quo* at any time.

That the sheriff's deed to defendant, Johanna Flanagan, is founded on assessments actually made by assessors on "the estate of Thomas

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Gamble" and "Widow Gamble."

(Signed), R. BARRY SMITH,

Attorney for plaintiffs and lessors.

The defendants admit,—

That the property now in question is that described in the trust deed to Breau, Palmer and Tait as the third lot.

That it was assessed in 1875, 1876, 1877 in no other way than as the "estate of Thomas Gamble" and in 1878 than as "Widow Gamble."

That the lessors of the plaintiff are the heirs of Thomas Gamble referred to in deed from Breau, Palmer and Tait, 3rd October, 1881.

That the lot in question was held by Thomas Gamble in actual possession since 1859 till the trust deed.

That Gamble died in December, 1875, and that his widow administered.

That trustees lived at the time in Dorchester, Westmoreland Co.

(Signed,) BORDEN & ATKINSON,

Defendant's attorneys.

Both parties agree that all deeds may be proved by production of registry books containing them, or copies of them, without objection on that ground.

The plaintiffs were, consequently, entitled to recover unless the defendant could show that their claim to the land had been extinguished. This they attempted to do by producing a deed from the sheriff of Westmoreland to Johanna Flangan, dated the 4th of March, 1880, of the *locus in quo*, made in pursuance of a sale under a warrant authorizing him to sell the said lands for non-payment of rates in the town of Moncton.

The plaintiff objected at the trial:

First—That the assessment was bad because not assessed upon the trustees, Palmer, Breau and Tait.

Secondly—That the town had no power to sell land, at all events, not to sell for taxes in arrears.

Thirdly—That if they had power to sell there were no arrears, consequently, no power to sell.

Fourthly—That under the act of 1878 ch. 82, Moncton Assessment Act, secs. 2, 3 and 4, and under the Incorporation Act of Moncton, the real estate of defaulting ratepayers cannot in any case be sold for taxes until the personal property is exhausted. The defendant contended that the trustees, Palmer, Breau and Tait, had no power to assign or re-convey to the lessors of the plaintiff, and

that the lessors are estopped on the ground of acquiescence.

The plaintiffs made out their *primâ facie* case, and, in my opinion, the purchasers under the sheriff's deed have no *locus standi* to attack the trust deed or the re-conveyance. It is contended by the plaintiffs that the assessments for 1875 and 1878 are bad. It is admitted that the property was assessed for 1875, 1876 and 1877, in no other way than as the "estate of Thomas Gamble"; and in 1878 as "Widow Gamble." It is contended that if the assessors could not obtain the names of any of the owners, but sought to rate in the name of the occupier or person having the ostensible control, then there was "no such description as to persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed."

I agree with Judge King that a description of person and property sufficient to indicate the property assessed, and the character in which the person was assessed, is essential to make an assessment against a mere occupier a binding assessment upon the estate of the real owner, and that the same is the case where an undivided estate is assessed in the name of one of the owners; therefore I agree with the learned judge that this last assessment, as it appears on the assessment list, was bad in form and substance, and was not a binding assessment against the estate of Thomas Gamble,

I also agree with the learned judge, that where a warrant is for the collection of a single sum for rates for several years, the inclusion in it of the amount of an assessment which does not appear to be either against the owner or the occupier of his property vitiates the warrant, and therefore the inclusion of the assessment of 1878, whatever may be said of the assessment of 1875, would vitiate the warrant in this case.

The owners, in this case, were not assessed; the estate of Thomas Gamble was not assessed; "the

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widow Gamble" was assessed but without any specification of the property on which she was assessed, or any indication of the capacity or character, whether as owner or or mere occupier, in which she was assessed. The owner of property cannot be bound by an assessment in which neither he nor his land is named; and there is, consequently, nothing to show that his land has been assessed, or that another has been assessed in respect of his land or liable to be assessed for it. Without such information appearing on the assessment roll, how is it possible that the provisions of sections 3 and 4 of chapter 82 of the acts of 1878 can be complied with? What then does all that was done in this case amount to but that there was no valid or binding assessment on this property? If so, how can the acts of the collector and chairman validate and make good an assessment that never existed, either against the owners of the property or against the property itself; and how could they, by an *ex parte* proceeding, sell so much of the real estate of such person, namely, the person assessed on real estate whether such person is owner or occupier thereof, for an assessment which never had a legal existence? To give the collector and chairman any authority or jurisdiction in the matter there must be, in my opinion. a legal assessment capable of being enforced, which there was not in this case for the year 1878; there being, in fact, no assessment, there could be no collection; therefore, as regards the assessment of 1878, the proceedings of the collector and chairman were simply *coram non judice*. There being no assessment to authorize a sale of any interest of the present lessors, the combined action of the collector and chairman could not legalize and give effect to a sale unauthorized by law. There was no assessment, in point of fact, as set out in the warrant, for the year 1878. In the warrant the taxes for 1878 were

stated to be against the estate of Thomas Gamble deceased. There was no such assessment; the actual assessment in 1878 was against "Widow Gamble," without reference to Thomas Gamble or his heirs or estate.

As to the estoppel claimed I do not think the mere fact of the lessors knowing of the sale, and not forbidding, or protesting against it, would estop them from contesting its validity, nor the mere fact of the plaintiff's requesting Dowling to attend the sale and bid the property in. It does not, however, appear, Judge King says, that Dowling bid, nor that defendants knew that he was present, or was present as agent for the lessors of the plaintiff, nor indeed, that Dowling was present at all; nor does it appear that the lessors of the plaintiff knew, at the time of the sale, of the illegality of the warrant or of the facts upon which that illegality is now sought to be maintained, nor that the defendant was at all influenced by what the lessors of the plaintiff did or omitted. So far as the defendant is concerned there is no representation made to her at all, and certainly none made with the intent that it should be acted upon by her. The plaintiffs did not, by words or conduct, wilfully cause defendant to believe in a certain state of things, and thereby induce her to act on that belief or to alter her previous position, and could not have meant their representations or acts to be acted on, and they could not have been acted on. In other words, the defendants were never deceived, or induced to alter their position by any statement or act of the plaintiffs. All the admission amounts to is, that plaintiffs knew of the sale and did not forbid it or protest against it. This, in my opinion, they were not bound to do; there was no duty to speak. Then the admission says they requested one Martin Dowling to attend at the sale and bid it in. I have already stated what

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Judge King says on this point, and Judge Fraser says, "it does not appear that the female defendant, when she purchased, was aware that Dowling was present acting for the lessors, nor was the knowledge of the lessors that a sale was about to take place, such conduct on their part as could have influenced the purchaser."

Therefore, in this case, the two great ingredients mentioned in *Freeman* v. *Cook* (1), referred to in *Howard* v. *Hudson* (2) are wanting, namely, that the plaintiff intended that the defendant should act on the faith of his act or representation, nor that the defendant did so act, nor does it come within any of the following cases.

In the Duchess of Kingston's Case (3) the principle is thus laid down:

And in *Cairncross* v. *Lorimer* (4), Lord Campbell (chancellor) stated the general rules as to estoppels of this class, when the legality of the act assented to is in question, in the following words:

The doctrine is found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudices of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

And again (5):

Lastly in *Carr* v. *London and North Western Railway Co.* (6), the following are laid down by Brett L. J. (delivering the judgment of the Court of Common Pleas) as "recognized propositions of an estoppel in pais. One such proposition," says his lordship, "is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did

(1) 2 Ex. 654.
(2) 2 E. & B. 1.
(3) Smith's L. C. Vol. 2, 807.
(4) 3 Macq. H. L. Cas. 829.
(5) At p. 898.
(6) L. R. 10 C. P. 307.

not in fact exist."

Another recognized proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

And another proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

There is yet another proposition as to estoppel. If in the transaction itself which is in dispute one has lead another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist.

To the above may be added the rule enunciated by James L.J. in *ex parte* Adamson, *In re* Collie (1).

Nobody, says his lordship, ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do some thing, or to abstain from doing something by reason of what he had said or done, or omitted to say or do.

Clarke & Chapman v. *Hart* (2).

Lord Chelmsford:—

In the case of *Freeman* v. *Cooke*, Mr. Baron Parke, in delivering the judgment of the Court of Exchequer, qualified that proposition by saying: "In most cases the doctrine in *Pickard* v. *Sears* (3) is not to be applied, unless the representation is such as to amount to the contract or license of the party making it." So that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or

(1) 8 Ch. D. 817. (2) 6 H. L. Cas. 656.
(3) 6 A. & E. 469.

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to a license.

I think, therefore, that the appeal should be dismissed.

STRONG J.—I am of opinion that the sale was illegal and void, and that there was no estoppel. My judgment is based on the grounds stated by Mr. Justice King in the court below.

FOURNIER J.—Concurred.

HENRY J.—I entirely concur in the views expressed that the sale was totally illegal. It was a sale under warrant for taxes assessed on an estate, and the whole sale was void. There is no evidence of concurrence in the sale, for the alleged agent did not bid and it does not clearly appear that he was even present.

I think the appeal should be dismissed.

GWYNNE J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Borden & Atkinson.*

Solicitor for respondents: *R. Barry Smith.*

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*Feb. 17, 18.

*Mar. 6.

THE WESTERN ASSURANCE COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

JOHN DOULL, WILLIAM MILLER, FRANCIS H. DOULL, WILLIAM M. DOULL, AND VINCENZO J. GIBSON (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insurance against fire—Condition in policy—Subsequent insurance—Notice to company—Waiver.

A policy of insurance against loss by fire contained the following condition:—In case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must be given in writing at once, and such subsequent

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

assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect.

The insured effected subsequent insurance and verbally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he, nor the agent, made any objection to the loss on the ground of non-compliance with the above condition.

In a suit to recover the amount of the policy the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company were estopped from setting it up.

Held, reversing the judgment of the court below, that the insured not having complied with the condition the policy ceased and became of no effect on the subsequent insurance being effected and that neither the agent nor the inspector had power to waive a compliance with its terms.

APPEAL from a judgment of the Supreme Court of Nova Scotia refusing to set aside a verdict in favor of the plaintiffs.

The plaintiff, Gibson, insured his stock in the Western Assurance Company and assigned the policy to the firm of Doull & Miller, to whom he was indebted. He subsequently effected an insurance of $4,000 on the same stock in the British American Insurance Company and notified the agent of the Western of his having done so, but such further insurance was not indorsed on his policy in the Western, nor in any way acknowledged in writing by the company. A loss having occurred, one Corey, the official adjuster or inspector of the Western, adjusted the damage, and a certain amount of delay took place owing to some of Gibson's books having been burnt or mislaid. Gibson had several interviews with the agent and the inspector, both of whom knew of the insurance in the British American, but at no time was payment of the loss objected to on that ground; the agent, on one occasion, telling him

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that the company would pay, and that the delay was occasioned by another company with whom Gibson had insured previous to insuring in the Western. The company did not pay and Doull & Miller sued, and when the case was brought down to trial obtained leave to amend by adding Gibson as a plaintiff. The company pleaded non-compliance with the condition in the policy requiring notice of subsequent insurance to be given to the company and indorsed on the policy or otherwise acknowledged in writing. In answer to that it was contended that the agent, or inspector, or both, had waived such condition. The plaintiffs obtained a verdict, which was sustained by the Supreme Court of Nova Scotia. The company then appealed to the Supreme Court of Canada.

Henry Q.C. and *Graham* Q.C. for the appellants.

Greer had no authority to waive any of the conditions of the policy. There was no doubt as to the subsequent insurance. The only proof of notice was that the same person was agent for both companies. They say that Greer told Doull that there was no objection to the claim, and that the mere fact that Greer was the agent was sufficient.

We take the point first that Greer had no authority to waive any condition. He only had special authority and had no right to settle losses. It is contended that the renewal was an acknowledgment of the subsequent insurance, but I take it that it makes no difference if it was renewed twenty times if it was not brought home to the company.

Billington v. *Provincial Ins. Co.* (1); *Scott* v. *McGrath* (2).

Greer had no authority to settle this loss, and therefore the waiver amounts to nothing. Where a contract provides that notice shall be given to an agent, it is not

(1) 3 Can. S. C. R. 182. (2) 7 Barb. (N.Y.) 53.

met by showing mere knowledge in the agent. *David* v. *Hartford Ins. Co.* (1); *Ayres* v. *Hartford Ins. Co.* (2); *Bush* v. *Westchester Ins. Co.* (3); *Acey* v. *Fernie* (4); were cited on the point as to authority of agent.

Even if Greer had authority to waive the condition, inasmuch as this matter called waiver operates as an estoppel, company could not be bound by it because the time had already expired.

And see also *Lohnes* v. *Ins. Co. of North America* (5), which refers to those other decisions. The Ontario decisions are to the same effect. *Hendrickson* v. *The Queen Ins. Co.* (6); *Walsh* v. *Hartford Ins. Co.* (7).

Sedgwick Q.C. for respondents.

Greer was the general agent of the company. The policy provides that proofs of loss shall be given to the agent. This is a condition which may or may not be taken advantage of by the company. I submit that Corey had authority to waive proofs of loss. When the policy was renewed the other insurance had been effected whereby the policy was void, therefore the premium should have been returned.

See Mayor on Insurance, sec. 500, citing a case from the Supreme Court of Illinois *Etna Ins. Co.* v. *Maguire* (8).

As to the appointment of adjuster, see a case from Indiana, *Etna Ins. Co.* v. *Tryer* (9) decided in 1883. May on Insurance, secs. 498, 501, 502 (10).

Both Corey and Greer extended the time for putting in proofs of loss. That is a matter for the jury. As the point regarding proofs of loss was not taken at the trial, I contend that silence is an admission that they were properly put in. Cites May, secs. 464, 468, 469, 473

(1) 13 Iowa 69.
(2) 17 Iowa 177.
(3) 63 N. Y. 531.
(4) 7 M & W. 151.
(5) 121 Mass. 439.
(6) 31 U. C. Q. B. 547.
(7) 73 N. Y. 5.
(8) 51 Ill. 342.
(9) 12 Ins. L. J. 768.
(10) P. 592a.

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and sec. 142 (1). As to agency Wood on Insurance (2).

Sir W. J. RITCHIE C. J.—The policy in this case was issued 22nd April, 1882, and contained this clause:

This policy is made and accepted in reference to the conditions herein contained and hereto annexed, which are hereby declared to be part of this contract, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein or otherwise specially provided for.

And this condition:

VI.—Notices of all previous assurances upon property assured by this company shall be given to them, and endorsed on this policy, or otherwise acknowledged by this company in writing, at or before the time of their making assurance thereon, otherwise the policy subscribed by this company shall cease and be of no effect. And in case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not), notice thereof must also be given in writing at once, and such subsequent assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of further assurance this company shall be liable only for such ratable proportion of the loss or damage happening to the object assured as the amount assured by this company shall bear to the whole amount assured thereon, without reference to the dates of the different policies; and any general policy on different properties to be treated as a specific policy on each property for the whole amount thereby assured.

On the 28th of May, 1883, a further insurance of $4,000 in the British American Insurance Company was put on the property by Gibson in addition to the amount insured by the policy in suit, and which was admitted to be in force.

This subsequent insurance was not at once notified to the company in writing, nor was it endorsed on the policy in suit granted by the company or otherwise acknowledged in writing, in default whereof the policy thenceforth ceased and became of no effect.

The respondents contend that the appellants waived

(1) P. 143. (2) P. 613.

this condition, and are stopped from setting it up. It is not, and cannot be, contended that the company, with knowledge of this further insurance waived the condition in respect to it, for previous to the loss it does not appear to have been called to their notice; in fact, the head office had neither notice verbal or written, nor actual cognizance of such further insurance.

But it is contended that the condition was waived by their agent, or inspector, or both, neither of whom, however, in my opinion, had any authority to dispense with the performance of this condition, if they really attempted or intended to do so, which is more than doubtful.

STRONG J.—The policy sued upon contains a reference to the conditions in the following terms:

This policy is made and accepted in reference to the conditions herein contained and hereto annexed, which are hereby declared to be part of this contract, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto in all cases not herein or otherwise specially provided for.

The sixth condition annexed to the policy is as follows:

VI.—Notices of all previous assurances upon property assured by this company shall be given to them, and endorsed on this policy, or otherwise acknowledged by this company in writing, at or before the time of their making assurance thereon, otherwise the policy subscribed by this company shall cease and be of no effect. And in case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not), notice thereof must also be given in writing at once, and such subsequent assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of further assurance this company shall be liable only for such ratable proportion of the loss or damage happening to the object assured as the amount assured by this company shall bear to the whole amount assured thereon, without reference to the dates of the different policies; and any general policy on different properties to be treated as a specific policy on each

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property for the whole amount thereby assured.

It is alleged in the declaration that, except as hereinafter mentioned, all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action.

Further, the declaration contains the following averment with reference to the 6th condition :

And as to the sixth condition contained in said policy, whereby it was provided that in case of subsequent assurance on any interest in property assured by defendant company notice thereof must be given in writing at once and such subsequent assurance endorsed on the policy granted by the company or otherwise acknowledged in writing, plaintiffs say that shortly after subsequent assurance was effected on said property, and before said loss, notice thereof was given verbally and in writing to the agent of defendant company, who accepted the same as a sufficient compliance with said condition on the part of the plaintiffs, it being the duty of the defendant company or its agent to endorse such subsequent assurance on the policy or otherwise to acknowledge it in writing, and which said company or its agent neglected to do.

The fifth plea is as follows :

5. And for a fifth plea to said amended declaration defendants say that no notice of any subsequent insurance was given their agent, nor was such notice accepted as sufficient compliance with said sixth condition as alleged, nor was it the duty of defendants to endorse such subsequent insurance on said policy, or otherwise to acknowledge it in writing, nor did defendants or their agent neglect so to do as alleged.

To this fifth plea the plaintiffs replied taking issue, and also as follows :—

2. As to 5th plea, that all subsequent insurances were known to defendants, and defendants accepted such knowledge as a sufficient compliance with 6th condition, and relieved plaintiffs from further compliance with condition.

Upon this replication issue was taken.

Pending this action the "Nova Scotia Judicature Act, 1884," was passed by the provincial legislature, and by the 10th sec. of that act it was made applicable

to proceedings in actions pending and which had not reached the stage of final judgment prior to the 1st of October, 1881. The cause came on for trial on the 8th of November, 1884. Consequently all equitable as well as legal questions, which were sufficiently raised by the pleadings, were open to the parties, and the court was bound, pursuant to the 12th sec. of the act in question, to administer equitable as well as legal relief in determining the issues raised upon the record.

The allegation as to compliance with the 6th condition contained in the declaration and which has already been stated, is clearly insufficient to show performance of this condition. The condition requires that notice shall be given to the company. It is not alleged, nor is it proved, that it was within the authority of the local agent to receive such a notice, and decided cases have determined that a condition of this kind requires that notice should be given to the company directly through its managing officers at its head office *Gale* v. *Lewis* (1); *Mason* v. *Hartford Ins. Co.* (2). Moreover, the terms of the condition show that beyond giving notice, the subsequent assurance must be indorsed on the policy or acknowledged in writing; the words are "in default whereof such policy shall thenceforth cease and be of no effect." It is neither pleaded nor proved that any notice was given to the company in the manner required, nor that the subsequent policy was endorsed or otherwise acknowledged in writing, which by the express stipulations of the policy was to be the only evidence of the appellants' consent to continue the risk after a subsequent policy had been effected *Noad* v. *The Provincial Ins. Co.* (3); *Chapman* v. *Lancashire Ins. Co.* (4).

(1) 9 Q. B. 730.
(2) 37 U. C. Q. B. 437.
(3) 18 U. C. (Q. B.) 584.
(4) 13 L. C. Jur. 36.

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The question as to the sufficiency of the respondent's answer to the defence raised upon this sixth condition is therefore reduced to one of waiver. It is not shewn that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction Moreover, the English case already quoted, which determines that the required notice is to be given to the company itself and not to the local agent, shows, *a fortiori*, that such an agent has in the absence of express authority no power to waive the condition Direct authority is, however, not wanting. In the case of *Shannon* v. *The Gore District Mutual Insurance Co.* (1) the facts were the same as in the present case, the subsequent assurance having been effected through the agent who also acted for the defendants in taking the original risk. It was contended that the successive insurances having been thus effected with the same person as the agent of the two companies, the company which granted the first policy had knowledge of the subsequent insurance, and were, therefore, estopped from setting up a condition vitiating the policy for want of written notice. But the Court of Appeal held otherwise, and determined that in such a case notice to the agent was not notice to the company, and that the agent neither had authority to waive the condition nor could by his conduct estop his principals the first insurers. As regards any direct action of the appellants through their immediate agents, the directors or principal officers of the company conducting its affairs at the head office, there is no pretence for saying that there is in the present case the slightest evidence of conduct upon which either a defence of waiver of the condition,

(1) 2 Ont. App. R. 396.

or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge; and without proof of such knowledge neither waiver nor estoppel can be made out.

If, therefore, the appellants have in any way disentitled themselves to set up the defence they insist upon, founded on the 6th condition, it can only be in consequence of what was done or agreed to by Mr. Corey, the adjuster, employed to ascertain the circumstances attending the loss and the amount for which the appellants were liable.

The observations already made with reference to a waiver by the company, that it could not be said to have waived an objection to its liability founded on a fact of which it had no knowledge, is also applicable to any contention of this kind founded on the mere fact of the appointment of Corey as an agent to ascertain the circumstances of the loss and a reference to him to adjust the proportion which the appellants were liable for. It is manifest that, upon the facts in evidence, no waiver can be implied from such an appointment and delegation. If, then, there was any waiver or estoppel binding the appellants, it can only be by reason of the acts of Corey within the scope of his authority. Corey was an average adjuster living at St. John, and came to Halifax for the special purpose of investigating this loss, and ascertaining the share which the several companies, whose policies covered the goods, were bound to contribute. It does not appear very clearly whether he was instructed directly from the principal office of the appellants or through Greer. The latter in his evidence says, he "had a telegram from defendant "company authorizing me to request Corey to adjust "the loss, and I requested him to do so." In cross-

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examination he says: "After a loss I notify the head "office and I get instructions from them what to do. "Generally they instruct Corey or Dodd to adjust for "them. I do not remember getting a telegram autho- "rizing me to get Corey." Corey himself does not state from whom he derived his instructions, nor what they precisely were.

I think, however, we may assume—and this is putting it perhaps more strongly against the appellants than the evidence warrants—that Corey was employed either directly by the appellants managing officers, or through Greer, in pursuance of express instructions from the head office; and that, consequently, whatever he did within the scope of his authority bound the appellants.

Then, what were his powers? We have no direct evidence of this. All that appears is that he was authorized to investigate and adjust the loss. By this I understand that it was his duty to ascertain the circumstances and amount of the loss, and either with or without the agreement of the adjuster for the other insurers to ascertain the proportion of it to which the defendants were liable It is manifest that this involved no actual authority to waive a condition by a breach of which the policy had been avoided long before the loss, and of which breach the appellants themselves, when they conferred authority on Corey to act for them, had no knowledge. Neither did it imply any such authority. As regards proofs of loss I should have no difficulty in holding that Corey had authority to waive them, for as the first step to be taken by him in investigating the loss would have been to call for the proofs he must have had, by implication, power to dispense with such proofs, or to accept such proofs short of those actually required by the conditions, as might seem to him sufficient. But as regards breaches of conditions which had vitiated the policy long before the

loss, these he could have had no more power to waive than he had to waive a defence *extra* the terms and conditions of the policy altogether, such as fraud in the inception of the contract or want of interest invalidating the policy *ab initio*.

In the case of *Mason* v. *Hartford Insurance Co.* (1) the court had to deal with this identical question, and they held that an agent with much wider authority than Corey had in the present case, viz, express authority to examine into the circumstances of the loss, adjust it and to settle it, or report to the office, had no authority to waive a condition respecting subsequent assurance in all respects similar to that now in question. The court, by Wilson J., say:

It was said at the trial the duties of the inspector are to examine into the circumstances, to adjust the loss and to settle, or report to the office. The description of the position which Mr. Marr, the inspector of the defendants, filled in their service, and of the duties that devolved upon him, and of the powers exercisable by him as such officer, does not necessarily give him the right to waive conditions favorable to the company unless the waiver relate distinctly to some matter in and over which he can exercise such power. It is said the inspector is to adjust the loss—that is, to examine the books of accounts and vouchers and to make all due enquiries of the insured and of his employees as to the value of the goods insured which have been destroyed or injured, to determine probably whether the goods claimed for come within the description of those insured, the extent of the loss sustained, how much is total and how much partial, the value to be set upon the different kinds of loss; and, generally, to do all such acts as will enable him to arrive at a fair estimate of the damage sustained. Now, suppose there was a condition on the policy that in adjusting the loss the insured should deliver to the inspector or agent of the company engaged in the adjustment an account or statement in writing of the various matters which the inspector should require him to furnish, and if he did not do so that the policy should be void. I should say without hesitation that if an adjustment were made by an agent without a statement in writing such as the condition required being furnished by the insured and without the agent requiring any such

(1) 37 U. C. Q. B. 437.

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statement because he was willing and content to do without it, that the adjustment so made—free from fraud or collusion of course - would be binding on the insurer because that would be an act within the line of duty, and powers, of such an agent to deal with. But when such a person assumes to dispense with conditions relating to the keeping of prohibited or highly hazardous goods or largely in excess of the allowable quantities, or to a misdescription of the mode of heating or the precautions required in case of steam being used, or with respect to chimneys or stove pipes, or the deposit of ashes in the proximity of dangerous places and the like, a different question is certainly presented. * * * * * * * * I am not satisfied that an inspector of an insurance company, or such an agent as Marr is described to be, has the right or power to waive or dispense with the condition in question relating to further insurance, or with any other condition than such as may fall clearly within the power of the agent's clear and acknowledged line of duty.

Although this case was not a binding authority either on the court below or on this court, yet the observations contained in the extract from the judgment just given so commend themselves to our consideration in the present case, alike by the force of the reasoning and by their exact applicability to the facts now before us, that they appear to me to be decisive of the question here raised as to the powers of Mr. Corey to waive this condition. It is further to be observed that the powers of the agent in the case just quoted from were much larger than those which were possessed by Corey, for in the Ontario case the agent had express power to "settle the loss."

But even if Corey had had authority to waive, it is plain, on the evidence, he never assumed to exercise it. All he did was to ascertain the circumstances attending the loss, and the amount which the appellants would have had to contribute to it in case they had been liable to pay; he did not assume to waive any rights of the appellants, and nothing of the kind could be implied from the investigation and valuation which he made or caused to be made. Indeed, so careful was Greer to guard against any such construc-

tion being put on what was done, that in the appointment of appraisers to value the damaged goods there was an express provision that the reference to the valuers should not affect the rights of the insurers as regards the conditions of the policies. The clause being as follows:—

It being understood that this appraisement is without reference to any other questions or matters of difference, if any, within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of or damage to such property covered by policies of said companies as may be found to have been saved in a damaged condition, and not in regard to any other matter whatever.

Nothing seems to have been done by Mr. Corey beyond making this appraisement and making an enquiry into the circumstances of the loss, and it is impossible to imply from these acts any intention on his part to waive the rights of the appellants to insist on a forfeiture under the 6th condition, even if he had had notice of the breach of condition, of which there was no evidence, and had had authority to waive the defence which the company had under its terms, in respect to which, also, there is an entire failure of proof.

I am of opinion that the appeal should be allowed and judgment in the court below entered for the appellants, with costs in both courts.

FOURNIER and TASCHEREAU JJ. concurred

HENRY J.—I think, also, that this appeal should be allowed. The condition in the policy is one which must be complied with or waived. The company, by signing a condition of that kind, reserves to itself the right to withdraw the policy in case of further insurance. That question is one which cannot be decided by a mere local agent. He may receive the notice for transmission, but he cannot act on it; it must be brought to the notice of some person authorized by the company

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to continue the insurance after notice has been given them. It has been decided in a number of cases in England that a local agent has not such authority, and a mere notice to him, even in a case where he is acting for another company taking the further risk, has been held to be no notice to the company.

But independent of all that, the condition requires that the consent should be signed on the back of the policy. So that, even if the company had consented verbally, and had not so signified its consent, it would not have been a compliance with the condition.

I think we must come to the conclusion that the agent had not power to waive the condition, and did not waive it.

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

Appeal allowed with costs.

Solicitors for appellants: *Henry & Weston.*

Solicitor for respondents: *Thomas Ritchie.*

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*May 19.
*June 22.

W. L'HEUREUX (PLAINTIFF)..... ..... APPELLANT;

AND

A. LAMARCHE, *et al.*, (DEFENDANTS)....RESPONDENTS.

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

Action en reddition de compte—Contradictory averments in plea—Effect of—Unsworn account.

In an action *en reddition de compte* by an assignor against his assignee to which the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, produced an unsworn account, asked the court to declare the same to be a true and faithful account of his administration; and prayed for the dismissal of the plaintiff's action:

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

Held, reversing the judgment of the Court of Queen's Bench dismissing the plaintiff's action, and restoring the judgment of the Court of Review, that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers and therefore his action had been improperly dismissed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing a judgment of the Court of Review and dismissing the plaintiff's action.

The appellant was a trader in the parish of Ste Geneviève de Batiscan, when, on the 23rd September, 1882, the respondents, who were his creditors, obtained an abandonment of all his property, and proceeded to the liquidation thereof. The appellant in June, 1883, sued the respondents claiming from them an account of their administration of his estate.

To this action the respondents demurred and also pleaded:

1. That the facts alleged in the plaintiff's declaration are false and insufficient in law;

2. That they should not have been sued personally but in their quality of trustees;

3. That they are not bound to render any account to the plaintiff but to his creditors only:

4. That by virtue of the deed of abandonment they became the absolute owners of appellant's property, and are not bound to account to him for it;

5. That the Superior Court, in the district of Three Rivers, has no jurisdiction over them;

6. That they have already accounted by their declarations, in a case C. C. No. 234, Guillet, plaintiff, L'Heureux, defendant, and Lamarche *et al.*, garnishees;

7. That the plaintiff's action is unfounded as well in fact as in law;

(1) 11 Q. L. R. 342.

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8. That without being bound to do so, they, in their quality of trustees (to wit: not under their present liability) set forth for the information of plaintiff, in lieu and stead of an account (here followed an account relative to their administration). And they concluded as follows: "that without admitting that they are bound to render any account to the plaintiff, the hereabove rendering of account be received, and the plaintiff's action dismissed with costs."

By his general answer to the plea to the merits, the appellant says: "That the facts, matters and things pleaded in the plea or exception (except the admissions therein contained) are all and each of them false, unfounded in fact and insufficient in law. Wherefore the plaintiff, persisting in the conclusions of his declaration, prays that the said plea or exception be dismissed with costs."

After the filing of that general answer the appellant inscribed the case for proof and final hearing upon the merits at the same time, the said appellant declaring by his said inscription that he had no evidence to produce.

The parties then proceeded to proof, the appellant cross-examining the respondent's witnesses without making any objection.

The appellant gave a consent and an admission at *enquête* to be used as evidence.

The Superior Court, sitting at Three Rivers, the sixteenth day of September, 1884, dismissed the respondents' demurrer, but maintained their exceptions and dismissed the appellant's action.

The case was then inscribed before the Court of Review at Quebec and that court reversed the judgment of the Superior Court.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reinstated.

Laflamme Q.C. for appellant.

According to law, the respondents' plea cannot certainly be considered as an account.

That plea can be summed up as follows: "The res-"pondents not being bound to account, for such and "such reasons, consent as a favor to give to the plain-"tiff certain informations, and they ask that such "informations be declared sufficient, and the plaintiff's "action dismissed with costs."

It is a denial of the plaintiff's right of action, and a refusal to render him an account.

How could a tribunal under such circumstances hold there was an account rendered, when the respondents themselves made no such pretention? See C. P. C. art. 522, 523. Ord. 1667, tit. 29. Pothier (1).

A defendant sued to render account cannot avoid the obligation to file an account duly sworn to, containing under separate heads the receipts, expenditure, etc., etc., by giving in lieu thereof some statements on his administration in a plea by which he prays that the plaintiff's action be dismissed.

Until now the jurisprudence has been always in conformity with the provisions of the law.

Les Curé et Marguillers v. *Robillard* (2); *Wood et al.* v. *Wilson* (3).

F. Langelier Q.C. for respondent.

The whole case depends upon the joint question whether under the circumstances in this case the accounts produced should have been sworn to. There had been no previous demand for an account and therefore no costs. If the plea is singularly worded the proper course for the appellant was to have the account set aside because it was not sworn, but as stated by Mr. Justice Tessier in the court below the appellant has

(1) Proc. Civ., 2 part, ch. 2 p. 98. (2) 21 L. C. J. 122.
(3) 26 L. C. J. 149.

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chosen to join issue on the pleadings and it is too late now to complain.

The learned counsel cited Dalloz, (1); Carré Proc. Civ. (2); Thomine Desmazures (C. P.) (3)

TASCHEREAU J. delivered the judgment of the court.—In 1882 the plaintiff, now appellant, assigned his estate to the defendants, present respondents, for the benefit of his creditors. By his present action he claims from the defendants an account of their administration of his estate. By their plea, the defendants first allege that they are not bound to account to the plaintiff, wherefore they ask the dismissal of the action.

2nd. They allege that they have already accounted to him before the institution of this action—and this as garnishees in a suit between one Guillet and the plaintiff—so therefore they pray for the dismissal of the action. 3rd. They plead the general issue. 4th. They produce a statement which they ask the court to declare to be a true and faithful account of their administration, and that the action be consequently dismissed.

To this extraordinary plea the plaintiffs' filed a general answer. The defendants produced evidence to establish their account.

The Superior Court dismissed the plaintiff's action, on the ground that the account produced was a true and faithful one. The *considerants* refer to the garnishment pleaded, but the *dispositif* clearly shows that the court was of opinion that the account therein given by the present defendants was not sufficient alone to entitle them to ask for the dismissal of the present action.

The Court of Review unanimously reversed that judgment on the ground that the issue to be first determined in the case is as to the right of the plaintiff

(1) 11 Vol. No. 44, pp. 531 & 534.

(2) 3 Vol. p. 667.

(3) Vol. 11, p. 20.

to ask for an account from the defendants, and that, till that point has been adjudicated upon, he, the plaintiff, is not bound to contest or admit the account filed with the plea.

The Court of Queen's Bench reversed the judgment of the Court of Review, and restored the first judgment by which the plaintiff's action had been dismissed. The plaintiff now appeals from that last judgment.

I am of opinion that the judgment of the Court of Review is the right one, and that the plaintiff's action was wrongly dismissed by the Superior Court.

The defendants first denied the plaintiff's right of action, and asked the dismissal of his action. The plaintiff joined issue with them on this point. Was it not the first one to be determined? The plaintiff says: "I am entitled to an answer." The defendants say: "No, you are not." Is this not a clear and distinct issue upon which the court must first pronounce? It seems to me that there can be no doubt on this point. Mr. Justice Casault, in the Court of Review, has gone so fully into the case that I can add nothing to it. I entirely concur in all that he says. I would confirm the judgment of the Court of Review in its entirety, thus allowing the appeal with costs against the respondents, costs in Queen's Bench to be also against present respondents, *distraction* of costs in all the courts to L. P. Guillet Esq., plaintiff and appellant's attorney; one-third of cost of printing cannot be taxed against respondent, in consequence of the unnecessary and useless paper printed.

Appeal allowed with costs.

Solicitor for appellant: *L. P. Guillet.*

Solicitor for respondents: *E. Gerin.*

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*Mar. 13, 15.
*June 22.

JANE WADSWORTH (DEFENDANT).....APPELLANT;

AND

F. A. McCORD, *et al.* (PLAINTIFFS).....RESPONDENTS.

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

Matrimonial domicile—Declaration in Act of Marriage—Civil status—Arts. 63, 65, 79, 80, 81, 83, *C. C. (P.Q.)*

In or about 1822, W., a native of Ireland, came to Canada and was employed as a shantyman on the Bonnechère, in the Province of Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was engaged to be married to one M. Q., the widow of one McM., in his life-time of Upper Canada. W. was married to the widow in the month of September and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up left his wife and daughter in the neighbourhood of Aylmer, in Lower Canada. In the winter he came down for her and brought her to his home on the Bonnechère and lived there for 10 or 12 years and acquired considerable wealth.

W. declared in the presence of the priest who performed the ceremony that he was a *journalier de la Province de Quebec*, and he was so described in the certificate of marriage.

M. Q. having died without a will, W. married again, and by his will left his property to his second wife, the appellant.

The respondents, by their action, claimed there was community of property between M. Q., their grandmother, and W. according to the laws of Lower Canada and demanded their share of it in right of heirships.

The appellant disputed this claim, contending there was no community.

Held, reversing the judgment of the court below, Fournier and Taschereau JJ. dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of this marriage.

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

Also, that the certificate *Acte de Mariage*, has only relation to residence in connection with matrimonial domicile, and, therefore, has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the judgment of the Superior Court in favor of the respondent.

The facts and pleadings are fully stated in the report of the case in the court below and in the judgment hereinafter given.

Laflamme Q.C. and *Fleming* Q.C. for appellants.

Barnard Q.C. *Creighton* and *Foran* for respondents.

The arguments relied on and cases cited are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—The appeal is from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, rendered on the 25th November last confirming the judgment rendered on the 13th day of May, 1884, by the Superior Court of Lower Canada, sitting at Aylmer, for the district of Ottawa. This latter judgment declared that James Wadsworth who married Margaret Quigley in the city of Quebec on the 23rd September, 1828, was domiciled in Quebec as stated in the marriage certificate, and that, in consequence, a community of property between himself and his wife resulted under the law of Lower Canada from the marriage, in the absence of a marriage contract to the contrary.

The law which settles questions of domicile which must determine this case is, I think, established beyond all question. In the first place, it cannot be disputed that the domicile of James Wadsworth, as distinguished from his residence at the time of his marriage, governs the rights of the parties, and I presume it will not be

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disputed that no man can be without a domicile. As to the distinction between domicile and residence, Lord Westbury, in *Bell* v. *Kennedy* (2), says:—

Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place.

Burge on colonial and foreign laws, (3):—

The place in which the marriage is celebrated may not be that of the domicile of either of the parties, before, or at the time of, or after the marriage. It may have been resorted to for no other purpose than that of celebrating the marriage, and they may have quitted it when the ceremony was performed.

It ought always to be remembered, that the question whether the status has been constituted by means of a legal marriage, is perfectly distinct from the consideration of the rights, powers and capacities, which the status confers. The enquiry whether the status has been constituted, is answered by the law of the country in which the marriage was contracted. If, by a marriage which according to that law is valid, the status is constituted the connection of the parties with the law of that country ceases, unless that place be the domicile of the husband; and then its law governs, not because the marriage was celebrated there, but because it is the country of the husband's domicile. The parties, if they do not by an express agreement on their marriage stipulate as to their future rights and capacities, are presumed to submit to them as they have been defined by some municipal law; and the law, which it is presumed they contemplate, is not that of a country in which they have no intention to reside, and to which, therefore, their status cannot be subject, but that of the country in which, as it is the place of their domicile, their rights and capacities are to be exercised.

Jurists, therefore, concur in selecting the law of the domicile

(1) 2 M. L. R. Q. B. 113. (2) 1 Sc. App. 307.
(3) Vol. 1, 244, Par. 2.

of the husband and wife, as that which determines the personal powers and capacities incident to their status, and not the law of the place in which the marriage was celebrated.

J. Voet, after laying down the rule that the wife's rights and capacities are those which are conferred by the law of her husband's domicile, however injurious they may be to her interests, treats of the effect of his change of their domicile.

Dicey on the law of domicile (1) says:

Where there is no marriage contract or settlement the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are determined by the law of the husband's actual domicile at the time of the marriage, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage.

And Mr. Westlake in his treatise on private international law (2) to effect of marriage on property, says:

Savigny begins by laying it down as the accepted principle "that the property of the spouse is to be regarded according to the domicile of the husband, not according to the place where the marriage was contracted."

It is equally clear that the domicile of an infant is, during infancy, the domicile of his father, which he retains on attaining majority until he changes it.—Dicey p. 7.

And again (3) Dicey says:

Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animus manendi*).

And in the case of *Bell* v. *Kennedy*, before referred to, the Lord Chancellor says:

The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made, by which the personal status of another domicile is acquired.

Per Lord Westbury:

The domicile of origin adheres until a new domicile is acquired.

And as the Lord Chancellor in the same case, says:

(1) At page 21. (2) At page 61, sec. 30.
(3) At page 9.

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Ritchie C.J.

The onus of proving the change of domicile is on the party who alleges it.

And Lord Chelmsford, in the case of *Morehouse* v. *Lord* (1) says:

Lord Chelmsford:

In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved. What was said by my noble and learned friend, Lord Wensleydale, in *Aikman* v. *Aikman* (2), lays down the rule upon this subject very clearly: "Every man's domicile of origin" (and this is to be considered as a domicile of origin resumed) "must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts that change."

In *Aikman* v. *Aikman* (3) Lord Wensleydale says:

Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts that change. This rule is laid down in the case of *Somerville* v. *Somerville* (4), and has been acted upon ever since.

In *Munro* v. *Munro* (5) the Lord Chancellor says:

Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the

(1) 10 H. L. Cas. 272.
(2) 3 MacQ. H. L. Cas. 877.
(3) 3 MacQ. H. L. Cas. 877.
(4) 5 Ves. 787.
(5) 7 C. & F. 876.

principle laid down by Lord Alvanley, in *Somerville* v. *Somerville* (1), and from which I see no reason for dissenting So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned and a domicile acquired but that again abandoned and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait; animo et facto;* that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larem rerumque ac fortunarum suarum summum;* in fact there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work, 1 Comm. Col & For Laws, 54, cites many authorities from the civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, not by residence alone, that domicile is acquired, but it must be residence with the intention that it should be permanent. In allegations depending upon intention difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

Munro v. *Munro* (2) Lord Brougham says :—

Now up to 1794 it is perfectly clear that the domicile was Scotch, and it appears to be agreed on all hands that the rules which Sir William Grant, then master of the rolls, extracted, as he said, from various decisions, the Annandale case, *Bruce* v. *Bruce*, and other cases, to all of which your lordships have been referred, were correct rules. The third of those rules which he extracted from decisions is very material in the present instance, and seems undeniable as the rule of the Scotch, as well as of the English courts; and I apprehend it is the rule universally that, where a domicile has been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the animus as well as the factum; there has been a desire and intention to change the domicile, as well as the fact of leaving that place of residence, in order to alter the former domicile and to acquire a new one.

Hodgson v. *DeBeauchesne* (3), The Right Hon. Dr.

(1) 5 Ves. 787. (2) 7 C. & F. 891.
(3) 12 Moore P. C. C. 328.

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Lushington says:—

In *Munro* v. *Munro* (1), Lord Cottenham said: "To effect this abandonment of the domicile of origion and substitute another in its place, it required *le concours de la volonté et du fait*; *animo et facto;* that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larum rerumque ac fortunarum suarum summum;* in fact, there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to refer intention. Mr. Burge (2), in his excellent work cites many authorities from the civilians to establish this proposition."

In *Collier* v. *Rivaz* (3), Sir Herbert Jenner Fust said: "Length of time will not alone do it; intention alone will not do; but the two taken together, do constitute a change of domicile."

In *Munro* v. *Douglas* (4), Sir John Leach observed: "A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*." It was clearly the opinion of that learned judge, that, to constitute domicile, intention and residence must concur. Denisart (5), quotes authority to the same effect, that neither the intention without the fact, nor the fact with the intention, can create a domicile.

Dicey (6) says:

D., a domiciled Englishman, leaves England with the intention of never returning there, and travels about the world without settling anywhere. He is domiciled in England.

In *Udny* v. *Udny* (7) the Lord Chancellor says:

It appears to me that sufficient weight was not given to the effect of the domicile of origin, and that there is a very substantial difference in principle between an original and an acquired domicile. I shall not add to the many ineffectual attempts to define domicile. But the domicile of origin is a matter wholly irrespective of any *animus* on the part of its subject. He acquires a certain *status civilis*, as one of your lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father. A change of that domicile can only be affected *animo et facto;* that is to say, by the choice of

(1) 7 C. & F. 877.
(2) 1 Comm. Col. & For. Laws, 54.
(3) 2 Curt. Ecc. Rep. 857.
(4) 5 Madd. 40.
(5) Tome 1 Title Domicile.
(6) At p. 60.
(7) I. Sc. App. 449.

another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends.

The Lord Chancellor (1):

I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent *exuere patriam*, or to become "a Frenchman instead of an Englishman," go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. * * *

Lord Westbury (2):

The law of England, and of almost all civilized countries, ascribes to each individual at his berth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile. and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another

(1) P. 452. (2) P. 457.

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domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is, for that purpose, relinquished, and remains in abeyance during the continuance of the domicll of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principle on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi*. can be inferred the fact of domicil is established.

In Mr. Justice Story's Conflict of Laws (the last edition) it is stated that "the moment the foreign domicile (that is the domicile of choice) is abandoned, the native domicile or domicile of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

Lord Colonsay (1):

I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicile of origin and domicile of choice.

Lord Chelmsford (2):

It is undoubted law that no one can be without a domicile.

Lord Chelmsford (3):

But in a competition between a domicile of origin and an alleged subsequently acquired domicile there may be circumstances to shew

(1) p. 461. (2) p. 453.
(3) p. 455.

that however long a residence may have continued no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile. As already shown, the domicile of origin remains till a new one is acquired *animo et facto.*

What will constitute a change of domicile has been frequently enunciated in the highest courts. Thus in *Lord* v. *Colvin* (1) the Vice Chancellor:

I would venture to suggest that the definition of an acquired domicile might stand thus: "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

I am disposed to think that the definition thus modified would be found to be in accordance with most, if not all, of the leading decisions on the subject of acquired domicile.

But whatever may be the most correct and proper terms in which to frame a definition of domicile, this at least is clear and beyond controversy, that to constitute an acquired domicile two things are requisite, act and intention, *factum et animus.* To use the language of an eminent jurist, to whose admirable writings I have before referred, "two things must concur to constitute domicile (of course he is speaking of acquired domicile); first, residence; and secondly, the intention of making it the home of the party." There must be the fact and the intent; for, as Pothier has truly observed, a person cannot establish a domicile in a place, except it be *animo et facto.*

Jopp v. *Wood* (2).

Marginal note.

(1) 4 Drew. 376. (2) 34 Beav. 88.

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A domiciled Scotchman went to India, where he was engaged in merchantile pursuits for nine years. Held, that this residence and occupation in India did not in the absence of any expression of intention change his domicile. Held, that the domicile of J S. at his death was Scotch, and that the domicile of his children, who were born in India and died infants there, was that of their father.

Sir J. Romilly, the Master of the Rolls:

It is quite settled that two things are necessary to constitute a change of domicile; first, the factum of the change of residence; and next, the *animus manendi.* In other words, in order to effect a change of domicile, the person must have settled in a residence out of his former domicile, whether it be the domicile of origin or an acquired domicile; and he must also have the intention of making that residence his permanent home.

On appeal, *Jopp* v. *Wood* (1), the Lord Justice Turner says:

But nothing is better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*, and although residence may be decisive as to the factum, it cannot when looked at with reference to the animus, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicile, although in some of the cases spoken of as "home," imports an abiding and permanent home, and not a mere temporary one The effect of residence or domicile is well explained by Dr. Lushington in his very able judgment in *Hodgson* v. *DeBeauchesne* (2), and I entirely agree in the opinion which is there expressed upon the subject.

In considering cases of this description it must be borne in mind that the acquisition of a new domicile involves an abandonment of the previous domicile; and in order, therefore, to effect the change, the animus of abandonment, or, as Lord Cranworth has strongly expressed it, the intention *exuere patriam*, must be shown.

Lord v. *Colvin*, February 14th, (3), Vice-Chancellor Kindersley's Court, domicile:

That place is properly the domicile of a person in which he has

(1) 4 DeG. J. & S. 621. (2) 12 Moo. P. C. C. 285.
(3) 5 Jur, N. S. 351.

voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home.

To constitute an acquired domicile two things must concur, residence, and the intention of making it the home of the party.

The two last cases on the subject that I saw were both decided in 1885 affirming the same principles.

In re Patience, Patience v. *Main* (1).

Marginal note:

P. was born in Scotland, in 1792. of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boardings houses in various places in England, dying in 1882, intestate and a bachelor, in a private hotel in London, leaving no real estate in England, and no property whatsoever, in Scotland. From the year 1810 till his death he never revisited Scotland, and for the last twenty-two years of his life never left the territorial limits of England.

Held.—That the domicile of the intestate at his death was Scotch.

The Lauderdale Peerage (2):

A change of domicile must be a change of residence *sine animo revertendi.* A temporary residence for the purposes of health, travel, or business does not change the domicile. Also (1) every presumption is to be made in favor of the original domicile; (2) no change can occur without an actual residence in a new place; and (3) no new domicile can be obtained without a clear intention of abandoning the old.

Page 739, Earl of Selborne:

The onus of proving a change of domicile, *animo et facto*, lies upon those who assert it.

Page 758, Lord Fitzgerald:

The extent to which the evidence must be carried to put an end to the domicile of origin is explained in clear terms in the Countess of Dalhousie's Case (3), and in *Munro* v. *Munro* (4), both of which were in this house, and reported in Clark and Finelly. It is not upon light evidence or upon a light presumption that we can act, but it must clearly appear by unmistakable evidence that the party

(1) 29 Ch. D. 976.
(2) 10 App. Cas. 693.
(3) 7 C. & F. 817.
(4) 7 C. & F. 842.

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who has a domicile of origin intends to part with it and intends to establish his domicile elsewhere.

I cannot discover that these principles are peculiar to the law of England; they are of universal application as principles of private international law, and so far as the Province of Quebec is concerned, there is nothing in the law of that province antagonistic to them. The code says, art. 79:

The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.

Art. 80:

Change of domicile is affected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.

Art. 81:

The proof of such intention results from the declarations of the person and from the circumstances of the case.

Art. 83:

* * * * The domicile of an unemancipated minor is with his father or mother or with his tutor.

I think, then, we may assume it to be established beyond all question:

First.—That no man can, at any time, be without a domicile.

Secondly.—That the domicile of the father is the domicile of the child during minority, and continues until changed, until a new domicile is acquired after majority.

Thirdly.—That the onus of proof of change of domicile is on the party alleging it.

Fourthly.—That domicile and residence are two distinct things, and that domicile must be ascertained to determine which of two municipal laws regulates the rights of the parties.

Fifthly.—That in order to lose a domicile of origin and acquire another, there must be a residence, and the intention of making the residence a permanent home and not a residence for a mere special or temporary

purpose; in other words, domicile imports an abiding and permanent home, and not a mere temporary one; there must be the *factum* of residence and the *animus manendi*.

Sixthly.—That the rights of the husband and wife are determined by the domicile of the husband at the time of the marriage, and not by the place where the marriage was contracted.

If this be so, then the plaintiff's claim must be founded on the contention that at the time of the marriage of James Wadsworth with Margaret Quigley, at Quebec, in the then Province of Lower Canada, he was domiciled in that province, and that by virtue of the laws thereof, in force at the time of the said marriage and still in force therein and by which the said marriage was governed, on the celebration of such marriage, there being no contract of marriage, the legal community of property was established which, on the death of Margaret Quigley, enured to the benefit of her children; and so that really the question in issue is, subject to the principles I have deduced from the cases, one of fact.

Wadsworth's history, not a very eventful one, shortly told is this. He was born of Irish parents, his father being a farmer resident and domiciled in the parish of Ematros, county of Monaghan, in Ireland. In 1822, at the age of 19 or 20, he emigrated; whether he came direct to Canada or not does not appear; if he did, which may be assumed, it is not shown in what part of Canada he landed. The first information we have of his whereabouts in Canada is from Mr. Mather, who saw him on the Bonnechere, in Upper Canada, now Ontario, in the year 1826, where he was lumbering in the employ of one McMullen. The market for the timber cut on the Bonnechere was at Quebec, to which place it was taken in rafts in the spring or summer season,

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on which rafts it is well known the raftsmen live during the progress to Quebec. Wadsworth was employed in taking rafts to Quebec, and when they were sold or disposed of, returning to the Bonnechere. His employer, McMullen, was killed in the year 1827; he had sent to Ireland for his wife, who came out to Quebec with her daughter in the spring of that year, where, on her arrival, she heard of the death of her husband, who had been killed a short time before She went from Quebec to Hull, and remained there for some months, when she determined to go back to Ireland, and for that purpose returned to Quebec on her way to Ireland. After the death of her husband the lumber business was carried on for the benefit of his partner Kelly, and his widow; in the spring of 1828 a raft in which Kelly and Mrs. McMullen were interested was brought to Quebec by Wadsworth. Mrs. McMullen, then in Quebec, boarded at Mulholland's, and for a portion of the time that Wadsworth was in Quebec on this occasion he appears to have boarded at the same house. While there Mrs. McMullen, instead of proceeding to Ireland, married Wadsworth on the third of September, 1828; immediately after Wadsworth left Quebec with his wife and returned to the Bonnechere, leaving his wife for a short time at Hull on their way up. Wadsworth in a few weeks returned to Hull for his wife and took her to the Bonnechere, where he purchased a property with a shanty on it, in which he and his wife from that time lived, until he subsequently built a house. He cleared land, farmed, lumbered, and dealt in furs with the Indians, and never again returned to Quebec with his family; nor did he himself visit Quebec for any other than the temporary purpose of taking down rafts and disposing of them there; he, with his wife and family, lived in the house on the Bonnechere, where his lumbering operations were car-

ried on; his children were born there, and one, if not two, died and were buried there; and he continued to reside there as his home for ten or twelve years, until he sold out his establishment to Mr. Egan and removed to the neighborhood of Hull, where he purchased a farm, as his sister, who was then married and settled there, says, to be near her, and subsequently left this neighborhood and resided in Ottawa several years, where his wife died. He married the defendant there, and afterwards moved, on the 9th of May, 1873, to Hull, where he resided until his death at that place.

There is no contradiction in the evidence in this case to which I will now refer. The facts are undisputed; the witnesses examined were the relatives Jane Wadsworth, sister of James Wadsworth, William Wadsworth, his brother, and Susan McMullen, daughter of his first wife by her husband McMullen and the intervenor in this case and others. (His Lordship here referred at length to the evidence of the different witnesses as establishing the facts above stated.)

How then is this apparently plain case met? Simply by the production of the marriage certificate of James Wadsworth and Margaret Quigley at the city of Quebec, in which certificate Wadsworth is described as, James Wadsworth, *journalier de cette ville.* It is as follows:

Extrait du Registre des baptêmes, marriages et sépultures de la paroisse de Notre Dame de Québec, pour l'anne mil huit cent vingt-huit:

"Le vingt-trois septembre mil huit cent vingt-huit, vu la dispense de deux bans de mariage accordée par Monseigneur Bernard Claude Panet, évêque de Québec, en date du vingt du présent mois, et la publication du troisième faite au prône de notre messe paroissale de dimanche dernier entre James Wadsworth, journalier de cette ville, fils majeur de William Wadsworth et de défunte Matilda McCabe, du comté de Monaghan en Irlande, d'une part; et Mary Quigley, veuve majeure de James McMullen, du township de Napean dans le Haut Canada, d'autre part; ne s'étant découvert aucun empêchement,

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nous, prêtre, vicaire de Québec soussigné, avons reçu leur mutuel consentement de mariage, en presence de Hugh Green et de James MacAnally, amis de l'époux. et de Rebecca Donaughy et de Catherine Dupel, amis de l'épouse, dont quelques uns avec les époux ont signé avec nous, les autres ayant déclaré ne le savoir faire.

Duly signed and certified.

Now, with all respect for those from whom I am constrained to differ, in my opinion this certificate has nothing whatever to do with the matter in controversy in this case, inasmuch as it has no connection with the question of domicile. Art. 63 says:

The marriage in solemnized at the place of the domicile of one or the other of the parties. If solemnized elsewhere the person officiating is obliged to ascertain and verify the identity of the parties. For the purposes of marriage domicile is established by a residence of six months in the same place.

But surely for no other purpose.

This certificate has only relation to residence in connection with matrimonial domicile, which latter domicile is established by a residence of six months, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties which is regulated by art. 6, which declares that:

The laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.

Which exception is:

But these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

Then, as these laws do not apply to persons domiciled out of Lower Canada, there is not, that I can discover, a jot or tittle of evidence to show that Wadsworth was ever in the city of Quebec with any other than a mere temporary purpose; when in the employ of others taking their rafts to market, when lumbering for himself taking his rafts to market for sale; living either on the raft or in a boarding house, and return-

ing, when his business was transacted, to the Bonnechere, where the lumbering operations in which he was engaged, either for others or for himself, were carried on, and to which locality, immediately after his marriage, or so soon as conveniently could be, he carried his wife and made it, for the time being, the permanent and fixed place of residence of himself and family, and the chief place where the operations of his business were carried on, and never voluntarily fixed the habitation of himself and family in the Province of Quebec.

There seems to me to be everything wanting in this case to establish a Lower Canadian domicile; that his domicile of origin was in Ireland is beyond question; the evidence shows that his visits to Quebec and temporary sojourn there were for a mere special and temporary purpose; that he was never there with the present intention of making it his permanent home; that his stay in Quebec did not an abiding and permanent home but a mere temporary one, nor had he any actual residence there with the intention of making it the seat of his principal establishment, but his principal establishment was always out of Quebec; that there was neither the *factum* of residence in Quebec, nor the *animus manendi*; and therefore there is no pretence for saying that he had changed his domicile of origin and acquired a domicile of choice in Quebec.

The real question in this case is not whether the domicile of James Wadsworth was in Ireland or in Upper Canada; what the plaintiffs have to establish to enable them to recover is, that James Wadsworth's domicile at the time of his marriage was in the province of Quebec. Having failed to establish this, but, on the contrary, it being clearly established, as I think it was, that his domicile was out of the province of Quebec,

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the plaintiffs have failed to establish the community claimed.

FOURNIER J.—Les Intimés réclament la succession de leur aïeule, Margaret Quigley, mariée deux fois, la première à James McMullen ou Mullen, et la deuxième à James Wadsworth. Ce dernier mariage a eu lieu à Québec, le 23 septembre 1828, sans contrat de mariage et aurait d'après les Intimés, établi une communauté de biens entre les conjoints. Les demandeurs intimés sont les enfants du second mariage et l'intervenante aussi intimée est issue du premier. Ils réclament la moitié des biens laissés par James Wadsworth comme ayant été commun en biens avec leur mère Margaret Quigley.

Cette demande a été rencontrée par une défense au fonds en fait et une défense en droit. Puis une exception péremptoire alléguant qu'avant et après son mariage avec Margaret Quigley, James Wadsworth résidait à Eganville, dans la province d'Ontario où il faisait des affaires et possédait des propriétés immobilières avant son mariage et diverses limites à bois qu'il tenait de la couronne ; qu'il n'avait jamais eu de domicile dans le Bas-Canada du vivant de Margaret Quigley et qu'il n'y avait point fait affaires et n'y avait pas acquis de propriétés immobilières à l'exception d'une seule à Aylmer. Dans un deuxième plaidoyer répétant le premier, l'appelante allègue que c'est par erreur que James Wadsworth a été désigné dans son acte de mariage, comme de la cité de Québec ; qu'il n'y résidait que temporairement, son domicile étant alors à Eganville, dans le Haut-Canada, où il est retourné de suite après son mariage. Par un troisième plaidoyer il est allégué que son domicile était encore en Irlande d'où il avait émigré.

Le sort de cette cause dépend uniquement de la déci-

sion de la question de savoir où était le domicile de James Wadsworth lors de son mariage à Québec, le 23 septembre 1828. S'il était réellement à Québec, comme le comporte son acte de mariage, il s'en suit d'après la loi de cette province qu'il y aurait eu communauté de biens entre James Wadsworth et Margaret Quigley et que les Intimés comme héritiers de cette dernière seraient bien fondés à réclamer leurs parts dans cette communauté. Au contraire, s'il était alors domicilié à Eganville (ou Bonnechère) dans le Haut-Canada, la loi de cette province n'admettant pas la communauté de biens entre époux, la demande des Intimés doit être rejetée. Il en serait de même s'il n'avait acquis un domicile ni à Québec, ni à Eganville et qu'il eût conservé son domicile d'origine en Irlande, car la loi de ce pays n'admet pas non plus la communauté de biens entre les conjoints.

Il paraît que la succession est assez considérable ; de là l'importance de la question de domicile.

La preuve assez contradictoire qui a été produite par les parties fait de cette cause un exemple de plus des difficultés que présente très souvent la décision des questions de domicile, surtout lorsqu'il s'agit d'en assigner un à des personnes qui ont fréquemment changé de résidences. Mais ces difficultés ne proviennent pas de l'obscurité du droit à cet égard, car, au contraire les principes qui règlent cette matière sont clairement énoncés dans le code civil qui n'a pas dérogé à cet égard à l'ancien droit français. Après avoir lu la revue si savante et si complète que l'honorable juge en chef a faite des décisi ns des tribunaux anglais sur les questions de domicile, on voit que les principes généraux dans la jurisprudence anglaise sont, à peu de chose près, les mêmes que ceux du droit français. La raison en est que dans l'un, comme dans l'autre droit, les principes sont tirés du droit romain La principale différence que j'y trouve et dont je parlerai plus loin, consiste

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dans les règles de la preuve suivie en France et dans notre droit, règles qui restreignent plus la preuve testimoniale que celles qui sont suivies dans les tribunaux d'Angleterre. C'est principalement pour cette raison, et non pour différence d'opinions sur les principes généraux du droit au sujet du domicile que j'en suis arrivé à une conclusion différente de celle de l'honorable juge en chef.

James Wadsworth qui émigra d'Irlande en 1822, n'était qu'un journalier au service d'un marchand de bois d'abord du nom de Mullen ou McMullen qui, à cette époque, manufacturait du bois l'hiver sur la rivière Bonnechère, dans Ontario, et le transportait en été au marché de Québec. C'est à ce travail que Wadsworth fut employé jusquà la mort de McMullen et jusqu'à ce qu'il pût faire des affaires pour son propre compte. Il continua pendant plusieurs années ce commerce, passant l'hiver dans la forêt à la préparation de son bois qu'il descendait ensuite au marché de Québec, où il résidait jusqu'à ce qu'il en eût disposé et obtenu de nouvelles avances pour recommencer ses opérations pour une autre année.

McMullen qui avait laissé en Irlande sa femme, Margaret Quigley, et sa fille Susan Mullen, l'intervenante, les ayant fait demander de venir le rejoindre au Canada, celles-ci arrivèrent à Québec en 1827 où elles apprirent la mort de Mullen avant d'avoir pu le rencontrer.

Après une année de résidence à Hull chez Benedict, la veuve de Mullen se rendit à Québec dans le but d'y prendre un passage pour retourner en Irlande ; mais ayant fait la rencontre de Wadsworth qui s'y trouvait pour affaire de commerce de bois, un mariage fut arrêté entre eux, et célébré en face de l'église catholique romaine, à Québec, le 23 septembre 1828. Après un court séjour dans cette ville, ils se rendirent chez Bene-

dict, à Hull, dans la province de Québec, où Margaret Quigley avait demeuré depuis son arrivée en Canada.

Les circonstances qui précédèrent ou suivirent ce mariage sont rapportées comme suit par Susan Mullen :

Mr. Wadsworth boarded in the same house with us (himself and Margaret Quigley, her mother), but when he came there, or how long he was there before the marriage, I cannot say. I cannot say if he was there a fortnight before the wedding. I think he was. We boarded at Mulholland's. Mr. Wadsworth came to Quebec on a raft of timber. We remained at olland's after the marriage until we left Quebec.

After the marriage and some time in October, Mr. Wadsworth, my mother and I came up to Hull where we stayed at George King's. Mr. Wadsworth left for the woods after settling us at King's. He went up before the ice took. My mother and I remained at King's until Mr. Wadsworth returned in January eighteen hundred and twenty-nine, when he took my mother up the Bonnechère and took me to Mr. Fulford's, in Hull.

Avant son mariage, il est difficile de dire que Wadsworth, qui ne résidait que temporairement en hiver dans la forêt pour y faire du bois, en été sur les radeaux qu'il conduisait à Québec, où il séjournait jusqu'à ce qu'il en eût disposé, et ensuite à Hull jusqu'au moment de repartir pour la forêt, ait eu un domicile dans une de ces localités plus que dans l'autre. Il n'y a pas de preuve qu'il ait fait à cette époque aucune déclaration montrant son intention de se fixer permanemment plutôt dans l'une que dans l'autre. La double condition de résidence de fait et la preuve d'intention de résider permanemment ne se rencontrant pas, Wadsworth n'y avait donc pas acquis encore un nouveau domicile.

L'Appelante a allégué dans ses plaidoyers qu'il possédait des immeubles à Bonnechère avant son mariage ; mais cette allégation n'est aucunement prouvée. Il n'est pas même certain qu'il y faisait alors des affaires pour son propre compte, car les témoins ne peuvent dire si les radeaux qu'il descendit à Québec en 1828,

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année de son mariage, était pour son propre compte ou celui de Kelly, l'associé de Mullen qui avait continué avec la veuve de celui-ci les affaires de leur société jusqu'au moment où elle se préparait à retourner en Irlande. Wadsworth, lors de son mariage, ne possédait aucune propriété à Bonnechère et n'y avait point de domicile. Il avait résidé autant à Québec qu'à Bonnechère, et s'il est difficile de dire que son domicile fut plutôt dans le Haut que dans le Bas-Canada, il n'est pas douteux cependant que par la déclaration qu'il fit de son domicile à Québec, dans son acte de mariage, il ait renoncé au domicile qu'on aurait pu lui attribuer en Irlande.

Mather, l'un des principaux témoins sur lesquels l'Appelante s'appuie pour prouver le domicile de Wadsworth à Bonnechère, donne un témoignage assez vague et qui se réduit à dire que lorsqu'il a connu Wadsworth, celui-ci vivait et faisait du bois dans le voisinage de la rivière Bonnechère, maintenant Eganville, Ontario. Il ne l'a pas vu à cet endroit, mais il l'a vu monter et descendre l'Ottawa pour aller à ses affaires et descendre des radeaux dans le printemps. Il ne sait pas si c'est la première année qu'il a fait sa connaissance, et Wadsworth faisait alors du bois pour lui-même, mais la deuxième année qu'il dit être celle de son mariage, il descendait un radeau, que lui Mather pensait appartenir à Wadsworth, mais il ne peut dire positivement si c'était à lui ou s'il n'en était que le conducteur (foreman). Il ajoute qu'il a compris de Wadsworth, que, avant et après son mariage, sa résidence (his home) était alors à Bonnechère. Lorsqu'il venait pour ses affaires à Hull, il se retirait soit chez Fulford soit chez Benedict, ou à l'hôtel Columbian. A cette époque, il n'y avait pas d'hôtel à Ottawa. Lorsqu'il venait de Québec il se retirait à Hull dans quelque maison de pension jusqu'à ce qu'il eut fait ses approvisionnements pour ses travaux d'hiver. Il ne

peut dire combien de temps il restait chaque fois à Hull, —il n'y restait que le temps nécessaire pour ses affaires —ne peut dire si c'était trois ou quatre semaines ou non. Quelques fois les approvisionnements pouvaient être expédiés par eau, d'autres fois il fallait attendre la glace. C'était dans le printemps de l'année de son mariage qu'il descendit un radeau comme je l'ai déjà dit. Il revint durant l'été ou l'automne de la même année avec sa femme. Peu de temps après il laissa l'hôtel de Benedict ou de Fulford, ne peut dire lequel, où il avait resté avec sa femme et se rendit à Bonnechère. Il pense que Wadsworth la laissa pour quelque temps et vint ensuite la chercher. Ce n'était pas plusieurs mois après, à ce qu'il pense,—ce n'était pas longtemps après. Wadsworth vécut sur la rivière Bonnechère jusqu'à ce qu'il vint exploiter une ferme qu'il avait achetée à Hull. Il continua son commerce et allait encore parfois dans la forêt. Il faisait des affaires pour lui-même et était supporté par M. Egan. Il a continué d'aller à Québec avec son bois après s'être fixé à Hull.

John Coyne ou Quyne, un des témoins les plus âgés, dit qu'il a connu Wadsworth avant son mariage, qu'il faisait alors du bois sur la rivière Bonnechère; l'a vu à Québec l'année de son mariage ; ne peut dire combien de temps il y est demeuré soit avant soit après son mariage; n'a pas vu sa femme à Québec, mais a entendu dire qu'elle y était. Après avoir laissé Québec, il retourna à Bonnechère. Il faisait un peu de bois à cette époque ; il croit qu'après avoir quitté Québec, Wadsworth laissa sa femme à Aylmer pour quelques jours. Dans le printemps de cette année, Coyne était absent de chez lui. Il laissa Québec pour Bonnechère avec sa femme peu de temps après son mariage..... Il pense que l'intention de Wadsworth lorsqu'il est parti pour Québec avant son mariage était de retourner à Bonnechère après son mariage. Ne se souvient d'aucune circonstance qui puisse

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faire voir qu'il avait l'intention de venir à Québec. Il commença à bâtir une maison à Bonnechère aussitôt après son retour de Québec avec sa femme. Ils ont vécu là jusqu'à ce qu'ils soient venus à Hull; ne sait pendant combien d'années; quelques-uns de leurs enfants y sont nés. Il faisait le commerce de bois et aussi la traite avec les sauvages. Il avait amassé quelque bien après son mariage, dans le township de Grattan et ses environs, mais il ne dit pas où cette localité est située. Il dit que Wadsworth pouvait parler un peu le français. Sa réponse à la question suivante qualifie la carrière de Wadsworth avant son mariage—tout en contredisant ce qu'il a dit de sa résidence à Bonnechère avant le mariage :—

Q. Had Wadsworth any definite place of abode before his marriage or was he like other shantymen in that respect, living in the woods during the winter season, on the river in the early summer, at Quebec after the arrival and until the sale of the timber there, and at or near Hull until it was time to renew winter operations? R. He was like any other shantyman before he was married, but was mostly on the Bonnechère.

Il avoue qu'il n'est pas en état de dire si Wadsworth a résidé à Hull avant et après son mariage. Avant il vivait avec ses hommes dans son chantier, en hiver, et sur ses radeaux, lorsque le bois descendait à Québec. Lorsque ce témoin a rencontré Wadsworth, avant son mariage, il faisait du bois à son propre compte. Il n'avait aucun titre de propriété près d'Eganville, car les terres n'étaient pas même arpentées. Ne peut dire si, en laissant Bonnechère avant son mariage, Wadsworth pensait à se marier. Il vivait la plupart du temps à son chantier et, au meilleur de ma connsissance, Wadsworth n'a jamais vécu dans Hull.

Susan Turner, Mde McMullin, donne une déposition presque semblable à celle de Coyne ; mais quel poids peut avoir son témoignage quand elle parle de faits qui se sont passés lorsqu'elle n'avait encore que six ans. Ce

témoignage n'est qu'une répétition de choses qu'elle a entendu dire, et non pas de faits qui se sont passés à sa connaissance. Elle admet n'être pas allée à Québec en 1828, bien qu'elle pense que Wadsworth pensionnait à Québec. Elle ne peut dire combien de temps avant son mariage elle a connu Wadsworth. Mais cependant elle pense que lorsqu'il a laissé Bonnechère en 182- il avait décidément l'intention d'y revenir pour en faire sa demeure Elle dit qu'il n'a commencé les affaires qu'en 1830, et s'accorde à dire avec Coyne qu'il n'avait pas et ne pouvait avoir de titre de propriété à Bonnechère, et qu'il n'y avait même pas de limites à bois dans ce temps-là, mais elle a entendu dire qu'avant son mariage il vivait avec ses hommes dans son chantier. Elle dit que Wadsworth n'a résidé à Hull que peu de temps après son mariage, et jusqu'à ce qu'il eût acheté une propriété. C'est à la charpente d'une maison à peine commencée que Wadsworth avait achetée d'un nommé Boulanger qu'elle fait allusion.

En appréciant ces témoignages d'après les règles tracées par le Code civil qui, sous ce rapport, n'a pas dérogé non plus à l'ancien droit français, il faut en rejeter une partie importante comme illégale.

Après avoir défini le domicile par l'article 79, et déclaré par l'article 80 que le changement s'en opère par le fait d'une habitation réelle dans un autre lieu, joint à l'intention d'y fixer son principal établissement, le code déclare dans l'article 81 que "la preuve de l'intention résulte des déclarations de la personne et des circonstances." L'intention de fixer son domicile d'une manière permanente peut donc être prouvée de deux manières, premièrement par des déclarations; deuxièmement, par les circonstances d'où résultent cette intention ; mais pour constituer le domicile il faut la réunion des deux éléments de l'habitation de fait dans un certain endroit, jointe à l'intention d'en faire sa résidence

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permanente.

Notre code n'a pas comme l'article 104 du code Napoléon indiqué la manière ni l'endroit où doivent se faire les déclarations d'intention, mais il n'en est pas moins certain qu'elles doivent être faites par écrit pour être reçues en preuve. En admettre la preuve testimoniale ce serait violer l'article 1223. Les déclarations dont il est question dans cet article ne sont évidemment autres que celles faites incidemment dans des actes judiciaires et extra-judiciaires, dans des actes de l'état civil, dans des actes notariés et même des actes sous seing privé. La pratique en France, dit Phillimore, Domicile (1), est de faire preuve des déclarations de domicile par la production d'actes. On peut s'assurer de la vérité de cette assertion en référant aux arrêts rendus sur des question de domicile en France; ces déclarations sont toujours prouvées par des actes écrits émanant de la partie dont il s'agit de déterminer le domicile, ou contredites par d'autres déclarations en sens contraires. Aussi dans aucun des rapports ne trouve-t-on d'allusions à la preuve testimoniale de déclarations de domicile.

En conséquence, la partie du témoignage qui se rapporte à des conversations avec Wadsworth par lesquelles on prétend prouver des déclarations de domicile à Bonnechère doivent être rejetées. D'après les autorités suivantes, on ne peut prendre de ces témoignages que la partie concernant le fait pur et simple de la résidence sans aucune qualification, soit par les paroles mêmes de Wadsworth, soit par ce que les témoins disent avoir compris de lui au sujet de sa résidence.

Laurent (2).

No 431. Les faits ne se présentent pas toujours dans la simplicité que la théorie suppose. Il arrive souvent qu'un seul et même fait comprend des éléments complexes, l'un matériel, l'autre juridique. Dans ce cas, on ne peut pas procéder d'une manière absolue et dire

(1) P. 131. (2) 19 vol. No. 431.

que la preuve testimoniale est admissible à raison du fait matériel à prouver ou qu'elle n'est pas admissible à raison du fait juridique qu'il s'agit d'établir. Les divers éléments d'un fait ne forment pas un tout indivisible ; il faut donc les séparer, en appliquant à chacun les principes qui régissent les faits selon qu'ils sont juridiques ou purs et simples, c'est-à-dire à prouver par témoins l'élément matériel du fait et prouver par écrit, dans le sens de l'art. 1341, l'élément juridique.

L'autorité suivante de Dalloz contient la même doctrine (1).

Mais si le fait pur et simple dont on demande à faire la preuve se rattache à un fait juridique qui détermine la nature et l'étendue du droit réclamé, ce fait juridique ne peut être prouvé par témoins. Ainsi, celui qui prétend posséder à titre de propriétaire, ou posséder pour autrui à titre de fermier, peut bien à l'aide de la preuve testimoniale, établir les faits matériels de sa possession ; mais il ne peut invoquer ce moyen de preuve pour déterminer le caractère juridique de cette possession.

La dernière partie de cette autorité est d'autant plus applicable, que comme le fait remarquer Duranton (2), l'on compare le domicile avec la *possession* avec laquelle il a en effet quelque rapport ; il se conserve comme elle par la seule intention Il résulte de ces autorités que l'Appelante pouvait bien prouver les faits matériels de résidence par la preuve testimoniale, mais elle ne pouvait avoir recours à cette preuve pour déterminer le caractère juridique de cette résidence dont la conséquence, en complétant la preuve du domicile, serait de détruire l'existence du contrat de communauté allégué par les Intimés. Le fait pur et simple de résidence pouvait donc être prouvé par témoins, les déclarations de Wadsworth, rapportées par ces témoins ne pouvaient pas l'être. Quant à ces déclarations, l'Appelante devait en faire la preuve régulièrement soit en se procurant un commencement de preuve par écrit, soit en produisant des déclarations suivant l'art. 81.

L'on comprend facilement l'importance de la ques-

(1) P. 126, No 50, 2 vol. Dalloz, (2) 1 Dur. p. 293.
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tion d'admissibilité de la preuve dans ce cas. Si elle était reçue contrairement aux dispositions de la loi le domicile de Wadsworth se trouverait établi à Bonnechère et la conséquence inévitable serait d'enlever aux Intimés l'héritage de leur mère pour le faire passer en mains étrangères. On voit de suite la nécessité de s'en tenir à la rigueur des principes de notre droit et de ne pas aller chercher ailleurs des règles différentes qui pourraient conduire à un résultat aussi désastreux

Il faut donc en vertu des autorités citées plus haut rejeter comme illégales les parties ci-après citées des témoignages ; ainsi que toutes les autres qui sont en contradiction avec le principe qui y est développé. Je ne citerai que les extraits suivants comme exemple des parties de témoignages qui doivent être rejetées.

Mather :—

I understood from himself, both before and after his marriage, that his home—to wit, the home of the late *James Wadsworth*—was on the Bonnechère until he moved on to a farm in the township of Hull, near the line of Eardley.

As near as I can remember, the first time I was in Eganville was in the year eighteen hundred and twenty-five.

Q.—Have you a certain recollection of Mr. Wadsworth's whereabouts prior to eighteen hundred and twenty-nine ?

A.—I am sure, as far as he told me, that he made the Bonnechère his home when I first knew him.

John McMullen :—

I understood from him that he had been living there with his wife from the winter of eighteen hundred and twenty-eight. About the year fifty-four (1854) (they had returned to Hull in 1836) the late Mrs. Wadsworth got me to show her the foundation of the old house, and she then said her husband came there to live after her marriage.

John Wadsworth :—

I understood, both from James and from his first wife, that they came to the Bonnechere on the first sleighing after their marriage.

William Wadsworth :—

If I remember right my brother told me that it was during the winter previous to my arrival in the country that Mr. Wadsworth

went up the Bonnechere to live.

John Coyne et S. McMullen :—

24. Do you know whether when he left for Quebec before his marriage he intended to return to the place he had been at before ? —A. J. Q. J. W's intention was, I think, to return to the Bonnechere after his marriage. S. McM. Most decidedly he came back to make it his home.

25. What circumstances do you remember showing that the said J. Wadsworth intended to return from Quebec ? A. J. Q. I do not remember. S. McMullen, I don't know except to lumber.

Il en est autrement pour la preuve de la résidence ; comme elle est un fait matériel, elle peut se prouver par témoins ; mais s'il s'y mêle un autre élément, comme par exemple dans le cas actuel, les déclarations ci-haut citées—ces déclarations qui ne sont pas des faits matériels, ne peuvent être prouvées par témoins, d'après les autorités ci-dessus citées.

Le témoignage de l'Appelante ainsi dégagé de sa partie illégale se réduit à établir le fait pur et simple de résidence à Bonnechère, sans aucune preuve légale d'intention de la part de Wadsworth d'en faire sa résidence. Il n'y a pas non plus de preuve légale qu'il ait été propriétaire d'immeubles à cet endroit ; et il est de fait qu'il n'a jamais eu de titres de propriété—car ce fait ne pouvait être légalement établi que par la production d'un titre, et il n'en a été produit aucun. Bien que la preuve du fait pur et simple d'occupation pût être faite par témoins, celle de l'existence d'un titre, duquel on voulait tirer une conséquence légale importante, comme celle de la preuve de l'intention, ne pouvait l'être que par la production du titre lui-même. Lorsque Wadsworth, comme le disent certains témoins, a vendu, à Egan, la propriété qu'il avait défrichée, il ne pouvait alors céder que les améliorations qu'il avait faites sur un sol qui ne lui appartenait pas. S'il y a un acte de cette vente, ce qui n'est pas prouvé, cet acte n'a pas été produit, sans doute parce que cette vente aurait

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détruit toute présomption de propriété chez Wadsworth en faisant voir qu'il n'avait vendu que ses améliorations et non le sol. Les lois alors en force dans le Haut-Canada ne permettait pas d'occuper les terres publiques sans une autorisation à cet effet. Son ocupation était conséquemment illégale C'est un principe consacré par une décision de la Cour du Banc de la Reine que " La simple occupation ou possession naturelle, comme celle d'un *squatter*, sans aucun titre quelconque, ne suppose aucun droit de propriété (1). Cette occupation sans titre démontre au contraire le fait que la résidence n'était que temporaire, puisqu'elle ne dépendait que de la volonté non de Wadsworth, mais de celle du propriétaire du sol qui pouvait l'en expulser à volonté. Une telle occupation étant absolument incompatible avec l'intention d'une résidence permanente, elle ne peut jamais servir à établir l'existence d'un domicile.

L'existence du titre même ne suffirait pas pour établir la preuve de l'intention, mais ce serait une circonstance qui pourrait la faire présumer, mais cette circonstance n'est pas prouvée légalement. C'est en s'appuyant sur une preuve illégale de déclarations d'intention de Wadsworth--et aussi sur une preuve illégale d'acquisition et de possession de propriétés que quelques-uns des juges se sont appuyés pour en conclure que Wadsworth avait son domicile à Bonnechère. Tandis qu'en faisant abstraction de cette preuve illégale, il est évident qu'il n'est pas plus prouvé que Wadsworth avait un domicile à Bonnechère lorsqu'il s'est marié, qu'il n'est prouvé que lors de son mariage il avait l'intention d'y retourner pour y fixer sa demeure.

C'est un principe incontestable que pour établir un domicile il faut le concours du fait et de l'intention, la résidence seule ne suffit pas. Où est la preuve qu'en

(1) Voir *Stuart v. Ives* vol. 1 L. C. R., p. 193.

se rendant à Bonnechère avec sa femme, Wadsworth avait alors l'intention de s'y établir d'une manière permanente? Il n'a jamais fait de déclaration d'une telle intention. L'art. 81 du code civil déclare que la preuve de l'intention résulte de la déclaration de la personne et des circonstances. La preuve des déclarations de Wadsworth fait complètement défaut et elle est essentielle pour la constitution d'un domicile. La résidence sans la preuve d'intention de s'établir d'une manière permanente ne suffit pas, le concours des deux est essentiel.

La résidence à Bonnechère, non accompagnée de preuves de la déclaration d'intention d'y demeurer permanemment, n'a pu constituer un domicile légal. Les observations de l'honorable juge Monck, résumant les principaux faits de la vie de Wadsworth, démontrent avec tant de force que son domicile était dans le Bas-Canada, que je me fais un devoir d'en donner un assez long extrait :

The legal presumption is that a man who, as a squatter, resides in the woods, on a lot which has not even been surveyed, and in connection with his lumbering operations, whether for seven years, as in this case, or for any number of years, for that matter, has no permanent settlement in view; and when it is considered that after these seven years Wadsworth bought a farm in Hull and settled there; when it is further borne in mind that it was in Hull that he had left his wife after his marriage; that it was in Hull that when his wife joined him in the winter following to share his shanty in the woods, he left his step-daughter to be educated; that it was in Hull that he caused his children who died while he was in the woods to be buried; that it was in Hull that he sent his children to school; and that it was in Hull that he must have transacted any business which as a member of a civilised community he might have had to transact, the conclusion is irresistible that his real domicile after his marriage was in Hull, in Lower Canada, and not on the Bonnechère River in Ontario.

Au soutien de cette conclusion, il y a la preuve la plus forte et la plus complète que l'on puisse faire de l'intention de l'établir dans cette province par la décla-

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ration contenue dans l'acte de mariage au sujet duquel l'honorable juge Tessier a fait les remarques suivantes que j'approuve complètement :—

Il n'y a pas, dit-il d'acte plus solennel que l'acte enregistré de la célébration du mariage en présence de plusieurs témoins. C'est par-là que les époux manifestent leur intention quant à l'existence de leur domicile et au régime des lois qu'ils adoptent concernant le mariage pour eux et leurs enfants à venir. Cela lie la femme, qui n'a pas d'autre domicile que celui du mari. (C.C. art. 83.)

J'avoue qu'il est difficile de fixer le domicile de gens qui n'ont pas encore de résidence permanente, mais il faut choisir entre Québec, Hull et la forêt de Bonnechère. Si vous dites que Bonnechère était à l'époque de leur mariage leur domicile matrimonial, *de facto et de animo,* où est la preuve de cette intention : tout montre le contraire, ils signent un acte solennel pour déclarer leur domicile à Québec : où est l'allégation ou la preuve de l'erreur ?

En vertu de l'article 65 de notre code, reproduisant la loi ancienne le fonctionnaire est tenu de constater et indiquer le domicile des époux. Il l'a fait. *Omnia præsumuntur rite et solemniter acta, donec probetur in contrarium.*

Je réfère aussi, sans les citer, aux raisons données par l'honorable juge Monk pour démontrer la force probante de l'acte de mariage d'après la loi de la province de Québec.

Pour diminuer l'effet de la preuve irréfutable de l'existence du domicile de Wadsworth à Québec, résultant de l'acte de mariage, on invoque la raison que le domicile du mariage est différent du domicile réel et on concède que Wadsworth pouvait y avoir un domicile suffisant pour y contracter mariage, puisque la validité de celui qu'il y a contracté n'est nullement attaquée. Le code civil, article 63, fixe à six mois l'habitation *continue* dans un même lieu pour y acquérir un domicile pour le mariage. Wadsworth qui, comme on l'a vu ne passait à Bonnechère, dans la forêt, que le temps qu'il ne résidait pas à Québec où il faisait ses principales affaires, avait donc à Québec une résidence de fait, un des éléments essentiels pour l'acquisition d'un domicile. Pour faire la preuve complète

du domicile réel à Québec il ne manquait que celle de l'intention d'en faire sa résidence permanente. Cette preuve on la trouve dans l'acte de mariage où il se déclare domicilié à Québec.

Cette déclaration est générale ; elle ne comporte aucune restriction dans les termes, ni par les circonstances dans lesquelles se trouvaient alors Wadsworth. Comme l'acte de mariage a la force probante de l'acte authentique, la déclaration qu'il contient ne peut être contredite que par des preuves écrites de même force. Des tiers pourraient en plaidant erreur être admis à la preuve testimoniale, mais l'appelante représentant comme légataire universelle Wadsworth qui a fait cette déclaration, n'e peut pas plus qu'il ne pourrait le faire lui-même attaquer par aucune espèce de preuve cette déclaration. Supposons par exemple que durant l'existence de ce mariage Margaret Quigley eut poursuivi son mari en séparation de biens et demandé le partage de la communauté,—celui-ci aurait-il pu attaquer cette déclaration comme frauduleuse. Evidemment il ne lui aurait pas été permis de plaider sa propre turpitude. Tout au plus aurait-il pu pendant les dix ans après la date de cette déclaration, demander a être relevé pour cause d'erreur, ce qu'il n'aurait pu établir que par des preuves écrites. L'appelante qui le représente à titre universel ne peut pas le faire plus que lui-même. Elle n'a pas tenté la preuve d'erreur, et l'eût-elle fait, l'action étant prescrite, c'eût été en pure perte. L'acte de mariage doit donc produire tous ses effets légaux, et il en résulte qu'ici le domicile réel coincide, on peut dire avec le domicile matrimonial, et il n'y a aucune objection légale à cela. Même si Wadsworth qui habitait Québec n'avait jamais auparavant fait de déclaration au sujet de son domicile, rien ne l'empêchait d'en faire une par son acte de mariage qui aurait eu alors l'effet de lui faire acquérir de suite un domicile

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réel puisqu'il avait déjà l'habitation de fait et qu'il n'avait pas d'autre domicile dans le pays (1)

Dès que la volonté est marquée la nouvelle demeure, ne fut-elle que d'un seul jour, établit le changement de domicile. C'est ce que fait très bien remarquer d'Argentrée sur l'article 449 de la Coutume de Bretagne. C'est d'ailleurs ce que décident expressément les lois 4 et 20 D. ad municipalem et l'art. 103 du Code Civil.

Cressé v. *Baby* (2).

Une personne venant dans un endroit dans le Bas-Canada avec l'intention d'y résider, acquiert un domicile immédiatement ; et son intention peut être prouvée par ses actes subséquents.

Dans tous les cas le fait du domicile, à Québec, doit rester acquis aux intimés d'après les autorités suivantes :

Toullier No 372.

Le fait doit toujours concourir avec l'intention. La résidence la plus longue ne prouve rien, si elle n'est accompagnée de la volonté, tandis que si l'intention est constante, elle opère le changement avec la résidence la plus courte, ne fut-elle que d'*un jour*, car du moment que le fait concourt avec l'intention, il forme ou change le domicile sans aucun délai.

La même doctrine a été énoncée par le conseil privé dans la cause de *Hodgson* v. *Beauchesne* (3).

Laurent, vol. 2, n° 81.

" Les circonstances variant à l'infini et pouvant recevoir une interprétation diverse d'après les nuances qui les distinguent, l'intention peut être douteuse. Que faudra-t-il décider en ce cas? La réponse est très simple. Le législateur se contente de circonstances, mais à la condition qu'elles fassent connaître l'intention. Si elles laissent du doute, pour la seule raison qu'il n'y aura pas de manifestation de volonté, et partant pas de changement de domicile. C'est l'opinion de Pothier :—

Le changement de domicile, dit-il, devant être justifié, on est toujours, dans le doute, présumé avoir conservé le premier. A vrai dire il n'y a pas de présomption, parce qu'il n'y a pas de loi qui l'établisse. L'ancien domicile subsiste jusqu'à ce qu'il ait été changé, pour qu'il soit changé il faut la preuve de l'intention; si l'intention n'est pas prouvée l'ancien domicile est maintenu."

(1) Merlin, Rep. vo Domicile, s. 5. (2) 10 L. Can. Jur. p. 313.
(3) 12 Moore P. C. p. 329-330.

Pour faire perdre aux intimés le bénéfice du domicile à Québec il faudrait avoir fait une preuve légale que ce domicile a été changé, et il n'y en a pas.

Je ferai remarquer comme l'a fait l'honorable juge, Tessier qu'il n'y a aucune preuve que Wadsworth ait eu l'intention de retourner en Irlande et qu'il n'a pu y conserver son domicile d'origine. Il avait une excellente occasion de manifester ses sentiments à cet égard, lors de son mariage avec Margaret Quigley qui était en route pour y retourner ; à son mariage il déclare au contraire son domicile à Québec, et après y être resté quelque temps, il se rend avec elle à Hull où elle demeurait déjà depuis un an. Je citerai encore de l'honorable juge les observations suivantes :

Il se trouve une suite de circonstances qui établissent, à part leur déclaration formelle dans l'acte du mariage, que l'intention des époux était de faire leur domicile conjugal dans la province de Québec. Ils résident quelque temps en la cité de Québec, ensuite à Hull dans la même province, ils font baptiser et enterrer leurs enfants à Hull, ils mettent à l'école les enfants survivants à Hull, ils y résident après leur retour de la forêt de Bonnechère, ils y meurent tous deux. C'est bien là le siège de leur association conjugale.

Cette conclusion a été celle de la majorité de la cour, deux des honorables juges ont différé de la majorité, pour le motif que si Wadsworth avait un domicile dans le pays, c'était dans le Haut-Canada, et que si ce n'était pas là, c'était en Irlande. On voit quelle incertitude, il y a dans leur esprit à ce sujet ; mais je crois avec la majorité de la cour que la seule preuve de déclaration d'intention au sujet de son domicile faite par Wadsworth a été celle contenue dans son certificat de mariage suivie de sa résidence à Hull et de son retour à cet endroit après son séjour à Bonnechère. La preuve de l'Appelante ne me paraît pas assez forte pour détruire celle des intimés et dans un cas où il y a de l'incertitude comme dans celui-ci je crois que les présomptions du bien jugé sont en faveur du jugement et qu'il n'y a pas de motif

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suffisant pour le renverser.

La décision de cette cause ne reposant que sur la signification à donner aux faits des différentes résidences de Wadsworth, je n'ai pas cru qu'il fût nécessaire de référer aux autorités, car les principes du droit sur ce sujet ne sont pas contestés. J'ai cru devoir m'attacher plus particulièrement à démontrer l'illégalité et l'insuffisance de la preuve de l'Appelante au point de vue de notre droit. Je crois avoir établi d'une manière certaine que le seul fait sur lequel s'appuie l'Appelante pour établir un domicile à Bonnechère, n'a aucun des caractères légaux qui puissent permettre aux juges d'en tirer la conclusion que Wadsworth avait l'intention de s'y fixer d'une manière permanente.

Appel renvoyé.

HENRY J.—Having had the privilege of seeing and considering the two judgments delivered in this case, both of which deal exhaustively with the matter in controversy, I consider it necessary to refer but generally to the legal question upon the conclusion of which the same is to be determined. The respondent claims to recover upon the allegation that there was a community of goods existing between the ancestor, James Wadsworth, and his first wife, Margaret Quigley (who had been previously married to a man named McMullen), during the time of their coverture. The proof of that position must be established or the respondent cannot recover. That community, it is claimed, arose from the alleged residence before the marriage of the parties at Quebec, which took place in September, 1828; and, in proof of which, a marriage certificate was produced in evidence in the terms stated in the two judgments before referred to. The law is clear and beyond all doubt in England and France, as well as in Quebec, that, by the domicile of birth, a personal

status is acquired which remains until an actual change is made by which the personal status of another domicile is acquired, the onus of proving which is on the party alleging it; and it is equally clear law that, after a second or other domicile obtained is abandoned, the domicile of birth, suspended in the meantime, is revived and the legal distribution of property determined accordingly. These positions are clearly provided for in the civil code of Quebec, and admitted on all sides.

The domicile by birth of James Wadsworth was shown and admitted to have been in the county of Monaghan, in Ireland, where he was born.

If, then, during the coverture in question, he had not acquired a domicile in Quebec or in Upper Canada, his domicile of origin was in Ireland when he was married, and during his coverture with his first wife through whom the respondent claims.

The main and, I may say, the only, question to be decided is the legal adoption of a domicile at Quebec as claimed by the respondent. If that be not shown it is quite unimportant to consider whether or not he had adopted such a legal domicile in Upper Canada as would remove or suspend his status of domicile in Ireland. It is only necessary to consider his acts and operations in Upper Canada as evidence to affect the question of the adoption by him of a domicile in Quebec. In considering the latter question the legal distinction between domicile and residence must be closely observed.

In this case there was no marriage settlement, and the mutual rights of the husband and wife to each other's movables, whether possessed at the time of the marriage, or acquired afterwards, are determinable by the law of the husband's actual domicile at the time of the marriage, without reference to the law of the

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country where the marriage is celebrated or where the wife was domiciled before marriage; and it was therefore necessary to show the establishment by James Wadsworth of a civil domicile for all legal purposes at Quebec when his marriage with his first wife was celebrated. If not, there is nothing in the evidence that, during that coverture, he ever acquired any.

Residence in a country is not even *primâ facie* evidence of domicile when the nature of that residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animo manendi*).

Up to the time of the marriage the evidence shows that he could not have been considered as having ever resided in Quebec. It is true he had gone there sometimes, not to reside in the ordinary acceptation of the term, but for a temporary purpose—that of taking there and disposing of rafts of timber, for others or himself, and returning to the Bonnechère as soon as that object was accomplished. It is shown that he had no place of residence at Quebec, but lived, while there, either on the rafts or in a boarding house. It is true that at first he was but a shanty man, so called, or, as called in the French language, *voyageur*, but his occupation, as such, differed materially from the great body of shanty men who had homes and residences in other places to which they returned during the interval of work in the woods. Wadsworth had no home or residence other than that he occupied at the site where his labor was performed—that was virtually his home; and it matters not whether it was a timber shanty or a castle, or whether it was his own or belonged to some one else for whom he was employed, but to which, when he left it, for the special purpose of taking down to Quebec and selling the rafts of timber he worked at in making, he always returned. The fact is well established by evidence and

it was not at all necessary to show that he was the owner of movables or immovables. By the evidence, I think his residence there is shown as in contradistinction to the allegation of his residence at Quebec. In deciding this case I feel the responsibility of coming to a conclusion in opposition to that of my learned brethren from Quebec, but I feel it, at the same time, of importance that I am sustained by the views and decisions of the learned Chief Justice Dorion and those of the learned Judge Cross. Residence must be imputed, in the absence of any other, to be the place where a party is employed in the production of marketable commodities rather than to the place he visits solely to make sale of them, and in this case, if we leave out the consideration of his residence of origin, we have but a choice between the two. It must be borne in mind that I am not so much considering whether Wadsworth obtained or made a domicile in Upper Canada, but the question of his alleged residence in Quebec at and before his marriage.

Apart then from the certificate of his marriage, where is there a scintilla of proof of his residence at Quebec? Could a Quebec merchant who shipped annually to England cargoes of timber, and who spent some months there, either living on board his ships or at a boarding house for the purpose of making sale of them, be said to have his residence there? Or could the same be said of one of his clerks or other agent, that he sent there for a like purpose? Could it be said of the clerk or other agent of a manufacturer in Ontario who was sent periodically to sell his employer's manufactured goods at Montreal or Quebec, and in doing so remained at each time, it might be for months, till the special object of his mission was obtained, and then returned each time to his occupation at the manufactory, be considered for a moment as having a legal residence at either of those

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last named cities? And in such a case would it be necessary to inquire whether he lived in a house of his own or elsewhere, or whether or not he was the owner of goods movable or immovable? Such, then, is the character of the alleged residence before and at the time of the first marriage of James Wadsworth. Where then is there in the facts shown any actual residence in any way affecting the question of his domicile? And if none, the point of intention is unnecessary to be considered.

I think I have made it sufficiently clear that Wadsworth had no residence in Quebec; but admitting for argument's sake that he had, where is the evidence of that other essential, his intention to make there his permanent residence? It is truly said that under the law in Lower Canada a person coming there with the intention of residing acquires a domicile immediately, and that his intention can be proved by his subsequent acts. That doctrine, however, applies with equal force to his residence at the Bonnechère where his acts, after his first going and working there, in farming and other operations, would go to show that he fully intended from the first to make that his permanent residence, constituting as it did the place where he derived the means of living and the accumulation of property, and having at Quebec only the market where he realized money from the sale of what, by his industry and labor, he from time to time produced Article 79 provides that, "the domicile of a person for all civil purposes is at the place where he has his principal establishment." It is clearly shown that Wadsworth had no establishment whatever at Quebec. It is said that before losing his domicile at Quebec there should have been legal proof that his domicile had been changed. Such no doubt would be the case if the domicile had been shown there.

One of the learned judges of the court below remarks upon the absence of proof that Wadsworth had had any intention of returning to Ireland and that he desired to preserve there his domicile of origin, and says that he had an excellent opportunity of manifesting his sentiments in that regard when his marriage to Margaret Quigley, who had come to Quebec on that occasion *en route* to return there, took place. No doubt before she consented to become the wife of Wadsworth she so intended. She was then a widow, having recently lost her husband, and intended, no doubt, under the circumstances to return to her native country, but for apparent reasons changed her mind. It is, however, unnecessary to speculate in reference to this matter, for it is the law that operates to continue the domicile and not the intention of the party. Allegiance to a British sovereign it is claimed cannot be changed to another by the act of the party, but domicile can be; but the status of domicile by birth is as tenacious as a man's allegiance until by his own act he changes or suspends it. The same learned judge gives great weight to the proof of marriage by the register, and he says that it is by that act that the married parties manifest their intention as to the existence of their domicile, and adds that they signed a solemn act (meaning the marriage register) to declare their domicile at Quebec and asks: "Where is the allegation or the proof of error?" The register, however, is but a certificate of marriage in the usual form. It calls James Wadsworth "*journalier de cette ville*," and so it might properly do even had he been born and had his domicile in Upper Canada. To prove such domicile would not contradict the register. Evidence of a party's domicile outside that register is not only admissible but is generally required. It is well settled by French as well as English law that a residence or domicile for the purpose of marriage is not

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necessarily a domicile affecting in any way the other civil rights of the parties. The law required a six months' residence to authorize a marriage, but in no way affected the permanent domicile of the husband. Domicile is not at all in question at marriage. Article 132 enacts that "if the last domicile is out of Lower Canada the curé is bound to ascertain that there is no legal impediment between the parties" and it is a significant fact that the register in this case contains a statement that the curé ascertained that no such impediment existed; which statement would be unnecessary if the curé had not considered that Wadsworth's domicile was out of Lower Canada. In view of that provision of the code, how can it be legitimately contended or adjudged that, as regards domicile, there was any intention on the part of those who framed, or the legislature that adopted it, that it was to be taken even as *prima facie*, not to say conclusive, evidence, and still we are asked to receive it as conclusive on the point. From the statement in question we are fully as much bound to decide that the domicile in question was out of, as to conclude from any other part of it that it was within, Lower Canada. The establishment of that status must therefore be shown by evidence of extrinsic matters.

It is quite true there is no proof of error for none has been suggested as to the register, but the legal effect of it is quite another matter. It was, and must be, admitted, that the register is proof of what it alleges but not of inferences to be drawn, and while the fact of residence at the time which is shown by it cannot be contradicted by oral evidence, it is not inconsistent with that statement, that such residence was but temporary; and that there was wanting the existence of the necessary intention of making it (Quebec) the seat of his permanent residence. The change must

be *animo et facto.* In addition to the fact of residence there must also be shown the animus—the intention to change the domicile and acquire a new one. It would, I submit with all due deference, be an unwarranted deduction from the mere fact of a residence enabling a party to be married if we decreed an intention to renounce thereby his domicile of origin and adopt another at the place where the marriage happens to be celebrated. Would it not be monstrous to decide that an Englishman—a titled nobleman if you will—who resided temporarily at Quebec for pleasure or business, and got married there, had thereby forfeited his domicile of origin and voluntarily changed it to one in Quebec? I can find nothing to justify or warrant such a conclusion and assumption, and such was virtually the position of Wadsworth at the time of his marriage. We need not inquire what position as to domicile Wadsworth occupied at the Bonnechère before his marriage. It is enough for us to know that his visits to Quebec were but transient and for special purposes, and not only independent of the question of domicile there, but under circumstances negativing the allegation of it.

We need not consider whether Wadsworth abandoned his domicile of origin and adopted one in Upper Canada, as a decision of that question is unnecessary under the issue before us.

There is, however, one legitimate consideration in regard to the position of those engaged in lumbering about the time Wadsworth first went to the Bonnechère, which distinguishes it from that of many and, at this day, the majority, of the places where lumbering has been and is carried on. The river Bonnechère falls into the Ottawa river, and at Eganville Wadsworth first operated and afterwards settled. The land was good and favorably situated for agricultural purposes,

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and access to it was comparatively easy. Timber limits had been granted, but the title to the soil remained in the crown. The matter of the improvements and cultivation made by what are known as squatters was considered when patents were subsequently issued, so that those who lived and settled upon the lands were not considered as trespassers; and, although not vested as to the possession by any act of the crown, they had a possession which the law respected against all others without title. In that way large portions of the country became improved and settled, and patents in the majority of cases followed to the parties in possession, and surveys were made to cover such possessions. A great many, therefore, who, during the winter months, worked in the woods at other parts of the year, were employed in the clearing, improving and cultivating of the land they settled on. Such was the course pursued by Wadsworth, and he, therefore, from the time of his marriage, had a residence and home, and was in the exclusive possession of land, which he continued to improve until he sold out for a considerable sum to Mr. Egan. His position was, therefore, very different from that of what is generally known as a mere shantyman. During the years he was employed in making timber he was employed in making himself a home, showing an intention of making there a civil domicile.

Article 81 of the Code provides that "the proof of "the intention results from the declaration of the per-"son and from circumstances." If, therefore, we were trying the question of the adoption of a new domicile by Wadsworth, I think his verbal declarations would be valid testimony, and if added to the other facts in evidence as to his living and working at the Bonnechère, I think as between Upper Canada and Quebec a decision in favor of the former should necessarily result.

I can find no express, or even implied, authority for rejecting such evidence. It is, of course, not so satisfactory or conclusive as declarations contained in deeds or other solemn legal documents, but I think such evidence cannot be excluded, and must, I think, be considered legitimate in the absence of any principle to the contrary. The Code makes no distinction between verbal and written declarations. I think, in view of the evidence and the law as to domicile, the respondent has failed to prove the civil domicile of James Wadsworth to have been at Quebec, upon which rested his right to recover, and that, therefore, the appeal herein should be allowed with costs.

TASCHEREAU J.—By representing to his wife, as he must be held to have done by the *acte de marriage*, that his domicile was at Quebec when he married, Wadsworth guaranteed to her, contracted with her in law, that she would be *commune en biens* with him. Now, could he have been admitted, in his lifetime, under any circumstances, in an action *en séparation de biens*, for instance, to contend that this declaration as to his domicile was a false one, or, in other words, that he had induced his wife to marry him under false pretences or representations? Would he have been received so to invoke his own fraud in order to deprive his wife of her share of the community? Undoubtedly not. Well, who is the appellant here? Clearly, purely and simply, the representative of Wadsworth, the warrantor of his deeds, entitled to what he himself would have been entitled to, but to nothing more. How can she then invoke Wadsworth's fraud to deprive the respondents of their share of this community? And when she does do so, when she avails herself of Wadsworth's fraud, is she not then herself in the eyes of the law, committing a fraud? Without adding another word

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to my brother Fournier's judgment, in whose reasoning and conclusions I unreservedly agree, I would, with him, dismiss the appeal, and confirm the judgment of the two courts below. This is a very important case, not only for the parties thereto on account of the large amount involved, but also for the public at large. It involves an intricate question of international law, which, as pointed out by the learned Chief Justice of the Court of Queen's Bench, may, hereafter, often arise in this country. We expect in the near future from the United Kingdom, and, in fact, from all Europe, a large immigration, and, evidently, cases like the present one must eventually with us become more frequent. But further than that, a principle of not less importance for the Province of Quebec is at stake, that is, whether the rules of the French law as to evidence are to govern such cases or not. For the appellants in the course of a most able and deliberate argument have failed to cite a single case from France in which it has been held that a different *coutume* than the one settled by the *acte de marriage* can be invoked to defeat a wife's claims or her heirs.

GWYNNE J.—The simple question which this case presents is: Had the deceased James Wadsworth at the time of his marriage in September, 1828, with Mrs. McMullen, his domicile in the then province of Lower Canada? That is to say, inasmuch as his domicile of origin appears to have been in Ireland, had he in September, 1828, abandoned that domicile and acquired a new one in the province of Lower Canada by taking up his residence in that province, with the intent of establishing the seat of his principal establishment in that province permanently or for an indefinite period. The argument of the respondents that he had, seems to me to be based wholly upon the assumption that the

marriage certificate subscribed by him at the city of Quebec, where he was married, in which he is described as *journalier de cette ville*, is a solemn act and declaration made by him with the intent of, and for the express purpose of, testifying that he had then, and thenceforth intended to have, his domicile in the city of Quebec. That the certificate was in point of fact subscribed by him with any such intent, there is not only not a particle of evidence, but his subsequent acts are inconsistent with his having then had such intention, and in point of law, apart from intention, it could not have the operation of substituting the city of Quebec as his domicile of choice in the place of his domicile of origin, which must remain until a new domicile has been acquired, in the acquisition of which intention is the essential element. The certificate is valueless as having no bearing at all on the question, unless it is adequate to establish that Wadsworth had acquired a domicile of choice in the city of Quebec. The description *journalier de cette ville*, that is, the city of Quebec, could afford no evidence of Wadsworth having acquired a domicile in some place in the province of Lower Canada outside of the city of Quebec, and as the only means we have of judging of his intention of acquiring a domicile of choice in substitution for his domicile of origin consist in drawing inferences from the evidence which we have of his acts and conduct, we have in those acts and conduct the plainest evidence, in my opinion, that he had no idea of establishing his domicile in the city of Quebec. Whether he had established it in some other part of the province of Lower Canada at the time of his marriage in September, 1828, must be determined upon the evid ence of his acts and conduct, if we have any signifying his intention apart wholly from the marriage certificate, which for that purpose is valueless.

The first that we hear of him after his leaving Ire-

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land in or about the year 1822, is that in 1826 we find him to be engaged in lumbering operations in Upper Canada with two persons named Kelly and McMullen then associated together in getting out lumber on the Bonnechère river. McMullen came to his death in the woods in the spring of 1827. It would seem that in the winter of 1827-28 Wadsworth was engaged in getting out timber there on his own account, for two witnesses who knew him well then speak of his having gone to Quebec in 1828 on a raft of his own to dispose of it. Susan McMullen, a daughter of the deceased McMullen, and who came out with her mother in 1827 to join her father, and was in 1828 only about nine years of age, speaks of her mother having been interested in the raft which Wadsworth brought down to Quebec in that year; but whether she was or not, or whether it was Wadsworth's own, matters not, for the evidence shows that his sole object in going down to Quebec then was to sell the raft. While in Quebec he lived part of the time on the raft, probably until it was sold, and part of his time at a boarding house where men of his class boarded, and where in the month of August he met Mrs. McMullen, the widow of McMullen, deceased, on her way back to Ireland, from whence she had come in 1827 to join her husband, who, however, came to his death in the woods shortly before her arrival. While boarding at the house where Wadsworth met the widow he was married to her in September, 1828, and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and he took his wife and her daughter with him; them he left in the neighborhood of Aylmer, on the river Ottawa, in Lower Canada, while he went on to his home on the Bonnechère. That his object in leaving his wife there was for a temporary purpose only appears from the fact that when the sleighing became good in the winter he came down

for her and brought her up to his home on the Bonnechère, and continuously from that time for at least 10 or 12 years she lived with him in Upper Canada, where he continued to carry on lumbering and farming and other business, from which he acquired considerable wealth. In the spring of 1829 he bought the right of one Baker to a house and a lot of 200 acres—a squatter's right, perhaps but in Upper Canada those rights were always respected by the Government,—and he moved into the house, added to it, cultivated the land, resided there with his wife until 1836, when he sold the place to a Mr. Egan. But although he sold that place he does not appear to have then left Upper Canada, for the evidence is that he lived there continuously for ten or twelve years after his marriage, and that all his children were born there. He did subsequently, but when does not appear, move across the river Ottawa to the township of Hull, for the purpose of being nearer a married sister, who was then living there. How long he remained there does not precisely appear, but after staying there for some years he returned to Upper Canada and resided for many years in Bytown, afterwards the city of Ottawa, where he owned considerable real estate and other property. While living there his wife died in 1872. In 1873 he married again in Ottawa, and afterwards moved across the river to Hull, but whether or not with the intention of acquiring a domicile there then does not appear, but whether he had or not such intention then is not important.

The circumstance of two of his daughters having been baptised at Aylmer, in Lower Canada, was relied upon as an item of evidence having, as was contended, the tendency to show that Wadsworth's intention ever since his marriage was to make his domicile in Lower Canada, but the account of the circumstance under which this took place shows the utter insuffici-

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ency of such evidence for the purpose for which it was relied upon. The baptismal ceremony took place in May, 1846, and under the following circumstances as Susan McMullen testifies. Mr. Wadsworth, she says:—

Had strong objections to the children being brought up Catholics, and they had to attend the Catholic church by stealth, as it were, so strong were his prejudices; the children were afraid they had never been baptised and consequently took advantage of their father's absence to be baptised in Aylmer. They might have been baptised by their mother before that, but not by any one keeping a register.

The circumstance also of a child of the marriage which was born in 1829 and which lived only for 14 months having been brought to Aylmer to be buried was relied upon for the like purpose, but the evidence shows that at that early period there was not, where Wadsworth resided in Upper Canada or in the neighborhood or nearer than Aylmer, any church or burial place, or priest or minister of any denomination, so that it is not strange that a person although domiciled in Upper Canada should have brought the dead body of his child to Aylmer as the nearest place where it could get a christian burial. Now the sole question being whether Wadsworth at the time of his marriage in 1828 had acquired a domicile in the Province of Lower Canada, the only inference which can be drawn from the evidence, in my opinion, is that he had not, and that his domicile of origin still remained unless he had acquired a domicile of choice in Upper Canada, but that he had acquired such a domicile is, I think, the proper inference to be drawn from the evidence. It is, however, sufficient for the purposes of the present case to say that he had not acquired a domicile in Lower Canada.

The appeal therefore must be allowed with costs and the plaintiff's action in the Superior Court dismissed with costs.

*Appeal allowed with costs.** 1886

WADSWORTH v. McCORD.

Solicitor for appellant : *J. R. Fleming.*

Solicitors for respondent : *Barnard and Barnard.*

THE TORONTO GRAVEL ROAD AND CONCRETE COMPANY (LIMITED), (DEFENDANTS)..... APPELLANTS;

AND

THE CORPORATION OF THE COUNTY OF YORK (PLAINTIFFS). RESPONDENTS.

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*May 28.

*Nov. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ry. Co.—Agreement with municipality—Construction of tramway—Traction engine—Agreement to withdraw and discontinue use—Right to use steam engine under.

An agreement was entered into under the authority of an Act of the Parliament of Ontario between the municipality of York and the Toronto Gravel Road and Concrete Company, under which the latter were to have a right to construct a tramway from their gravel pits to the city of Toronto. One of the clauses of the agreement was as follows: "So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use and employment of the said traction engine and of any other traction engine upon or along such public highways."

Under this clause the company claimed the right to put steam engines upon the road over such public highway.

Held, affirming the judgment of the Court of Appeal, that the use of steam engines was an infraction of the said clause.

APPEAL from a decision of the Court of Appeal for Ontario, refusing to set aside the judgment of the chancellor in favor of the respondents.

This was an action against the appellants to restrain them from using steam engines upon a tramway con-

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

* [Leave to appeal to the Privy Council has been granted in this case.]

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structed by virtue of an agreement between them and the respondents, the municipality of he county of York. The concluding clause of the agreement, under which the respondents claim that the use of steam engines is prohibited, is set out in the above head note. Judgment was given for the municipality on the hearing before the chancellor, and such judgment was sustained by the Court of Appeal. The company appealed from the last mentioned judgment to the Supreme Court of Canada.

Robinson Q.C. for appellants.

The point raised on this appeal is whether the defendants have the right to use steam as a motive power on their road.

The first statute to be looked at is the R. S. O. ch. 186 from 31 Vic. ch. 34 "to regulate use of traction engines on highways." 36 Vic. ch. 114 (O.) incorporated the respondents' company and 37 Vic. ch. 90 gives them the right to operate their tramway by steam power. It is under this statute, and the agreement of the 10th August, 1874, made with the respondents, that the whole case depends.

The Ontario statute 37 Vic. ch. 90 gives the appellants the right to operate their tramway by steam power wherever located, and it was to such a tramway (that is, one that could be operated by steam) that permission to locate upon the highway in question was given to the appellants by the respondents under the agreement of the 10th August, 1874.

There is no implied obligation in this agreement not to use steam. The respondents contend that the implication arises strongly under the agreement that we were to use horses as the motive power. We contend that the onus is upon them to show we have waived our statutory right to use steam power.

The corporation thought, as they say, they were get-

ting rid of steam in every form. The appellants say the agreement was to prevent the use only of the traction engine. It is a *casus omissus*. Whose business was it to put it in the agreement? It was the respondents' for they were seeking to deprive us of a right given us by said statute.

But the respondents could not, by any agreement or by-law, curtail or reduce our chartered rights, and the statute 37 Vic. ch. 90 having regulated the method of use (*ex. gr.* the speed) in case steam was used, it was out of the power of the respondents to prohibit the use of steam as a condition attached to the use of the highway question.

Calder & Hebble Nav. Co. v. *Pilling* (1); *Queen* v. *Governors of Darlington School* (2); questioned in *Dean* v. *Bennett* (3).

Even if the respondents had the power to attach the condition that steam could not be used they have not done so, and the right of the appellants to use steam as a motive power upon the tramway under the act remains unimpaired by any terms or conditions contained in the agreement of the 10th of August, 1874.

Osler Q. C. follows:

The condition of the parties at the time necessitated an agreement. The traction engines were destroying the business of the toll roads of the county of York. We had a charter giving us a right to use a tramway with steam power. We had to get the consent of the municipality to construct, and there is nothing authorizing the interference with the operation of the road after construction. The method of construction is one thing, the mode of operation another. There are cases in which a railway may run along a highway with the consent of the municipality, but the

(1) 14 M. & W. 76. (2) 6 Q. B. 682.
(3) 6 Ch. App. 489.

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municipality cannot give assent and make it a condition that the trains shall be run by horses. With reference to street railways there is power to regulate not only the construction but the operation. There is no similar provision here

Section 1 gives the power to construct the tramway in accordance with the act of Parliament, and this includes the right to use steam. Then the municipality, by the 84th section of the Joint Stock Road Act, had the right to charge tolls only on horses and other animals, and the section as to tolls means only to provide for tolls allowed by law.

No case was made out for the rescission or reformation of the agreement in question, and in any event the respondents are estopped by their laches from claiming any such relief. *Campbell* v. *Edwards* (1).

Cassels Q. C. for respondent:

It is obvious from the agreement that what the parties contemplated was the use of a tramway or street railway.

The letter of the president, Mr. Lamond Smith, written to Mr. Morse on the 4th June, 1874, and by him enclosed to the county, and the petition presented to the county, and the further letter of Mr. Lamond Smith of the 10th July, 1874, written to the chairman of the committee on the roads and bridges of the county of York, ask the right from the county to make a tramway or street railway.

What was in the minds of the Toronto Road Co., and what was asked from the county, was the right to construct a tramway or street railway, and the term "tramway" used in the agreement is plainly synonymous with the term "street railway." The reference in the agreement approving the use of the tramway by horses, carriages and teams of parties using

(1) 24 Grant 152.

the Kingston road also shows that what was contemplated was a street railway. *Smith* v. *Hughes* (1).

Kerr Q. C follows:

The moving cause for the negotiations was the removal of a nuisance caused by the steam and noise of the traction engine. A tramway is constructed and used in the manner contemplated by the parties until the bill was filed. The rail was a tramrail, the motive power was horses.

This is not the case of parties in the trade dealing with one another, and having reference to a particular kind of traction engine. In any event, in order to support the appellants' contention it is necessary to go into the evidence, in order to ascertain and prove what kind of traction engine was contemplated by the parties when the agreement in question was entered into, and it is submitted on the part of the present respondents, that if the case is viewed in this light that the evidence greatly preponderates in favor of the contention of the county.

The effect of granting the demand of the defendants would be make this road practically a branch of the Grand Trunk Railway.

Robinson Q. C. in reply.

Sir W. J. RITCHIE C. J.—I think the term "traction engine," referred to in the agreement, contemplated a steam engine for locomotion upon common roads, and should receive that construction as being the common and ordinary understanding of the term, not only in common parlance, but by lexicographers, (the last edition of the Imperial Dictionary thus defines it "a steam locomotive engine for dragging heavy loads on common roads,") as distinguished from a carriage supporting and driven by a steam engine and used to

(1) L. R. 6 Q. B. 597.

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draw railway carriages, but also because the parties were making provision against the use of such an engine and others of a similar character, and there is is nothing in the agreement to show that locomotives were in the contemplation of either party, but the inference from the provisions of the agreement is to the contrary. This construction is no narrowing of the terms of the agreement, but is only giving to the language used its fair and legitimate meaning in reference to the matter then under discussion, namely, the removal of the traction engine then in use and the use thereafter of engines of a similar character. If so, had the company ever obtained the leave or consent of the council to use steam locomotives, and was this consent necessary ?

The question of using steam, apart from the traction engine then in use, was not, in my opinion, a matter in the contemplation of either party. The municipality wished to get rid of the nuisance occasioned by a traction engine running on the road, and the company was desirous of getting authority to lay down, in lieu thereof, a tramway for the purposes of an ordinary street railway to be propelled by horse power, and there is nothing in the agreement to show that the municipality consented to the use of steam on such tramway, but the irresistible inference is to the contrary. The company, no doubt, wanted to get rid of the use of steam on the public road, and the agreement was doubtless entered into with that view by substituting an ordinary street railway in lieu thereof. It can hardly be supposed that it could have been contemplated by either party that the agreement got rid of the steam one day—for which the company obtained the great advantage of laying down a tramway—and they could, the next day, place a similar steam locomotive, though of a different nature, on the road, and

that, too, without any provision for tolls or restriction of any kind. Instead of this, I think all the agreement, fairly construed, was intended to confer on the company was the right to lay the tramway and use it as an ordinary street railway, thereby, by necessary implication, excluding the use of steam. And I entirely agree with the learned Chief Justice, that the language of the deed points to the use of horse power alone.

FOURNIER J. concurred.

HENRY J.—I am of the opinion that the appeal should be dismissed. The agreement was entered into between the parties, after the appellants had been running their traction engine for some years, in consequence of the people who usually used the highway becoming excited in consequence of numerous accidents and making application to have its running discontinued by the corporation.

The law of construction is well settled that all written contracts should be construed according to the intention of the parties to be gathered from the instrument, together with the surrounding circumstances if the words of the instrument are susceptible of more than one meaning.

Here the permission was given to use the traction engine for a tram-railroad. A tram-railroad is not generally understood to be a road worked by steam engines. Horses are to be used. That is referred to in the letter written by Mr. J. L. Smith. The permission therefore was but a license to substitute on a tram-railroad a traction engine for horses.

Although strictly speaking a traction engine may be stationary, yet it is generally understood to be a locomotive engine. Etymologically, it means an engine capable of drawing on a tram-railroad. Then they say "we are not to use a traction engine, but we want to

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use our engine not on a tram-railroad but on an ordinary railroad." I have yet to learn that a locomotive in use on an ordinary railway is not a traction engine.

These parties had not authority to lay down an ordinary railway, but what is essentially different, a tram-railway. Everybody knows that a tram-railway is one almost always worked by horses.

The following is the authority:—

The company shall be at liberty forthwith to lay down and construct a tram-way, in accordance with the last mentioned act of the Parliament of Ontario, for the carriage of freight and passengers upon and along the Kingston road, from the gravel beds or pits of the said company in the townships of York and Scarboro' to the city of Toronto.

Construing that agreement it does not appear that the parties intended an ordinary tram-railroad to be operated by horses.

Then the agreement concludes thus:—

So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county and shall discontinue the use and employment of the said traction engine and of any other traction engines upon or along such public highways.

Now, if the appellants intended when entering into that agreement to use not a locomotive ordinary traction engine, but an ordinary locomotive railway engine it was I think an inception of fraud.

I have come to the conclusion that it was not the intention of either of these parties when this agreement was entered into that the appellants should have the right to use a steam engine on an ordinary railway, as they now claim, and that the words "any other traction engine" must be construed to include any kind of locomotive engine. I think the appeal should be dismissed with costs.

Taschereau J.—Concurred.

GWYNNE J.—The point involved in this case appears

to me to be free from doubt upon the true construction of the agreement of August, 1874, in the light of the surrounding circumstances. By an Act of the Legislature of the province of Ontario 36 Vic. ch. 114, the defendants were incorporated as a company for the purpose, among other things, of excavating, hauling and selling gravel and sand for building and other purposes, and for making and selling a composition called cement, and for these purposes they were empowered to acquire and hold lands, &c. In the pursuit of their business they acquired lands in the township of Scarborough from which they excavated gravel, which they hauled in trucks drawn by a traction engine along the Kingston road, a public highway belonging to the defendants, to the city of Toronto for sale, &c. This traction engine they used under the authority of another act of the Legislature of Ontario 31 Vic. ch. 34, by which it was enacted that it should be lawful for any person to employ traction engines for the conveyance of freight and passengers over any public highway in the province, subject to certain provisions therein, and among such provisions that no traction engine so to be employed should exceed in weight twenty tons, and that the speed of any traction engine should at no time exceed the rate of six miles per hour, and in cities, towns and incorporated villages the rate of three miles per hour, and that the width of the driving wheels of all such engines should be at least twelve inches and the wheels of the trucks or waggons should be four inches in width for the first two tons capacity, load and weight of truck included, and an additional half inch for each further ton. The use of those traction engines and trucks by the defendants upon the public highway belonging to the plaintiffs being authorized by act of parliament could not be abated as a nuisance, but the use of them on the Kingston road, a public

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thoroughfare in the immediate vicinity of the city of Toronto, did nevertheless, in fact, prove to be an intolerable nuisance to the public having occasion to travel on the highways; a nuisance not merely arising from these properties of the engine, which gave it the appellation of a traction engine as distinguished from other engines, but from the use of steam as the propelling power.

The defendants also themselves appear to have found that the use of the traction engine and trucks upon the highway was not sufficiently convenient for the advantageous carrying on of the business for which they were incorporated and in which they were engaged, for they applied to the Ontario Legislature for an act to amend their act of incorporation which was passed upon the 24th March, 1874. By this Act 37 Vic. ch. 90, the defendants were empowered to construct a double or single tramway or way of wood, or of iron, or wood and iron and other materials, from their gravel beds in the township of Scarborough in the county of York through the township of York to some point within the city of Toronto; and to take and hold all lands necessary for the purpose, with full power to carry and transport on and over their said roadway in cars, carriages and other vehicles gravel and other property and passengers at such reasonable rates as the directors of the company for the time being should impose, and it was enacted that the said road might be worked by horse or other power; but if by steam that the rate of travelling should not exceed ten miles per hour. They were by this act also empowered to construct a wire tramway from and to the points aforesaid for the purpose of carrying and transporting gravel and other freight and to acquire take and hold all lands necessary for the use, objects and conveniences connected in any way therewith or aiding the traffic thereof;

and to operate the same by stationary steam engines; and by the act it was further provided that the councils of the municipalities through or in which the said tramways or roads might be constructed might by by-law or otherwise permit the company to construct the same or some or any part thereof in, along, over, and upon, the highways and streets, upon such terms and conditions as might be agreed upon between them. Now by this act the defendants had power given to them either to construct a wire tramway on their own property to be acquired for the purpose, to be operated by stationary engines or to construct an ordinary tramway in like manner on their own property to be operated by locomotive steam power or by horse power, or, to make use of the public highways either for the purpose of a wire tramway or of a tramway to be operated by locomotive steam power or by horse power, but the public highways could be used for any of the above purposes only with the consent of the municipalities whose highways were proposed to be affected, first obtained, and upon such terms and conditions as might be agreed upon between such municipalities and the defendants. The defendants, probably from motives of economy, seem to have preferred, if they could obtain permission, to construct their tramway upon the Kingston road which was the property of the defendants to acquiring land of their own for the purpose. In order to obtain the assent of the municipality to whom that road belonged it was obviously necessary that the defendants should explain to the council of that municipality, the county of York, what species of tramway they proposed constructing, namely, whether a wire tramway, or an ordinary tramway, and if the latter whether to be operated by locomotive steam power or by horse power In view of the objection which had been raised by the public to the use of the traction

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engine which was propelled by steam, the use of which as the propelling power was the chief cause of objection to the traction engine, it was naturally to be expected that the council of the municipality would withhold their consent to the construction of the tramway on the highway if locomotive steam engines should be the propelling power intended to be used. In the month of July, 1874, the defendants applied to the council of the county of York for permission to lay their tramway on the highway, and after divers negotiations with property owners along the road and the members of the county council, a draft agreement dated the 24th of July, 1874, was adopted in council and was reduced to a completed agreement dated the 10th of August, 1874, and was signed by the warden and clerk of the council of the county of York, with the common seal of the county attached, and by the vice-president and the managing director of the defendants' company, whereby the defendants obtained permission to construct their tramway on the terms and conditions therein mentioned. This instrument after reciting that the defendants are the owners of a traction engine which, under the authority of an act of the Parliament of Ontario, had been employed for the conveyance of freight over the public highways of the county of York, and that by a certain other act of the Parliament of Ontario the defendants were authorized upon certain terms and conditions to construct tramways for the conveyance of freight and passengers upon and along the public highways of the said county of York, and that one of such terms and conditions was that before constructing said tramway upon or along such public highways the consent of the said corporation should be first had and obtained; and that the defendants had applied to the said corporation for leave to lay down and construct a tramway upon and along the Kingston road, being one

of the public highways of the said county from their gravel beds or pits in the township of Scarborough through the township of York to the city of Toronto, and that the said corporation had agreed upon the terms and conditions thereinafter mentioned to give their consent to such application, it was thereby agreed: 1st. That the defendants should be at liberty to lay down and construct a tramway in accordance with the last mentioned act of the parliament for Ontario for the carriage of freight and passengers upon and along the Kingston road, from the defendants' gravel pits aforesaid to the city of Toronto; 2nd. Among other things that the said tramway should be constructed so as to interfere as little as possible with the ordinary traffic of the said highway; 4th. That tolls to be collected should not exceed the same as for ordinary conveyances, viz., not more than 7 cents for cars drawn by one horse and 10 cents for cars drawn by two horses; 5th. That the said company should, if required, run not less than two passenger cars daily each way (or in lieu thereof an omnibus or sleigh) from the Don Bridge to Norway at such hours as might be found most convenient for the company and the public so long as the said tramway is in use; 6th. In case of horses, carriages, teams, or other vehicles or animals meeting or being overtaken by the horses, waggons, carriages, or other vehicles of the said company travelling upon the said tramway, the said company should have the first and immediate rights of way over and upon the said tramway; and 7th. So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use and employment of the said traction engine and of any other traction engine upon or along such public highways. Now, from this agreement, it is apparent that the with-

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drawing of the traction engies not only from the Kingston road, but also from all highways in the county of York, was made one of the conditions upon which permission to lay a tramway at all was granted, and although no express provision is inserted to the effect that steam shall not be used as a motive power, the reason for that is apparent, namely, that the provisions numbered 4, 5 and 6, making special provision for the use of horse power, which provisions are quite inconsistent with the use of steam which was also the chief objectionable feature in the traction engine, show unmistakeably that what the parties to the agreement were intending to provide for, was the construction of a tramway to be operated with horse power; and that the permission which the defendants intended to be understood as asking for, and which the plaintiffs intended to grant, was permission to construct such a tramway. There cannot, I think, be a doubt that the defendants well knew that the council of the municipality understood the defendants to be applying for permission to lay a tramway to be operated by horses as the motive power, and that the defendants intended to be so understood, and that such was the extent of the permission which the council of the county intended to grant. It is inconceivable that a municipality which insisted upon the withdrawal of traction engines from all highways of the county mainly because of their being operated by steam, as a condition of granting permission to the defendants to construct the tramway, would have ever given their consent if steam power was to be used on the tramway. Upon the agreement being perfected the defendants constructed their tramway suitable only for the use of horse power, and so maintained and used it for about five years, when they proceeded to construct a railway for the purpose of and with the intention of giving up horse power and using steam as the

motive power.

The learned counsel, Mr. Robinson, in his argument before us, and also, as appears by the judgment of Hagarty C.J., in his argument before the Court of Appeal for Ontario, submitted that the true state of the case was that at the time of the agreement being made and entered into both the plaintiffs and the defendants thought only of horses as the motive power, but he contended that steam not being expressly excluded, the statutory right, as he called it, of the defendants now to construct their tramway so as to use, and to use, steam power thereon, was not interfered with; but if neither party thought of steam as the motive power to be used, but both did think of horse power, and only of horse power, and made express provision pointing to the use of horse power, and not pointing to the use of any other power, these provisions, coupled with the well known objection the public had to the use of the traction engines, because of their being propelled by steam, as clearly indicate an intention to exclude steam power as if it had been in express terms excluded. And as to the argument that the statutory right, as it was called, of the defendants to use steam was not interfered with by the agreement, the answer is that the defendents have no statutory right to use steam power on a tramway constructed on a highway nor to have a tramway at all on a highway without the consent of the municipality owning the highway for that purpose first obtained, which permission when called in question the defendants must show. Here the defendants show only permission to lay a tramway on the Kingston road which permission makes provision plainly pointing to its being worked by horse power and has no provision applicable to steam being used as the motive power, the defendants therefore, in my judgment completely fail to show a permission co-exten-

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Gwynne J.

sive with the right which they assert of using steam power, and it is in my judgment quite unnecessary to rest upon the argument so much insisted upon on the one side that the term traction engine being used as describing the only engine expressed to be excluded, authorized the defendants to use any other description of engine, and on the other side that every locomotive steam engine is a traction engine and that therefore every species of steam engine is expressly excluded. The appeal should, in my opinion, be dismissed with costs and the perpetual injunction and the decree granted by the Court of Chancery maintained with costs in all the courts.

Appeal dismissed with costs.

Solicitors for appellants: *C. & H. D. Gamble.*

Solicitors for respondents: *Blake, Kerr, Lash & Cassels.*

1885

*May. 19.

*Nov. 16.

WILLIAM D. LONG AND GEORGE H. BISBY (PLAINTIFFS) ..... APPELLANTS;

AND

EDWARD H. HANCOCK, J. B. FAIRGRIEVE AND JOHN HALLAM (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Interpleader issue—Insolvent Co.—Chattel mortgage by—Preference over other creditors—Intention to prefer—R. S. O. ch. 118.

A company being indebted to L. & B. in a large amount, and believing that their charter did not allow a mortgage on their property to secure an overdue debt, made an agreement to give such mortgage for an advance of a larger sum, agreeing to return the amount of the debt to the mortgagees. At the time of this transaction the company believed that by getting time from this creditor they would be able to carry on their business and avoid failure. This hope was not realized, however, as the company were subsequently compelled to stop payment, and the above

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

respondents, who were also creditors, obtained judgments and issued executions against the goods secured by the mortgage, and on an interpleader issue brought to try the title to such goods, the chancellor hearing the cause gave judgment for the execution creditors, and the Court of Appeal sustained that judgment by a division of the court. On appeal to the Supreme Court of Canada.

Held, reversing the judgment of the chancellor, that inasmuch as the company *bonâ fide* believed that by giving this mortgage and getting an extension of time for payment of plaintiffs' debt, they would be able to carry on their business, the mortgage was not a preference of this debt over those of other creditors, and not a fraudulent preference under R. S. O. ch. 118.

APPEAL from a decision of the Court of Appeal for Ontario (1), refusing, by a divided court, to set aside a judgment of the chancellor in favor of the respondents.

This was an interpleader issue to try the title to certain goods seized under execution issued on judgments obtained by the respective respondents against the Hamilton Knitting Company. The company being indebted to the plaintiffs in the sum of $4,750, and believing that their charter would not allow them to give a mortgage on their property to secure an overdue debt, entered into an arrangement with the plaintiffs whereby the latter were to advance $5,000, to be secured by a chattel mortgage on the stock and machinery of the company constituting all their available assets, and the company were to return the amount of the debt ($4,750) to the plaintiffs. This arrangement was duly carried out, the mortgage was given as agreed, and the surplus of the $5,000, after returning the amount of the plaintiffs' debt, went into the business of the company. According to the evidence given on the hearing it appeared that the company believed that by giving this mortgage, and being relieved from the present payment of plaintiffs' debt, they would be able to carry on their business and avoid failure; it also appeared that the plaintiffs, previous to the mort-

(1) 12 Ont. App. R. 137. (2) 7 O. R. 154.

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gage, had been urging the payment of, or security for, their debt.

The company failed, however, and the respondents, being creditors, obtained judgments on their respective debts on which executions were issued, and the goods secured by the above-mentioned mortgage were seized under such executions. The plaintiffs then instituted these proceedings to try the title to such goods.

The learned chancellor who heard the cause held that the mortgage was in contravention of the statute relating to fraudulent preferences; that the pressure brought upon the company was too slight to warrant the giving of the mortgage, and gave judgment for the defendants.

The plaintiffs appealed, and the Court of Appeal being equally divided the judgment of the chancellor was sustained.

The plaintiffs then appealed to the Supreme Court of Canada.

Crerar for appellants contended that the chattel mortgage was valid and cited, *inter alia: Johnson* v. *Fesemeyer* (1); *Newton* v. *The Ontario Bank* (2); *Fidgeon* v. *Sharpe* (3); *McCrae* v. *White* (4); *Slater* v. *Oliver* (5); *VanCasteel* v. *Booker* (6); *Mogg* v *Baker* (7); *Ex parte* Hall (8).

Martin Q.C., and *Furlong* for respondent Hancock, and *A. D. Cameron* for respondent Fairgrieve, contended that the transaction by which appellants took security upon all the available assets of their debtors and prevented them from getting credit elsewhere was a sham, and could not, upon the evidence of the case, be upheld. The learned counsel cited in support of the judgment appealed from the following cases: *Smith* v.

(1) 25 Beav. 88; 3 DeG. & J. 13.
(2) 15 Gr. 283.
(3) 5 Taunt. 539.
(4) 9 Can. S. C. R. 22.
(5) 7 O. R. 158.
(6) 2 Ex. 691.
(7) 4 M. & W. 348.
(8) 19 Ch. D. 580.

Cannan (1); *Ex parte* Hawker. *In re* Keely (2); *In re* Wood (3); *Parkes* v. *St. George* (4); *Reese Silver Mining Co.* v. *Atwell* (5).

Crerar in reply cited *The Credit Company* v. *Pott* (6).

Sir W. J. RITCHIE C. J.—I can see no evidence of pressure in this case, nor, taking the whole evidence together, can I discover sufficient to lead my mind to the conclusion that the mortgage was given with either the intent to defraud or delay the creditors of the company, or with intent to give one or more of the creditors a preference over the other creditors, or over any one or more of such creditors.

The company was, no doubt, in very straightened circumstances, and when the plaintiffs insisted on a settlement of their claim the position of the company appears to have been fairly discussed between the president and the manager, and the president seems very fairly to have expressed his determination, in the event of the manager arriving at the conclusion that with an extension of time from the plaintiffs the company could not pull through, as he expressed it, then to recommend an assignment for the general benefit of all the creditors, but if, on the contrary, the manager, as the practical business man of the company, should be of opinion that on obtaining such an extension as Parkes considered necessary, the business could be run and the company extricated from its difficulties, he, Parkes, would recommend giving the required security. The manager appears to have required that the dates of payment in the mortgage should be settled to his satisfaction, and if so, the business could be carried on and the company saved. A discussion appears to have taken place between the plaintiffs and Parkes as to the

(1) 2 E. & B. 35.
(2) 7 Ch. App. 214.
(3) 7 Ch. App. 302.
(4) 10 Ont. App. R. 496.
(5) L. R. 7 Eq. 347.
(6) 6 Q. B. D. 295.

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terms of payment to be inserted in the mortgage, as to which the parties appear to have been at variance; finally, the terms on which the manager thought the company could be carried on were agreed to, and Parkes recommended the giving of the security.

I think the evidence shows that if such an arrangement would not enable them to carry the company through the mortgage would not have been given, and an assignment would have been recommended by the president in lieu thereof. The terms having been satisfactorily arranged, a by-law of the company was passed authorizing the giving of the mortgage for $5,000, which was unanimously confirmed by all the stockholders of the company, such sum ($5,000) being an amount sufficient to pay off the indebtedness to the plaintiffs, and a further sum of $156.13, which the company employed in the purchase of wool. The company resumed business and continued until the 25th of June, when the respondent Hancock issued a writ against them on which he obtained judgment, but it is worthy of remark that no portion of this judgment debt had been created at the time when the mortgage in question was given. And as to the respondent Hallam, the lawyer says:

When he knew I had given the mortgage to Long & Bisby, after that I had showed him the books and statements, and gave him an order on Lockhart, he was perfectly well satisfied to let the matter stand and give me all the time needed on the balance of this account.

I cannot think this was a device or scheme to prefer the plaintiffs, nor can I think the president and manager believed the company to be hopelessly insolvent; had they so thought, the evidence leads my mind to the conclusion that the mortgage would not have been given, but a general assignment in lieu thereof; and after the mortgage was given the plaintiffs and the

company had dealings to the extent of about $2,140.

"It was expected, at the time the mortgage was given, that exertions would be made to get the preferred stock taken."

While I think there was no pressure in this case, I cannot agree with the chancellor that the transaction was a scheme by the company to give a preference to the plaintiffs over the other creditors, but was an agreement entered into whereby the company hoped to be enabled to continue its business and meet its engagements, and not with the intent of defeating or delaying its creditors, or to prefer the plaintiffs over Hancock, who was not a creditor at the time it was given, or over others who were at that time creditors.

I do not think the evidence justifies me in saying that the whole proceeding was a sham; in other words, a gross fraud entered into by the plaintiffs, the president and manager of the company and the entire body of shareholders, to confer a preference on the plaintiffs and defraud all the other creditors of the company and to prevent an equal distribution of the assets of the company. Before coming to such a conclusion, I think the evidence should be much stronger than it is in this case.

I do not think it is necessary at all to apply the doctrine of pressure to this case. The plaintiffs, no doubt, wanted to secure their debt from a company in, no doubt, very straightened circumstances, and which, had the plaintiffs pressed their claim for immediate payment, would have necessitated the winding-up of the company, but which would be avoided, in the opinion of the president, manager and shareholders, by obtaining a postponement of the time of payment of the debt and thus enable the company to work on and extricate itself from its embarassments, and also to enable it, by the issue of preferential stock,

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to provide working capital. I think the fair result of the evidence is that the assignment was not a fraud, nor intended to be a fraud, on the creditors, but was considered an arrangement whereby the company could be saved and all the creditors ultimately paid, and it was entered into with this intent.

It is nothing to say, after the subsequent events, that the company was hopelessly insolvent, and quite as little to say, before the happening of these events, that the manager, the president and the whole body of shareholders combined fraudulently to benefit the plaintiff and wrong the other creditors of the company; that the president's consultation with the manager as to the ability of the company to go on if an extension of time was granted, and the statement of the manager that from his knowledge of the position of the company by obtaining the terms he stipulated for he could get through, were false and made with a fraudulent intent; that the discussion as to the terms and the refusal to give the mortgage unless those terms were acceded to, was all a sham; that the president did not believe the statement of the manager but bargained himself with the plaintiffs to give them a fraudulent preference, and that the whole body of shareholders unanimously joined with the president and manager, approved of their doings and so united in committing a gross fraud on their innocent creditors. And for what? What were the manager, president and shareholders to gain by benefitting the plaintiffs and defrauding the other creditors? Before attributing such conduct to any one we should expect to find a motive but I can discover none in this case unless it be that to which I am disposed to attribute the conduct of the parties—a desire to perpetuate the company, to "pull her through" as it is expressed, and so pay everybody. That with an extension of time from the principal

creditor this might be done, but without such extension an attempt to carry it on would be hopeless, all parties own. They acted in good faith and I cannot say that it has been made out, beyond all reasonable doubt, that a fraud upon the creditors and upon the act has been made out. Suspicion will not do; fraud must be proved, not presumed.

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—I have come to the same conclusion. The defence set up that the chattel mortgage was given to effect a preference to these creditors over others is not sustained by the evidence.

That is the only defence, and I do not think that, under the evidence, this court or any other court should interfere.

GWYNNE J.—This is an interpleader issue in which the question is whether a chattel mortgage executed on the 5th day of May, 1883, by a certain corporation, called the Hamilton Knitting Company, to the appellants, is or not void or against the creditors of the company within the provisions of the revised statutes of Ontario ch. 118 sec. 2. To be void under that statute it must have been executed by the company when in insolvent circumstances or on the eve of insolvency, and with intent to give to the appellants a preference over the other creditors of the company.

That the appellants who were the largest creditors of the company, and whose claim was for a long time overdue, had become, immediately preceding the execution of the mortgage, very urgent for payment of their demand, and were pressing for such payment with threats of instant legal proceedings unless they should be paid or secured, there can, I think, be no doubt upon the evidence, but it is contended that the doctrine

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of pressure has no application in a case arising under the provisions of the statute in question. In support of this contention we have been referred to the language of the Lords Justices in appeal in *ex parte Hall* (1), and in *ex parte Griffith* (2), and to the language of Mr. Justice Patterson in the Court of Appeal for Ontario in the case of *Brayley* v. *Ellis* (3). In the two former cases the questions arose under the 92nd section of the English Bankruptcy Act of 1869, which declared that every conveyance or transfer of property or charge thereon, and every payment made by any person unable to pay his debts from his own moneys as they become due, in favor of any creditor, or of any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, if the person making such conveyance, &c., &c., become bankrupt within three months after the date of making the same, shall be deemed fraudulent and void as against the trustee in bankruptcy.

In *ex parte* Hall the circumstances of the case as described in the judgment of Sir George Jessel, Master of the Rolls, were as follows (4) :—

The bankrupt was pressed by the appellant on the 14th February to give him security which he had promised, but he did not give it. On the 17th February Chamberlin (the debtor's brother-in-law) went to see the appellant, and told him that the bankrupt was about to stop payment. Thereupon the appellant went to Leicester to see if he could not get some security from the bankrupt. There he was again told by the bankrupt that he was about to stop. He endeavored to obtain some security from him, but he failed, though he says he told the bankrupt that he should bring an action against him instantly if he did not perform his promise of the 17th January. Then the appellant went back to Leeds, and after he had gone away the bankrupt delivered the two bills to Brown, requesting him to hand them over to the appellant.

Then with reference to this state of facts the learned

(1) 19 Ch. D. 584.
(2) 23 Ch. D. 69.
(3) 9 Ont. App. R. 588.
(4) At p. 585.

master of the rolls proceeds :

Can that delivery of the bills to Brown be said to have been made in consequence of *bonâ fide* pressure on the part of the appellants? It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, "I am about to become bankrupt," or "I shall stop payment in a week." The creditor says, "Pay me my debt or I will sue you for it." Can that be called *bonâ fide* pressure by the creditor? When you consider the matter it seems to me that it would be absurd so to call it, and that is exactly what occurred in the present case.

In *ex parte* Griffith the circumstances, as also described in the judgment of the same learned judge, were these. Wilkinson was indebted to his traveller, Griffith, in a large sum of money (1) :—

He is going to stop payment, and writes a letter to Griffith, who was then on a journey, telling him in effect as plainly as possible, "I can't go on, come up to London immediately; "I can't meet my bills, and I cannot pay even the ordinary weekly wages, therefore you must at once come to London." Well, in compliance with that letter Griffith comes to London and he finds that Wilkinson's affairs are in a hopeless state. A discussion appears to have taken place between Griffith and Wilkinson, in which Griffith says: "Can't you give me a preference," (that is what it comes to), and he asks him to assign those debts over to him as security for the amount owing to him. There is no pretence as far as I can find for saying that there was anything more than a request by Griffith for a preference. It is said that Wilkinson refused to comply with the request; I suppose he said: "In the present state of my affairs I can't pay you." But just on the eve of signing his petition, the very day before, he does assign those debts to Griffith. For what purpose? Clearly to give him a preference. I say, sitting as a jury, that the learned registrar was quite right in coming to the conclusion that the mind of Wilkinson was influenced, not by the demand of Griffith for a preference, but by his desire to accede to the demand and to give him a preference. That is within the very words of sec. 92. If the assignment was made with a different view, it would not be within the statute. If it was made with a view to prefer the creditor, and also with some additional view, it may be that it is not within the statute. But the additional motive may have been so trifling that it ought not to be taken into account.

(1) See 23 Ch. D. 82.

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Lord Justice Lindley in that case says:

Wilkinson's letter of the 29th of June, 1881, which brought Griffith up to town, throws a flood of light upon the transaction. Taking that letter into consideration and not being led away on a false scent by an enquiry whether there was *bonâ fide* pressure at that time, taking that letter as part of the transaction and bearing in mind its relation to that which took place afterwards, I am driven irresistibly to the conclusion that the security was given by Wilkinson with a view to prefer Griffith.

And Lord Justice Bowen:

There is no question, in my mind, that this particular assignment was made with a view of giving this creditor a preference. But that, as the master of the rolls has said, may not be enough, and I go further and I say that the assignment was made with the view of preferring this creditor, and to give the *coup de grace* to it, I say, sitting as a juryman, that it was made with the sole view of giving this creditor a preference over every other creditor.

Now if these learned judges had been of the opinion that the doctrine of pressure had no application whatever in a case arising under the 92nd section of the Bankruptcy Act of 1869 it is inconceivable that they should have taken so much pains to point out that it would be absurd to call pressure that which was relied upon as pressure, and that the transactions which were impeached were the voluntary acts of the bankrupts. If they had been of opinion that the doctrine of pressure was wholly inapplicable in view of the provisions of the statute, they would, I have no doubt, have expressed that opinion in equally unequivocal language as that used by Mr. Justice Paterson in *Brayley* v. *Ellis* in relation to this same ch. 118 of the statutes of Ontario now under consideration, and which he has repeated in his judgment in the present case. It is upon the authority of the above cases of *ex parte Hall* and *ex parte Griffith*, and of certain passages in the judgments of the learned judges of the Court of Appeal for Ontario, in *Davidson* v. *Ross* (1), and of the observations of Mr. Justice Patterson in *Brayley* v. *Ellis*, that the contention,

(1) 24 Gr. 22.

that the question of pressure is wholly unimportant in a case arising under ch. 118 of the statutes of Ontario, is rested. This conclusion is not, in my opinion, a fair deduction from what is said in *ex parte Hall* or in *ex parte Griffith*, and as to the passages in *Davidson* v. *Ross* which are relied upon they did not meet with favor in this court in *McCrae* v. *White* (1) where it was also pointed out that those passages were not necessary for the determination of the *res decisa* in *Davidson* v. *Ross* and were, therefore, merely *obiter dicta*. The question of the existence or non-existence of pressure applied by a creditor upon his debtor to enforce payment of, or security for, his debt is one which, in my opinion, is still an important item to be taken into consideration in cases arising under ch. 118 of the Ontario statutes, and I confess I am unable to see how it can be said to be irrelevant or inappropriate unless, upon an enquiry as to the proper inference as to a party's intent in executing a conveyance, we are to exclude wholly from consideration the circumstances surrounding its execution. The statute does not say that all conveyances, &c., &c., executed by a person in insolvent circumstances or on the eve of insolvency, even though executed to procure the cessation of legal proceedings to recover a just debt, and to avert the injurious and probably ruinous consequences attending a judicial sale under an execution in the suit shall be void as against the creditors of the debtor; but that all conveyances, &c., executed by a debtor in insolvent circumstances, &c., and with intent to defeat or delay creditors, or to give one creditor a preference over the other creditors of the debtor, shall be void.

Pressure is therefore an all important item for the proper determination of the question whether the con-

(1) 9 Can. S. C. R. 22.

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veyance which is impeached was executed with one of the intents named in the statute as having the effect of invalidating it, or with an intent not prohibited by the statute and which is, therefore, unobjectionable. Now that there was *bonâ fide* pressure applied by the appellants, the creditors in this case, there can, I think, be no doubt, and the proper inference to be drawn from the evidence as to the intent of the mortgagors in executing the mortgage, in my opinion, is that it was executed under the influence of the pressure and with the view, by obtaining time for payment by instalments of the amount secured by the mortgage, to enable the company to recover from the depression in which its affairs then were and eventually to become successful in its business, and not with the intent of giving to the appellants a preference over the creditors of the company.

Whether the expectation of the manager of the company was over sanguine or not it appears to have been honestly entertained by him, and I see no reason to doubt that the president and directors of the company, in executing the chattel mortgage, acted honestly upon the faith of the manager's assurances that with time given as provided in the mortgage, and the arrangements he had made, he would carry the company successfully through its difficulties. It is unnecessary for me to go through the evidence which has been ably reviewed by Mr. Justice Burton with whose view of it I concur. The sole ground for the suspicion which has been cast upon the transaction appears to have arisen from the form in which the mortgage has been drawn, namely, in consideration of a loan of $5,000 then made instead of being stated to be partly in consideration of a past debt and partly of a small further advance then made. But there can I think be no doubt upon the evidence that this form was honestly adopted under an impression,

wholly erroneous in my opinion, that the company had no power to execute a chattel mortgage to secure a past debt.

Every trading corporation has the same power that an individual trader has to mortgage his property to secure an overdue debt unless this power be expressly restrained and prohibited by the act incorporating the company, and there is no prohibitory clause of that nature in the act incorporating this company. The erroneous opinion entertained upon this point having been the cause of the adoption of the form which the mortgage has assumed, namely, as security for a loan of $5,000 out of which the old debt of almost $4,700 was paid, it would be unjust to impute to the execution of the mortgage, and as evidenced by its form, an intent fraudulent within this chapter 118, when that form can, upon the evidence, be attributed to a wholly different and honest intent.

The appeal, in my opinion, should be allowed with costs and judgment be ordered to be entered for the appellants, the plaintiffs in the interpleader issue, with costs in all the courts.

Appeal allowed with costs.

Solicitors for appellants: *Crerar, Muir & Crerar.*

Solicitor for respondent Hancock: *E. Furlong.*

Solicitor for respondent Fairgrieve: *A. D. Cameron.*

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*Oct. 30.

AND

1886 LES COMMISSAIRES D'ÉCOLE DE LA PAROISSE DE ST. VALENTIN } RESPONDENTS.

*March 16. ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Con. Stats. L. C. ch. 15 *secs.* 31 *and* 33—40 *Vic. ch.* 22 *sec.* 11 *P. Q.—Construction of—*33 *Vic. ch.* 25 *sec.* 7 *P. Q.—Erection of a school house—Decision of superintendent—Mandamus.*

Under 40 Vic. ch. 22 sec. 11 the Superintendent of Education for the province of Quebec, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered that the school district of the municipality of St. Valentin should be divided into two districts with a school house in each.

The School Commissioners by resolution subsequently decreed the division, and a few days later on a petition presented by ratepayers protesting against the division, they passed another resolution refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed another resolution declaring that the district should not be divided as ordered by the Superintendent, but should be re-united into one.

In answer to a peremptory writ of *mandamus* granted by the Superior Court ordering the School Commissioners to put into execution the decision of the Superintendent of Education, the School Commissioners (respondents) contended that they had acted on the decision by approving of it, and that as the law stood they had power and authority to re-unite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the Superintendent.

Held, reversing the judgment of the court below, that the Commissioners having acted under the authority conferred upon them by Cons. Stats. L. C. ch. 15 secs. 31 and 33, and an appeal having been made to the Superintendent of Education, his decision in the matter was final (40 Vic. ch. 22 sec. 11, P.Q.), and could only be modified by the Superintendent himself on an application made to him under 33 Vic. ch. 25 sec. 7; and, therefore, that the peremptory *mandamus* ordering the respondents to execute the Superintendent's decision should issue.

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

APPEAL from a judgment of the Court of Queen's Bench of the province of Quebec (appeal side), rendered at Montreal on the 27th day of May, 1884, reversing the judgment of the Superior Court ordering the issue of a peremptory writ of *mandamus*.

The facts and pleadings are fully stated in the judgments hereinafter given.

Trudel Q.C. for appellants contended:

1. That section 11, ch. 22, 40 Vic., gave the Superintendent of Public Instruction absolute power to decide upon the matters which gave rise to this cause and that his decision is *final*.

2. That the Superintendent, after mature consideration of the matter in question, gave a decision according to justice and equity and gave clear and precise orders which were never complied with.

3. That the appellants were entitled to the full and entire execution of the decision of the Superintendent and the issuing of a writ of *mandamus* was the proper mode and only proceeding which could legally be resorted to to force the school commissioners to execute the decision of the Superintendent; 4. That the decision of Mr. Justice Chagnon ordering the issuing of said writ was according to law; 5. That said *mandamus* was the only proper remedy to be employed.

Geoffrion Q.C. and *Beaudin* for respondents contended that the decision of the Superintendent had been complied with and that the commissioners had a perfect right afterwards in the interest of the entire district to reunite the divided parts, reconstituting the old district, and they referred to secs. 7, 31, 33 and 64 of ch. 15 of Cons. Stats., L. C., and secs. 10, 11, 13, 40, 54 of 40 Vic., ch. 22, P. Q.

They also contended that the proper remedy for the appellants was not by *mandamus* citing Tapping on *mandamus* (1).

(1) P. 288.

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Sir W. J. RITCHIE C. J.—I think the school commissioners did not carry out the decision of the Superintendent of Education as they should have done, but on the contrary have attempted to evade doing so in an unjustifiable manner.

I think the appeal should be allowed.

FOURNIER J.—La contestation entre les parties en cette cause origine d'une différence d'opinion entre les contribuables de l'arrondissement No. 2, de la municipalité scolaire de la paroisse de St. Valentin, sur l'opportunité de faire une nouvelle division de cet arrondissement demandée par certains d'entr'eux aux commissaires d'école, intimés, qui, par leur résolution en date du 2 mai 1882, refusèrent cette demande. Par une autre résolution adoptée à la même séance, ils retranchèrent cependant une partie de cet arrondissement connue sous le nom de "*Le Petit rang*."

La section 11 du ch. 22, de 40 Vic. accordant un appel de cette décision des commissaires au Surintendant de l'instruction publique, les requérants dont la demande avait été refusée adoptèrent les procédés indiqués par la loi pour appeler de la décision rendue contre eux. Sur cet appel le surintendant rendit le 17 mai une décision dont le dispositif est en ces termes :

En conséquence, je maintiens la requête des dits requérants, j'annulle et mets de côté la résolution des dits commissaires du deux Mai dernier au sujet de la division du dit arrondissement No. 2, j'ordonne que le dit arrondissement No. 2 soit divisé et il est par le présent divisé en deux parties égales: la première partie sera connue sous le nom d'arrondissement No. 2, et la deuxième partie sous celui d'arrondissement No. 2½; et qu'il soit construit, suivant la loi et les règlements, une maison d'école dans chacun des dits arrondissements; que Jean-Baptiste Bornais, Pierre Cloutier, Achille Boivin et Olivier Bisaillon soient annexés au dit arrondissement No. 2, et j'ordonne de plus que chacune des dites maisons d'école qui sera construite dans chacun des dits arrondissements à la diligence et sous l'autorité des dits commissaires, sera fixée et érigée dans le

centre de chacun des dits arrondissements, eu égard aux distances et au chiffre de la population.

Pour se conformer à cette décision les intimés adoptèrent le 5 février 1883, une résolution divisant l'arrondissement No. 2 en deux autres, désignés par les Nos. 2 et 2½. Tout en reconnaissant qu'il était de leur devoir de se soumettre à cette sentence, ils exprimaient leur opinion que cette division était de nature à nuire à l'instruction en détruisant une de leur meilleures écoles. Après avoir défini les limites des nouveaux arrondissements, les commissaires, ordonnent comme suit la construction de deux maisons d'écoles :

Que le site de l'école du dit arrondissement No. 2½ soit fixé sur le coin ouest de la propriété de Jérémie Boivin, sur le chemin de la dite deuxième ligne, laquelle propriété est désignée au livre de renvoi officiel sous le numéro 236 ; pourvu toutefois qu'il n'y ait pas déjà de bâtisses de construites sur le dit site. Dans ce cas, un autre endroit près de là devra être choisi ;

Qu'une maison d'école soit construite d'après les plans et devis de la maison d'école No. 1, si tels plans et devis sont approuvés par le surintendant ; sinon qu'il soit prié lui-même d'avoir à en fournir d'autres, que le Secrétaire-Trésorier soit autorisé à lui écrire à cet effet afin que les travaux de la dite maison puissent se commencer le plus tôt possible. Agréé unanimement.

Le 27 du même mois une autre requête présentée aux commissaires, leur demandant de rescinder leur résolution du 5, fut rejetée pour les motifs suivants :

Que les commissaires ne doivent ni ne peuvent prendre sur eux de changer leur résolution du cinq février courant par laquelle ils ont divisé l'arrondissement No. deux, tel qu'ordonné par la sentence de l'honorable Surintendant, en date du dix-sept mai huit cent quatre-vingt-deux.

Que cependant, les dits commissaires seraient heureux que le dit honorable Surintendant voulût bien faire droit à la dite requête et révoquer la dite sentence, vu que c'est la conviction des dits commissaires qu'un tel arrangement serait pour le plus grand avantage des contribuables et même des opposants.

Qu'en conséquence, la dite requête soit adressée par le secrétaire-trésorier au dit honorable Surintendant, avec prière de vouloir bien la prendre en considération ;

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Qu'à l'avenir, aucune autre requête concernant cette question ne soit reçue par les dits commissaires qui sont parfaitement décidés à se soumettre aux ordres de l'honorable Surintendant, qu'ils soient ou non favorables aux dits requérants.

Mais le 27 avril 1883, une requête ayant été présentée aux appelants leur demandant de réunir l'arrondissement No. 2 et No. 2½, ils firent droit à cette requête, *révoquant virtuellement* leur résolution du 5 février 188..

La résolution du 27 avril ayant été communiquée au Surintendant, il répondit qu'il ne pouvait approuver le devis de la maison d'école qu'ils avaient l'intention de construire dans l'arrondissement No. 2, vu que par là il approuverait leur résolution du 27 avril dernier, ce qu'il n'avait pas le droit de faire. Il les prévenait en même temps que sur eux retomberait toute la responsabilité de cette procédure.

Les appelants désirant se prévaloir de la sentence du Surintendant et considérant comme absolument nuls tous les procédés des commissaires tendant à l'anéantir, demandèrent un bref de *mandamus* pour faire ordonner l'exécution de la dite sentence, en date du 17 mai 1882, et faire ordonner conformément à icelle la construction d'une maison d'école convenable dans l'arrondissement No. 2, tel que fourni par la récente sub-division, et à ce que les résolutions contraires à la dite sentence soient déclarées nulles. Les intimés ont plaidé par défense en droit que la requête ne fait pas voir que le Surintendant avait le pouvoir de rendre la dite sentence (17 mai 1882), et que les résolutions des 27 avril et 17 mai 1883, modifiant sa dite sentence n'ayant pas été portées en appel, sont en force, et qu'il n'est pas allégué que les requérants n'ont pas d'autre remède que le *mandamus*. La défense au fonds répète les mêmes moyens dans une forme peu différente.

Après enquête et audition au mérite, la Cour Supé-

rieure a ordonnée l'émission d'un bref de *mandamus*. Ce jugement, porté en appel à la Cour du Banc de la Reine, a été infirmé. C'est de ce dernier jugement qu'il y a maintenant appel à cette Cour.

La principale question soulevée par cette contestation est de savoir si la résolution du 2 mai 1882, pouvait former la base d'un appel au surintendant, et si celui-ci avait juridiction pour réviser un procédé de cette nature. Autant qu'on peut le voir par les allégations de la requête libellée, la demande faite aux commissaires et servant de base à la résolution du 2 mai 1882, est une demande négative. C'est plutôt une protestation contre le projet de diviser l'arrondissement No. 2, dont il devait sans doute être question. La requête à ce sujet n'étant pas alléguée on ne peut s'en faire une idée que par le procès-verbal de la séance dans laquelle a été adoptée la résolution du 2 mai 1882 qui constate que les commissaires prennent en considération une requête signée par 29 contribuables de l'arrondissement No. 2 demandant que leur école soit réparée, tel que décidé par les commissaires " et qu'aucun changement et division ne soient faites dans cet arrondissement." La requête paraît aussi avoir demandé le renvoi à leurs arrondissements respectifs des personnes qui avaient été annexées à cet arrondissement. Ensuite la résolution suivante est adoptée :

Qu'aucun changement ne soit fait dans ce qui reste du dit arrondissement No. 2, et que les résolutions déjà adoptées quant aux réparations à faire à l'école de cet arrondissement, soient mises à effet.

Les commissaires prennent aussi en considération à la même séance, la requête de Jean-Baptiste Bornais, l'un des appelants, demandant à être annexé à l'arrondissement No. 2, et la renvoie.

Cet exposé des procédés était certainement insuffisant pour faire voir qu'il avait été adopté à cette séance une

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décision susceptible d'être reformée par appel. Mais la preuve a suppléé à ce défaut par la production du procès-verbal entier de cette séance, lequel fait voir que ce jour-là une lettre du Surintendant de l'instruction publique avaient été lue devant les commissaires, les autorisant à changer les limites de l'arrondissement No 2, en en détachant le *Petit rang*, et engageant en même temps les commissaires à diviser le reste de l'arrondissement No. 2, et à y fixer deux maisons d'écoles. La suggestion du Surintendant quant au retranchement du Petit rang fut adoptée, mais la division du reste de l'arrondissement fut refusée. De cette manière on voit que la résolution ne se borne pas au maintien des limites de l'arrondissement No. 2, mais qu'il est aussi fait un changement important dans ses limites par le retranchement du *Petit rang*, en même temps qu'elle constate le refus de diviser ce qui reste de cet arrondissement conformément à l'ordre du Surintendant. Cette décision est-elle applicable ?

La section 11 de l'acte 40 Vic., chap. 22, dit :

Lorsque l'emplacement d'un maison d'école est choisi par les commissaires ou syndics d'écoles, ou *qu'un changement est fait dans les limites d'un arrondissement* d'école, ou qu'un nouvel arrondissement est établi dans une municipalité scolaire, ou qu'un ou plusieurs *arrondissements établis sont changés ou subdivisés*, ou lorsque les commissaires ou syndics d'écoles refusent ou négligent d'exercer ou remplir quelqu'une des attributions ou devoirs que leur confère cette section, les contribuables intéressés pourront en appeler en tout temps au Surintendant par requête sommaire . . . la sentence rendue par le Surintendant sera finale ; et il pourra ordonner par cette sentence que les commissaires ou syndics d'écoles fassent ce qui leur a été demandé *ou ce qu'il leur ordonne de faire* ou s'abstiennent de le faire ou ne le fassent qu'en tout ou en partie et aux conditions exigées par la sentence.

D'après cette section, il est clair qu'un changement fait dans les limites d'un arrondissement donne le droit d'en appeler au Surintendant. Dans ce cas, un tel changement ayant eu lieu par le retranchement du

Petit rang l'intervention du Surintendant était justifiable. Le refus de diviser le reste de l'arrondissement, ainsi que l'ordonnait le Surintendant, donnait également droit d'appeler de la décision des commissaires; car si les circonstances, exigeaient cette division dans l'intérêt de l'éducation comme le déclare le Surintendant, le refus de le faire était une négligence et un refus de la part des commissaires de remplir une de leurs attributions, d'après les termes de la susdite section, et donnait lieu d'appeler d'une décision refusant cette division. Pour ce refus de diviser, comme pour le changement fait par le retranchement du *Petit rang*, il y avait lieu à appel et la sentence rendue à ce sujet par le Surintendant est dans les limites de ses attributions.

Cette sentence ayant donné gain de cause aux appelants, ceux-ci se trouvaient avoir par cela même acquis le droit de la faire exécuter. Mais les commissaires, après s'être soumis à cette sentence et avoir rejeté une requête qui en demandait la modification comme on l'a vu par la résolution ci-dessus citée, ne tardèrent pas à adopter des procédés qui en détruisaient l'effet. Dès le 27 avril 1883, ils adressent une requête demandant, contrairement à la dite sentence, la réunion des deux arrondissements No. 2 et 2½, et déclarèrent qu'une seule école, au lieu de deux, serait construite. Le 17 mai, une résolution fut adoptée pour donner suite à celle du 27 avril, décrétant la réunion des arrondissements. Etait-il alors au pouvoir des commissaires d'exercer une juridiction quelconque au sujet des limites de ces arrondissements et d'en ordonner la réunion, après la sentence rendue par le Surintendant et après avoir déclaré qu'ils s'y conformeraient. L'affirmative a été soutenue par eux en se fondant sur les secs. 31 et 33 du ch. 15, Statuts Refondus, B. C. Ces deux sections sont en force et donnent certainement aux commissaires le droit d'établir des arrondissements d'école, d'en

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déterminer les limites, de les changer à leur discrétion, de créer de nouveaux arrondissements de temps en temps suivant les besoins de la population ; ainsi que le droit, quand ils le jugeront à propos, d'unir deux ou plusieurs arrondissements, et de les séparer de nouveau, en donnant avis de leur décision au Surintendant. Les commissaires ont incontestablement ce pouvoir et ils en ont fait un légitime exercice quand, pour se conformer à la sentence du Surintendant ils ont fait la division qu'il avait ordonnée. Mais ce pouvoir une fois exercé devient sujet à l'appel établi par la sec 11, et ne peut plus après cet appel être exercé par les commissaires ; il tombe ensuite sous le contrôle exclusif du Surintendant. Sa décision étant finale, les commissaires doivent s'y soumettre et n'ont plus le pouvoir d'adopter aucune résolution qui serait en contradiction avec sa sentence. C'est pour toutes les parties intéressées chose jugée. Admettre la prétention des intimés ce serait virtuellement abolir le droit d'appel qui ne serait plus qu'une procédure illusoire, si les commissaires pouvaient mettre de côté la sentence du Surintendant en adoptant une autre résolution au même effet que celle que le Surintendant aurait rejetée ou modifiée. Les commissaires sont, dans ce cas, dans la même position qu'un tribunal inférieur vis-à-vis d'une cour d'appel, lorsque celle-ci est saisie du litige, le tribunal de première instance n'a plus de juridiction, et la décision du tribunal supérieur doit être exécutée. Je considère comme absolument nulles les résolutions des 27 avril et 17 mai 1883, ordonnant la réunion des deux arrondissements, et il n'y avait aucune nécessité d'en faire le sujet d'un second appel, comme le prétendent les intimés Mais comme il peut être utile, suivant les circonstances, de faire modifier la sentence du Surintendant, la loi y a sagement pourvu par la sec. 7 du ch. 28, 33 Vic., en statuant que :

Le Ministre de l'instruction publique ou le Surintendant de l'éducation pour le temps d'alors, pourra, de temps à autre, si on lui donne des raisons suffisantes, propres à le satisfaire, changer, révoquer ou modifier toute décision par lui rendue sur appel de la décision des commissaires d'écoles ou syndics, en vertu du par. (8) huit de la soixante et-quatrième section du chapitre quinze des Statuts Refondus du Bas-Canada.

Cette section qui donnait aussi un appel au Surintendant a été retranchée et remplacée par la section 11, du ch. 22 de 45 Vic, citée plus haut. Il est évident d'après cette section que s'il devient avantageux de faire des modifications aux changements des limites d'arrondissements réglées sur appel par une sentence du Surintendant, que ce n'est plus aux commissaires que l'on peut s'adresser, nonobstant les secs. 31 et 33 du ch. 15, mais au Surintendant qui par la dite sec. 7, est seul investi de ce pouvoir. Ceci démontre à l'évidence qu'il ne pouvait pas y avoir appel sur les résolutions des 27 avril et 17 mai 1883, modifiant la sentence, mais que le seul remède qui restait aux intéressés était de s'adresser au Surintendant pour lui demander de la modifier lui même en lui donnant des raisons suffisantes pour l'engager à le faire. Il est facile de voir que la loi n'a pas créé deux juridictions concurrentes sur les changements d'arrondissements, mais une jurisdiction de première instance chez les commissaires et une d'appel chez le Surintendant. Un conflit de juridiction à ce sujet aurait été une source féconde de contestation que la loi a voulu éviter en rendant la décision du Surintendant finale, et ne laissant qu'à lui seul le droit de modifier sa sentence. En conséquence je suis d'avis que la sentence du Surintendant a été valablement rendue, et qu'elle ne pouvait être affectée par les résolutions contaire des commissaires, et que les appelants ont droit d'en demander l'exécution.

Quant aux objections faites à l'émission du bref de *mandamus*, je suis d'avis pour les raisons données par

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l'Hon. Juge de la Cour Supérieure qu'elles n'étaient pas fondées.

Pour ces motifs, je suis d'opinion que l'appel doit être alloué avec dépens.

HENRY J.—The differences existing between the parties to this suit have arisen under section 11 of ch. 22, 40 Vic., of the Statutes of Quebec, which provides as follows:

When a site for a school house is chosen by the school commissioners or trustees, or a change is made in the limits of a school district, or a new school district is established in a school municipality, or when one or more established school districts are changed or subdivided, or when the school commissioners or trustees refuse or neglect to exercise or fulfil any of the functions or duties conferred upon them by this section, the ratepayers interested may at all times appeal to the Superintendent, by summary petition; but such appeal shall not be allowed, unless with the approval of three visitors other than the school commissioners or trustees of the said municipality; the decision given by the Superintendent *shall be final* and he may, by such decision, order the school commissioners or trustees to do that which they have been required or which he orders them to do, or abstain from doing, or to do only in whole or in part and upon the conditions required by such decision.

It is shown that within the jurisdiction of the respondents there was in 1882 a school district considered by some to be too large, and a petition for a division of it into two districts having been considered and rejected by the respondent commissioners, the matter was taken by appeal under that section from that decision to the Superintendent, who ordered that the district should be divided into two districts with a school house in each. That order was duly made and a resolution of the commissioners was passed in February, 1883, as follows:—

That though they regret to be obliged to make the said division, yet they are bound to obey the decision of the superintendent and comply with his order in the matter, and consequently the said division is decreed.

Nothing, however, was done by the commissioners

to carry out or give effect to the order of the superintendent, but a resolution was subsequently passed refusing to do so, upon which the appellants obtained a peremptory writ of *mandamus* to be issued out of the Superior Court, ordering and requiring the commissioners to perform the order of the superintendent.

The respondents seek to justify their refusal to perform the order of the superintendent, because, as they allege, a petition was subsequently, during the said month of February, presented to them against the said division and that they unanimously resolved:—

1st. That they ought not and cannot take upon themselves to change their previous resolution by which in obedience to the superintendent's order, they have decreed the said division.

2nd. That they would, however, be pleased if the superintendent would revoke his said order.

3rd. That consequently the said petition be referred to the superintendent with a recommendation to his consideration.

4th. That the said commissioners are absolutely to submit to the orders of the superintendent and will hereafter refuse to receive any petition against it.

The commissioners failed to cause the division to be made, and in the month of May following passed a resolution, that the district should not be divided as ordered by the superintendent, but re-united into one, and it alleged that such was done in answer to the prayer of a petition of a majority of the inhabitants of the district.

That is substantially the justification offered by the commissioners for their failure to do what appears to me to have been their plain and obvious duty.

After the decision of the superintendent was regularly made in regard to any matter as provided for by the section in question the duties of the commissioners became wholly and solely ministerial. After a case before them goes to the superintendent by appeal the functions of the commissioners as judges in the matter are at end and they, by the plain and express words of the sec-

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tion, become the mere instruments provided to put in execution the orders of the superintendent. The commissioners are virtually a court of original jurisdiction over certain matters in relation to schools with an appeal from their decisions to the superintendent. When he becomes legally seized by an appeal of a matter previously decided by the commissioners, they become denuded of all power over the subject matter except, ministerially, to carry out his orders and cause the proper effect to be given to them.

In this case he, as the appellate and higher tribunal, decided that the district in question should be divided.

The law as found in the section of the statute I have quoted makes his decision final and conclusive and it throws upon the commissioners the duty of carrying out his orders. That is their only duty and it is one they are bound to perform. They have no discretion in the matter nor can they either question or consider, as far as their functions go, the propriety of the legitimate decision of the superintendent. As well, in my opinion, might a legal tribunal of first instance undertake to reverse a decision of a higher court to which a case had been removed by appeal, or decline to adopt and carry out the decision of the higher tribunal.

I think the writ was properly issued and that the appeal should be allowed and that our judgment should be for the appellants with costs in all the courts.

If the commissioners had, as required, caused the decision of the superintendent to be carried out by an actual division of the district into two in the manner directed by the order of the superintendent, and that the two districts actually existed, the commissioners might then have received and decided upon a petition to unite them and their decision would be binding unless by an appeal to the superintendent their decision was reversed. That, however, is not the case before us.

The commissioners in this case had, as I think, no jurisdiction. Their last order was to re-unite two districts that had never existed—that had never been created or established as required by the order of the superintendent. The commissioners had passed a resolution agreeing to do so, but failed to give effect to their own resolution. Their last order was, in my opinion, against the provision of the statute, and they having no authority to make it, no appeal from it was necessary.

I think the writ was properly issued, that the appeal should be allowed and that the appellants are entitled to our judgment with costs.

TASCHEREAU J.—This is a case under the Lower Canada School Law about the division of certain school districts in the municipality of St. Valentin.

The appellants obtained a preremptory writ of *mandamus* in the Superior Court against the school commissioners of the said municipality ordering them to put into execution a certain decision of the superintendent of education, rendered on the 17th May, 1882, under sect. 1140 V. ch. 22, which reads as follows:—

When a site for a school house is chosen by the school commissioners or trustees, or a change is made in the limits of a school district, or a new school district is established in a school municipality, or when one or more established school districts are changed or subdivided, or when the school commissioners or trustees refuse or neglect to exercise or fulfil any of the functions or duties conferred upon them by this section, the ratepayers interested may at all times appeal to the superintendent, by summary petition; but such appeal shall not be allowed, unless with the approval of three visitors other than the school commissioners or trustees of the said municipality; the decision given by the superintendent shall be final and he may, by such decision, order the school commissioners or trustees to do that which they have been required or which he orders them to do, or abstain from doing, or to do only in whole or in part and upon the conditions required by such decision.

The superintendent had ordered, on an appeal to him duly instituted under the said section, that a large

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school district in the said municipality should be divided into two districts with a school house in each. The legality of this order has not been questioned before this Court.

The school commissioners appeared disposed at first to submit, and unanimously passed in February, 1883, a resolution couched in the following terms:

That though they regret to be obliged to make the said division, yet they are bound to obey the decision of the superintendent and comply with his order in the matter, and consequently the said division is decreed.

On the 27th February, again on a petition presented against this division, the commissioners unanimously resolved:

1st. That they ought not and cannot take upon themselves to change their previous resolution by which in obedience to the superintendent's order they have decreed the said division. 2nd. That they would however be pleased if the superintendent would revoke his said order. 3rd. That, consequently, the said petition be referred to the superintendent with a recommendation to his consideration. 4th. That the said commissioners are absolutely determined to submit to the orders of the superintendent and will thereafter refuse to receive any petition against it.

Nothing better than these resolutions, had they acted in accordance with them, could be expected from the commissioners, and they certainly seemed fully then to know their duty and to be so far ready to perform it. It seems, however, that in their opinion the simple passing of these resolutions and the mere consignment in their registers that they were ready to submit to the superintendent's orders were by themselves a sufficient compliance with these orders, and to this, alone, their submission was to be confined. For not only did they never take any steps to put these orders into execution, but few weeks later, on the 27th of April and 17th of May, they openly set them at defiance, and not only refused to execute them, but actually ordered the very reverse, of what had been ordered by the superinten-

dent, by a resolution to that effect at a regular meeting that the said districts should not be divided as ordered by the superintendent but re-united into one. These last words appear by their own registers to have been in the prayer of the petition presented to them. They now plead in answer to the demand for a *mandamus* ordering to put the superintendent's decision into execution: 1st. That they were justified to refuse to execute the said decision because a majority of the parties interested had petitioned them to do so; and 2nd. That their resolution refusing to obey the said decision of the superintendent has not been appealed from to the superintendent.

Their contention, it seems to me, is an extraordinary one. Their whole argument consists in opposing their rebellious act as a justification for their rebellion to the constituted authority in the matter. We have not here got to enquire whether this division should take place or not. The superintendent has pronounced on that, and his decision is final, says the statute. And the contention, that because a majority, or the totality of the inhabitants of these divisions, or of the whole parish, or, even if it were of the whole of the Province itself, have asked the commissioners not to obey the superintendent's orders, they were, *ipso facto*, authorized to do so, seems to me utterly untenable. The statute tells them "you shall obey"; these petitioners said to them "don't obey," and to the petitioners' wishes, (say the respondents,) we submitted in preference to the law's precepts; and that is our defence to the *mandamus*. I have no hesitation to say that such a defence cannot prevail.

That is not, in my opinion, how should be received the orders of a high officer of the state, whom, very properly indeed, the law has declared should be the

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sole arbiter of these dissensions amongst the school rate-payers. His decrees must be respected and obeyed as those of a court of justice should be, and the refusal or negligence to do so is nothing else but an act of rebellion to law and authority.

As to the commissioners contention that their resolutions of April and May, by which they refused to submit to the superintendent's decision, have not been appealed from the to superintendent himself, and so that they stand in full force, it evidently is as unfounded as their first one, and must fall with it. They had no right or authority whatsoever to pass these resolutions; they were consequently null, absolutely null, and no appeal against them was necessary to put them aside. In fact it all comes to the same question; they here again oppose their rebellious acts in support of their rebellion. They say "it is true that we refused to obey the decree, that we acted in direct opposition to it, but our refusal, our acts of insubordination, stand till they are appealed from." Well, as I have said before, the refusal, their acts of insubordination, are illegal and void, and it was not necessary, nay, it would have been ludicrous to say the least, to appeal from them to the superintendent.

I am of opinion that the judgment of the Superior Court by which the commissioners were ordered to submit to the superintendent's decree was right, and that the judgment of the Court of Queen's Bench which reversed the judgment of the Superior Court was wrong. The appeal should, therefore, in my opinion, be allowed, and the judgment of the Superior Court restored with costs in all courts against the respondents.

The conduct of the commissioners in the matter has been so outrageous, the illegality of their acts so flagrant, and their bad faith so glaring, that, had it been asked, I would have put all the costs against them personally.

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It seems hard to make the rate-payers suffer the consequences of the misdeeds of these officers.

GWYNNE J. concurred.

Appeal allowed with costs.

Solicitors for appellants: *Trudel, Charbonneau & Lamothe.*

Solicitors for respondents: *Loranger & Beaudoin.*

MARY D. ADAMSON (DEFENDANT).....APPELLANT;

AND

ALFRED ADAMSON (PLAINTIFF).....RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute of Limitations—Conveyance to trustees—In trust for tenant for life—Remainder to joint tenants or tenants in common—Possession by tenant for life.

By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with remainder as follows:—Lot No. 2 to G. A. and lot No. 1 to A. A. to the use of them, their heirs and assigns, as joint-tenants and not as tenants in common. E. A. the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878 A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.

Held, that as there was no time prior to the death of the tenant for life when either the trustee or the remainder-man could have interfered with the possession of the said lot, the statute of limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

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

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Held also, that for the purpose of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

APPEAL form a decision of the Court of Appeal for Ontario (1), dismissing an appeal from a decree of the Court of Chancery (2), in favor of the plaintiff.

The facts of the case will be found fully set out in the above head-note and previous reports.

Robinson Q. C. for the appellant.

The appellants was in possession of the land in question here for more than ten years before plaintiff brought his action, paying no rent and never having made an acknowledgment of title. This, under the statute of limitations in Ontario, would bar the plaintiff's right to bring an action unless it is found that the statute did not run against him.

The plaintiff's title to the land is under the trust deed, by which lands are held in trust for Ellen Adamson for life and remainder as follows:—Lot number two to George, lot number one to Alfred, sons, &c., to the use of them, their heirs and assigns as joint tenants

There is a difficulty here in reconciling a joint tenancy with estates in severalty.

The whole question is whether both trustee and *cestui que trust* are barred by the statute. As to that see Lewin on Trusts (3).

The trustee holds the legal estate and must protect the interests of the *cestui que trust*. If he fails to do so the rights of the latter may be gone. The trustee should have had the possessor of the land attorn to him. Our statute not only takes away the right of action from the one party but it gives an absolute title to the other.

(1) 7 Ont. App. R. 592. (2) 28 Gr. 221.
(3) 8th ed. p. 886.

Mowat Q.C., Attorney-General of Ontario, and *McLennan* Q.C. for the respondents.

There are no words of inheritance as to the estates in severalty, and the grantor clearly intended to convey a fee. The words "as joint tenants and not as tenants in common" in the deed cannot be rejected unless no other construction is possible, which is not the case.

Grantor intended survivorship to be an essential element. *Doe* v. *Green* (1), *Doe* v. *Davies* (2).

Then as to the statute of limitations. The words of the deed are "to the parties of the second part, &c., to their use and benefit forever." A use can be limited upon a use; so, if these words had been omitted, grantees would have taken a legal estate.

The policy of the statute was to place legal and equitable estates on the same footing in regard to the act. R. S. O. ch. 108 sec. 29.

The courts always strive to avoid destroying a remainder. *Thompson* v. *Simpson* (3).

Even if the legal estate is barred the equitable is not. *Morgan* v. *Morgan* (4), *Mills* v. *Capel* (5), *Wrixon* v. *Vize* (6).

As to how astute courts are to find relief against the statute see *Gerrard* v. *Tuck* (7), *Re Lowes' settlement* (8), *Locke* v. *Matthews* (9), *Whitmore* v. *Humphries* (10), *Heath* v. *Pugh* (11).

Robinson Q.C. was heard in reply.

Sir W. J. RITCHIE C.J.—I think this appeal must be dismissed. I think the plaintiff's right to recover has not been barred by the statute of limitations. The plain-

(1) 4 M. & W. 229.
(2) 4 M. & W. 599.
(3) 1 Dr. & War. 459.
(4) L. R. 10 Eq. 99.
(5) L. R. 20 Eq. 692.
(6) 3 Dr. & War. 104.
(7) 8 C. B. 231.
(8) 30 Bev. 95.
(9) 13 C. B. N. S. 753.
(10) L. R. 7 C. P. 1.
(11) 6 Q. B. D. 345; 7 App. Cas. 235.

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tiff's right to the land first accrued in February, 1875, on the death of Ellen Adamson, the tenant for life, as equitable remainder-man in fee, and in January, 1878, he obtained the legal estate in fee by conveyance from the devisees of the surviving trustee under the trust deed of August, 1837; and the time therefore, in my opinion, first began to run against him in February, 1875, when the right to sue first accrued to him. The mother was tenant for life, and had a right to the possession, and had a right to occupy the land, by herself or her tenants, whether such tenants were for her life or at will, and the trustee had no right to interfere with any such tenancy or the possession of the tenant thereunder. That she did occupy by a tenant at will the evidence of the defendant clearly shows. Such tenant never was in as a trespasser against the tenant for life, but, on the contrary, after her husband's death, she occupied with the consent and permission of the tenant for life. Such tenancy at will was never put an end to by the lessor or lessee, and could not have been determined by the trustee.

Under such circumstances, I cannot conceive it possible that the equitable remainder-man can be cut out by any such dealing with the possession by the tenant for life and her tenant at will. Whether the title of an equitable remainder-man could be destroyed by a possession, for the statutory period, by a trespasser on the tenant for life, or whether even, in such a case, it would have any other effect than to bar the tenant for life during the existence of her tenancy, it is quite unnecessary to discuss. Under the Real Property Limitations Act, (1), the right of entry in respect of an estate in remainder shall be deemed to have first accrued at the time at which such estate became an estate in possession. The life estate, in this case, subsisted

(1) R. S. O. ch. 108 sec. 5 sub-sec. 11.

until 1875, consequently, until that date, plaintiff's estate did not become an estate in possession. The tenant for life, by herself through her tenant at will, enjoyed the property during her life time, and on her death the plaintiff, as remainder-man, became entitled to the enjoyment of the estate. During the life time of the tenant for life there was not any point of time, that I can discover, where either the trustee or the *cestui que trust* could enter upon or assert a right of either to the premises.

I think we are not called upon, in this case, to discuss the construction of the deed, as to whether plaintiff was entitled to the whole as joint-tenant with his brother George, or only to one-fourth, as heir of his brother George. It is sufficient for the present action, that as against the defendant he has the legal estate in the whole; and so far as the defendant is concerned, it matters not whether he is entitled to the whole beneficial interest, or whether the other heirs of George have a beneficial interest in three-fourths.

Agreeing then, as I do, with the learned judges of the Court of Appeal, that whether the present plaintiff was entitled in equity to the whole of the lot in question, or merely to a portion, as one of the heirs of his deceased brother George, he is entitled, in this action, to recover the whole lot, having acquired the legal estate from the trustee, to which the statute of limitations is no answer, inasmuch as the defendant, upon her own showing, was tenant at will to her mother-in-law, the tenant for life, and until that tenancy was determined by the death of the tenant for life the statute would not begin to run, which effectually disposes of the case. Therefore, I do not think it necessary to discuss the differences of opinion entertained by the Court of Appeal on another branch of the case. I think the appeal should be dismissed with costs.

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Henry J.

FOURNIER and TASCHEREAU JJ.—Concurred.

HENRY J.—I am of the same opinion. I entirely concur in the judgments delivered by the learned judges who decided the case in the Court of Appeal. I agree with the conclusion that they arrived at in regard to the estate, namely, that it was an estate in common and not joint. It gives a separate lot to each of the two brothers in fee, to them and their heirs, naming them as lot number one and lot number two, and then there is another clause that they should hold as joint tenants. Under that it is attempted to show that the plaintiff took the property by survivorship. The learned judge decided that he took it as heir to his brother who died without issue, and therefore that he took it not by virtue of the deed but as heir.

I think the statute of limitations did not begin to run until 1875. The plaintiff here could not have brought a suit in the lifetime of the tenant for life; she died in 1875 and it is not necessary to inquire how she occupied it, whether by herself or by her tenant.

I entirely concur that the appeal, in every consideration of the case, should be dismissed.

GWYNNE J.—This appeal must be dismissed upon the ground that an equitable remainder-man in fee to whom the legal estate has been conveyed by the trustees upon the decease of the equitable tenant for life, who had been admitted into actual possession for her life by the trustee of the legal estate, is not barred of his right of action by the possession of a person who had entered as tenant of the tenant for life in possession under circumstances that might have been sufficient to have barred an action by the tenant for life. The statute preserves the right of entry of the person entitled to an equitable remainder in fee upon his estate

becoming an estate in possession by the death of an equitable tenant for life, equally as it does the rights of a person entitled to a legal remainder in fee upon the decease of a legal tenant for life. The property in question was granted and conveyed to the use of trustees, their heirs and assigns, upon trust to the use of Ellen Adamson, wife of the grantor, for and during the term of her natural life without impeachment for waste, and from and after her decease, then it was declared that the trustees should stand seised and possessed thereof, to uses, in language which has given occasion to an attempt being made by the defendant to raise upon this record a question, whether the trustees were to stand seised of the remainder upon the decease of the tenant for life to the use of George Adamson, a brother of the plaintiff, in fee in severalty, or to the use of George Adamson and the plaintiff as joint tenants in fee; other lands were by the same deed conveyed to the same trustees to the use in like manner of Ellen Adamson for life, and the remainders on her decease to the use of other persons in fee, and the trusts of the deed were finally declared to be that the trustees should convey and assure the several lands therein mentioned to the persons severally entitled to the remainders in fee upon the decease of the tenant for life. When the trustees admitted the tenant for life into possession of the land in question in this suit, she became and was possessed thereof under and in virtue of the provisions of the trust deed for the term of her natural life, and the trustees had no right or power of interference with such her possession, whether the same was held by herself actually in person, or by any person admitted into possession by her as her tenant. If she had conveyed her estate and interest in the land to the defendant, the latter would have become entitled to the possession thereof during the life of the tenant for life, and could have

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held the same free from any interference or interruption whatever by the trustees of the legal estate, so long as the tenant for life should live, but upon her decease the defendant would be liable to be evicted by the trustees in the interest of the equitable remainder man in fee. Now, in this case, defendant's claim having originated in a tenancy at will under the equitable tenant for life, the latter could have determined that estate at her pleasure, and if upon such determination the defendant had refused to surrender possession to the tenant for life, the latter could have evicted her by an action of ejectment at law without the interposition of the trustees of the legal estate, for in such case the defendant would have been estopped from denying the title of the equitable tenant in fee under whom the defendant had entered as tenant at will, and the effect of the defendant having been suffered by the tenant for life to remain in possession for such a length of time, and under circumstances that would be sufficient to bar the right of the tenant for life to recover in such an action, would simply be to vest in the defendant the right of possession during the life of the tenant for life, that is to say, to vest in the defendant the possession of the land and the right thereto during the estate and interest of the tenant for life, upon whose decease such the defendant's title would determine equally as if the tenant for life had by deed conveyed the land to the defendant for the estate of the tenant for life, and upon the decease of the tenant for life the right of the trustees to enter and evict the defendant in the interest of the equitable remainder-man in fee would attach. George Adamson having died intestate and without issue during the life of the tenant for life, the persons seized of the legal estate in trust shortly after her decease conveyed the land in question to the plaintiff in fee simple, upon the assumption that by the

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trust deed the remainder in fee therein had been vested in George Adamson and his brother, the plaintiff, as joint tenants in fee; but whether the estate in remainder in the land in question was so vested in the plaintiff in joint tenancy in fee with his deceased brother George we are not called upon to decide in the present action, for the whole legal estate having been conveyed to the plaintiff by the persons seised thereof upon the trust purposes of the trust deed, he is entitled to recover the whole of the land in question, which he will hold to his own use if the remainder was conveyed in such joint tenancy; and to the use of himself and the other persons who are co-heirs with him of his deceased brother George if the remainder in the land in question was conveyed by the trust deed to the use of George in fee in severalty. The persons who are interested in raising with the plaintiff a question upon this point not being before the court, no such question can arise upon the present record.

Appeal dismissed with costs.

Solicitors for appellant: *Bethune, Moss, Falconbridge and Hoyles.*

Solicitors for respondent: *Mowat, MacLennan & Downey.*

MICHAEL STARRS (DEFENDANT).....APPELLANT;

AND

THE COSGRAVE BREWING AND MALTING COMPANY OF TORONTO (PLAINTIFFS)..... RESPONDENTS.

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*Nov. 19.
1886
*April 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Suretyship—Contract of with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety after.

S. by indenture under seal became security to the firm of C. & Sons for goods to be sold to one Q., and agreed to be a continuing

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

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security to the said firm, or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the said firm, or "any member or members of the said firm of C. & Sons," to the said Q., so long as they should mutually deal together.

P. C., the senior member of the said firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interest in the said business to a joint stock company.

An action having been brought against S. for goods sold to Q., after the death of the said P. C.:

Held, reversing the judgment of the Court of Appeal, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

APPEAL from the judgment of the Court of Appeal for Ontario (1), allowing the appeal of the respondents from the judgment of Mr. Justice Rose (2) dismissing the respondents' action.

The action was on a bond dated 16th of April, 1879, given by the appellant to Patrick Cosgrave, John Cosgrave and Lawrence Joseph Cosgrave, then carrying on business as brewers, under the name of Cosgrave & Sons, as security for any beer, ale or porter they might sell to one Michael Quinn.

The respondents alleged that after the execution of the bond the firm of Cosgrave & Sons supplied goods to Quinn; that on the 6th of September, 1881, Patrick Cosgrave died; that afterwards John Cosgrave and Lawrence Joseph Cosgrave entered into a fresh partnership and carried on the business under the old name, and supplied goods to Quinn as before till the 2nd of October, 1882, when they transferred the business to one James Douglas, as trustee; that the business was still carried on under the same name of Cosgrave & Sons till the 13th of December, 1882, when Douglas assigned the business to the respondents, who

(1) 11 Ont. App. R. 156. (2) 5 O. R. 189.

thence afterwards carried it on.

The respondents sought to recover the balance due from Quinn on all the prior transactions up to $5,000, the amount of the bond.

The appellant urged that he was not responsible for any transactions after the death of Patrick Cosgrave, and that all prior transactions were paid, which, on the argument, was admitted to be the case.

The following is the bond or agreement above mentioned :

Memorandum of agreement made this 19th day of April, A.D. 1879.

Between Patrick Cosgrave, John Cosgrave, and Lawrence Joseph Cosgrave, all of the city of Toronto, carrying on business as brewers, under the name, style, and firm of Cosgrave & Sons, of the first part, and Michael Quinn, of the city of Ottawa, hotel keeper, of the second part, and Michael Starrs, of the said city of Ottawa, grocer, surety for the said party of the second part, of the third part.

Witnesseth that at the request of the said party hereto of the third part, it hath been agreed and it is hereby agreed between the said parties hereto, that they, the said parties of the first part, should, from time to time, so long as they, the said parties of the first part, desire, sell to the said party of the second part, and that the said party of the second part should purchase from the parties of the first part beer, ale, lager beer, and the casks, bottles, and vessels containing such liquors, or any part thereof, and at such prices and on such terms of payment as may from time to time be mutually agreed upon, and that the said party of the third part should be a continuing security to the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, to the amount of $5,000, to cover and protect any sales or

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advances now or hereafter indefinitely to be made by the said parties of the first part or any member or members of the said firm of Cosgrave & Sons to the said parties of the second part, so long as they may mutually deal together.

And further, it is hereby agreed between the said parties hereto, that until all such sales and advances, and every part thereof, shall have been paid in cash, that these presents shall continue to be a good and valid security at law and in equity to the said firm of Cosgrave & Sons to the amount of $5,000, notwithstanding that they may from time to time receive other securities, notes, bonds, deeds, conveyances, or assignments of lands or goods, or either of them, from the said party of the second part, or any other person or persons as further security for the said sales or advances, or any part thereof, and notwithstanding that they, the said parties of the first part or any of them, may extend the time of payment of the moneys due, or any part thereof, for any such sales or advances, and notwithstanding that they, the said parties of the first part, or any of them, may do any act, matter, or thing thing that would release the said party of the third part at law or in equity from these presents, were it not for the stipulations herein contained.

In consideration whereof the said party of the second part hereby agrees with the said parties of the first part to pay the price of all advances and sales of ales, porter, and lager beer, and of all casks, vessels, or bottles that may from time to time be sold to him by the said parties of the first part, or any of them, and at the times that may from time to time be agreed for the payment thereof, and also to pay all notes, bonds, mortgages, or other securities that may from time to time be given for the same.

And the said party of the third part hereby coven-

ants and agrees with the said parties of the first part, and with each of them, that he, the said party of the second part, will pay for all such sales and advances, and at the times that might be agreed for the payment thereof, and also all notes, bonds, mortgages, and other securities that may be given for the same, or any part thereof, and that he, the said party of the second part, will in all things perform and fulfil this agreement and all other agreements that may hereafter be made by and between the said parties of the first and second parts with reference to any such sales or advances, or in respect of any money unpaid therefor, and that in default thereof that he, the said party of the third part, will, to the extent of $5,000, be liable to, and pay, the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, for all ale, porter and lager beer, and for all casks, bottles, and vessels containing same that may from time to time be sold by the parties of the first part, or the said firm of Cosgrave & Sons, or by any member thereof, to the said party of the second part, and also that in default of payment by the said party of second part of all or any notes, bonds, mortgages, or other securities that may from time to time be given by him, the said party of the second part, to the said parties of the first part as security for any such sales or advances, or any part thereof that he, the said party of the third part, will pay the same.

It is hereby expressly stipulated between the parties hereto that nothing herein contained shall compel the parties or any of them hereto to any dealing to any given amount, or for any given period; and further, that these presents shall continue a valid and continuing agreement till all such sales or advances have been fully paid for in cash, and all agreements, notes, bonds mortgages, and securities hereinafter made in respect

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thereof have been fully satisfied.

McLennan Q.C. and *O'Gara* Q.C. for the appellant.

This action is for goods supplied after the death of Patrick Cosgrave and up to the date of the notice that appellant would no longer be a surety for Quinn.

We submit, in the first place, that the death of Patrick Cosgrave dissolved the firm with which the appellant made his contract of suretyship, and an entirely new firm was created by the sons after his death, although under the same name. It is the fact that the name of the original is retained that is relied upon by the respondents to bind us under the clause in the deed, by which he covenants to be a continuing security to the member or members for the time being of the firm of Cosgrave & Sons. But those words must be held to depend upon the continued existence of the firm, and once its existence ceases any covenant made with it must be released. To hold otherwise would be to make the appellant covenant with any firm of the name of Cosgrave & Son, which would be absurd. Words must be construed in a legal, not a commercial, sense. *Bank of Scotland* v. *Christie* (1), *Pemberton* v. *Oakes* (2), *Backhouse* v. *Hall* (3), *Chapman* v. *Beckinton* (3), *Weston* v. *Barton* (4), *Williamson* v. *Steeves* (5), Pollock on Contracts p. 440.

But I submit, secondly, that even if Starrs can be held liable after the death of Patrick Cosgrave, he is discharged by the giving of time to his principal, the company having taken Quinn's notes for the full amount of the debt.

Osler Q.C. for the respondents.

It is admitted that effect must be given to the words "continuing security in the deed," and I think a reasonable explanation of our contention may be found in

(1) 8 Cl. & F. 214.
(2) 4 Russ. 154.
(3) 6 B. & S. 507.
(4) 4 Taun. 673.
(5) 4 All. (N.B.) 449.

the difference between the terms "firm" and "partnership."

(The learned counsel here read the definitions of these words from Imperial Dictionary and Wharton.)

The main thing in the arrangement was the goods supplied. As long as Cosgrave's beer was sold to Quinn it made no difference who the parties were who supplied it. All the members might go out of the firm, and as long as the brewery business was carried on the liability of the guarantor continued.

The case of *Pemberton* v. *Oakes* shows the question to be whether or not the parties ever manifested any intention that the liability should continue in case of a change in the firm. The document itself is the best answer to that question.

See *Lloyds* v. *Harper* (1), *Barclay* v. *Lucas* (2), *Metcalf* v. *Bruin* (3), *Pease* v. *Hirst* (4), *Pariente* v. *Lubbock* (5), Lindley on Part. 4 Ed. p. 215, *Ex parte Lloyd* (6), *Ex parte Loyd* (7).

If a change in the firm would relieve the surety I submit that, according to the authority of these cases, we come within the exception.

As to the question of time being given to the principal, I draw your lordships' attention to the express provision in the agreement. *Hargreave* v. *Smee* (8).

McLennan Q.C. in reply cites Baylis on Sureties 140, and *Fire Extinguisher Co.* v. *North-West Ex. Co.* (9).

Sir W. J. RITCHIE C.J.—This action was brought to recover $5,000 upon an agreement of suretyship. The learned judge gave judgment in favor of the respondents.

The firm of Cosgrave & Sons appears to have been a

(1) 16 Ch. D. 290.
(2) Cited in 1 T. R. 291.
(3) 12 East 400.
(4) 10 B. & C. 122.
(5) 8 DeG. M. & G. 5.
(6) 1 Glyn. & J. 389.
(7) 3 Dea. 305.
(8) 6 Bing. 244.
(9) 20 Gr. 625.

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case of ordinary partnership, and there being no agreement to the contrary, there can be no doubt that the death of Patrick Cosgrave immediately dissolved the partnership, not only as regards the deceased, but as regards all the other partners. This, Mr. Lindsey says, is obviously reasonable, for, by the death of one of the members, it is no longer possible to adhere to the original contract, the essence of which is, in such a case, that all the parties to it should be alive. And the mere fact that the partnership was entered into for a definite term, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death.

The representatives of the deceased have no right to succeed him in the firm unless there is a clear agreement to that effect.

On dissolution, each one of the partners has a perfect right to require, and through equity to compel, a final settlement and adjustment of all questions and all property. On dissolution the power and authority of the surviving partners is for the purpose of winding up and no further; it is an incident to the contract of partnership that the surviving partners should collect the assets and wind up the business of the firm, and after the dissolution of the firm the authority of each partner to bind the firm continues only so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution, and not otherwise. So that, as to future dealing, the partnership is terminated by the death of one partner, the dissolution, as between the partners themselves, putting an end to the joint power and authority of all the partners any further to employ the property or funds or credit of the partnership in the business or trade thereof or do any act or make any disposition of the partnership property in any manner inconsistent with the primary duty now

incumbent upon all of them of winding-up the whole concern of the partnership. And therefore it is the duty of the surviving partners thenceforth to cease altogether from carrying on the trade or business thereof.

All parties must be assumed to have entered into this agreement with the full knowledge of the law governing partnerships. Who then were the parties of the first part with whom Starrs contracted? The firm of Cosgrave Bros. by whomsoever and of what time soever composed? Clearly not. The deed itself states that the parties of the first part were Patrick Cosgrave, John Cosgrave and Lawrence Joseph Cosgrave, doing business under the firm of Cosgrave & Sons; it is with that firm, as so composed at the date of the deed, that Starrs contracted; it was with the association of these three, so carrying on business under the name of Cosgrave & Sons, and no other. So soon as the death of the one partner occurred there was a dissolution, and though the surviving partners might enter into a new co-partnership, they had no power or authority to continue the old co-partnership so at an end, and their duty then was, as surviving partners, to close up the affairs of the defunct co-partnership, and the representatives of the deceased partner had the right, and their sole right was, to compel an account by the surviving partners of the state of the firm on the death of their principal, and to call on the surviving partners to settle and close up the affairs of the co-partnership, and to pay over to the estate of the deceased partner the share coming to him on such settlement; and they had no right to carry into a new partnership affairs of the old, whether the old would be thereby benefited or injured.

In this case, the moment Patrick Cosgrave died, *eo instanti*, the partnership was dissolved. When was the

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new partnership established? And what were the rights of all parties in the interval that must have existed between the death of the partner and the then dissolution of the firm, and the coming into existence of the new firm, which could only exist by virtue of the new contract entered into by the members of such new firm?

In my opinion, the rights of the surviving members of the old firm, and of the representatives of the dead partner, and of every one dealing with that firm, in the absence of an express contract to the contrary, was then and there fixed and determined, and the affairs of the old firm with whom Quinn dealt and for whose indebtedness Starrs became guarantee were then and there settled and determined, and the liability on the guarantee could not be extended, without the consent of Starrs, to dealing between Queen and a new firm with which, as such, Starrs had no connection. The wording of the agreement itself, I think, clearly shows that the security was only to the firm of Cosgrave & Sons as it existed at the time of entering into the contract; the sum guaranteed, $5,000, was "to cover and protect any sales or advances now or hereafter indefinitely to be made by Cosgrave & Sons, or any member or members of the said firm of Cosgrave & Sons to Quinn (that is as I construe it—sales on account of the said firm) so long as they, that is, in my opinion, the firm of Cosgrave & Sons as it existed, and Quinn, may mutually deal together."

The law of England was well established before the passing of the Mercantile Amendment Act; a guarantee was not a continuing guarantee so as to remain in force after the death of a member of a firm to or for which it was given, unless it appeared by the terms of the instrument that it was the intention of all parties that it should so continue, and the Mercantile Amendment Act did not alter the English law as settled by

decided cases, but it was, as said by Blackburn J. in *Backhouse* v. *Hall* (1), to make the law of Great Britain uniform, there being a difference in Scottish law. The question as put in that case is just what arises in this: "Does the intention that the guarantee should continue appear by express stipulation, or by necessary implication, or from the nature of the firm, or otherwise?" And the answer, as given in that case, applies with equal force to this. Now there is certainly no express stipulation and there is nothing in the nature of the firm beyond those incidents common to every partnership that the partners had changed or might again change, with the exception or additional consideration that, in the present case, the partnership had ceased to exist by the death of one of the partners and no provision for its continuance.

I think, therefore, that this contract should not be construed as a continuing guarantee after the dissolution of the firm with which the guarantor contracted, and that the appeal should be allowed.

The following authorities may be cited in support of the views I have expressed. In *Myers* v. *Edge* (2), the report gives the facts as follows:—

At the trial before Rooke J., at Lancaster, the plaintiffs, to take the case out of the statute of frauds, gave in evidence the following letter written by the defendant dated 15th, January, 1794. "To Messrs. Myers. Fielden, Ainsworth & Co.:—If you please you may let the bearer, Thomas Duxbury, have six bunches of twist more than I told you, and I will be answerable for them as before; and after this I will be answerable for one pack and no more; so when he pays you for the first half pack you may let him have another, and so on till I tell you to the contrary; and you may make the invoice to us both, &c." At the time when this engagement was entered into, Ainsworth was a partner in the same house with the plaintiffs, and continued so till May, 1795; during which time many parcels of goods were delivered to Duxbury, which were all paid by him, who wa

(1) 6 B. & S. 507. (2) 7 T. R. 254.

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debited for them in the plaintiffs books. The goods in question were furnished to Duxbury by the plaintiffs alone after Ainsworth had retired from the partnership, and Duxbury having failed to pay for them, they demanded payment of the defendant, who said it should be settled, and requested time; but afterwards refusing to pay, this action was brought. It was objected on the part of the defendant, that the action could not be maintained by the present plaintiffs, because Ainsworth, with whom also the contract was made, was not joined with them, and he not being a partner at the time when the goods were furnished. Rooke J. overruled the objection, considering the security as having been given to the house and not to the individuals; the jury found a verdict for the plaintiffs. A rule was granted in this term calling on the plaintiffs to show cause why the verdict should not be set aside and a non-suit entered, or a new trial granted.

Lord Keynon C.J. (1):

I think that the rule ought to be made absolute. We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it. Here the defendant contracted with Myers, Fielden, Ainsworth & Co. Perhaps the defendant when he entered into this contract had great confidence in Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished; at least it is too much for us to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. * * * But we cannot say that a contract, that on the face of it imports to have been made with five, ought to be construed to be a contract made with four persons only. I very much approve of the case cited from 3 Wilson 532.

Ashhurst J.:

This is not a contract made with a corporation, it is made with a partnership consisting of a certain number of individuals; and when one of the partners left the business, it put an end to this engagement. If the plaintiffs had intended to furnish goods to Duxbury after this alteration in the partnership, they should have required a new undertaking.

Denman C. J. in *Chapman* v. *Beckinton* (2).

All this may well have been without advertising to or intending to alter the legal consequences of such change in the members of the firm; and we ought to be slow in extending by implication the meaning of words beyond that which they ordinarily bear in legal construction, in order to extend the liability of a surety.

(1) At p. 256. (2) 3 Q. B. 720.

We are strengthened in this opinion by the authority of a case cited by the counsel for the defendant, which it is difficult to distinguish in principle from the present, that of *Pemberton* v. *Oakes* (1). There a banking partnership was formed for fifteen years, between Harding, Oakes and Wellington; it was stipulated that, if Oakes or Wellington should die during the term the concern should be continued by the survivor or survivors, the deceased's share to be paid to his executor up to the death; but if Harding should die he might dispose of his share to his wife and children; and there was a provision for his appointing persons who should carry it on, as if he were living, during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favor of his children as to this share, and appointed persons to carry on the concern with his partners; and, he dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them for sums already due or which should become due to them for advances to be made thenceforward to the end of fifteen years, was liable for any advance made after the death of Harding. And the present lord chancellor held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm. In this case it is true, no new partner has been admitted; but that is immaterial if the death of one of the old ones works a dissolution. And it is true, also, that in this case the defendant (the surety) is averred to have had full notice of the covenants in the partnership deed, a circumstances which did not exist in the case cited; but this also is immaterial, the question turning on the written language of the instruments.

In DeColyar's Law of Guarantees, 2 Ed. 255:

To the same effect, also, is the case of *Weston* v. *Barton* (2). There the condition of the bond was for the repayment to five persons of all sums advanced by them, or any of them, to Catterall & Watson, in their capacity of bankers. It was held that the bond did not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. Mansfield C. J. delivered the following judgment: "The question here is, whether "the original partnership being at an end, in consequence of the

(1) 4 Russ. 154. (2) 4 Taunt. 673.

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"death of Golding, the bond is still in force as security to the sur-
"viving four; or whether that political personage, as it may be
"called, consisting of five, being dead, the bond is not at an end.
"The case has stood over in consequence of doubts which the court
"entertained on particular expressions in the bond. Many cases
"were cited at the bar, and the result of them is that, generally,
"when a change takes place in the number of persons to whom such
"a bond is given, the bond no longer exists. These decisions cer-
"tainly fall hard on the obligees; for I believe the general under-
"standing is that these securities are given to the banking house,
"and not to the particular individuals who compose it; and we
"should readily so construe the bond if the words would permit.
"The words of the condition on which the question depends (and
"which His Lordship now read over), again and again refer to the obli-
"gee's capacity as bankers; they were bankers, only as they were
"partners in their banking house, as it is called, and this security is
"conditioned to pay any money advanced 'by them five, or any or
"'either of them.' Taking those last words by themselves, it might
"at first be conceived that, if any one of the five advanced money
"this bond should secure it, but the words are afterwards explained,
"when it is seen that the money is to be paid to the five. Now it
"could never be intended that money advanced by one of them
"singly should be repaid to the five; and this shows that the words
"'advanced by them, or any, or either of them,' must be confined in
"their meaning to money advanced by any or either of them in their
"capacity of bankers, on behalf of all the five. This, then, being the
"construction of the instrument, from almost all the cases, in truth,
"as we may say, from all (for though there is one adverse case, *Bar-*
"*clay* v. *Lucas*, the propriety of that decision has been very much
"questioned), it results that where one of the obligees dies the
"security is at an end. It is not necessary now to enter into the
"reasons of those decisions, but there may be very good reasons for
"such a construction; it is very probable that sureties may be
"induced to enter into such a security, by a confidence which they
"repose in the integrity, diligence, caution and accuracy of one or
"two of the partners. In the nature of things there cannot be a
"partnership consisting of several persons, in which there are not
"some persons possessing these qualities in a greater degree than the
"rest; and it may be that the partner dying, or going out, may be
"the very person on whom the sureties relied; it would, therefore,
"be very unreasonable to hold the surety to his contract after such
"change. And, though the sum here is limited, that circumstance
"does not alter the case; for, although the amount of the indemnity

"is not indefinite, yet £3,000 is a large sum; and, even if it were "only £1,000, the same ground, in a degree, holds, for there may be "a great deal of difference in the measure of caution or discretion "with which different persons would advance even £1,000; some "would permit one who was almost a beggar to extend his credit to "that sum; others would exercise a due degree of caution for the "safety of the surety; and, therefore, we are of opinion, that as to "such sums only which were advanced before the decease of Gold-"ing can an indemnity be recovered by the plaintiffs; and, as to "the sums claimed for debts incurred since his decease, the judg-"ment must be for the defendant."

A similar decision was also come to in the case of *Pemberton* v. *Oakes*, 4 Russ. 154. There a banking partnership was formed for fifteen years, between Harding, Oakes and Wellington. It was stipulated that if Oakes or Wellington should die during the term, the concern should be continued by the survivor or survivors, the deceased share to be paid to his executors up to the death; but that if Harding should die, he might dispose of his share to his wife and children, and there was a provision for his appointing persons who should carry it on as if he were living during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favor of his children as to this share, and appointed persons to carry on the concern with his partners, and he, dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them for sums already due, or which should become due to them for advances to be made thenceforward to the end of the fifteen years, was liable for any advance made after the death of Harding. Lord Chancellor Lyndhurst held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm.

And yet another case in which the same view prevailed, is that of *Chapman* v. *Beckington* (1). In that case the plaintiff and one William Chapman entered into partnership, by deed, with one Potts. Potts was to be the acting partner. In consideration of this trust he and the defendant bound themselves by a bond of guarantee to the plaintiff and the said William Chapman, for the observance by Potts of the covenants in the partnership deed, and also that Potts, during

(1) 3 Q. B. 703.

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such time as he should continue the acting partner in the said trade of the said co-partnership, should faithfully make and deliver a true account in writing of all sums of money, notes, bills and other partnership effects, which should come to his hands, or which he should be intrusted with by or on account of the said co-partnership, and also make good, answer for and pay over, the moneys due on the balance to the said plaintiff and W. Chapman. Potts, after the decease of W. Chapman, rendered false accounts. It was held, that the co-partnership referred to in the condition of the bond was determined by W. Chapman's death, and that the defendant was therefore not liable for Potts' default happening after that event. In this case Lord Denman C.J., said: "Many cases were cited to show that, where the surety had covenanted with the house, and not the members of the firm, or had stipulated that his liability should not be affected by a change of the members, he would remain liable to the new firm. These cases we do not in the least question, our judgment proceeding on the language of this condition, making all due allowance for the effect which the language of the deed ought to have on its construction."

And at p. 270:

The effect of the death of one of the principal debtors is to determine the surety's liability. Thus in *Simon* v. *Cooke* (1), a bond by which, after reciting the partnership of J. C. and T. C., one W. P. become surety for such sums as should be advanced to meet bills drawn by J. C. and T. C. or either of them, was held not to extend to bills drawn by J. C. after the death of T. C.

The voluntary retirement of one of the principal debtors likewise has the effect of putting an end to the surety's liability. In the case of *The University of Cambridge* v. *Baldwin* (2), the condition of a bond recited that the chancellors, masters, and scholars of the university of Cambridge had appointed B., C. and J. their agents for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned that if the said B., C. and J., and the survivors and survivor of them, and such other persons as should or might at any time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said chancellor, &c., and their successors, for all books delivered or sent to them or any or either of them for sale as aforesaid, and should pay all moneys which should become payable to the said chancellor, &c., in respect of such sale, then the obligation to be void, &c. An action having been brought on this bond against the surety, it was held that, by

(1) 1 Bing. 452. (2) 5 M. & W. 580.

the retirement of J. from the partnership of B., C. and J., the defendant, as their surety, was discharged from all further liability on this bond.

Lord Arlington v. *Merricke* (1):

In *Bodenham* v. *Purchas*, a bond was given to secure a banking account to several partners; one of them died and a new partner was taken in; the obligor was at that time indebted in a considerable sum; new advances were made, and money paid on account, no new head of account being opened, but the whole being treated as one entire account; the balance was much reduced, and was afterwards transferred to another customer, who, with his assent, was charged by the bankers with the debt of the obligor; that customer becoming insolvent the surviving bankers sued the obligor; it was held, that in the absence of any specific appropriation the money paid on account must be applied to the debt due at the death of the partner, and the money so paid being sufficient to cover that debt, the bond was discharged.

FOURNIER J.—I think the agreement plainly shows that the appellant only became a guarantee to the firm of Patrick Cosgrave & Sons. In no other way can effect be given to the words "member or members for the time being constituting the firm of Patrick Cosgrave & Sons." I believe these words must have been inserted there inadvertently, but being there we must give effect to them. The appeal must be allowed.

HENRY J.—I cannot conceive the existence of the slightest relationship between the company here, the Cosgraves, who entered with partnership after the death of the senior partner, and Starrs.

In the first place there was a new partnership of the surviving members of the old one. They carried on business, not for the late partnership, nor for any one interested in that partnership, but for themselves. There was no time when the heirs-at-law of the deceased partner could not have enforced a settlement of the previous partnership. The law does not make a party answerable to any one unless by his own act.

(1) 2 Wm. Saun. 823 n.

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As soon as Patrick Cosgrave died the contract was put an end to, and I think the plaintiffs here have no cause of action. All the advances made to Quinn were paid for up to a certain time, after notice by the appellant that he would not be answerable under the contract.

The business was conducted for several years in the name of the sons, and then a company was formed. Now how can it be said that there was any privity of contract between Starrs and the company? What right had the company to carry on a contract entered into with totally distinct persons and hold the guarantor to another party answerable?

I consider that the appeal should be dismissed, and judgment given in favor of the appellant with costs.

TASCHEREAU J.—I am of the same opinion. I do not think the appellant is answerable for any sales made after the death of Patrick Cosgrave.

GWYNNE J.—I am of opinion that whatever right of action, if any there was, which the firm of Cosgrave & Sons constituted as it was after the death of Patrick, had against the defendant upon his guarantee, at the time of the execution of the instrument of the 2nd of October, 1882, that right has passed to the plaintiffs by force of that instrument and of that of the 13th December, 1882, and that therefore this action is well brought by the plaintiffs, if Cosgrave & Sons had such a right of action.

The learned counsel for the defendant in his argument before us contended that assuming the guarantee of the defendant to be a continuing guarantee until the 5th of April, 1882, as adjudged by the Court of Appeal for Ontario, and to cover what was then due by Quinn to the firm of Cosgrave & Sons as then constituted, still the evidence showed such amount to have been subsequently and before action fully paid, and that therefore the

Court of Appeal for Ontario should have adjudicated upon this point instead of directing a reference to the registrar of the divisional court to enquire and report thereon to that court. The parties at the trial certainly seem to have been of opinion that the evidence as taken was sufficient to enable a determination to be made not only of this point but upon all the points raised, when it was agreed that, upon the jury passing upon the single point agreed to be submitted to them, namely, whether the notice, admitting it to have been given, had not been retracted, as was alleged, then all the other questions should be submitted to the determination of the court. The defendant was, and now is, entitled to judgment in his favor upon this point or any of the points raised and which have all been argued before us, if the evidence be sufficient to warrant and require such judgment as it is contended that it is. The evidence shows Quinn to have been indebted to Cosgrave & Sons on the 5th April, 1882, in a sum varying from $5,931.56, according to Quinn's evidence, to $6,640 according to the evidence of John Cosgrave It also appears in evidence that between the 5th of April and the 2nd October, 1882, Quinn paid to Cosgrave & Sons $6,620.25, but that this sum was applied, or should have been, or was applicable, to the payment of the amount due on the 5th April, 1882, does not appear, for goods were delivered by Cosgrave & Sons to Quinn between the said 5th of April and 2nd of October to the amount of $6,000, and the manner in which the parties dealt appears to have been that Quinn was in the habit of giving his notes or acceptances to Cosgrave & Sons for the amounts of the several deliveries of the goods sold to him, which notes Cosgrave & Sons discounted and used the proceeds in their business. These notes, under what was deemed to be the authority of the provision in the guarantee relating to extension of time for pay-

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ment to Quinn, were, as they fell due, renewed, and their renewals were again from time to time renewed in whole or in part; Quinn's practice as to payments made by him appears to have been to remit moneys for the purpose of meeting particular notes falling due in the bank where they were. By exhibit No. 9, which appears to have been filed by the defendant, it appears that on the 5th April, 1882, there were in existence and discounted by Cosgrave & Sons ten notes given by Quinn which represented the goods previously sold to him, which notes were made payable at different times between the 6th of April and the 3rd of August, and that all of these notes were renewed at least once, and many of them several times, and that one of such renewals for $406.65, was dated the 2nd November, 1882, after the execution of the indenture of the 2nd October, and after the firm of Cosgrave & Sons had assigned all their estate, good will, debts and securities to Douglas in trust to be assigned to the plaintiff company when formed; now, if this exhibit is to be relied upon, and its correctness does not appear to be questioned, then there appears to have been still due by Quinn, when the plaintiffs became assignees of Cosgrave & Sons' assets, notes and securities, (in respect of sales made to Quinn by Cosgrave & Sons prior to the 5th April, 1882,) the sum of $2,759.11, which still remains due, and for which, if the judgment of the Court of Appeal for Ontario be correct as to the continuance of the guarantee, the defendant is liable to the plaintiffs, unless he has become discharged from such liability by reason of the time given by Cosgrave & Sons to Quinn after the 5th April, 1882, and by the plaintiffs since the assignment to them.

I understand it to have been contended by the learned counsel for the defendant, that by the books of the plaintiffs and all of Quinn's notes remaining still

unpaid, and which were before the court at the trial, it appeared that the plaintiffs held notes or acceptances of Quinn's given payable to themselves, which have been discounted by them, and which were taken and received by them in renewal of the notes which were current in the hands of Cosgrave & Sons on the 2nd of October, 1882, and by which notes the plaintiffs have given an extension of time for payment of the moneys secured by the notes, which Cosgrave & Sons held on the said 2nd October in respect of goods sold prior to 5th April, 1882. This may have appeared at the trial, but I find a difficulty in tracing it upon the exhibits before us. If it be true, the parties must be aware of it, and a reference to ascertain it would involve a needless expense, but if it be true the defendant is, in my opinion, discharged and entitled to judgment in his favor upon this point, for the agreement in the guarantee as to the extension for time for payment which might be given to Quinn cannot, in my opinion, be construed to extend to the plaintiffs, who derive title only as the assignees of the assets, business notes, debts and securities, which belonged to the firm of Cosgrave & Sons; which firm upon the execution of the instruments of the 2nd October, 1882, became extinct; assuming the defendant's right to have judgment rendered in his favor to rest upon this point alone the reference ordered by the Court of Appeal for Ontario, does not appear to be large enough to authorize the taking of evidence upon this point, if the evidence given at the trial be insufficient; nor upon a point as to which the plaintiffs can so readily supply what evidence may be necessary, ought there be any necessity for a reference. Whether the defendant is discharged by the extension of time given by Cosgrave & Sons after the termination of the guarantee upon the 5th of April, as the Court of Appeal for Ontario has adjudged, of which extension of time extending over

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six months there is abundant evidence, has still to be considered, and as the consideration of this question seems to me to throw some light upon the question as to the continuing character of the guarantee, I propose to consider these two questions together. The authorities relating to the question of continuance of the guarantee, notwithstanding the death of Patrick, have been so fully reviewed by the Divisional Court and the Court of Appeals that I do not propose to refer to them further than to say that the principle to be collected from them and which governs this case is, that the question whether or not the guarantee is to be construed as continuing in force after the death of Patrick is to be solved by ascertaining, upon a full consideration of the whole instrument, giving effect as far as possible to all of its clauses and provisions, what was the intention of the parties as appearing expressed in the instrument containing the guarantee, or to be gathered by necessary implication therefrom. I entirely agree with the majority of the Court of Appeals for Ontario that the clause which declares that it was mutually agreed upon that the defendant should be a continuing security

> To the said parties of the first part or to the member or members for the time being constituting the said firm of Cosgrave & Sons to the amount of $5,000 to cover and protect any sales or advances now or hereafter to be made by the said parties of the first part, or any member or members of the said firm of Cosgrave & Sons, to the party of the second part (Quinn) so long as they may mutually deal together.

and that portion of the clause containing the covenant of the defendant to the effect that in default of payment by Quinn for all goods sold to him at the times that might be agreed upon for the payment therefor, the defendant

> Will to the extent of five thousand dollars be liable to, and pay, the said parties of the first part, or the member or members for the time being constituting the said firm of Cosgrave & Sons

do seem to manifest the intention of the parties to have

been that the guarantee should continue in force not only for the benefit of the three persons then parties of the first part who then constituted the firm of Cosgrave & Sons, but for the benefit also of some other persons, who, as was contemplated should, in the future, for the time being, constitute the firm, regarding it as having a continuing existence with a varying constituency; the whole instrument, however, must be taken together, and if there be some other clauses and provisions in the instrument which are inconsistent with this construction their effect may be to require a modification of the construction, to the extent even, if necessary, of wholly eliminating the words "or to the member or members for the time being constituting the said firm of Cosgrave and Sons," wherever they occur. It is quite impossible, in my opinion, to construe them in the connection in which they are found with the words "the said parties of the first part," as meaning, as has been contended, the said Patrick, John and Lawrence Cosgrave or any or either of them. If the other clauses of the instrument require us to hold that the guarantee must determine upon and by reason of the death of Patrick, no sensible meaning can, I think, be attached to the above words and they must be wholly rejected. Whether or not they must be so rejected is the question. The construction of the instrument containing the guarantee is, as the plaintiffs contend, not merely that the defendant is surety for Quinn and guarantees the payment by him for all ale, porter, &c., sold to him by the firm of "Cosgrave and Sons," as it was constituted when the instrument was executed, but that he continues to be such surety for all sales made to him by the firm as constituted after the death of Patrick; and that the instrument being under seal the defendant's liability under it could not be terminated so long, as the firm, however constituted, should continue dealing

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with Quinn or at least not without payment, as a condition of such termination, of all moneys then remaining unpaid upon the sales made to him; and further, that the defendant is not merely guarantee for payments being made by Quinn at the expiration of the credit upon which the goods should be sold to him, but that it should be competent for the firm, however constituted from time to time, indefinitely, to give to Quinn extension of time for payment upon his promissory notes or acceptances, and that the defendant shall not be discharged by such extension of time being given, but shall continue liable to pay all such paper, however indefinitely renewed and even though the firm continued renewing after the notice of the 5th April was given and for such length of time as seemed pleasing to the firm. The right of the defendant to terminate by notice all liability for any goods that might thereafter be sold to Quinn cannot be doubted. It is well settled upon the authority of *Orford* v. *Davies* (1), *Coulthart* v. *Clementson* (2), and *Lloyd* v. *Harper* (3). In the last case the distinction is pointed out between a guarantee for a thing done once for all as upon the appointment of a person to an office or employment guaranteeing his trustworthiness and fidelity during such employment and a guarantee like the present one for payment of goods to be sold from time to time to one upon whose behalf the guarantee is entered into, in which case the guarantee is divisible and attaches to each sale when made as a separate transaction; as to the payment for all previous sales being a condition precedent to, or concurrent with, the notice taking effect; no case in support of that contention has been found; however, in the present case defendant's liability as to those sales had not attached on the 5th of April, 1882,

(1) 12 C. B. N. S. 748. (2) 5 Q. B. D. 46.
(3) 16 Ch. D. 314.

for at that time they were all covered by notes of Quinns then current which had been discounted by Cosgrave & Sons.

Now the second clause of the instrument, which immediately follows that which declares the agreement of the parties as to the continuance of the security, provides as follows:

And further, it is hereby agreed between the said parties hereto, that until all such sales and advances and every part thereof shall have been paid in cash, that these presents shall continue to be a good and valid security at law and in equity to the said firm of Cosgrave & Sons to the amount of $5,000, notwithstanding that they may from time to time receive other security, notes, bonds, deeds, conveyances or assignments of lands or goods or either of them, from the said party of the second part or any other person or persons as further security for the said sales or advances or any part thereof, and notwithstanding that they, the said parties of the first part or any of them, may extend the time of payment of the moneys due or any part thereof for any such sales or advances, and notwithstanding that they, the said parties of the first part, or any of them, may do any act, matter or thing that would release the said party of the third part at law or in equity from these presents were it not for stipulations herein contained.

"The said firm of Cosgrave & Sons," in this clause must, I think, be construed as referring only to the firm, as then constituted, namely, Patrick, John and Lawrence, who are described in the first clause of the instrument as carrying on business as brewers under the name style and firm of Cosgrave & Sons of the first part; and the persons who may extend to Quinn the time for payment of the moneys due on sales to him are expressly declared to be "the said parties of the first part or any of them," these words "or any of them" in this connection having no more force than declaring that any of them may do what, the said parties of the first part that is to say, what the three of them might together do. Then in the next clause Quinn, the party of the second part to the instrument, in consideration of what has gone before, "agrees with the

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"said parties of the first part" to pay the price of all advances and sales of ale, porter and lager beer and of all casks, &c., &c., that may from time to time be sold to him "by the said parties of the first part, or any of "them," at the times that may be agreed from time to time for the payment thereof, and also to pay all notes, &c., &c, that may be given for the same.

"The said parties of the first part" in this clause must be construed as referring to the same Patrick, John, and Lawrence Cosgrave, and by this clause it is manifest that the only persons whom Quinn covenants to pay for all goods contemplated as to be sold to him on the faith of the instrument are "the said parties of "the first part." This covenant can only be construed as a covenant by Quinn with the parties to the instrument of the first part; that is, with Patrick, John and Lawrence Cosgrave jointly, to pay them the price of all goods to be sold by them, or any of them on behalf of all, to Quinn, and also to pay all notes, &c., &c, as may from time to time be given for the same goods. Then follows the covenant of the defendant that Quinn "will pay for all such sales," which words must be referred to the sales mentioned in the previous clause containing Quinn's covenant, that is to say, the sales to be made by the three persons who were the said parties of the first part, or any of them on behalf of all, and also all notes, &c., &c., that may be given for the same. Then as to these notes, &c., &c., in default of payment by Quinn the covenant contains these words:

And also that in default of payment by the said party of the second part of all or any notes, &c., &c., that may be given by him to the said parties of the first part as security for any such sales or advances, or any part thereof, that he (the defendant) will pay the same.

This latter clause in connection with that first above extracted in full, seems to place beyond all doubt that the only persons who were competent to extend the time to Quinn for payment of goods sold to him, by

from time to time taking notes, &c., &c., from him, without thereby discharging the surety, were "the said "parties of the first part," to whom alone the notes were to be given, that is to say, Patrick, John and Lawrence Cosgrave, or any of them, acting on behalf of the three of them; and as it appears by the instrument, as I think it does, to have been the clear intention of the parties that the power of extending the time for payment of the price of the goods to be sold must belong to "the said parties of the first part," it follows that if the power of extending to Quinn the time for payment be limited, as I think it clearly is upon the sound construction of the clauses and provisions above extracted to Patrick, John and Lawrence Cosgrave jointly or to any of them on behalf of them all, it follows that they must be the only persons who are dealt with by the instruments as the vendors to whom alone the defendant became Quinn's guarantor and that therefore the guarantee came to an end upon the death of Patrick. The clauses and provisions which I have above extracted seem to me so plainly to demonstrate that the defendant only became guarantor to Patrick, John and Lawrence Cosgrave in respect of their joint sales to Quinn, that I do not think any effect can be given to the words, "to the member or members for the time being constituting the said firm of Cosgrave and Sons," which have created all the difficulty and we must regard them as having been inadvertently introduced by the draftsman of the instrument. I am of opinion, therefore, that the appeal must be allowed with costs both in this court and in the Court of Appeal for Ontario and that the judgment for the defendant in the Divisional Court must be reinstated.

Appeal allowed with costs.

Solicitors for appellant: *O'Gara & Remon.*

Solicitors for respondents: *Boswell & Eddis.*

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*Nov. 19, 20 & 21.
1886
*April 9.

HENRY BEATTY, ON BEHALF OF HIMSELF AND ALL OTHER SHAREHOLDERS OF THE DEFENDANT COMPANY, EXCEPT THE DEFENDANTS OTHER THAN THE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE NORTH-WEST TRANSPORTATION COMPANY (LIMITED) AND JAMES HUGHES BEATTY (DEFENDANTS) ..... RESPONDENTS;

AND

WILLIAM BEATTY, JOHN EDWARD ROSE, ROBERT LAIRD AND JOHN D. BEATTY (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Sale by Director to Company—Ratification of by-law by shareholders—Vote of owner of property.

Where a director of a joint stock company procured the passage, by the board of directors, of a by-law authorizing the sale to the company of his own property ;—

Held, that such by-law was illegal, and could not be ratified by the resolution of the shareholders of the company at a meeting subsequently called for the purpose of such ratification, which resolution was passed by a small majority obtained by the votes of the interested director.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favor of the plaintiff.

The facts of the case, which are fully set out in the first report (2) may be briefly stated as follows:—

James H. Beatty, one of the directors of the North-West Transportation Company, had a boat called the "United

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

(1) 11 Ont. App. R. 205. (2) 6 O. R. 300.

Empire," which he was desirous of selling to the company. In order to effect such sale he became the owner of more than half the shares of the company, a few of which he transferred to the defendants, Rose and Laird, and at the first annual meeting thereafter the said James H. Beatty, and the defendants Rose and Laird, were elected directors and constituted a majority of the board, which was composed of five.

The board passed a by-law authorizing the purchase by the company of the said boat, and a meeting of the shareholders was subsequently called at which such by-law was confirmed, the said James H. Beatty being present and voting for such confirmation. Without his vote the resolution could not have been passed as he himself voted on nearly half the stock of the company, the capital stock being 600 shares, and there was only a majority of seventeen in favor of the resolution.

The plaintiff Henry Beatty, one of the shareholders of the company who voted against the resolution to confirm the by-law, took proceeding on behalf of himself and the other dissentient shareholders to have the sale of the said boat to the company set aside, and a decree was made by the chancellor (1) ordering it to be set aside. The Court of Appeal reversed this decree, holding that though the by-law was illegal the action of the shareholders was lawful, and effected a valid contract of sale. From this decision the plaintiff appealed to the Supreme Court of Canada.

Mowat Atty. Gen. for Ontario and *McLennan* Q.C. for the appellant.

This is a contest between J. H. Beatty and the other substantial shareholders of the company, none of whom had any interest in the property sold, and we seek to set aside the sale of the said Beatty's boat on the ground that he was both vendor and vendee in such sale.

(1) 6 O. R. 300.

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There are two cases in which a majority cannot bind a minority, one where the matter in question is *ultra vires* of the company, and the other where it is a fraud upon the company.

The present case is *sui generis* and the transaction is against the policy of the law. *Re Pepperell* (1).

The true rule to govern a case of this kind is laid down in *Gregory* v. *Patchett* (2); see also *Gray* v. *Lewis* (3); *Menier* v. *Hooper Tel. Works* (4); *MacDougall* v. *Gardiner* (5); *Mason* v. *Harris* (6); *re London and Mercantile Discount Co.* (7); *Pender* v. *Lushington* (8); *East Pant du Mining Co.* v. *Merryweather* (9).

The conduct of Beatty was most inequitable in forcing a sale of his property upon an unwilling minority, and the court will not permit a majority to act inequitably whether their conduct can be called fraudulent in the ordinary sense or not.

Then again the extent of the transaction must be considered. The shareholders may sanction a moderate payment, but not a large one. *Tennant* v. *Trenchard* (10).

The transaction placed Beatty in a position inconsistent with his duty as a president, manager and director of the company. *Davidson* v. *Tulloch* (11).

There is authority for setting aside such sale, even if made by an outsider. See *ex parte Chippendale, Re German Mining Co.* (12).

Then it is submitted that under the statute incorporating the company only the board of directors could make a contract of this kind, and the shareholders in general meeting had no power over it. If the board had

(1) 27 W. R. 410.
(2) 33 Bea. 595.
(3) 8 Ch. App. 1035.
(4) 9 Ch. App. 350.
(5) 1 Ch. D. 13.
(6) 11 Ch. D. 97.
(7) L. R. 1 Eq. 277.
(8) 6 Ch. D. 70.
(9) 2 H. & M. 254.
(10) 4 Ch. App. 537.
(11) 3 Macq. H. L. Cas. 783.
(12) 4 DeG. M. & G. 19.

made the contract, shareholders could not annul it. Then the converse is true. See 32 and 33 Vic. ch. 13 ss. 15, 16 and 22. *Aberdeen Ry. Co.* v. *Blakie* (1).

The following cases were also cited: *Foster* v. *Oxford, &c., Ry. Co.* (2); *Panama, &c., Tel. Co.* v. *India Rubber, &c., Tel. Works Co* (3).

Robinson Q.C. and *MacDonald* Q.C. for the respondents.

One always distrusts the assertion of a rule to prevent fraud, when coupled with a refusal to enter upon the question whether there is fraud in the matter or not. And here plaintiffs charged fraud in their bill and abandoned it on the hearing

According to the contention of the appellants any measure could be defeated in which a party holding shares is interested. If so, what degree of interest would be required? A matter of principle does not admit of degrees, and therefore the slightest possible interest would be sufficient. We agree that the minority should be protected against the operation of fraud, but not on a mere technical rule against the interests of the company.

The question is, whether or not a shareholder is prevented from voting upon a question in which he has a present interest.

See Lindley on Joint Stock Companies (4); Stevens on Joint Stock Companies (5), and Thring on Joint Stock Companies (6).

A shareholder, in a meeting of shareholders, is not a trustee for anybody. He can do acts upon his shares which he could not do as a director. When he comes to the meeting of shareholders, his fiduciary character is gone.

(1) 1 Macq. H. L. Cas. 461.
(2) 13 C. B. 200.
(3) 10 Ch. App. 516.
(4) 4th Ed. p. 545 et. seq.
(5) P. 190.
(6) 4th Ed. pp. 92 & 93.

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It is clear that J. H. Beatty could have distributed his stock among his friends and the same result would have been reached without the posibility of being questioned.

In Lushingtons case that was allowed in spite of a provision that the voting power of the stock should be limited and by the distribution the limit was excepted.

In re Stranton Iron and Steel Company (1), was a strong case to the same effect.

I would refer also to *Atwool* v. *Merryweather* (2); *Erlanger* v. *New Sombrero Phosphate Co.* (3). I read this to rebut the contention that a case of this tenor and effect is shocking to the moral sense

Cumberland Coal Co. v. *Sherman* (4); *Imperial Credit Ass.* v. *Coleman* (5).

And, as bearing on the general principle, we cite *Gregory* v. *Patchett* (6), which is a very clear illustration of what a majority can do. *Faulds* v. *Yates* (7); *East Pant du Mining Co.* v. *Merryweather* (8).

Pender v. *Lushington*, cited by my learned friends, has not the least bearing upon the right of a shareholder to vote when interested.

The distinction between a shareholder and a director is pointed out in the case of *Smith* v. *Anderson* (9), and that between a trustee and a director in *Re Denham* (10); *Flitcroft's Case* (11).

If the shareholders could deal with this matter the action of the directors is immaterial. *MacDougall* v. *Gardiner* (12); *Great Luxembourg Ry. Co.* v. *Magnay* (13); *Mason* v. *Harris* (14); *Menier* v. *Tel. Co.* (15).

(1) L. R. 16 Eq. 559.
(2) L. R. 5 Eq. 464 n.
(3) 3 App. Cas. 1218.
(4) 30 Barb. (N.Y.) 553.
(5) 6 Ch. App. 558.
(6) 33 Beav. 595.
(7) 11 Am. Rep. 24.
(8) 2 H. & M. 261.
(9) 15 Ch. D. 247.
(10) 25 Ch. D. 752.
(11) 21 Ch. D. 519.
(12) 1 Ch. D. 13.
(13) 25 Beav. 586.
(14) 11 Ch. D. 97.
(15) 9 Ch. App. 350.

Mowat Q.C., Attorney General, in reply.

The case of *Great Luxembourg Ry. Co* v. *Magnay* decides that a director of a company is a trustee. And the case of *Bowes* v. *City of Toronto* (1) decided that even a member of a municipal council is a trustee.

There are many other cases besides that of fraud where personal interest disqualifies.

Pender v. *Lushington* does not decide that shares may be distributed and votes used for all purposes.

Sir W. J. RITCHIE C. J.—Though it may be quite true, as a general proposition, that a shareholder of a company, as such, may vote as he pleases, and for purposes of his own interest, on a question in which he is personally interested, does that proposition necessarily cover this case? Is it not abundantly clear that, whatever a simple stockholder may do, no director is entitled to vote, as a director, in respect to any contract in which he is personally interested? Directors cannot manage the affairs of the company for their own personal and private advantage; they cannot act for themselves and, at the same time, as the agents of the corporation whose interests are conflicting; they cannot be the sellers of property and the agents of the vendee; there must be no conflict between interest and duty; they cannot occupy a position which conflicts with the interests of the parties they represent and are bound to protect. Is it not somewhat of a mockery to say that this by-law and sale were invalid and bad, and not enforceable against the company as being contrary to the policy of the law by reason of a director entering into the contract for his personal benefit where his personal interests conflicted with the interests of those he was bound to protect, but that it can be set right by a meeting of the shareholders, by a resolution carried by

(1) 6 Gr. 1.

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the vote of the director himself against a large majority of the other shareholders? If this can be done how has the conflict between self-interest and integrity ceased? While recognizing the general principle of non-interference with the powers of the company to manage its own affairs, this case seems to me to be peculiarly exceptional; a director, acting for the company, makes a sale, acting for himself, to the company, a transaction admittedly indefensible; this purchase is submitted to the shareholders, and the director, having acquired a controlling number of votes for this purpose, secures a majority by his own votes thus obtained without which the purchase would not have been sustained, and confirms as a shareholder his invalid act as a director, and thus validates a transaction against which the policy of the law utterly sets its face.

It does seem to me that fair play and common sense alike dictate that if the transaction and act of the director are to be confirmed it should be by the impartial, independent, and intelligent judgment of the disinterested shareholders, and not by the interested director himself who should never have departed from his duty. If he had done his duty and refrained from acting in the transaction as a director the by-law might never have been passed, and the contract of sale never entered into; and having acted contrary to his duty to his co-shareholders he disqualified himself from taking part in the proceedings to confirm his own illegal act; and then to say that he was a legitimate party to confirm his own illegal act seems to me simply absurd, for nobody could doubt what the result in such a case would be, as the futileness of the interested, but discontented shareholders attempting to frustrate the designs of the interested director with his majority is too manifest; but he, if he had done his duty towards them and refrained from entering into the transaction,

would never have heen in the position of going through this farce of submitting this matter to the shareholders, and when so submitted of himself voting that he, though he had acted entirely illegally, had done right, and thereby binding all the other shareholders who thought the purchase undesirable; or in other words, by his vote carrying a resolution that the bargain he himself had made for the company as buyer, from himself as seller, was a desirable operation and should be confirmed.

I cannot distinguish this case in principle from *Erlanger* v. *The New Sombrero Phosphate Co.* (1), in which a sale by promoters of a company was made to the company. Lord Penzance thus states the general doctrine:

The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the courts of equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the courts have always cast upon him who holds that position the burden of showing that he has not used it to his own benefit.

And Lord Cairns, speaking of the duty of promoters of a company, makes these observations:

It is now necessary that I should state to your lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining now, and when, and in what shape, and under what supervision it shall start into existence and begin to act as a trading corporation.

If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the

(1) 3 App. Cas. 1218.

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purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.

The following American cases, also, contain the same doctrine. *Ogden* v. *Murray* (1).

Grover J.:

This brings the case within the rule, which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of *cestui que trust*, or beneficiaries, viz., that trustees, and persons standing in similar fiduciary relations, shall not be permitted to exercise their powers, and manage or appropriate the property, of which they have control for their own profit or emolument, or, as it has been expressed, "shall not take advantage of their situation, to obtain any personal benefit to themselves at the expense of their *cestui que trust*."

This by no means assumes that the trustees were not, in this case, in the actual exercise of the highest integrity. I cannot for a moment doubt that, in reference to the particular case before us; but the principle is one of great importance, and it forbids any inquiry into the honesty of a particular case.

In *Mathew Ryan et al* v. *The Leavenworth, &c., Railway Co.* (2) Horton C. J. says:

This contract was secured, through the votes and influence of members of the directory, who were directly interested in the procurement of such contract; and, the president of the corporation, in executing the same, while nominally representing the corporation, was really acting adverse to its interests and the interests of its stockholders and in the promotion of gain to himself and his co-

(1) 3 Am. Corp. Cases Withrow 614.

(2) 7 Am. Corp. Cases, Binmore 149.

partners. The elementary text books of authority, on the subject of corporations, lay down the rule that the fiduciary character of directors is such that the law will not permit them to manage the affairs of the corporation for their personal and private advantage when their duty would require them to work for and use reasonable efforts for the general interests of the corporation and its stockholders and creditors. The directors are the primary agents of the corporation and this relation requires of them the highest and most scrupulous good faith in their transactions for the corporation ; and the general rule, that no trustee can derive any benefit from dealing with these funds of which he is a trustee, applies with still greater force to the state of things in which the interest of the trustee deprives the corporation of the benefit of his advice and assistance.

In *European and North American Railway Co.* v. *Poor* (1), Appleton C. J. says :

The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. The agent to sell cannot become a purchaser of that which he is the agent to sell, for his position as selling agent is adverse to and inconsistent with that of a purchaser. So, the agent to purchase cannot, at the same time, occupy the position of a seller. It is not that in particular instances the sale, or the purchase, may not be reasonable, but to avoid temptation, the agent to sell is disqualified from purchasing and the agent to purchase from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sale on purchases, if he deems it for his interest.

* * * *

The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders for and in behalf of whom they act. "The relation between the directors of a corporation and its stockholders," observes Johnson J., in *Butis* v. *Wood* (2), "is that of trustee and *cestui que trust.*" "The directors," remarks Romilly, master of the rolls, in the *York and Midland Railway Co.* v. *Hudson* (3), "are persons selected to manage the business of the company for the benefit of the shareholders." It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. Persons, who become directors and managers of a corporation, place themselves in the situation of trustees; and the relation of trustees and *cestuis que trust* is, thereby, created between them and the

(1) 4 Am. Corp. Cases, Withrow 422.

(2) 38 Barb. 188.

(3) 19 Eng. Law &. Eq. 365.

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stockholders, *Scott* v. *Depeyster* (1). All acts done by the directors officially should be for the interest of the *cestuis que trust.* Holding a fiduciary relation they cannot be permitted to acquire interests adverse to such relation.

In *Coleman et al.* v. *Second Avenue Railroad Co.* (2).

Grover J.:

That the grantees, directors, acting as directors and composing a majority of the board, could not make a bargain with themselves as individuals, binding upon the company to purchase their grant upon the term fixed by them as directors, is a point already determined by this court in *Butts* v. *Wood* (3). If they could not as directors make such a contract obligatory upon the company, they could not by their acts as a board bind the company to pay them any specific sum for their grant.

In *Wardell* v. *Railroad Co.* (4).

Field J.:

It is among the rudiments of the law that the same person cannot act for himself, and, at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus, a person cannot be a purchaser of property, and, at the same time, the agent of the vendor. The two positions impose different obligations and their union would, at once, raise a conflict between interest and duty; and "constituted as humanity is, in the majority of cases, duty would be over borne in the struggle," *Marsh* v. *Whitmore* (5). The law, therefore, will always condemn the transactions of a party in his own behalf, where, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule: they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and, then, personally participate in the benefits.

In Spering's Appeal (6), Sharswood J. says:

In *Williams* v. *Page* (7), Sir John Romilly said, in treating a director as a trustee: "The trust is no doubt a peculiar one." In

(1) 1 Edw. Ch. 513.
(2) 3 Am. Corp. Cas. Withrow 605.
(3) 37 N. Y. 317.
(4) 6 Am. Corp. Cas. Binmore 96.
(5) 21 Wall. 178.
(6) 4 Am. Corp. Cas., Withrow 132.
(7) 24 Beav. 661.

Great Luxembourg Railway Co. v. *Magnay* (1), he held that if a director enters into a contract for the company he cannot personally derive any benefit from it. So, also, in *ex parte* Bennett (2), directors of a public company are trustees for the shareholders and their private interests must yeild to their public duty wherever they are conflicting. In *Turquard* v. *Marshall* (3), which is the last English case on the subject, Lord Romilly, master of the rolls, held directors liable, first, for not calling a meeting of the shareholders, under a clause of the charter requiring them to do so, on the exhaustion of their surplus fund, and, second, for loaning money, to one of themselves, without security. He used however this language: "That if directors have been guilty of gross and palpable breach of trust, which cannot be set right by a public meeting of the company, they may be made responsible for their misconduct.

In *Port et al.* v. *Russell et al.* (4), Buskirk J. says:

The question presented for our consideration and decision is, can a director, in an incorporated company, become a contractor with the company, or can he have any personal and pecuniary interest in a contract between the company of which he is a director and a third person? We think the law is well settled, both in England and in this country, that he cannot. In the case of *The Aberdeen Railway Company* v. *Blaikie* (5), the house of lords, reversing the judgment of the Court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director or the chairman at the date of the contract, was invalid and not enforceable against the company. Lord Cranworth in delivering the opinion of the court, says: "A corporate body can only act by agents and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was impossible to obtain. It may some

(1) 25 Beav. 592.
(2) 18 Beav. 339.
(3) 3 Eq. Law Rep. 127.
(4) 4 Am. Corp. Cas., Withrow 384.
(5) 1 Macq. App. Cas. 461.

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time happen that the terms upon which a trustee has dealt, or atetmpted to deal, with the estate or interest of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may, even, at the time, have been better, but still, so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The three leading cases in this country are *Michaud* v. *Girod* (1); *Coal and Iron Company* v. *Sherman* (2); and the *Hoffman Steam Coal Company* v. *Cumberland Coal and Iron Company* (3). In these cases will be found a full, able and exhaustive discussion of the question and a thorough examination of the English and American cases.

If this is so as regards promoters, why should it not apply with equal force to directors and shareholders selling to the company? This sale was not made through the medium of a board of directors who would, could and did exercise an independent and intelligent judgment on the transaction, and it will be a bold man who will say that Mr. Beatty, either as a director or shareholder, was a competent and impartial judge as to whether the purchase ought or ought not to be made.

In my opinion, the whole policy of the law is against the recognition of such a transaction as this, which, if permitted, would open a door by which directors would be enabled successfully to subvert that wise rule which prevents a party from being at the same time buyer and seller, to the injury and wrong of dissatisfied shareholders, and whereby directors recreant to their duty may illegally benefit themselves at the expense of those whose interests it is their duty to protect by forcing the property on unwilling purchasers on their own terms, thereby subverting the commonly received idea, and treating as a vulgar error the ordinarily received notion, that it requires two to make a bargain.

I think it is clear in this case that the defendant, a

(1) 4 Howard U. S. 503. (2) 30 Barb. 553.
(3) 16 Maryland, 456.

director, by his action as director, and by means of the majority secured by his own vote, obtained a benefit for himself at the expense of the minority, the rest of the shareholders. It may possibly be that the act of Mr. Beatty as a director in obtaining the passage of this by-law and making this sale and obtaining a sufficient number of votes to enable him thereby to carry a resolution, at a meeting of the shareholders, to confirm such sale, and by reason thereof ratifying and confirming the sale, may not be properly characterized as fraudulent; if not actually fraudulent it was, in my opinion, an illegal and oppressive proceeding on his part whereby the minority of shareholders were overreached and deprived of their right, and therefore the transaction was such a one as such a majority could not confirm and as should not be sustained in a court of justice.

I rest this case entirely on the position Beatty held as a director and the duty which pertained to that office. In that view it is not necessary to discuss how far, or rather under what circumstances a shareholder may vote at a general meeting of shareholders on matters on which he is individually interested. I cannot, however, but look upon it as rather a bold and startling proposition that a shareholder should be able to offer a property for sale to the company from a bare majority of votes and by such vote, against the will of all the other shareholders, compel the company to become the purchaser at his own price and on his own terms, against the wish of all the other shareholders who may, as in this case, be a minority of 289 votes against 306.

FOURNIER J.—I entirely agree, for the reasons given by the learned Chancellor, that the appeal should be allowed.

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HENRY J.—I concur in the decision of my learned brothers. In the first place, it involves a decision as to whether or not a shareholder has a right to vote on a matter in which he is personally interested, because, if he had such a right, then he could vote for this sale. I think it is competent for a shareholder so to vote at a meeting properly called. But this case does not depend upon that, because, in my opinion, the by-law passed by the directors was improperly passed and could not be confirmed by the shareholders.

I may have no reason to suppose that Beatty did not consider it in the best interests of the company that they should become the owners of his vessel, and the evidence is favorable on that point; and without attributing any intentional wrong to him, we may inquire whether the by-law was, independent of that consideration, valid.

The decision of the directors in favor of the by-law was obtained by the votes of the party who was selling the property. It is well settled that the same party cannot be buyer and seller; a director of a company has a fiduciary character, and he is bound to exercise his functions in the best interests of the company. Where he is himself personally placed in interest in antagonism to the company, his acts are to be considered illegal. The by-law was, in this case, the foundation of the resolution of the shareholders; the directors would not have passed it, but for the vote of the party who was interested in making the sale. The shareholders would not have confirmed the by-law if Beatty had not purchased sufficient additional shares to give him a majority of the votes, so that, by his own act he occupied such a position as director and shareholder as enabled him to deal altogether in his own interests. Now this, if such were tolerated, would enable any person who intended to wrong a company to compel

them to purchase, at an exorbitant price, property of which he was the owner. To sanction the exercise of such a power would be dangerous and wrong. I think the sale in this case was illegal, and the judgment of the court below should be reversed with costs.

TASCHEREAU J.—I am of the same opinion.

GWYNNE J.—The defendant, James Hughes Beatty, being the owner of 301 out 600 shares which constituted the whole capital of the North-West Transportation Company, and having built a steamship called the United Empire on the speculation of disposing of it to the company and being desirous of selling it to the company of which he was also a director, adopted the following mode of accomplishing his purpose. On the morning of the 7th February, 1883, on which day a general annual meeting of the shareholders was to be, and was, held, he assigned five of those shares to the defendant Laird and five to the defendant Rose who thereby became qualified to be elected directors of the company At the shareholders meeting of that day, a proposition was made by, or on behalf of the defendant James Hughes Beatty, that the company should become purchasers of the steamship, and the price at which the defendant would sell it was mentioned and a resolution was put to the meeting and carried, that a by-law of the company for the purpose of authorizing the purchase embodying the proposed terms, should be prepared and submitted to a special meeting of the shareholders to be convened on the 16th day of the said month of February, for the purpose of considering the same, and of authorizing or declining to authorize the purchase. At this meeting of the 7th February, the defendant James Hughes Beaty, William Beatty, Rose and Laird were elected directors of the company, and at a meeting of those directors, subse-

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quently held between that day and the tenth of the same month, the defendant, James Hughes Beatty, was elected president, the defendant, John Beatty, besides being a director continued to fill also the office of secretary-treasurer, which office he held from the first organization of the company

At a meeting of directors held on the 10th of February, 1883, a by-law was prepared and approved of by the board for the purpose of being submitted to the special meeting of shareholders to be held on the 16th February, in pursuance of the resolution of the 7th of that month.

This by-law was as follows:

Whereas in consequence of the loss of the steamer Asia and depreciation through wear and tear of the value of other steamers belonging to the company, the capital of the said company has been impaired and the carrying powers of the said company reduced, and it is therefore considered essential, in the interest of the company, and to maintain its efficient working, to purchase a steamer to replace the said steamer Asia. And whereas it has been agreed between the company and James Hughes Beatty, Esq., one of the directors of the said company, that the said company should buy, and the said James Hughes Beatty should sell to them, the steamer United Empire for the price or sum of one hundred and twenty-five thousand dollars to be paid as follows:—Twenty thousand dollars in cash, and five thousand within five months from the date hereof, secured by promissory note of the company, with interest at seven per cent., and the balance in three equal payments on the first days of December 1883, 1884 and 1885, with interest at seven per cent. per annum on unpaid purchase money with privilege to the company to pay off the purchase money at any time or times, in sums of not less than $5,000, the said balance to be secured on the assets of the company hereinafter set forth. Therefore the North-West Transportation (limited) enacts as follows:—

That the said company purchase from the said James Hughes Beatty, the said steamer at and for the said price or sum of one hundred and twenty-five thousand dollars payable and secured as hereinbefore recited.

That the president is hereby authorized to affix the seal of the company to a mortgage to the said James Hughes Beatty, on the following assets: The steamer, United Empire, Manitoba, Ontario and Quebec, to secure payment of the balance of one hundred

thousand dollars, according to the terms hereinbefore recited and provided for the amount of unpaid purchase money as additional security.

That for the purpose of making the cash payment, the treasurer of the company may apply any funds in hand, which are not immediately needed for working expenses, and may borrow from any person or corporation on the credit of the company, such sum as may be necessary to make up the balance of the said cash payment.

On the 16th February the special meeting of shareholders was held at the office of the company in Toronto, for the purpose of considering the above by-law, and of adopting or rejecting the same, which meeting was attended in person or by proxy by the holders of 595, out of the total number of 600 shares, constituting the capital of the company, and as appears by the following extract taken from the minutes of the meeting, the following proceedings took place:

The by-law, for the purchase of the steamer United Empire was submitted to the shareholders and read by the secretary, as also the agreement of Mr. James H. Beatty in the sale and completion of the said steamer, the said by-law having been passed by the directors at their meeting on the 10th instant, and said agreement having been executed the same day. The matter having been fully and freely discussed, it was moved by Mr. Laird, seconded by Mr. Rose, "that the by-law passed by the directors for the purchase of the said steamer be now confirmed" Mr. James H. Beatty stating the $125,000 is the actual cost of the boat, including $4,000 for superintendence, $800 for expenses and interest on advances, and that he will lay before the board a detailed statement of cost including the above items, and will credit on said $125,000 any sum by which said cost shall not equal said $125,000, the company agreeing to pay any excess, such excess to be added to the $100,000 as mentioned in the by-law, and paid in three equal payments with said sum—The vote having been taken by shares, it was declared carried, and the by-law thus adopted.

Objections to the adoption of the by-law were made by Mr. Hankey (who held 71 shares), as follows:—

1. No necessity for the purchase of a new vessel.

2. The valuation of the "United Empire" is excessive and unfair, and considering the extent of Mr. James H. Beatty's interest, such valuation should have been submitted to outside and disinterested

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arbitration.

The defendant, James H. Beatty, upon the vote for the adoption of the by-law gave 291 votes, which together with fifteen other votes, given by three of the other directors constituted the whole number, namely, 306 votes given in favour of the by-law, and the purchase of the steamer. The votes given against the by-law and the purchase were 289 in number. The by-law was thus carried, and the purchase made by the votes of the defendant, James H. Beatty himself alone, acting in the double and conflicting characters of vendor and vendee. The defendant could no more in this character act in such double and conflicting characters than he could as a director. He can no more, by his possession of 291 shares out of 600, compel the holders of other 289 shares to purchase his property against their will at his price, at a meeting of shareholders than he could do so, by his casting voice at the board of directors. The question is not as to the right of courts of justice interfering with the exercise by a shareholder in a company of his right of voting, which is incident to the possession of his shares, upon the ground of his having an interest in the matter upon which the votes are taken, different from that of the other shareholders, but as to the right of one shareholder in a company to use his controlling votes, to the exclusion of all shareholders dissenting from him, for the purpose of assuming to represent the company, and in its name to contract with himself for the purchase of his own property, on his own terms.

The question, in short, simply is whether a valid contract has been entered into by the company with the defendant, James Hughes Beatty, for the purchase from him of the steamer United Empire. Now to every valid contract of sale, there must be two perfectly independent parties—the vendor and the vendee, if the

latter be so under the control and influence of the former that the latter's assent to the purchase is obtained only by force of such control and influence, there is no valid contract, the assent of the vendees being given under compulsion of the vendor is no consent, and there is no contract for the want of two assenting minds. Now this is exactly what has taken place here. The vendor while going through the form of submitting to the general body of independent shareholders the question whether the purchase shall be made or not, lays aside for a time his character of vendor and assumes that of vendee, and by force of his controlling number of votes neutralises the votes of all the independent shares, which are given against the purchase in the proportion of 289 to 15, and so the vendor, in the name of the company and assuming to act for it and to bind it, contracts with himself for the purchase of the vessel from himself, on his own terms and mortgages the whole of the assets of the company to himself to secure payment of the purchase money. It is impossible that such a transaction can be maintained; it is precisely such a one as comes within the designation of illegal oppression and (in the eye of a Court of Equity) fraudulent to use the language of Lord Justice James in *MacDougall* v. *Gardiner* (1); but no such question arises here as did in that case which was, as to the sufficiency of the frame of the bill. In the present case, the statement of claim contains all the necessary averments in explanation of its being filed, not in the name of the company as plaintiff, but by the shareholder on behalf of himself, and all other shareholders who are prejudiced by the wrongful exercise by the defendant, James Hughes Beatty, of his controlling influence to consummate in the name of the company a transaction with himself, which is illegal and in the eye of a court

(1) 1 Ch. D, 21.

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of equity fraudulent.

That the three directors who gave the fifteen votes in favour of the purchase, which were the only votes so given except those of the vendor, did so in the belief and conviction, that the purchase was in the best interests of the company, and a fair and honest one, I do not entertain a doubt, and it may be that the defendant, the vendor himself, entertained the same belief, but his entertaining that belief is altogether beside the question and can afford no excuse for his assuming to bind the company as vendees, and in the name of the company to contract with himself as the vendor.

The case of *East Pant Du United Lead Mining Co.* v. *Merryweather* (1), which was much relied upon in the Court of Appeal for Ontario, in support of this sale by the defendant vendor, to the company assenting thereto, only through the vendor assuming to bind them, is very distinguishable from the present case. There a bill had been filed in the name of a company as plaintiff's, alleging that a contract for the purchase of a mine on the part of the company had been fraudulently obtained by the defendant Merryweather and was void, and that he was not entitled to 600 shares, which had been allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money returned to the shareholders who had advanced it. The defendant, Merryweather and two directors who sided with him, moved the court that this bill should be taken off the file on the ground that there had been no resolution of any majority of the shareholders authorizing the use of the company's name for that purpose, and that it was a bill filed without the sanction of the company.

The vice chancellor thought that the proceedings ought not to be stayed until the shareholders should

(1) 2 H. & M. 254.

have an opportunity of expressing their opinion as to whether they would adopt the bill or not, and the motion was ordered to stand over for that purpose An extraordinary general meeting was accordingly held for that purpose and after a protest had been made at the commencement of the proceedings against Merryweather's presence, and right to vote, a motion was made for the adoption of the bill, this was met by an amendment to refer all matters in difference between the shareholders and Merryweather to arbitration and to stay all proceedings. Upon a poll being taken the amendment was carried by a majority of twenty votes. 78 of the votes given for the amendment were given by Merryweather, so that if these should be excluded, the motion in adoption of the bill would have been carried.

In this state of things the motion to take the bill off the file as not being authorized by the company was renewed, and the only question was, whether a bill could be filed in the name of the company by a minority of the company, charging fraud against some of the majority, and alleging that these persons were not to be considered as shareholders or entitled to vote. The question was one as to practise and pleading. The late Sir John Rolt, who was counsel, making the motion, admitted that a bill might have been framed though not in the name of the company as plaintiffs. The single question before the vice chancellor Sir W. Page Wood was: "Had the company sanctioned the suit? To "decide," says the learned vice chancellor, "that it has "done so, would be to discard Mr. Merryweather's "votes and to do that, would in effect be to decide now "on this application the question at issue in this suit."

The question raised by the bill was, whether the contract, in virtue of which alone, Merryweather acquired the shares, was valid or not. To discard the

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votes would have been in effect to pronounce the contract to have been invalid, a point not raised by the motion to take the bill off the file, and so, on such a motion, to decide a point only put in issue by the bill. There was no alternative left but to order the bill to be taken off the file and to leave the objecting shareholders to frame their bill on their own behalf, and not in the name of the company as plaintiffs, as it was admitted by Sir John Rolt in argument, they might have done.

So in *Pender* v. *Lushington* (1) the plaintiff Pender was the registered holder of 1,000 shares in the Direct United States Cable Company, he was also the chairman of the Globe Telegraph and Trust Company, which was worked in connection with the Anglo American Telegraph Company. On the 2nd February, 1877, an extraordinary general meeting of the company was held, pursuant to notice, at which Pender moved a resolution in these terms :—

> That it is expedient to put an end to the present antagonism of this company towards the Anglo American Telegraph Company and its connections, and to work this company's cable in friendly alliance with their lines; and that a committee of shareholders be appointed to be named by the meeting to confer with the directors as to the best method of giving effect to this resolution, and to report to the shareholders at such time as the meeting shall appoint.

This resolution was seconded and put to the meeting whereupon an amendment was moved by a shareholder, and was seconded and put to the meeting by the chairman and declared to be carried. A poll being demanded by Mr. Pender, the meeting was adjourned to the 5th February, when the poll should be taken. At the adjourned meeting it appeared from the report of the scrutineers that according to the number of votes recorded, there would have been a majority of votes against the amendment, but the chairman ruled out

(1) 6 Ch. D. 71.

649 votes and declared the amendment carried by a majority of 609. Mr. Pender then moved a second resolution, and the votes were again taken, and the resolution would have been carried, but the chairman ruled out the same votes as before, and it was accordingly lost. The grounds on which the chairman ruled out these votes, were that they were given in respect of shares, which had been transferred by certain large shareholders in the Direct United States Cable Company and with the object of increasing the voting powers of the transferors, and of furthering the view of the Globe Telegraph and Trust Company. These shares had been duly transferred to their present holders three months before the meeting was held according to article 59 of the articles of association, and the names of the holders were on the register. An action was then brought by Pender on behalf of himself and all the other shareholders of the Direct United States Cable Company, who voted against the amendment to the first resolution, and in favour of the second resolution at the said meetings and the said company as plaintiffs against Lushington and others, the directors of the same company as defendants. A motion was then made on behalf of the plaintiffs, to restrain the defendants from ruling out the 649 votes, and acting contrary to the second resolution, until the hearing of the action. Now, the question involved in this motion was simply whether the fact of the plaintiff having an interest in another company, and which the defendants and those acting with them had not, which special interest of the plaintiffs constituted the motives of their actions made illegal the transfer of shares by the plaintiffs to their own nominees, having otherwise no interest in the company, for the purpose of thereby increasing the voting power of the plaintiff, and which transfer of shares was in other respects within the provisions of the articles of asso-

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ciation, and whether the plaintiff, by reason of his interest in the other companies, was deprived of the right to have the votes of the transferees of shares counted on the poll which was taken.

This is the question to which the observations of the master of the rolls, Sir George Jessel, applies, when he says:

> If these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question "and again" there is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest "and again." I am not going to give any opinion as to what the effect of the resolutions may be, when passed. The only point on which I am asked to decide is to say they ought to have been passed, in other words, that there was a majority for them, and to restrain the defendants until further order from acting in contravention of them.

Now, if the only question in the present suit was merely whether the fact that the defendant James Hughes Beatty had a special interest in the adoption of the question, submitted to the meeting, which the other shareholders had not, deprived him of the right of voting on the question this case might be referred to as an authority that it did not, but the question in the two cases are very different, and it is the difference in the questions voted upon and the conflicting nature of the interests and the opposing character of the positions, which the defendant assumed to represent and act in, and not the mere fact of his having an interest different from that of the other shareholders which makes the difference. In *Pender* v. *Lushington* the question was merely upon which side was the majority of votes in point of fact given without any enquiry as to the effect of the resolution; in the present case, the question is, as to the effect of a resolution carried by the sole con-

trol of a vendor of a chattel, who assumed to act also in the character of vendee, and insists upon his right of thus perfecting as valid, a contract made by himself as representing the company, in which he is as shareholder and director, with himself as vendor of the chattel for the purchase of his property upon his own terms. So likewise the case of *Mason* v. *Harris* (1), relied upon in support of the judgment of the Court of Appeal supports the contention of the appellant. Whatever may have been the motive of the defendant in forcing his steamer upon the company, or in attempting so to do, namely whether he did or did not *bonâ fide*, believe it to be the interest of the company, to acquire the steamer on the terms named, the transaction is no less one in which the defendant assumed to fill the inconsistent and conflicting positions of vendor and vendee, and by reason thereof the essential condition to the creation of a valid contract was wanting.

The appeal therefore must be allowed with costs, and the judgment of the learned chancellor must be restored.

Appeal allowed with costs.

Solicitors for appellants: *Mowat, MacLellan, Downey & Langton.*

Solicitors for respondents: *MacLaren, McDonald, Merritt & Shepley.*

(1) 11 Ch. D. 107.

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*Mar. 17, 18, 19.
*May 17.

THE WINDSOR HOTEL COMPANY OF MONTREAL (DEFENDANTS)..... } APPELLANTS;

AND

THE HON. ALEXANDER CROSS (PLAINTIFF)..... } RESPONDENT.

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

Sale of land—Warranty against charges and incumbrances—Promise to pay without reserve by subsequent deed with knowledge of assessment—Interest, agreement as to—Compensation—Cross appeal.

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P. by which without any reserve they acknowledged to owe and promised to pay certain sums of money, amongst others, to Mrs. L., transferree of one of the vendors, who on the 3rd April, 1875, sold the Windsor Hotel property in Montreal to the appellants, and by the same deed Mrs. L. agreed to assist the appellants in obtaining a loan of $350,000, to relinquish the priority of her hypothec for her share on the property, and also to extend to 6 years the period for the payment of the balance due her, waiving any right to interest until the appellant company had an available surplus after paying interest and insurance in connection with the new loan. Subsequently, on 15th June, 1880, Mrs. L., by notarial deed, transferred to the respondent the balance alleged to be due her under the deed of the 28th June, 1877, and the respondent brought an action to recover this balance with interest from 1st July, 1877, to the 15th December, 1885, date of the action.

To this action the appellants pleaded *inter alia*, that under the deed of the 28th June, 1877, interest could be demanded only from the 1st July, 1881, the secretary of the company having on said date testified for the first time there was an available surplus; and also that both principal and interest were compensated by the sum of $1,901.70 paid the city for assessments imposed under 42 and 43 Vic. ch. 53, P.Q., for the cost of public improvements

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

made in the vicinity of the property prior to the sale of the property to the company in 1875. The assessment rolls originally made for these improvements were set aside by two judgments in 1876 and 1879.

Held—affirming the judgment of the court below, that under the circumstances the respondent cannot be said to be the *garant* of the purchasers of the said property, and therefore he is entitled to the payment of the balance alleged to be due under the deed of the 28th June, 1877, notwithstanding any claim the appellants might have against their vendors under the general warranty stipulated in the deed of purchase of April, 1875.

Held also, that by the terms of the deed of the 28th June, 1877, interest could be recovered only from the 1st of July, 1881.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court dismissing respondent's action.

The suit was brought by the respondent to recover from the appellants a balance which the latter acknowledged to owe and promised to pay to Mary Ann Campbell, widow of Elisha Lane, by a deed executed before Hunter, N. P., on the 28th June, 1877, and transferred to the respondent by deed before the same notary, the 26th June, 1882, duly signified.

The facts which gave rise to the litigation between the parties are as follows :—

On the 3rd of April, 1875, David Torrance, Mary Lunn, Julia Lunn, Emma H. Lunn, and Alexander H. Lunn, sold to the company, appellants, the property on which the Windsor hotel has been since built in the city of Montreal, for the sum of $112,212, whereof $18,702 were paid, leaving a balance of $93,510 unpaid.

Alexander H. Lunn, one of the vendors, transferred to Mrs. Lane on the 7th June, 1876, his share of the purchase money, and by deed of the 28th June, 1877, the company agreed to pay Mrs. Lane, representing one of the vendors, and the other vendors, $86,034.46

(1) 4 Dorion's Q. B. Rep. 280 S. C. M. L. R. 1 Q. B.

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being 87½ per cent. of their claim in principal and interest. Mrs. Lane and the vendors, David Torrance and others, excepting Alexander H. Lunn, who was not a party to the deed, agreed to assist the company in obtaining a loan of $350,000 and to relinquish the priority of their hypothecs upon the property, and also to extend to six years the period for the payment of the balance due them, "they relinquishing and waiving "any right to exact and require any interest upon the "amount of said balance until the net revenues of the "company shall be sufficient to pay the annual liabili-"ties of the company for interest, insurance, etc., in "connection with the said loan of $350,000, after which "they would be entitled to receive interest to the "extent of 7 per cent., out of the surplus of revenue, "according to its sufficiency."

Previous to the sale of the property to the company, certain public improvements had been made in the vicinity by the opening of Stanley street and of Dominion square, and the property had been assessed for a share of the costs of these improvements. The claim of the city was, however, disputed, and by the deed of sale of 3rd of April, 1875, the vendors reserved all right of action, claims and demands they might have against the mayor, aldermen and citizens of Montreal, for the recovery of the special assessment for the opening of Stanley street, and for the drain in said street paid by the vendors to the corporation,

By two judgments rendered in 1876 and 1879, the assessment rolls, by which the property sold to the company had been charged with a proportion of the cost for opening and widening Stanley street, and for opening Dominion square, were set aside.

Subsequently the city obtained from the provincial legislature authority to cause other assessment rolls to be made for the purposes of assessing, in whole or in

part, the cost of the improvements already made upon all and every the pieces or parcels of land or real estate which the commissioners (to be named), should determine to have been benefited. (Act of 1879 42 and 43 Vict, ch. 53 s. 4 § 1 and 4.)

New assessment rolls were made under this act, and the commissioners having determined that the property of the company was benefited by the improvements referred to, assessed the amount to be paid by the company to the sum of $522.90 for the opening and widening of Stanley street, and to the sum of $1,350 for the opening of Dominion square.

These two sums, with interest, amounting in all to $1,901.70 were paid in 1882 by the company, who was subrogated to the rights of the city.

The pleadings sufficiently appear in the head note, and are fully set out in the report of the case in the court below.

At the hearing of the case before the Superior Court the secretary of the company testified that it was only since July, 1881, that the company had a net surplus available to pay interest on the claim of the respondent, and judgment was rendered on the 9th June, 1884, declaring the compensation pleaded by the appellants to have taken place and dismissing respondent's action.

The Court of Queen's Bench for Lower Canada (appeal side) on the 25th September, 1885, reversed the judgment of the Superior Court and condemned the appellants to pay the respondent the sum of $1,801.23, with interest from the 17th December, 1883, and costs.

From this judgment the present appellants appealed to the Supreme Court of Canada and the respondent filed a cross appeal claiming to be entitled to interest on the capital from the 1st of July, 1877, under the deed of agreement of the 25th June, 1877

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The principal question which arose on this appeal was as to the right of the appellants to set off, in compensation of the respondent's demand for a balance due under a deed of sale, the amount of certain special assessments on the property sold, which they were afterwards compelled to pay, or in other words, whether the respondent was a warrantor ?

Paynuelo, Q.C., and *Abbott*, for appellants, contended on this point that the respondent, as representing one of the vendors under the said deed of sale, was bound equally and jointly and severally with the other vendors to warrant the appellants, and indemnify them for the payment of the amount of these assessments, which were created before, and existed at the time of the granting of the deed of sale.

The germ of the obligation was in existence and they were liable for the cost of the improvement as fixed by the subsequent assessment roll, whenever made.

The fact of the respondent being a transferee does not relieve him from this claim of compensation. There is nothing to show that the assignment to him was accepted by the company defendants. The transfer fromMrs. Lane to him was only signified upon the company on the 14th December, 1883; but there was no acceptance by the company of that assignment, or of the assignment to Mrs. Lane, which never appears to have been signified to them. And any acceptance which might be inferred from the agreement of June, 1877, was before any right to claim compensation existed.

The learned counsel cited Pothier Communauté (1), Marcadé (2); Laurent (3); Arts Civil Code (4); Blackwell Tax Titles (5).

(1) 7 Vol. No. 118.
(2) 6 Vol. p. 262 and 263.
(3) 24 Vol. No. 224.
(4) 1176, 1177, 1174 C. C.
(5) 4 Ed. p. 633.

Geofrion for respondent.

The agreement contained in the notarial document of the 28th June, 1877, settled the relations and obligations of the parties towards each other, and precludes the appellants from raising the questions put forward by them.

That document formally recognized Mary Ann Campbell as a creditor, and distinctly undertook to pay her according to its terms.

It made no allusion whatever to the debt having been originally created as part of the consideration of the purchase of property nor to its having come by transfer from Torrance et al.

The appellants must be considered to have waived, as far as Mary Ann Campbell was concerned, any demand they may have had against Torrance *et al.*, or otherwise, and to have given her the assurance that she might rely upon them for her payment.

Her case is much stronger than that provided for by Art. 1192 C. C., which itself is very clear; that provides merely for an acceptance of notice of the assignment; but here a debtor distinctly acknowledged to owe and promised to pay a debt, without reference to its having proceeded from another party by transfer.

The learned counsel also referred to Larombière (1); Demolombe (2); Civil Code (3); Dalloz, Vo. Vente (4).

TASCHEREAU J. delivered the judgment of the court: The respondent, as transferee of a balance due by the appellants on the purchase price of the property known as the Windsor hotel, and whose assignment had been accepted by the debtors, sued the appellants for the same. The appellants claim that the sale from Torrance *et al.* of 3rd April, 1875, was made with war-

(1) 3 Vol. No. 1295.
(2) 28 Vol. No. 572.
(3) Arts. 1180, 1187 & 1188 C. C.
(4) 43 Vol. No. 1779.

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ranty and being respondent's *auteurs* they are bound to warrant the appellants against charges and incumbrances. We are of opinion that the judgment of the court below should be affirmed for the reason given by Chief Justice Sir A. A. Dorion, that even supposing the vendors to have been under the general warranty stipulated in the deed of sale of 3rd April, 1875, liable to reimburse the sums paid by the company on the assessment rolls made under the Act of 1879, the respondent is not one of the vendors nor bound to the warranty stipulated in that deed of sale. He did not sue on this deed of sale but upon the deed of the 28th June, 1877, which was duly signified and by which the appellants promised to pay Mrs. Lane, respondent's transferor, without any reserve the sum he claims, this promise having been made by the company after full knowledge of all the circumstances, and after one of the original assessment rolls had been set aside. Under such circumstances the respondent cannot be held to be a *garant* of the said company and therefore this appeal must be dismissed with costs.

As to the cross appeal we are of opinion that the court below properly held that the interest should be allowed only from the 1st July, 1881.

Appeal dismissed with costs and cross appeal dismissed with costs.

Solicitors for appellants; *Abbott, Tait, Abbott and Campbell.*

Solicitor for respondent: *Selkirk Cross.*

HOBBS, OSBORN & HOBBS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE NORTHERN ASSURANCE CO. (DEFENDANTS) ..... } RESPONDENTS.

1885 Dec. 4, 5.
1886 *April 9.

HOBBS, OSBORN & HOBBS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE GUARDIAN FIRE & LIFE ASSURANCE CO. OF LONDON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Condition in policy—Loss by explosion—Loss by fire caused by explosion—Exemption from liability.

A policy of insurance against fire contained a condition that "the company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning."

A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire but not for that caused by the explosion.

Held, reversing the decision of the Court of Appeal, Taschereau J. *dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Division (2) in the suit against the Guardian, and that of the Queen's Bench Division (3) in the suit against

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

(1) 11 Ont. App. R. 741. (2) 7 O. R. 634.
(3) 8 O. R. 342.

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the Northern, both of which judgments were in favor of the defendants.

These two cases were precisely similar, the insurance effected in the two companies being the same premises and goods. The fire by which the loss occurred to the plaintiff was caused by a burning match being dropped into a keg of gunpowder, which exploded and set fire to the stock insured. A part of the loss was occasioned by the explosion, and a part by the subsequent fire, and the insurance companies claimed to be liable for the latter only, under the 11th statutory condition of ch. 162 R. S. O. which provides that "the company will make good loss caused by the explosion of coal gas in a building not forming part of the gas works, and loss by fire caused by any other explosion or by lightning. The amount of the loss caused by fire was paid into court and payment of the balance refused. The plaintiffs brought suit for such balance and submitted the facts to Chief Justice Wilson without argument, and a formal verdict was entered for the plaintiffs in such case which was set aside by the Divisional Court and the Court of Appeal. The insurance companies appealed from the decision of the latter court to the Supreme Court of Canada.

Gibbons for the appellants.

It is submitted that an explosion by gunpowder is a fire, it being, in fact, the action of a vapid fire.

See *Scripture* v. *Lowell Mutual Fire Ins. Co.* (1) where the authorities on this question are reviewed.

The following cases refer to the distinction between such an explosion causing fire and one not: *Waters* v. *Merchants' Louisville Ins. Co.* (2); *City Fire Ins. Co.* v. *Corlies* (3); *Everett* v. *London Assurance* (4); *Taunton* v. *Royal Ins. Co.* (5).

(1) 10 Cush. 356.
(2) 11 Peters 213.
(3) 21 Wend. 367.
(4) 19 C. B. N. S. 126.
(5) 33 L. J. Ch. 406.

Lightning causing fire is covered by ordinary insurance against fire.

In the present case there is an express provision in regard to explosion which distinguishes it from *Stanley* v. *Western Ass. Co.* (1), relied upon by the company.

See also *Citizens' Ins. Co.* v. *Parsons* (2). Exception must be strong to relieve the insurance company, *Harper* v *New York Ins. Co.* (3); *Barbat* v. *Allen* (4).

Marsh for the respondents.

We have paid for all the loss caused by fire, and did not insure against loss by explosion. Even if the explosion is a fire, it is not such a fire as is insured against. The policy insures against "fire," using the word in its general, not in its scientific, sense. The company are liable for loss by fire caused by an explosion, but not for loss by explosion not caused by fire.

But there is one case in which the company is liable for loss by explosion, namely, by explosion of coal gas. That necessarily excludes liability for loss by any other explosion. *Expressio unius est exclusio alterius.* See *Aspdin* v. *Austin* (5), *Hare* v. *Horton* (6), *Blackburn* v. *Flavelle* (7).

If the fire had caused the explosion we might be liable for the loss by the latter, but here the explosion was the proximate cause of the loss. I would also refer to *Everitt* v. *London Ins. Co.* (8), Bunyon on Ins. (9), *Babcock* v. *Montgomery Mutual Ins. Co.* (10).

Sir W. J. RITCHIE C.J.—The policy of assurance upon which this suit was brought is as follows :—

"Sum assured $7,000. Premium $35.00.

"Whereas Messrs. Hobbs, Osborn & Hobbs, London,

(1) L. R. 3 Ex. 71.
(2) 7 App. Cas. 96.
(3) 22 N. Y. 441.
(4) 7 Ex. 609.
(5) 5 Q. B. 671.
(6) 5 B. & Ad. 715.
(7) 6 App. Cas. 628.
(8) 19 C. B. N. S. 126.
(9) P. 38.
(10) 4 N. Y. Rep. 326.

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"have paid the sum of thirty-five dollars to the under-
"signed, George Denholm, as authorized agent at Mon-
"treal, of the Guardian Fire and Life Assurance Com-
"pany, of London; being the premium for insuring
"from loss or damage by fire, the property hereby
"described; not exceeding the sum specified on each
"article, namely:—

"On a four storey and basement brick building 31 by
"100 feet, covered with patent roofing owned and
"occupied by the assured as a wholesale hardware
"store, situate and being Nos. 343 and 345 Richmond
"street, London, Ontario; adjoined by similar class
"buildings on either side as per application and diagram
"fyled in this office."

I adopt the conclusions arrived at in *Scripture* v. *Lowell M. F. Ins. Co.* (1), that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion or of both combined. In either case the damage occurring is by the action of fire and covered by the ordinary terms of the policy against loss by fire

The policy in this case being an ordinary policy against fire, the liability of the company to indemnify the assured would, in my opinion, be beyond question unless the assured's right to recover is barred by reason of the terms of the 11th statutory condition which reads as follows:—

11. The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works and loss by fire caused by any other explosion or by lightning.

I think this condition was not intended to limit but rather to extend, or at any rate to make clear, the liability of the insurer to losses caused by the explosion of coal gas in any building not forming part of gas

(1) 10 Cush. Mass. 356.

works, and to make liable the company for loss by fire caused by any other explosion, and not to limit or restrict the right of the assured to recover for a loss by the action of fire, whether the results of such action is in the form of combustion or explosion, the same being such a loss as would be covered by the ordinary terms of a policy against loss by fire, in other words, was not intended to change the contract as entered into in the policy and alter the risk as expressed on the face of the policy, and I think this is abundantly manifest from the preceding section, which is as follows :—

"10. The company is not liable for the losses following from *a* to *f* inclusive :

a. In case of non-ownership.

b. Riot, invasion, &c.

d. Goods to which fire heat is being applied.

e. Repairs by carpenters, &c.

f. For loss or damage occurring while petroleum, rock, earth, or coal oil, camphine, burning fluid, benzine or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, excepted,) or more than twenty-five pounds weight of gunpowder are stored or kept in the building insured or containing the property insured unless permission is given in writing by the company."

Surely if the legislature had intended to exclude from liability such a loss, admittedly covered by the policy, as an explosion by gunpowder, we should have found it in the category of losses for which the company is not liable, but a critical reading of the condition excludes the construction of the defendants. It says the company shall make good a "loss by fire caused by any other explosion or by lighting," but it does not say the company shall make good a loss by explosion caused by fire, which is the loss covered by the terms

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of the policy, but by fire caused by explosions. An explosion of steam or dynamite by concussion might overturn an oil lamp in the same or in the adjoining building whereby the building was injured and burnt; in such a case there would be a loss by fire caused by the explosion, and for such, under the terms of the contract, the insurer would be liable

I think the appeal should be dismissed and verdict for plaintiff restored.

FOURNIER J.—I am in favor of allowing the appeal on the grounds stated by His Lordship the Chief Justice.

HENRY J.—This is an action on a policy of insurance issued to the appellants by the respondent company for $5,000 on a four-storey stone and brick building, having basement, owned by the insured, occupied as a hardware store (wholesale), situate on the west side of Richmond street, London, Ontario, against destruction or damage by fire, but subject to the terms and conditions printed on the back of the policy, which were to be taken as part of the policy.

The provisions required by the Insurance Act for variations from the statutory conditions were not adopted in the policy, and we are, therefore, to consider the rights of the parties in this case by applying those conditions as against those in the policy which conflict with them in favor of the appellants.

We are then to inquire how the loss occurred, and to what to attribute it. The question for our decision is whether, under the circumstances, the respondent company is liable for damage to the property covered by the policy not occasioned by the immediate action of fire, but through an explosion. If an explosion from any other cause than that of fire took place, without causing fire in the building insured, it could not be

contended that any liability would arise, unless specially provided for either in the conditions of the policy or those prescribed by the Act.

An explosion in a building might be the cause of serious damage, but the general provision of the policy against damage by fire would not cover it; but if fire resulted, and damage was done thereby, such damage would be covered under the 11th statutory condition: "The company will make good loss caused by the "explosion of coal gas in a building not forming part "of gas works, and loss by fire caused by any other "explosion or by lightning."

The judgments of all the learned judges who decided this case in favor of the respondents are founded on their construction of that statutory provision. With every deference to opinions justly entitled to great weight and consideration, I feel constrained to say that in my opinion that statutory condition does not affect in any way the merits of the contest between the parties, and that the contract in the body of the policy is the governing one in this case,—and I do not think the appellants need invoke the aid of the statutory condition, nor do I think that its provisions can aid the respondents.

The policy and the loss or damage are admitted, but the respondents allege that under the statutory condition they are not liable.

It is not so much a question of law as of fact that we are called on to decide. The policy is an indemnity against loss or damage by fire, and the legitimate inquiry is therefore to ascertain if the loss in this case caused more immediately by the explosion had or had not its origin in fire; and if we decide that question in the affirmative, then the only one left is as to subsequent results. We have to decide whether the fire was caused by the explosion, or the latter caused by the

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former.

The evidence upon that point is to be found in the "statement of facts," agreed upon as follows: "The "said loss was occasioned by some employees accident-"ally setting fire to some gunpowder stored in "the premises insured." Which, then, in the order of time was first, the explosion or the fire? Which caused the other? Did not the fire precede the explosion? If it did, how can it be said that the explosion caused the fire. It is said the company is not liable for a loss caused by explosion, nor would they be if it was an explosion not preceded by fire. Without the fire there would have been no explosion, and the damage was occasioned by the explosion as the immediate result of the fire. The damage was, therefore, through the agency of the explosion caused by the fire. The time the fire was burning is of but little consequence, and if it caused the explosion, it is unimportant how long it lasted before the explosion took place. Suppose that instead of the almost instantaneous explosion, which I I presume took place in the appellants store, a fire had accidentally caught in some ignitable substances and after progressing for hours had reached and exploded gunpowder or some other explosive substances, and damage thereby was done to the insured property, could it be gravely argued that the subsequent explosion was not caused by the fire? The proposition, to my mind, admits but of one solution. As well might it be said, in the case of three men standing on the verge of a precipice, one violently shoves a second against the third, who, by the violence, is thrown over the precipice and killed, that his death was occasioned by the second man who was pushed against him. The fire in this case took effect on the gunpowder, and the latter, influenced and promoted by the former, did the damage as the immediate and not remote result of the

primary cause.

I think the defence not sustainable either under the contract in the body of the policy, or within the terms of the 11th statutory condition pleaded by the respondents, and, as the legal result, that the appeal should be allowed and the judgment of the learned judge who tried the action affirmed with costs.

TASCHEREAU J.—I have had some difficulty in reaching this conclusion, and if my judgment could have affected the case, I might have decided on dismissing the appeal. I will not dissent, however, though I was much impressed by the arguments of the judges in the court below.

GWYNNE J.—By reason of the neglect of the defendants to endorse on these policies the statutory conditions with variations, as required by the Act to secure uniform conditions on policies of fire insurance, ch. 162 of the revised statutes of Ontario, these policies must be read as being subject to the statutory conditions only. The policies are for indemnity against all loss by fire, but loss by fire only happening to the property insured, which consists of a hardware warehouse and the stock of hardware therein, subject, however, to the exceptions and qualifications specified in the 10th statutory condition, and subject also, to such exception and qualification, if any, as may be contained in the 11th of such conditions, which is as follows:

The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning.

Some of these statutory conditions, if care be not taken by inserting variations framed so as to adapt the conditions to the particular property insured in each case, may prove to be inapplicable in some cases; for it must be always borne in mind that, although

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the act requires that when they are not endorsed on the policy with variations in the manner pointed out in the Act the statutory conditions alone without any variations are to be imported into the contract contained in every policy; they must be imported and read in their proper place and character, that is to say, not as what they are not, but as what they are, namely, conditions only, to which the contract, which is in the body of the policy, and is a contract of indemnity against loss to the insured property by fire, is subject. Now the contracts contained in these policies being for indemnity against any loss by fire which should happen to the insured property, subject to such qualification, if any, as is contained in the 11th condition, what is that qualification, if there be any ?

The condition begins with an affirmation of liability in a particular case terminating with an implied negation of liability in another case. The affirmation is that "the company will make good loss"—what loss? Plainly only such as can be said to come within their contract for indemnity against loss by fire contained in the body of the policy, for they could be liable to make good no other—"Occasioned by the explosion of coal gas." Now loss occasioned by explosion of coal gas occurring on the insured premises unless specially excepted, would be a loss within the contract of indemnity contained in the body of the policy, but in reading this condition in connection with the particular property here insured, it is not merely to an explosion of coal gas occurring on the insured premises, to which the condition relates, but an explosion of coal gas occuring "in a building not forming part of gas works," and doing damage to the insured property of the plaintiffs—so that the manner in which this condition (if it affects at all the contract in the policy) operates as a qualification or modification of the liability of the

defendants to indemnify the insured against loss by fire happening to the insured premises, namely. the plaintiffs hardware warehouse and stock of hardware, is that the defendants will not be responsible for any loss occurring to the insured property, although within the terms of the contract of indemnity contained in the body of the policy, if such loss be occasioned by the explosion of coal gas occurring in any building which forms part of gas works. This is the only way, in my opinion, in which this condition qualifies the contract of indemnity contained in the body of the policies, and except as qualifying such contract it can have no operation whatever.

As to reading the condition as an independent contract providing for the case of loss of a wholly different character, and occuring from a different cause from that mentioned in the body of the policies, namely, the case of loss occurring by concussion wholly apart from loss by fire, if such concussion should be occasioned by the explosion of coal gas, it might be in a building quite remote, that is, in my opinion, quite out of the question. Such a construction would create a wholly new contract, imposing a wholly new liability on the defendants, not imposed by the body of the policy—diverting that which is intended to be, and whose sole office is to operate as, a condition or qualification, subject to which the contract, which is in the body of the policy, is made into a wholly new and independent contract. Such a construction cannot, in my opinion, be supported. But the condition adds that the company will make good loss by fire caused by any other explosion or by lightning. Such losses, however, are within the terms of the contract contained in the body of the policies, and this affirmation of liability in respect of such losses is but a re-affirmation of a liability incurred by the contract, which is in the body of the

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policies, and is not a qualification of that contract. The language is not put in the form of an exception from or qualification of, that contract, and this condition in which the language appears can operate in no other way. If it had been intended to operate as creating an exemption from liability for such loss as should be occasioned by the explosion of gunpowder on the insured premises as distinguishable from loss by fire, it should have been specifically so expressed, and no doubt would have been in the 10th condition, in which provision is made for the case of gunpowder being on the insured premises, and which provision must, I think, be held to comprehend the whole of the provisions as affecting the policies in so far as gunpowder or its explosion is concerned.

The whole question really arising in the cases is one arising on the contract as contained in the body of the policies, unqualified, as it appears to me, by the 11th condition, and is simply this: When gunpowder within the quantity authorised by the tenth statutory condition is on the insured premises, and becomes ignited by contact with fire, whether of the flame of a candle, or a lighted match, or otherwise, and by explosion expands and spreads the fire by which it became ignited, and in such explosion and expansion does damage, is or is not the whole of the property so damaged loss within the contract contained in the policy for indemnity against loss by fire? And are the defendants liable for the whole of the damage so occasioned, or only for a part? And can they separate the loss so as to claim exemption from liability for so much as is attributable to the explosion as distinguished from that attributable directly to fire subsequent to the explosion, and the answer, in my opinion, is that the whole loss or damage is loss by fire within the contract of indemnity, and that the defendants are liable for the

whole.

In the case of the Northern Insurance Company, whose policy insured the stock in trade on the insured premises, including the gunpowder which exploded, the contention that the defendants are exempt from liability for a part of the loss as attributable to the explosion seems to me to border upon the brink of absurdity. The gunpowder itself, having been part of the stock in trade insured, its loss surely is a loss within the terms of the policy for which the insured is entitled to be indemnified—its loss was loss by fire. If, then, the plaintiffs are entitled to indemnity for the loss of the gunpowder, how can their right to indemnity be said to be limited to the property damaged or destroyed subsequently to the loss of the gunpowder? The loss for which the plaintiffs are in both cases, in my opinion, entitled to indemnity is the whole loss caused by and consequent upon the fire which ignited the gunpowder which, by its explosion, expanded and caused the whole loss.

The appeals, therefore, in both cases, should, in my opinion, be allowed with costs to the plaintiffs in all the courts, and judgment should be entered for the plaintiffs on the verdicts rendered in their favor.

Appeal allowed with costs.

Solicitors for appellants: *Gibbons, McNab & Mulkern.*

Solicitors for respondents: *Lount & Marsh.*

1885
*Nov. 30.
*Dec. 1.
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*May. 17.

Re STANDARD FIRE INSURANCE COMPANY (CASTON'S CASE).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Contributories—Subscription for stock—Payment by services.

The act of incorporation of a joint stock company provided "that no subscription for stock should be legal or valid until ten per cent. should have been actually and *bonâ fide* paid thereon."

C. gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, such power of attorney containing these words "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years.

The company having failed, proceedings were taken to have C. placed on the list of contributories, in which proceedings he gave evidence to the effect that the sum to his credit was for professional services to the company, he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services.

Held, affirming the judgment of the court below, Henry J. dissenting, that C. was rightly placed on the list of contributories.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the order of Ferguson J. (2), that Caston was properly placed on the list of contributories of the Standard Fire Ins Co.

For a statement of the facts of the case see the reports in the courts below.

Galt for the appellant.

If the contract with Caston for the stock is invalid

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

(1) 12 Ont. App. R. 486. (2) 7 O. R. 448.

there has been no payment. *Fothergill's Case* (1). I submit that it is invalid. There was to be a local board in Toronto of which he was to be solicitor, but such board was never formed. No bill for services was rendered, and the application never came before the company or the directors. The company could not take advantage of the subscription without being paid everything required to make it good. *Simpson's Case* (2); *Pellatt's Case* (3).

The certificate of stock was not issued by direction of the directors, but by the mere motion of the secretary. See Roscoe's N. P. Evidence, 15th ed. p. 1,060, and see Stephens on Joint Stock Companies for the form of the certificate.

The certificate being non-negotiable we are not bound by it. *Duke* v. *Andrews* (4); *Chaplin* v. *Clarke* (5). And see *Eley* v. *Positive Ass. Co.* (6); and *Nicol's Case* (7) as to contract between shareholders and applicants for stock.

The learned counsel cited also *Cartmell's Case* (8) and *Hallmark's Case* (9), and referred to secs. 15 and 19 of the Joint Stock Companies Act R. S. O. ch. 49 and secs. 29, 34, 35, 37 and 49 of R. S. O. ch. 50.

Bain Q.C. for respondents.

The entry in the books of the company, and the issue of the stock certificate, are *primâ facie* evidence of Caston being a shareholder, and the onus is on him to show that he is not.

The ten per cent. clause only referred to the increased stock, and after the board was formed the directors could allow payment in any form they chose, by promissory notes, by services or in any other manner. See *East*

(1) 8 Ch. App. 270.
(2) 4 Ch. App. 184.
(3) 2 Ch. App. 527.
(4) 2 Ex. 290.
(5) 4 Ex. 403.
(6) 1 Ex. D. 20.
(7) 29 Ch. D. 421.
(8) 9 Ch. App. 691.
(9) 9 Ch. D. 329.

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Gloucester Ry. Co. v. *Bartholomew* (1); *Piscatagua Ferry Co.* v. *Jones* (2).

The distinction between *Elkington's Case* (3) and *Pellat's Case* referred to by the learned counsel is pointed out in the former, and see also *Thomson's Case* (4); *Woollaston's Case* (5); *Oakes* v. *Turquand* (6).

The intention of the company to accept the application for stock, as shown by the issue of the certificate, makes the applicant a stockholder. *Richards* v. *Home Ass. Co.* (7); *Gorrissen's Case* (8); *Ritso's Case* (9); *National Ins. Co.* v. *Egleson* (10).

Galt in reply cited *Bain* v. *Whitehaven Ry. Co.* (11); *Nasmith* v. *Manning* (12); *Port Dover & Lake Huron Ry. Co.* v. *Grey* (13); *re Duckworth* (14).

HENRY J.—The law requires that 10 per cent. of the stock of a joint stock company should be paid up, and that no subscription for stock shall be valid unless that amount is paid. The question arises then: Was that amount paid in this case?

The payment must be to the company, and it is claimed here that $100 was paid to the company in services. But it is in evidence that no such services were performed for the company. Any services performed were for the promoters of the company, and the payment for the stock was arranged to be by services for the promoters, and not for the company.

I think it is necessary, to entitle a party to claim as one of the stockholders of a company, that he should be a regular and lawful stockholder. I do not think

(1) L. R. 3 Ex. 15.
(2) 39 N. H. 491.
(3) 2 Ch. App. 511.
(4) 34 L. J. Ch. 525; 4 DeG. J. & S. 749.
(5) 4 DeG. & J. 437.
(6) L. R. 2 H. L. 325.
(7) L. R. 6 C. P. 591.
(8) 8 Ch. App. 507.
(9) 4 Ch. D. 774.
(10) 29 Gr. 406.
(11) 3 H. L. Cas. 1.
(12) 5 Can. S. C. R. 417.
(13) 36 U. C. Q. B. 425.
(14) 2 Ch. App. 578.

such could have been the case here unless ten per cent. of the stock was paid up. The claimant had arranged for no services to the company; he had no claim against the company; and if he had applied to the company for his stock, I think they could well have answered: "You have not paid the 10 per cent;" and if he had claimed that he had arranged that with the promoters, they could have replied: we have nothing to do with the promoters. I think the plaintiff could not have enforced his claim against this company in any way, and the rule should work both ways.

In my opinion the appeal should be allowed with costs.

GWYNNE J.—In my opinion the appeal in this case should be dismissed, and the appellant's name has been rightly placed on the list of contributories. The condition upon which the appellant says he agreed to subscribe for the shares in the Alliance Insurance Company now merged into the Standard, namely that the stock so subscribed for should be paid by services to be rendered by him as solicitor of the company, that is to say that the moneys to become due to him for services as solicitor should be applied by the company to his quotas in payment of his stock, was a condition subsequent, and although under the circumstances stated by the appellant in his evidence, he might have had the right to rescind the contract while the company was solvent, he has lost that right now.

In October, 1880, he executed a power of attorney to one Crawford, the manager of the company, authorizing him to subscribe for ten shares in the capital stock of the Alliance Insurance Company of the face value of $100 each, and in that power of attorney are the words following:—"And I herewith enclose ten per cent. thereof, and ratify and confirm all my said

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attorney may do by virtue thereof." Now what his attorney did was to cause the appellant's name to be entered on the stock register as a holder of ten shares, upon which ten per cent. was entered as paid. The appellant now says that he never did send the $100 mentioned in the power of attorney to be sent with it, and being asked, was there any arrangement between him and any person as to the credit of $100, he replied, "that was part of my services, it was not in cash," and being further asked if it had not been credited for services he had rendered the company in getting subscriptions, he replied "Yes, part of my arrangement." Again he says: "It was distinctly understood that I should pay no cash on my stock." And the question being again asked whether he was not to be credited on his stock for services, he replied, "yes." He admitted also that he had received a scrip certificate of shares held by him, which on his examination he produced, and bears date the 9th November, 1880, whereby it is certified under the hand of the secretary of the company, that the appellant holds ten shares of the stock of the Alliance Insurance Company, of the par value of "one hundred dollars each on which ten per cent. has been paid in." This certificate he held in his hands for years without repudiating it so long as the company continued in existence, nor in fact until the Standard Insurance Company into which the Alliance became merged, became insolvent and in process of being wound up. He also received a warrant of attorney under the seal of the company dated 30th of October, 1880, constituting him solicitor of the company for the transaction of their professional business arising out of and in and for the county of York and city of Toronto. Under these circumstances, I do not think that he can evade being placed on the list of contributories. The case as it appears to me, presents as clear a case of

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liability to contribution as appeared in the recent cases of Southport and West Lancashire Banking Company; Fishers case and Herringtons case (1).

Sir W. J. Ritchie C.J. and Fournier and Taschereau JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *A. G. Galt.*

Solicitors for the petitioners: *Bain, Laidlaw, & Co.*

Solicitors for the liquidators: *Osler, Teetzel & Harrison.*

WILLIAM L. MACKENZIE AND ARTHUR B. LEE (PLAINTIFFS)... APPELLANTS;

1884 *Dec. 2.

1885 *June 22.

AND

HENRY F. CHAMPION, DAVID E. SPRAGUE, SAMUEL TROTT AND WILLIAM J. MITCHELL (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEENS BENCH FOR MANITOBA.

Agent—Sale by—Duty of, under instructions to sell lands—Vendor and purchaser—Contract not binding under Statute of Frauds—Commission—Mis-trial.

McK. *et al*, the appellants, real estate brokers at Winnipeg, received verbal instructions from the respondents to sell certain lands of theirs at a certain price and terms of payment. McK. *et al.* sold the land at the price named, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their purchase for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants

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

(1) 31 Ch. D. 120.

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then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the said lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers.

The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favor of the appellants for the full amount of their claim, thereby giving them 2½ per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. In review before the full court a judgment was rendered directing that the verdict should be reduced to $125, being commission at the rate of 2½ per cent. on the $5,000 actually paid, or in the alternative, that there should be a new trial.

Held, affirming the judgment of the court below, Strong J. dissenting, that there been a mis-trial, and therefore the order for a new trial should be affirmed, appellants to have the alternative of reducing his verdict to the $125.

Per Henry J.—It was the duty of the appellants to take from the the purchasers a binding agreement under the statute, and having neglected to do so, they were not entitled to any compensation.

APPEAL from a judgment of the Court of Queen's Bench for Manitoba, making absolute a rule to reduce the verdict of $1,365 obtained by the appellants to the sum of $125, or, in the alternative, that there should be a new trial without costs.

The material facts of the case are as follows:

1. About the first day of January, 1882, the appellants, who were real estate agents or brokers in the city of Winnipeg, received verbal instructions from the respondents to sell part of the south half of lot 12, in the parish of Kildonan, containing 145 acres, at $275 an acre, the whole price amounting to $39,875: on the terms of $5,000 cash, $12,000 on a mortgage then exist-

ing on the property, and the balance cash in twenty days from date of sale.

On the 13th day of said month of January, the appellants sold the land at the said price, receiving from the purchasers the sum of $5 000 as a deposit on account of the purchase money, and giving therefor a receipt.

On the day the appellants sold the said land and received the said $5,000 from the purchasers, Henry F. Champion, one of the respondents, called at the office of the appellants, who informed him of the sale, and the said Champion then demanded and received from the appellants the $5,000, and then gave to the appellants a receipt therefor.

On the 14th day of said month of January, the appellants received instructions from the respondents to sell 10 acres, being another part of said south half of lot 12, parish of Kildonan, east of Main street, in the city of Winnipeg, at the price of $1,500 per acre.

On the 15th day of January, the appellants as such agents of the respondents, sold the said 10 acres to one F. W. Barrett (acting for the syndicate who had purchased the 145 acres), who agreed to purchase at the price at which the appellants had been authorized to sell, but the formal agreement was closed by said Barrett with Henry F. Champion, one of the respondents, to whom Barrett paid $1,500 on account of the purchase money of $15,000, and Champion gave to said Barrett a receipt for the amount so paid.

Prior to the expiration of the twenty days, within which the balance of the purchase money on the 145 acre parcel was to be paid, the purchasers discovered that the patent for 75 or 80 acres thereof (being what is known as the outer two miles thereof) had not been issued, and the respondents were without title to such portion; and on account of this want of title in the respondents the purchasers refused to complete their

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purchase.

The appellants having brought their action for commission upon the entire purchase, the respondents pleaded *inter alia* as follows:

3rd. And the defendants, by way of set-off and counter-claim to the plaintiff's declaration, say:—That (in consideration that the defendants would employ the plaintiffs as their agents, to sell certain lands and premises, being all and singular the lands and premises in respect of which the plaintiffs' claim for commission and services is made, and to properly complete such sale as they might make, by preparing and having executed a sufficient agreement or memorandum to satisfy the statutes in that behalf, for reward to the plaintiffs), the plaintiffs promised the defendants to sell the said lands, and to complete such sale by preparing the necessary agreement in writing to make a binding contract with such person or persons as should become purchasers of said lands, and the defendants employed the plaintiffs, and the plaintiffs accepted the said employment and on the terms aforesaid; that the plaintiffs pretended to sell the said lands, but so negligently and carelessly and unskilfully conducted the transaction necessary to effect the same that no binding or proper agreement was drawn up or prepared in form sufficient to bind the proposing purchasers, as it was the duty of the plaintiffs to have done, and the said proposing purchasers afterwards repudiated the said purchase, and refused to carry out the same and to pay the purchase money for the said lands, whereby the defendants have suffered great loss and damage, owing to said sale having fallen through, and owing to their being unable to effect a sale of the said lands, owing to the existence of the said abortive sale, and owing to their having incurred great expense in defending suits at law in respect of said sale, by reason of the plaintiffs' negligent,

careless and unskilful conduct in their employment as defendants' agent. And the defendants claim ten thousand dollars.

The appellants having joined issue upon the 1st and 2nd pleas by their replication to defendant's third plea, said they did not promise to complete such sale by preparing the necessary agreement in writing as alleged, and that they did not accept said employment on the terms alleged.

After issue joined upon the appellants replications to the defendant's third plea, the issues were tried by a jury. The questions submitted to the jury by the learned Chief Justice, who tried the case, and answers thereto are as follows:—

1st. Did the plaintiffs make a sale for the two parcels of land, viz., the 145 acre parcel or the 10, both or either of them? A. Yes, both.

2nd. Did the plaintiffs undertake the sale of the property under any special agreement? A. Generally

3rd Did Montgomery, Davis, Horseman and Thompson actually agree to buy, and pay their $5,000 on account? A. Yes.

4th. Did Champion receive this money from Mackenzie & Lee, and did he so receive it as the money paid by Montgomery and others to Mackenzie & Lee? A. Yes.

5th. Is the price—2½ per cent.—the ordinary price charged by real estate agents? A. Yes.

6th. Have the defendants yet in their possession the $3,500 or the $5,000 of the very money raised by the plaintiff's efforts? A. $5,000.

His Lordship—Now, if any of you wish me to put any other questions to them, I will try to do it

Mr. Howell—I will ask you to put this question: "Under all the circumstances was it the duty of Mackenzie to bind the defendants as well as the purchaser?"

His Lordship—I answer that is a matter of law, and for me to decide, and I have decided it.

Mr. Howell objects to his Lordship's charge where it was stated that the vendor can make time the essence

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of the contract by letter or notice.

Mr. *MacMahon* Q.C. for appellants relied on the following authorities as to appellants' right to recover their commission under the circumstances, viz :—*Prickett* v. *Badger* (1); *Mansell* v. *Clements* (2); *Rimmer* v. *Knowles* (3); *Green* v. *Lucas* (4); *Fisher* v. *Drewett* (5); *Bailey* v. *Chadwick* (6); *Wilkinson* v. *Alston* (7); *Harris* v. *Pethick* (8); *Doty* v. *Millar* (9); Wharton's Agency (10).

Mr. *D. McCarthy* Q.C. for respondents cited Story on Agency (11); *Bain* v. *Fothergill* (12); and contended that the question submitted to the jury and answers thereto, do not justify a verdict for the appellants, and that the learned Chief Justice should have complied with the request of defendants' (respondents') counsel to leave the question to the jury "under all the circumstances was it the duty of Mackenzie to bind the purchasers as well as the defendants?" This was a question of fact to be determined from all the evidence given as to what were plaintiffs' instructions and what they undertook to do in the transactions between defendants in this suit and the purchasers.

Sir W. J. RITCHIE C.J.—This is an appeal from the Court of Queen's Bench of Manitoba. The action was brought for commission on a sale of lands, or rather an attempted sale, which went off. A deposit of five thousand dollars had been made, and the plaintiff brought his action to recover the whole commission, as if the sale had been completed. I have gone over the evidence carefully and I think certain questions of fact raised by the

(1) 1 C. B. N. S. 296.
(2) L. R. 9 C. P. 139.
(3) 30 L. T. N. S. 496.
(4) 33 L. T. N. S. 584 affirming S. C., 31 L. T. N. S. 731.
(5) 48 L. J. N. S. Ex. 32.
(6) 39 L. T. N. S. 429.
(7) 48 L. J. N. S. Q. B. 733.
(8) 39 L. T. N. S. 543.
(9) 43 Barb. (N. Y.) 529.
(10) Sec. 323.
(11) 9 Ed. Secs. 183, 331, 332.
(12) L. R. 7 H. L. 158.

pleadings, which ought to have been submitted to the jury, were not so submitted by the judge.

I think the jury should have been asked to find what the contract was between the plaintiff and the defendant; that is, what defendants were employed to do, and then what they did do; whether plaintiff was to make a valid and binding sale of the property? If so, did plaintiff fulfil the contract and make such a sale; if he did he would be entitled to his commission, otherwise not.

If a sale was made, was the same not completed by reason of want of title in or default of defendants? If such was the case, the plaintiff would be entitled to his commission. Or, in other words, was plaintiff merely to find a purchaser willing to purchase; if so, did he fulfil his contract, and was the purchaser ready and willing to complete his purchase, and did the sale fall through because defendant could not or would not complete the sale by reason of want of title or otherwise, and so the non-completion of the sale was the fault of the principal, and not that of the agent? If so, plaintiff would be entitled to his commission, because he substantially performed what he undertook to do. And whether the plaintiff should have bound the purchaser by a writing or not, did the sale go off by reason of the purchaser not being so bound or by reason of the defendant's refusal or inability to complete it?

All these matters should have been submitted to the jury with proper directions. The question, therefore, in this case turned rather on questions of fact than of law, and I am of opinion that the court below in granting a new trial did right, and that the judgment should be affirmed.

I observe that a condition was annexed to the judgment that a new trial was granted unless the plaintiff was willing to reduce the verdict, which was for the

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full commission on the whole amount of the purchase money, to the amount of the commission on the deposit of five thousand dollars. This is not objected to by the defendant, who seems to be willing that the matter should stand in that way If the plaintiff is willing to reduce this verdict in that way it can stand; otherwise I think a new trial should be ordered. The appeal dismissed with costs.

STRONG J.—I have no doubt whatever as to the disposition of this appeal, except such as arises from finding myself differing, not only from the court below, but from the majority of this court. I think the appeal should be allowed.

The plaintiffs were real estate brokers at Winnipeg, not lawyers or professional conveyancers, but persons whose business it was to find purchasers for owners of land desiring to sell during a season of great speculation in such property. They were instructed generally, as the jury found, by the defendants to sell certain lands of theirs at a certain price and upon certain terms of payment. No special agreement was come to, either as to their own remuneration, or as to the special terms of the bargain or agreement they were to make with a purchaser. This fact the jury also found. Further, no instructions were given to the plaintiffs as to the nature of the defendant's title. Upon this state of facts I am of opinion that the proper inference, whether as matter of fact or matter of law was that the only duty undertaken by the plaintiffs, was to find a purchaser for the price and on the terms to which they were limited by their instructions, and that it was not incumbent on them to do more than to bring the parties together, which they did and thereby earned their commission and are entitled to receive the amount which the jury found, namely, two and a half

per cent. on the price—amounting to $1,365, the sum for which the verdict was entered. Strictly speaking the nature and scope of the plaintiffs' authority was as a conclusion of fact a proper matter for the consideration of the jury; but the rule being that a new trial will not be granted in order merely to leave to the jury a question which, upon the evidence, they can only answer in one way, the omission of the learned Chief Justice to leave this question precisely to the jury is not a ground for a new trial. In saying that the question could only be answered by the jury in favor of the plaintiffs, by finding that the authority of the plaintiffs was merely to act as brokers to find purchasers and bring them and the vendors together, and that it was no part of their undertaking or duty to prepare a contract and procure it to be signed, and that any conclusion to the contrary would be so manifestly contrary to evidence that the court would have granted a new trial on that ground alone, I rest upon what appears to me, the irresistible conclusion, that it could not have been the duty of these unprofessional agents to prepare a document which required professional skill and for the preparation of which they had never received the proper and indispensable instructions as to the state of the title. In other words, I proceed upon the same reasoning, not as leading to a conclusion of law, but to an inference of fact, which led Vice Chancellor Hall, who was also dealing with the question as one of fact, to the same conclusion in the case of *Hamers* v. *Sharp* (1).

Then as regards the receipt of the deposit or part payment by the plaintiffs which was handed over by them to one of the defendants—that I consider makes no difference, if the foregoing conclusion is the proper one. The plaintiffs had not authority, in my opinion,

(1) L. R. 19 Eq. 108.

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to accept this money, but having received it, and given an acknowledgment or voucher for it, their act in so doing, although not originally authorized, was ratified by the defendant Champion's adoption of it by receiving and appropriating the money. As regards the receipt, to which considerable importance has been attached as indicating that the plaintiffs recognized it to be their duty to procure a signed agreement, I am of opinion that it was entirely immaterial. It was manifest upon the evidence that the plaintiffs had no authority to enter into an agreement, and if, having no authority, they had innocently and without fraud even assumed to sign a contract, that could not have prejudiced the defendants, and being a mere nullity as regards them, could not have disentitled the plaintiffs to receive their commission. But I maintain that the receipt, the signing of which is relied on as such strong evidence against the plaintiffs, is entirely ineffectual as a contract for another reason than that of want of authority. It does not constitute a binding contract either at law or at equity in consequence of the uncertainty of its terms. This is perceptible at a glance. No Court of Equity could decree specific performance on the basis of any contract contained in this receipt. According to this document the price was to be $39,875, of which $12,000 was to be secured by mortgage and the balance paid in cash in 20 days from the date of the receipt. As to the terms of the mortgage with respect to the length of time for which the deferred payment of $12,000 was to be continued on the security of the property, whether for six months or 20 years, or for a reasonable time the receipt is silent. No court could of course supply such terms without making a contract for the parties. The conclusion, therefore, is that the receipt was only intended to operate according to its form and tenor as a voucher for the money paid and

not as a contract or agreement binding on the plaintiffs' principals. Then the receipt of the money, though originally unauthorized, was an act adopted and ratified, and this adoption and ratification included the incidental act of giving the voucher for it.

I conclude therefore that the plaintiffs did all they were bound to do and earned their commission by finding the purchasers and that they did nothing and omitted nothing which amounted to misfeasance or non-feasance disentitling them to the commission which they thus earned.

The judgment on the motion for a new trial should therefore in my opinion be reversed and the rule *nisi* discharged.

FOURNIER J. concurred with Sir W. J Ritchie C.J.

HENRY J.—I am of opinion that the plaintiffs are not entitled to recover at all. They commence their action under the common counts, for money payable by the defendants to the plaintiffs for the work, journeys and attendances of the plaintiff, by him done, performed and bestowed, as agent for the sale of lands of and for the defendants, and otherwise for the defendants at their request, and for commissions due from the defendants to the plaintiffs in respect thereof. The other common counts follow, but there is no evidence given except under this portion of the plaintiffs' demand. It is in evidence that Mackenzie did not make a sale, that is, he did not make a legal sale. He made an arrangement to sell for a certain amount, but took no accountable document to complete the sale. I take it that in law he was bound to make a sale, and that he was entitled to charge only for a complete sale. I think, therefore, that he has failed in making out a case.

Then there is a counter claim set up by the defendants for damages occasioned by the failure of the sale, owing

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to the plaintiffs not taking a written agreement. If we desired to enter into that we should, I think, require to send back the case to a jury in order to ascertain what the defendants are entitled to under the counter claim, and (if the plaintiffs were entitled to recover anything on their claim for commission) to see on which side the balance would lie. That, however, does not come before us, in consequence of the court below not having considered the question. They seem to have considered only the plaintiffs' claim, and they have allowed them the commission on the sum which they received in part payment of the consideration money on the sale of this land. At the trial the jury, under the direct n of the Chief Justice, gave a verdict for the amount of the commission on the whole amount. The court said to the plaintiffs, "No, you are not entitled to that; but if you consent to reduce it to a commission of 2½ per cent. on the amount received, we will allow the verdict to stand to that extent." The plaintiffs refused, and appealed to this court.

The plaintiff Mackenzie, it is to be observed, does not state that he was employed to enter into negotiations for a sale; but he charges that he was entitled to get remuneration for a sale. If he did not complete that sale, he is not entitled to get remuneration for anything. In his evidence we find the following;—

Q. Did they give you any instructions about the sale? A. Yes, they told me to sell it for $200 an acre, with outer two miles west of Main street, and four miles back.

Q. What were you authorized to sell at? A. At first I was authorized to sell at $200 an acre.

Q. Do you remember when it was given to you for sale in the first place? A. About the beginning of January.

Q. Was there any change made in your instructions? A. Not until after I had got a purchaser for it for $200, by a man named Fanning; I went over to them and told them the man was there waiting to take the property, but I did not close with him until it was verified. It was not concluded; they would not take the $200.

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Now to complete that sale, it was his duty to take a binding contract from the party to whom he sold; otherwise he does not perform his agreement.

The Statute of Frauds requires that the sale shall be in writing to bind the parties; but it is not necessary that the instructions of an agent should be in writing, therefore the plaintiff had verbal authority to bind his principal, and if he had taken a written agreement from the purchaser the sale would be completed. In default of this, I do not think he is entitled under his contract to recover any compensation whatever. I think the question is one of law and not of fact, and therefore I think the verdict should be set aside, and judgment given for the defendants.

TASCHEREAU, J.—I am of opinion that there should be a new trial for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for Appellants: *MacMahon and Dunbar.*

Solicitors for Respondents: *Archibald, Howell and Vivian.*

DAME EMILY SWEENY ET AL.....APPELLANTS;

AND

THE BANK OF MONTREAL.....RESPONDENTS.

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*Feb. 10.
*June 22.

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

Stock held in trust—Purchase of by a bank—Effect of—Mandatary and pledgee, obligations of a—Action to account—Arts. 1755, 2268, *C.C. (P.Q.)*

S. brought an action against the Bank of Montreal to recover the value of stock in the Montreal Rolling Mills Company, transferred to the bank under the following circumstances: S.'s

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

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money was originally sent out from England, to J. R. at Montreal, to be in invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company, as follows: "J. Rose in trust," without naming for whom, and paid for it with S.'s money. He subsequently sent over the certificates of stock to S., and paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends on these shares, credited them to J. R., who paid them to S. J. R. subsequently became insolvent, and S., not receiving her dividends as usual, sued the bank for an account.

Held, reversing the judgment of the court below, Strong J. dissenting, that there was sufficient to show that J. R. was acting as the mandatary or agent of S., and the Bank of Montreal, not having shown that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canda, rendered on the 25th September, 1884, confirming a judgment of the Superior Court rendered at Montreal on the 24th December, 1881, dismissing the present appellant's action, so far as the present respondent was concerned, with costs.

The action in the court of original jurisdiction was brought by the present appellant against Wentworth J. Buchanan, bank manager, the Bank of Montreal the present respondent, James Rose, merchant, and the Montreal Rolling Mills Company, a body politic and corporate, defendants.

The following are the material facts of the case as proved at the trial by documentary and oral evidence:

On the 18th March, 1871, Messrs. Crawford and Lockhart, of Belfast, in Ireland, remitted to the Bank of Montreal (the respondent) as directed by the Sweeny family, to the credit of James Rose, the sum of £2,040 11s. 1d.; and the following entry was made in the books of Morland, Watson & Co., in which firm Mr.

Rose was a partner, in the following words:

1871. March 31. James Rose ex deposit
Crawford & L. 20 March.....£2,040 11s. 1d.

$9,930.71

On the 25th March, 1871, Messrs. Crawford and Lockhart remitted to the respondent, at Montreal, the balance due to the Sweenys to Mr. Rose's credit, notifying him thereof by letter of that date.

This amount was also carried into the books of Morland, Watson & Co., to the credit of Mr. Rose under date of April 14th, 1871.

Against this amount Mr. Rose drew on the 4th April $4,000, which amount on that day he expended on four shares of stock of the Montreal Rolling Mills Company, of the value of $1,000 per share, as appears by the account of James Rose (in trust) in the books of that company.

On the 11th April, 1871, Mr. Rose obtained from the Montreal Rolling Mills Company a certificate numbered 1008, by which, under the hands of its president and secretary, it was certified that on that day James Rose, in trust, was the holder of three shares in its capital stock, whereof the full value of $1,000 per share had been paid.

This certificate was subsequently sent to the present appellant by Mr. Rose, and he paid her the amounts of the dividends declared previous to the 1st January, 1880.

On the 3rd June, 1876, Mr. Rose in trust, transferred to the defendant W. J. Buchanan in trust 250 shares, each of $100 fully paid up, in the capital stock of the Montreal Rolling Mills Company—(the value of the shares having been before that time changed from $1,000 to $100 per share. This stock was given apparently as collateral security for advances made at

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the time or to be made thereafter by the respondent, on the notes of one James Howley indorsed by Mr. Rose to Mr. Rose personally.

There was another transfer of shares in the Montreal Rolling Mills Company's stock made on the 13th March, 1879, making in all 310 shares paid up in full transferred to Mr. Buchanan in trust for the respondent.

From the establishment of the Rolling Mills Company, up to March, 1873, Mr. Rose had twenty-five shares of $1,000 each fully paid up, which, in the last mentioned month were changed as already mentioned into two hundred and fifty shares of $100 each fully paid up, and he never sold or transferred any of the said shares until he transferred them as already mentioned on the 3rd of June, 1878, to Mr. Buchanan in trust for the respondent--the said 250 shares being the only fully paid up shares he possessed at the time of the said transfer.

The appellant was unaware of the transfer to Mr. Buchanan until the beginning of the year 1880.

On the 27th January, 1881, protests were served on the respondent and the Montreal Rolling Mills Company, and in May of that year the action in the court below was instituted.

The conclusions of the declaration, which set out the facts hereinbefore recited, prayed that the appellant might be declared the owner and proprietor of thirty shares of the said stock of the Montreal Rolling Mills Company. That W. J. Buchanan and the respondent be ordered to transfer the same to the said appellant and the Montreal Rolling Mills Co. to accept such transfer and make such entries and in default defendants be adjudged, &c., to pay to appellants the sum of $3,900 value of said shares with costs.

To this action the respondent pleaded alone, setting up:—

1o. That Rose being indebted to it in a sum exceeding $30,000 transferred to the bank as security therefor, 250 shares of the capital stock of the Montreal Rolling Mills Company of the par value of $25,000, which shares are now legally held for the said bank as collateral security for such debt which still remains wholly unpaid.

That the defendants now pleading are ignorant whether, and consequently deny that the shares referred to in the plaintiffs' declaration formed part of the said two hundred and fifty shares, as to all of which no trust whatever was disclosed to the said bank, the said James Rose dealing with the same as his own property."

Then followed a denial of plaintiffs' allegations not specially admitted.

To this plea the plaintiff answered generally.

The Superior Court dismissed the plaintiff's action on the ground that Rose could always dispose of those shares as he has done for there was no *cestui que trust* disclosed and no acceptance of any trust, the oral testimony of Rose himself being inadmissible to prove acceptance.

The Court of Queen's Bench for Lower Canada affirmed the judgment of the Superior Court.

W. H Kerr Q C. for appellants.

Robertson Q.C. and *Laflamme* Q.C. for respondents.

The points relied on by counsel are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—It cannot be disputed, I think, that a sum of money belonging to the plaintiff came to the hands of James Rose ; that he on the 11th of April, 1871, invested such money in shares in the stock of the Montreal Rolling Mills Company in and for the benefit of, and in trust for, the said plaintiff, and the same was

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entered in the books of the said company in the name of the said "James Rose in trust," and the certificate issued by the said company certified that "James Rose in trust" was "the holder" of the said shares, which certificate Rose handed to plaintiff as showing her stock in the said company for whom plaintiff swears he bought it. That Rose paid plaintiff the dividends on this stock up to or near the 6th of January, 1880, and his answer to the question: "By whom were the dividends received?" Was: "It was received by me from the bank" Q—"You received it from the bank of Montreal?" A.—"Yes." Q—"That is you received the dividends on the whole stock?" A.—"Yes, on the whole stock." Q.—"You transferred this stock to the bank of Montreal?" A.—"Yes." Buchanan endorsed the dividend cheques over to Rose; and Rose says:—"They were paid to me up to that time and I paid them to her as I got them."

On the 3rd of June, 1876, Rose transferred the stock to W. J Buchanan "in trust" at the company's office. The transfer was signed "James Rose, in trust;" and on the 13th of March, 1879, in same manner other shares, as security for the benefit of the Bank of Montreal for a private indebtedness of Rose to the bank, as collateral security for advances made by the bank to him. Though standing in the books of the Rolling Mills Company "in trust," and though the transfer was signed by "James Rose in trust," and transferred by that transfer to Buchanan in trust, no enquiries appear to have been made as to who was interested in the stock or on what trust it was held, or whether Rose owned the stock or had a right to transfer it for an indebtedness of his own. Mr. Buchanan is asked, Q.—"Did he give you to understand that this stock was "stock belonging to himself, or did he deal with it as "some one else's? Was there any question of its belong-

"ing to any one else, or of any one else having any "interest in it?" And he answers: "He offered this "stock to us as security." The question was not put to him, "Do you own this stock?" The learned Chief Justice of the court below seems to assume that it was not proved that Rose was ever requested to invest plaintiff's money in Montreal Rolling Mills stock, nor that she ever accepted or ratified the pretended trust; but to my mind the evidence is clear on both these points. She had the money in Rose's hands to invest for her; he does do so, in this stock in his own name in trust for her; he transmits her the certificate of ownership of the stock, showing it is held in trust by him, and she receives through him from time to time the half yearly dividends. I cannot conceive stronger evidence of the acceptance, adoption and ratification of Rose's acts on her behalf than this conduct of plaintiff. The plaintiff adopted and enjoyed the benefit of the investment. If there ever was a case where the maxim, *Omnis ratihabitio retrò trahitur et mandato priori æquiparatur*, is applicable, I think this is that case.

There can be no doubt the transfer of this stock by Rose for securing his private indebtedness was a flagrant breach of trust, and the simple question is which of two innocent parties must bear the loss caused by the gross fraud of Rose.

There can be no doubt that the bank had full actual notice of the existence of a trust of some description, a trust for some one not disclosed. They could not obtain a transfer at the company's office without seeing there, if they chose to look, that the stock was registered in the name of Rose in trust, but without that, the very transfer on which they took the stock showed that Rose was dealing with trust property and transferring property he held in trust and which the assignee well knew, for Mr. Buchanan himself thus expresses it:—

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"He transferred the stock to me in trust. There was a transfer of two hundred and fifty shares of Montreal Rolling Mills stock; the transfer was signed by James Rose in trust, and he transfers it by that transfer to me in trust."

I am quite prepared to adopt the language of the court in *Shaw* v. *Spencer* (1), "that where one known to be a trustee is found pledging that which is known to be trust property to secure a debt of his own, the act is one *primâ facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has the right to give it." It would and should then hardly be disputed, as was suggested in this same case, if the words had been in trust for Emily Sweeney, the duty of enquiry would be cast on the creditor, but the effect of the words "in trust" as there suggested is the same. They must mean in trust for some one whose name is not disclosed, and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known.

As pledging trust property is *primâ facie* unlawful, where is the hardship of imposing on the person taking the security the duty of inquiry and the burden of ascertaining the actual position of the property instead of remaining in ignorance without even, as Mr. Buchanan says, putting the question to him: "Do you own the stock?" The assignee having the notice that this stock was held by Rose in trust, when he sought to deal with it for his own private benefit, in my opinion the duty of inquiring as to the nature, character and limitations of the trust was imposed on the person taking it as security for such an indebtedness.

When there is actual notice that a trust exists and

(1) 100 Mass. R. 389.

the use to be made of the trust property is *primâ facie* a misappropriation, to refrain from asking any question of Rose as Buchanan says, or making any inquiry whatever, is to my mind not only a want of ordinary prudence but gross negligence.

I cannot understand how in any system of jurisprudence a creditor can receive from a trustee by way of pledge for securing a private debt due by the trustee trust property knowing the same to be property held in trust and hold such property against the *cestui que trust* the beneficial owner thereof by force of a transaction on its face so dishonest and fraudulent.

Buchanan does not pretend he did not know it was held in trust. After answering as before, he is then asked—

Is it a very common thing for stock to be standing in that way in trust? A. It is very often done; it is frequently so with bank stocks.—Q. And there is never any inquiry as to who the party is, when it is put in that way? A. No; it is done without hesitation. An advance is made without hesitation on stock when it is put in that way and no questions are asked.

In the case of *Mangles* v. *Dixon* (1) it was held that the assignee of any security, (that is, when the assignee has only an equitable right, as an assignee of a bond,) stands in the same position as the assignor as to the equities arising upon it. How different the idea of Mr. Buchanan from that of Lord St. Leonards, who in that suit, at p. 732, as to right of parties when they have actual notice of equities, as when parties have notice that property is held in trust, says:

They are bound by the notice which they have; for equity will not permit a man to shut his eyes to a fact of which he has been informed, and therefore if he has notice he is bound by the knowledge he has thus acquired.

If the bank, knowing in this case, as they must have done, that Rose was borrowing money for his own private use on a pledge of property belonging to another,

(1) 3 H. L. Cas. 702.

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which he held in trust, and that he was thus dealing with it for his own benefit and as his own property, chose to advance money on such property under such circumstances and ask no question, they cannot, in my opinion, be said to have taken it in good faith, and cannot be in a better position in reference to it than Rose himself, and as he had no beneficial interest in the property they can claim none, but must be held to have taken the property charged with the trust, and so are bound to account for it to the plaintiff as the *cestui que trust* entitled to the beneficiary interest therein.

I do not think Rose, in this case, could claim under any law to be entitled to pledge for advances for his own personal benefit property held in trust for and belonging to another, any more than Barrow in the case of the *City Bank* vs. *Barrow* (1), to which my brother Taschereau has called my attention, could pledge the property in his hands belonging to another, and that, consequently, the bankers in this case, as the bankers in that, cannot set up any title to the stock as derived from him against the real owners.

I am, therefore, of opinion that the appeal should be allowed.

STRONG J.—For the reasons given by the learned Chief Justice of the Court of Queen's Bench, and also for some additional reasons, I am of opinion that the judgments of the courts below ought to be affirmed. Before proceeding to consider the various points of law which have been raised in argument, it may be well to remark that the decision in this case must depend entirely upon the law of the Province of Quebec, as embodied in the Civil Code, and that the English law of trusts, and analogies derived from that law, are entirely inapplicable, and cannot be resorted to for the

(1) 5 App. Cas. 664.

purpose of determining the rights of the parties. Further, it is to be borne in mind that (excepting perhaps the law relating to substitutions) there is nothing in the legal system established by the Quebec Code in any way resembling the doctrine of a double ownership in the case of trusts which prevail in the English courts, by which property held in trust is regarded as the legal property of one owner,—the trustee,—and the beneficial property of another owner—the *cestui que trust.*

By the law of the Province of Quebec, as well as by the ancient and modern law of France on which it is founded, no distinction is made between the legal and the beneficial ownership, and the rights of a person who has ceded or caused to be ceded his property to a mandatary, by a transfer absolute in form, are in no sense rights *in rem*, but mere personal rights, entitling the party making the cession to a personal remedy against the mandatary for any breach by the latter of his obligations, and to nothing more. I am, of course, referring to a case in which the property is transferred to the mandatary, and not to the case of a deposit, when the property remains in the depositor and the possession only is parted with.

Having made this preliminary observation as to a general principle of law, which must be kept constantly in view in considering this case, and as to which I shall have to say more, and refer to some authorities hereafter, I now propose to inquire what were the legal rights of the appellant as against Rose; first, in respect of the money deposited with him by Messrs. Crawford & Lockhart, and next in respect of the shares now in question, in which, as Rose now alleges, he invested the money.

As regards the money remitted by Messrs. Crawford & Lockhart to Rose, the proof appears to be sufficient

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to establish that Rose was a depositary of it. The entry in the books of Morland, Watson & Co., the firm in which Rose was a partner, appears to me to constitute a commencement of proof, sufficient to let in oral proof according to art. 1233 C.C. (P.Q.), which seems to restrict the definition of a commencement of proof, according to the ancient law, in a less degree than art. 1347 of the French Code, which requires that a writing, to constitute a commencement of proof, should emanate from the party against whom it is sought to be used, or from one of his "auteurs," the latter a condition not required by the terms of art. 1233 of the Quebec Code, and, as it appears from the authorities, not required by the ancient law of France (1). This entry shows that the moneys remitted by Messrs Crawford & Lockhart reached Rose's hands, and were by him deposited with the firm of Morland, Watson & Co., of which he was a member, and would have been sufficient according to Bonnier under the stricter French law. This entry is a writing emanating from the firm of Morland, Watson & Co., of which Rose was a member; there is nothing to show, and no reason can be suggested, why a writing emanating from others, jointly with the party sought to be charged with it, should not be a sufficient commencement of proof; then this writing does emanate from Rose in conjunction with his partners—at least it was an entry made by one who represented the firm, the clerk or book-keeper, in whose handwriting it is, and who was a person representing the several members of the firm, including Rose, which is sufficient. Bonnier (2) says:

D'abord aux termes de l'article No. 1347 l'auteur de l'écrit doit être le defendeur, ou celui qu'il répresente. Il est le même en sens inverse, de celui qui le répresente: ainsi, les ecrits du mandataire peuvent être opposés au mandant.

(1) Bonnier, Traité des Preuves, Vol. I. Nos. 165-166.

(2) Traité des Preuves, Vol. I. No. 167.

I am, therefore, of opinion that this entry on the books is a sufficient commencement of proof to let in oral evidence of the deposit of this money with Rose as a depository for the appellant. Indeed, I should not have thought the matter called for even so much consideration, if it had not been so strenuously argued by the respondent that it was insufficient for that purpose.

This contract of deposit, however, only involved a personal obligation on the part of Rose to pay over the money when called upon, and there having been, up to the date of the purchase of the shares, no mandate to invest, this was nothing more than an ordinary debt, and did not involve any obligation to transfer the shares, the equitable doctrine of following moneys held upon deposit, as trust funds, into a wrongful investment, having no place, as far as I have been able to ascertain, in French law.

It is said, however, that there was a mandate to invest, and it therefore becomes a question whether any such agency is proved. I fail to find in the record any proof of such a mandate anterior to the purchase of the shares.

It is clear law that a mandate may be either express or tacit, but whether express or tacit, as in the case of every contract, the assent of both parties, of the principal as well as of the agent, must be established by legal proof.

As regards direct proof, mere verbal evidence is of course inadmissible, under the French law of evidence, to establish the mandate. A tacit mandate may however, be established by the acts and conduct of the parties, and from such acts and conduct the assent of the mandator as well as of the mandatary may be inferred. There is however nothing in the evidence warranting the inference that the appellant assented in any way to an investment of her money in these shares,

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prior to the date at which they were acquired, on the contrary, it appears they were bought by Rose without her knowledge or assent.

The question arises however, whether there was not such a tacit ratification by the appellant, of the purchase of the shares by Rose, as was equivalent, in law, to a prior authority. The general principle of law that the ratification of the acts of one who assumes to act as agent, is to be deemed equivalent to a prior authority, is expressly provided for by the Quebec Code, and the article 1720, (identical with 1998 of the French Code) in which this principle of law is embodied, also expressly delares that such ratification may be either express or tacit. Then the acceptance of the benefit of the act of the assumed agent, by the person for whose benefit he has ostensibly acted, with knowledge of all the circumstances, is considered as implying adoption, and amounts to tacit ratification (see Troplong Mandat Nos. 610 and 611.) This principle, by which subsequent adoption or ratification is considered equivalent to prior authority, is however, like all legal fictions, subject to the qualification that the rights of third parties, intervening before the ratification, are not to be affected *ex post facto.*

Turning then to the evidence I proceed to enquire if there is place for the application of this principle to the facts of the present case.

Was there then such an assent by the appellant, to Rose's investment of her money in Montreal Rolling Mills shares, as amounted to a tacit ratification sufficient, under article 1720, to make Rose her agent by relation in the acquisition of the shares? As before stated any acts of recognition or assent on the part of the appellant to have this effect must have been prior in point of time to the transfer by Rose to Mr. Buchanan.

The proof on this head consists entirely of statements

contained in the deposition of Rose. It is to be remembered that the two transfers to Mr. Buchanan were completed respectively on the 3rd June, 1876, and the 14th March, 1879. In order then to give the appellant a title in priority to the bank, it must be shown that there was an adoption by her of the investment, at a date anterior to the last transfer to the respondents. Any silent acquiescence by Miss Sweeney in what is stated in Rose's letter is therefore manifestly too late for this purpose, as that letter is of the 6th June, 1880, a date long subsequent to the last transfer to the respondents.

The statements material to this question contained in Rose's deposition are as follows :—

Q. Have you any doubts as to whom the stock referred to in the certificate, plaintiff's exhibit number 1, belongs?

(The defendant's counsel objects to this as involving a question of law. Objection reserved by the court.)

A. The certificate was handed to Miss Sweeney, the plaintiff in this case.

Q. And for whom did you buy it?

A. For her.

Q. Did you ever pay anything to her coming from this stock?

(The defendant's counsel again repeats his first objection above set forth, and the objection is again reserved by the court.)

A. Yes I paid her the dividends up to the time the bank stopped me from drawing them.

Q. When was that?

A. I paid her dividends up to or near the date of this letter, plaintiff's exhibit "A. 9," namely the sixth of January, 1880, and I expected the dividends to be paid again, shortly after that time, as usual. They were paid to me up to that time and I paid them to her. I expected to receive them as usual soon after, but they were stopped. It was the first time they were stopped. The dividends fell due on the first of February following the date of that letter, and I thought they would be paid then as they had been before. They were always paid to me previously and I had paid them over to Miss Sweeney as I got them.

Q. The dividends of the Montreal Rolling Mills Company are payable in August and in February of each year, are they not?

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A. Yes.

Q. And you received them up to what date ?

A. Up to the date of that letter exhibit "A, 9."

Q. That is January, eighteen hundred and eighty (1880) ?

A. The dividend previous to the date of that letter exhibit "A 9" was received and paid over to Miss Sweeney and the other ladies entitled to it.

Q. By whom was the dividend received?

A. It was received by me from the bank.

Q. You received it from the Bank of Montreal ?

A. Yes.

By the judge—That is, you received the dividends on the whole of the stock ?

A. Yes; on the whole of the stock.

From this it appears that at some unascertained time, whether before or after the dates of the transfers to the bank is left uncertain, the certificate for the shares was handed to Miss Sweeney, and that the proceeds of dividends accruing up to January, 1880, were received by Rose, and by him paid over to the appellant. This is the only evidence which tends to prove ratification to be found in the case. The onus of proving a mandate by ratification or otherwise was, of course, upon the plaintiff in the action, but can it be said that either of these facts, taken separately or together, establish that Miss Sweeney, with the knowledge that her money had been invested in Rolling Mills shares, accepted the certificate and took the profits of the shares prior to the transfers to the respondents. Time was material, and it was incumbent on the plaintiff to establish the date, but the handing over of the certificate, for all that appears, may have been after the last transfer to the respondents, for no date is assigned to it by Rose, and in a case like the present, when the anxiety of Rose to throw the loss occasioned by his fraud and misconduct on the bank rather than on the appellant is manifest, I think we ought jealously to scrutinize his evidence, and that we are not entitled to supply defects in the

proof by making presumptions and drawing inferences to establish material facts which the plaintiff ought to have proved directly. Again, the mere fact that Rose received the dividends and handed the proceeds to the appellant proves nothing towards making out a case of ratification, unless it is also shown that Miss Sweeney was informed by him, or in some way knew, that the money was in fact the proceeds of an investment in these shares, but of this most material fact there is not a word of proof to be found in Rose's deposition or elsewhere in the record. It is quite consistent with Rose's statements, that whilst he handed the money to Miss Sweeney, he also told her that the money was the produce of other investments, or that it was interest on money remaining in his hands or in those of his firm, or that it was the profit of some investment not specified, in any of which cases there would have been no ratification of his act in investing in these particular shares, for it was incumbent on the plaintiff to prove that she knew of the purchase of these particular shares and assented to it prior to the transfer to the respondents. In this I think the appellant has failed, and consequently it is not proved that Rose held the shares as her agent when the respondent acquired them.

I, therefore, come to the same conclusion as the Court of Queen's Bench, that the appellant failed to prove her case, of which the establishment of a mandate was the indispensable foundation, and that, therefore, she must fail in her action.

There are, however, in my opinion, other reasons for holding that this appeal cannot succeed, reasons which are consistent with the hypothesis that the evidence is sufficient to establish the agency, and that the conclusion before stated on that head is erroneous.

Then assuming, that either by reason of some prior

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authority, proof of which has been overlooked, or by reason of ratification prior to the transfer to the respondents, it matters not which, a mandate is sufficiently established, I proceed to inquire what would have been, in law, the consequence and effect of such proof as regards Rose's powers of disposition upon the shares in question.

Mourlon, who, though an institutional writer, is regarded as a sound authority on French law, states, with clearness and conciseness, the legal consequences of a purchase by an agent of tangible, corporeal property, property susceptible of being transferred by tradition. He says (1) if corporeal property, such as a house, is purchased by an agent in the name of his principal, the agent is a mere "porte-voix," and the property passes at once to the principal; but if the agent purchases in his own name, the law operating on the contract of sale transfers the property to the agent in the first instance, who becomes bound by a legal obligation to transfer it at once to his principal, which latter obligation the law also by force of art. C.N. 711 (C.C.P.Q. art. 583) implements by transferring the property to the principal, who thus acquires the property by force of these two mutations.

The law thus applicable to the case of a corporeal, movable or immovable, cannot be applicable to the property in these shares now in question, for the legislature has expressly enacted that the property in them shall be passed in one way, and in one way only, namely, by a transfer on the books of the company.

This brings the enquiry to the question: What are the legal powers of disposition of an agent or mandatary to whom property is either transferred by the mandator or principal, or who, with the knowledge and assent of the principal, obtains from a third party a

(1) Vol. III. pp. 477-478.

transfer of property such as this for the benefit and behoof of the principal.

In the French law such an agent is designated a *mandataire prête-nom* and according to the highest authorities he is entitled to exercise unlimited powers of disposition over the property so vested in him, and third persons acquiring rights in or title to the property from him, are not considered to be in bad faith, or in any way affected by knowledge or notice that the agent is dealing with the property in contravention of the agreement between him and his principal, the sole remedy of a principal in such a case being a personal action against the mandatary who is considered, as regards third persons, to have been invested with unlimited powers of disposition, as much so as if he was himself the veritable and absolute proprietor. As showing that such is a correct definition of the powers of the person known in French law as *mandataire prête-nom*, I refer to Laurent, (1), who says :—

On appelle "prête-nom," en matière de mandat, celui qui, en apparence, a les droits du propriétaire sur une chose, tandis qu'en réalité il n'est que mandataire.

The author then gives, as an illustration, the case of a transfer of property transferred by the owner to one who, as agreed by a *contre lettre* or secret convention, is to hold it as a mandatary for the benefit of the party making the transfer. From this, however, it is not to be inferred that this particular species of agency is confined to the case of a transfer by the principal himself and does not include the case of a transfer by a third person to a mandatary for the beneficial use of the principal, for such a distinction would, of course, be purely arbitrary, and moreover is shown by the *arrêt* of the Court of Cessation, hereafter to be cited, to have no existence.

(1) Vol. 28 p. 82 No. 76.

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Laurent, in the passage referred to, next proceeds to consider what are the powers of disposition which such a *prête-nom mandataire* has over the property with which he is invested, and he shows that these rights are those of an absolute proprietor. Thus he says :—

Donc, a l'égard des tiers, le mandat est censé ne pas exister: partant, celui qui, en réalité, n'est qu'un mandataire aura les droits que lui donne son titre apparent. Si c'est une cession, il sera considéré comme propriétaire à l'egard des tiers, et il pourra valablement faire tous actes de disposition, quand même par ces actes il dépasserait les bornes du mandat qu'il a recu sous forme de cession.

Next he considers the case of the third party having notice that the person with whom he deals is only a mandataire, and, after citing a decision of the Court of Cassation, proceeds as follows :

Cela implique qui celui qui constitue un mandat sous forme de prête-nom a l'intention que les rapports entre le prête-nom et les tiers soient règlés par l'acte apparent, et qu'il n'y ait de mandat qu'entre lui et le prête-nom: de sorte que le mandat, même connu des tiers, soit censé ne pas exister à leur égard. Mais, comme le cessionnaire apparent est, en realité, mandataire, nait la question de savoir en quelle qualité les tiers entendent traiter avec lui, alors qu'ils savent que le prétendu cessionnaire n'est qu' un mandataire? Est-ce l'acte apparent qui prévaudra, quoique les tiers sachent que ce n'est qu'un acte apparent? On suppose que le cessionnaire a traité en cette qualité, et que les tiers ont accepté cette qualité apparente. Dans ce cas, il faut dire, avec la cour de cassation, que l'acte apparent régle les rapports du prête-nom avec les tiers, malgré la connaissance qu'ils ont de la réalité des choses.

Having thus shown that knowledge of the fact that the mandate does not affect the third party who may purchase from the "prête nom," Laurent next proceeds to consider a question, which is also the vital question in the present case, and his decision of which applies *a fortiori* here, namely, whether the knowledge of a third party acquiring title from the mandatary, not merely of the existence of the mandate, but also of its terms, and that the act of the mandatary in ceding his apparent

rights is in contravention of the convention existing between him and his principal binds the purchaser. He says on this head:

Il y a cependant un motif de douter: si le prête-nom fait ce qu'il n'avait pas le droit de faire comme mandataire, l'acte sera-t-il valable? Ne peut-on pas dire que les tiers sont de mauvaise foi? Dans la doctrine consacrée par la cour de cassation, on écarte la question de bonne foi. Il y a, en effet, une difference entre la contre lettre de l'article 1321 et le mandat donné sous forme de prête-nom. La contre-lettre a pour objet de tromper les tiers, elle éveille du moins l'idée et le soupçon de fraude: tandis que celui qui donne un mandat à un prête-nom ne veut pas tromper, il consent à ce que le mandataire agisse à l'égard des tiers, non comme mandataire, mais comme cessionnaire: c'est lui qui pourra être trompé si le mandataire dépasse les bornes de son mandat; il accepte d'avance cette conséquence de l'acte apparent qu'il passe, il renonce à se prévaloir contre les tiers du mandat que ceux-ci ignorent ou sont censés ignorer. Il suit de là qu'il n'y a pas, dans l'espèce, mauvaise foi de la part des tiers, ils font ce que le mandant les autorise à faire.

I have given this somewhat long extract from Laurent as it shows the law very clearly and is very apposite to the questions which are presented for our decision in this appeal.

The *arrêt* of the Court of Cassation, already referred to, and upon which Laurent founds his text, is reported in Dalloz, 1864, Vol. 1, p. 282 (the case of *Richaud C. Lécurieux*) and it fully bears out his conclusions. The court says in effect that the *mandat prête-nom* is a contract *sui generis* not governed by the general principles of the law applicable to the contract of mandate, and that the question of the good or bad faith of those dealing with the mandatary cannot arise. It is further of importance, as showing that the principle applies as well to the case of a cession made to the mandatary by a third party for the benefit of the principal, as to that when the cession is by the principal himself, directly to the *prête-nom* for in that case the fact was, the property and the rights in question had been ceded to the

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prête-nom by a third person.

In this *arrêt* the court says :—

Attendu, en droit, que le mandat proprement dit ne doit point être confondu avec le mandat *sui generis*, connu sous la dénomination de prête-nom: Attendu que lorsque le mandat a constitué son prête-nom maître absolu de la chose à l'égard des tiers, il importe peu que le tiers avec qui ce dernier a traité en son nom personnel ait eu connaissance de la qualité de prête-nom: que cette circonstance ne saurait exercer aucune influence sur les droits et obligations qui naissent du contrat: que cet acte s'étant accompli hors de la présence du mandant, qui a voulu y demeurer étranger, celui-ci ne peut pas plus s'en prévaloir qu'il ne pourrait être invoqué contre lui.

These authorities might be largely added to, but I will only refer further to Troplong, Mandat (1), which is in entire accord with the law before stated from Laurent and the Court of Cassation.

It cannot be objected that these authorities are not applicable in the Province of Quebec, for the law of agency as embodied in the Quebec Civil Code agrees in every respect material to the present question with that of the French Code. And it is to be observed that the doctrine of the Court of Cassation is not founded on any particular article or text of the Code, but on a presumption of law (*præsumptio juris et de jure*) as to the intention of a principal who transfers or authorizes a transfer of property to his agent or mandatary to be held by the latter ostensibly as absolute owner, but in reality for the beneficial use of the principal, and the reasons which have induced the French courts and jurists to make such a presumption are equally applicable in the Province of Quebec.

Then applying the before stated principles of law to the facts in proof in the present case and, assuming for the present purpose that the fact of agency by ratification is sufficiently established, we find that the relations between appellant and Rose were exactly such as according to the authorities cited constituted the latter

(1) No. 43.

a *mandataire prête-nom*, according to the definition before given.

The absolute property in these shares was vested in him, though for the benefit of his principal; for, if the appellant was entitled, even as between herself and Rose, to claim any interest in the shares, it could only be on the ground that she had recognized and adopted his acts in taking the transfer in his own name, and as such ratification was in all respects equivalent to a prior authority, we are by a sort of legal fiction to regard Rose as having acquired the shares originally as the mandatary of the appellant with her authority and assent, thus exactly fulfilling the conditions pointed out by Laurent and the Court of Cassation as requisite to constitute the peculiar species of the contract of mandate now in question.

Next arises the enquiry, were the powers of disposition incidental to an agency of this nature legally exercised?

It is to be observed that both the Court of Cassation and the text writers above mentioned lay it down that a degree of knowledge which, in an ordinary case, would constitute a purchaser in bad faith, would have no effect upon the validity of the acquisition by a person to whom a *prête-nom mandataire* might sell or pledge the property entrusted to him, and that even though such a purchaser or pledgee should have notice not merely of the fact, that the person from whom he was buying or taking security was an agent holding the property for the benefit of another, but also of the additional fact that the disposition of the property proposed to be made would actually contravene the convention between the agent and his principal, such notice would still not invalidate a transfer made to the third party having such knowledge. This goes far beyond anything which is requisite in the present case;

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for at the most the words "in trust," entered in the share register and added to Rose's name in the transfer to Mr. Buchanan (if indeed they had any signification at all), would only have signified that Rose, having the absolute property in the shares, held that absolute property as the mandatary for some undisclosed principal, in which case, as already shown, the law clearly justified Mr. Buchanan in assuming, as he did, that Rose had the power to do what he actually did, namely, to pledge the shares for advances to be made or already made to him by the bank.

That this is the very utmost effect which can be attributed to this appearance of these words "in trust" in the share register and transfer is apparent when we consider the general principle of the law that good faith is always to be presumed, and that it lies on those who allege bad faith to prove it. Whilst I say this, I by no means concede that it would in law have made any difference if Rose had disclosed to Mr. Buchanan facts, which there is no pretence for saying he did communicate, viz., the entire history of these shares and of the purchase of them by Rose with the funds of the appellant, just as fully in every respect as Rose states those alleged facts in his deposition, for it appears to me that the question of good or bad faith is entirely immaterial in dealing with an agent, such as Rose undoubtedly was. It is out of the question to say in face of the law, which says that bad faith must be proved and not presumed, that even if bad faith or notice of all the facts had been material, there was any obligation on Mr. Buchanan to make enquiry, as the declaration charges there was. To say there was such a duty cast upon the respondents would be to apply the doctrine of constructive notice, which prevails in English courts of equity, and which being entirely founded on presumption is expressly excluded in French law by the principle

already mentioned that no presumption of bad faith shall be made. Whilst I have made these observations on the evidence, as showing that nothing was done by the bank or the manager knowingly to prejudice the rights of Miss Sweeney, I must repeat that, in my judgment, it would have made no legal difference if Mr. Buchanan had received the fullest information as to Miss Sweeney's connection with the shares in question.

I have carefully refrained from making any observations on the English law applicable to the case, either for the purpose of drawing analogies or pointing out distinctions. I have endeavoured to consider the case on what I consider to be the principles of the French law prevailing in the Province of Quebec, by which alone it falls to be decided. I may, however, be permitted to add that I should doubt whether even upon the highly artificial principles as to constructive notice which prevails in courts administering English equity there would have been sufficient in the words "in trust," (for it is the appearance of these words in the share register and in the transfers, which alone can be referred to as establishing notice,) to have put Mr. Buchanan on enquiry. The argument doubtless would be that Mr. Buchanan was put upon enquiry by seeing these words added to Rose's name as indicating that he was acting in the quality of a trustee or agent. But in the first place I should doubt if the words "in trust" are not too general and vague for any such purpose, and in the next place it would have appeared to me to be out of the question to suppose that an enquiry from Rose, who was dealing with the shares as his own, would have led to any communication of the appellants rights, and an enquiry of the officers of the Rolling Mills Company would certainly have been fruitless as all they could have said would have been that they added the words "in trust" because Rose instruct-

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ed them to do so: and consequently there would have been no ground for applying the doctrine of constructive notice which proceeds on the inference that knowledge would have been obtained if enquiry had been made. I need not however speculate on what the result of the evidence would have been in an English Equity Court for it is sufficient to say that this case is to be decided by the law of Quebec, and that adjudged by that law the result is that, first; no presumption of any notice or knowledge not actually found to have been brought home by the respondent's manager can be imputed to them; and secondly, that even if Rose had stated to Mr. Buchanan every fact and circumstance contained in his deposition in this cause, Mr. Buchanan would have been in law fully justified in accepting the transfer and the notice would not have impaired or in any way affected the title of the bank to hold the shares as security for the advances for which they were pledged.

That the view of the law, before stated, is that acted on in practice in dealing with shares in the Province of Quebec, is proved on the part of the respondent and not contradicted. Mr. Buchanan, in his deposition, states that it is not unusual to find these words "in trust" added in the certificate, but that such addition is not considered as incapacitating the holder from disposing of the shares freely as his own property, and that it is not the usage to make any inquiries into the nature of the title in such cases.

That a trust may be created in the shares of this company, which it would be imperative on the courts of the Province of Quebec to enforce, according to the principles prevailing in English courts of equity, I do not for a moment question. In the case, which may be supposed, of shares being put into trust by a settlement made between parties domiciled in England,

and which, according to the intention of the parties, is to be construed and executed according to the law of that country, there can be no doubt that on the ordinary principles of private international law the rights of the parties would be considered by the Quebec courts as governed by the rules relating to trusts which prevail in English law, provided, of course, that proper proof of that law was adduced. But in the present case all the parties to the contract being domiciled in Quebec, which was also the *locus* of the contract, and where it was to be carried into execution, I maintain that their rights under it must be ruled exclusively by the law of Quebec.

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

FOURNIER J.—La poursuite de l'appelante, Demanderesse en Cour Supérieure, a pour but le recouvrement de trois actions dans le fonds de la "Montreal Rolling Mills Company," originairement de mille dollars chacune, régulièrement convertie plus tard en actions de cent piastres chacune,—détenues pour elle en *fidéicommis*, (*in trust*) par James Rose l'un des défendeurs, qui les a illégalement transportées à la Banque de Montréal, intimée, comme sûreté collatérale d'une dette qui lui était personnelle.

L'Appelante allègue que lors de ce transport par le dit James Rose (*in trust*) *fidéicommis* il était à la connaissance des défendeurs et de chacun d'eux que les dites actions n'étaient point la propriété du dit James Rose, mais celle d'autres personnes et qu'il était en conséquence du devoir des défendeurs de s'enquérir de ce fait avant d'en consentir ou accepter un transport.

L'Intimée seule a plaidé à cette demande, alléguant que les dites actions lui ont été transportées conjointement avec au-delà de deux cents autres pour la garantie

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d'une créance qu'elle avait contre le dit James Rose pour un montant excédant trente mille dollars ; alléguant en outre qu'aucun *fidéicommis* ne lui a été dénoncé et que le dit James Rose disposait de ces actions comme de sa chose propre.

D'après la preuve écrite et testimoniale, il est établi que la famille Sweeny dont l'appelante est un des membres, fit le 18 mars 1871, remise à James Rose par l'intermédiaire de MM. Crawford et Lockhart de Belfast, en Irlande, d'une somme de £2040.11.1. On ne trouve dans la lettre d'envoi de cette somme aucune instruction particulière sur la manière de la placer ou employer,—mais elle contient les passages suivants faisant voir qu'une partie de ces fonds appartenait à l'appelante et qu'ils restaient sa propriété.

BELFAST,
18th March, 1871.

Dear Sir,

We have at length brought the sale of the Sweeny property to a close and now enclose balance sheet between the Sweeny family and ourselves, and have this day remitted to the Montreal Bank as *directed by your friends* to your credit £2040.11.1.—We also send you, as you wish, a statement shewing the portions of the purchase money to *which each party was entitled with their* contributions to the costs of the sale, and also to the sums which had to be repaid Mr. Esson for 17½ years accumulations of rent and interest.

It would be very desirable if the Certificates which will become necessary on Miss Sweeny attaining age to prove her heirship, were now procured while there are so many parties who could give information which it might be difficult to obtain in 15 or 16 years hence.

Cette somme fut reçue par Rose vers le 31 du même mois et par lui déposée entre les mains de la société Morland, Watson et Cie., dont il faisait partie. Ce fait est constaté par l'entrée suivante que l'on trouve dans les livres de cette société, "1871, March. James Rose ex Deposit Crawford & L., 20 March, £2040.11.1"—égale à $9,930.71. Il fut crédité pour cette somme dans les livres de la société. Plus tard la balance de ce qui revenait à la famille Sweeny fut également remise à

James Rose, par MM. Crawford et Lockhart, comme cela est prouvé par la production de leur correspondance.

Le 14 avril, même année Rose tira sur ce dépôt une somme de $4,000 qu'il employa le même jour à acheter quatre actions en *fidéicommis* (*in trust*) de la "Montreal Rolling Mills Company" de la valeur de $1,000, chacune. Ce fait est prouvé par les livres de cette compagnie.

Le 11 avril il se fit remettre par la dite compagnie un certificat No. 1008 sous le seing du président et secrétaire, constatant que lui le dit James Rose était le détenteur en *fidéicommis* (*in trust*) de trois actions dans le capital de la dite compagnie, dont le plein montant de mille dollars par part avait été acquitté. Ce certificat fut transmis par Rose à l'appelante à laquelle il a aussi fait parvenir les dividendes de ces actions jusqu'au 1er janvier 1884.

Le 3 janvier 1876, Rose toujours avec la qualité de *fidéicommissaire* transporta à l'un des défendeurs W. J. Buchanan agissant (*in trust*) comme *fidéicommissaire* pour l'intimée, deux cent cinquante actions, du montant de $100 chaque, payé, dans le fonds social de la comgagnie. Quoique l'appelante n'en ait pas fait un grief dans sa déclaration, ce transport paraît d'après la preuve avoir été fait comme sûreté collatérale d'escompte fait dans le même moment et à être fait par après, sur les billets de James Hawley, endossé par Rose. Ce fait forme un des considérants du jugement de la Cour Supérieure, énoncé comme suit :—

Considérant que le dit transport n'a été fait que pour garantir des avances a être faites au dit James Rose, et non pour garantir des dettes alors existantes.

Le 13 mars 1879, un autre transport d'actions dans la même compagnie fut fait de la même manière, ce qui faisait en tout 310 actions payées en plein, transportées à

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l'intimée par Rose.

Depuis l'établissement de la "Montreal Rolling Mills Company" James Rose a été l'un des actionnaires jusqu'à la date des transports ci-dessus mentionnés, et y a toujours eu ces actions inscrites en *fidéicommis* (*in trust*).

L'appelante, confiante dans le certificat qui lui avait été transmis, recevant régulièrement ses dividendes, croyait ses fonds en parfaite sûreté lorsqu'elle apprit au commencement de Janvier 1880, que ses actions avaient été transportées à l'intimée à laquelle elle en fit plus tard la demande par un protêt qui fut suivi de l'action en cette cause.

L'appelante a retracé la disposition de ces fonds d'une manière certaine depuis le moment de leur envoi jusqu'à celui de leur emploi en actions dont les certificats lui furent remis presqu'aussitôt et dont elle est toujours demeurée en possesion. Malgré cela la Cour Supérieure a renvoyé sa demande, se fondant principalement sur les considérants suivants :—

1o. Considérant que par le dépôt de la dite somme de trois mille piastres fait entre les mains du dit James Rose, ce dernier est devenu propriétaire de la dite somme en autant que ce *dépôt est irrégulier*.

2o. Considérant que la preuve du dépôt en matière civile ne peut se faire vis-à-vis de *tiers que par écrit*.

3o. Considérant que le fait, que le dit James Rose, a apposé son nom comme souscripteur des dites parts n'a pas eu l'effet vis-à-vis des tiers de rendre la demanderesse propriétaire des dites parts, que s'il en était autrement on ne saurait à qui attribuer la propriété de ces parts dans les cas où elles serait réclamées par plusieurs déposants ; que le dit James Rose ne pouvait pas vis-à-vis des tiers soustraire ses biens à l'action de ces créanciers par le seul fait d'ajouter à son nom le mot *in trust*, et tant que le *fidéicommis* (*trust*) n'est pas déclaré comme étant la propriété d'une personne nommée, les tiers ont droit d'agir avec la dépositaire dans telles circonstances comme si ces choses étaient siennes.

Ce jugement a été confirmé par la Cour du Banc de la Reine, et c'est ce dernier jugement confirmant le premier qui est actuellement soumis à la révision de

cette cour.

Le premier considérant du jugement de la Cour Supérieure est fondé sur une proposition évidemment inadmissible, savoir, que Rose est devenu propriétaire de la somme de trois mille piastres en autant que le dépôt qui en a été fait est irrégulier. L'omission de quelques-unes des conditions légales d'un dépôt peut bien changer la nature des obligations du dépositaire, mais elle n'a certainnement pas l'effet de le rendre propriétaire de la chose déposée Le contrat peut alors suivant les circonstances se transformer en un mandat obligeant le dépositaire à remettre ou à rendre compte de la somme reçue. Ce considérant est en outre contraire à la preuve qui constate que du moment que Rose a touché cette somme, loin de s'en considérer le propriétaire il en a fait au contaire une entrée dans les livres de compte constatant que la somme qui lui avait été remis par MM. Crawford et Lockhart provenait de la succession Sweeny. La lettre d'envoi ne lui conférait ni droit de propriété ni de jouissance dans cette somme. L'entrée qu'il en a faite prouve bien qu'il l'a compris ainsi. De plus l'employant presqu'aussitôt à l'acquisition, comme il a déjà été dit, d'actions souscrites, il est vrai par lui-même, mais en *fidéicommis* (*in trust*), ne conservait-il pas encore à cette somme, le caractère d'un dépôt ou du moins d'une somme d'argent à raison de laquelle il reconnaissait n'avoir aucun droit de propriété, et dont il ne pouvait disposer qu'au bénéfice d'autres personnes.

Son mandat à cet égard n'est pas bien formel, mais la lettre d'envoi en contient assez pour faire comprendre que ces fonds ne lui étaient transmis que pour être placés au profit des héritiers. Il n'y a certainement pas d'autre conclusion à tirer de cette lettre, surtout par rapport à l'appelante. En effet, si ces deniers n'avaient pas été envoyés pour être placés, pourquoi MM.

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Crawford et Lockhart auraient-ils pris la précaution de recommander à Rose de se procurer de suite les preuves de l'état civil de Mlle Sweeny. Non seulement ces deniers étaient sa propriété, mais ils devaient être placés pour elle Il est bien vrai comme le dit l'hon. Juge Rainville que le dépôt qui en a été fait est irrégulier parce que l'obligation de garder les deniers et de les restituer en nature n'a pas été imposée à Rose. Mais quelle peut être la conséquence de cette omission, serait-ce de rendre Rose propriétaire. Il est certain que non d'après ce qui a été dit plus haut. Et d'ailleurs le but que se proposait évidemment l'appelante n'était pas de confier la garde de ses deniers, mais bien de les faire placer ainsi que je l'ai déjà dit. Pour bien apprécier la convention des parties, il ne faut pas perdre de vue le but qu'elles avaient. En faisant application aux faits de cette cause de l'autorité suivante de Duranton on est forcé de conclure que ce n'est pas un dépôt qui a été fait, mais un mandat qui a été confié à Rose. Au vol. 18, n° 12, après avoir défini le dépôt, il dit :—

Et puisque le but principal du contrat de dépôt est la garde de la chose remise à ce titre, il n'y aurait pas de dépôt, mais quelque autre contrat, dans le cas où les parties se seraient principalement proposé, par leur convention et la remise d'un objet, quelque autre but que la simple garde quand bien même elle se trouverait secondairement comprise dans les obligations de celui à qui la chose serait confiée, ainsi que cela a lieu souvent dans le cas d'un mandat et dans d'autres cas encore ; ce serait un mandat avec une autre espèce de contrat, selon les circonstances du fait ; car dit le jurisconsulte Ulpien dans la loi (1), c'est toujours au but principal que se sont proposé les parties entraitantes, qu'il faut s'attacher : *unius cujusque contractus initium spectandum est ;* l'auteur continue en citant plusieurs cas de cette transformation d'un dépôt imparfait en un autre contrat qui n'attribue aucunement la propriété de la chose remise à celui qui l'a reçue.

Suivant cette autorité, il faut conclure que le dépôt irrégulier dans le cas actuel s'est transformé en un contrat de mandat, et ce qui serait encore plus conforme

(1) 8 pp. ff., *Mandati.*

aux faits, c'est qu'il n'y a eu dès l'origine qu'un contrat de mandat et non pas un contrat de dépôt, et que Rose était un mandataire et non un dépositaire et que tout ce qu'il a fait pour l'appelante l'a été en la première qualité. Dans le cas même où Rose ne serait pas considéré comme ayant eu un mandat régulier, il est impossible de ne pas le considérer au moins comme le *negotiorum gestor* de l'appelante. S'il n'a pas eu dès l'origine instruction spéciale de faire des deniers qui lui ont été remis, l'emploi qu'il en a fait, il est du moins constant qu'il les a reçus, qu'ils appartiennent à l'appelante; qu'il en a fait le placement pour elle, quoique pas nommément; qu'aussitôt après l'achat des actions il en a transmis le certificat à l'appelante et qu'il lui a fait remise des dividendes. Son ingérence, en supposant qu'elle ne fut pas autorisée, le place dans la position au moins d'un *negotiorum gestor* responsable de ses actes envers l'appelante. Mais par la ratification de ses actes l'ingérence de Rose est devenue sujette à toutes les obligations d'un mandataire régulier envers son mandant. Cette ratification est prouvée bien positivement par l'acceptation par l'appelante du certificat que Rose lui avait transmis pour constater l'achat des actions et par la réception des dividendes pendant plusieurs années. Ces faits constituent certainement une ratification formelle de l'emploi des deniers qui a fait naître entre l'appelante et Rose les mêmes obligations que s'il y avait eu un contrat de mandat régulier dès l'origine. En conséquence de ce qui précède, je reconnais qu'il n'y a pas eu de dépôt régulier,—mais que la lettre de MM. Crawford et Lockhart est suffisante pour établir la preuve d'un mandat de gérer pour l'appelante, et que dans tous les cas l'ingérence de Rose, son emploi des deniers, la transmission du certificat des actions—la réception par l'appelante du certificat et des dividendes ont établi entre eux les obligations

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de mandant et de mandataire.

On a fait objection à la réception de la preuve testimoniale sur le principe que ni le contrat de dépôt ni le contrat de mandat ne peuvent être prouvé par témoins. Ce principe est certain, mais ne s'applique pas à la gestion d'affaires. La preuve testimoniale était donc admissible pour prouver tous les faits d'ingérence de Rose. En outre, lorsqu'il y a un commencement de preuve par écrit, la preuve testimoniale peut être reçue pour compléter la preuve du contrat du mandat Dans les deux cours cette preuve a été considérée comme illégale et c'est principalement pour ce considérant que la Cour du Banc de la Reine a confirmé le jugement de la Cour Supérieure. Je regrette d'avoir à dire que je ne puis accepter cette conclusion. Non seulement je crois qu'il y a un commencement de preuve par écrit suffisant, mais je trouve qu'il y a une preuve complète du fait que les actions en question n'appartiennent ni à Rose ni à l'intimée. Celle-ci en les acceptant et Rose en les remettant (*in trust*) en *fidéicommis* ont tous deux admis que ces actions n'appartenaient ni à l'un ni à l'autre. Cette déclaration formelle faite par écrit doit avoir son effet, et si elle n'indique pas l'appelante comme propriétaire, elle ne laisse plus au moins à établir que la question d'identité de la personne du propriétaire. Ce fait matériel de l'identité pouvait sans doute être prouvé par témoin, après l'admission des deux parties qu'elles n'étaient pas les propriétaires. Il ne restait donc qu'à faire disparaître l'incertitude créée à cet égard par l'insertion des mots *in trust.* Cette incertitude est-elle, comme l'a dit l'hon. Juge de la Cour Supérieure, une raison suffisante pour faire attribuer à Rose la propriété de ces actions ? La réponse est dans l'écrit même, où Rose dit qu'il ne les détient pas pour lui. S'il s'agissait d'un meuble ordinaire réclamé par différentes parties, regarderait-on comme suffisante pour en priver le véri-

table propriétaire, et l'attribuer à ceux qui le répudieraient, la raison qu'on ne peut distinguer auquel des réclamants ils appartient. On essaierait sans doute avant cela d'en chercher par la preuve testimoniale, le véritable propriétaire. Cette déclaration *in trust* qui suit les actions depuis leur première origine jusqu'aux transports fait à l'intimée, constitue un commencement de preuve par écrit suffisant non seulement contre Rose, mais aussi contre l'intimée qui a fait la même déclaration par l'intermédiaire de son agent Buchanan ; ainsi il émane des deux parties, et il n'y a pas lieu de discuter la question de savoir si n'émanant que de Rose il pouvait aussi servir contre la banque. Les autorités citées dans le *factum* de l'appelante établissent clairement cette proposition développée dans le vol 5 p. 88, No. 7 de Lacombière, des Obligations.

Un écrit est censé émané de la personne à laquelle on l'oppose, lorsqu'il émane de son auteur ou de son mandataire.

Au surplus cette objection ne pouvait être opposée par l'intimé, même s'il n'y en avait contre elle, comme contre Rose, le même commencement de preuve par écrit, pour la raison que l'appelante n'était pas partie aux transactions entre Rose et l'intimée, et qu'il lui a été impossible de se procurer une preuve écrite d'un acte qui se faisait en fraude de ses droits. L'art. 1233, par. 5, C.C, est positif sur ce point. La preuve testimoniale pouvait donc être admise :—

1o Parce que les faits du *negotiorum gestor* qui par la ratification se transforment en mandat, peuvent être prouvés par témoins.

2o. Parce que l'appelante n'étant pas partie aux transactions faites à son détriment il ne lui était pas tenue de se procurer une preuve écrite.

3o. Parce qu'il y a dans l'insertion des mots *in trust* un commencement de preuve par écrit émanant de Rose et de l'intimée, suffisant pour faire admettre la

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preuve testimoniale.

Les actions dont il s'agit sont sans doute d'après l'art. 387, considérées comme meuble, mais elles ne sont pas dans tous les cas sujettes à l'effet de l'art. 2268, déclarant que la possession d'un meuble corporel, à titre de propriétaire fait présumer le juste titre. Quoique l'article ne semble viser que les meubles corporels, je ne contesterai pas la proposition avancée par l'intimée que les actions aux porteurs doivent, pour leur transmission, en certains cas, être assimilées, à la transmission des meubles corporels. Mais les auteurs, quelques-uns mêmes de ceux cités par le savant conseil de la Banque intimée, reconnaissent qu'il y a des exceptions auxquelles ce mode de transmission ne peut s'appliquer. Marcadé (1) en fait ainsi la distinction dans le n° 12.

C'est seulement aux meubles individuels que s'applique la prescription instantanée de notre art. 2289. Les universalitées ou quote-part d'universalités, aussi bien mobilières qu'immobilières, n'ont jamais été soumises qu'à la prescription trentenaire, et l'exposé des motifs déclare explicitement que cette règle est maintenue.

Mais notre disposition ne s'applique même pas à tous les meubles individuels ; elle s'applique seulement à ceux qui s'acquièrent par transmission purement manuelle et pour l'aliénation desquels un écrit n'est pas nécessaire.

Après avoir fait voir que l'art. 2279 s'aplique aux actions au porteur, et aux billets de banque, il conclut ainsi qu'il suit :

Il faut donc dire que l'article s'appliqne aux meubles matériels et à ceux qui sont représentés par un signe matériel au moyen duquel on obtient la valeur ; en un mot, à tous les biens meubles qui se transmettent de la main à la main.

Pour le transport des actions dont il s'agit il y avait des formalités à remplir. Ces actions ne sont pas au porteur ; elles ne peuvent être transportées que par un écrit fait dans les livres de la compagnie et signé par les parties. Elles ne sont donc pas susceptibles d'être transmises de la main à la main.

(1) 12 Vol. p. 363.

L'intimé ne peut en conséquence opposer l'art. 2268. Même d'après cet article l'appelante aurait droit de prouver sa propriété, et de prouver les vices de la possession et les vices du titre de la banque. C'est ce qu'elle a amplement fait en prouvant sa propriété des actions, et l'acceptation du transport par l'intimée en face de la déclaration qu'elle achetait ou prenait en gage la propriété d'autrui. Cette transaction si on la considère comme vente, est encore nulle d'après l'art. 1487, comme étant la vente de la chose d'autrui.

Le conseil de l'intimée a fait une très savante dissertation pour établir la légalité du transport de ces actions fait à la banque comme sûreté collatérale. C'est-à-dire que même si elles appartenaient à l'appelante, Rose pouvait valablement les mettre en gage. Cette proposition exigerait un examen sérieux et approfondi pour être combattue. Mais heureusement que ce travail est tout fait et que la question est réglée par la plus haute autorité judiciaire de l'empire, celle de la chambre des Lords siégeant comme cour d'appel. Ce haut tribunal n'est pas, il est vrai, notre cour de dernier ressort comme le Conseil Privé, mais dans la décision que j'invoque *City Bank* v. *Barrow* (1), il s'agissait de décider d'après le code civil, B.C. Ainsi la discussion si complète qu'on y trouve et la décision rendue dans cette cause de la doivent avoir sur ce point toute la force d'une autorité. Le cas était beaucoup plus favorable que le cas actuel, car celui qui avait mis les articles en gage avait le pouvoir de les vendre, tandis que Rose n'avait ni le pouvoir de vendre ni celui de mettre en gage. Comme il serait trop long de faire une analyse de ce rapport. Je ne donnerai qu'un extrait du préambule du rapport et un court extrait des motifs de lord Selborne :

When there is a power, by law, to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge * *

(1) 5 App. Cas. 664.

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Held, that under the circunstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow, entitled to pledge Barrow's goods, and that, consequently, the bankers could not set up any title to the goods, as derived from him, against the real owner.

A la page 669, lord Selborne dit :

If there are two things, in fact and in law, which it is easy to distinguish from each other, I should have said that those two things were, sale and pledge * * * *
Not only in the nature of the case are there these differences, but there is no system of jurisprudence which does not recognize them. In this very Canadian Code there is a whole chapter on the subject of sale. It begins by thus defining a sale, "Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay." And there is another chapter on the subject of pledge which begins :— "Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him, with the owner's consent, in security for his debts." Each of those subjects is pursued in details, in a series of clauses carefully and throughout distinguished from each other. Not only is it so in this Canadian Code, but it is generally so in others, certainly in the French Code and in the text writers upon the French law, which deal with these two things very much in the way in which they are dealt with in Canada. Therefore, to say that when there is power given by law to sell, when a purchaser has by law a good title under circumstances particularly defined, that power extends by implication to a pledge, and the pledgee will have a good title also, is an assumption for which neither reason nor authority has been, nor I think can be, alleged."

Si, comme on le voit d'après cette autorité, celui qui a légalement le pouvoir de vendre n'a pas celui de mettre en gage, à plus forte raison celui qui, comme Rose n'avait aucun autre pouvoir que celui d'un mandataire, ne pouvait-il mettre en gage la chose de son mandant.

En résumé je suis d'avis que les actions en question sont la propriété de l'appelante et que l'intimée les ayant illégalement acquises, elle est tenue d'en consentir une rétrocession tel que demandé. En conséquence l'appel devrait être maintenu avec dépens.

HENRY J.—I think it is clear from the evidence that Rose had in his possession, and it is unimportant in this case how he came by it, certain money belonging to the appellant, and that he invested it in the stock of the Montreal Rolling Mills Company in his own name, but "in trust," and that for two or three years he collected dividends and paid them over to the appellant Miss Sweeny. Whether he was instructed by her to invest the money is immaterial, because, after it was invested, she ratified the act, and became virtually the principal, and not only entitled to be considered as such, but liable to all the incidents attending that position; and if the company had failed, it is clear she would have become a contributory for unpaid stock, and obliged to contribute to the payment of what is due to creditors; under such circumstances Rose held that stock as her trustee.

The bank claims it was transferred to them absolutely by Rose, but in order to sustain that defence it would be necessary for them to prove that he was not only a trustee to hold, but also that he had authority to sell.

There is no pretence that he had authority from the plaintiff to convey or sell that stock. But even if he had the power of dealing with or selling it at all, that would not authorize him to transfer it to another party in payment of a debt which he owed. She, therefore, is entitled, to all intents and purposes, to claim the value.

But we are told it was held by him "in trust" and that the *cestui que trust* for whom he held was not named. That, I think, is immaterial, the stock was shown to have been held by him "in trust" for somebody, and the bank knew that fact and they, under such circumstances, must be held to have known that they were taking from him, in payment of his debt, what belonged

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to another. I consider it amounted to a fraudulent transaction for the bank to take the stock from Rose, knowing that he did not own it. I would consider such conduct discreditable on the part of any moneyed institution. Independently of that, they have shown no right to hold the stock by the transfer from him. If the principal can show that he was entitled to the property he can always take advantage of the illegal act of transfer of property by his agent, and if Rose took the stock improperly in his own name without any qualification, having used the money of the appellant to purchase it, she would be entitled to come into court and make him transfer it to her. I think the appeal should be allowed with costs and the appellant declared entitled to rank for the amount she claims.

TASCHEREAU J.—I am also of opinion that this appeal should be allowed. The remittance of the money by Sweeny's agent to Rose did not, as held by the Superior Court, create a contract of *depôt irrégulier* (1). If Rose's act in investing this money in these shares had not been ratified by Sweeny, he would have been, supposing there was no proof of a mandate, a *negotiorum gestor*, acting under a *quasi* contract. In that case, no commencement of proof in writing would have been necessary. Article 1233 C. C.

It is evident, however, that this money was sent to him to be invested for and in Sweeny's name. This seems to me an irresistible inference of fact in the case. Demolombe (2). For what else was this money sent? Then, there was subsequently a complete ratification by Sweeny of this investment, first, by her accepting the certificate of these shares in lieu of her money, and, secondly, by

(1) See Pont 1st des Petits contrats, 385 and seq.; Pothier, depôt 82; Troplong, depôt 23 a 33, 91, 114, 116, and mandat 71, 118 and seq.; 19 Laurent, 547 and seq.

(2) Obligations, 60 and seq.

her receiving, during over eight years, the dividends thereon. Rose was then a mandatary, and a commencement of proof in writing was, perhaps, necessary to prove the mandate, though both the mandator and the mandatary admit it. Did the plaintiff adduce such a commencement of proof? She has produced and holds the only certificate in writing issued for these shares: this certificate expressly says that these shares were held by Rose for a third person, as mandatary or agent, in *nomine procuratoris;* for the words "in trust" can mean nothing else. Can she not, then, prove by oral evidence that this third person, for whom Rose got these shares, is herself? There are, moreover, Crawford's letter to Rose, transmitting him these moneys for the plaintiff, the entries in the books of Rose's firm, and the words "in trust" added to Rose's name in the register of the Montreal Rolling Mills, which all prove that these shares did not belong to Rose personally; Rose's evidence was then perfectly legal. It was argued for the bank that Rose being Sweeny's mandatary his evidence was objectionable on that ground. But it must be remarked that when he gave his evidence he had long before ceased to be such mandatary.

The bank's contention, that a writing sufficient to create a commencement of proof in favor of the plaintiff should have emanated from them, and from them alone, is unfounded. It never was possible for the plaintiff to get a writing from the bank in the matter, and the law in such a case does not require one: Article 1233 C.C. Laurent (1); Bedarride, Dol and Fraude (2).

Then it is not necessary that such a writing should emanate from the adverse party. Pothier, it is true, was of a contrary opinion, but the courts in France, in cases before the Code Napoleon, were all against him on

(1) 19 Vol. No. 585. (2) 2 Vol. No. 728.

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this point. Bonnier (1); Table Gen. Dev. V. Preuve, commencement de (2); Marcadé under article 1347; Dalloz. Vo. Obligations (3); Bedarride (4); Sebire and Carteret, Ency. De Droit (5).

The fact that our Code leaves out the qualification of a commencement of proof given by the Code Napoleon demonstrates, it seems to me, that the codifiers must have been of opinion that the last one was new law, but that they deemed it better to adhere to the old law.

Moreover, even if we were to hold that the commencement of proof in writing required is the same for us as the one required by the Code Napoleon, the bank's contention on this point could not prevail because their very title to these shares and the only one on which they can rely to retain them is signed by Rose "in trust," that is to say, "for a third party." This constitutes, according to all the authorities, a writing emanating from them. Laurent (6); Dalloz V. Obligations (7).

As to the appellant's contention that the bank may be here taken as the *ayant cause* of Rose, and that a writing by Rose is, on that ground, a writing by the bank, I would have some doubts, though it is not unsupported by authority. Demolombe, (8); Marcadé, (9); Laurent, (10); Bedarride (11).

But there is another aspect of this part of the case. What were the real relations between the bank and Rose? No other, it seems to me, than that of a mandator and mandatary as regards the dividends, and pledgor and pledgee as regards the capital. Rose authorized the bank to receive the dividends on these

(1) 1 Vol. 165
(2) Nos. 2, 3 & 5.
(3) No. 4744 and seq. 4756.
(4) Dol and Fraude No. 731.
(5) Vo. Commencement de preuve.
(6) 19 Vol. Nos. 494, 495.
(7) No. 4794.
(8) 7 Vol. Des contrats, No. 133, Turin, 4 mars, 1806 *In re* Camosso, S. G. 6, 2, 909.
(9) Under Art 1357.
(10) 19 Vol. 517.
(11) Dol and Fraude, No. 759.

shares for him and transferred to them the capital as a pledge or security. The bank consequently never became the owner of these shares. This appears by their own plea. Now, according to all the authorities under the Code Napoleon, in fact under the very terms of Art. 1347 thereof, the writing necessary to constitute a commencement of proof may emanate from the person represented by the party against whom the proof is brought. Here the bank is the mandatary and pledgee of Rose, and not only represents him, but they are, in law, as to this, one person. The admissions in writing by Rose that this money belonged to a third person are then sufficient commencement of proof against the bank and in fact are to be held admissions by the bank itself. Dalloz Vo. Obligations (1); Aubry et Rau, (2); Nimes 1st February, 1870, Dalloz Rec. Per. 1872, 1st part, (3); Rolland de Villargue (4). I repeat, however, that I do not think it was necessary in this case for the plaintiff to produce any writing by or from the bank.

The respondent has referred us to the authorities on *prête-noms*. But there was no *prête-nom* here. Sweeny never authorized Rose to sell these shares either in his name or in her name; and Rose did not buy these shares, or transfer them to the bank, in his own name, but only as agent. He did not disclose the name of his principal, but he informed the bank, by signing "in trust" that it was as agent or mandatary, and for a third party, that he was acting. They were put on their guard and were bound to ascertain who the third party was, and what was the extent of Rose's powers as such mandatary. Not having done so, they have only themselves to blame if they suffer

(1) Nos. 4794, 4796.
(2) P. 332.
(3) 8 Vol. 119.
(4) Vo. Commencement de preuve par écrit, No. 4.

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from having dealt with an unauthorized agent (1). Article 1703 C. C. specially enacts that for all acts of alienation and hypothecation the mandate must be express. There was no such mandate here from Sweeny to Rose. The original mandate was to invest her moneys. Having done so, his powers as to the capital had lapsed. He was *functus officio*, art 1755 C. C., and he had no right thereafter to dispose of or deal in any way with this investment without a new authorization or mandate.

The law as to factors and brokers, relied upon by the respondent, has no application to this case. Rose was not a factor or broker, neither was he a trader dealing in such securities. It is precisely because the rule is *nemo plus juris in alium transferre potest quam ipse habet* that the factor's Acts and article 1735 *et seq.* of our Code were necessary, in the interests of commerce, to legalize sales made by factors and brokers in certain cases. See Per Lord Blackburn, in *City Bank* v. *Barrow* (2); *Clarke* v. *Lomar* (3); *Johnston* v. *Lomar* (4). If Rose had taken these shares in his own name, or had transferred them to the bank as owner, even then the plaintiff's contention would probably prevail. The sale of a thing which does not belong to the seller is null, says Art. 1487 C.C. That such, as a general rule, is the law in regard to the pledge of a third person's property is unquestionable. Before the code, though the sale of another person's property was not null, it was not doubted that a pledge of anything of which the pledgor was not the owner conferred no right as against the owner to the pledgée. *Cassills* and *Crawford* (5). If a debtor, says Pothier Nantissement (6), gives as a pledge what does not belong to him, the owner may revendicate it, though the pledgee

(1) 1 Pont des Petits Contrats, 1066, 1080.
(2) 5 App. Cas. 664.
(3) 4 L. C. J. 30.
(4) 6 L. C. J. 77.
(5) 21 L. C. J. 1.
(6) No. 7.

is not paid. I refer also to Troplong du Nantissement (1) and Massé (2); *Moor* v. *Lambert* (3). The authorities of Troplong Nantissement (4) and other commentators who are of opinion that now, in France, in virtue of art. 2279 of the Code Napoleon, the sale or pledge of a thing belonging to a third party is valid when the vendee or pledgee could reasonably and without any doubt believe that the vendor or pledgor was really the owner, cannot apply here. In the first place our corresponding art. 2268, different in this from the French Code, applies expressly to corporeal movables only; secondly, it applies only to purchasers in good faith: Troplong, Prescription (5) and authorities cited in the Belgian edition. And thirdly, under our article, possession of a movable is not (*per se*) a title, but only a presumption of title. The owner of a movable is, within three years from the loss of his possession, always admitted to reclaim it by proving the defects of the possession of any one who detains it. The article and the codifiers expressly say so. Supplementary Report (6).

Upon these last three grounds also must fall the contention raised by the bank, at the argument, that the appellant cannot recover the said shares without reimbursing the advances they made upon them. There are, however, two additional, and to my mind decisive, reasons which militate against the bank on this point. The first one is that there is no plea on the record raising the issue, the second is that the bank's plea is not that they made advances on these shares, but only, and as against them this is conclusive, that these shares were transferred to them as collateral security for advances previously made.

The case of the *City Bank* v. *Barrow* (7) is, it seems

(1) Nos. 68 and 69.
(2) 6 Vol. Droit. Comm. No. 444 and seq.
(3) 5 La. Ann. Rep. 66.
(4) No. 70 et seq.
(5) Nos. 9 6 et seq. 1065.
(6) Vol. 3, 367.
(7) 5 App. Cas. 664.

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to me, in point, even if the bank here could be considered as having acquired these shares in good faith. It was there held that the Art 1498 C. C. and the words, "nor in commercial matters generally," in Art. 2268, cannot be interpreted as legalizing, in the general sense contended for by the respondents here, the pledge of a thing belonging to a third party, even in commercial matters. It was also there held that these articles do not apply to the contract of pledge. Upon this last point it must be remarked here that though by the Act 42-43 Vic. chap. 18 (Q.) the said articles now undoubtedly apply to the contract of pledge, yet the bank in the present case cannot take advantage of that statute, because they got these shares from Rose before its sanction.

The case of *Fawcett* and *Thompson* (1), cited by the respondent, has no application; there the purchase had been made in good faith in the usual course of trade.

Appeal allowed with costs (2).

Solicitors for appellants: *Kerr, Carter & Goldstein.*

Solicitors for respondents: *Robertson, Ritchie & Fleet.*

1885 *Dec. 7, 9.

1886 *Mar. 8.

JAMES H. BEATTY (DEFENDANT)..... APPELLANT;

AND

LUCIUS S. OILLE AND OTHERS, (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

New trial—Verdict for plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.

in an action to recover the balance of the contract price for work done for the defendant, the declaration also containing the

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

(1) 6 L. C. J. 139.

(2) Application was made to the Judicial Committee of the Privy Council for leave to appeal from this judgment and was granted. After argument the judgment of the Supreme Court was affirmed.

common count for work and labor, the evidence showed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court refusing to set aside a verdict for the plaintiffs and order a new trial.

This action was brought by the executors of the late George N. Oille, of St. Catharines, to recover from the appellant the sum of $14,500, being a balance alleged to be due by him under a contract in writing and under seal between the said George N. Oille and the appellant, executed on the 13th day of May, 1881.

Under the contract Oille agreed for the sum of $26,500 to build a compound engine "of the proportions, quality, style and finish, with furnishings the "most complete and best, and to be provided with "cylinder boilers built of the best boiler steel, and "shall have all the requirements, furnishings and "attachments complete, according to the specifications "hereunto annexed, said specification to form and does "form part of this agreement, the engines and boilers "to be all finished in every particular, and furnished, "set up, and securely and amply fastened to the steamer "now building near the town of Sarnia, on or before "the 1st day of March, A.D. 1882."

The specifications which, as appears above, are made a part of the contract, commence as follows: "Specifications of a compound engine and two cylinder "boilers to be built by George N. Oille, of the city of "St. Catharines, for James H. Beatty, of the town of "Thorold, to be completed and set up in the vessel

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"now being constructed at the town of Sarnia, and to "be in every way finished and furnished with all "things necessary and required for such a style of "engine and boilers and description of steamer; the "material used in the engine and boilers shall be of the "very best quality and the work on the most improved "and approved plans and best workmanship."

The appellant's defence was that default was made in the completion of the engine; that Oille, in December, 1882, wholly abandoned the work; that the appellant was then obliged to finish it, and expended large sums of money in so doing; that by reason of the default of Oille the engine and boiler were not finished until the opening of navigation in 1883, and the appellant thus lost the profits which the boat would have earned in the season of 1882; that the work was performed by Oille in an unskilful, negligent and careless manner; that large sums had been expended by the appellant in remedying defects, and that it would be necessary to expend a still larger amount before the engine and boiler were brought to the standard called for by the contract; that the moneys expended by the appellant to complete the engine and boilers and remedy the defects and the loss by the delay and defective and negligent work were more than the amount of the plaintiff's claim, and the appellant counter-claimed for the balance.

The case came on before Mr. Justice Armour and a jury on the 17th and 18th January, 1885.

While the appellant was being examined at the trial the plaintiffs admitted his right to credit for the moneys expended by him in completing the work after it had been abandoned as aforesaid, and also a sum of between $200 and $300 which the appellant paid in replacing a portion of the machinery in which inferior material had been used, and the plaintiff's claim was thus reduced

to the sum of $9,911.50, which sum, with interest to the date of the trial, making in all the sum of $10,329, was claimed by the plaintiffs when the case went to the jury.

The jury brought in a verdict for the plaintiffs for the sum of $10,329, being the full amount claimed, and wholly disallowed the claim and counter-claim of the appellant.

The defendants applied to the Divisional Court for a new trial, which was refused, and on appeal to the Court of Appeal the judgment of the Divisional Court refusing the new trial was sustained.

S. H. Blake Q.C. and *McDonald* Q.C. for the appellants.

The questions to be decided are: First—Was the work done according to contract? And secondly—If not, is the defendant entitled to damages for the non-completion and for the loss of what the vessel would have earned during the season?

The work was not finished until May, 1883. The season commences in May and ends in November. The date for completing the engine, namely, March 1st, was important, as it would leave two months to complete all arrangements and get the vessel ready by the first of May. The hull was ready to receive the boiler in December, 1881. The boiler was not commenced until June, and the engine until September, 1882.

Then the engine when finished was defective. The reason why the boat was not given a higher speed than 11 or 12 miles an hour is, that the port or opening into the high-pressure engine from the boiler was too small. The same mistake was made between the high-pressure and the low-pressure engine. The vacuum pipe also was too small and the hot well was so badly constructed that it burst. A large outlay would be required to remedy these defects and make the boat fit

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for her business. See *Thomson* v. *South Eastern Ry. Co.* (1).

It is clear that we are entitled to damages for loss of what would be the ordinary use of what the plaintiff contracted to supply us with. *Cory* v. *Thames Iron Works and Ship Building Co.* (2); *Ex parte Cambrian Steamship Co.* (3); *Elbinger Actien Gessellschafft* v. *Armstrong* (4); Roscoe's *Nisi Prius* (5); Benjamin on Sales (6); *Hadley* v. *Baxendale* (7).

Large profits might have been made out of this boat. See *Fletcher* v. *Tayleur* (8).

Then we are entitled to a new trial on the ground of misdirection. *White* v. *Crawford* (9) and *Hoyt* v. *Stockton* (10) show that the observations of the judge to the jury on matters of fact will form ground for a new trial if the jury have been misled by them. See also *Maddock* v. *Glass* (11).

Osler Q.C. and *Cox* for the respondents

The objections to the judge's charge were not made at the trial and should not be considered here.

As to the claim that the engine was defective it is only necessary to refer to the evidence, which shows that the appellant tested it on two trial trips and made no objection then nor at any time until he put in his counter claim in 1884. The vessel was kept running for a year, never losing a day, and was sold then for the full cost price, with $4,000 added for his personal superintendence in her construction.

In answer to the claim for damages for the non-completion according to contract, it is submitted that the defendant sustained no substantial injury thereby. The

(1) 9 Q. B. D. 320.
(2) L. R. 3 Q. B. 181.
(3) 4 Ch. App. 112.
(4) L. R. 9 Q. B. 473.
(5) 15 ed. p. 490.
(6) p. 873.
(7) 9 Ex. 341.
(8) 17 C. B. 21.
(9) 2 U. C. C. P. 352.
(10) 2 Han. (N. B.) 60.
(11) 5 U. C. Q. B. 229.

contractor for the hull failed in March, 1882, with $45,000 of work yet to be done. There is no evidence that the vessel would have been ready for sea if the engine and boiler had been furnished. Defendant had no sale for the vessel until 1883, and could have done nothing with her before.

The following authorities were also cited: *Canada Central Ry.* v. *Murray* (1); *Connecticut Mutual Ins. Co.* v. *Moore* (2); *Cousins* v. *Merrill* (3); *Reg.* v. *Fick* (4); *Fitzpatrick* v. *Casselman* (5).

Sir W. J. RITCHIE C.J.—There does not appear to have been any misdirection in this case, and no objection was taken to the judge's charge. The questions raised were properly for the jury, who found in favor of the plaintiff with, evidently, the concurrence of the learned judge before whom the case was tried.

On a motion to the Divisional Court to set aside the verdict on the ground that the verdict, so far as it was in favor of the plaintiff on his statement of claim, was against law and evidence and the weight of evidence, and also so far as it related to the contention of the defendant, the court were of opinion that the finding of the jury ought not to be disturbed; that there was no miscarriage in the case upon any question of law; that there was no objection to the judge's charge nor any room for objection; that though the impression on the mind of the learned judge was favorable to the plaintiff he presented the evidence fairly to the jury, and that his comments thereon seem to have been fully warranted; that though there was a technical breach of contract which might have entitled the defendant to have recovered nominal damages, yet that that was not a ground for interfering with a verdict when the jury

(1) 8 Can. S. C. R. 315.
(2) 6 App. Cas. 644.
(3) 16 U. C. C. P. 114.
(4) 16 U. C. C. P. 379.
(5) 29 U. C. Q. B. 5.

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found, as they must be taken to have done in this case, that substantial damage had not flowed from the breach, at which conclusion the court thought the jury were fully warranted in arriving; therefore the court refused to interfere with the verdict.

The defendant appealed from this decision of the Divisional Court to the Court of Appeal. That court was unanimously of opinion that though on his counter claim the defendant was in strictness entitled to a finding in his favor for nominal damages for breach of contract as to the time appointed for finishing the work, yet the court would not disturb the verdict on that ground as "for a long series of years the courts have refused to disturb verdicts merely for the purpose or entering a nominal amount for either party, where no right was involved and the case sounded wholly in damages." The court could not see that there was any misdirection, and concurred generally in the reasons for judgment in the court below discharging the rule against the verdict. "The evidence" the court said "was, as usual, rather contradictory as to the character of the work done by plaintiff, but it was a fair question for the jury as to whether it fairly answered the contract and specifications," and the court would not say that the jury had arrived at an erroneous conclusion, and they thought it unlikely that any other jury to whom the case should be submitted would arrive at any different conclusion, and so dismissed the appeal, and so, I think, must we

I am far from being prepared to say that the jury and the courts below were wrong in the conclusions at which they arrived. On the contrary, had I been on the jury I think I should have arrived at the same conclusion that the jury did.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

GWYNNE J.—This action is brought by the executors of one Oille to recover a balance alleged to be due to them as such executors upon a contract made by their testator with the defendant for the construction and fitting of composite engines and boilers in a vessel then being about to be built by the defendant. The plaintiffs in their statement of claim alleged the completion of the engines and boilers and the fitting the same in the vessel, and that after the completion of the vessel they were found, upon a trial trip, to work satisfactorily, whereupon, as the plaintiffs alleged, the balance of the contract price amounting to $14,500.00 ($12,000.00 having been paid during the progress of the work) became due and payable to the plaintiffs, as such executors, with interest. The defendant in his statement of defence set out the contract whereby it appeared that Oille, in the month of May, 1881, had agreed with the defendant to construct the engines and boilers according to specifications annexed to the contract and to set up the same in a steam vessel then being built by the defendant at the town of Sarnia, on or before the 1st day of March, 1882, and by the contract it was provided that the whole of the work on the engines and boilers should be pushed forward so as not to interfere with or delay the shipbuilders in their work, and that any change made in material, construction, and furnishing, required by the shipowner or the inspector, should be consistent with the said contract, and it was thereby agreed further that when the engines and boilers should be finished and set up in the vessel and everything finished and requirements met according to the contract and a satisfactory trial made by a round trip to Duluth and return, that then the shipowner should pay to the contractor in full of his contract the full sum of twenty-six thousand five hundred dollars, but that should the contractor desire it he could draw money during the

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time of completing the contract to the amount of twelve thousand dollars. The defendant then alleged that Oille failed in completing the work by the time specified in the contract, and that in the month of December, 1882, the work being still unfinished, he wholly abandoned the work and left the same in an unfinished state, and that the work then done was not done according to the contract, and was unskilfully and negligently done and performed, and that after the abandonment of the said work by Oille the defendant was obliged to complete the same, and thereupon employed men and obtained materials for the purpose of completing said work, and had expended in such work and materials the sum of $7,000; that the said steamer had since the opening of navigation in the year 1883, and during the seasons of 1883 and 1884, been employed in running between Sarnia and Duluth, yet that no satisfactory trip had yet been made by reason of the said engine not working properly or satisfactorily; that the defendant had expended large sums of money in investigating and endeavouring to ascertain the defect in the construction of the said engine, and had ascertained that certain work in the construction of the said engine in the interior thereof was performed by Oille not according to the specifications in the contract mentioned, but in an unskilful, careless and negligent manner, which work was, as the defendant alleged, recently and long after the opening of navigation for the year 1883, discovered by the defendant; and the defendant claimed that the plaintiffs' claim should be dismissed with costs, and by way of counter-claim the defendant claimed that he should be paid by the plaintiffs out of the assets of the estate of their testator, the said Oille, the damages which the defendant had sustained by reason of the default of the said Oille in not completing his said contract according to the terms thereof, and for

the loss which the defendant had sustained in being deprived of the earnings of his said steam vessel for the season of 1882, and for the loss and damage which the defendant had sustained by reason of the unskilfulness, neglect and careless work performed on said engine, as aforesaid. The plaintiffs in their reply, among other things, alleged that the delay in completing the said contract was caused solely by the defendant and the persons employed by him to construct the hull of the said vessel, and they alleged further that during the progress of the said contract work the defendant made frequent changes therein and required the said Oille to alter the same in many particulars and vary from the said specifications, and also to do work not provided for by the said specifications, and thereby materially hindered and delayed the said Oille in his said contract work; and the plaintiffs submitted that by reason of such the conduct of the defendant, the said Oille was released from the obligation to complete the said work at the time specified in the contract; and the plaintiffs further alleged that the said specifications were prepared and the said engines and boilers and other work mentioned in the said contract were planned and designed by the defendant, and he personally superintended the said contract work during the progress thereof and that the same was done in all respects according to his instructions and directions, and they further alleged that a satisfactory trial trip was made after the completion of the said work, and that the defendant was satisfied therewith and made no complaints whatever respecting the same until shortly before the commencement of this action, and they denied that the defendant had suffered any damage whatever by reason of any default of the said Oille, or that he had sustained any loss whatever for which the said Oille was, or the plaintiffs as his executors are, respon-

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sible. At the trial before Armour J. it appeared that the inspector referred to in the contract to superintend for the defendant the performance of the work was not appointed by the defendant until the latter end of November, 1881. In a letter of the 21st of that month addressed by the defendant to Oille, he says :—" I have engaged " Mr. Thos. Pettigrew for one year at $1,0 0 and board, " he to take charge of the work in your shop till the " engine and boiler are completed and set up, and then " he is to take charge of and run the engine till the " close of navigation, and he will be ready to com- " mence work next week. Get your material and men " at once. Should the forging not be ready now, go to " Buffalo and see after it so that there may be no delay, " also all patterns and castings. In a word, the whole " work is to be shoved ahead. I hope you have ordered " the strap plates for the horizontal seams as they must " be triple riveted. We have taken measures of the " hold and find the distance from the top of the boiler " to the top of the main deck, allowing six inches for " the saddle, to be 23 inches, and the throw down " should stand about six inches above the deck, say " whole length, 30 inches between boiler and dome. " Now there is another thing I wish to call your atten- " tion to, that is, the absolute necessity of making pro- " vision for a receiver over engine working at right " angles; this could be dispensed with provided the " engine worked at opposite centres. This must be " provided without fail. How have you arranged in " regard to the small cylinder where the receiver was " intended to be? Can you give me the size of the " engine on which you intend to have the steam lap " and exhaust pipe, with the distance the exhaust pipe " will be from the centre of the engine, giving size of " exhaust pipe and the inside and outside measures from " centre. This we want, as we are laying our beams

"and stringers. Please write at once, give the size and "distance of exhaust pipe from cylinder."

It appeared from the evidence of Pettigrew, who had thus been engaged by the defendant to superintend the construction of the engines and to run he vessel when completed, that the defendant himself was backwards and forwards at the workshop where they were constructed 80 per cent. of the time during which the work was in progress, and yet during all that time he does not appear to have ever complained of the delay which had occurred in the construction of the engines or that the contract therefor had thereby been broken. He also gave evidence that the vessel made a satisfactory trial trip when finished, and that she ran 16 trips during the year 1883, during all of which trips the engines ran very fairly and were successful during the season. In March, 1883, Oille, the contractor, died, and in June of that year, after the trial trip, one of the plaintiffs having written him a letter enquiring as to the working of the engines, the defendant in reply wrote the following letter, dated June 15th, 1883:—

DEAR SIR,—I have just returned from the East and found your letter, and beg to state I am not in a position to give you the desired information respecting the working of the engine of the "United Empire," but from the intimation I am inclined to think it does not work satisfactorily, but will write when I receive the engineer's full report. There are several parts that must be supplied with different material, which may affect the efficiency. It will be some two weeks before I can get this report from the engineer, when I will correspond with you fully respecting the efficiency of the engine.

The defendant, however, never did subsequently correspond with the plaintiffs, or either of them, upon the subject. Pettigrew, who was the engineer who ran the vessel in 1883, upon this point said that the defendant applied to him for a report of the working of the engines, and although he saw the defendant upon the occasion of every trip that the only thing which passed

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between them upon the subject of the engines was when laying up the vessel in the fall of the year 1883 the defendant came into the engine room and said that "there must be something wrong with the engine "because she was not coming up to his expectation, and "he asked me what was the matter. I told him that "the proportions of the engines were the same as the "Buffalo engines, and that they did as good work as "any boats that were going across the lakes."

He added, in his evidence, that he had got a speed of 11, 12 and 13 miles an hour out of the engines, and that he ran her at the speed which he found to be most economical for her, which was upon an average 11 ² miles per hour. It appeared, also, in evidence that the persons who had contracted to build the hull for the defendant failed, and in March, 1882, wholly abandoned their contract, after which time the defendant had to take the work into his own hands and was obliged to lay out in workmanship and material the sum of $45,000 to complete the vessel, of which sum the material which the defendant was obliged to purchase to complete the vessel cost from $10,000 to $15,000. The contention of the defendant upon this point was that although the contractors for construction of the hull did abandon their contract in March, 1882, still that the vessel had been sufficiently advanced to receive the machinery in the fall of 1881. In answer to this contention the plaintiffs relied upon the defendant's letter of the 21st November, 1881; and, moreover, they contended that even if the jury should be of opinion that the hull was sufficiently advanced so as to receive the engines before the 1st March, 1882, still the non-completion of the vessel so as to engage in the navigation of 1882 was not to be attributed to the delay in the completion of the engines, but to the delay occasioned by the failure of the contractors for the construc-

tion of the hull, and in support of their contention that the defendant had not been damnified, as he claimed to be, by the delay in construction of the engines, from not having the use of the vessel during the period of navigation of 1882, the plaintiffs relied upon the following which appeared in evidence, namely, that the vessel was built by the defendant wholly upon the speculation of selling her to a certain company called the North-West Transport and Navigation Company, of which company the defendant was the principal stockholder, and that during the whole of the year 1882 that company refused to purchase or to have anything to do with the vessel, and so the plaintiff contended that it was for the jury to say whether the defendant had not for this reason taken the whole of the year 1882 to complete the vessel, and that he was in reality not damnified by the delay which had taken place in the construction of the engines. Much evidence was entered into upon the question whether or not the engines and boilers had been constructed in accordance with the specifications, and as to the sufficiency of the work to meet the requirements of the contract, by which it was stipulated that the engines were to be built, according to the specifications annexed, with furnishings most complete and with cylindrical boilers built of the best boiler steel. The specifications appeared to have been drawn by the defendant himself, and not to have been altogether perfect, many things which as was contended by the defendant were necessary to make the engine complete and perfect not being specifically mentioned therein. During the examination of one of the witnesses, an expert, the learned judge before whom the case was tried made the observation that: "The question is, did this engine fill the "specifications, to begin with, and as far as these speci-"fications do not specify, was it reasonably fit for the

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"purpose for which it was intended?" And he added: "If the man who ran the engine in 1883, says it is as "good an engine as ever went into a ship, that would "be evidence to go to a jury to show that it was rea-"sonably fit for the work." No objection appears to have been taken to the correctness of this view, as to the question before the jury as to the sufficiency or insufficiency of the engine to meet the contract, the main ground of insufficiency relied upon by the defendant, was that the speed of the vessel did not come up to what was expected by him, which was from 13 to 14 miles per hour, and the evidence he relied upon on this point was that of an expert who had examined the vessel after the close of navigation of the year 1884, and who suggested considerable changes at a very large outlay with the view of increasing the speed of the vessel. Whether the suggestions made by this witness were at all necessary and whether the alterations suggested were required by the contract was the subject of much criticism, and of evidence in contradiction offered by the plaintiffs, which latter evidence included that of the witness Pettigrew who inspected the whole of the work until the engines and boilers were fitted in the vessel, the part taken by the defendant in completing them being only to advance for materials and work a sum in excess of the $12,000 agreed to be paid during the progress of the work. The learned judge no doubt, formed an opinion which the jury perceived to be unfavorable to the defendant, but he left the case to the jury with charge to which no objection whatever was taken either for misdirection or non-direction or for any other cause. Nor was he asked to vary in any respect upon any point, the manner in which he left the case to the jury. His direction as to the rule of law as to the measure of damages applicable in cases of the nature of the present was not

then nor has it since been objected to. The jury upon this charge rendered a verdict for the plaintiff of $10,329 00 allowing thus to the defendant $4,171.00, to cover all moneys which had been advanced by the defendant during the progress of the work and certain parts of the machinery which had proved defective and which had been supplied by the defendant, but disallowing the defendant's counter claim for damages for the delay complained of in the non-completion of the engines by the 1st of March, 1882, or otherwise. A rule *nisi* for a new trial upon the ground of the verdict being against law and evidence and the weight of evidence, having been obtained, was, on argument, discharged by the Divisional Court, whose judgment has been unanimously sustained by the Court of Appeal for Ontario, the defendant has appealed to this court, and in the argument before us the learned counsel for the defence undertook to establish, which he has failed to do, that these judgments are clearly erroneous. *Moore* v. *The Connecticut Ins. Co.* (1) before the Privy Council, is an authority that even where a verdict is unsatisfactory in the opinion of a court before which it is reviewed as against law and evidence and the weight of evidence, which the verdict in this case does not appear to me to be, that is not sufficient to justify a court in granting a new trial. That in order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favor of the party as to lead to the conclusion that the jury in finding for the other party have either wilfully disregarded the evidence or failed to understand or appreciate it. Consistently with this ruling, which is conclusively binding upon this court, there does not appear to be any foundation for the contention that the unanimous judgments of two court

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upon the point in question should be reversed. The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs

Solicitors for appellants: *MacLaren, MacDonald, Merritt and Shepley.*

Solicitors for the respondents: *Miller, Cox and Gale*

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ACTION—*En reddition de compte—Contradictory averments in plea—Effect of—Unsworn account.*] In an action *en reddition de compte* by an assignor against his assignee the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, but he produced an unsworn account, and asked the court to declare the same to be a true and faithful account of his administration, and prayed for the dismissal of the plaintiff's action *Held*, reversing the judgment of the Court of Queen's Bench dismissing the plaintiff's action, and restoring the judgment of the Court of Review, that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers and therefore his action had been improperly dismissed. L'HEUREUX *v.* LAMARCHE — — — — — 460

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sum of $808 50 for three years' school taxes imposed on property occupied by them as a farm, situated in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the mother house situated in another municipality. *Held*, reversing the judgment of the court below, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by sec. 13 of ch. 16 32 Vic. (P.Q.) *Held*, also, that said sec. 13 does not extend, as regards exemptions, sec. 77 of ch. 15 of the Cons. Stats. L.C, which has not been repealed, but which has been amended by the addition of sec. 26 ch. 6 41 Vic. (P.Q.) LES COMMISSAIRES D'ECOLES DE ST. GABRIEL *v.* LES SŒURS DE LA CONGRÉGATION DE NOTRE DAME DE MONTREAL. — — — 45

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BILL OF LADING—*Assignment of—Property in goods under—Stoppage in transitu—Replevin*] H., of Souris P.E I., carried on the business of lobster packing, sending his goods to M., of Halifax N S, who supplied him with tin plates, &c. They had dealt in this way for several years, when, in 1881, H. shipped 180 cases of beef *viâ* Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M, the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H draw on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent:—*Held*, affirming the judgment of the court below, Henry J. dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them. *Held*, also, that whether or not a legal title to the goods passed to McM. the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them. MCDONALD *v.* MCPHERSON — — — — 416

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CHATTEL MORTGAGE—*Security for after acquired property—Agreement not to register—Assignment in trust by mortgagor—Legal title of trustee in goods mortgaged—Equitable title of mortgagee—Priority*] In May, 1880, the defendant D., being indebted to the plaintiffs in the sum of $8,000, gave them a chattel mortgage on all his stock in trade, chattels and effects then being in the store of the said defendant D., on Granville street, in the city of Halifax; and by the said mortgage the said defendant D. further agreed to convey to the plaintiffs all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of substitution in place of stock then owned by him in connection with his said business, which goods were never so conveyed to the plaintiff. By the terms of the mortgage, the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the defendant D. and the plaintiffs, that to save the business credit of D. the said mortgage was not to be filed and was to kept secret, and it was not filed until the 12th December, 1881. On the 13th of December, 1881, D. made an assignment of all his property, real and personal, to the defendant F., in trust for the benefit of his (D.'s) creditors, and such trust deed was executed by D., F. and one creditor of D, and subsequently by a number of other creditors. F. had no notice of the mortgage to the plaintiffs. F. took possession of the goods in the store on Granville street, and refused to deliver them to the plaintiffs, who demanded them on 14th December, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being commenced the defendant F. delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were

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all that remained from the stock on the premises in May, 1880 *Held*, affirming the judgment of the court below, Strong J. dissenting, that the legal title to the property vested in the defendant F. must prevail, the plaintiffs' title being merely equitable, and the equities between the parties being equal. McAllister *v.* Forsyth. — — — — 1

2——*Interpleader issue—Insolvent Co.—Chattel mortgage by—Preference over other creditors—Intention to prefer—R. S. O. ch. 118.*] A company being indebted to L. & B. in a large amount, and believing that their charter did not allow a mortgage on their property to secure an overdue debt, made an agreement to give such mortgage for an advance of a larger sum, agreeing to return the amount of the debt to the mortgagees. At the time of this transaction the company believed that by getting time from this creditor they would be able to carry on their business and avoid failure. This hope was not realized, however, as the company were subsequently compelled to stop payment, and the above respondents, who were also creditors, obtained judgments and issued executions against the goods secured by the mortgage, and on an interpleader issue brought to try the title to such goods, the chancellor hearing the cause gave judgment for the execution creditors, and the Court of Appeal sustained that judgment by a division of the court. On appeal to the Supreme Court of Canada, *Held*, reversing the judgment of the chancellor, that inasmuch as the company *bonâ fide* believed that by giving this mortgage and getting an extension of time for payment of plaintiffs' debt they would be able to carry on their business, the mortgage was not a preference of this debt over those of other creditors, and not a fraudulent preference under R. S. O ch. 118. Long *v.* Hancock. — — — — 532

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2——*Joint stock company—Contributories—Subscription for stock—Payment by services*] The act of incorporation of a joint stock company provided "that no subscription for stock should be legal or valid until ten per cent should have been actually and *bonâ fide* paid thereon." C. gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, such power of attorney containing these words: "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years. The company having failed, proceedings were taken to have C. placed on the list of contributories, in which proceedings he gave evidence to the effect that the sum to his credit was for professional services to the company, he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services. *Held*, affirming the judgment of the court below, Henry J. dissenting, that C. was rightly placed on the list of contributories. CASTON'S Case. — — — — 644

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DOMICILE—*Matrimonial—Declaration in act of marriage—Civil status—Arts.* 63, 65, 79, 80, 81, 83, *C C.* (*P.Q.*)] In or about 1822, W., a native of Ireland, came to Canada and was employed as a shantyman on the Bonnechère, in the Province of Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was

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engaged to be married to one M. Q., the widow of one McM., in his lifetime of Upper Canada. W. was married to the widow in the month of September and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up left his wife and daughter in the neighborhood of Aylmer, in Lower Canada. In the winter he came down for her and brought her to his home on the Bonnechère and lived there for 10 or 12 years and acquired considerable wealth. W. declared in the presence of the priest who performed the ceremony that he was a *journalier de la Province de Québec*, and he was so described in the certificate of marriage. M. Q. having died without a will W. married again, and by his will left his property to his second wife, the appellant. The respondents, by their action, claimed there was community of property between M. Q., their grandmother, and W. according to the laws of Lower Canada, and demanded their share of it in right of heirship. The appellant disputed this claim, contending there was no community. *Held*, reversing the judgment of the court below, Fournier and Taschereau JJ. dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of this marriage. Also, that the certificate, *acte de mariage*, has only relation to residence in connection with matrimonial domicile, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties. WADSWORTH *v* MCCORD. — — — — 466

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HABEAS CORPUS.—*Continued.*

conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the Supreme Court could not go behind the conviction and inquire into the merits of the case by the use of a writ of *habeas corpus*, and thus constitute itself a court of appeal from the magistrate's decision.—The only appellate power conferred on the court in criminal cases is by the 49th section of the Supreme and Exchequer Court Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.—Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus* granted by a judge of the Supreme Court in chambers; and as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of said judge in chambers, the said section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court. *Semble*, per Ritchie C.J., that ch. 70 of the Revised Statutes of Ontario relating to *habeas corpus* does not apply to the Supreme Court of Canada. *In re* MÉLINA TREPANIER — 111

2——*Granted by judge in chambers—Appeal under sec.* 51 *Supreme and Exchequer Act—Writ improvidently issued—Jurisdiction of court to quash—Control of court over its own process—Criminal case under sec.* 51—*Supreme Court of British Columbia—Constitution of—Commission to judge presiding over—Trial of prisoner in—Order to change venue—Provision for increased expenses—Practice*] Section 51 of the Supreme and Exchequer Court Act does not interfere with the inherent right which the Supreme Court of Canada, in common with every superior court, has incident to its jurisdiction to enquire into and judge of the regularity or abuse of its process, and to quash a writ of *habeas corpus* and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court.—The said section does not constitute the individual judges of the Supreme Court of Canada separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process (Fournier and Henry JJ. dissenting).—Per Strong J.—The words of section 51 expressly giving an appeal when the writ of *habeas corpus* has been

HABEAS CORPUS.—*Continued.*

refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from, and revise, rescind and vary, orders made under this section.—The right to issue a writ of *habeas corpus* being limited by section 51 to "an inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry JJ. dissenting.)—Per Fournier and Henry JJ. dissenting:—The restriction imposed by section 51 to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada" is merely intended to exclude any enquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the *habeas corpus* in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an act of the Parliament of Canada.

Query—Is section 51 of the Supreme and Exchequer Court Act *ultra vires?*

Semble, that when a judge in a province has the right to issue a writ of *habeas corpus* returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately (Fournier and Henry JJ. dissenting).—An application to the court to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner (Henry J. dissenting).—After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.—If the record of a superior court, produced on an application for a writ of *habeas corpus*, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence (Henry J. dissenting).—A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff (Henry J. dissenting).—The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England.—The various statutes of British Columbia providing for the holding of courts of oyer and terminer and general gaol delivery render unnecessary a commission to the presiding judge.—Per Strong J.:—The power of issuing a commission, if necessary, belonged to the Lieutenant Governor of the province (Henry J. *contra*).—An order made pursuant to Dominion

HABEAS CORPUS.—*Continued.*

statute 32 and 33 Vic. ch. 29 sec. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order.—Even if the writ of *habeas corpus* in this case had been rightly issued, the prisoner on the materials before the judge was not entitled to his discharge, but should have been remanded. *In re* ROBERT EVAN SPROULE 140

INSOLVENCY—*Insolvent Co.—Chattel mortgage by—Preference—Intention to prefer—R. S. O. ch.* 118 — — — — — 532

See CHATTEL MORTGAGE 2.

INSOLVENT ACT OF 1875—*Secs.* 28, 29, 30—*Sureties, liability of.*] *Held*, that where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. LÉTOURNEUX *v.* DANSEREAU 307

INSURANCE, FIRE—*Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.*] Where a policy of insurance against loss or damage by fire contained the following provision:—"If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease." *Held*, affirming the judgment of the court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition. THE SOVEREIGN FIRE INSURANCE CO. *v.* PETERS — — — 33

2——*Condition in policy—Subsequent insurance—Notice to company—Waiver.*] A policy of insurance against loss by fire contained the following condition:—"In case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must be given in writing at once, and such subsequent assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." The insured effected subsequent insurance and verbally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he, nor the agent, made any objection to the loss on the ground of non-

INSURANCE, FIRE.—*Continued.*

compliance with the above condition. In a suit to recover the amount of the policy the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company were estopped from setting it up *Held*, reversing the judgment of the court below, that the insured not having complied with the condition the policy ceased and became of no effect on the subsequent insurance being effected and that neither the agent nor the inspector had power to waive a compliance with its terms. WESTERN ASSURANCE CO. *v.* DOULL 446

3——*Condition in policy—Loss by explosion—Loss by fire caused by explosion—Exemption from liability.*] A policy of insurance against fire contained a condition that "the company will make good a loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire but not for that caused by the explosion. *Held*, reversing the decision of the Court of Appeal, Taschereau J. *dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion. HOBBS *v.* GUARDIAN ASSURANCE CO. — — 631

INSURANCE, LIFE—*Policy—Condition — Voluntary exposure to unnecessary danger.*] The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents, amongst other defences, by their fourth plea invoked a condition to which the policy sued on was subject, to wit:—"No claim shall be made under this policy when the death or injury may have happened in consequence of unnecessary danger, hazard or perilous adventure." The uncontradicted evidence was that the deceased was killed by a train coming against the vehicle in which he was driving alone on a dark night in what was called a net-work of railway tracks in the company's station yard at Toronto, at a place where there was no road-way for carriages. *Held*, affirming the judgment of the court below, that the undisputed facts established by the plaintiff showed "that the deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that therefore respondents were entitled to a non-suit. NEILL *v.* THE TRAVELLERS' INS. CO. — — — — 55

INTERPLEADER—*Insolvent Co.—Chattel mortgage by—Preference—Intention to prefer.*— 532
See CHATTEL MORTGAGE 2.

JURISDICTION—*of court in habeas corpus matters—Conviction by magistrate—Going behind conviction—Inquiry as to evidence—Supreme and Exchequer Court Act, sec.* 49 111
See HABEAS CORPUS 1.

2——*of court to quash writ of habeas corpus when improvidently issued by order of judge in chambers—Control of court over its own process —Sec.* 51 *Supreme and Exchequer Court Act—Criminal case under* — — — — 140
See HABEAS CORPUS 2.

LAND—*Sale of* — — — — 624
See SALE OF LAND.

LIBEL—*Action for—Malicious prosecution—Arts.* 2262 *and* 2267 *C.C.* — — — 75
See MALICIOUS PROSECUTION.

LIMITATIONS—*Statute of* — — 564
See STATUTE OF LIMITATIONS.

MALICIOUS PROSECUTION—*Action for libel—Slander—Prescription—Arts.* 2262 *and* 2267 *C.C. —Proceedings instituted to remove plaintiff from position of Commissioner of Expropriations.*] On the 14th April, 1868, S. and two others, B. and M., were named joint commissioners to name the amount which should be accorded for expropriation of property required for widening one of the streets in the city of Montreal. On the 7th August, 1868, the appellants, in consequence of an award made by S. in reference to said property, passed a resolution charging him with fraud and partiality, and an application was made on their behalf to the Superior Court to have him removed from the office of commissioner. On the 17th September, 1870, the conclusions of the petition were granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for the expropriation. The charges of fraud and partiality were held unfounded. On the 20th of September, 1873, the Court of Queen's Bench for Lower Canada (appeal side) re-instated the said S. and B. in their position as commissioners. On the 4th November, 1876, this judgment was confirmed by the Privy Council. In May, 1871, S. brought an action against the defendants for damages which he alleged he had suffered in consequence of his having been unjustly removed by the appellants from the position of commissioner. The respondents, widow and daughter of the late S., became plaintiffs *par reprise d'instance*. The appellants pleaded that the action was barred under Arts. 2262 and 2267 C.C. (P.Q.) The Superior Court dismissed the action on the 31st May, 1880, but the Court of Queen's Bench (appeal side) reversed the judgment and allowed $3,000 damages to the respondents. *Held*, on appeal to the Supreme Court of Canada, affirming the judgment of the Court of Queen's Bench, Fournier J. dissenting, that the

MALICIOUS PROSECUTION.—*Continued.*

action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution in following up that resolution by proceedings instituted in the courts maliciously and without any just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought. Per Strong J.—Following the practice adopted in the Court of Queen's Bench for Lower Canada, where they either increase or lessen the amount of damages according to their appreciation of the facts, the damages in this case should be increased to $10,000. THE MAYOR OF MONTREAL *v.* HALL — — — — 75

MANDAMUS—*School Commissioners, Province of Quebec—Powers of—Superintendent of Education—Decision of—Obedience to by Commissioners—Appeal from decision.* — — 546
See SCHOOL COMMISSIONERS.

MANDATARY—*Obligation of—Stock held in trust—Purchase of by bank—Effect of—Action to account—Arts.* 1755, 2268 *C.C* (*P.Q.*) 661
See PRINCIPAL AND AGENT 2.

MARRIAGE—*Declarations in act of—Matrimonial domicile—Civil Status—Arts.* 63, 65, 79. 80, 81, 83 *C.C.* (*P.Q.*) — — — 466
See DOMICILE.

MUNICIPAL CODE—*Province of Quebec—Art.* 712—*Construction of.* — — — 384
See ASSESSMENT AND TAXES 2.

MUNICIPAL CORPORATION—*Construction of subway by—Authorized by special statute—*46 *Vic. ch.* 45 (*Ont.*)—*Agreement with Railway Companies—Order in Council under* 46 *Vic*, *ch.* 24 (*D.*)—*Work done as agents of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.*] A special statute in Ontario (46 Vic. ch. 45) authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways; provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of Parkdale and the railway companies to the Privy Council of Canada, purporting to be made under 46 Vic. ch. 24 (D.), an order of the Privy Council was obtained

MUNICIPAL CORPORATION.—*Continued.*

authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to, and approved of by, the ratepayers of that municipality. In an action by the owner of property injured by the work: *Held*,—Per Ritchie C.J., Fournier and Henry JJ., that the work was not done by the municipality under the special act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer.—Per Gwynne J.—That the work should be considered as having been done under the special act, and the plaintiffs were entitled to compensation thereunder.—Per Taschereau J.—That the work was done by the municipality as agent of the railway companies and it was therefore not liable. WEST *v.* PARKDALE. — — — — 250

2——*Municipality—Drainage in—Petition for—Extending into adjoining municipality—Report of engineer—Not defining proposed termini—Benefit to lands in adjoining municipality—Assessment on adjoining municipality.*] Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having been signed by a majority of the rate-payers of the township to be benefited by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under sec. 582 of 46 Vic. ch 18, on the grounds, *inter alia*, that a majority of the owners of property to be benefited by the proposed drainage works had not petitioned for the construction of such work as required by the statute; that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law; that the Council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law; and that the report did not specify any facts to show that the Council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work, and that no assessment whatever should be made on the lands or roads in Dover as the work would, in fact, be an injury thereto and that the report did not sufficiently specify

the beginning and end of the work, nor the manner in which Dover was to be benefited. Three arbitrators were appointed under the provisions of the act, and at their last meeting they all agreed that the township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought $500 should be taken off the town line, and W. D., another of the arbitrators, held that while the bulk sum assessed was not too great, the assessment on the respective lands and roads, and parts thereof, should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award, "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line, made by the surveyor, should be sustained and confirmed, and that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained. The Queen's Bench Division set aside this award on the two grounds, namely, of want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work. The judgment of the Queen's Bench Division was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:—*Held*, Ritchie C.J. dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give to the corporation of Chatham jurisdiction to enter the township of Dover and do any work therein.—That the arbitrators should have adjudicated, upon the merits of the appeal, against the several assessments on the lots and roads assessed, as their award was, by secs. 400 and 403 of 46 Vic. ch. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with at all as held by one of the arbitrators.—That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the Court of Revision.—That the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that their award should also have also been set

aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute and did not warrant them to be assessed. Township of Chatham *v.* Township of Dover 321

3——*By-law—36 Vic. ch. 48 (O.)—Bonus to railway—Vote of ratepayers on by-law for—Premature consideration of by-law—Error in copy submitted to ratepayers—Signing and sealing by-law—To be passed by same council*] A by-law was submitted to the council of the city of O., under 36 Vic. ch. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute such by-law was to be taken into consideration by the council after one month from its first publication on the 24th of September, 1873. The vote of the ratepayers was in favor of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor of the council, however, refused to sign it, on the ground that its consideration was premature; and on 5th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city of O. for the delivery of the debentures provided for by the by-law, in which suit the question of the validity of the whole proceedings was raised. *Held*, affirming the judgment of the court below—1. That the vote of 20th November, 1873, was premature, and not in conformity with the provisions of sec. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under sec. 226. 2. That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of. 3. That the proceedings of 7th April, 1874, were void for two reasons. One, that the by-law was not considered by the council to which it was first submitted as provided by sec. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason

MUNICIPAL CORPORATION.—*Continued.*

is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates. *Semble*, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favorable vote. CANADA ATLANTIC RAILWAY CO. *v.* CORPORATION OF THE CITY OF OTTAWA — — 365

4——*Agreement with company—To discontinue use of traction engine—Steam engine included in*— — — — — — — 517
See AGREEMENT.

NEW TRIAL—*Refused—Verdict for plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.*] In an action to recover the balance of the contract price for work done for the defendant, the declaration also containing the common count for work and labor, the evidence showed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal. *Held*, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages. BEATTY *v.* OILLE— — — — — — 706

NOTICE—*By policy holder to company of subsequent insurance—Condition in policy—Waiver*— — — — — — 446
See INSURANCE, FIRE 2.

PARTNERSHIP—*Dissolution of, by death of partner—Liability of surety to, after dissolution—Continuing security* — — — 571
See CONTRACT 1.

PLEA—*in action en reddition de compte—Contradictory averments in—Effect of—Unsworn account* — — — — — — 460
See ACTION 1.

POLICY—*of insurance against fire—Condition in—Not to assign without written consent of company—Breach of condition* — — 33
See INSURANCE, FIRE 1.

2——*of insurance against fire—Condition in—As to subsequent insurance—Notice to company—Waiver* — — — — — 446
See INSURANCE, FIRE 2.

3——*of fire insurance—Condition as to loss by explosion—Exemption from liability* — 631
See INSURANCE, FIRE 3

PRACTICE—*In habeas corpus matter—Conviction before magistrate—Arrest on warrant after—Inquiry into evidence—Jurisdiction of court—Certiorari on application for writ of habeas corpus.* — — — — 111
See HABEAS CORPUS 1.

2——*In habeas corpus matter—Writ granted by judge in chambers—Jurisdiction of court to quash—Control over its own process—See* 51 *Supreme and Exchequer Court Act—Criminal law—Trial for murder in court of oyer and terminer, British Columbia—Order to change venue—Provision for increased expense—*32-33 *Vic. cap.* 29, *sec.* 11 (*D*). — — — — 140
See HABEAS CORPUS 2.

PREFERENCE—*Insolvent Co.—Chattel mortgage by—Intention to prefer—R. S. O. ch* 118. — — — — — 532
See CHATTEL MORTGAGE 2.

PRESCRIPTION—*Action for libel—Malicious Prosecution.* — — — — 75
See MALICIOUS PROSECUTION.

PRINCIPAL AND AGENT—*Agent—Sale by—Duty of, under instructions to sell lands—Vendor and purchaser—Contract not binding under Statute of Frauds—Commission—Mistrial.*] McK. *et al*, the appellants, real estate brokers at Winnipeg, received verbal instructions from the respondents to sell certain lands of theirs at a certain price and terms of payment. McK. *et al.* sold the land at the price named, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their purchase for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the said lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers. The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favor of the appellants for the full amount of their claim, thereby giving them 2½ per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. In review before the full court a judgment was rendered directing that the verdict should be reduced to $125, being commission at the rate of 2½ per cent. on the $5,000 actually paid, or, in the alternative, that there should be a new trial. *Held*, affirming the judgment of the court below, Strong J. dissenting, that there had been a mis-trial, and therefore the order for a new trial should be affirmed, appellants to have the alternative of reducing his verdict to $125. Per Henry J.—It was the duty of the appellants to take from the purchasers a binding agreement under the

PRINCIPAL AND AGENT.—*Continued.*

statute, and having neglected to do so, they were not entitled to any compensation. MACKENZIE *v.* CHAMPION. — — — 649

2——*Stock held in trust—Purchase of by a bank—Effect of—Mandatary and pledgee, obligations of a—Action to account—Arts.* 1755, 2268, *C.C.* (*P.Q.*)] S. brought an action against the Bank of Montreal to recover the value of stock in the Montreal Rolling Mills Company, transferred to the bank under the following circumstances: S.'s money was originally sent out from England to J. R. at Montreal, to be invested in Canada for her J R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company, as follows: "J. Rose, in trust," without naming for whom, and paid for it with S.'s money. He subsequently sent over the certificates of stock to S., and paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank, as security for his indebtedness, some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends on these shares, and credited them to J. R., who paid them to S. J. R. subsequently became insolvent, and S., not receiving her dividends as usual, sued the bank for an account. *Held*, reversing the judgment of the court below, Strong J. dissenting, that there was sufficient to show that J. R. was acting as the mandatary or agent of S., and the Bank of Montreal, not having shown that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank. SWEENY *v.* BANK OF MONTREAL — — — — — 661

3——*Construction of subway by municipality—Special statute—Agreement with railway companies—Municipality agent of companies or principal—Injury to property* — — — 250

See MUNICIPAL CORPORATION 1.

PRIORITY—*of title to goods mortgaged—Security for after acquired property—Assignment in trust by mortgagor—Legal title of trustee—Equitable title of mortgagee* — — — — 1

See CHATTEL MORTGAGE 1.

RAILWAYS AND RAILWAY COMPANIES—*Lands taken for railway purposes—Arbitration—Award—Matters considered by arbitrators—Costs*] A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which offer was not accepted and the matter was referred to arbitration under the Consolidated Railway Act, 1879. On the day that the arbitrators met, the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the

RAILWAYS AND RAILWAY COS.—*Continued.*

arbitration, the company because the award was less than their off r, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer. *Held*, affirming the judgment of the Court of Appeal, Gwynne J. dissenting, that under the circumstances neither party was entitled to costs. ONTARIO AND QUEBEC RAILWAY CO. *v.* PHILBRICK — — — 289

2——*Agreement with municipality for construction of subway—Order in Council under* 46 *Vic. cap.* 24 (*D*)—*Work done by municipality as agent of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.* — — — 250

See MUNICIPAL CORPORATION 1.

3——*Bonus to—Action against municipality for—Illegal by-law granting bonus.* — 365

See MUNICIPAL CORPORATION 3.

REPLEVIN—*Bill of lading—Assignment of—Property in goods under—Stoppage in transitu.* — — — — — 416

See BILL OF LADING.

SALE OF LAND—*Warranty against charges and incumbrances—Promise to pay without reserve, by subsequent deed, with knowledge of assessments—Interest, agreement as to compensation.* — — — — — 624

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N.P., by which, without any reserve, they acknowledged to owe, and promised to pay certain sums of money amongst others to Mrs. L., transferee of one of the vendors, who, on the 3rd April, 1875, sold the Windsor Hotel property in Montreal to the appellants, and by the same deed Mrs. L. agreed to assist the appellants in obtaining a loan of $350,000, and to relinquish the priority of her hypothec for her share on the property, to extend to six years the period for the payment of the balance due her, waiving also any right to interest until the appellant's company had an available surplus after paying interest and insurance in connection with the new loan. Subsequently, on 15th June, 1880, Mrs. L., by notarial deed, transferred to the respondent the balance alleged to be due her under the deed of the 28th June, 1877, and the respondent brought an action to recover this balance with interest from 1st July, 1877, to the 15th December, 1885, date of the action. To this action the appellants pleaded, *inter alia*, that under the deed of the 28th June, 1877, interest could be demanded only from the 1st July, 1881, the secretary of the company having on said date testified for the first time there was an available surplus; and also that both principal and interest were compensated by the sum of $1,901.70 paid the city for assessments imposed under 42 and 43 Vic. ch. 53, P.Q., for the cost of public improvements made in the vicinity of the property prior to the sale of the property to the company in 1875. The assessment rolls originally made for these improvements were set aside by two judgments in 1876

SALE OF LAND.—*Continued.*

and 1879. *Held*, affirming the judgment of the court below, that under the circumstances the respondent couldnot be said to be the *garant* of the purchasers of the said property, and therefore he was entitled to the payment of the balance alleged to be due under the deed of the 28th June, 1877, notwithstanding any claim the appellants might have against their vendors under the general warranty stipulated in the deed of purchase of April, 1875 *Held, also*, that by the terms of the deed of the 28th of June, 1877, interest could be recovered only from the 1st of July, 1881. WINDSOR HOTEL CO. *v* CROSS — — — — 624

SCHOOL COMMISSIONERS—*Province of Quebec—Powers of—Con. Stats. L. C. ch.* 15 *secs.* 31 *and* 33—40 *Vic. ch.* 22 *sec.* 11 *P.Q.—Construction of*—33 *Vic. ch.* 25 *sec.* 7 *P.Q.—Erection of a school house—Decision of superintendent—Mandamus*] Under 40 Vic. ch. 22 sec. 11 the Superintendent of Education for the province of Quebec, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered that the school district of the municipality of St. Valentin should be divided into two districts with a school house in each. The School Commissioners by resolution subsequently decreed the division, and a few days later, on a petition being presented by ratepayers protesting against the division, they passed another resolution refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed another resolution declaring that the district should not be divided as ordered by the Superintendent, but should be re-united into one. In answer to a peremptory writ of *mandamus* granted by the Superior Court ordering the School Commissioners to put into execution the decision of the Superintendent of Education, the School Commissioners (respondents) contended that they had acted on the decision by approving of it, and that as the law stood they had power and authority to re-unite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the Superintendent. *Held*, reversing the judgment of the court below, that the Commissioners having acted under the authority conferred upon them by Cons. Stats. L. C. ch. 15 secs. 31 and 33, and an appeal having been made to the Superintendent of Education, his decision in the matter was final (40 Vic. ch. 22 sec. 11, P.Q.), and could only be modified by the Superintendent himself on an application made to him under 33 Vic. ch. 25 sec. 7 ; and, therefore, that the peremptory *mandamus* ordering the respondents to execute the Superintendent's decision should issue TREMBLAY *v.* VALENTIN. — — — 546

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STATUTE OF LIMITATIONS—*Conveyance to trustees—In trust for tenant for life—Remainder to joint tenants or tenants in common—Possession by tenant for life.*] By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with remainder as follows :—Lot No. 2 to G. A. and lot No. 1 to A. A. to the use of them, their heirs and assigns, as joint tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878 A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2. *Held*, that as there was no time prior to the death of the tenant for life when either the trustee or the remainder-man could have interfered with the possession of the said lot, the statute of limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover. *Held*, also, that for the purpose of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs. ADAMSON *v.* ADAMSON. — — — — — 564

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